THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

Honorable Dale Van Slambrook, Master-in-Equity

CASE NO. 2004-CP-08-1855

APPELLATE CASE NO. 2018-001993

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

v.

Belinda Fox and Gerry Fox, Appellants.

RECORD ON APPEAL

VOLUME I

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

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

I. JUDGMENT NOTWITHSTANDING VERDICT (JNOV)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEPTIC TANK

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

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

SUBDIVISION

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

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

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

RESTRICTIVE COVENANTS

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

LACK OF AMENTITIES

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

TESTING/WETLANDS

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

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

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

II. THERE ARE NO GROUNDS FOR A NEW TRIAL

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

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

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

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Cooper, are liable regardless of their knowledge.")

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

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

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

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

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

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

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

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

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

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

A. Equitable Indemnification

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

Res judicata does not apply

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2018 Oct 09 3:19 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855

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

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

(Court Exhibit 1, paragraph 6).

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

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

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

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

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

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

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

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

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

CONCLUSION

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

_____

Dale Van Slambrook
Master-in-Equity, Berkeley County

Dated:_____

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ELECTRONICALLY FILED - 2018 Oct 09 3:19 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855



Berkeley Common Pleas

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

Case Number: 2004CP0801855

Type: Master/Order/Form 4

AND IT SO ORDERED!

s/Dale E. Van Slambrook #3079

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 04-CP-08-1855

DIANA R B. AND RONALD E. PRICE

PLAINTIFF(S)

BELINDA FOX, DANNY L. GILBERT, AND EAGLE HARBOR, INC., et al.

DEFENDANT(S)

Submitted by: J. Derrick Jackson	Attorney for : ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

FILED
2018 JUN 29 P 1:50
MARY P. BURNHAM
CLERK OF COURT
BERKLEY COUNTY, SC

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Ronald E.Price and Diana Price	Danny Gilbert individually and Heritage Classic Homes, Inc	$ 97, 836,83
Ronald E.Price and Diana Price	Danny Gilbert Belinda Fox Gerry Fox, Eagle Harbor, Inc and Eagle Harbor Phase II Development Partnership	$82,530.00
Ronald E.Price and Diana Price	Danny Gilbert Belinda Fox, Gerry Fox Eagle Harbor, Inc and Eagle Harbor Phase II Development Partnership	$247,590.00

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Master-In-Equity

3079
Judge Code

6/26/18
Date

SCRCP Form 4C (02 2017)

For Clerk of Court Office Use Only

This judgment was entered on the 26 day of June, 2018 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

J. Derrick Jackson, SC Bar No.: 15192
TOBIAS G. WARD, JR., PA
P.O. Box 6138
Columbia, SC 29260
Fax 803-403-8754
dj@tobywardlaw.com
Attorney for Plaintiffs

ATTORNEY(S) FOR THE PLAINTIFF(S)

Paul B. Ferrara, III, Esquire
2300 Otranto Road
North Charleston, SC 29406
Attorney for Defendants
Belinda Fox and Gerry Fox

Carl B. Hubbard, Esquire
2201 Middle Street, Box 15
Sullivan's Island, SC 29482
Attorney for Eagle Harbor, Inc., Heritage Classic Homes, Inc. and the Eagle Harbor Phase II Development Partnership through Danny L. Gilbert a partner, and EHHOA, Inc.

Steven L. Smith, Esquire
Smith & Koontz, P.A.
Post Office Box 40578
Charleston, South Carolina 29423-0578
Attorney for Knight's Redi-Mix, Inc.

M. Richardson Hyman, Esquire
PO Box 127
Charleston, SC 29406
Attorney for Sarah Winn and Troy L. Winn

G. Hamlin O'Kelley, III, Esquire
Buist Byars & Taylor, LLC
652 Coleman Blvd., Ste 200
Mt. Pleasant, SC 29464
Attorney for Concerned Citizens of Eagle Harbor Inc.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1:

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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,

vs.

Belinda Fox, et. al.

Defendants,

CASE NO. 04-CP-08-1855

ORDER AFTER TRIAL ON THE MERITS

FILED
2010 APR 29 P 3:50
BERKELEY COUNTY, S.C.

Knight's Redi-Mix, Inc.,

Plaintiff,

vs.

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

Defendants,

and

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

Third Party Plaintiffs,

vs.

Danny L. Gilbert, Individually,

Third Party Defendant.

CASE NO. 04-CP-08-1150

ORDER AFTER TRIAL ON THE MERITS

This matter came before me for a non-jury trial on May 3rd and May 4th, 2018[1]. 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 Winn[2], 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

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[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 FACTS[6]

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)

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[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 home[7]. (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.

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[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 Gilbert[8] to construct their home on

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[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 Sum[9] 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 Conditions[10] 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."

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[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 C[11]. 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.

[12]Sections 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, EHI, 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 Winn[13] 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

[13]Troy 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

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).

AMENTITIES

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.

JUSTIFIABLE 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

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[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.

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[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 Aril 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.

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[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

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[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

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[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

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[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

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CASE NO. 2004-CP-08-1855
)
Ronald E. Price and Diana R.B. Price,) **SCHEDULING ORDER AND**
) **ORDER OF BIFURCATION**
Plaintiff,)
)
vs.)
)
Belinda Fox, Gerry Fox, Danny L. Gilbert,)
Sarah C. Winn, Troy L. Winn, Eagle Harbor,)
Inc., Heritage Classic Homes, Inc., the Eagle)
Harbor Phase II Development Partnership,)
EHHOA, Inc., Concerned Citizens of Eagle)
Harbor Subdivision, Inc., Mark and Brenda)
Milos, William Derrick and Kelli T. Johnson,)
Richard E. and Joyce Seabrook, Kelly & Lori)
Gibson, Mark & Jennifer L. Dawson,)
Charlene Willman, Deborah L. Walker,)
Diane L. Dunigan, Avonne Beaver, William)
R. and Ethel Rogers, Donald G. Gilbert, Jr.,)
Jaime L. and Sunny T. Britt, Joel H. and)
Deana S. Bennett, Jimmy H. Thigpen,)
Michael L. and Linda H. Cable, Albert H.)
Isom, Jr., Karen M. and Randy I. Watterson,)
Fred Jr. and April Rodriguez, Jason P. Parker,)
Jr., Tristen Mustapher and Quiozel Simmons,)
Michael L. and Joyce W. Segars, L&I.)
Contractors, Inc., Tyson K. and Jennifer M.)
Swanson, First State Bank, Deborah Stricke)
Loftis, Claude R. and Eunice Beede, Karen L.)
Richardson and Anthony S. Hernendez,)
Monica L. Davis, William C. Davis, Charles)
H. Crosby, Jen Crosby, Kenneth J. and Joan)
H. Younginer, Randolph C. Evans, Dennis L.)
Ordrasek, David F. and Erica Shipman,)
Travis L. Davis et al, Robert Legette, CMH)
Homes, Inc., Dee Dee Cox, Robert J. and)
Heather N. Faas, Stephan R. and Aud Griebe,)
Michael A. and Arin D. Hunter, Robert A.)
and Norm Newton, Philip R. Davey Trust,)
R.B. and Brenda D. Brown, Andrew and)
Patricia Finkelstein, Wells Fargo Bank, NA)
(successor by merger to Wachovia) Bank,)

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

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NA), Robert A. and Mic Poirier, Doug Cotton, Christopher S. and Kellie Anne Hiers, James S. and Fawn S. Hall, Kevin W. and Eugenia P. Craggs, David D. and Nancy Fletcher, Suzen Fletcher, Elizabeth Gilbert, William Adams, Richard and C. Mullenniex, HSBC Bank USA, NA as trustee, Rudolph C. and Tonja M. Evans, Michael and Renee L. Jenkins, David W. Barnett, Lori A. and Hermand Lenhart, Bank of NY as trustee, Rodney D. Lewis, Kingston Plantation, Aaron and Teresa A. Paderewski, S. Paige and Jarrett J. Gibbons, Grieco Development, Gary H. Jr. and Kam Bell, Jr., GBF Investments, Inc., Calvin R. Cooper, Smoak Property Holdings, LLC, Smoak Jedburg, LLC, Burbage H. Smoak, Metro Contracting, Inc., Frederick G. Jr, and Janet J. Hall, Michael R. and Robin A Petrell, Travis V. and Renee C. Hollifield, Billy C. and Marsha L. Hollifield, Dean A. Heatherdale, Stanley K. Hollifield, Jeremy Lee Baker, William Jr. and Becki Robinson, Steven K. and Sondra B. Baxter, Phillip S. and Tracy R. Harris, Pendley Construction Inc., Tidelands Bank, William Adams, Karen Lynn Driggers, Richard Thomas Lindberg, Mary Lindberg and any other unknown current or former owner in Eagle Harbor Subdivision,

Defendants.

THIS MATTER came before the Court on March 21, 2019, for a status conference regarding the potential trial of the case. Present before the Court were the following attorneys:

1. J. Derrick Jackson, attorney for the Plaintiffs,
2. M. Richardson Hyman, Jr., attorney for Sarah Winn and Troy L. Winn,
3. Carl B. Hubbard, attorney for Eagle Harbor, Inc., Heritage Classic Homes, Inc., Eagle Harbor Phase II Development Partnership, through Danny L. Gilbert, a Partner,
4. Paul B. Ferrara, III, attorney for Belinda Fox and Gerry Fox; and

5. G. Hamlin O'Kelley, III, attorney for Concerned Citizens of Eagle Harbor Subdivision, Inc.

Based upon discussions had with the Court and the Court's available schedule, the parties have agreed, and the Court does hereby order as follows.

1. The Prices will proceed to try their claims against the developers of the Eagle Harbor subdivision including causes of action for negligent misrepresentation, breach of fiduciary duty and unfair trade practices claims against Gerry Fox, Belinda Fox, Heritage Classic Homes, Danny Gilbert, Eagle Harbor, Inc., and Eagle Harbor Phase II Development Partnership (the "Development Litigation") during this Court's term May 2, 3, and 4, 2018.
2. The Prices will proceed to try their claims against Danny Gilbert and Heritage Classic Homes, Inc., for negligence, and Knight's Reid Mix, Inc., will proceed to try its mechanic's lien claims (the "Construction Litigation") during this Court's term May 2, 3, and 4, 2018.
3. The Prices and the defendants involved in litigation over the roads in Eagle Harbor subdivision, including the Concerned Citizens of Eagle Harbor, Inc., Sarah Will, and Troy Winn will not try their claims about the roads (the "Road Litigation) during this Court's term May 2, 3, and 4, 2018; therefore it is hereby

ORDERED, that the trial of this case is hereby bifurcated pursuant to Rule 42 SCRCP with only the Development Litigation and Construction Litigation to be tried by this Court May 2, 3, and 4, 2018; and it is further

ORDERED, that this Court will schedule the Road Litigation at another time; and it is also

ORDERED, that the Defendants the Concerned Citizens of Eagle Harbor, Inc., Sarah Winn, and Troy L. Winn are excused from appearance at trial on May 2, 3, and 4, 2018, as the issues to be tried then do not affect any claims in which they are involved; and it is further

ORDERED, that as a result of this Court's ruling here, the Court's prior Order in this matter requiring publication of the Third Amended Summons and Complaint shall be held in abeyance until after the trial of the Development and Construction Litigation to be held May 2, 3, and 4, 2018; and

IT IS SO ORDERED!

Moncks Corner, SC
3/27, 2018

The Honorable Dale E. Van Slambrook
Master in Equity for Berkeley Coutny

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2004-CP-08-1855

RONALD E. PRICE AND DIANA R. B. PRICE

PLAINTIFF(S)

BELINDA FOX, ET AL

DEFENDANT(S)

Submitted by: Tobias G. Ward, Jr.	Attorney for: ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

FILED
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CLERK OF COURT
BERKELEY COUNTY, S.C.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendants Gerry Fox's Motion to Reconsider is denied without further argument based upon Rule 59(f)SCRCP.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge: PETER M. MCCOY, JR. — Judge Code: 3079 — Date: 11/27/17

SCRCP Form 4C (03/2013)

Page 1

For Clerk of Court Office Use Only

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

TOBIAS G. WARD, JR., PA
Tobias G. Ward, Jr., SC Bar No.: 5826
P.O. Box 6138
Columbia, SC 29260
Fax 803-403-8754
tw@tobywardlaw.com

ATTORNEY(S) FOR THE PLAINTIFF(S)

Paul B. Ferrara, III, Esquire
2300 Otranto Road
North Charleston, SC 29406

ATTORNEY(S) FOR THE DEFENDANT(S) BELINDA FOX AND GERRY FOX

CLERK OF COURT

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)) COUNTY OF BERKELEY)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2004-CP-08-1855
RONALD E. PRICE AND DIANA R. PRICE, Plaintiffs, vs. BELINDA FOX, GERRY FOX, DANNY L, GILBERT, SARAH WINN, TROY L. WINN, EAGLE HARBOR, INC., HERITAGE CLASSIC HOMES, INC., and the EAGLE HARBOR PHASE II DEVELOPMENT PARTNERSHIP, Defendants.	**ORDER FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS TROY AND SARAH WINN**

FILED
16 MAY -6 AM 9:14
CLERK OF COURT
BERKELEY COUNTY, S.C.

BACKGROUND

This matter came before the Court on the motion for partial summary judgment of the Defendants Troy L. Winn and Sarah Winn ("Winns") as to certain claims brought by the Plaintiffs Ronald and Diana Price as set forth in the Second Amended and Supplemental Complaint served on the Winns. For practical purposes, the claims can be designated as fiduciary claims arising out of the development of the roads in Eagle Harbor Subdivision, and claims which were not. The Winns moved for partial judgment against Plaintiffs on all "non-road-related" claims set forth in the Plaintiffs' Second Amended and Supplemental complaint which was served upon them. The basis for the motion was that the statutes of limitation had run prior filing of a motion to amend and add such claims against the Winns; who were not original parties to the action.

DISCUSSION

It appears from the representations of the Prices counsel to the court and the Winns' counsel that he will not oppose the motion and it further appears to the satisfaction of this court that there are sufficient grounds to order partial summary as to the Winns on the non-road related claims.

THEREFORE, IT IS HEREBY ORDERED, that partial summary judgment is granted in favor of Defendants Winn on all claims raised in the Plaintiffs' Second Amended and Supplemental Complaint **EXCEPT**, those set forth below; and,

IT IS FURTHER ORDERED, that those claims against the Winns in the Plaintiffs' Second Amended and Supplemental Complaint alleging a breach of a fiduciary duty in regard to the roads of Eagle Harbor Subdivision are not included within the scope of the partial summary judgment above and remain viable claims against the said Defendants.

Dale Van Slambrook
Master-in-Equity

Dated: 5/4/16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	
Ronald E. Price and Diana R. B. Price,	)	C/A No.: 2004-CP-08-1855
	)	AMENDED
	)	ORDER DENYING SUMMARY
Plaintiff(s),	)	JUDGMENT FOR GERRY FOX
	)	
vs.	)	
	)	
Belinda Fox, Gerry Fox et. al.	)	
	)	
Defendant(s).	)	

FILED
2017 OCT 23 PM 4:46
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.

This matter came before me for a hearing on August 24, 2017 pursuant to a motion for summary judgment filed by Defendant Gerry Fox ("Fox"). Present at the hearing were the Plaintiff Diana Price represented by her counsel, J. Derrick Jackson and Paul B. Ferrara, III representing the movant Defendant Gerry Fox. After carefully considering the briefs with attachments submitted by the parties, the arguments of counsel and the applicable law, this court denies the motion for summary judgment.

FACTUAL/PROCEDURAL BACKGROUND[1]

Gerry Fox along with Danny Gilbert, Heritage Classic Homes, and Eagle Harbor, Inc. decided to develop a subdivision Eagle Harbor, Inc. Gerry Fox purchased 90.96 acres of land which would become Phase I for Eagle Harbor. (Deed, Deposition pp 17-18, 23) Gerry Fox purchased another 62.63 acres of land but placed the land in his wife Belinda Fox's name "for asset protection" because he had "Dr." in front of his name. (Deed, Deposition pp. 42, 45-46, Plat). He opened up a bank account in the name of

[1] These facts are presented in the light most favorable to the Prices as the non-moving party and are based upon and supported by the Deposition excerpts and exhibits attached to the Prices brief. The facts are not binding on the parties in further proceedings.

Heritage Classic Homes, and according to his deposition testimony, Danny Gilbert required Gerry Fox's approval to spend money. (Deposition p. 56, 80-81) Gerry Fox allowed Gilbert to "do all the work" in exchange for a split of the profits. (Deposition p.54) The Foxes specifically allowed Gilbert to market and sell the properties on their behalf. (Deposition p. 77) According to the public records, the Fox sold almost $900,000 in sales of real property in Eagle Harbor Subdivision. (See Sales Summary)

As alleged in the Second Amended Complaint, in the summer of 2003, the Prices were looking for a subdivision lot to build their home on and came across Gilbert at what looked like a sales office in Eagle Harbor Subdivision. Gilbert, in his role as marketing partner, showed the Prices Lot 20. He made several material representations to the Prices including that the Lot 20 (approximately 8 acres) could be subdivided into three, separate residential lots, that the lots would perk, and 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. On or about September 13, 2003, the Prices, in reliance on the representations of Gilbert entered into an Agreement to Buy and Sell Lot 20 for $90,400. Gilbert explained that the owner of Lot 20, Belinda Fox was his partner. Subsequent to the closing, the Prices learned that the representations by Gilbert as marketing partner were false. The property could not be subdivided into three, separate residential lots because the soil does not perk, a condition known to Gilbert and the partnership as early as February 2002. Also, the lot would not be part of a restricted community with a valid homeowner's association, associated covenants, restrictions, architectural guidelines and other benefits, which would enhance the value of the subject property being purchased by them because valid, restrictive covenants were not properly recorded for the Phase II subdivision. The promised amenities were never developed.

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In addition to these problems, the developers of Phase II of Eagle Harbor Subdivision failed to comply with applicable governmental regulations before selling lots. After wetland studies were conducted by the Army Corp of Engineers, the Prices learned that approximately two acres of Lot 20 were delineated as federally defined freshwater wetlands. Various roads in the subdivision were also impacted by wetlands.

According to his deposition testimony, Gerry Fox didn't know if he made an effort to make sure Gilbert was complying with subdivision regulations (Dep. p. 68), knew about the covenants but made no investigation if they were accurate (Dep. p. 87), made no investigation to see if the property sold to the Prices could be subdivided (Dep. p. 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. (Dep. p. 97)

The Prices filed suit on August 23, 2004, against Danny Gilbert and Belinda Fox alleging fraud, negligent misrepresentation, and unfair trade practices. The Prices amended their suit on October 20, 2005 adding Eagle Harbor, Inc. and including the factual allegations about the defective restrictive covenants. On November 29, 2005, the Prices filed a motion to file a Second Amended Complaint. This Second Amended Complaint added Gerry Fox as a party and included the allegations about negligent development. Inexplicably this Second Amended Complaint was withdrawn by Consent Order on February 7, 2006 by a previous counsel of the Prices.

After the Foxes and the Winns transferred the roads in Eagle Harbor while still in a defective state, the Prices filed a motion on September 23, 2011 to amend and supplement the Amended Complaint to add the Winns and Gerry Fox and include a declaratory judgment cause of action related to the roads. The court granted the motion and the Second Amended and Supplemental Complaint was filed and served.

Gerry Fox has filed the present motion seeking summary judgment based on the statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d331, 333 (2002)

DISCUSSION

Fox argues that the Prices individual claims against him are barred by the three year statute of limitations set forth in South Carolina Code Annotated §15-3-530. Fox asserts the Prices knew about their claims for damages in 2004 and that at least by 2005 knew about their claims against Gerry Fox. The Prices do not contest that they knew about their claims in 2004 or that they filed a Second Amended Complaint which included Gerry Fox in 2005, but assert that under the relation back provisions of Rule 15(c) their claims against Fox relate back to the original pleadings.

RELATION BACK UNDER RULE 15(c) SCRCP

Rule 15(c) SCRP provides as follows:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment *changing* the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such *notice* of the institution of the action that he will not be *prejudiced* in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(Emphasis added).

All these factors have been satisfied in this case. There is no dispute that the Second Amended Complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings relating to misrepresentations made to the Prices and lack of disclosure, the failure to properly develop the subdivision, the defective covenants and the presence of wetlands on the property.

Also, there is no prejudice for Gerry Fox as his wife (who he put forth as the proper party by buying the land in her name) was an original Defendant from the beginning of the lawsuit. Finally, he had sufficient knowledge that he should have been included as a Defendant during the limitations period.

Fox does not contest these elements, but rather relies on a line of cases going back to *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). In *Jackson* the court states, "The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of party. See *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 635 N.E.2d 323 (1994) (determining that Ohio's Rule 15(c), which is similar to our Rule 15(c), allows for relation back when a party is substituted but not when a party is added while retaining a party named in the original suit).

The court notes that even in that case, there was a split in authority on whether *adding* a party was a change under Rule 15(c). The *Jackson* court notes, " *But see Harding*

v. Godwin, 238 Ga. App. 432, 518 S.E.2d 910 (1999) (noting the Georgia relationship back statute, which contains essentially the same language as our Rule 15(c), authorizes the addition of a new party under certain circumstances if the requirements of the statute are strictly met), cert. denied(Oct. 22, 1999)(emphasis added). *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000). The other cases cited by the Fox all rely on this single 2000 Court of Appeals decision.

The Prices submit that the interpretation of the relation back doctrine under Rule 15(c) has changed or evolved in the seventeen years since *Jackson* . This court agrees. The modern interpretation of Rule 15(c) is that an amendment adding a party relates back if the new party received adequate notice within the limitations period and suffers no prejudice in its defense. This modern rule can be seen in the following cases[2].

In *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007) the court states,

> In light of these policies, Rule 15(c) must be understood to freely permit amendment of pleadings and their relation-back so long as the policies of statutes of limitations have been effectively served. *See* 3 James Wm. Moore, et al., *Moore's Federal Practice* § 15.19[3][a] (3d ed. 1997) ("The purpose of Rule 15(c) is to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities, when the policy behind the statute of limitations has been addressed"). And that is accomplished in Rule 15(c) by requiring that a new party have had adequate notice within the limitations period and by assuring that the new party not be prejudiced by the passage of time between the original pleading and the amended pleading.

In *Goodman*, the lower district court ruled -similar to the citations by the Fox in his brief-, "(1) that the amended complaint did not "change the party or the naming of the party against whom the claim [was] asserted," but rather added Praxair Services,

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[2] The court is aware and the Prices disclosed these cases are based on federal law and application of the federal rules of civil procedure; however, our Rule of Civil Procedure is based on the Rule 15 of the federal rules of civil procedure and typically the federal courts and especially the Fourth Circuit for our jurisdiction point the way to the developing interpretations of the law.

Inc.; (2) that Goodman "was fully aware of the existence of [Praxair Services, Inc.] and its correct name," and therefore his mistake in naming only Praxair, Inc., in the original complaint was not the type of mistake on which Rule 15(c)(3) acts..." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007).

In response to the district court ruling, the 4th Circuit Court of Appeals found that the *addition* of parties to a complaint may be broadly construed as a *change* of parties. *See Goodman*, 494 F.3d at 468 (accepting plaintiff's interpretation of Rule 15(c) that an " 'an *addition* to something is generally regarded as a *change* to that thing' "). The court wrote, "[W]e can discern no policy that would be served by the ... defendants' restrictive reading of 'changes,' which would force the amending party to drop a defendant for each defendant he adds." *Id.* at 469. This appears to be what Fox is contending, that the Prices must drop a Defendant (presumably Ms. Fox) to add him to the complaint.

The *Goodman* court also clarified the "mistake" language of Rule 15(c), "The "mistake" language is textually limited to describing the notice that the new party had, requiring that the new party have expected or should have expected, within the limitations period, that it was meant to be named a party in the first place, although it also implies that the plaintiff in fact made a mistake. No policy supports permitting relation-back for typographical mistakes, but not for oversights or mistakes of inclusion or omission. The policy considerations of Rule 15(c) concern whether the repose granted by statutes of limitations is preserved for parties named in amended pleadings. And that depends on the notice to and effect on the new party. The limitations of Rule 15(c)(3) thus only apply when the policies underlying limitations rules may be trampled. As Justice Holmes explained:

> Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

New York Cent. & Hudson River R.R. v. Kinney, 260 U.S. 340, 346, 43 S.Ct. 122, 67 L.Ed. 294 (1922) (emphasis added); *see also* Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 Calif. L.Rev. 1549, 1573–78 (2001) (advocating liberal construction of "mistake" language in Rule 15(c)(3))." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007). In this case, Fox had notice from the beginning of the Prices claim.

The *Goodman* case has been cited and followed by the district court for South Carolina in a product liability case, "Based on this evidence, Mid–Continent should have known that, as the chair manufacturer, it would be included in McKnight's complaint. When an added party "has been given fair notice of a claim within the limitations period and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation back." *Goodman*, 494 F.3d at 471. *McKnight v. Iceberg Enterprises LLC*, No. 9:10-CV-03248-DCN, 2012 WL 2418870, at *4 (D.S.C. June 26, 2012).

The present case provides a good illustration of the application and intent of the rule. Gerry Fox had full notice of the claims against him from the beginning of this litigation. He was not named as a party initially because of his own design to place the Phase II property in his wife's name for asset protection. He is not prejudiced in his defense in this matter because his wife Belinda Fox was named in the original pleadings and Mr. Fox has had a front row seat to monitor the course of this litigation. Furthermore, this case has not been scheduled for trial and this court can enter an appropriate scheduling order to mitigate any prejudice. This court finds that policies behind the statute of limitations have been satisfied as to Gerry Fox and that the amended pleadings relate back under the modern interpretation of Rule 15(c). Therefore, Fox's motion for summary judgment based on the statute of limitations is denied.

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EQUITABLE ESTOPPEL

The Prices also assert that summary judgment should be denied because there is a least a scintilla of evidence to create a genuine issue of material fact as to the issue of equitable estoppel. The court notes that Gerry Fox testified he placed the Phase II property in his wife's name despite her lack of involvement or knowledge of the project.

Application of equitable estoppel does not require an intentional misrepresentation. It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct.App.1985) (overruled on other ground by *Atlas Food Sys. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)); *Brown v. Pearson*, 326 S.C. 409, 419, 483 S.E.2d 477, 482 (Ct.App.1997). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) (citation omitted). Whether the actions lulled the plaintiff into "a false sense of security" is usually a question of fact. *Dillon County Sch. Dist. No. Two*, 286 S.C. at 219, 332 S.E.2d at 561.

Here, Gerry Fox testified in his deposition he intentionally put his wife Defendant Belinda Fox forward so as to protect his assets from claims like the Prices. This court finds there is at least a scintilla of evidence on this issue, that it is usually a question of fact and therefore denies summary judgment.

THEREFORE, IT IS HEREBY ORDERED, that Gerry Fox's motion for summary is denied.

Dale Van Slambrook
Master-in-Equity, Berkeley County

Dated: 10/9/17

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-08-458

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

Plaintiffs,

vs.

Investors Title Insurance Company,

Defendant.

FILED
2015 SEP -9 PM 3:04
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(B), SCRCP, Plaintiffs and Defendant hereby stipulate that this action, and any and all claims that were or could have been asserted therein are hereby dismissed and ended with prejudice. Each party shall bear his, her or its own respective fees and costs.

WE SO STIPULATE:

J. Derrick Jackson
Tobias G. Ward, Jr., PA
P.O. Box 6138
Columbia, SC 29260

Attorneys for Plaintiffs

Dated: 9-1, 2015

WE SO STIPULATE:

Emily H. Farr
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

Attorney for Defendant

Dated: 9-2, 2015

EMH

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
RONALD E. PRICE AND DIANA R. B. PRICE,	)	
	)	CASE NO. 04-CP-08-1855
Plaintiffs	)	
	)	**ORDER GRANTING PLAINTIFFS' MOTION TO AMEND AND FILE SUPPLEMENTAL COMPLAINT**
vs.	)	
Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc.,	)	
Defendants,	)	

FILED
15 SEP -8 AM 11:40
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

This matter came before me by way of Plaintiffs', Ronald E. Price and Diana R.B. Price ("Prices") motion to amend and file a supplemental complaint. The Defendant Belinda Fox filed a memorandum in opposition to the motion, and the Prices filed a reply brief. By agreement of the parties and status conference order the court took the motion under advisement to be decided upon the briefs. A subsequent telephone status conference was held by the court on August 26, 2015. After considering the briefs and applicable law, the court concludes that the motion to amend and supplement should be granted.

BACKGROUND[1]

The Plaintiffs alleges various causes of action against Danny Gilbert, Belinda Fox, and Eagle Harbor, Inc. related to the sale and purchase of Lot 20 in Phase II of Eagle Harbor Subdivision. The factual allegations in the complaint concern alleged 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

[1] To the extent factual allegations are discussed herein, they are Plaintiffs' allegations and should not be construed as findings of fact by this court.

comply with applicable local and federal regulations concerning the development which caused them damage.

CHANGES MADE BY AMENDMENT

The Plaintiffs proposed Second Amended Complaint includes Gerry Fox, Troy and Sarah Winn, Heritage Classic Homes, Inc. and Eagle Harbor Phase II Development Partnership ("Partnership"). It drops causes of action for fraud, and civil conspiracy, because the Prices allege the existence of a "developmental partnership" versus a conspiracy, and adds a cause of action for breach of fiduciary duty. The Prices allege 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 Second Amended Complaint also seeks a declaratory judgment declaring the Plaintiffs rights to use the private roads within the subdivision and to an affirmative injunction requiring the Partnership and Partners to cause the roads to be restored to adequate standards, and to provide a segregated funds account for the roads continued maintenance for a reasonable time.

REASONS FOR AMENDMENT

The Prices contend that after finally being able to take the deposition of Gerry Fox, the Prices discovered that the development of Phase II, Eagle Harbor Subdivision was the result of a real estate development partnership including Gilbert, the Winns and the Foxes. The Prices note that Mr. Fox testified in his deposition that he had an agreement with Defendant Danny Gilbert to split the profits of Phase II and that he along with the Winns (who purchased the land for the other lots in the subdivision) would split the expenses. Fox could approve how the money for development was spent and Gilbert marketed the property. Gilbert determined the prices and shared in

the profits at closing. (See deposition excerpts and map attached to Prices' Memorandum in Support.)

REASONS FOR SUPPLEMENT

The Prices allege the Developers/Grantors owed fiduciary duties to the Prices and other homeowners in Eagle Harbor subdivision to insure that the common areas were in good repair at the time the developers conveyed the property to EHHOA, Inc. The Prices further allege that the developers failed to provide the association with funds sufficient to effectuate any needed repairs to those areas. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349S.C. 25, 562S.E.2d 633 (2002)(citing *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 828 (1993).)

After the Prices filed their complaint, the developing Partners (sought to be included in the amendment) conveyed their interests in the roads to EHHOA, Inc. in the summer of 2011, when the roads allegedly were still in need of repair. The Prices further allege the Developing Partners filed a lawsuit against the engineer for the development of Phase II of Eagle Harbor, and received settlement proceeds, in part, based on the condition of the roads in the summer of 2011. (See Deeds, Business Filing, and Fox Deposition Excerpts, pp. 108, 109, and 118 attached to original memorandum.) The Prices supplemental allegations adds to the complaint the allegations about the roads and seeks to enforce the alleged fiduciary responsibilities set forth in *Concerned Dunes West Residents, Inc.*

The court was informed by the parties that a separate lawsuit (2014-CP-08-00052) was filed by an entity called the Concerned Citizens of Eagle Harbor, Inc. This entity represented some of the private property owners in Eagle Harbor subdivision, but not all and not the Prices. The Prices were not made party to this suit and there was no class action filed in the suit. The suit was dismissed as settled pursuant to Rule 43(k) SCRCP on June 12, 2015.

APPLICABLE LAW

Rule 15, SCRCP, provides that leave to amend shall be freely given when justice requires and does not prejudice any other party. *See* Rule 15, SCRCP; *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590 (1993). It is well established that a motion to amend or supplement is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. *Id.* The prejudice envisioned by Rule 15 is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998).

In this case, the court concludes that justice does require leave to amend as the Prices discovered after Gerry Fox's deposition the alleged partners and real estate partnership which developed Phase II, and it would be unjust to leave them out of the suit when other alleged partners are already named. More importantly, the court does not conclude that the party opposing amendment has met the burden of establishing prejudice as envisioned by the rule.

First, while this case is old for various reasons including multiple changes of counsel on both sides and an intervening appeal, the essential facts alleged remain unchanged and the unnamed partners should have been aware of these facts from their actual participation in the events, from the factual allegations in the original pleadings, and from the inclusion of the other development partners in the original complaint. In short, there is no surprise wrought by the amendment and supplemental pleadings.

Second, even if the issues alleged in the amendment and supplemental pleadings somehow were a surprise, then there is still no prejudice because the parties will have ample time to prepare a defense. This entire matter has been referred to this court for disposition and the court can mitigate any alleged prejudice to the parties. Moreover, while substantial discovery has taken place, the court believes much of this discovery can be shared and used among the parties. For example, there is no reason to believe

that Gerry Fox cannot share and use the discovery conducted by his wife Belinda Fox. Any additional discovery needed to prepare can be handled by an appropriate scheduling order which the court is requiring within ninety days of the service of this Second Amended and Supplemental Complaint.

SUPPLEMENTAL COMPLAINT

Rule 15(d) SCRCP provides, "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

Even though a supplemental pleading is technically different than a motion to amend the pleadings under Rule 15(a) SCRCP, the standard for granting or denying these motions is the same. *Cf.* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d § 1504* (1990) ("Inasmuch as the discretion exercised by the court in deciding whether to grant leave to amend is similar to that exercised on a motion for leave to file a supplemental pleading, the court's inattention to the formal distinction between amendment and supplementation is of no consequence.").

In this case, as with the motion to amend, the Defendants have not established any surprise or prejudice which would result from allowing the supplemental pleading. Indeed the motion to supplement to include the allegations and parties about the roads was filed within a few months after the roads were transferred to EHHOA, Inc.

Furthermore, the court does not believe the suit filed by the Concerned Citizens of Eagle Harbor, Inc. adversely affects the Prices' motion. The Prices were not parties to that suit and that suit has been dismissed and is no longer pending.

CONCLUSION

Rule governing amendment of pleadings strongly favors amendments, and the court is encouraged to freely grant leave to amend. *Parker v. Spartanburg Sanitary Sewer Dist.* 362 S.C. 276, 607 S.E.2d 711(S.C. App. 2005). Rule 8(f), SCRCP, requires that "[a]ll pleadings shall be so construed to do substantial justice to all parties." We agree with the committee note on amended Fed. R. Civ.P. 15(c) that Rule 8(f), SCRCP, is applicable and that the rules should be liberally construed. *Hughes v. Water World Water Slide, Inc.*, 314 S.C. 211, 442 S.E.2d 584 (1994).

THERERFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1) Plaintiffs' motion to amend and supplement the complaint is hereby granted and the Plaintiffs may file the Second Amended and Supplemental Complaint;
2) Plaintiffs shall serve the Second Amended and Supplemental Complaint within thirty (30) days of filing;
3) The Parties shall conference and submit a proposed scheduling order within 90 days after service of the amended pleadings. If the parties cannot consent to the proposed scheduling order then each party should submit a proposed scheduling rrder.

IT IS SO ORDERED.

Dale Van Slambrook, Master in Equity
for Berkeley County

Dated: 9/4/15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
Ronald E. Price And Diana R. B. Price,	)	
	)	
Plaintiffs	)	CASE NO. 04-CP-08-1855
	)	
vs.	)	**AMENDED ORDER OF**
	)	**DISQUALIFICATION**
Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc.,	)	
	)	
Defendants,	)	

FILED
2013 JAN 15 AM 11:00
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came before me pursuant to a Motion to Reconsider, Alter or Amend filed by Jeffrey T. Spell, Esquire ("Spell") on February 4, 2013 to amend this court's November 1, 2012 Order of Disqualification to allow Spell to represent Defendant Danny Gilbert, Eagle Harbor, Inc. and Heritage Classic Homes in all pretrial matters in certain litigation filed by Ronald and Diana Price ("Prices"). In this court's November 1, 2012 order, Spell was disqualified under Rule 3.7[1] because Spell was a likely witness. In response to Spell's motion, the Prices filed a Return on February 22, 2013, in which they renewed their argument from their brief[2] before the prior Order on Disqualification that Spell should also be disqualified under Rule 1.9(a) since the Prices were Spell's former clients in a substantially related matter. This court elected to treat that argument as a motion to reconsider the court's ruling on that issue. After carefully considering Spell's Motion to Reconsider the Order of Disqualification dated November 1, 2012 as well as Price's Return to the Motion, this court now concludes that Spell is also disqualified under Rule 1.9(a) and hereby amends its order accordingly.

[1] All references to "Rules" are to the South Carolina Rules of Professional Conduct unless otherwise stated.

[2] The court allowed parties to submit briefs, affidavits and exhibits prior to the original Order of Disqualification dated November 1, 2012.

STATEMENT OF THE CASE

After a status conference and motion hearing on February 28, 2012, this court granted Jay Masty, Esquire's motion to be relieved[3] as counsel for Danny Gilbert ("Gilbert"), Eagle Harbor, Inc. ("Eagle Harbor" or "EHI") and Heritage Classic Homes, Inc. ("Heritage Classic Homes" or "HCH") (collectively "Gilbert entities"). The court gave Gilbert and his entities 20 days to secure other counsel and notify the court and opposing counsel that he had done so. On March 22, 2012, Jeffrey T. Spell ("Spell") called J. Derrick Jackson ("Plaintiffs' counsel") notifying him that Gilbert wanted Spell to represent him and the Gilbert entities. Plaintiffs' counsel then contacted his clients to see if they had any objections and if they would waive the conflict acknowledged by Spell. On March 28, 2012, Plaintiffs' counsel notified Spell by e-mail that his clients were not willing to waive the conflict and that Gilbert would need to find other counsel as soon as possible. Spell responded "Thank You" Thereafter, there was no record of any communication until May 4, 2012, when Plaintiffs' counsel e-mailed Spell about scheduling his deposition On or about May 18, 2012, Plaintiffs' counsel spoke with Spell confirming his deposition date and time and following up on a subpoena for his records that was issued on May 4, 2012. On May 23, 2012, Plaintiffs' counsel notified Spell that he may want to reschedule his deposition which was scheduled for May 25, 2012, and on May 24, 2012, Plaintiffs' counsel confirmed with Spell that his deposition would be rescheduled to a mutually agreeable time and date.

On June 5, 2012, at the previously rescheduled status conference, Spell appeared and stated that he intended to represent Gilbert and the Gilbert entities despite the Prices objections. This issue surprised Prices' counsel who thought the issue had been settled by the March 28, 2012 e-mail noting the Prices objections and that they were not willing to waive any conflicts. This court held a conference with the attorneys and

[3] This was filed by Masty in September 2011.

allowed counsel 20 days[4] to submit a brief on the issue. Thereafter, the court issued its order dated November 1, 2012 disqualifying Spell under Rule 3.7 because Spell was a likely witness. As previously discussed, Spell filed a Motion to Reconsider, Alter or Amend and the Prices filed a Return asking the court to amend its order to include disqualification under Rule 1.9(a). This Amended Order follows:

FACTUAL BACKGROUND[5]

Spell is a licensed South Carolina attorney and is the owner of Low Country Title Services, LLC. Both Troy Winn (Winn) and Gerry Fox (Fox) have testified that Spell was Danny Gilbert's attorney throughout the development process and that he closed most of the real estate closing for lots in Eagle Harbor Subdivision. (Exhibits[6] 9, 10, 11, 12, 15) Fox also testified that Spell could have provided the real estate contracts which were used to sell lots in Eagle Harbor Subdivision. (Exhibit 11) Gilbert handled the sale of the lots as an agent of both Winn and Fox. (Exhibits 8, 13) Spell also represented Eagle Harbor, Inc. in closing construction loans. (Exhibits 20, 27) Spell is listed as a contributor of Services to Eagle Harbor (Exhibit 19) Spell may also have prepared the covenants and restrictions which were recorded for Eagle Harbor Subdivision. (Exhibit 10) Spell may also have prepared the incorporation documents for Eagle Harbor Homeowners Association, Inc. for which Danny Gilbert is the organizer. Spell did prepare and record the documents conveying the roads in the subdivision from the Winns and Foxes to Eagle Harbor Home Owners' Association, Inc. (Exhibit 16)

On or about September 13, 2003, the Prices signed an Agreement to Buy and Sell (which may have been prepared by Spell) to purchase Lot #20 in Eagle Harbor. Subdivision Phase II from Belinda Fox. This Agreement had "Jeff Spell" preprinted as the closing attorney. (Exhibit 21)

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[4] This was extended an additional five days upon request by Plaintiffs' counsel.
[5] This shall be the court's findings of fact, unless otherwise qualified.
[6] References to "Exhibits" herein are to Plaintiff's Response to Spell's Notice of Appearance.

On November 06, 2003, Spell submitted a title research request for Lot #20 and in the blank for "My Client" listed "Ronald Price" and "Dana [sic] RB Price." (Exhibit 22) On or about November 25, 2003, Ronald Price individually and as attorney in fact for Diana Price executed an Attorney Preference form designating Jeffrey T. Spell as attorney. (Exhibit 23)

The closing took place on November 25, 2003 at the law office of Spell. He did not attend the closing, but had an associate, Brian Badger witness the closing. Spell's agency, Low Country Title, LLC is listed as the Settlement Agent. On the HUD-1 Settlement Statement, the Prices were charged several fees by Low Country Title Services, LLC including a "closing fee", "an Abstract or Title Search", and "Document Preparation." The HUD-1 also shows the Prices were charged for and issued an owners title policy. (Exhibit 24, 25) The HUD-1 was signed "Jeffrey T. Spell by Brian W. Badger." The HUD-1 reflects payments to Heritage Classic Homes, Inc. of $41,020 and Dee Dee Cox another $3,000 which was a debt of Gilbert. (Exhibit 24) Fox testified that this was Gilbert's share of the profits. (Exhibit 14) According to the Prices, Spell never disclosed to the Prices his prior representation or relationship with Gilbert, Fox, Eagle Harbor or the Winns. (Price Affidavits Exhibits 1, 3)

The closing was for buying the property and constructing a home and the Prices had contracted with Gilbert/Heritage Classic Homes to construct their home. After building started, the Prices discovered several issues which they allege were contrary to what Gilbert had represented to them when he sold the lot. The Prices contacted Spell by e-mail as their closing attorney for advice about these problems. (Exhibit 2) In this e-mail, Price states in Item 4, "Since you were our closing agent, we assume you are the #1 person to ask about the following ...issues as well." Price then proceeds to list items like the delay in getting a septic tank permit, the inability to subdivide, the legality of the restrictive covenants (all of which are part of the present lawsuit.) Price concludes, "you as our closing agent, should be able to help us."

The Prices were named as Defendants in a lawsuit filed by Gilbert's subcontractor (Case #1150) and subsequently the Prices filed the present suit for the alleged misrepresentations related to the property issues (Case#1855).

LAW/ANALYSIS

STANDARD

It should be noted that doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification. *See, International Business Machines Corporation v. Levin*, 579 F. 2d 271 (3rd Cir. 1978) and *Chugach Electric Association v. United States District Court*, 370 F. 2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820, 88 S. Ct. 40 (1967). However, the burden of proving a conflict of interest is on the party seeking the disqualification. *Duncan V. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F. 2d 1020 (5th Cir. 1981)(quoted in S.C. Bar Ethics Advisory Opinion No. 90-34[7]).

RULE 1.9 DUTIES TO FORMER CLIENTS

Rule 1.9(a) provides as follows:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The Prices were Spell's Clients

In this case, Spell cannot seriously dispute that he "formerly represented" the Prices. He was selected as attorney on the attorney preference form, his company Lowcountry Title Services, LLC was listed as "Settlement Agent" for the closing. He is responsible for the title search which lists the Prices as "My Client", the title commitments and the title policy that were issued. Lowcountry Title was paid fees by the Prices at closing. The closing documents are signed Jeffrey Spell by various persons in his office. Subsequent to the closing, the Prices contacted Spell by e-mail for his help

[7] All future references to the SC Bar Ethics Advisory Opinions will only be to the Opinion No.

as "closing attorney." The Prices state they believed he was their attorney and relied upon him to protect their interests. (Price Affidavits, Exhibits 1 and 3)

The matters are substantially related.

The present litigation is substantially related to the Spell's former representation of the Prices. Many of the issues raised in the complaint are issues which the Prices asked for Spell's help. Looking at the Prices, Amended Complaint (1855)(Exhibit 29), paragraph 8 refers to the Agreement to Buy and Sell. This Agreement may have been drafted and provided by Spell and is the Agreement closed for the sale of the property. Paragraph 10 alleges the condition in the Agreement about being able to subdivide the property into two separate lots, paragraphs 11 alleges that this representation was made by Defendants during negotiations and "up through the closing." Paragraph 12 includes allegations that the property could not be subdivided because of DHEC requirements for a septic tank system. Advising the Prices about their Agreement and whether or not the subdivide condition could be satisfied due to DHEC regulations were all part of Spells former representation. Indeed, in Diana Prices' March 11, 2004 e-mail to Spell (Exhibit 2), she specifically asks Spell about the DHEC permits and the notification that she could not subdivide the property. She asks Spell, "This was a main factor in us purchasing the lot.... does this constitute a breach of contract?"

Another example of how Spells' former representation is substantially related to this case is the lack of binding restrictive covenants. In paragraph 13 (as well as other paragraphs) of the Amended Complaint, the Prices allege, "all Defendants led your Plaintiffs to believe that they were purchasing property in a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits confirmed by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits." Winn testified that he thought Spell prepared the

covenants (Exhibit 10) which the Prices allege are not valid since they were executed by a Declarant (Eagle Harbor) that never owned the property. (See paragraph 14 of the Amended Complaint.)

Regardless of whether or not Spell prepared and recorded the restrictive covenants, as closing attorney he had a duty to advise the Prices as to what restrictions were binding (or not binding) on the property they were purchasing. This is another issue Ms. Price asked Spell about in her March 11, 2004 e-mail to Spell. (Exhibit 2)

The same point can be made about the Eagle Harbor Homeowners Association, Inc. ("EHHOA") which is the recipient of the roads in the subdivision conveyed through deeds prepared and recorded by Spell. EHHOA's registered agent is Gilbert and the Prices contend membership is not required because of the invalid covenants. Therefore, according to the Prices, the roads have no source of continued maintenance. These allegations are the subject of a proposed amendment to the complaint which the court has under consideration.

Yet another example is the allegation that property purchased by the Prices was not ready for construction because Gilbert had not applied for the proper DOT permit to install a septic line across a state road. (Exhibit 2 (A)). According to the Prices, this delayed construction on the Prices house and was another matter upon which Spell should have advised the Prices. In her e-mail she asks Spell to explain her options.

Another example is the presence of wetlands encumbering about 2.0 acres of the Prices property. (Exhibit 26) This is part of the Prices alleged damages. As part of his title search, and as closing attorney, Spell should have advised the Prices as to possible wetlands encumbering their property and cannot now represent the same Defendants who should have obtained the required wetland studies.

Indeed, Spell's former representation is so substantially related that a previous attorney of the Prices included him as a Defendant in a proposed Second Amended

Complaint (Exhibit 30)(Fifth Cause of Action) which was never served and later withdrawn for reasons unknown to the Prices or their current counsel.

The final elements of Rule 1.9(a) are easily satisfied. Obviously, Gilbert and his entities interests are materially adverse to the Prices being on opposite sides in contested litigation. Finally, the Prices did not consent to the conflicted representation which was communicated to Spell by e-mail from the Price's counsel.

Opinion 10-3 is distinguishable

The primary Ethics Opinion recited and relied upon by Spell is distinguishable. Spell principally relies on Opinion 10-3. (Exhibit 35) The facts of that opinion are as follows:

> "Several years ago, an attorney conducted a transaction which pertained to a bond for title/contract for sale for two parties. ...Another attorney with the same law firm, who practices at another location than the previous attorney, may be retained by the Homeowners Association to address a violation of the recorded covenants and restrictions on the subject real property. This would include sending letters to the prospective purchasers on behalf of the Homeowners Association regarding such violations, and potentially filing a lawsuit on behalf of Homeowners Association against both prospective purchaser and title owner."

In Opinion 10-3, the committee begins it opinion by stating, "The South Carolina Supreme Court has held that representing a borrower in a residential transaction and later representing the lender in foreclosure does not create an appearance of impropriety. *In re Anonymous*, 298 S.C. 163, 378 S.E.2d 821 (1989). Ironically, this statement comes from a footnote in the opinion. The actual *holding* of the opinion was that a lawyer who represented both the buyer and seller in a residential real estate transaction should not subsequently represent the purchaser against the seller in litigation regarding the condition of the property sold so as to avoid the appearance of impropriety. The "appearance of impropriety" was the test under the old rules and has been replaced by Rule 1.9(a) and the substantial relationship analysis.

Under the specific facts of 10-3, the committee concluded as follows:

When the closing involves an installment land sale contract, rather than a sale by deed, whether a substantial relationship exists between the closing and a later action against the buyer would depend on 1) whether the lawyer advised the buyer about the specific contract involved or merely advised the buyer about land contracts generally and 2) whether the subsequent adverse representation involved the same legal issues about which the lawyer gave the buyer advice. Ordinarily, neither would occur. Therefore, without more, enforcement of HOA covenants or restrictions based solely on post-closing acts or omissions of the buyer would not ordinarily be substantially related to the prior closing.

This conclusion shows several distinguishing factors from this case. First, Gilbert and his entities are not mere lenders or an HOA, they are the developers of a project for which Spell provided substantial services before providing closing services for the Prices. Second, as pointed out in detail above, there are common legal issues about which the Prices sought Spells advice as closing attorney and which are part of the present litigation. Third, the committee emphasized that the litigation was based solely on post-closing action or omissions. As noted above, in this case, many of the allegations relate to pre-closing conduct, actions or omissions. Fourth, the sale in this case was by deed, and not an installment land sale contract.

Finally, this court notes that the committee itself noted that its opinion conflicted with many previous opinions on the subject: 84-24 (closing attorney cannot represent lender in subsequent foreclosure on same property;) 90-22 (closing attorney may update title but cannot file lis pendens or represent lender in foreclosure;) 05-05 (closing attorney cannot represent HOA in collecting dues for property purchased.)

While the committee continued in its opinion to try an explain this conflict, some of the quotes from those opinions are worth noting. From 90-22, "Rule 1.9 concerns loyalty to the client in cases of serial representation; its protections are for the benefit of the former clients." G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1986) at 174." "The concerns underlying this proscription are the potential for violation of the lawyers duty of loyalty, as well as the risks that confidential information gained in a prior representation will be used to the

disadvantage of the former client." ABA/BNA *Lawyers Manual on Professional Conduct*, 51:202.

From 05-05, "One of the signal events in a client's life is the purchase of a home. A lawyer representing a client purchasing a home finds herself in the role of helping a client acquire a valuable and enduring possession. The expected duty of loyalty is profound. For a lawyer to ultimately take a position endangering home ownership when that lawyer had previously used his or her best efforts to help the client obtain a home would be an expression of hostility to a former client in violation of Rule 1.9 and a breach of the corresponding duty of loyalty owed to that former client.

This court concludes that Spell is disqualified from representing Gilbert and his entities under Rule 1.9(a) because of this previous representation of the Prices. The present litigation is substantially related to his previous representation and Spells representation would be materially adverse and breach his duty of loyalty to the Prices.

RULE 3.7 LAWYER AS WITNESS

Rule 3.7(a) provides that "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Spell is likely to be a necessary witness in this case. Indeed, the best evidence of this is that the same parties Spell wants to represent listed him as a witness in their answer to the Prices interrogatories in this case. (Exhibit 31) Likewise, the Prices also listed him as a witness in their answers to interrogatories. (Exhibit 32) Therefore, it defies logic to suggest he is not likely to be a necessary witness. Moreover, since the interrogatories listing Spell date back to 2006 and 2007, it demonstrates that the Prices are not naming him as a witness to disqualify him.

Spell's deposition was originally scheduled before the June 5, 2012 hearing at the same time as Troy Winn, but postponed because of the possibility that Winns' attorney would also take Spell's deposition if Winn was added as a party.

Spell obviously has substantial information about the facts in this case since he represented Gilbert and Eagle Harbor. As noted in the factual background, he closed most of the loans in the subdivision, possibly prepared the covenants and restrictions, possibly prepared the contract which were used in the sale of the lots, and prepared and recorded the deeds concerning the roads to the EHHOA. He also may have organized and prepared the Bylaws for EHHOA. It not clear at this point how much a role Spell played in advising Gilbert and the other developers, but Winn testified when asked about Spell's role, "It was Danny's attorney. That's all I Know. And that he used him for everything that needed to be done." (Exhibit 10) And as alleged in the pleadings, Danny Gilbert played a role in everything.

Spell argues that it's premature to disqualify him as attorney and that can be done later at trial as needed; however this argument ignores the language of the Rule and the cases that have considered the issue. First, the rule uses the phrase "is likely" which looks to a present calculation of a possible future event. Second, the cases suggest the withdrawal should take place when the potential to be a witness is recognized. *See In re Westmoreland*, 353 S.C. 44 ,577 S.E.2d 209(2003)(public reprimand for lawyer who refused to withdraw from representing one of the partners in a partnership dispute when it became apparent he would be required to testify in the trial of the matter both as a witness to some events and as a party-defendant to others.) *See also In re Hawkins*, 320 S.C. 57, 463 S.E.2d 92 (1995) (under Code of Professional Responsibility lawyer failed to withdraw as counsel even though lawyer should have known he might be called as a significant and probably adverse fact witness.)

Finally, contrary to Spell's representations at the rescheduled Status Conference, this rule is not solely for the benefit of his potential clients. Comment 1 to Rule 3.7 provides, "Combining the roles of advocate and witness can prejudice *the tribunal* and the *opposing party* and can also involve a conflict of interest between the lawyer and client." *Emphasis added.*

Comment 2 to Rule 3.7, "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof." Comment 3, "To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3)." So it is apparent the rule is also intended to protect the tribunal and opposing party.

There are three limited exceptions to the rule, none of which apply to this case. First, the rule does not apply to uncontested matters. Until Spell's deposition is taken, its unknown which matters will be uncontested, but it's likely many of the matters will be. For example, in the Defendants Answers to Prices' Interrogatories Spell is expected to testify that there was no representation that the property could be subdivided, a statement with which the Prices strongly disagree. Second, there is no issue about the value of legal services, and finally, Gilbert and his entities will suffer no hardship from disqualification. Spell filed his notice of appearance in June 2012, and Gilbert has had since September 2011 to secure other counsel, and can still do so. Furthermore, as part of this court's previous order, Gilbert and his entities were afforded an additional 30 days to secure counsel because of the disqualification.

This court finds that Spell is disqualified under Rule 3.7 (a) because it is apparent he is likely to be a fact witness at the trial of this civil action.

MOTION TO RECONSIDER DENIED

As this court has found that Spell is also disqualified under Rule 1.9(a), the court finds it unnecessary to decide if Spell could have represented the Gilbert Defendants in pretrial matters only.

CONCLUSION

Under Rule 1.9(a), Spell cannot now represent Gilbert and his entities in a matter which is substantially related to Spell's former representation of the Prices and in which Gilbert and his entities interests are materially adverse to the Prices. Also, it appears likely that Spell will be a necessary witness at the trial of this matter; accordingly, he is disqualified under Rule 3.7. For all these reasons, and because any doubts about a conflict of interest should be resolved in favor of disqualification, this court hereby disqualifies Spell from representing Gilbert and his entities.

Danny Gilbert, Eagle Harbor, Inc. and Heritage Classic Homes, Inc. have had ample time before to secure other counsel. Accordingly, they shall only have 15 days to secure other counsel.

IT IS SO ORDERED.

Robert E. Watson, Master-in-Equity
Berkeley County

Moncks Corner, South Carolina
May 6, 2013

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
RONALD E. PRICE AND DIANA R. B. PRICE, Plaintiffs vs. Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc., Defendants,	)	CASE NO. 04-CP-08-1855
KNIGHT'S REDI-MIX, INC., Plaintiff, vs. HERITAGE CLASSIC HOMES, INC., RONALD E. PRICE, DIANA R. B. PRICE, and WESTERN SURETY COMPANY, Defendants, and RONALD E. PRICE, DIANA R. B. PRICE, Third Party Plaintiffs, vs. DANNY L. GILBERT, Individually, Third Party Defendant.	)	CASE NO. 04-CP-08-1150

FILED
2010 SEP -2 AM 9:33
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

CONSENT ORDER OF CONSOLIDATION

This matter comes before me heard upon the consent of the parties to the above captioned civil actions now pending. These actions involve common questions of facts arising out of the purchase and construction of improvements on certain real property. In order to avoid unnecessary costs, avoid a multiplicity of suits and promote judicial economy, the parties agree that these civil actions be consolidated for trial pursuant to Rule 42(a), SCRCP.

THEREFORE, it is hereby ordered that civil actions, 2004-CP-08-1855 and 2004-CP-08-1150, be consolidated for trial.

IT IS SO ORDERED.

Robert E. Watson

The Honorable Robert E. Watson
Berkeley County Master-In-Equity

Dated: 8/31/10

WE CONSENT:

Tobias G. Ward, Jr., Esquire
Todd & Ward, PC
Post Office Box 1549
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Attorney for Ronald E. & Diana R.B. Price

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Deluca & Maucher, L.L.P.
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Goose Creek, SC 29445
Attorney for Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc.

Steven L. Smith, Esquire
Smith & Koontz, P.A.
P.O. Box 40578
Charleston, SC 29423-0578
(843) 760-0220
Attorney for Knights Redi-Mix, Inc.

THEREFORE, it is hereby ordered that civil actions, 2004-CP-08-1855 and 2004-CP-08-1150, be consolidated for trial.

IT IS SO ORDERED.

Dated:_____

The Honorable Robert E. Watson
Berkeley County Master-In-Equity

WE CONSENT:

Tobias G. Ward, Jr., Esquire
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Attorney for Knights Redi-Mix, Inc.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

RONALD E. PRICE and
DIANA R. B. PRICE,

Plaintiffs,

vs.

BELINDA FOX and
DANNY L. GILBERT,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 04-CP-08-1855

CONSENT ORDER

FILED
2006 FEB -7 AM 11:18
BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

THIS MATTER came before me pursuant to the consent of the attorneys representing the above parties, in which G. Waring Parker of Chellis & Frampton desires to withdraw, without prejudice, Plaintiffs' Motion to file a second Amended Complaint by adding new parties.

Therefore, with the consent of the attorneys, G. Waring Parker, and Jay S. Masty:

1. Plaintiffs' Motion to file a second Amended Complaint is hereby withdrawn without prejudice; and

IT IS SO ORDERED.

R. Markley Dennis, Jr., Circuit Court Judge

January 27, 2006
Moncks Corner, South Carolina

I SO MOVE AND CONSENT:

G. Waring Parker, Esquire
Attorney for Plaintiffs

I CONSENT:

Jay S. Masty, Esquire
Attorney for Defendants

CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY
DATE _____ CLERK OF COURT, C.P. & G.S.

Exhibit 4

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

RECEIVED
NOV 09 2018
SC Court of Appeals

Honorable Daniel E. Van Slambrook, Circuit Court Judge

CASE NO. 2004-CP-08-1855

Ronald E. Price and Diana R. B. Price . . . . . Respondents-Appellees

v.

Belinda Fox and Gerry Fox . . . . . Petitioners-Appellants

NOTICE OF APPEAL

Belinda Fox and Gerry Fox appeal the Orders of the Honorable Daniel E. Van Slambrook, Circuit Court Judge, filed October 23, 2017, November 28, 2017, June 26, 2018, and October 9, 2018 bearing file number 2004-CP-08-1855. I received written notice, via electronic mail, of the final Order on October 9, 2018.

November 5, 2018

__/s_____
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Attorney for Eagle Harbor, Inc., Heritage Classic Homes, Inc. and the Eagle Harbor Phase II Development Partnership through Danny L. Gilbert, a partner

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

Ronald E. Price and Diana R. Price

Plaintiffs,

vs.

Belinda Fox, Gerry Fox, Danny Gilbert, Sarah Winn, Troy L. Winn, Eagle Harbor Inc., Heritage Classic Homes, Inc. and the Eagle Harbor Phase II Development Partnership,

Defendants.

COURT OF COMMON PLEAS

CASE NO. 2004-CP-08-1855

ANSWER TO PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

NOW COMES Belinda Fox and Gerry Fox (hereinafter "Defendants") by and through their attorney, Paul B. Ferrara, III, would answer the Plaintiffs' Second Amended and Supplemental Complaint as follows:

FOR AND AS A FIRST DEFENSE
(General Denial)

1. Defendants deny each and every allegation of the Second Amended and Supplemental Complaint not hereinafter specifically admitted.

FOR AND AS A SECOND DEFENSE

2. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent
3. Defendants lack sufficient information to admit the allegations contained in paragraph 1, and therefore deny the same and demand strict proof thereof.
4. Defendants admit the allegations contained in paragraph 2.
5. Defendants lack sufficient information to admit the allegations contained in paragraphs 3 through 6, and therefore deny the same and demand strict proof thereof.
6. Defendants deny the allegations contained in paragraphs 7.

7. Defendants lack sufficient information to admit the allegations contained in paragraph 8, and therefore deny the same and demand strict proof thereof.
8. Defendants crave reference to the Master Plan for the Eagle Harbor Subdivision; Defendant lacks sufficient information to admit the allegations contained in paragraph 9 and therefore, denies the same and demands strict proof thereof.
9. Defendants crave reference to the Agreement to Buy and Sell and SF Agreement referred to in paragraph 10. Defendants admit that on or about November 15, 2003, they became licensed realtors in the State of South Carolina. Defendants lack sufficient evidence to admit the remainder of paragraph 10, and therefore deny the same and demand strict proof thereof.
10. Defendants lack sufficient information to admit the allegations contained in paragraph 11 through 14, and therefore deny the same and demand strict proof thereof.
11. Defendants deny the allegations contained in paragraph 15.
12. Defendants lack sufficient information to admit the allegations contained in paragraphs 16 and 17, and therefore deny the same and demand strict proof thereof.
13. Defendants deny the allegations contained in paragraph 18.
14. Defendants admit paragraph 19.
15. Defendants deny the allegations contained in paragraphs 20 and 21.

FOR AND AS A THIRD DEFENSE AS TO THE FIRST CAUSE OF ACTION

16. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.
17. Paragraph 22 states a legal conclusion to which no response is required. To the extent that the Defendants are required to respond to the allegations, the allegations are denied.
18. Defendants deny the allegations contained in paragraphs 23 through 29.

FOR AND AS A FOURTH DEFENSE AS TO THE SECOND CAUSE OF ACTION

19. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

20. Paragraph 30 states a legal conclusion to which no response is required. To the extent that the Defendants are required to respond to the allegations, the allegations are denied.

21. Defendants deny the allegations contained in paragraphs 31 through 39.

FOR AND AS A FIFTH DEFENSE AS TO THE THIRD CAUSE OF ACTION

22. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

23. Paragraph 40 states a legal conclusion to which no response is required. To the extent that the Defendants are required to respond to the allegations, the allegations are denied.

24. Defendants deny the allegations contained in paragraphs 41 through 45.

FOR AND AS A SIXTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

25. Without admitting liability or that Plaintiffs have suffered damages, to the extent Plaintiffs have suffered damages, Plaintiffs failed to properly and timely mitigate its damages. The Defendants plead this failure to mitigate damages as a complete bar to this action, or in the alternative, a reduction in recovery to the claims of Plaintiffs.

26. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A SEVENTH AFFIRMATIVE DEFENSE
(Estoppel)

27. By and through its conduct prior to and after bringing this lawsuit, Plaintiffs should be estopped from asserting its claim against the Defendants. Therefore, the Defendants plead estoppel as a complete bar to this action.

28. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A EIGHTH AFFIRMATIVE DEFENSE
(Statute of Frauds)

29. To the extent the Plaintiffs are relying on contracts other than those that are written, their claims are barred by the Statute of Frauds and should be dismissed.

30. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A NINTH AFFIRMATIVE DEFENSE
(Unclean Hands)

31. The Plaintiffs do not have clean hands with regard to the allegations in Plaintiffs' Second Amended and Supplemental Complaint. The Defendants plead the doctrine of unclean hands as a complete bar to this action.
32. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A TENTH AFFIRMATIVE DEFENSE
(Failure to state a claim)

33. The Second Amended and Supplemental Complaint fails to state a claim for which relief can be granted and therefore should be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.
34. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS AN ELEVENTH AFFIRMATIVE DEFENSE
(Waiver)

35. By and through their conduct prior to and after bringing this lawsuit, Plaintiffs waived their rights against these Defendants. Therefore, these Defendants plead the doctrine of waiver as a complete bar to this action.
36. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A TWELFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

37. Defendants are informed and believe that the Plaintiffs have failed to commence this action within the time as required by the applicable Statute of Limitations and that such

failure to commence the action within the statutory defined time limit constitutes a bar and a complete defense to all claims against this Defendant.

38. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

FOR AND AS A THIRTEENTH AFFIRMATIVE DEFENSE
(Failure of Consideration)

39. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

40. The answering Defendants allege that each and every purported Cause of Action in the Complaint is barred as a result of a failure of consideration.

FOR AND AS A FOURTEENTH DEFENSE
(Comparative Negligence)

41. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

42. The answering Defendants allege that the Plaintiffs' claims are barred by Plaintiffs' own negligence that exceeds fifty-percent.

FOR AND AS A FIFTEENTH DEFENSE
(Assumption of Risk)

43. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

44. The answering Defendants allege that the Plaintiffs' claims are barred by assumption of risk.

FOR AND AS A SIXTEENTH DEFENSE
(Non-waiver of Defenses, Counterclaims, or Crossclaims)

45. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

46. Defendants reserve and do not waive any additional or further defenses, affirmative defenses, crossclaims or counterclaims as maybe revealed by additional information that maybe acquired in discovery or otherwise.

FOR AN AS A SEVENTEENTH DEFENSE: BY WAY OF CROSSCLAIM
(Jurisdiction)

47. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.
48. Defendants, Belinda Fox and Gerry Fox, are residents of Berkeley County, South Carolina.
49. Upon information and belief, Co-Defendant Danny Gilbert is a resident of Berkeley County, South Carolina.
50. Upon information and belief Co-Defendant Heritage Classic Homes is a corporation organized and doing business in the State of South Carolina.
51. This court has personal jurisdiction over the parties, subject matter jurisdiction over this action, and venue is proper in Berkeley County, South Carolina.

FOR AND AS A EIGHTEENTH DEFENSE: BY WAY OF CROSSCLAIM
(Breach of Fiduciary Duties)

52. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.
53. Without admitting liability or damages, the answering Defendants allege that a fiduciary relationship existed between Co-Defendants, Danny Gilbert and Heritage Classic Homes, and the answering Defendants to the extent alleged that an Eagle Harbor Phase II Development Partnership existed.
54. Arising out of the fiduciary relationship among partners are certain duties, including but not limited to, the duty of loyalty.
55. Defendants allege that Co-Defendants, Danny Gilbert and Heritage Classic Homes, breached the fiduciary duties owed to the alleged partnership between the co-defendants, to the extent such partnership existed.

56. Co-Defendants, Danny Gilbert and Heritage Classic Homes, acted in their sole interest and put their own interests above that of the alleged partnership.

57. As a result, the answering Defendants and the alleged partnership suffered actual and incidental damages for which Co-Defendants, Danny Gilbert and Heritage Classic Homes, should be liable.

FOR AND AS AN NINETEENTH DEFENSE: BY WAY OF CROSSCLAIM
(Indemnification)

58. The allegations of the preceding defenses are re-alleged and incorporated by reference insofar as they are consistent.

59. Defendants assert that a special relationship exists between the Defendants and Co-Defendants, Danny Gilbert and Heritage Classic Homes, in that the parties are alleged partners and in a contractual relationship.

60. Without admitting liability or that Plaintiffs suffered damages, Defendants assert that Danny Gilbert's acts and/or omissions alone caused damages to the Defendants and the alleged partnership, and that Defendants did not contribute in any way to the damages suffered.

61. Defendants are entitled to equitable indemnity and/or contractual indemnity from Co-Defendants, Danny Gilbert and Heritage Classic Homes, for any amount(s) which Defendants may be required to pay Plaintiffs, plus attorney fees and costs incurred in defending themselves in this action.

WHEREFORE, Defendants having fully answered the Second Amended and Supplemental Complaint of Plaintiffs:

1. Dismiss Plaintiffs' second amended and supplemental complaint with prejudice;
2. Order that Defendants be indemnified in whole or in part by Co-Defendants, Danny Gilbert and Heritage Classic Homes;
3. Award Defendants attorney's fees and the costs of defending this action; and
4. Award Defendants such other and further relief as is just and proper.

FERRARA LAW FIRM, PLLC,

By: _____

PAUL B. FERRARA, III
Attorney for Defendant
2300 Otranto Road
North Charleston, SC 29406
T: 843-569-5511 / F: 843-569-5411
Email: Paul@ferraralawfirm.net

January 6, 2016

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY)	CASE NO.: 2004-CP-08-1855
RONALD E. PRICE, AND DIANA R.B. PRICE, Plaintiffs,)	ANSWER OF EAGLE HARBOR, INC., HERITAGE CLASSIC HOMES, INC., and EAGLE HARBOR PHASE II DEVELOPMENT PARTNERSHIP
vs.)	
BELINDA FOX, GERRY FOX, DANNY L. GILBERT, SARAH WINN, TROY L. WINN, EAGLE HARBOR, INC., HERITAGE CLASSIC HOMES, INC., and the EAGLE HARBOR PHASE II DEVELOPMENT PARTNERSHIP, Defendants.)	

FILED
2005 JAN -6 PM 3:01
CLERK OF COURT
BERKELEY COUNTY, S.C.

TO: DERRICK JACKSON, ESQ., ATTORNEY FOR RONALD E. PRICE AND DIANA R.B. PRICE.

NOW COME the Defendants, Eagle Harbor, Inc., Heritage Classic Homes, Inc., and Eagle Harbor Phase II Development Partnership, as alleged, through Danny L. Gilbert, and Answering the Second Amended and Supplemental Complaint respectfully submits the following Answer, and with each allegation not specifically admitted or qualified herein as being strictly denied.

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Numbered allegations 1 through 4 are admitted.
2. It is admitted that Heritage Classic Homes, Inc. (HCH) is a corporation organized and existing under the laws of the State of South Carolina, except as admitted the remaining allegations of paragraph 5 are denied.
3. It is admitted that Eagle Harbor, Inc. was incorporated as a not for profit entity, except as admitted, the remaining allegations of paragraph 6 are denied.
4. The allegations of paragraph 7 are denied.
5. See response to paragraph 7. It is admitted the Winns and Foxes acquired certain real property that was developed in Eagle Harbor Subdivision as Phase II, except as admitted, the allegations of paragraph 8 are denied.
6. It is admitted the Prices met with Danny Gilbert regarding Lot 20 and they discussed various aspects of the lot and Eagle Harbor Subdivision, except as admitted the allegations of paragraph 9 are denied.
7. It is admitted the Prices entered into an agreement for the purchase of Lot 20 and that HCH would build a home for them, except as admitted, the allegations of paragraph 10 are denied.

Carl B. Hubbard, Esq.
2201 Middle Street, Box 15
Sullivan's Island, SC 29482
843-814-3481
chublaw@comcast.net

This the 6th day of January, 2016.

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on the Plaintiffs on 6th January, 2016, when the undersigned placed a copy of the same in the United States Post, with sufficient first class postage attached thereto and properly addressed to the Plaintiffs' counsel of record.

Carl B. Hubbard, Esq.

2016 JAN -6 PM 3:03
CLERK OF COURT
BERKELEY COUNTY, SC

ELECTRONICALLY FILED - 2018 Sep 27 5:11 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2004-CP-08-1855
Ronald E. Price and Diana R. B. Price, Plaintiffs, vs. Belinda Fox, Gerry Fox, Danny L. Gilbert, Sarah C. Winn, Troy L. Winn, Eagle Harbor, Inc., the Eagle Harbor Phase II Development Partnership, EHHOA, Inc., Concern Citizens of Eagle Harbor Subdivision, Inc., Mark and Brenda Milos, William Derrick and Kelli T. Johnson, Richard E. and Joyce Seabrook, Kelly & Lori Gibson, Mark & Jennifer L Dawson, Charlene Willman, Deborah L. Walker, Diane L. Dunigan, Avonne Beaver, William R and Ethel Rogers, Donald G. Gilbert, Jr., Jamie L. and Sunny T. Britt, Joel H and Deana S. Bennett, Jimmy H. Thigpen, Michael L and Linda H Cable, Albort H. Isom, Jr., Karen M. and Randy I Watterson, Fred Jr., and April Rodriquez, Jason P. Parker, Jr., Tristen Mustapher and Quiozel Simmons, Michael L. and Joyce W Segars, L&L Contractors, Inc., Tyson K and Jennifer M. Swanson, First State Bank, Deborah Sticke Loftis, Claude R. and Eunice Beede, Karen L. Richardson, and Anthony S. Hernandez, Monica L. Davis, William C. Davis, Charles H. Crosby, Jen Crosby, Kenneth J. and Joan H. Younginer, Randolph C. Evans, Dennis L. Ordasek, David F. and Erica Shipman, Travis L. Davis et al, Robert Legette, CMH Homes, Inc., Dee Dee Cox, Robert J. and Heather N. Faas, Stephen R. and Aud Griebe, Michael A. and Arin D. Hunter, Robert A. and Norm Newton, Phillip	**DEFENDANTS BELINDA FOX AND GERRY FOX'S NOTICE OF MOTION AND MOTION TO ELECT REMEDY**

R. Davey Trust, R.B. and Brenda D. Brown, Andrew and Patricia Finkelstein, Wells Fargo Bank, NA (successor by merger to Wachovia Bank, NA), Robert A. and Mic Poirier, Doug Cotton, Christopher S. and Kellie Anne Hiers, James S. and Fawn S. Hall, Keving W. and Eugenia P. Craggs, David D. and Nancy Fletcher, Suzen Fletcher, Elizabeth Gilbert, William Adams, Richard and C. Mullenniex, HSBC Bank USA, NA as trustee, Rudolph C. and Tonja M. Evans, Michael and Renee L. Jenkins, David W. Barnett, Lori A. and Hermand Lenhart, Bank of NY as trustee, Rodney D. Lewis, Kingston Plantation, Aaron and Teresa A. Paderwoski, S. Paige and Jarrett J. Gibbons, Greico Development, Gary H. Jr., and Kam Bell, Jr., GBF Investments, Inc., Calvin R. Cooper, Smoack Property Holdings, LLC, Burbage H. Smoak, Metro Contracting, Inc., Calvin R. Cooper, Smoack Property Holdings, LLC, Smoack Jedburg, LLC, Burbage H. Smoak, Metro Contracting, Inc.m Frederick G. Jr., and Janet J. Hall, Michael R. and Robin A. Petrell, Travis V. and Renee C. Hollifield, Billy C. and Marsha L. Hollifield, Dean A. Heatherdale, Stanley K. Hollifield, Jeremy Lee Barker, William Jr. and Becki Robinson, Steven K. and Sondra B. Baxter, Phillip S. and Tracey R. Harris, Pendley Construction, Inc., Tidelands Bank, William Adams, Karen L. Driggers, Richard Thomas Lindberg, Mary Lindberg and any other unknown current or former owner in Eagle Harbor Subdivision, Defendants.	

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ELECTRONICALLY FILED - 2018 Sep 27 5:11 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855

PLEASE TAKE NOTICE that Defendants Belinda Fox and Gerry Fox, by and through their undersigned attorney, will move the Court, ten (10) days after the service of this Notice or at such time as is scheduled to be heard, for an Order, pursuant to all applicable rules of the South Carolina Rules of Civil Procedure and South Carolina case law, directing Plaintiffs Ronald E. Price and Diana R. B. Price to elect a remedy, and in support of this motion shows the Court as follows:

Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts. *Tzouvelekas v. Tzouvelekas,* 206 S.C. 90, 94, 33 S.E.2d 73, 74 (1945). The purpose of election of remedies is to prevent double or multiple recoveries for a single wrong. *Tomlinson v. Mixon*, 367 S.C. 467, 470-71, 626 S.E.2d 43, 44-45 (Ct. App. 2006). While modern procedure permits a plaintiff to assert all viable causes of action available under one set of facts, there is a restriction on the possible recovery such that a plaintiff may only recover their actual damages once. *Inman v. Imperial Chrysler-Plymouth*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990); *Tomlinson*, 367 S.C. at 470-71, 626 S.E.2d at 44-45; *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995).

A defendant may raise the issue of election of remedies at any stage of the case. *Cowart v. Poore,* 337 S.C. 359, 364-65, 523 S.E.2d 182, 185 (Ct. App. 1999). Indeed, to carry out the doctrine's purpose, the Court should, on his own motion, require election if multiple causes of action go to the jury. *Id.* In this case, Defendants bring this motion as part of their post-trial motions under Rule 59, and it is entirely proper to raise this motion at this stage. *Collins Music Company v. Smith,* 332 S.C. 145, 503 S.E.2d 481 (1998) (requiring election of remedies as a result of a Rule 59(e) motion); *Smith,* (reversing trial court's denial of motion to require election

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of remedies made as part of a Rule 59(e) motion and remanding with instruction that plaintiff elect the one cause of action on which they wish to recover). Moreover, it is of no significance that the various causes of action had different elements. *Smith* (election of remedies applied to 4 different causes of action). Additionally, it does not matter that the various causes of action all had different measures of damages. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331,450 S.E.2d 66 (Ct. App. 1994). Given the above, an election is still required.

This matter was decided by a bench trial, which returned verdicts against these Defendants in favor of Plaintiffs on two claims: (1) negligent misrepresentation; and (2) violation of the S.C. Unfair Trade Practices Act. These two claims were based upon the same set of facts: whether the Defendants made false and misleading representations to Plaintiffs so that Plaintiffs would purchase Lot 20. The trier of fact in this action awarded Plaintiffs $82,530 in damages for negligent misrepresentation against these Defendants. The trier of fact also awarded $82,530 actual damages trebled to $247,590, plus reasonable attorney's fees and costs, for violating the South Carolina Unfair Trade Practices Act. In its Order, the Court stated that Plaintiffs could not collect damages for both negligent misrepresentation and unfair trade practices because they are two theories for recovery of the same damages but are limited to a single recovery: Under the doctrine of election of remedies, Plaintiffs must now elect as to which of the remedies presented by the Court it wishes to accept, and its award is accordingly limited to that remedy.

The two claims on which the Master returned a verdict in favor of Plaintiffs against these Defendants are all based on the same set of facts and involve damages that are the direct and

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natural consequence of the same conduct. Therefore, multiple recoveries as to these claims are not permitted. *Brown,* at 294,465 S.E.2d at 95; *Collins Music Co.,* at 148, 503 S.E.2d at 482.

Moreover, the Clerk of Court has entered a judgment of $330,120 against Defendants Belinda Fox and Gerry Fox, further supporting the notion of double recovery ($82,530 for negligent misrepresentation plus $247,590 for unfair trade practices equals $330,120). A final judgment in this case needs to reflect the correct dollar amount that Plaintiffs elect.

WHEREFORE, Defendants Belinda Fox and Gerry Fox, respectfully pray that this Honorable Court enter an Order granting that Plaintiffs Ronald E. Price and Diana R. B. Price be required to make an election at this time as to just one cause of action under which to recover and a final judgment that is reflective of the damages awarded.

Respectfully Submitted,

FERRARA LAW FIRM, PLLC

/s_____

PAUL B. FERRARA, III
Attorney for Defendants Belinda Fox & Gerry Fox
2300 Otranto Road
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paul@ferraralawfirm.net

September ____, 2018

ELECTRONICALLY FILED - 2019 Feb 15 2:27 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	FOR THE NINTH JUDICIAL CIRCUIT
Ronald E. Price And Diana R. B. Price,	)	CASE NO. 04-CP-08-1855
Plaintiffs,	)	
	)	**PLAINTIFFS' ELECTION OF REMEDY**
vs.	)	
Belinda Fox, et. al.	)	
Defendants,	)	

Defendants Belinda and Gerry Fox (Foxes) filed a motion to require the Plaintiffs to elect remedies. After the non-jury trial on the merits, the court returned verdicts against the Foxes and other Defendants in favor of Plaintiffs Ronald and Diana Price (Prices) on two claims: (1) negligent misrepresentation; and (2) violation of the S.C. Unfair Trade Practices Act. These two claims were based upon similar facts concerning alleging false and misleading representations to Prices related to the purchase of Lot 20 in Eagle Harbor Subdivision.

The court awarded Plaintiffs $82,530 in damages for negligent misrepresentation against these Defendants. The court also awarded $82,530 actual damages trebled to $247,590, plus reasonable attorney's fees and costs, for violating the South Carolina Unfair Trade Practices Act. In the order, the court stated that Plaintiffs could not collect damages for both negligent misrepresentation and unfair trade practices because they are two theories of recovery for the same damages but are limited to a single recovery.

The Prices have agreed to elect the remedy of the violation of the South Carolina Unfair Trade Practices Act provided; however, if this remedy is overturned or modified on appeal the Prices reserve the right to request entry of judgment for negligent misrepresentation.

TOBIAS G. WARD, JR., PA

s/ J. Derrick Jackson
Tobias G. Ward, Jr., SC Bar No.: 5826
J. Derrick Jackson, SC Bar 15192
P.O. Box 50124
Columbia, SC 29250
803-708-4200
dj@tobywardlaw.com

February 15, 2019

ELECTRONICALLY FILED - 2019 Feb 15 2:27 PM - BERKELEY - COMMON PLEAS - CASE#2004CP0801855

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CASE NO. 2004-CP-08-1855
)
Ronald E. Price and Diana R.B. Price,)
)
Plaintiff,)
)
v.)
)
Belinda Fox, Gerry Fox, Danny L. Gilbert, Sarah C.)
Winn, Troy L. Winn, Eagle Harbor, Inc., Heritage)
Classic Homes, Inc., the Eagle Harbor Phase II)
Development Partnership, EHHOA, Inc.,)
Concerned Citizens of Eagle Harbor Subdivision,)
Inc., Mark and Brenda Milos, William Derrick and)
Kelli T. Johnson, Richard E. and Joyce Seabrook,)
Kelly and Lori Gibson, Mark & Jennifer L. Dawson,)
Charlene Willman, Deborah L. Walker, Diane L.)
Dunigan, Avonne Beaver, William R. and Ethel)
Rogers, Donald G. Gilbert, Jr., Jaime L. and Sunny)
T. Britt, Joel H. and Deana S. Bennett, Jimmy H.)
Thigpen, Michael L. and Linda H. Cable, Albert H.)
Isom, Jr., Karen M. and Randy I. Watterson, Fred Jr.)
and April Rodriguez, Jason P. Parker, Jr., Tristen)
Mustapher and Quiozel Simmons, Michael L. and)
Joyce W. Segars, L&I Contractors, Inc., Tyson K.)
and Jennifer M. Swanson, First State Bank, Deborah)
Stricke Loftis, Claude R. and Eunice Beede, Karen)
L. Richardson and Anthony S. Hernendez, Monica)
L. Davis, William C. Davis, Charles H. Crosby, Jen)
Crosby, Kenneth J. and Joan H. Younginer,)
Randolph C. Evans, Dennis L. Ordrasek, David F.)
and Erica Shipman, Travis L. Davis, et. al., Robert)
Legette, CMH Homes, Inc., Dee Dee Cox, Robert J.)
and Heather N. Faas, Stephan R. and Aud Griebe,)
Michael A. and Arin D. Hunter, Robert A. and)
Norm Newton, Philip R. Davey Trust, R.B. and)
Brenda D. Brown, Andrew and Patricia Finkelstein,)
Wells Fargo Bank, NA (successor by merger to)
Wachovia) Bank, NA, Robert A. and Mic Poirier,)
Doug Cotton, Christopher S. and Kellie Anne Hiers,)
James S. and Fawn S. Hall, Kevin W. and Eugenia)
P. Craggs, David D. and Nancy Fletcher, Suzen)
Fletcher, Elizabeth Gilbert, William Adams,)
Richard and C. Mullenniex, HSBC Bank USA, NA)

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT/ NEW TRIAL/ MOTION TO RECONSIDER

FILED
2010 JUL 19 PM 12:36
MARY BROOM
CLERK OF COURT
BERKELEY COUNTY, SC

as trustee, Rudolph C. and Tonja M. Evans, Michael) and Renee L. Jenkins, David W. Barnett, Lori A.) and Hermand Lenhart, Bank of NY as trustee,) Rodney D. Lewis, Kingston Plantation, Aaron and) Teresa A. Paderewski, S. Paige and Jarrett J.) Gibbons, Grieco Development, Gary H. Jr. and Kam) Bell, Jr., GBF Investments, Inc., Calvin R. Cooper,) Smoak Property Holdings, LLC, Smoak Jedburg,) LLC, Burbage H. Smoak, Metro Contracting, Inc.,) Frederick G. Jr., and Janet J. Hall, Michael R. and) Robin A. Petrell, Travis V. and Renee C. Hollifield,) Billy C. and Marsha L. Hollifield, Dean A.) Heatherdale, Stanley K. Hollifield, Jeremy Lee) Baker, William Jr. and Becki Robinson, Steven K.) and Sondra B. Baxter, Phillip S. and Tracy R.) Harris, Pendley Construction Inc., Tidelands Bank,) William Adams, Karen Lynn Driggers, Richard) Thomas Lindberg, Mary Lindberg, and any other) unknown current or former owner in Eagle Harbor) Subdivision,)
)
Defendants.)

NOW COME the Defendants, Belinda Fox and Gerry Fox, by and through their undersigned attorney, and move this Court to grant a judgment notwithstanding the verdict, or in the alternative, an Order granting a New Trial. Additionally, the Foxes respectfully request the Court to reconsider its ruling on res judicata. Defendants' motions are based upon the foregoing issues of law and good cause, which should be explored at a hearing on this motion:

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure, the Defendants, Belinda Fox and Gerry Fox, by and through their undersigned attorney, move the Court for an Order granting judgment notwithstanding the verdict. "In ruling on motions for judgments notwithstanding the verdict, the Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the

motions." Strange v. South Carolina Dep't of Highways and Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). The motions should be denied where either the evidence yields more than one inference, or its inference is in doubt. Id. The Court will reverse only where there is no evidence to support the ruling below. Id.

A. Plaintiffs' damages proven at trial were speculative and not certain.

Here, judgment notwithstanding the verdict should be granted in favor of the Foxes because the Plaintiffs' award of damages is speculative and not proper. South Carolina courts have held that proof of 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). In this case, the Court has made a finding of fact that the Prices' property contained 2.0 acres of wetlands. However, page 62 of Plaintiffs' Exhibit 38, hereinafter "Carter's Report," is in direct conflict with the Court's finding of fact regarding the wetlands on the Plaintiff's property. Carter's report makes the faulty assumption that Plaintiffs' 7.86-acre property contains "one-third to one-half wetlands." This yields a range of 2.62 acres to 3.93 acres on the 7.86-acre tract. The Court, in its Order, made a finding that Plaintiffs were damaged in the amount of $82,530.00 based upon the difference between the assumed land pre and post misrepresentation. The Court's damage award for negligent misrepresentation directly relies on Plaintiff's Exhibit 38, which assumes facts not in evidence and opposite of the Court's finding of fact above. As Plaintiff's damages failed to account for the .62 acres value difference, judgment notwithstanding the verdict should be granted and a new trial be issued.

B. Plaintiffs trial testimony failed to prove that any false representations were made by Belinda Fox and Gerry Fox.

Plaintif failed to establish the first element of the cause for negilgenct misrpersentation. An additional basis for judgment notwithstanding the verdict is established as the Court's record is void of any false representations by the Foxes to the Prices. The first element of negligent misrepresentation requires: (1) "the **defendant to make a false representation** to the plaintiff." See Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003)(Emphasis added). While the Court made several findings of fact of misrepresentations by Gilbert: (1) he represented the property as dividable into two lots, and that the property could be subdivided into three lots with the homeowners' association approval; (2) he represented to the Plaintiffs that they could put a septic tank on the property; (3) he represented that the lot would be a part of a gated community with valid covenants and restrictions; (4) he represented that various amenities would be available for use by the residents; (5) he represented that testing had been done; and (6) he did not disclose to the Prices that their lot contained wetlands or that the soil had a high-water table, it did not find that the Foxes made or acquiesced in the above represention. The trial record contains no testimony that the Foxes actually made any false representations to the Prices. The Court summarily found that the Foxes were liable for the misrepresentations of Gilbert based upon agency principles and partnership. This finding is flawed as there was no testimony that the partnership to develop Eagle Harbor authorized Gilbert to make any of these misrepresentations on behalf of the Eagle Harbor partnership. The Plaintiffs failed to establish this critical link. Moreover, the trial testimony is clear that Gilbert acted in his own self-interest to secure a home building contract with the Prices.

C. **Plaintiff cannot receive 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. Moroever, 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 Plaintiff's have asserted a claim for damages for the negligence misrepresentation and Unfair Trade Practices Act. The Court has instructed the Plainitff to elect its remedy on either cause. However, the same damages asserted by Plaintiff's have been recovered in case number 2007-CP-08-458. The testimony at trial was that the Price's received

$125,000 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. 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 Price's already received One Hundred Twenty Five Thousand ($125,000.00) Dollars, in case number 2007-CP-08-458 for the same injury, they can not recover twice for the same wrong. To do so would provide a windfall to the Price's. The Court stated in its Order that the Foxes did not pay the Price's and as such, it should not be allowed to benefit from the title insurance company litigation. However, the Court should focus on the inequitable result of the Prices recovering an additional Forty-Two Thousand Four Hundred Seventy ($42,470) Dollars which it the difference between this Court actual damage award and the prior settlement amount. If the Price's had not negotiate 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) Dollars against Belinda Fox. However, as the Price's retained the subrogation interest, it will be allowed to recover Two Hundred Seven Thousand Five Hundred Thirty ($207,530) 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).

D. Plaintiffs failed to prove that the alleged misrepresentations were false when made.

The trial testimony failed to establish the falsity of statements at or prior to closing on Lot 20. 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 Court found that Gilbert represented the following: (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) that the lot would be a part of a gated community with valid covenants and restrictions; (4) that various amenities would be available for use by the residents; (5) that 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. All of the above misstatements 1-6 are based on unfulfilled promises or statements as to future events. The Order does not find and the Plaintiff's failed to prove that Gilbert actually knew that the statemetns were false when made. Additionally, Ty Adley, a representative from Berkeley County testified that the lot can currently be subdivided. Plaintiffs did not prove that the lot could not be subdivided and further did not prove that they tried to get the homeowner's association approval to subdivide the lots into three separate lots. As such, Plaintiff failed to establish the representations to actually be actionable.

For the above reasons, judgment notwithstanding the verdict should be granted.

II. MOTION FOR NEW TRIAL

Pursuant to Rule 59(a) of the South Carolina Rules of Civil Procedure, the Defendants, Belinda Fox and Gerry Fox, by and through their undersigned attorney, move the Court for an Order granting a new trial. South Carolina Rules of Civil Procedure Rule 59(a) provides that in an action tried without a jury, "a new trial may be granted to all or any of the parties and on all or part of the issues... for any of the reason for which rehearings have heretofore been granted in the courts of the State." Rule 59(a) further provides, "the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

A. **A new trial should be granted for the Foxes because principals are not liable for the acts of their agents unless the agent's acts are within the scope of their agency of the partnership.**

An Order granting a New Trial should be granted in favor of both Defendants Belinda Fox and Gerry Fox on the grounds that the evidence at trial failed to establish that neither Belinda Fox or Gerry Fox violated the Unfair Trade Practices Act, hereafter "UTPA". The Court imputed the acts of Gilbert onto the Foxes based upon agency. In order to hold the Foxes liable under the South Carolina Unfair Trade Practices Act, there must be testimony that the Foxes consented to Gilbert's acts. South Carolina Code § 39-5-20 (a) further states, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The plain reading of the statute establishes the tort of UTPA requires the Plaintiff to establish willful conduct not mere negligence. 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. 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. Schloss v. Silverman, 172 Md. 632, 192 A. 343 (Md., 1937).

In the trial of this matter, the evidence did not establish consent or ratification of Gilbert's actions by the Foxes. The Court found in its Order that the willful and malicious tort of UTPA was established through the misrepresentations by Gilbert and his actions were implied consent to as his actions benefited the partnership. However, a careful review of the record evidences there was no testimony at trial that the Foxes consented to 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 UTPA. 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 copartner. Plaintiff's failed to establish that the partnership's ordinary course of business was to make false representations to sell property in Eagle Harbor or the 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. Moreover, the trial record also lacks any evidence that the Foxes engaged in an unlawful trade practice in their own individual capacity, or that the Foxes' individual actions had an adverse impact on public interest. *See* S.C. Code Ann. §§ 39-5-10 to 39-5-560.

As Plaintiff's have failed to establish the Foxes either consented to the actions of Gilbert or are liable, in their own individual capacity for UTPA, a new trial should be granted.

B. <u>A new trial should be issued as the Court's award of damages to the Plaintiffs is not supported by the evidence at trial.</u>

An Order granting a New Trial should be granted in favor of the Foxes because the Plaintiffs' award of damages is not supported by the verdict. As discussed above, the Court's findings of fact on the amount of acreage in the wetlands is lower than the amount of acreage used in the damages calculation. The Court found 2.0 acres of wetlands existed on the Plaintiffs' property. However, the Court's damage award is based upon Mr. Carter's report which assumes at least 2.62 to 3.93 acres of wetlands on the property. This critical difference clearly would result in the Plaintiff's damages being reduced. Two acres of the total 7.86 acres yields a percentage of wetland to total acreage of 25.44. The mathematical difference is 25.44 versus 33.33-50 percent. This could result in the loss property value of being reduced by 47.46 to 7.89

percent. The above establishes that the award is too speculative and the Court's award of damages to the Plaintiffs for the loss of value does not meet the requisite proof of certainty. Therefore, a new trial should be granted on this issue as well.

III. MOTION TO ALTER OR AMEND THE JUDGMENT

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, the Defendants, Belinda Fox and Gerry Fox, by and through their undersigned attorney, move the Court for an Order to Alter or Amend the Judgment. South Carolina Rules of Civil Procedure Rule 59(e) states, "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order."

A. The Court should issue an order addressing equitable indemnification asserted by the Foxes in this matter.

An equitable indemnification claim was asserted by the Foxes against Gilbert in the pleadings in this action and at trial. South Carolina has long recognized the principle of equitable indemnification. See Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983); Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." Town of Winnsboro v. Wiedeman-Singleton, Inc.(Winnsboro I), 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II)(citation omitted).

The testimony by Gilbert and the Foxes established the required elements for equitable indemnification. As a matter of equity, if the Foxes are deemed liable to Plaintiffs, under the theory of agency, based on the false statements of Gilbert, it is only fair and equitable to allow the Foxes to recover any losses they have sustained from Gilbert. At trial there was clear

testimony that Gilbert was the one who caused the damages incurred by the Prices, which have been imputed onto the Foxes. The Defendants Foxes request that the Court issue an order holding that the Foxes be allowed to recover against Gilbert, pursuant to equitable indemnification, any damages that the Foxes may pay to the Prices.

B. The Court should reconsider its ruling on the res judicata.

The Court found that res judicata did not apply but did not address the "privies" element. For res judicata to be established, the parties must be the same or their privies. Bagwell v. Hinton, 205 S.C. 377, 400, 32 S.E.2d 147, 156 (1944). The identity of the parties in the first lawsuit also includes persons in privity with the named parties. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). 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). In regard to res judicata or collateral estoppel, 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).

The Court admitted as a trial exhibit the complaint between Chicago Title and the Price's, Berkeley County case 2007-CP-08-458. A careful review of that action as compare to the instance case establish that all elements of res judicata apply, including privity. The privies element is established through the title policy that the Prices entered into with Investors Title Insurance Company. Paragraph 7 of the policy, which was admitted as court exhibit, states:

7. TRANSER OF YOUR RIGHTS
"When we settle a claim, 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 . . . You must let us use your name in enforcing these rights."

Although it is true that the Prices later bargained away the subrogation right, the policy language establishes that, there was as a matter of fact, privity between Chicago Title and Belinda Fox at the time of the policy. The Investors Title case was resolved with a stipulation of dismissal as evidence by the Court exhibit entitled "Stipulation of Dismissal" in case number 2007-CP-08-458. 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. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997). In this case, it is clear that the claims are the same, the privies are the same and there was a final adjudication on the merits. As such, res judicata should bar Plaintiffs claims.

As such, the Court should reconsider its prior Order and hold the collateral source rule bars Plaintiffs' claims against the Foxes. Otherwise, the Plaintiffs will be allowed to recover twice on the same action.

Wherefore, Defendants Belinda Fox and Gerry Fox respectfully request the Court to grant their Motion for Judgment notwithstanding the Verdict, or grant their Motion for New Trial, or grant their Motion to Reconsider.

FERRARA LAW FIRM, PLLC

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SC Bar No.: 70511
paul@ferraralawfirm.net

North Charleston, South Carolina
July 12, 2018

STATE OF SOUTH CAROLINA)) COUNTY OF BERKELEY)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 04-CP-08-1866
RONALD E. PRICE AND DIANA R.B. PRICE, Plaintiffs, vs. BELINDA FOX AND DANNY L. GILBERT, Defendants.	**COMPLAINT** (Jury Trial Demanded) (Fraud, Negligent Misrepresentation, and Unfair Trade Practices)

FILED
2005 AUG 23 PM 2:51
CLERK OF COURT
BERKELEY COUNTY, S.C.

The Plaintiffs, Ronald E. Price and Diana R. B. Price complain of the Defendants as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendant, Belinda Fox, is a resident of the County of Berkeley and was the prior owner of Lot 20, Eagle Harbor, Phase II, Tax Map # 194-00-02-122.

3. Upon information and belief, the Defendant, Danny L. Gilbert, is a resident of the County of Berkeley and at all times relevant herein, acted as a developer for Eagle Harbor, Phase II, and as an agent or partner with the Defendant, Fox, and participated in, authorized, ordered, directed, and perpetuated the tortous acts against the Prices alleged herein.

4. On or around September 13, 2003, the Prices entered into an Agreement to Buy and Sell (hereinafter "Agreement") to purchase certain property from the Defendant, Fox, wherein the Defendant, Gilbert, acted on behalf of, as agent for, in concert with and signed on behalf of

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IN THIS COUNTY
Mary P. Brown
DATE 12/21/15
CLERK OF COURT, C.P.& G.S.
BERKELEY COUNTY, SC

Defendant, Fox.

5. The Agreement provided in pertinent part: "Developer agrees to allow subdividing of property into 2 separate lots, with possibility of 3 upon approval of Homeowners Association." (Agreement, para. 8(I).)

6. During negotiations for the property up through the closing, the Defendant, Gilbert continually represented that the property could be subdivided into at least two separate lots.

7. Prior to selling the property to the Prices, the Defendants knew that the property could not be subdivided because it did not meet the minimum requirements imposed by DHEC for a septic tank system.

FOR A FIRST CAUSE OF ACTION
(Fraud)

8. The Plaintiff repeats and realleges the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

9. The Defendants made representations to the Plaintiffs that the property could be subdivided into at least two separate lots.

10. The aforesaid representations by the Defendants were false.

11. The aforesaid representations concerning subdivision of the property were material to the Prices' decision to purchase the property.

12. The Defendants knew that the representations concerning the ability to subdivide the property were false, and the Defendants made the representations with the reckless disregard for the truth.

13. The Defendants intended that the aforesaid representations be acted upon.

14. The Plaintiffs did not know that the representations concerning the ability to subdivide the property were false and the Plaintiffs relied on the representations by the Defendants in deciding to purchase the property.

15. The Plaintiffs had a right to rely on the representations concerning the property, particularly since the representations were specifically stated in the Agreement.

16. As a direct and proximate result of the aforesaid representations by the Defendants, which were false, and with such representations being wilful, wanton, and with the reckless disregard for the rights of the Plaintiffs and the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages and punitive damages in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

17. The Plaintiff repeats and realleges the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

18. The Defendants made false representations to the Plaintiffs concerning the ability to subdivide the property.

19. The Defendants had a pecuniary interest in making the false statements to the Plaintiffs.

20. The Defendants owed a duty of due care to the Plaintiffs to provide truthful information to the Plaintiffs.

21. The Defendants breached the duty by failing to exercise due care in making knowingly false representations concerning the ability to subdivide the property.

22. The Plaintiffs justifiedly relied on the representations by the Defendants concerning the

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ability to subdivide the property.

23. As a direct result of the negligent misrepresentations by the Defendants, which were grossly negligent, wilful, wanton and with reckless disregard for the rights of the Plaintiffs, the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages, and punitive damages, in an amount to be determined by the trier of fact.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices)

24. The Plaintiff repeats and realleges the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

25. The Defendants' false representations concerning the ability to subdivide the property as set forth in the Contract constitute the unfair and/or deceptive acts or practices in the conduct of trade or commerce in violation of S.C. Code Ann. § 39-5-10, *et. seq.*, South Carolina Unfair Trade Practices Act.

26. The Defendants' conduct affects the public interest by misrepresenting what is being purchased versus what is actually being provided.

27. The Defendants' conduct is capable of being of repeated and in fact has been repeated.

28. The Defendant's misrepresentations were willful, knowing, and with the total disregard for the rights of the Plaintiffs and other members of the public.

29. As a direct and proximate result of the Defendants' actions described above, the Plaintiffs have suffered actual damages, and are entitled to an award of treble damages, costs, and attorney's fees as this Court may deem appropriate.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, jointly and severally, for actual damages in excess of $50,000, incidental, consequential, and punitive damages, treble damages, attorney's fees, interest, the costs of this action, and for such other and further relief as this Court deems just and proper.

PEDERSEN & SCOTT, P.C.

William A. Scott
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Charleston, South Carolina 29407
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Fax (843) 556-5635
ps3law@aol.com
ATTORNEYS FOR PLAINTIFFS

Dated this 12th day of August, 2004.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
RONALD E. PRICE AND)
DIANA R.B. PRICE)
)
Plaintiffs)
)
vs.)
)
BELINDA FOX AND)
DANNY L. GILBERT)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 04-CP-08-1855

NOTICE OF MOTION AND MOTION
TO AMEND COMPLAINT

FILED
2005 AUG 10 PM 1:55

Please take notice that the Plaintiff; Ronald and Diana Price, will move no earlier than ten (10) days after service of this motion or as soon thereafter as the motion may be heard to amend the complaint with respect to the above referenced action, a copy of that proposed amended complaint being attached hereto and incorporated herein by reference. This Motion is being made pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, the court record in this case, any affidavits and/or other memoranda to be submitted in support of the Motion, and argument of counsel.

Respectfully submitted,

CHELLIS & FRAMPTON, P. A.

Exhibit 2

MICHAEL D. MOORE, ESQUIRE
ATTORNEY FOR PLAINTIFF
112 WEST FOURTH NORTH STREET
SUMMERVILLE, SC 29483

This 10th day of August, 2005.
Summerville, SC

CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY
DATE 12/21/15
CLERK OF COURT, C.P.& G.S.
BERKELEY COUNTY, SC

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STATE OF SOUTH CAROLINA)) COUNTY OF BERKELEY)) RONALD E. PRICE AND DIANA R.B. PRICE)) Plaintiffs)) vs.)) BELINDA FOX AND DANNY L. GILBERT, Individually, and EAGLE HARBOR, INC.)) Defendants.)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 04-CP-08-1855 FIRST AMENDED COMPLAINT (Jury Trial Demanded) (Fraud, Negligent Misrepresentation, Unfair Trade Practices and Civil Conspiracy)

The Plaintiffs, Ronald E. Price and Diana R. B. Price complaining of certain acts committed by the above named Defendants, hereby allege as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendant, Belinda Fox, is a resident of the County of Berkeley and was the prior owner of Lot 20, Eagle Harbor, Phase II, Tax Map # 194-00-02-121

3. Upon information and belief, the Defendant Eagle Harbor, Inc. is a South Carolina Domestic Corporation, licensed do business and in fact doing business in the County of Berkeley, State of South Carolina, where it engages in the business of Residential Development, and in particular, served as the Developer of that certain subdivision known as Eagle Harbor, Phase II;

4. Upon information and belief, the Defendant, Danny L. Gilbert, is a citizen and resident of the County of Berkeley, State of South Carolina, and at all

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IN THIS COUNTY
DATE 12/21/15
CLERK OF COURT, C.P.& G.S
BERKELEY COUNTY, SC

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times relevant herein, acted as a principal, developer, agent and owner of Eagle Harbor, Phase II, and as an agent or partner with the Defendant, Fox.,

5. Notwithstanding the fact of the incorporation of the business known as Eagle Harbor, Inc., your Plaintiff is informed and believes that the Defendant Danny Gilbert should be found to be personally, jointly and severally liable for the injuries and damages outlined herein below, due to his having operating the business of Eagle Harbor, Inc., as his alter ego, and otherwise due to those other factors justifying the piercing of the Corporate Veil under current South Carolina Jurisprudence.

6. As is more specifically alleged hereunder, Plaintiff is informed and believes that the Defendant Gilbert, along with Defendant Fox and Defendant Eagle Harbor, conspired with the others to, participated in, authorized, ordered, directed, and perpetuated the tortuous acts against the Plaintiffs, as more specifically alleged hereunder.

7. It appears that the parties hereto, and the things and matters alleged herein are all within the jurisdiction of this Honorable Court, and that jurisdiction is proper.

8. On or around September 13, 2003, the Prices entered into an Agreement to Buy and Sell (hereinafter "Agreement") to purchase certain property with the Defendant, Fox, wherein the Defendant, Gilbert serving in both his individual capacity and as the agent for that certain Defendant, Eagle Harbor, also acted on behalf of, as agent for, in concert with and in fact signed that "Agreement" on behalf of Defendant, Fox.

9. The aforesaid Agreement, a copy of which is attached hereto as Exhibit A, provided for the Prices to buy property from the Defendant, Fox upon certain terms and conditions as set forth in the contract.

10. The Agreement provided in pertinent part: "Developer agrees to allow subdividing of property into 2 separate lots, with possibility of 3 upon approval of Homeowners Association." (Agreement, para. 8(I).)

11. During negotiations for the property up through the closing, the Defendants, Gilbert, individually and as agent for Defendant Eagle Harbor, Inc., continually represented that the property could be subdivided into at least two separate lots.

12. Prior to selling the property to the Prices, all the Defendants knew that the property could not be subdivided because it did not meet the minimum requirements imposed by DHEC for a septic tank system.

13. Further, at all times pertinent hereto and as an inducement to Plaintiffs to enter into the "Agreement" it is alleged that all Defendants led your Plaintiffs to believe that they were purchasing property in a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits confirmed by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

14. After entering into that purchase agreement thereafter closing on the property, Plaintiffs later came to discover to their amazement that although a an

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attempt had been made to give the appearance that such covenants, restrictions, bylaws, ARB guidelines, a valid homeowners association existed, at appears that these neighborhood amenities were never created and the record notice documents evidencing theses amenities were instead a sham, because Eagle Harbor never owned the properties composing the development and thus never had the authority to set up the amenities so reflected in the record notice documents.

FOR A FIRST CAUSE OF ACTION

(Fraud)

15. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth herein verbatim.

16. The Defendants made the following representations to your Plaintiffs, to wit:

a) That the property could be subdivided into at least two separate lots; and

b) That your Plaintiffs were purchasing property in a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

17. The aforesaid representations by the Defendants were false.

18. The aforesaid representations were material to the Prices' decision to purchase the property.

19. The Defendants knew that the representations made by them were false, and the Defendants made the representations with the reckless disregard for the truth.

20. The Defendants intended that the aforesaid representations be acted upon.

21. The Defendants has a pecuniary interest in making the representations as aforesaid;

22. The Plaintiffs did not know that these representations were false and the Plaintiffs relied on the representations by the Defendants and in deciding to purchase the property.

23. The Plaintiffs had a right to rely on the representations concerning the property, particularly since the representations were specifically stated in the Agreement and were material to your Plaintiff's decision to purchase the property.

24. As a direct and proximate result of the aforesaid fraudulent representations made by the Defendants, which were false, and with such representations being willful, wanton, and with the reckless disregard for the rights of the Plaintiffs and the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages and punitive damages in an amount to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION

(Negligent Misrepresentation)

25. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

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26. The Defendants made false representations to the Plaintiffs concerning the ability to subdivide the property.

27. The Defendants had a pecuniary interest in making the false statements to the Plaintiffs.

28. The Defendants owed a duty of due care to the Plaintiffs to provide truthful information to the Plaintiffs.

29. The Defendants breached the duty by failing to exercise due care in making knowingly false representations concerning the ability to subdivide the property.

30. The Plaintiffs justifiably relied on the representations by the Defendants concerning the ability to subdivide the property.

31. As a direct result of the negligent misrepresentations by the Defendants, which were grossly negligent, willful, wanton and with reckless disregard for the rights of the Plaintiffs, the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages, and punitive damages, in an amount to be determined by the Jury in this cause.

FOR A THIRD CAUSE OF ACTION

(Unfair Trade Practices)

32. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

33. The Defendants' false representations as outlined above constitute the unfair and/or deceptive acts or practices in the conduct of trade or commerce in

violation of S.C. Code Ann. § 39-5-10, et. seq., South Carolina Unfair Trade Practices Act.

34. The Defendants' conduct affects the public interest by misrepresenting what is being purchased versus what is actually being provided.

35. The Defendants' conduct is capable of being of repeated and in fact has been repeated.

36. The Defendant's misrepresentations were willful, knowing, and with the total disregard for the rights of the Plaintiffs and other members of the public.

37. As a direct and proximate result of the Defendants' actions described above, the Plaintiffs have suffered actual damages, and are entitled to an award of treble damages, costs, and attorney's fees as this Court may deem appropriate.

FOR A FOURTH CAUSE OF ACTION

(Civil Conspiracy)

38. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

39. Upon information and belief, your Plaintiffs allege that all of the Defendants acted together and in concert in making the above described representations, all working together toward the injuries and damages suffered by your Plaintiffs.

40. Plaintiffs, upon information and belief, allege that the Defendants, so acting together, all acted for the specific purpose of injuring your Plaintiff so that they (the Defendants) might realize economic gain at your Plaintiff's expense.

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41. Plaintiff has suffered special damages and other damages as heretofore alleged as a result of the conspiratorial actions of the Defendants.

42. That to the extent that the Defendants acted willfully, wantonly, and/or with reckless disregard for the rights of your Plaintiffs and for the purpose if injuring them for their own profiteering, your Plaintiff is informed and believes that they are entitled to an award of punitive damages in an appropriate amount to be determined by the jury in this cause.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, jointly and severally, for actual damages in excess of $50,000, incidental, consequential, and punitive damages, treble damages, attorney's fees, interest, the costs of this action, and for such other and further relief as this Court deems just and proper.

CHELLIS & FRAMPTON, PA

By:_____

Michael D. Moore, Esquire
P.O. Box 430
112 West 4th St. North
Summerville, SC 29483
843-871-7765

ATTORNEYS FOR PLAINTIFFS

Dated this 10th day of August, 2005.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 04-CP-08-1855
RONALD E. PRICE AND)
DIANA R.B. PRICE)
)
Plaintiffs)
)
vs.) **NOTICE OF MOTION AND MOTION**
) **FOR LEAVE TO FILE AND SERVE SECOND**
) **AMENDED COMPLAINT**
BELINDA FOX,)
DANNY L. GILBERT, and)
EAGLE HARBOR, INC.)
Defendants.)

Please take notice that the Plaintiff, Ronald and Diana Price, will move no earlier than ten (10) days after service of this Motion or as soon thereafter as the Motion may be heard for leave to file and serve their Second Amended Complaint, a copy of that proposed Amended Complaint being attached hereto and incorporated herein by reference. This Motion is being made pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, the court record in this case, any affidavits and/or other memoranda to be submitted in support of the Motion, and argument of counsel.

Respectfully submitted,

CHELLIS & FRAMPTON, P. A.

MICHAEL D. MOORE, ESQUIRE
ATTORNEY FOR PLAINTIFF
112 West Fourth North Street
Summerville, SC 29483

This 29th day of November, 2005.
Summerville, SC

Exhibit 3

CERTIFIED TRUE COPIES OF RECORD
IN THIS COUNTY
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STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

RONALD E. PRICE AND
DIANA R.B. PRICE

Plaintiffs

vs.

BELINDA FOX; DR. TROY WINN, DVM; DANNY L. GILBERT; JEFFREY SPELL, GARY FOX; METRO CONTRACTING; SARAH WINN; TROY WINN; AND ELIZABETH GILBERT; Individually, EAGLE HARBOR, INC. and INVESTERS TITLE INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 04-CP-08-1855

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)
Professional Negligence, Negligent Development Fraud, Negligent Misrepresentation Unfair Trade Practices and Civil Conspiracy

The Plaintiffs, Ronald E. Price and Diana R. B. Price complaining of certain acts committed by the above named Defendants, hereby allege as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendant Belinda Fox, is a resident of the County of Berkeley and was the prior owner of Lot 20, Eagle Harbor, Phase II, Tax Map # 194-00-02-122, and also a developing partner in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

3. Upon information and belief, the Defendants Gary Fox, Sarah Winn, Dr. Troy Winn, and Elizabeth Gilbert are all citizens and residents of the County of Berkeley, State of South Carolina, and all served and participated at all relevant times here to as developing partners in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II, and III.

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4. Upon information and belief, the Defendant Eagle Harbor, Inc., is a South Carolina non-profit Corporation, licensed do business and in fact doing business in the County of Berkeley, State of South Carolina, where it engages in, among other things, the business of Residential Development, and in particular, served in concert with, and as a principal and/or partner in, that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

5. Upon information and belief, the Defendant Metro Contracting, is a SC Corporation licensed to do business and in fact doing business in the County of Berkeley, State of South Carolina, and in particular, served in concert with, and as a principal and partner in, that certain residential development and joint enterprise know as Eagle Harbor, Phases I, II, and/or III.

6. Upon information and belief, the Defendant, Danny L. Gilbert, is a citizen and resident of the County of Berkeley, State of South Carolina, and at all times relevant hereto, acted as a principal, developer, agent and owner of Eagle Harbor, Inc., and also as an agent, principal and partner, along with said Defendants Dr. Troy Winn, DVM, Gary Fox, Troy Winn, Elizabeth Gilbert, Metro Contracting, Eagle Harbor, Inc., and Jeff Spell in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

7. Upon information and belief, the Defendant Jeffrey Spell, was at all pertinent times hereto an attorney licensed to do business and in fact doing business in the County of Berkeley, State of South Carolina, where he concentrated his practice in the area of residential real estate closings, particularly with respect to properties located within the Development known as Eagle Harbor, Phases I, II and III.

8. Notwithstanding Defendant Jeffrey Spell's representation of buyers at closings involving the purchase of residential properties within said Eagle Harbor, Phases I, II and III, it is alleged, upon information and belief, that at all times pertinent hereto, he also acted in the capacity as an agent principal and partner, along with said Defendants Gary Fox, Troy Winn, Elizabeth Gilbert,

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Metro Contracting, Danny L. Gilbert and Eagle Harbor in the residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

9. Notwithstanding the fact of the incorporation of the business known as Eagle Harbor, Inc., your Plaintiff is informed and believes that the Defendant Corporate Officers Danny Gilbert and Elizabeth Gilbert should be found to be personally, jointly and severally liable for the injuries and damages outlined herein below, due to their having operated the business of Eagle Harbor, Inc., as their alter ego, and otherwise due to those other factors justifying the piercing of the Corporate Veil under current South Carolina Jurisprudence.

10. As is more specifically alleged hereunder, Plaintiffs are informed and believes that the Defendants Gilbert, along with Defendants Fox, Winn, Spell and Eagle Harbor Inc., conspired with one another and/or others, as well as participated in, authorized, ordered, directed, and perpetuated the tortuous acts against the Plaintiffs, as more specifically alleged hereunder,

11. As common partners in that certain joint enterprise and development known as Eagle Harbor, Phases I, II and III, it is alleged that each Defendant named above is jointly and severally responsible for the tortuous acts committed against the Plaintiffs, as more specifically alleged hereunder.

12. Upon information and belief, Investors Title Insurance Company is a North Carolina title insurance company insuring title risks in the County of Berkeley, State of South Carolina, and did in fact issue an owner's policy with respect to the lot purchased by the Plaintiffs that constitutes the subject of this action, that lot lying and being in the County of Berkeley, State of South Carolina, and being more particularly described as lot 20, located in Eagle Harbor Subdivision, Phase II.

13. It appears that the parties hereto, and the things and matters alleged herein are all within the jurisdiction of this Honorable Court, and that venue is proper.

14. On or around September 13, 2003, the Prices entered into an Agreement to Buy and Sell (hereinafter "Agreement") to purchase certain property located within Eagle Harbor, Phase II, Lot 20, with the seller of that individual lot being Defendant Fox, wherein the Defendant, Gilbert serving in both his individual capacity and as the agent for that certain Defendant, Eagle Harbor, also acted on behalf of, as agent for, in concert with, and in fact signed that "Agreement" on behalf of Defendant, Fox, and for the other Defendant partners in the Development.

15. The aforesaid Agreement, a copy of which is attached hereto as Exhibit A, provided for the Prices to buy property from the Defendant Fox upon certain terms and conditions as set forth in the contract.

16. The Agreement provided in pertinent part: "Developer agrees to allow subdividing of the property into 2 separate lots, with possibility of 3 upon approval of Homeowners Association." (Agreement, para. 8(I).)

17. During negotiations for the property up through the closing, the Defendants Danny L. Gilbert, Belinda Fox, Attorney Jeff Spell and Eagle Harbor, Inc., acting individually, and as principals and agents for the other Defendant partners in the joint enterprise, continually represented that the property being sold to your Plaintiffs could be subdivided into at least two separate lots.

18. Prior to selling the property to the Prices, all the Defendants knew or should have known that the property could not be subdivided because it did not meet the minimum requirements imposed by DHEC for a septic tank system.

19. Further, at all times pertinent hereto and as an inducement to Plaintiffs to enter into the "Agreement", it is alleged that Defendants led your Plaintiffs to believe that they were purchasing property in a gated, restricted community with private, well maintained roadways, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other

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benefits confirmed by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

20. Upon information and belief, Attorney Jeff Spell, presumably acting as the closing agent for the Plaintiffs Price and charged with the duty of fully examining title on behalf of Plaintiff purchasers, knew or should have known both in his professional capacity and as a partner in Defendants' certain joint enterprise that the property could indeed not be subdivided and that your Plaintiffs were not actually purchasing the property they had bargained for, a gated, restricted community with private, well maintained roadways, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits confirmed by the same

21. After entering into that purchase agreement and thereafter closing on the property, Plaintiffs later came to discover to their amazement that although an attempt had been made to give the appearance that such covenants, restrictions, bylaws, ARK guidelines and, a valid homeowners association existed, it appears that these neighborhood amenities were never created and the record notice documents evidencing theses amenities were instead a sham, because no Declaration of Covenants and Restrictions had been properly filed with respect to Phase II of the Development prior to the closing. Further, it appears that Defendant Eagle Harbor, Inc., never specifically owned the properties composing the development, and thus never had the authority to set up the homeowner's association and other amenities so reflected in the record notice documents.

FOR A FIRST CAUSE OF ACTION

(Fraud)

22. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth herein verbatim.

23. The Defendants made the following express and implied representations to your Plaintiffs, to wit:

a) That the property could be subdivided into at least two separate lots; and

b) That your Plaintiffs were purchasing property in a gated, restricted community with private, well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

24. The aforesaid representations by the Defendants were false.

25. The aforesaid representations were material to the Prices' decision to purchase the property.

26. The Defendants knew that the representations made by them were false, and the Defendants made the representations with the reckless disregard for the truth.

27. The Defendants intended that the aforesaid representations be acted upon.

28. The Defendants has a pecuniary interest in making the representations as aforesaid;

29. The Plaintiffs did not know that these representations were false and the Plaintiffs relied on the representations by the Defendants and in deciding to purchase the property.

30. The Plaintiffs had a right to rely on the representations concerning the property, particularly since the representations were specifically stated in the Agreement, the existence of a valid declaration of covenants and restrictions had been excepted to in the title policy issued by Jeff Spell, and these facts were material to your Plaintiff's decision to purchase the property.

31. As a direct and proximate result of the aforesaid fraudulent representations made by the Defendants, which were false, and due to such representations being willful, wanton, and with the reckless disregard for the rights of the Plaintiffs, and the Plaintiffs have incurred actual damages in

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excess of $50,000 and are entitled to incidental and consequential damages, as well as and punitive damages in an amount to be determined by the Jury.

FOR A SECOND CAUSE OF ACTION

(Negligent Misrepresentation)

32. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

33. The Defendants made false representations to the Plaintiffs concerning the ability to subdivide the property.

34. The Defendants had a pecuniary interest in making the false statements to the Plaintiffs.

35. The Defendants owed a duty of due care to the Plaintiffs to provide truthful information to the Plaintiffs.

36. The Defendants breached the duty by failing to exercise due care in making knowingly false representations concerning the ability to subdivide the property.

37. The Plaintiffs justifiably relied on the representations by the Defendants concerning the ability to subdivide the property.

38. As a direct result of the negligent misrepresentations by the Defendants, which were grossly negligent, willful, wanton and with reckless disregard for the rights of the Plaintiffs, the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages, and punitive damages, in an amount to be determined by the Jury in this cause.

FOR A THIRD CAUSE OF ACTION

(Unfair Trade Practices)

39. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

40. The Defendants' false representations as outlined above constitute the unfair and/or deceptive acts or practices in the conduct of trade or commerce in violation of S.C. Code Ann. § 39-5-10, et. seq., South Carolina Unfair Trade Practices Act.

41. The Defendants' conduct affects the public interest by misrepresenting what is being purchased versus what is actually being provided.

42. The Defendants' conduct is capable of being of repeated and in fact has been repeated.

43. The Defendants' misrepresentations were willful, knowing, and with total disregard for the rights of the Plaintiffs and other members of the public.

44. As a direct and proximate result of the Defendants' actions described above, the Plaintiffs have suffered actual damages, and are entitled to an award of treble damages, costs, and attorney's fees as this Court may deem appropriate.

FOR A FOURTH CAUSE OF ACTION

(Civil Conspiracy)

45. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

46. Upon information and belief, your Plaintiffs allege that all of the Defendants acted together and in concert in making the above described representations, all working together toward the injuries and damages suffered by your Plaintiffs.

47. Plaintiffs, upon information and belief, allege that the Defendants, so acting together, all acted for the specific purpose of injuring your Plaintiff so that they (the Defendants) might realize economic gain at your Plaintiff's expense.

48. Plaintiff has suffered special damages and other damages as heretofore alleged as a result of the conspiratorial actions of the Defendants.

49. That to the extent that the Defendants acted willfully, wantonly, and/or with reckless disregard for the rights of your Plaintiffs and for the purpose of injuring them for their own profiteering, your Plaintiffs are informed and believe that they are entitled to an award of punitive damages in an appropriate amount to be determined by the jury in this cause.

FOR A FIFTH CAUSE OF ACTION AS TO THE DEFENDANT JEFF SPELL

(Professional Negligence)

50. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth herein verbatim.

51. Defendant Attorney Jeffrey Spell, acting in his capacity as the residential closing attorney with respect to the purchase of property by the Plaintiffs, owed your Plaintiffs a duty of due care in the handling of all matters related to that closing.

52. As an attorney licensed to practice in the State of South Carolina, with a practice emphasis in the area of residential loan closings, Defendant Spell was required to exercise that minimum degree of care normally attributed to an attorney holding himself out as one with a practice emphasis in residential closing transactions.

53. Defendant Jeff Spell violated the minimum degree of care, and otherwise breached his duty of due care to your Plaintiffs, acting negligently, willfully, wantonly, and with reckless disregard for the rights of your Plaintiffs, in one or more of the following ways, to wit:

a) By representing to the Plaintiffs and otherwise leading them to believe that he was representing their interest at closing when in fact he was not, thereby effectively preventing your Plaintiffs from seeking effective counsel in the closing of the underlying transaction;

b) By failing to properly disclose his representation of the Sellers and Developers with respect to the closing on the property purchased by your Plaintiffs until several months after the

closing, thereby effectively preventing your Plaintiffs from seeking effective counsel in the closing of the underlying transaction;

c) By failing to advise your Plaintiffs and proffering a consent to duel representation at or before closing in such a timely manner that Plaintiffs could be assured that their interest had been adequately protected;

d) By failing to properly review the record title documents in such a meaningful way that Plaintiffs could be properly informed that they were not indeed purchasing a property in a private community with well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same;

e) By failing to take proper exception to the invalidity of the declaration of covenants and restrictions in both the owners and/or mortgage title policies so as to put Plaintiffs on notice that the property purchased by them was not in a private community with well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same;

f) Notwithstanding the failure of properly taking exception to the invalidity of the declaration of covenants and restrictions pertaining to the property, by failing to properly advise your clients of said invalidity of those documents purportedly filed of record;

g) By failing to disclose to your Plaintiffs all other information relevant to the purchase of the subject property of which he knew or should have been aware, and in particular, the utter unsuitability of the property for subdivision as had been contemplated in the original agreement to buy and sell real estate;

h) By not attending the closing and instead allowing another attorney or individual with whom he associated to represent the Plaintiffs interest at closing, whom did not have the requisite skill,

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knowledge and other information vital to the Plaintiffs in their decision to purchase the subject property; and

i) By not advising your Plaintiffs of the availability and advisability of obtaining additional title coverage for subdivision related title issues.

j) By otherwise failing to exercise that minimum degree of skill, diligence and competence necessary and proper given the circumstances then and there prevailing.

54. As a direct result of the negligent, careless, reckless, willful and wanton actions and inactions of the Defendant Spell, as aforesaid, your Plaintiffs have been injured in the following respects, to wit:

a) Plaintiffs have lost value to their property which would not have otherwise been purchased if it were not for the actions and inactions of said Defendant Spell;

b) Plaintiffs have been prevented from subdividing their property as contemplated, and therefore have lost the ability they had bargained for to sell individual tracts within the lot purchased by them;

c) Plaintiffs have lost the use of their property by virtue of the fact that a portion of their parcel constitutes wetlands and is restricted in use;

d) Plaintiffs have been made to incur interest carrying charges and other refinancing costs associated with their underlying financial obligation for property that they would not have purchased were it not for the actions and inactions of Defendant Spell,;

e) Such other and further damages as might be determined by the Jury in this Cause.

55. That to the extent that the Jury in this cause finds that Defendant Spell's actions and inactions were reckless, willful and/or wanton, as previously alleged, your Plaintiffs believe that they are entitled to an appropriate award of punitive damages.

FOR A SIXTH CAUSE OF ACTION AS TO ALL DEFENDANTS

(Negligent Development)

56. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth herein verbatim.

57. As developers of the subdivision in which Plaintiffs' property was purchased, all Defendants owed to your Plaintiffs a duty to use due care in the development of Eagle Harbor.

58. All Defendants breached their duty of due care properly owing to your Plaintiffs in one or more of the following ways, to wit:

a) By failing and refusing to comply with state, federal and local rules and regulations pertaining to the subdivision of residential property;

b) By selling the subject lot to your Plaintiffs before obtaining requisite county and state regulatory approvals and/or obtaining the requisite encroachment permits such that Plaintiffs were extremely delayed in their ability to improve the property and to use the same for its purposes.

c) By failing and refusing to obtain the requisite granting of easements and other conveyances before subdivision of the property so as to ensure the creation and perpetual maintenance of a properly gated, restricted community with private, well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

d) By failing and refusing to ensure the proper creation of a valid homeowners association so as to generate homeowner's dues vital for the preservation and maintenance of the private roads, common areas and drainage easements located within the subdivision;

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e) By failing and refusing to obtain necessary wetlands studies before development so as to prevent illegal subdivision and innocent individual encroachment on federally protected wetlands;

f) By encumbering with mortgages and other financial obligations property intended for the common use and enjoyment of the residents purchasing property within the subdivision;

g) By failing and refusing to disclose to your Plaintiffs the latent defects and other problems connected with the subdivision so as to put your Plaintiffs on notice of the dangers they would be assuming by purchasing property so negligently developed by Defendants;

h) By creating the appearance that Plaintiffs were purchasing property within a properly gated, restricted community with private, and well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, when in fact, Defendants knew or should have known that the same was simply not true;

i) By failing and refusing to properly advise your Plaintiffs through Defendants duly authorized representatives before closing that the lot being purchased by them was entirely unsuitable for subdivision, and in fact further deceiving Plaintiffs by representing that that their property could be subdivided when Defendants knew or should have known at the time of the Plaintiffs' purchase that this representation was wholly untrue;

j) By otherwise engaging in additional negligent, careless, reckless, willful and wanton acts and omissions in direct violation of the standard of care by developers to your Plaintiffs as may be found by the Jury.

k) That as a result of the negligent, careless, reckless, willful and wanton actions outlined hereinabove, Plaintiffs have been injured and damaged as heretofore alleged, and seeks an appropriate award for their actual and compensatory damages suffered in an amount to be determined by the Jury in this cause.

59. To the extent that the Jury in this cause finds that Defendants actions and inactions were reckless, willful and/or wanton, as previously alleged, your Plaintiffs believe that they are entitled to an appropriate award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION AS TO THE DEFENDANT INVESTORS TITLE INSURANCE COMPANY

(Declaratory Judgment)

60. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth here verbatim.

61. Plaintiffs seek a declaratory judgment brought pursuant to S.C. Code Annotated Sections 15-53-10 *et seq*, whereby Plaintiffs seek this Court's declaration of whether Defendant Investor's Title Insurance Company has responsibility for covering the loss claimed by Plaintiffs under the either or both the Mortgage Title Insurance Policy and the Owners Title Policy issued at the closing with respect to the subject property, namely policy numbers OR-A-055849 and M-A 146678.

62. The Plaintiffs have brought certain claims for relief against the remaining Defendants in this cause touching and concerning, among other things, the defective recording of a declaration evidencing certain covenants and restrictions, the same not being excluded from coverage under the Defendant Investor's Title Insurance Coverage Statement.

63. Plaintiffs are informed and believe that this issue of coverage should be resolved by declaratory decision.

64. Plaintiffs allege that they will suffer irreparable harm if their cause seeking a declaratory judgment is not heard, as the underlying case and the question of coverage contain common questions of law and fact, and should as a practical matter be resolved in a simultaneous fashion.

65. Under the circumstances herein, there is a controversy of a justifiable nature between the parties, and your Plaintiffs are informed and believe that they are entitled to have the Court inquire

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into these matters and issue a declaratory judgment determining the rights of the parties with respect to the question of coverage by Defendant Investors Title Insurance Company of America.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, jointly and severally, for actual damages in excess of $50,000, incidental, consequential, and punitive damages, treble damages, attorney's fees, interest, the costs of this action, and for such other and further relief as this Court or the Jury might deem just and proper; and

As to the Defendant Investors Title Insurance Company of America, for a judgment declaring whether or not coverage exists for the loss so suffered by the Plaintiffs, and in the case such coverage does exists, then for a determination of the monetary amount of coverage to be paid over to Plaintiffs and their mortgage lender in satisfaction of the respective owners' and mortgagee's policy.

CHELLIS & FRAMPTON, PA

By: _____

Michael D. Moore, Esquire
P.O. Box 430
Summerville, SC 29483
(843) 871-7765
ATTORNEYS FOR PLAINTIFFS
Dated: November 22, 2005

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 04-CP-08-1855
RONALD E. PRICE and DIANA R. B. PRICE,	)	
Plaintiffs,	)	
vs.	)	CONSENT ORDER
BELINDA FOX and DANNY L. GILBERT,	)	
Defendants.	)	

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BERKELEY COUNTY, S.C.

THIS MATTER came before me pursuant to the consent of the attorneys representing the above parties, in which G. Waring Parker of Chellis & Frampton desires to withdraw, without prejudice, Plaintiffs' Motion to file a second Amended Complaint by adding new parties.

Therefore, with the consent of the attorneys, G. Waring Parker, and Jay S. Masty:

1. Plaintiffs' Motion to file a second Amended Complaint is hereby withdrawn without prejudice; and

IT IS SO ORDERED.

R. Markley Dennis, Jr., Circuit Court Judge

January 27, 2006
Moncks Corner, South Carolina

I SO MOVE AND CONSENT:

G. Waring Parker, Esquire
Attorney for Plaintiffs

I CONSENT:

Jay S. Masty, Esquire
Attorney for Defendants

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BERKELEY COUNTY, SC

Exhibit 4

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF BERKELEY	)	
Ronald E. Price And Diana R. B. Price,	)	
	)	
Plaintiffs,	)	CASE NO. 2004-CP-08-1855
	)	
vs.	)	
	)	
Belinda Fox, Gerry Fox, Danny L. Gilbert, Sarah C. Winn, Troy L. Winn, Eagle Harbor, Inc., Heritage Classic Homes, Inc., the Eagle Harbor Phase II Development Partnership, EHHOA, Inc., Concerned Citizens of Eagle Harbor Subdivision, Inc., Mark and Brenda Milos, William Derrick and Kelli T. Johnson, Richard E. and Joyce Seabrook, Kelly & Lori Gibson, Mark & Jennifer L. Dawson, Charlene Willman, Deborah L. Walker, Diane L. Dunigan, Avonne Beaver, William R. and Ethel Rogers, Donald G. Gilbert, Jr., Jaime L. and Sunny T. Britt, Joel H. and Deana S. Bennett, Jimmy H. Thigpen, Michael L. and Linda H. Cable, Albert H. Isom, Jr,. Karen M. and Randy I. Watterson, Fred Jr. and April Rodriguez, Jason P. Parker, Jr., Tristen Mustapher and Quiozel Simmons, Michael L. and Joyce W. Segars, L&L Contractors, Inc., Tyson K. and Jennifer M. Swanson, First State Bank, Deborah Stricke Loftis, Claude R. and Eunice Beede, Karen L. Richardson and Anthony S. Hernendez, Monica L. Davis, William C. Davis, Charles H. Crosby, Jen Crosby, Kenneth J. and Joan H. Younginer, Randolph C. Evans, Dennis L. Ordrasek,	)	**SUMMONS** **(TO THE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT)**

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BERKELEY COUNTY, SC

Exhibit 5

David F. and Erica Shipman, Travis L.)
Davis et al, Robert Legette, CMH Homes,)
Inc., Dee Dee Cox, Robert J. and Heather)
N. Faas, Stephan R. and Aud Griebe,)
Michael A. and Arin D. Hunter, Robert A.)
and Norm Newton, Philip R. Davey Trust,)
R.B. and Brenda D. Brown, Andrew and)
Patricia Finkelstein, Wells Fargo Bank,)
NA (successor by merger to Wachovia)
Bank, NA), Robert A. and Mic Poirier,)
Doug Cotton, Christopher S. and Kellie)
Anne Hiers, James S. and Fawn S. Hall,)
Kevin W. and Eugenia P. Craggs, David)
D. and Nancy Fletcher, Suzen Fletcher,)
Elizabeth Gilbert, William Adams,)
Richard and C. Mullenniex, HSBC Bank)
USA, NA as trustee, Rudolph C. and)
Tonja M. Evans, Michael and Renee L.)
Jenkins, David W. Barnett, Lori A. and)
Hermand Lenhart, Bank of NY as trustee,)
Rodney D. Lewis, Kingston Plantation,)
Aaron and Teresa A. Paderewski, S. Paige)
and Jarrett J. Gibbons, Grieco)
Development, Gary H. Jr. and Kam Bell,)
Jr., GBF Investments, Inc., Calvin R.)
Cooper, Smoak Property Holdings, LLC,)
Smoak Jedburg, LLC, Burbage H. Smoak,)
Metro Contracting, Inc., Frederick G. Jr,)
and Janet J. Hall, Michael R. and Robin A)
Petrell, Travis V. and Renee C. Hollifield,)
Billy C. and Marsha L. Hollifield, Dean A.)
Heatherdale, Stanley K. Hollifield, Jeremy)
Lee Baker, William Jr. and Becki)
Robinson, Steven K. and Sondra B. Baxter,)
Phillip S. and Tracy R. Harris, Pendley)
Construction Inc., Tidelands Bank,)
William Adams, Karen Lynn Driggers,
Richard Thomas Lindberg, Mary
Lindberg and any other unknown current

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or former owner in Eagle Harbor Subdivision,

Defendants.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Third Amended and Supplemental Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Third Amended and Supplemental Complaint upon the subscribers, at their office, Post Office Box 50124, Columbia, SC 29250, within thirty (30) days, after service hereof, exclusive of the day of such service, exclusive of the day of such service, and if you fail to answer the Third Amended and Supplemental Complaint in the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third Amended and Supplemental Complaint.

Tobias G. Ward, Jr., SC Bar No.: 5826
J. Derrick Jackson SC Bar No.: 15192
P.O. Box 50124
Columbia, SC 29250
803-708-4200
Fax 803-403-8754
tw@tobywardlaw.com
Attorney for Plaintiff

Dated: 7-27-16
Columbia, South Carolina

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF BERKELEY	)	
Ronald E. Price And Diana R. B. Price,	)	
	)	
Plaintiffs,	)	CASE NO. 2004-CP-08-1855
	)	
vs.	)	
	)	**THIRD AMENDED AND**
Belinda Fox, Gerry Fox, Danny L. Gilbert,	)	**SUPPLEMENTAL COMPLAINT**
Sarah C. Winn, Troy L. Winn, Eagle	)	
Harbor, Inc., Heritage Classic Homes,	)	
Inc., the Eagle Harbor Phase II	)	
Development Partnership, EHHOA, Inc.,	)	
Concerned Citizens of Eagle Harbor	)	
Subdivision, Inc., Mark and Brenda	)	
Milos, William Derrick and Kelli T.	)	
Johnson, Richard E. and Joyce Seabrook,	)	
Kelly & Lori Gibson, Mark & Jennifer L.	)	
Dawson, Charlene Willman, Deborah L.	)	
Walker, Diane L. Dunigan, Avonne	)	
Beaver, William R. and Ethel Rogers,	)	
Donald G. Gilbert, Jr., Jaime L. and Sunny	)	
T. Britt, Joel H. and Deana S. Bennett,	)	
Jimmy H. Thigpen, Michael L. and Linda	)	
H. Cable, Albert H. Isom, Jr,. Karen M.	)	
and Randy I. Watterson, Fred Jr. and	)	
April Rodriguez, Jason P. Parker, Jr.,	)	
Tristen Mustapher and Quiozel Simmons,	)	
Michael L. and Joyce W. Segars, L&L	)	
Contractors, Inc., Tyson K. and Jennifer	)	
M. Swanson, First State Bank, Deborah	)	
Stricke Loftis, Claude R. and Eunice	)	
Beede, Karen L. Richardson and Anthony	)	
S. Hernendez, Monica L. Davis, William	)	
C. Davis, Charles H. Crosby, Jen Crosby,	)	
Kenneth J. and Joan H. Younginer,	)	
Randolph C. Evans, Dennis L. Ordrasek,	)	

FILED
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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

David F. and Erica Shipman, Travis L.)
Davis et al, Robert Legette, CMH Homes,)
Inc., Dee Dee Cox, Robert J. and Heather)
N. Faas, Stephan R. and Aud Griebe,)
Michael A. and Arin D. Hunter, Robert A.)
and Norm Newton, Philip R. Davey Trust,)
R.B. and Brenda D. Brown, Andrew and)
Patricia Finkelstein, Wells Fargo Bank,)
NA (successor by merger to Wachovia)
Bank, NA), Robert A. and Mic Poirier,)
Doug Cotton, Christopher S. and Kellie)
Anne Hiers, James S. and Fawn S. Hall,)
Kevin W. and Eugenia P. Craggs, David)
D. and Nancy Fletcher, Suzen Fletcher,)
Elizabeth Gilbert, William Adams,)
Richard and C. Mullenniex, HSBC Bank)
USA, NA as trustee, Rudolph C. and)
Tonja M. Evans, Michael and Renee L.)
Jenkins, David W. Barnett, Lori A. and)
Hermand Lenhart, Bank of NY as trustee,)
Rodney D. Lewis, Kingston Plantation,)
Aaron and Teresa A. Paderewski, S. Paige)
and Jarrett J. Gibbons, Grieco)
Development, Gary H. Jr. and Kam Bell,)
Jr., GBF Investments, Inc., Calvin R.)
Cooper, Smoak Property Holdings, LLC,)
Smoak Jedburg, LLC, Burbage H. Smoak,)
Metro Contracting, Inc., Frederick G. Jr,)
and Janet J. Hall, Michael R. and Robin A)
Petrell, Travis V. and Renee C. Hollifield,)
Billy C. and Marsha L. Hollifield, Dean A.)
Heatherdale, Stanley K. Hollifield, Jeremy)
Lee Baker, William Jr. and Becki)
Robinson, Steven K. and Sondra B. Baxter,)
Phillip S. and Tracy R. Harris, Pendley)
Construction Inc., Tidelands Bank,)
William Adams, Karen Lynn Driggers,
Richard Thomas Lindberg, Mary
Lindberg and any other unknown current

or former owner in Eagle Harbor Subdivision,

Defendants.

The Plaintiffs, Ronald E. Price and Diana R. B. Price complaining of certain acts committed by some of the above named Defendants as described herein, hereby allege as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendants, Gerry and Belinda Fox ("Foxes"), are residents of the County of Berkeley.

3. Upon information and belief, the Defendant, Danny L. Gilbert ("Gilbert"), is a citizen and resident of the County of Berkeley, State of South Carolina.

4. Upon information and belief, the Defendants, Sarah and Troy Winn ("Winns"), are residents of the County of Berkeley.

5. Heritage Classic Homes, Inc. ("HCH") is a corporation organized and existing pursuant to the laws of the State of South Carolina and at all relative times alleged herein was acting as the alter ego of Defendant Gilbert.

6. The Defendant Eagle Harbor, Inc. ("EHI") was incorporated as a not for profit entity, but through its officer and agent Gilbert was the beneficiary and partner of the conduct alleged herein.

7. The Defendant EHHOA, Inc. ("EHHOA") is or is purported to be a nonprofit domestic South Carolina corporation. The Plaintiffs are informed and believe this is a merely a "shelf" corporation with no shareholders and only an incorporator and Defendant Danny Gilbert, the registered agent.

8. The Defendant Concerned Citizens of Eagle Harbor Subdivision, Inc. ("CCEHI") upon information is a South Carolina nonprofit mutual benefit

Confidential

corporation whose members are some but not all of the lot owners in Eagle Harbor Subdivision.

9. The other named Defendants are current or former lot owners in Eagle Harbor Subdivision and are being added pursuant to an order of this court. ("Lot Owner Defendants") as necessary parties who may have an interest in the subject matter of the litigation.

10. In the summer of 2001, the Foxes, Winns, EHI, HCH and Gilbert formed a partnership denominated for the purpose of this suit as the Eagle Harbor Phase II Development Partnership ("the Partnership").

11. Pursuant to this Partnership, the Winns and Foxes acquired certain real property which would become 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. The Partners would then split the profits when the lots were sold. Gilbert's company HCH would be the builder and would receive Gilbert's share of the profits for his role in developing and selling property.

12. In the summer of 2003, the Prices were looking for a subdivision lot to build their home on and came across Gilbert at what looked like a sales office in Eagle Harbor Subdivision. Gilbert, in his role as marketing Partner, showed the Prices Lot 20. He made several material representations to the Prices including that the Lot 20 (approximately 8 acres) could be subdivided into three, separate residential lots, that the lots would perk, and 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 the property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the

same benefits. Gilbert showed them the Master Plan for the Eagle Harbor Subdivision.

13. On or about September 13, 2003, the Prices, in reliance on the representations of Gilbert entered into an Agreement to Buy and Sell Lot 20 for $90,400. Gilbert explained that the owner of Lot 20, Belinda Fox was his Partner. Concurrently, the Prices entered into an SF Agreement with HCH/Gilbert to construct their home on Lot 20. Subsequently the Foxes passed their realtor exams, to become licensed realtors with the state of SC, on/about Nov 15, 2003 prior to the Prices purchase of the property.

14. On November 25, 2003, the closing for the sale of Lot 20 to the Prices occurred and Gilbert received $46,000 as his share of the profits. Gilbert directed that $41,000 be paid to HCH, an entity he owned and controlled and another $3,000 to Dee Dee Cox in settlement of an obligation of GB Fox and Gilbert's company HCH. He also received $2,000 in earnest money which he directed that the Prices pay to him.

15. Subsequent to the closing, the Prices learned that the representations by Gilbert as marketing Partner were false. The property could not be subdivided into three, separate residential lots because the soil does not perk, a condition known to Gilbert and the Partnership as early as February 2002.

16. Also, the lot would not be part of a restricted community with a valid homeowner's association, associated covenants, restrictions, architectural guidelines and other benefits, which would enhance the value of the subject property being purchased by them because valid, restrictive covenants were not properly recorded for the Phase II subdivision.

17. The promised amenities were never developed.

18. In addition to these problems, the Partnership as Developer of Phase II of Eagle Harbor Subdivision failed to comply with applicable governmental regulations before selling lots, including but not limited to the following:

a) SC Code §48-14-10, Stormwater Management, not obtaining land disturbance permits;
b) The Clean Water Act, Section 33 USC 1344, not ensuring wetlands studies were conducted;
c) SCDHEC Regulations 62-57, and/or 56 for septic system requirements, and Berkeley County Regulation
d) §59-93(a)(14) not obtaining SCDOT encroachment permits.

19. After wetland studies were conducted by the Army Corp of Engineers, the Prices learned that approximately two acres of Lot 20 were delineated as federally defined freshwater wetlands. Various roads in the subdivision were also impacted by wetlands.

20. These violations have injured the Prices resulting in loss of time and resources to construct their home, limited use of their property, particularly subdividing for residential use, and with no system for perpetual maintenance of the common areas.

21. The Partnership failed to adequately organize and fund EHHOA, Inc. ("EHHOA") such that it would be an entity capable of receiving and maintaining any common areas within the subdivision including the gates and roads.

22. Foxes, Winns, Gilbert, and EHI filed suit against Stantec, an engineering company and received a settlement in June 2011 concerning the defective roads in the subdivision.

23. Despite knowledge through the lawsuit that the roads were defective and in need of repair, in June 2011, the Foxes and the Winns conveyed the roads to an inadequately capitalized EHHOA with no apparent means to maintain and repair the defective roads. Gilbert is still listed as the registered agent for EHHOA.

24. Since the Restrictive Covenants were not valid and do not bind individual owners to be members of EHHOA, there is no recorded access for the individual owners to use the private roads.

FOR A FIRST CAUSE OF ACTION
(Negligent Misrepresentation)

25. The preceding allegations are realleged as if fully repeated herein.

26. The Partnership and its marketing partner Gilbert had a pecuniary interest in making representations to prospective purchasers including the Prices concerning property for sale in Phase II, Eagle Harbor Subdivision.

27. The Partnership and its marketing partner Gilbert owed a duty to use due care in making representations to prospective purchasers and to disclose all material information concerning the purchase.

28. The Partnership and its marketing partner Gilbert breached that duty and were negligent by failing to exercise due diligence before making any representations and by making the following material misrepresentations: (1) all governmental requirements had been met before selling the property; (2) that the lot was approved and ready for residential building; (3) that the property was approved for residential subdivision and could be subdivided into three, separate residential lots; and (4) that the property was restricted by valid, enforceable restrictive covenants, creating a perpetual maintenance of the private roads and other subdivision improvements.

29. The Partnership and Gilbert, due to their negligence, also failed to disclose the material fact that two acres of Lot 20 and parts of the roads were subject to wetlands and that Lot 20 would require a separate Lot 21(which they did not own) to use as a sewage drain field.

30. As a direct and proximate result of the Partnership and Gilbert's negligent misrepresentations, the Prices have suffered damages including the delay

of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction.

31. Also as a direct and proximate result of the Partnership and Gilbert's negligent misrepresentations, the Prices have suffered damages in the form of loss of use of their property and diminution in value.

32. The Prices are entitled to judgment against the Partnership, and the individual Partners for all damages the Prices have suffered from Negligent Misrepresentation.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty/Declaratory Judgment)

33. The allegations of the preceding paragraphs are realleged as if fully repeated herein.

34. The Partnership as Developer for Eagle Harbor Subdivision Phase II had a fiduciary duty to purchasers in the subdivision to develop the subdivision in accordance with all applicable governmental regulations, to properly setup and fund EHHOA, Inc. and to adequately construct common area improvements including the roads and to transfer the common area improvements to the owners in good condition.

35. The Partnership breached that duty by failing to comply with applicable governmental regulations before selling lots, including but not limited to the following:

a) SC Code §48-14-10, Stormwater Management, not obtaining land disturbance permits;
b) The Clean Water Act, Section 33 USC 1344, not ensuring wetlands studies were conducted;

c) SCDHEC Regulations 62-57, and/or 56 for septic system requirements, and Berkeley County Regulation;
d) §59-93(a)(14) not obtaining SCDOT encroachment permits.

36. The Partnership also breached its duty by failing to properly set up EHHOA, Inc. as the Restrictive Covenants were invalid and do not require membership and there is no mechanism to assess dues for the continued repair and maintenance of the common areas.

37. The Partnership further breached its fiduciary duty by transferring the roads which were then in disrepair to an inadequately capitalized EHHOA, Inc., a paper entity with Gilbert as registered agent.

38. The Prices are further informed and believe that the Partnership has failed to secure easements or other rights of access to ensure the owners have full rights of access and use of the private roads within the subdivision.

39. The Prices are informed and believe that the Defendant Partners received a settlement from a lawsuit filed against Stantec, an engineering firm that worked on the development, but the Partners have not notified the Prices or other owners about the settlement or showed them documentation which would ensure the roads would be repaired and maintained.

40. As a direct and proximate result of the Partnership's breach of its fiduciary duty as developer of Phase II, the Prices have suffered damages from the delay of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction. The Prices have also suffered damages in the form of loss of use of their property and diminution in value.

41. The Prices are entitled to judgment against the Partnership and the Partners for all of their damages together with punitive damages for the reckless disregard for their rights as owners.

42. The Prices are further entitled to a declaration by this court as to their rights to use the private roads within the subdivision and to an affirmative injunction requiring the Partnership and Partners to cause the roads to be restored to adequate standards, and to provide a segregated funds account for the roads continued maintenance for a reasonable time.

43. In the event an affirmative injunctive is not ordered, the Prices seek as alternative relief monetary damages against the Defendants in an amount sufficient to cause the roads to be restored to adequate standards as certified by a professional engineer, and to provide a segregated funds account for the roads continued maintenance for a reasonable time.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices Act)

44. The allegations of the preceding paragraphs are realleged as if fully repeated herein.

45. The misrepresentation made by the Partnership and its marketing Partner Gilbert, its failure to comply with governmental regulations, its unwillingness to properly create and fund the subdivision are unfair and deceptive acts in the conduct of trade or commerce.

46. The acts impact the public interest in that the acts were done to the public at large in the offering of lots in a residential subdivision, further, the acts are capable of repetition and upon information and belief were repeated.

47. As a direct and proximate result of the Partnership's unfair and deceptive acts, the Prices have suffered damages the delay of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior

to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction. The Prices have also suffered damages in the form of loss of use of their property and diminution in value.

48. Upon information and belief that the acts of the Partnership, especially its marketing Partner Gilbert were willful and that the Partnership and Gilbert knew or should have known its acts were unfair and deceptive.

49. The Prices are entitled to judgment against the Partnership and its Partners for three times its actual damages together with reasonable attorney fees.

WHEREFORE, having set for the grounds therefore, the Prices pray for judgment against the Defendants, jointly and severally as follows:

For all actual, consequential and special damages as alleged herein;

For treble damages under the unfair trade practices act and reasonable attorney' fees;

For punitive damages as appropriate for breach of a developer's fiduciary duty;

For a declaration that the Prices have the right to use the private roads within the subdivision;

For an affirmative injunction requiring the Defendants to repair the roads within the subdivision and to create a segregated account for their continued maintenance for a reasonable period of time;

In the event an affirmative injunctive is not ordered, as alternative relief for monetary damages against the Defendants in an amount sufficient to cause the roads to be restored to adequate standards as certified by a professional engineer, and to provide a segregated funds account for the roads continued maintenance for a reasonable time.

For such other relief as may be just and property.

TOBIAS G. WARD, JR., PA

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July 27, 2016

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF BERKELEY	)	
RONALD E. PRICE AND DIANA R. B. PRICE,	)	
	)	
Plaintiffs,	)	CASE NO. 04-CP-08-1855
	)	
vs.	)	**SECOND AMENDED AND SUPPLEMENTAL COMPLAINT**
Belinda Fox, Gerry Fox, Danny L. Gilbert , Sarah Winn , Troy L. Winn, Eagle Harbor, Inc., Heritage Classic Homes, Inc. and the Eagle Harbor Phase II Development Partnership,	)	
Defendants,	)	

FILED
2015 SEP 30 PM 1:13
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

The Plaintiffs, Ronald E. Price and Diana R. B. Price complaining of certain acts committed by the above named Defendants, hereby allege as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendants, Gerry and Belinda Fox ("Foxes"), are residents of the County of Berkeley.

3. Upon information and belief, the Defendant, Danny L. Gilbert ("Gilbert"), is a citizen and resident of the County of Berkeley, State of South Carolina.

4. Upon information and belief, the Defendants, Sarah and Troy Winn ("Winns"), are residents of the County of Berkeley.

5. Heritage Classic Homes, Inc. ("HCH") is a corporation organized and existing pursuant to the laws of the State of South Carolina and at all relative times alleged herein was acting as the alter ego of Defendant Gilbert.

6. The Defendant Eagle Harbor, Inc. ("EHI") was incorporated as a not for profit entity, but through its officer and agent Gilbert was the beneficiary and partner of the conduct alleged herein.

7. In the summer of 2001, the Foxes, Winns, EHI, HCH and Gilbert formed a partnership denominated for the purpose of this suit as the Eagle Harbor Phase II Development Partnership ("the Partnership").

8. Pursuant to this Partnership, the Winns and Foxes acquired certain real property which would become 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. The Partners would then split the profits when the lots were sold. Gilbert's company HCH would be the builder and would receive Gilbert's share of the profits for his role in developing and selling property.

9. In the summer of 2003, the Prices were looking for a subdivision lot to build their home on and came across Gilbert at what looked like a sales office in Eagle Harbor Subdivision. Gilbert, in his role as marketing Partner, showed the Prices Lot 20. He made several material representations to the Prices including that the Lot 20 (approximately 8 acres) could be subdivided into three, separate residential lots, that the lots would perk, and 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 the property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits. Gilbert showed them the Master Plan for the Eagle Harbor Subdivision.

10. On or about September 13, 2003, the Prices, in reliance on the representations of Gilbert entered into an Agreement to Buy and Sell Lot 20 for $90,400. Gilbert explained that the owner of Lot 20, Belinda Fox was his Partner. Concurrently, the Prices entered

into an SF Agreement with HCH/Gilbert to construct their home on Lot 20. Subsequently the Foxes passed their realtor exams, to become licensed realtors with the state of SC, on/about Nov 15, 2003 prior to the Prices purchase of the property.

11. On November 25, 2003, the closing for the sale of Lot 20 to the Prices occurred and Gilbert received $46,000 as his share of the profits. Gilbert directed that $41,000 be paid to HCH, an entity he owned and controlled and another $3,000 to Dee Dee Cox in settlement of an obligation of GB Fox and Gilbert's company HCH. He also received $2,000 in earnest money which he directed that the Prices pay to him.

12. Subsequent to the closing, the Prices learned that the representations by Gilbert as marketing Partner were false. The property could not be subdivided into three, separate residential lots because the soil does not perk, a condition known to Gilbert and the Partnership as early as February 2002.

13. Also, the lot would not be part of a restricted community with a valid homeowner's association, associated covenants, restrictions, architectural guidelines and other benefits, which would enhance the value of the subject property being purchased by them because valid, restrictive covenants were not properly recorded for the Phase II subdivision.

14. The promised amenities were never developed.

15. In addition to these problems, the Partnership as Developer of Phase II of Eagle Harbor Subdivision failed to comply with applicable governmental regulations before selling lots, including but not limited to the following:

a) SC Code §48-14-10, Stormwater Management, not obtaining land disturbance permits;
b) The Clean Water Act, Section 33 USC 1344, not ensuring wetlands studies were conducted;
c) SCDHEC Regulations 62-57, and/or 56 for septic system requirements, and Berkeley County Regulation
d) §59-93(a)(14) not obtaining SCDOT encroachment permits.

16. After wetland studies were conducted by the Army Corp of Engineers, the Prices learned that approximately two acres of Lot 20 were delineated as federally defined freshwater wetlands. Various roads in the subdivision were also impacted by wetlands.

17. These violations have injured the Prices resulting in loss of time and resources to construct their home, limited use of their property, particularly subdividing for residential use, and with no system for perpetual maintenance of the common areas.

18. The Partnership failed to adequately organize and fund Eagle Harbor Homeowners Association, Inc. ("EHHOA") such that it would be an entity capable of receiving and maintaining any common areas within the subdivision including the gates and roads.

19. Foxes, Winns, Gilbert, and EHI filed suit against Stantec, an engineering company and received a settlement in June 2011 concerning the defective roads in the subdivision.

20. Despite knowledge through the lawsuit that the roads were defective and in need of repair, in June 2011, the Foxes and the Winns conveyed the roads to an inadequately capitalized EHHOA with no apparent means to maintain and repair the defective roads. Gilbert is still listed as the registered agent for EHHOA.

21. Since the Restrictive Covenants were not valid and do not bind individual owners to be members of EHHOA, there is no recorded access for the individual owners to use the private roads.

FOR A FIRST CAUSE OF ACTION
(Negligent Misrepresentation)

22. The preceding allegations are realleged as if fully repeated herein.

23. The Partnership and its marketing partner Gilbert had a pecuniary interest in making representations to prospective purchasers including the Prices concerning property for sale in Phase II, Eagle Harbor Subdivision.

24. The Partnership and its marketing partner Gilbert owed a duty to use due care in making representations to prospective purchasers and to disclose all material information concerning the purchase.

25. The Partnership and its marketing partner Gilbert breached that duty and were negligent by failing to exercise due diligence before making any representations and by making the following material misrepresentations: (1) all governmental requirements had been met before selling the property; (2) that the lot was approved and ready for residential building; (3) that the property was approved for residential subdivision and could be subdivided into three, separate residential lots; and (4) that the property was restricted by valid, enforceable restrictive covenants, creating a perpetual maintenance of the private roads and other subdivision improvements.

26. The Partnership and Gilbert, due to their negligence, also failed to disclose the material fact that two acres of Lot 20 and parts of the roads were subject to wetlands and that Lot 20 would require a separate Lot 21(which they did not own) to use as a sewage drain field.

27. As a direct and proximate result of the Partnership and Gilbert's negligent misrepresentations, the Prices have suffered damages including the delay of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction.

28. Also as a direct and proximate result of the Partnership and Gilbert's negligent misrepresentations, the Prices have suffered damages in the form of loss of use of their property and diminution in value.

29. The Prices are entitled to judgment against the Partnership, and the individual Partners for all damages the Prices have suffered from Negligent Misrepresentation.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty/Declaratory Judgment)

30. The allegations of the preceding paragraphs are realleged as if fully repeated herein.

31. The Partnership as Developer for Eagle Harbor Subdivision Phase II had a fiduciary duty to purchasers in the subdivision to develop the subdivision in accordance with all applicable governmental regulations, to properly setup and fund the 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.

32. The Partnership breached that duty by failing to comply with applicable governmental regulations before selling lots, including but not limited to the following:

a) SC Code §48-14-10, Stormwater Management, not obtaining land disturbance permits;

b) The Clean Water Act, Section 33 USC 1344, not ensuring wetlands studies were conducted;

c) SCDHEC Regulations 62-57, and/or 56 for septic system requirements, and Berkeley County Regulation

d) §59-93(a)(14) not obtaining SCDOT encroachment permits.

33. The Partnership also breached its duty by failing to properly set up Eagle Harbor Home Owners Association, Inc. as the Restrictive Covenants were invalid and do not require membership and there is no mechanism to assess dues for the continued repair and maintenance of the common areas.

34. The Partnership further breached its fiduciary duty by transferring the roads which were then in disrepair to an inadequately capitalized EHHOA, Inc., a paper entity with Gilbert as registered agent.

35. The Prices are further informed and believe that the Partnership has failed to secure easements or other rights of access to ensure the owners have full rights of access and use of the private roads within the subdivision.

36. The Prices are informed and believe that the Defendant Partners received a settlement from a lawsuit filed against Stantec, an engineering firm that worked on the development, but the Partners have not notified the Prices or other owners about the settlement or showed them documentation which would ensure the roads would be repaired and maintained.

37. As a direct and proximate result of the Partnership's breach of its fiduciary duty as developer of Phase II, the Prices have suffered damages from the delay of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction. The Prices have also suffered damages in the form of loss of use of their property and diminution in value.

38. The Prices are entitled to judgment against the Partnership and the Partners for all of their damages together with punitive damages for the reckless disregard for their rights as owners.

39. The Prices are further entitled to a declaration by this court as to their rights to use the private roads within the subdivision and to an affirmative injunction requiring the Partnership and Partners to cause the roads to be restored to adequate standards, and to provide a segregated funds account for the roads continued maintenance for a reasonable time.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices Act)

40. The allegations of the preceding paragraphs are realleged as if fully repeated herein.

41. The misrepresentation made by the Partnership and its marketing Partner Gilbert, its failure to comply with governmental regulations, its unwillingness to

properly create and fund the subdivision are unfair and deceptive acts in the conduct of trade or commerce.

42. The acts impact the public interest in that the acts were done to the public at large in the offering of lots in a residential subdivision, further, the acts are capable of repetition and upon information and belief were repeated.

43. As a direct and proximate result of the Partnership's unfair and deceptive acts, the Prices have suffered damages the delay of construction due to the Defendants not ensuring the property met SCDHEC and SCDOT requirements prior to the sale. Delay damage include costs for additional rent, storage of personal property, added mortgage loan interest paid, refinancing of loan cost due to increased interest rate penalty because of delay in construction. The Prices have also suffered damages in the form of loss of use of their property and diminution in value.

44. Upon information and belief that the acts of the Partnership, especially its marketing Partner Gilbert were willful and that the Partnership and Gilbert knew or should have known its acts were unfair and deceptive.

45. The Prices are entitled to judgment against the Partnership and its Partners for three times its actual damages together with reasonable attorney fees.

WHEREFORE, having set for the grounds therefore, the Prices pray for judgment against the Defendants, jointly and severally as follows:

For all actual, consequential and special damages as alleged herein;

For treble damages under the unfair trade practices act and reasonable attorney' fees;

For punitive damages as appropriate for breach of a developer's fiduciary duty;

For a declaration that the Prices have the right to use the private roads within the subdivision;

For an affirmative injunction requiring the Defendants to repair the roads within the subdivision and to create a segregated account for their continued maintenance for a reasonable period of time;

For such other relief as may be just and property.

TOBIAS G. WARD, JR., PA

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September 28, 2015

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO: 2007-CP-08-458

RONALD E. PRICE and
DIANA R.B. PRICE,

Plaintiffs,

-versus-

INVESTORS TITLE INSURANCE COMPANY,

Defendant.

COMPLAINT
(Jury Trial Demanded)

FILED
2007 FEB 22 P 12:15
HARRY P. BRADY, III
CLERK OF COURT
BERKELEY COUNTY, SC

THE PLAINTIFFS above-named, complaining of the Defendant above-named, would show and allege unto this Honorable Court as follows:

ONE: That Plaintiffs are residents of the County of Berkeley, State of South Carolina.

TWO: That upon information and belief, the Defendant, Investors Title Insurance Company, is a North Carolina title insurance company licensed to do business in South Carolina and insuring title risks in the County of Berkeley, State of South Carolina.

THREE: This matter involves real property located in the County of Berkeley, State of South Carolina.

FOUR: That the parties hereto and the things and matters alleged herein are all within the jurisdiction of this Honorable Court and venue is proper.

FIVE: That on or about September 13, 2003, the Plaintiffs signed a contract to purchase a tract of land in the County of Berkeley, State of South Carolina, known and designated as Lot 20 located in the subdivision known as Eagle Harbor, Phase II, St. James, Goose Creek Parish, containing 7.861 acres, more or less, and bearing Berkeley County TMS Number 194-00-02-122, of parent tract 194-00-02-031. A copy of said contract is attached hereto as Exhibit "A". Concurrently, on September 13, 2003, the Plaintiffs entered into a Standard Form Construction Agreement to build their residence on said property.

SIX: That on or about November 25, 2003, the Plaintiffs purchased the aforementioned tract of land. The deed by which the Plaintiffs purchased said tract is recorded in the Berkeley County RMC Office in Book 3723 at Page 200. A copy of said deed is attached hereto as Exhibit "B" and is incorporated herein by reference.

SEVEN: That in conjunction with the closing and purchase of the above described property on November 25, 2003, the Defendant issued a title insurance commitment covering the Plaintiffs' property described in paragraph Five above (hereinafter referred to as "Plaintiffs' property"). A copy of the title insurance commitment is attached hereto as Exhibit "C" and is incorporated herein by reference. The Plaintiffs were not provided with a copy of said title commitment until on or about July 10, 2006, despite the requests of the Defendant for a copy of said Commitment.

EIGHT: That in connection with the purchase of Plaintiffs' property, they obtained an Owner's Policy of Title Insurance issued by Defendant, a copy of which is attached hereto as Exhibit "D" and incorporated herein by reference.

NINE: That subsequent to Plaintiffs' purchase of their property, Plaintiffs discovered various defects, which have resulted in devaluation of their property and/or has affected the marketability of their property. Plaintiffs submit that the following defects and/or risks are covered by the title insurance policy issued by the Defendant:

1. Fraud or misrepresentation of seller in stating special stipulation in the Purchase Agreement (Exhibit A) that the property could be subdivided, when in fact it could not be subdivided, and such terms and conditions were not excepted from coverage of policy.

2. Public recorded documents giving constructive notice of defects or violations:

(a) Eagle Harbor Subdivision, Phase II Plat, recorded September 2002; and

(b) Declarations of Restrictive Covenants, recorded February 2003.

3. Restricted from use as residential property due to non-compliance with SCDHEC requirements prior to sale of property to Plaintiffs.

4. Construction liens, unauthorized work of contractor due to non-compliance of SCDHEC and building code regulations, which subsequently forced Plaintiffs to demolish and dispose of uncompleted structure, due to its hazardous condition and risk. The terms and conditions of the Standard Form of Agreement between Owner and Contractor (Exhibit "E") were not excepted from coverage.

5. Seller's failure to perform wetland studies, as required under the Federal Coastal Zone Management Act, or other federal law or SC Code, Chapter 39, Title 48, or any other such regulations pursuant to local, state or federal laws, prior to selling the property to the Plaintiffs, which has resulted in the use of a portion of Plaintiffs' property being restricted; and the Defendant did not except this from policy coverage.

TEN: That the Plaintiffs provided a written claim for damages under their Owners Policy of Title Insurance by written correspondence dated March 14, 2004 and March 26, 2004. The Plaintiffs have also corresponded in writing with the Defendant concerning their claim numerous times since the original claim letters. The Defendant, through one if its employees, initially suggested that Plaintiffs' claims were not covered by the title insurance policy. However, Plaintiffs did not receive a formal written denial of their claims until October 9, 2006.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment)

ELEVEN: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Ten above as if fully set forth verbatim herein.

TWELVE: That Plaintiffs seek a declaratory judgment brought pursuant to South Carolina Code, annotated, §15-53-10 *et seq.*, whereby Plaintiffs seek this Court's declaration of whether the Defendant has responsibility for covering the loss claimed by Plaintiffs under either or both the mortgage title insurance policy and the owners title insurance policy issued by Defendant with respect to Plaintiffs' property, namely policy numbers OR-A-055849 and M-A 146678.

THIRTEEN: That Plaintiffs also seek this Court's declaration that Plaintiffs are owed coverage on their Owner's Policy, commensurate with that of the lender's policy, due to the fact that the policies were issued simultaneously, and the premium paid by the Plaintiffs afforded them with coverage matching that of the lender, in the amount of $261,700.00.

FOURTEEN: That Plaintiffs are informed and believe that this issue of coverage and amount of coverage should be resolved by declaratory decision. Plaintiffs allege that they will suffer irreparable harm if their cause seeking a declaratory judgment is not heard.

FIFTEEN: That under the circumstances herein, there is a controversy of a justifiable nature between the parties, and your Plaintiffs are informed and believe that they are entitled to have the Court inquire into these matters and issue a declaratory judgment determining the rights of the parties with respect to the questions of coverage and amount of coverage by the Defendant.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract / Specific Performance)

SIXTEEN: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Fifteen above as if fully set forth verbatim herein.

SEVENTEEN: That the title insurance commitment and the title insurance policies issued by the Defendant with respect to Plaintiffs' property constitutes a contract between the Plaintiffs and Defendant.

EIGHTEEN: That the Plaintiffs have fully performed their obligations and all conditions required of them by the above referenced policies.

NINETEEN: That the failure and refusal of the Defendant to defend the Plaintiffs' title and pay the benefits due under its policies is a violation of its contractual duties to Plaintiffs and represents Breach of Contract.

TWENTY: That the Plaintiffs are entitled to recover damages resulting from the Defendant's Breach of Contract.

TWENTY-ONE: That further, because the Plaintiffs have adhered to and performed their obligations under the contract, including without limitation, paying the applicable premium, the Plaintiffs are entitled to an Order of Specific Performance, compelling the Defendant to defend the Plaintiffs' title.

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

TWENTY-TWO: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Twenty-One above as if fully set forth verbatim herein.

TWENTY-THREE: That implied in the title insurance policies issued by Defendant, is a Covenant of Good Faith and Fair Dealings, which requires the Defendant to adjust Plaintiffs' claims in an objective, good faith manner.

TWENTY-FOUR: That Defendant has failed to evaluate Plaintiffs' claims objectively and has failed to take the actions required of it under its policies.

TWENTY-FIVE: That the Defendant, upon information and belief, conducted its investigation in an effort to deny Plaintiffs' claims, rather than with an objective attempt to correctly administer Plaintiffs' claims.

TWENTY-SIX: That the Defendant did virtually no investigation concerning Plaintiffs' claims until a substantial lapse in time had occurred.

TWENTY-SEVEN: That the Defendant has acted unreasonably in refusing to defend the Plaintiffs' title.

TWENTY-EIGHT: That the Defendant has acted in disregard of the terms of the contract of title insurance issued in this matter and of the Plaintiffs' rights and has acted in bad faith.

TWENTY-NINE: That the Defendant has breached the duty of Good Faith and Fair Dealing.

THIRTY: That the Defendant's denials of the Plaintiffs' covered were willful and in reckless disregard of the Plaintiffs' rights.

THIRTY-ONE: That as a result of the Defendant's bad faith, the Plaintiffs are entitled to actual damages, consequential damages, and punitive damages.

THIRTY-TWO: That if Plaintiffs prevail in this case, they will be entitled to recover all reasonable attorney's fees for prosecution of the case against the Defendant in an amount to be determined by the trial Court pursuant to South Carolina Code §38-59-40.

FOR A FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty)

THIRTY-THREE: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Thirty-Two above as if fully set forth verbatim herein.

THIRTY-FOUR: That the Defendant at all times owed a fiduciary duty to the Plaintiffs and that as a result of Defendant's conduct as set forth above, the Defendant has breached the fiduciary duty and the Plaintiffs were damaged as a result thereof.

FOR A FIFTH CAUSE OF ACTION

(Negligence and Negligence *Per Se*)

THIRTY-FIVE: The Plaintiffs repeat and re-allege the matters set forth in paragraphs One through Thirty-Four above as if fully set forth verbatim herein.

THIRTY-SIX: That Defendant owed a duty to Plaintiffs to:

1. Act with reasonable promptness regarding the claims submitted by Plaintiffs;
2. Promptly investigate Plaintiffs' claims;
3. Make a good faith effort to promptly, fairly, and equitably settle Plaintiffs' claims;
4. Act without unreasonable delay;
5. Offer sufficient Owner Title Insurance Coverage to Plaintiff and have Plaintiffs sign form SC-305; and
6. Have Plaintiffs sign form SC-512a regarding Owner's Title Insurance Coverage.

THIRTY-SEVEN: That the Defendant breached its duties to Plaintiffs by:

1. Failing to act with reasonable promptness with respect to Plaintiffs' claims;
2. Failing to promptly investigate Plaintiffs' claims;

3. Failing to use good faith and to effect prompt, fair, and equitable settlement of claims as required by South Carolina Code Section 38-59-20, and

4. Failure to offer sufficient Owner's Title Insurance Coverage to Plaintiffs and have them sign all necessary forms that are required by South Carolina law, such as form SC-305 required by South Carolina Code Section 38-75-960 and form SC-512a, which amounts to Negligence *Per Se*.

THIRTY-EIGHT: That the Defendant, by its acts and/or omissions of its agents and employees, was negligent, careless, reckless, wanton, and grossly negligent in the particulars set forth above.

THIRTY-NINE: That as a direct and proximate result of the aforesaid wrongful conduct on the part of the Defendant, its agents, and/or employees, the Plaintiffs sustained damages in the amount of actual and punitive damages to be determined by the trier of fact in this case.

WHEREFORE, the Plaintiffs pray unto this Honorable Court for judgment against the Defendant as follows:

1. For judgment against the Defendant for actual damages, consequential damages, punitive damages, and attorney's fees, plus such other legal or equitable relief as this Honorable Court deems proper.
2. For a judgment declaring whether or not coverage exists under the title insurance policies issued by the Defendant for the losses suffered by the Plaintiffs, and in the case that such coverage does exist, for a determination of the proper amount of coverage and the monetary amount of coverage to be paid over to Plaintiffs and/or their mortgage lender, and satisfaction of the respective owners and mortgagee title insurance policies.

3. For such other and further relief as this Honorable Court may deem just and proper.

JOSEPH W. GINN, III
Attorney for Plaintiffs
6 Carriage Lane, Suite A
Charleston, SC 29407
843/571-0766
843/571-1225 (fax)

Charleston, South Carolina

February 20, 2007

From: Farr, Emily
Sent: Wednesday, April 22, 2009 10:16 AM
To: 'DIANA BRZOZOWSKI PRICE'
Cc: Becker, James
Subject: RE: Letter Dated April 3, 2009 - Case 2007-CP-08-458

Ms. Price,

To follow-up on the voicemail I just left you at the number below, attached is the response from SCDOT. The encroachment permit you were concerned about was obtained. We are very close to being able to confirm whether or not we will be able to settle with you under the terms you discussed previously with Jamie Becker. In light of this, it makes sense to request another continuance of the hearing while we are in the midst of settlement discussions.

Please give me a call at your earliest opportunity to discuss further, or just reply to this e-mail.

Thank you,

Emily H. Farr, Esq.
Haynsworth Sinkler Boyd, P.A.
803-540-7705

Investors Title Insurance Company

INNOVATIVE BY INSTINCT

A Stock Company • P.O. Drawer 2687 • Chapel Hill, NC 27515-2687

Residential Title Insurance Policy
One-To-Four Family Residences

Policy Number: OR-A 056849

Issued with Policy Number: M-A 146878

Schedule A

File Number: PRICE 03-11-021

Date of Policy: December 3, 2003 at 04:00 PM

Amount of Insurance: $90,400.00

1. Name of Insured:
   Ronald E. Price and Diana R.B. Price
2. Your interest in the land covered by this policy is:
   Fee Simple
3. The land referred to in this policy is described in the attached Schedule C.

LOWCOUNTRY TITLE SERVICES, LLC

By: Jeffrey T. Spell and Associates

JEFFREY T. SPELL, ATTORNEY AT LAW

Note: This Policy consists of insert pages labeled as Schedule A, Schedule B-Part 1 and Schedule C. This Policy is of no force and effect unless all schedules are included, along with any added pages incorporated herein.

(PRICE 03-11-021.PFD/PRICE 03-11-021/31)

Residential Title Insurance Policy
One-To-Four Family Residences

Policy Number: OR-A 0856849

Schedule B - Part 1

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

I. The lien of the security instrument:

Mortgage from Ronald E. Price and Diana R.B. Price to National City Mortgage Company , dated November 25, 2003, filed for record on December 3, 2003 in Book 03723, Page 00204, in the principal sum of $261,700.00 .

II. The dower, curtsey, homestead, community property, or other statutory marital rights, if any, of the spouse of any individual insured.

1. Taxes for the year 2002 EXEMPT.

a. TAXES AND ASSESSMENTS FOR THE YEAR 2004 , NOT YET DUE OR PAYABLE.

b. EASEMENTS AS RECORDED BEC in Book 2425, in Page 296; in Book 2425, at Page 310, in the RMC Office for Berkeley County, South Carolina.

c. Subject to an 11' Sewer Force Main Easement as shown on said plat.

d. Subject to a 10' Drainage Easement (10' each side) as shown on said plat.

e. Subject to a 66' R/W bisecting the property as shown on said plat.

f. Subject to a Sanitary Sewer, Septic Drain Field Easement as shown on said plat.

g. RESTRICTIONS AS RECORDED in Book 3125, at Page 178, in the RMC Office for Berkeley County, South Carolina.

Note: This Policy consists of insert pages labeled as Schedule A, Schedule B-Part 1 and Schedule C. This Policy is of no force and effect unless all schedules are included, along with any added pages incorporated herein.

Residential Title Insurance Policy
One-To-Four Family Residences

Policy Number: OR-A 056849

Schedule C

The land referred to in this Policy is described as follows:

EXHIBIT "A"

All that certain piece, parcel, or tract of land, situate, lying and being in Second Goose Creek Tax District, County of Berkeley, State of South Carolina, measuring and containing 7.861 acres, more or less, known and designated as Lot 20, "Prepared for: Eagle Harbor Incorporated, Danny L. Gilbert, CEO, Berkeley County, South Carolina", as more particularly shown and delineated on a plat entitled: "FINAL PLAT OF EAGLE HARBOR, PHASE II, ST. JAMES, GOOSE CREEK PARISH" prepared by William M. Ferguson, Stantec Consulting Services, Inc., dated July 25, 2002, and recorded September 26, 2002, in Plat Book P, at Page 261-A, in the RMC Office for Berkeley County, South Carolina. Said property having such size, shape, metes, butting and bounds as will by reference to said plat.

Being a portion of the same property conveyed to Belinda Fox by deed of Bennie Harvey Ordel, a/k/a Bennie Harvey Ordell, dated August 13, 2001 and recorded August 21, 2001, in Book 2382, at Page 143, in the RMC Office for Berkeley County, South Carolina.

TMS # 194-00-02-031

Note: This Policy consists of insert pages labeled as Schedule A, Schedule B-Part 1 and Schedule C. This Policy is of no force and effect unless schedules are included, along with any added pages incorporated herein.

(PRICE 03-11-021 PFD/PRICE 03-11-021/

C. F. "Ike" Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

November 22, 2005

Donald and Diana Price
1104 Saddlehorn Road
Summerville, South Carolina 29483

Re: USACOE non-jurisdictional wetlands
SAC 87-2005-2039-2
Berkeley County

Dear Mr. & Mrs. Price:

The S. C. Department of Health and Environmental Control – Office of Ocean and Coastal Resource Management (OCRM) received a copy of the U. S. Army Corps of Engineers (USACOE) wetland delineation determination letter to you dated November 7, 2005. This letter was in response to your request for a wetland determination, and indicated that there are federally defined wetlands on the property referenced in the letter.

As a result of the recent U. S. Supreme Court decision regarding isolated wetlands the USACOE has determined that the isolated wetland associated with the property are not subject to the jurisdiction of the USACOE. However, if these wetlands are to be impacted, and if activity on the property will, at any time, require other state or federal permits, then OCRM will exert jurisdiction over these non-jurisdictional wetlands through Coastal Zone Management and Wetland Mitigation policies of the S. C. Coastal Zone Management Program. OCRM will address these issues through its certification of these state or federal permits.

If you have any questions concerning this matter, please contact me at 843-747-4323 ext. 133.

Sincerely,

Jan L. Hensel, Jr.
Federal Certification Section

cc: Richard Chinnis
Jeff Thompson
Bill Perry

000214

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405
Phone (843) 744-5838 • Fax (843) 744-5847 • www.scdhec.gov

P23

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

REPLY TO ATTENTION OF

Regulatory Division

26
27
28

November 7, 2005

Ronald and Diana Price
1404 Saddlehorn Road
Summerville, South Carolina 29483

Re: SAC 87-2005-2039-2
Berkeley County

Dear Mr. and Mrs. Price:

This is in response to your letter of September 20, 2005, requesting a wetland determination for a 7.86 acre tract located at the terminus of Saddlehorn Road, in Berkeley County, South Carolina. The project area is depicted on the survey plat you submitted which was prepared by Ashley Engineering & Surveying, Inc., dated October 20, 2004, and entitled "CLOSING SURVEY FOR DON PRICE & DIANA PRICE CITY OF GOOSE CREEK BERKELEY COUNTY, SOUTH CAROLINA."

I have depicted the approximate boundaries of wetlands and other waters of the United States on a copy of the plat referenced above. The property in question contains approximately 2 acres of federally defined freshwater wetlands or other waters. However, none of these aquatic resources are considered to be subject to the jurisdiction of this office due to a recent decision by the U.S. Supreme Court. The location and configuration of these areas, as well as their status relative to jurisdiction, are reflected on the plat referenced above.

It should be clearly noted that the decision of the U.S. Supreme Court to exclude certain waters and wetlands from federal jurisdiction under the Clean Water Act has no effect on any state or local government restrictions or requirements concerning aquatic resources, including wetlands. You are strongly cautioned to ascertain whether such restrictions or requirements exist for the area in question before undertaking any activity which might destroy or otherwise impact these wetland resources.

Based on an on-site inspection and a review of aerial photography and soil survey information, it has been determined that the boundaries shown on the referenced plat are a reasonable approximation of the location and boundaries of the wetlands or other waters found on the site. However, you are cautioned that this delineation is approximate, subject to change, and should be used for planning purposes only. In order for a more accurate determination to be provided, these areas should be surveyed and platted. Upon receipt of such a plat, this office can then issue a letter verifying the accuracy of the actual boundaries. Please note that this office does not require that these non-jurisdictional areas be surveyed. However, if the landowner voluntarily wishes to obtain a more accurate determination or needs to perform this type of mapping due to the requirements of state or local governmental entities, we will provide review and verification of this mapping upon request.

Please be advised that this determination is valid for five (5) years from the date of this letter unless new information warrants revision of the delineation before the expiration date. All actions concerning this determination must be complete within this time frame, or an additional delineation must be conducted. Further, be advised that this preliminary jurisdictional determination is not an appealable action under the Corps of Engineers administrative appeal procedures defined at 33 CFR 331.

In future correspondence concerning this matter, please refer to SAC-87-2005-2039-2. You may still need state or local assent. Prior to performing any work, you should contact the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. A copy of this letter is being forwarded to them for their information.

If you have any questions concerning this matter, please contact me at 843-329-8044 or toll free at 1-866-329-8187.

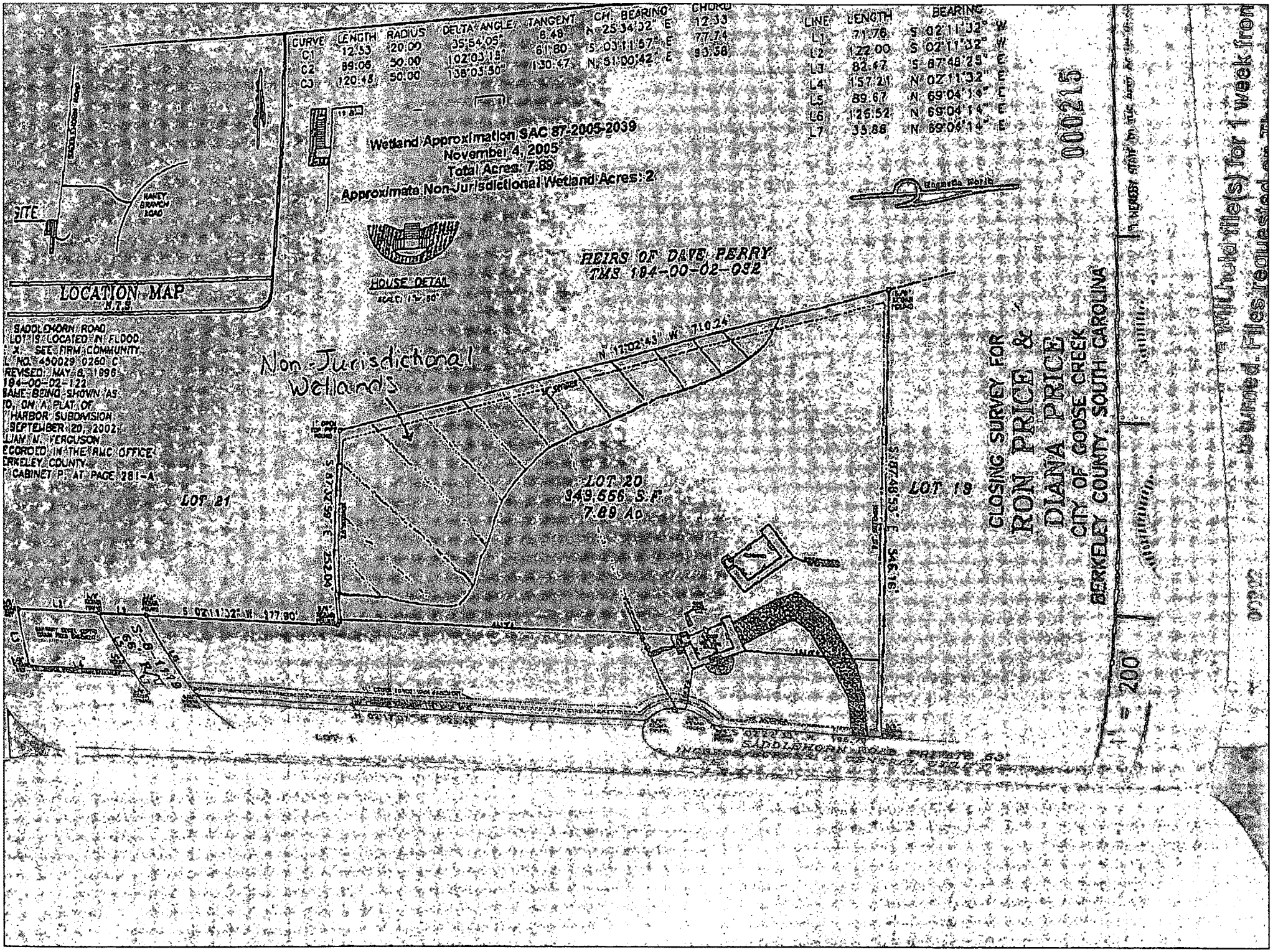
Respectfully,

Elizabeth Jackson
Biologist

Enclosure:
Basis for Jurisdiction
Customer Service Survey

Copy Furnished:

South Carolina Department of Health
and Environmental Control
Office of Ocean and Coastal
Resource Management
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405


CURVE LENGTH RADIUS DELTA ANGLE TANGENT CH. BEARING CHORD
C1 12.53 20.00 35°54'05" 6.48 N 25°34'02" E 12.33
C2 89.06 50.00 102°03'15" 61.80 S 05°11'57" E 77.74
C3 120.48 50.00 138°03'50" 130.47 N 51°00'42" E 93.58
LINE LENGTH BEARING
L1 71.76 S 02°11'32" W
L2 122.00 S 02°11'32" W
L3 82.47 S 87°48'29" E
L4 157.21 N 02°11'32" E
L5 89.67 N 69°04'14" E
L6 125.52 N 69°04'14" E
L7 35.88 N 69°04'14" E
Wetland Approximation SAC 87-2005-2039
November 4, 2005
Total Acres: 7.89
Approximate Non-Jurisdictional Wetland Acres: 2
LOCATION MAP
N.T.S.
SITE
HANEY BRANCH ROAD
HOUSE DETAIL
SCALE: 1" = 50'
HEIRS OF DAVE PERRY
TMS 184-00-02-032
SADDLEHORN ROAD
LOT IS LOCATED IN FLOOD
X SEE FIRM COMMUNITY
NO. 450029 0260 C
REVISED: MAY 6, 1996
184-00-02-122
BEING SHOWN AS
ON A PLAT OF
HARBOR SUBDIVISION
SEPTEMBER 20, 2002
JUAN N. FERGUSON
RECORDED IN THE RMC OFFICE
BERKELEY COUNTY
CABINET P AT PAGE 281-A
Non-Jurisdictional Wetlands
LOT 21
LOT 20
949,566 S.F.
7.89 Ac.
LOT 19
N 17°02'43" W 710.24'
S 87°48'53" E 346.16'
S 02°11'32" E 732.04'
S 02°11'32" W 177.90'
SADDLEHORN ROAD PRIVATE 50'
CLOSING SURVEY FOR
RON PRICE &
DIANA PRICE
CITY OF GOOSE CREEK
BERKELEY COUNTY, SOUTH CAROLINA
1" = 200'
Returned Files requested on this date will include title(s) for 1 week from
00015

:14, 2004

Diana R.B. Price and Ronald E. Price
PO Box 191
Mt. Blanchard, Oh 45867
419 694-2175
AND
1104 Saddlehorn Rd.,
Summerville, SC 29483
843 729 6050

Investors Title Company
PO Drawer 2687
Chapel Hill, North Carolina
27515-2687

Reference: Policy Number OR-A 055849, County of Berkeley, in South Carolina

In review of our title insurance policy and guidance stated under the "CONDITIONS" Item 3, "HOW TO MAKE A CLAIM" we are notifying you of conditions, which have resulted in us experiencing "undue costs/damages" although we do not yet know the magnitude of our loss. We have invested over $50,000 cash into the land and preparation to build our home. We see a $50,000 loss in the "inability" to subdivide our lot as promised in our land purchase contract and another $50,000 due to contractor "unauthorized" construction, defective construction, and misrepresentation of construction costs.

We've only known of the following for a short period of time and have attached documents which we feel justify and serve as evidence to our situation.

The Developer (on behalf of seller) and Contractor—Mr. Gilbert

- Sold us, as well as other persons a lot that has not yet been "finally approved" through South Carolina Department of Health and Environmental Control (SCDHEC) and the Department of Transportation (SCDOT). Refer to letters from DHEC (Berkeley County/Trident District) dated Feb 7, 2002, and two letters dated Feb 26, 2004, which are attached as #1, 2, and 3.
- Misrepresented our ability to "subdivide" our lot. Our ability to subdivide was the "main" consideration in purchasing this lot.. we had no need for a lot of 8 acres. Refer to our purchase agreement and SCDHEC letter from Columbia, SC, dated Feb 26, 2004, attached at #4 and 5.
- Performed "unauthorized" construction on our property. Refer to County Permitting, Berkeley County, SC letter dated Jan 22, 2004 and our contract termination letter dated Jan 30, 2004, attached as #6 and 7.
- Threatened to "lien" our property. Refer to email dated Feb 5, 2004 and "mechanic's lien" documents recorded at Berkeley County, although not yet served to us, attached as #8, and 9 A, B, and C. We have been trying to determine what the document entitled "Construction/Rehab Loan Title Company (Closing Agent) Certification" does or doesn't do for us. It appears the document is stating that we are insured against mechanic's liens during the life of the loan, including the construction/rehab period. Is that with you? Refer to attachment #10. For the time

being, we have sent Mr. Gilbert a NOTICE OF NON-RESPONSIBILITY, under SC Law, Section 29-5-80, which should prevent him from serving and/or validating the lien documents he has initiated.

We have been unable get information from Mr. Gilbert (attachment #11 and #12) or to establish communication with our closing agent—using phone, email, and fax, in an effort to get answers to several issues and find out our rights and entitlements. It appears there may be some sort of "conflict of interest" for the closing agent in his representation of the seller and/or developer and us. We were not given a choice of closing agents on our purchase agreement. we are not sure why and never questioned it until now. We have numerous other documents/pieces of correspondence for more details, if needed.

Recent contact with Berkeley County/Trident District of the SCDHEC and SCDOT confirms Mr. Gilbert made application on/about March 1, 2004, to get the required SCDOT "encroachment" permit, allowing him to seek the "final plat" approval from SCDHEC. It appears that the authorization is well under way. However, there is still the delay in getting the work hired and the follow through of the work.

We are delayed in construction based on negligence of the contractor/developer, and/or the seller, as responsibility is appropriately placed. These delays are causing us "extra" costs, such as household goods storage, additional lender interest payments, communications, transportation etc.. We are not quite sure of the scope of our "extra" cost at this time. The contractor's "unauthorized" work—verified by Berkeley County Permitting, has resulted in costs associated with hiring a new contractor, repairing the current structure, and getting "real" cost estimates, is definitely a burdensome cost.

At this point we have NOT yet retained an attorney, although we have consulted several, which is in fact how we got the guidance to contact you. We do not wish to hire an attorney on our own, if the possibility for representation will be handled by you—a choice under the provisions of the title policy. We are simply trying to get our house built with the least amount of cost to us or others, as well as alert you to damages/losses we have and will incur beyond our control and, as we understand it, falls under coverage by our title insurance. Please contact us--our most urgent need is the "mechanic's lien" insurance. Once Mr. Gilbert gets the encroachment permit from SCDOT, we may be given permission, from SCDHEC, to proceed with constructing our home.

Sincerely,

Ronald E. Price and Diana R. B. Price

CC: Lowcountry Title Company

Attachments: #1 – 3: Berkeley Co. DHEC Letters dated Feb 7, 2002, and Feb 26, 2004
#4: Purchase Agreement dated Sept 13, 2003
#5: SCDHEC Letter dated Feb 26, 2004
#6: Berkeley County Permitting Letter dated Jan 22, 2004
#7: Letter of Construction Contract Termination dated Jan 30, 2004
#8-9: Email dated Feb 5 and County recordings of Feb 20, 2004
#10: Const/Rehab Loan Title Co (Closing Agent) Cert, Nov 25 2004
#11: Letter to Developer/Contractor dated March 5, 2004
#12: Berkeley County "final" Plat, approved Aug '02 & recorded Sep '02

0 / 204

D H E C

PROMOTE PROTECT PROSPER

BERKELEY COUNTY HEALTH DEPARTMENT
Division of Environmental Health
109 W. Main Street
Moncks Corner, SC 29461
(843) 719-4649, 723-5355, 567-3125 ext. 4649
Fax (843) 719-4321

Feb. 26, 2004

Diana Price
P.O. Box 191
Mount Blanchard, OH 45867

Re: Septic Tank Permit #2004010050

Dear Ms. Price,

It has come to our attention that the Eagle Harbor Subdivision has yet to obtain written permission from the SCDOT allowing four separate borings under Leisure Drive (S-8-1119) for four separate lots in the subdivision, of which Lot 20 is one. Per our recent discussions, I regret to inform you that our agency has no choice but to temporarily revoke your septic tank permit for Lot 20 in Eagle Harbor until this written permission is obtained from the DOT and a copy of the final approved plat for the subdivision is submitted to our office. I deeply regret the hardship and inconvenience this may cause you, but rest assured that your permit will be reinstated immediately upon satisfaction of these two requirements.

If you have any questions, or if I can be of any further service to you, please do not hesitate to contact me at (843) 821-9524.

Sincerely,

Benjamin B. Bozardt

Benjamin B. Bozardt
District Wastewater Supervisor
Trident District

BERKELEY COUNTY
Permitting Department

January 22, 2004

Danny Gilbert
C/O Heritage Classic Homes
1044 Eagle Harbor Lane
Summerville, SC 29483

Re: 1104 Saddlehorn Road (BP2003-1517)

Dear Mr. Gilbert,

It has come to our attention that a septic tank approval letter has not been issued by the Department of Health and Environmental Control for the above referenced project.

Pursuant to S.C. Code of Regulations §61-56, Section III. C. The general contractor (or prime contractor, or person constructing the building) shall not begin construction of the building until a permit to construct an individual sewage treatment and disposal system is issued by the Health Authority. ***If it is discovered that you do not have your own individual septic tank system and are not connected to an approved sewage system, you will be found in violation of this regulation and will be punished in accordance with Section 44-1-150, code of Laws of South Carolina, 1976, with each day being deemed a violation and treated as a separate offense, the maximum punishment for which is 30 days in jail or a fine of $200.00.***

Please be advised that you are to immediately stop construction on this project until you receive the proper permit for construction of the septic tank required by DHEC.

It has also come to our attention that the sub-contractor hired to install the plumbing did not pick up or apply for his permit on this project. The fee has been doubled for the permit and if they have not picked up their Permit Authorization Card, that too, will be double fees. The sub-contractors for the electrical and mechanical work have not picked up their permits, either. Those permits will not be double fees unless work began without their permits. This must also be rectified before construction can resume.

223 North Live Oak Drive • Moncks Corner, South Carolina 29461-3707
Moncks Corner (843) 719-4292 • Charleston (843) 723-3800 • St. Stephen (843) 567-3136

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

RONALD E. PRICE AND DIANA PRICE)
☒ Plaintiff) CASE NO.
) 04-CP-08-1855
v.)
) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
Belinda Fox; Danny L. Gilbert; Eagle Harbor, Inc.)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Michael D. Moore, Bar No. 65409 Address: CHELLIS & FRAMPTON, P.A. Post Office Box 430 Summerville, SC 29484 phone: 843-871-7765 fax: 843-875-6657 e-mail: mdmesquire@chellisandframpton.com other:	, Bar No. Address: phone: fax: e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Amend Complaint
Estimated Time Needed: 15 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — 11/29/05 Date submitted

SECTION III. Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JSO

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: Date:

CLERK'S VERIFICATION

Collected by: Joe Ann Dennis — Date Filed:
25.00

CC; mm 25.00 11/30/05

SCCA/233 (11-03)

JSO

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY RONALD E. PRICE AND DIANA R.B. PRICE Plaintiffs vs. BELINDA FOX, DANNY L. GILBERT, and EAGLE HARBOR, INC. Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 04-CP-08-1855 **NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AND SERVE SECOND AMENDED COMPLAINT**

UF

Please take notice that the Plaintiff, Ronald and Diana Price, will move no earlier than ten (10) days after service of this Motion or as soon thereafter as the Motion may be heard for leave to file and serve their Second Amended Complaint, a copy of that proposed Amended Complaint being attached hereto and incorporated herein by reference. This Motion is being made pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, the court record in this case, any affidavits and/or other memoranda to be submitted in support of the Motion, and argument of counsel.

Respectfully submitted,

CHELLIS & FRAMPTON, P. A.

MICHAEL D. MOORE, ESQUIRE
ATTORNEY FOR PLAINTIFF
112 West Fourth North Street
Summerville, SC 29483

This 29th day of November, 2005.
Summerville, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

RONALD E. PRICE AND
DIANA R.B. PRICE

Plaintiffs

vs.

BELINDA FOX; DR. TROY WINN, DVM; DANNY L. GILBERT; JEFFREY SPELL, GARY FOX; METRO CONTRACTING; SARAH WINN; TROY WINN; AND ELIZABETH GILBERT; Individually, EAGLE HARBOR, INC. and INVESTERS TITLE INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 04-CP-08-1855

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)
Professional Negligence, Negligent Development Fraud, Negligent Misrepresentation Unfair Trade Practices and Civil Conspiracy

The Plaintiffs, Ronald E. Price and Diana R. B. Price complaining of certain acts committed by the above named Defendants, hereby allege as follows:

1. The Plaintiffs, Ronald E. Price and Diana R. B. Price (hereinafter the "Prices"), are residents of the County of Berkeley, State of South Carolina.

2. Upon information and belief, the Defendant Belinda Fox, is a resident of the County of Berkeley and was the prior owner of Lot 20, Eagle Harbor, Phase II, Tax Map # 194-00-02-122, and also a developing partner in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

3. Upon information and belief, the Defendants Gary Fox, Sarah Winn, Dr. Troy Winn, and Elizabeth Gilbert are all citizens and residents of the County of Berkeley, State of South Carolina, and all served and participated at all relevant times here to as developing partners in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II, and III.

4. Upon information and belief, the Defendant Eagle Harbor, Inc., is a South Carolina non-profit Corporation, licensed do business and in fact doing business in the County of Berkeley, State of South Carolina, where it engages in, among other things, the business of Residential Development, and in particular, served in concert with, and as a principal and/or partner in, that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

5. Upon information and belief, the Defendant Metro Contracting, is a SC Corporation licensed to do business and in fact doing business in the County of Berkeley, State of South Carolina, and in particular, served in concert with, and as a principal and partner in, that certain residential development and joint enterprise know as Eagle Harbor, Phases I, II, and/or III.

6. Upon information and belief, the Defendant, Danny L. Gilbert, is a citizen and resident of the County of Berkeley, State of South Carolina, and at all times relevant hereto, acted as a principal, developer, agent and owner of Eagle Harbor, Inc., and also as an agent, principal and partner, along with said Defendants Dr. Troy Winn, DVM, Gary Fox, Troy Winn, Elizabeth Gilbert, Metro Contracting, Eagle Harbor, Inc., and Jeff Spell in that certain residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

7. Upon information and belief, the Defendant Jeffrey Spell, was at all pertinent times hereto an attorney licensed to do business and in fact doing business in the County of Berkeley, State of South Carolina, where he concentrated his practice in the area of residential real estate closings, particularly with respect to properties located within the Development known as Eagle Harbor, Phases I, II and III.

8. Notwithstanding Defendant Jeffrey Spell's representation of buyers at closings involving the purchase of residential properties within said Eagle Harbor, Phases I, II and III, it is alleged, upon information and belief, that at all times pertinent hereto, he also acted in the capacity as an agent principal and partner, along with said Defendants Gary Fox, Troy Winn, Elizabeth Gilbert,

Metro Contracting, Danny L. Gilbert and Eagle Harbor in the residential development and joint enterprise known as Eagle Harbor, Phases I, II and III.

9. Notwithstanding the fact of the incorporation of the business known as Eagle Harbor, Inc., your Plaintiff is informed and believes that the Defendant Corporate Officers Danny Gilbert and Elizabeth Gilbert should be found to be personally, jointly and severally liable for the injuries and damages outlined herein below, due to their having operated the business of Eagle Harbor, Inc., as their alter ego, and otherwise due to those other factors justifying the piercing of the Corporate Veil under current South Carolina Jurisprudence.

10. As is more specifically alleged hereunder, Plaintiffs are informed and believes that the Defendants Gilbert, along with Defendants Fox, Winn, Spell and Eagle Harbor Inc., conspired with one another and/or others, as well as participated in, authorized, ordered, directed, and perpetuated the tortuous acts against the Plaintiffs, as more specifically alleged hereunder,

11. As common partners in that certain joint enterprise and development known as Eagle Harbor, Phases I, II and III, it is alleged that each Defendant named above is jointly and severally responsible for the tortuous acts committed against the Plaintiffs, as more specifically alleged hereunder.

12. Upon information and belief, Investors Title Insurance Company is a North Carolina title insurance company insuring title risks in the County of Berkeley, State of South Carolina, and did in fact issue an owner's policy with respect to the lot purchased by the Plaintiffs that constitutes the subject of this action, that lot lying and being in the County of Berkeley, State of South Carolina, and being more particularly described as lot 20, located in Eagle Harbor Subdivision, Phase II.

13. It appears that the parties hereto, and the things and matters alleged herein are all within the jurisdiction of this Honorable Court, and that venue is proper.

14. On or around September 13, 2003, the Prices entered into an Agreement to Buy and Sell (hereinafter "Agreement") to purchase certain property located within Eagle Harbor, Phase II, Lot 20, with the seller of that individual lot being Defendant Fox, wherein the Defendant, Gilbert serving in both his individual capacity and as the agent for that certain Defendant, Eagle Harbor, also acted on behalf of, as agent for, in concert with, and in fact signed that "Agreement" on behalf of Defendant, Fox, and for the other Defendant partners in the Development.

15. The aforesaid Agreement, a copy of which is attached hereto as Exhibit A, provided for the Prices to buy property from the Defendant Fox upon certain terms and conditions as set forth in the contract.

16. The Agreement provided in pertinent part: "Developer agrees to allow subdividing of the property into 2 separate lots, with possibility of 3 upon approval of Homeowners Association." (Agreement, para. 8(I).)

17. During negotiations for the property up through the closing, the Defendants Danny L. Gilbert, Belinda Fox, Attorney Jeff Spell and Eagle Harbor, Inc., acting individually, and as principals and agents for the other Defendant partners in the joint enterprise, continually represented that the property being sold to your Plaintiffs could be subdivided into at least two separate lots.

18. Prior to selling the property to the Prices, all the Defendants knew or should have known that the property could not be subdivided because it did not meet the minimum requirements imposed by DHEC for a septic tank system.

19. Further, at all times pertinent hereto and as an inducement to Plaintiffs to enter into the "Agreement", it is alleged that Defendants led your Plaintiffs to believe that they were purchasing property in a gated, restricted community with private, well maintained roadways, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other

benefits confirmed by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

20. Upon information and belief, Attorney Jeff Spell, presumably acting as the closing agent for the Plaintiffs Price and charged with the duty of fully examining title on behalf of Plaintiff purchasers, knew or should have known both in his professional capacity and as a partner in Defendants' certain joint enterprise that the property could indeed not be subdivided and that your Plaintiffs were not actually purchasing the property they had bargained for, a gated, restricted community with private, well maintained roadways, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits confirmed by the same

21. After entering into that purchase agreement and thereafter closing on the property, Plaintiffs later came to discover to their amazement that although an attempt had been made to give the appearance that such covenants, restrictions, bylaws, ARK guidelines and, a valid homeowners association existed, it appears that these neighborhood amenities were never created and the record notice documents evidencing theses amenities were instead a sham, because no Declaration of Covenants and Restrictions had been properly filed with respect to Phase II of the Development prior to the closing. Further, it appears that Defendant Eagle Harbor, Inc., never specifically owned the properties composing the development, and thus never had the authority to set up the homeowner's association and other amenities so reflected in the record notice documents.

FOR A FIRST CAUSE OF ACTION

(Fraud)

22. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth herein verbatim.

23. The Defendants made the following express and implied representations to your Plaintiffs, to wit:

a) That the property could be subdivided into at least two separate lots; and

b) That your Plaintiffs were purchasing property in a gated, restricted community with private, well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

24. The aforesaid representations by the Defendants were false.

25. The aforesaid representations were material to the Prices' decision to purchase the property.

26. The Defendants knew that the representations made by them were false, and the Defendants made the representations with the reckless disregard for the truth.

27. The Defendants intended that the aforesaid representations be acted upon.

28. The Defendants has a pecuniary interest in making the representations as aforesaid;

29. The Plaintiffs did not know that these representations were false and the Plaintiffs relied on the representations by the Defendants and in deciding to purchase the property.

30. The Plaintiffs had a right to rely on the representations concerning the property, particularly since the representations were specifically stated in the Agreement, the existence of a valid declaration of covenants and restrictions had been excepted to in the title policy issued by Jeff Spell, and these facts were material to your Plaintiff's decision to purchase the property.

31. As a direct and proximate result of the aforesaid fraudulent representations made by the Defendants, which were false, and due to such representations being willful, wanton, and with the reckless disregard for the rights of the Plaintiffs, and the Plaintiffs have incurred actual damages in

excess of $50,000 and are entitled to incidental and consequential damages, as well as and punitive damages in an amount to be determined by the Jury.

FOR A SECOND CAUSE OF ACTION

(Negligent Misrepresentation)

32. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

33. The Defendants made false representations to the Plaintiffs concerning the ability to subdivide the property.

34. The Defendants had a pecuniary interest in making the false statements to the Plaintiffs.

35. The Defendants owed a duty of due care to the Plaintiffs to provide truthful information to the Plaintiffs.

36. The Defendants breached the duty by failing to exercise due care in making knowingly false representations concerning the ability to subdivide the property.

37. The Plaintiffs justifiably relied on the representations by the Defendants concerning the ability to subdivide the property.

38. As a direct result of the negligent misrepresentations by the Defendants, which were grossly negligent, willful, wanton and with reckless disregard for the rights of the Plaintiffs, the Plaintiffs have incurred actual damages in excess of $50,000 and are entitled to incidental and consequential damages, and punitive damages, in an amount to be determined by the Jury in this cause.

FOR A THIRD CAUSE OF ACTION

(Unfair Trade Practices)

39. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

40. The Defendants' false representations as outlined above constitute the unfair and/or deceptive acts or practices in the conduct of trade or commerce in violation of S.C. Code Ann. § 39-5-10, et. seq., South Carolina Unfair Trade Practices Act.

41. The Defendants' conduct affects the public interest by misrepresenting what is being purchased versus what is actually being provided.

42. The Defendants' conduct is capable of being of repeated and in fact has been repeated.

43. The Defendants' misrepresentations were willful, knowing, and with total disregard for the rights of the Plaintiffs and other members of the public.

44. As a direct and proximate result of the Defendants' actions described above, the Plaintiffs have suffered actual damages, and are entitled to an award of treble damages, costs, and attorney's fees as this Court may deem appropriate.

FOR A FOURTH CAUSE OF ACTION

(Civil Conspiracy)

45. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully as if said matters were set forth here verbatim.

46. Upon information and belief, your Plaintiffs allege that all of the Defendants acted together and in concert in making the above described representations, all working together toward the injuries and damages suffered by your Plaintiffs.

47. Plaintiffs, upon information and belief, allege that the Defendants, so acting together, all acted for the specific purpose of injuring your Plaintiff so that they (the Defendants) might realize economic gain at your Plaintiff's expense.

48. Plaintiff has suffered special damages and other damages as heretofore alleged as a result of the conspiratorial actions of the Defendants.

49. That to the extent that the Defendants acted willfully, wantonly, and/or with reckless disregard for the rights of your Plaintiffs and for the purpose of injuring them for their own profiteering, your Plaintiffs are informed and believe that they are entitled to an award of punitive damages in an appropriate amount to be determined by the jury in this cause.

FOR A FIFTH CAUSE OF ACTION AS TO THE DEFENDANT JEFF SPELL

(Professional Negligence)

50. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth herein verbatim.

51. Defendant Attorney Jeffrey Spell, acting in his capacity as the residential closing attorney with respect to the purchase of property by the Plaintiffs, owed your Plaintiffs a duty of due care in the handling of all matters related to that closing.

52. As an attorney licensed to practice in the State of South Carolina, with a practice emphasis in the area of residential loan closings, Defendant Spell was required to exercise that minimum degree of care normally attributed to an attorney holding himself out as one with a practice emphasis in residential closing transactions.

53. Defendant Jeff Spell violated the minimum degree of care, and otherwise breached his duty of due care to your Plaintiffs, acting negligently, willfully, wantonly, and with reckless disregard for the rights of your Plaintiffs, in one or more of the following ways, to wit:

a) By representing to the Plaintiffs and otherwise leading them to believe that he was representing their interest at closing when in fact he was not, thereby effectively preventing your Plaintiffs from seeking effective counsel in the closing of the underlying transaction;

b) By failing to properly disclose his representation of the Sellers and Developers with respect to the closing on the property purchased by your Plaintiffs until several months after the

closing, thereby effectively preventing your Plaintiffs from seeking effective counsel in the closing of the underlying transaction;

c) By failing to advise your Plaintiffs and proffering a consent to duel representation at or before closing in such a timely manner that Plaintiffs could be assured that their interest had been adequately protected;

d) By failing to properly review the record title documents in such a meaningful way that Plaintiffs could be properly informed that they were not indeed purchasing a property in a private community with well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same;

e) By failing to take proper exception to the invalidity of the declaration of covenants and restrictions in both the owners and/or mortgage title policies so as to put Plaintiffs on notice that the property purchased by them was not in a private community with well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same;

f) Notwithstanding the failure of properly taking exception to the invalidity of the declaration of covenants and restrictions pertaining to the property, by failing to properly advise your clients of said invalidity of those documents purportedly filed of record;

g) By failing to disclose to your Plaintiffs all other information relevant to the purchase of the subject property of which he knew or should have been aware, and in particular, the utter unsuitability of the property for subdivision as had been contemplated in the original agreement to buy and sell real estate;

h) By not attending the closing and instead allowing another attorney or individual with whom he associated to represent the Plaintiffs interest at closing, whom did not have the requisite skill,

knowledge and other information vital to the Plaintiffs in their decision to purchase the subject property; and

i) By not advising your Plaintiffs of the availability and advisability of obtaining additional title coverage for subdivision related title issues.

j) By otherwise failing to exercise that minimum degree of skill, diligence and competence necessary and proper given the circumstances then and there prevailing.

54. As a direct result of the negligent, careless, reckless, willful and wanton actions and inactions of the Defendant Spell, as aforesaid, your Plaintiffs have been injured in the following respects, to wit:

a) Plaintiffs have lost value to their property which would not have otherwise been purchased if it were not for the actions and inactions of said Defendant Spell;

b) Plaintiffs have been prevented from subdividing their property as contemplated, and therefore have lost the ability they had bargained for to sell individual tracts within the lot purchased by them;

c) Plaintiffs have lost the use of their property by virtue of the fact that a portion of their parcel constitutes wetlands and is restricted in use;

d) Plaintiffs have been made to incur interest carrying charges and other refinancing costs associated with their underlying financial obligation for property that they would not have purchased were it not for the actions and inactions of Defendant Spell,;

e) Such other and further damages as might be determined by the Jury in this Cause.

55. That to the extent that the Jury in this cause finds that Defendant Spell's actions and inactions were reckless, willful and/or wanton, as previously alleged, your Plaintiffs believe that they are entitled to an appropriate award of punitive damages.

FOR A SIXTH CAUSE OF ACTION AS TO ALL DEFENDANTS

(Negligent Development)

56. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth herein verbatim.

57. As developers of the subdivision in which Plaintiffs' property was purchased, all Defendants owed to your Plaintiffs a duty to use due care in the development of Eagle Harbor.

58. All Defendants breached their duty of due care properly owing to your Plaintiffs in one or more of the following ways, to wit:

a) By failing and refusing to comply with state, federal and local rules and regulations pertaining to the subdivision of residential property;

b) By selling the subject lot to your Plaintiffs before obtaining requisite county and state regulatory approvals and/or obtaining the requisite encroachment permits such that Plaintiffs were extremely delayed in their ability to improve the property and to use the same for its purposes.

c) By failing and refusing to obtain the requisite granting of easements and other conveyances before subdivision of the property so as to ensure the creation and perpetual maintenance of a properly gated, restricted community with private, well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, which would enhance the value of the subject property being purchased by them, and otherwise provide for amenities and services not otherwise available in a neighborhood without the same benefits.

d) By failing and refusing to ensure the proper creation of a valid homeowners association so as to generate homeowner's dues vital for the preservation and maintenance of the private roads, common areas and drainage easements located within the subdivision;

e) By failing and refusing to obtain necessary wetlands studies before development so as to prevent illegal subdivision and innocent individual encroachment on federally protected wetlands;

f) By encumbering with mortgages and other financial obligations property intended for the common use and enjoyment of the residents purchasing property within the subdivision;

g) By failing and refusing to disclose to your Plaintiffs the latent defects and other problems connected with the subdivision so as to put your Plaintiffs on notice of the dangers they would be assuming by purchasing property so negligently developed by Defendants;

h) By creating the appearance that Plaintiffs were purchasing property within a properly gated, restricted community with private, and well maintained roads, a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits conferred by the same, when in fact, Defendants knew or should have known that the same was simply not true;

i) By failing and refusing to properly advise your Plaintiffs through Defendants duly authorized representatives before closing that the lot being purchased by them was entirely unsuitable for subdivision, and in fact further deceiving Plaintiffs by representing that that their property could be subdivided when Defendants knew or should have known at the time of the Plaintiffs' purchase that this representation was wholly untrue;

j) By otherwise engaging in additional negligent, careless, reckless, willful and wanton acts and omissions in direct violation of the standard of care by developers to your Plaintiffs as may be found by the Jury.

k) That as a result of the negligent, careless, reckless, willful and wanton actions outlined hereinabove, Plaintiffs have been injured and damaged as heretofore alleged, and seeks an appropriate award for their actual and compensatory damages suffered in an amount to be determined by the Jury in this cause.

59. To the extent that the Jury in this cause finds that Defendants actions and inactions were reckless, willful and/or wanton, as previously alleged, your Plaintiffs believe that they are entitled to an appropriate award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION AS TO THE DEFENDANT INVESTORS TITLE INSURANCE COMPANY

(Declaratory Judgment)

60. The Plaintiffs repeat and reallege the matters set forth in the preceding paragraphs as fully and completely as though said matters were set forth here verbatim.

61. Plaintiffs seek a declaratory judgment brought pursuant to S.C. Code Annotated Sections 15-53-10 *et seq,* whereby Plaintiffs seek this Court's declaration of whether Defendant Investor's Title Insurance Company has responsibility for covering the loss claimed by Plaintiffs under the either or both the Mortgage Title Insurance Policy and the Owners Title Policy issued at the closing with respect to the subject property, namely policy numbers OR-A-055849 and M-A 146678.

62. The Plaintiffs have brought certain claims for relief against the remaining Defendants in this cause touching and concerning, among other things, the defective recording of a declaration evidencing certain covenants and restrictions, the same not being excluded from coverage under the Defendant Investor's Title Insurance Coverage Statement.

63. Plaintiffs are informed and believe that this issue of coverage should be resolved by declaratory decision.

64. Plaintiffs allege that they will suffer irreparable harm if their cause seeking a declaratory judgment is not heard, as the underlying case and the question of coverage contain common questions of law and fact, and should as a practical matter be resolved in a simultaneous fashion.

65. Under the circumstances herein, there is a controversy of a justifiable nature between the parties, and your Plaintiffs are informed and believe that they are entitled to have the Court inquire

into these matters and issue a declaratory judgment determining the rights of the parties with respect to the question of coverage by Defendant Investors Title Insurance Company of America.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, jointly and severally, for actual damages in excess of $50,000, incidental, consequential, and punitive damages, treble damages, attorney's fees, interest, the costs of this action, and for such other and further relief as this Court or the Jury might deem just and proper; and

As to the Defendant Investors Title Insurance Company of America, for a judgment declaring whether or not coverage exists for the loss so suffered by the Plaintiffs, and in the case such coverage does exists, then for a determination of the monetary amount of coverage to be paid over to Plaintiffs and their mortgage lender in satisfaction of the respective owners' and mortgagee's policy.

CHELLIS & FRAMPTON, PA

By: _____

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(843) 871-7765
ATTORNEYS FOR PLAINTIFFS
Dated: November 22, 2005

In the Matter Of:

Ronald and Diana Price vs. Belinda and Gerry Fox, et al.

Hearing

September 24, 2018

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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BERKELEY

RONALD E. PRICE and DIANA R. B. PRICE,

Plaintiffs,

vs. CASE NO. 04-CP-08-1855

BELINDA FOX, ET AL.,

Defendants.

HEARING

BEFORE: JUDGE DALE EDWARD VAN SLAMBROOK

DATE: September 24, 2018

TIME: 2:06 p.m.

LOCATION: Berkeley County Master-In-Equity
300-B California Avenue
Moncks Corner, South Carolina

REPORTED BY: Julie L. Bonomo

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

THE COURT: All right. So we are here on motions in the Price versus Fox, et al., 2004-CP-08-1855, and my understanding is that we have two motions to reconsider. One on behalf of the Foxes by Mr. Ferrara and then the second one by Mr. Hubbard; is that correct?

MR. HUBBARD: Yes, Your Honor.

THE COURT: That's what we have in front of us today. Anything else that I don't understand or missed that we would be considering today?

MR. JACKSON: No, Your Honor.

MR. FERRARA: Your Honor, may it please the Court, Paul Ferrara, I -- just inside of that motion to reconsider we had a motion for a new trial and motion to alter or amend, but, yeah, that's correct.

THE COURT: Okay. The same two motions filed by you two. Okay. So whichever wants to go first, have at it. Mr. Ferrara?

MR. FERRARA: Thank you, Your Honor, may it please the Court. Your Honor, first and foremost, I was speaking with Mr. Jackson about this and I would like some direction from the Court because this will dispense with some of my argument

today. I understand Your Honor's ruling that alternatively you have awarded the Prices damage for the negligent misrepresentation cause of action or the South Carolina Unfair Trade Practices cause of action and that they're not allowed to recover on both of those because that would be duplicate damages.

And so as I understand it, based upon Mr. Jackson's affidavit in the filings with the Court, it appears that the Prices have elected to proceed forward on the Unfair Trade Practice Cause of Action. And so, if that is the case, then I can just limit my argument today on that and not waste that Court's time regarding the negligent misrepresentation causes of action.

THE COURT: Is that right?

MR. JACKSON: Well, Your Honor, I assume he meant based on my attorney's fee affidavit, perhaps, that he concluded that. I'm not sure that I'm required to elect as long as I'm limited to a single recovery. For example, if he decides to appeal, I believe I could defend either position. And if either one of them gets overturned, I would still have the other position. I'm definitely leaning to a single recovery, but

that's 100 percent clear, but in terms of election, I don't think I'm required to elect at this time.

THE COURT: Okay. Mr. Ferrara, certainly if you wanted to withdraw the argument as to one, but you might end up waving that again if there was some appeal or some crossover on that. I'll leave that to you on how you want --

MR. FERRARA: Sure.

THE COURT: -- how you want to do it.

MR. FERRARA: Okay. Your Honor, I guess first and foremost, Your Honor, I would like to first start with the motion for a new trial as it relates to the unfair trade practices cause of action. Specifically, Your Honor is very familiar with that and respectfully, Your Honor, I would just -- I'll rest on the grounds and the motion that's been filed with the Court that Your Honor has read.

I will just briefly highlight for today's purposes, Your Honor, that I reviewed the trial transcript and I have received that from the court reporter, Your Honor, and I can find no evidence that defendants Belinda Fox nor Gerry Fox meet the first element of unfair trade practice. Which is that either one of those two individuals,

Your Honor, engaged in an unlawful trade practice in their own capacity. That's important, Your Honor.

This cause of action, unfair trade practices as created by statute to allow a remedy to plaintiffs, but there must be willful conduct on behalf of the defendants. Just simply saying that Belinda and Gerry are part of an enterprise that Mr. Gilbert was part of is not enough, I submit to Your Honor.

This cause of action, as Your Honor is aware, allows for treble damages and that is because of the element that requires willful conduct to severe cause of action, and it's not as simple as a negligence cause of action or even a negligent misrepresentation cause of action to make my clients liable.

I have looked at the trial transcript, looked at the depositions that were part of the trial and I think it's clear, Your Honor, that neither Belinda nor Gerry made not only unlawful trade practice, but not even a misrepresentation. There was no negligent misrepresentation by Belinda or Gerry in their own capacity. I understand the Court's order about Mr. Gilbert and his

representations, but I respectfully request Your Honor to hold that against Mr. Gilbert in his own individual capacity.

THE COURT: So you're saying that wouldn't be imputed again as a -- in partnership with these folks, with your folks? Is that what you're saying?

MR. FERRARA: Yes, Your Honor. And I understand, of course, the general principles of agency. However, in this case, Your Honor, as the trial testimony established, there is no evidence that Belinda nor Gerry authorized Mr. Gilbert to act deceptively or to make false representations.

I reviewed the trial transcript and I will be happy to share that with the Court if you need it at a later date, but I think that it's clear according to the Prices and even Gerry Fox and Belinda Fox that the representations that the Court is basing its award upon were not made by my clients. And furthermore, Your Honor, Mr. Gilbert admitted and so did Mrs. Fox that there was no connection between representation and his conduct being acquiesced or authorized by Gerry or Belinda.

Now, respectfully, Your Honor, I do think if there was some evidence that Mr. or

Mrs. Fox authorized Mr. Gilbert to act and make false representations and make actionable conduct, I think the plaintiff would have met their burden. But in this case, that's missing. The plaintiff has not met their burden as to the Foxes on that. So really what I'm getting to, Your Honor, is when I cited this in the motion Abbott versus Sumter Lumber Company by our supreme court basically said the principals are liable for an agent's acts if it's within the scope of the agency.

So in this case, Your Honor, careful review of the transcript doesn't evidence that there is any -- that Mr. Gilbert was authorized to make false representations on behalf of the Foxes. Importantly, Your Honor, to elicit that point, if we look at the timeline in the trial transcripts, the closing of this property happened, as I recall, in November of 2003, and the DHEC letters, Your Honor, that are exhibits, Plaintiff's Exhibit 40 I believe was after.

The Court apparently relied upon this DHEC letter, as Your Honor may remember, to base its understanding that Mr. Gilbert was on notice that there were deficiencies with this particular lot that the Prices purchased. But that letter was

in February of 2004 and the closing happened before. So if we think about this, the improper conduct that Mr. Gilbert is being found responsible for by the Court, his conduct occurred presumably at the time of closing. And then we have a DHEC letter that the Court, I presume, is relying upon to establish Mr. Gilbert's willful conduct which happened later. And so the -- it's impossible that the false or misleading, unlawful conduct of Mr. Gilbert could have been known to him at the time of closing. In fact, the trial testimony, Your Honor, was that Mr. Gilbert was not aware about the status of the property until later.

Importantly, I did want to also direct the Court's attention to Plaintiff's Exhibit 40 where Mr. Bozart (ph) admits that he did issue a permit to Diana Price for the construction of her home on February 12, 2004. And so I submit to Your Honor that in order for that permit to have been issued at that time, even DHEC must have been under the impression that that property was able to be sold and in compliance.

Later on, they revoked the permit and the letter references that because of the encroachment permit from the DOT that was missing.

But as I understand the Court's award of damages, the delay of building on this lot is not part of the damages that the Prices have been awarded. And so now what we have, Your Honor, is that the unlawful conduct, if the Court is relying upon the DHEC information, does not naturally and probably flow to the damages in this.

And so, the third element, Your Honor, on unlawful trade practice cause of action requires that the conduct has an adverse impact on public interest. I'll just simply state, Your Honor, I think this cause of action does not apply to the cause that was tried before Your Honor. It's not the appropriate remedy, but clearly while there was repetitive testimony about problems with the neighborhood, I submit to Your Honor that there was not enough testimony to establish that this conduct could be repeated or that it has been repeated again, and that it has an adverse impact on the public interest.

I know Mr. Hubbard has briefed that point, Your Honor, and I would join in his comments on behalf of the Foxes with that rationale. And as I move on, Your Honor, I just think that it's important that this cause of action requires

willful and malicious conduct, and the trial testimony does not establish that the Foxes willfully or maliciously acted to harm the Prices. So I'll respectfully request that you grant a new trial on that or vacate or modify your order to reflect that.

Additionally, Your Honor, moving on, Your Honor, I moved the Court to alter or amend your final order, Your Honor, with respect to the equitable indemnification asserted by the Foxes in the pleadings. Your Honor, my memo or my motion states that a right to indemnify may arise by contract, implied contract even, or as a matter of equity.

Your Honor, for the reasons that I just elicited, that the conduct that apparently the Court is holding that the Foxes are responsible to the Prices for, occurred through actions of Mr. Gilbert. And the trial testimony was that there was no agreement between Mr. Gilbert and the Foxes. That despite the Court's ruling, I assume at this point that that agency law creates liability for the Foxes for Mr. Gilbert's conduct. I would respectfully request that you grant the Foxes claim for equitable indemnification against

Mr. Gilbert.

On Page 454 of the trial transcript, Your Honor, I called Mr. Gilbert to the stand and I made an announcement to the Court that we were proceeding forward on the equitable indemnification cause of action against Mr. Gilbert, and Your Honor allowed me to call him as an adverse witness in that regard. And so, I respectfully request, Your Honor, just to clarify whether the Court believes that the Foxes would be entitled to indemnification on that point.

THE COURT: So you're asking for a ruling as to the equitable indemnification claim be included in the order.

MR. FERRARA: Yes, sir.

THE COURT: At least

MR. FERRARA: Yes, sir.

THE COURT: Preferably favorable, of course.

MR. FERRARA: Yes, sir. Additionally, Your Honor, I'll move now to the negligent misrepresentation cause of action. In short, Your Honor, respectfully request Your Honor to alter or amend the judgment to exclude the Foxes from this cause of action as well, Your Honor. Respectfully,

because of the lack of false representation by Belinda and Gerry Fox to the Prices.

I believe Mrs. Price, at trial, testified that no representations were made to her. I don't recall now and I don't want to misrepresent to the Court about Mr. Price, but I do believe this, that the uncontroverted testimony in trial was that the representations that the Court has deemed to be actionable came from Mr. Gilbert in connection with the lot.

And so, importantly, Your Honor, again the plaintiff is missing the fact that defendants Gerry and Belinda Fox made false representations to them. They are, of course, relying upon agency and I'm going to get to that in a moment, but I would respectfully request you exclude them from the order because they actually didn't make a false representation.

Secondarily, Your Honor, many of the representations with respect to the ability of the lot to be built upon, the ability of the lot to be subdivided, the compliance, in general, with both state and federal regulations at the time of closing, I submit to Your Honor were not false for the trial doesn't establish -- the testimony at

trial doesn't establish that those statements were known to be false at the time that Mr. Gilbert made them at the closing.

So I said, Your Honor, the closing occurred in November of 2003 and plaintiffs submitted a lot of these letters from DHEC that occurred after. There is a letter in the trial transcript that was from 2002, but that letter doesn't establish that Mr. Gilbert knew that any of that information contained in that letter was not accurate at the time that the lots were sold to the Prices.

These statements that the Court has ruled upon, after the fact, the plaintiffs are asking the Court to piece together and assume that these statements must have been false. But when we look at what was actually presented at trial, the plaintiffs have failed to meet their burden to establish that Mr. Gilbert actually knew of the statements to be false at the time.

The reason I say that, Your Honor, is to not be flippant or make light of that, but our Court has clearly said that if you make a representation of a -- the representation, Your Honor, has to be known to be false at the time.

And specifically in my motion, Your Honor, Fields versus Melrose Limited Partnership makes the point that the representation must relate to a present or preexisting fact and be false when made. And respectfully, Your Honor, I think a lot of these representations were to nonpresent or preexisting facts. Meaning, they're equivalent to salesmanship or puffery.

So this case, Your Honor, as I understand it, stands for the proposition that if promises are made for future acts that, in essence, the Court has ruled that a litigant or a plaintiff cannot rely upon things that may or may not happen in the future because that is not justifiable. That makes common sense. It's got to be a statement that you know is false at the time.

Yes, Mr. Gilbert knew of the general regulations as established in 2002 by DHEC, but there was no testimony that at the time that Mr. Gilbert assisted in selling the lot in 2003 that he was -- that he knew that everything wasn't in place in order to get a permit for the Prices' home.

In fact, the permit was given by DHEC as established by plaintiff's 40 and then they

revoked it due to the encroachment permit, which really has not anything to do with the development, and I don't want to waste the Court's time on it, and the Court hasn't awarded any delay damages for the delay of their home. That did cause a delay, presumably I think the Prices testified about three months. That caused a delay in their case, but the Court has ruled at this point that there weren't any damages associated with that delay.

And so Mr. Gilbert surely did not know and there has been no evidence that he knew that something was lacking at the time of closing. And I think Plaintiff's 40, Your Honor, establishes that even DHEC thought that everything was in compliance on February 12, 2004, which was a few months after closing.

So it's important, Your Honor, that even though a statement or a fact may not -- may have turned out not to be accurate when made, if it is a statement of a future fact, that that's not actionable. Specifically, Your Honor, as well, the homeowners' association covenants and restrictions, I would submit to you, Your Honor, that to the extent that the Court is making an award based upon that, the covenants and restrictions, that those

covenants and restrictions are part of Mr. Carter's opinion and we're going to get to that momentarily. But I believe Mr. Gilbert testified that his attorney Steve Smith prepared or assisted in the covenants, and he was under the impression that the covenants were valid.

And so, again, the covenants whether they were valid or were not valid at the time is not the point. The point is did Mr. Gilbert know that the covenants were invalid at the time that he assisted in the sale of the property with the Prices and he couldn't have known. There has been no testimony that he did and he couldn't have known. And presumably Mr. Spell, who did the closing, would have brought that up if there was there was an obvious problem. So if the real estate attorney that is doing the closing doesn't know about it, how could Mr. Gilbert know about it?

Finally, Your Honor, let's see. A moment, Your Honor. I lost my place. Finally, Your Honor, the Rule 50, motion for a new trial, is based in part additionally on Mr. Carter's testimony, his trial exhibit, and the Court's finding of fact. I don't take issue with the Court's finding of fact. However, if I understand

Your Honor's ruling, that based upon the Army Corps of Engineers exhibit and that approximately 2 acres of wetlands existed on the Prices' lot that they purchased, that based upon that, the Court found that Mr. Carter's opinion of damage to the Prices for the difference between what they purchased and what they thought they purchased -- I'm paraphrasing, Your Honor -- was 82,000 -- I believe 82,570.

MS. BAIG: 530.

MR. FERRARA: 530. Your Honor, I submit to the Court that Mr. Carter's report is based upon many assumptions, and one of those assumptions being that there is over half to a third of their total property being wetlands. I did the math, Your Honor, 2.62 acres to 3.93 acres. And I specifically asked Mr. Carter to try to weed through his whole report and just help the Court understand what is the value of the 2 acres of wetlands that the Prices purchased. And he said, I and I have got the trial document -- I can send Your Honor the transcript, it's on page 169, but he says he couldn't say what the 2 acres of wetlands were valued at based upon this report and his exhibit that was submitted at trial, Plaintiff's

38.

And so, I think the appropriate remedy, Your Honor, is to have either additional testimony or a trial on a limited purpose of -- to answer the Court's question about what the value of the plaintiffs' damages are at a minimum. As Your Honor knows, the plaintiffs aren't allowed to have just some amount of damages that they want, and even if they have an appraiser just put a number down on a piece of paper, that doesn't meet the required elements of certainty as required by our supreme court.

And so I tried to ask Mr. Carter specifically what are the 2 acres worth of wetlands. Because I understood the testimony at up to trial and Mr. Carter couldn't answer at that time. But I would respectfully request, Your Honor, in order to be able to satisfy justice and comport with the law of South Carolina to allow additional testimony, allow a new trial for additional testimony on that point. Because the plaintiffs -- if the plaintiffs -- if the order stands, Your Honor, respectfully, I believe it would be speculative and it's clearly -- the record is clear that Mr. Carter said he based his report

upon the assumptions.

And I could send Your Honor all of his trial testimony if the Court would need that again. I have got the transcript in its entirety and I'll represent, as an officer of the Court, I specifically went back and read his testimony to make sure I didn't misunderstand it, but his testimony at trial was that he couldn't tell us the value. And I would think, Your Honor, that maybe we could do a simple calculation to adjust the Court's award or Mr. Carter's damage down by the appropriate pro rata percentage, but Mr. Carter said it wasn't that simple.

Additionally, Your Honor, I was trying to ask him about the value of the property to help understand the damage claimed by the plaintiff and he again told me that it wasn't that simple because there were several different factors. So I would just respectfully request, Your Honor --

THE COURT: Didn't Mr. Carter -- Mr. Carter, he present a figure as to what it would be worth based upon if the representations were true versus as it existed? Wasn't that his testimony as to value and the difference between the two of them?

MR. FERRARA: Yes, Your Honor. Well, what is even more -- yes, but his testimony was that based upon the assumption that -- assuming the truth of his report that in Paragraph B of his letter, Your Honor, that one-third to one-half of the 7.86 acres was wetlands, but Your Honor ruled based upon the Army Corps of Engineers exhibit that the plaintiff had 2 acres -- approximately 2 acres of wetlands.

So at that time, Mr. Carter was not aware of the amount of wetlands. He was just assuming based upon Michael Moore's representation that approximately one-half to one-third of the property contained wetlands and was unusable. So that was the issue.

THE COURT: Wasn't the cross-examination relative to the specific of amount of wetlands that was contained?

MR. FERRARA: There was and Mr. Carter said that he could not give an evaluation about the dollar amount.

THE COURT: Okay.

MR. FERRARA: And so --

THE COURT: But confronted with what you see is a significant discrepancy, he didn't

change his opinion, did he?

MR. FERRARA: He did not.

THE COURT: Okay. I'm sorry to interrupt you. Go ahead.

MR. FERRARA: No problem. Your Honor, his opinion also says that there were no enforceable restrictive covenants in the neighborhood, but I don't know that there was testimony that the restrictive covenants were not valid as of today. I understand the plaintiffs' position, but I don't know that that -- the preponderance of the evidence was met on that point. So that is another assumption, but.

THE COURT: You're talking about the ones that were put in place after the ownership changed hands though, right?

MR. FERRARA: Yes, Your Honor.

THE COURT: Okay.

MR. FERRARA: And so Mr. Carter's valuation is on the date of closing, which plaintiffs don't have a problem with that or at least the Foxes don't have a problem with that. But he just assumed that the covenants and restrictions wouldn't be valid ever as to that neighborhood or to the Prices, and so I think that

that is a faulty assumption. And the Court may not have put any weight upon that when awarding damages, but nonetheless -- let's see here.

Respectfully, Your Honor, there should be a new trial on that point at a minimum. Again, Your Honor, I think that in order to allow the order in its current state to stand would not be proper because the damages that were presented at trial are -- that amount -- the damages by Mr. Carter seemed to be inconsistent with the Court's finding about the Army Corps of Engineers' letter that references the 2 acres.

Specifically, Your Honor, I do want to mention one other thing. That the Army Corps of Engineers' letter, while it was admitted, just having that document from the Army Corps of Engineers admitted doesn't establish with certainty the plaintiffs required proof to damages. The Army Corps of Engineers' letter respectfully, Your Honor, if you look at the carefully basically elicits that based upon the representation by the lot owner to the Army Corps of Engineers, we concur that if you believe that wetlands exist on your property, we will say that wetlands exist on your property and that this is not a representation to

you. That only 2 acres of wetlands exist on your property or that wetlands exist on your property at all and that we can change our opinion at any time and that you can't really rely upon it. That document in and of itself, Your Honor, doesn't establish that.

Now, I understand the Court may not have relied upon that, but Mrs. Price's testimony that approximately 2 acres of wetlands were on her property, maybe the Court relied upon that. But this type of, you know, hearsay and slippery slope, allow that and then get from there to here, to there, to there, is exactly what this case is, Your Honor. The unfair trade practices action requires some type of willful conduct and a steady flow of proximate cause from that conduct to the damages to the Prices. And respectfully, Your Honor, that is lacking in this case.

Belinda nor Gerry Fox have not done anything in their own individual capacity or even authorized by their agency with Mr. Gilbert. There has been no evidence that they directly or indirectly allowed Mr. Gilbert to do these things that were false and willful at the time that caused the Prices damage.

Respectfully, Your Honor, I would like the Court to allow the trial, a new trial, on the testimony on the valuation of the property that -- and I think that the Court can do that quickly and expeditiously if Your Honor would allow, and make it very brief as to that point. And so for those reasons respectfully, Your Honor, we request that you grant the relief not only for the new trial, the judgment notwithstanding the verdict or alter or amend the judgment as Your Honor deems so fit.

THE COURT: All right. Thank you. Well, so I don't get too confused, instead of hearing both and then having you respond in full, let me have you -- hear from you.

MR. JACKSON: Certainly, Your Honor, I will be glad to.

THE COURT: Mr. Jackson just as to his arguments. I know there is obviously going to be some crossover.

MR. JACKSON: Yes, Your Honor, and that's fine, however the Court wants me to proceed. Derrick Jackson on behalf of Ronald and Diana Price. I'll address Mr. Ferrara's order. First, Your Honor, on Wednesday of last week I filed a copy and I sent the Court a copy of my brief. So I

want to make sure the Court was aware that was sent in.

THE COURT: I have that.

MR. JACKSON: And I filed a full return. As to the unfair trade practices, I think Mr. Ferrara mischaracterized the law as saying that you have to prove a willful or malicious act. That can be a requirement for treble damages, but not just for the unfair trade practice in itself. He also implied that you somehow had to have an authorization, that somehow that Foxes had to authorize Gilbert in order to have that as liability. But the case that he cited talked about scope of agency, and scope of agency and authorization are not necessarily the same thing. Of course, someone can be proceeding in the general, like in this case, Mr. Gilbert by selling lots would be the scope of his agency, and it doesn't matter whether or not they specifically authorized them. Although, the evidence is certainly they did.

I mean, recite in my brief that Mr. Fox knew that he was going to do all -- Gilbert was going to do all the work. Mrs. Fox knew he was, you know, dealing with the salespeople, dealing

with selling of the lot. Both of them said that they knew that he was marketing the lots and so they put him in that position of authority, but even so, it's not required that they ratify that.

And Your Honor, a side case in the unfair trade practices part of my -- in my brief the State versus McLeod and C & L Corp. cases, it's very similar. They have it was a -- you know, it says C & L authorized Cooper to sell lots, in turn, authorized the salesmen to assist them. The misrepresentations were made during the negotiations for the sale of the lots and thus were made while the salesmen were acting within the scope of their authority.

And it goes on to say, but both C & L and Wayne Cooper, these were the principals, were liable regardless of their knowledge. So they can by liable regardless of whether they specifically -- again, I cite partnership as the primary basis for liability similar to negligent misrepresentation. I would point out for the Court the Unfair Trade Practices Act defines a person to include partnership specifically. So you have all that going into the thing.

There is other citations I have in

there where they said they are liable regardless of the ratification, and they go -- specifically they say, "Principals liable for the fraud, deceits, concealments, negligence, and other malfeasance."

THE COURT REPORTER: Slow down, please, sir.

MR. JACKSON: I'm sorry. "And omissions of duty as agent, acting within the scope as agent. Although the principal did not authorize, participate in, or know of such misconduct." Then it cites two cases there, the Williams case. So clearly your have all of that in there.

Now he cites, he goes back and he refers to the DHEC letters, but there was actually, in fact, two DHEC letters that Gilbert had prior to that sale that references that. The first letter was all the way back to 2001 about the subdivision. The second letter was February 7, 2002, and that specifically mentioned that lot 20, you know, could not support a septic tank, so you have that.

Now, he mentions equitable indemnification. We certainly don't have any specific objection if the Court wants to award indemnification. We only say we would request two

conditions on that. One is that he is only indemnified to the extent that he actually pays on the damages. You can't just have a general indemnification until he actually pays those damages. Otherwise, there is nothing to be indemnified against.

And the second condition would be that to the extent it's unpaid, it's junior and subordinate to any unpaid damages the Prices still have. And so that those two I would request. Other than that, we have no objection to the equitable indemnification.

On the negligent misrepresentation, again, I cite that in the brief. Again, I think Mr. Ferrara misstates the law when he says that they have to know the representation was false. The very idea of negligent misrepresentation arose from the person who had duty because they had a pecuniary interest in the transaction, a duty of care to representations to third parties. So if he, you know, he had a duty to find out and make sure the representations he made were accurate. So it's not correct to say he had to know a falsity. If he knew of the falsity, that would make it graduate from negligent misrepresentation to fraud.

And so that is not a requirement.

Now, on each of those elements, and I'll hit the high points in my brief because I don't want to take up too much of the Court's time. I do believe there was sufficient evidence that they were false at the time they were made. The septic tank, because of the February 7, 2000 letter, Gilbert specifically knew it didn't meet the minimum standards for any type of surface treatment and disposal system. That is 2002. That is well before the Prices' closing, and that specifically mentioned Lot 20 and therefore he knew that that would have been false.

Subdivision, he knew because there was no ability to have a septic tank, he would also know that there was no ability to subdivide for residential use. Now, they tried to make the argument and they did present evidence that it could be potentially subdivided for nonresidential use, but the testimony was that Gilbert told the Prices because of the size -- they didn't want to buy that large of an acre -- he said, well, you can subdivide these lots and sell them and help pay for the construction cost. Well, who wants to buy a nonbuildable lot in a subdivision? So that

argument doesn't hold any water.

The restrictive covenants, I think the evidence is very clear that they're not valid and enforceable. He testified that they did -- the declarant Eagle Harbor, Inc. only owned two lots in the subdivision and those were donated. I mean, those were like borrow pits. And so certainly those were not enforceable covenants.

The testing, he represented that there had been testing that had been done and everything was fine, yet we know that there was a problem with the high water table that he hadn't had knowledge of and we also know that he didn't do any of the compliance with the Clean Water Act or any of the other things or a wetland delineation. So you have all of that.

Turning to Mr. Carter, a couple of things about that, and I point these all out in the brief. Number one, the letter that he is referring to as Mr. Carter's letter was actually sent by the attorney to a different appraiser, another appraiser that was not even used in this case. One week later, after that, that was dated November 1st. One week later, on November 7th, the Prices received the wetland delineation that is at issue

in this case. And therefore, you know, it was understandable that he was estimating a little bit at that time, but now they had gotten the specifics. To say that Mr. Carter was not aware or made a faulty assumption is just not true. He included the wetland delineation in the 2 acres in his report. It was part of his report.

Not only that, when he is talking about the property description in his appraisal, and he talks about the site location, he specifically mentions 2.0 acres of wetlands when he was defining what the buildable site area is. So Mr. Carter was fully aware of the 2.8 acres and used that in coming up with his report. Now, so you have that.

Mr. Ferrara made bunch of arguments about, well, he didn't talk about the -- he didn't testify that the 2 acres of wetlands were worth a certain amount of money. Well, his task was to determine ultimately the difference in value as represented versus the represented of what they got. He also upon cross-examination by Mr. Ferrara said you don't sell lots that way. You don't sell lots as wetlands and highlands, you sell them at a blended rate, and he testified to that.

Now, in terms of the Army Corps of

Engineers and representations that were made as to that in the 2.8 acres as being, quote, approximate. Yeah, they were approximate, but the law requires a reasonable degree of certainty. I would point out to the Court two things about how reasonable that is. Number one, I asked Mr. Carter while he was on the stand how accurate were these Army Corps of Engineers' determinations. He said, in my experience, they're very accurate.

Number two, in the determination itself the Army Corps said this determination is good for five years absent, you know, some reason to change the delineation. So I would submit that was a reasonable -- 2 acres was a reasonable thing to rely on.

I believe I have covered Mr. Ferrara's points that he argued about and any that he didn't argue about I would say, Your Honor, they're fully covered in my brief and I would stand on the brief as to those arguments. Thank you.

THE COURT: Thank you, Mr. Jackson. Mr. Hubbard?

MR. HUBBARD: Thank you, Your Honor Carl Hubbard for Danny Gilbert, Heritage Classic Homes, Inc., Eagle Harbor, Inc., and by default I

think Eagle Harbor Phase 2 Partnership as it might appear.

Your Honor, I probably won't be as eloquent or concise as these two lawyers, but as devastating as the verdict was or the findings were, on May 7th when you sent your initial e-mail out asking Mr. Jackson to prepare a draft order, I did breathe a certain sigh of relief as Eagle Harbor, Inc. was not listed in your e-mail as being liable. In fact, I think that you referred to Danny Gilbert d/b/a Eagle Harbor to develop EH including Lot 20, but Eagle Harbor, Inc. as a distinct corporate defendant was not listed in your e-mail.

So when the final order did arrive, I was somewhat surprised to see that Eagle Harbor, Inc. has been found liable for being part of the partnership with the Foxes and Mr. Gilbert. It's has been found for liable treble damages and attorneys fees and these sorts of things. So I wasn't clear as to how moving it from May 7th to the final order Eagle Harbor, Inc. became liable, but I'll go through -- I have filed a brief that -- or I have submitted a brief. I have not been able to file it. I have tried a couple of times to get

on the Berkeley County newly-established website for e-filing and I'm getting a notice that something -- and I have sent an e-mail asking them to help me, but I'm not sure when that will happen.

THE COURT: Somehow they're down today including the public index.

MR. HUBBARD: But I think everybody probably has them, the memorandum that I have submitted.

THE COURT: We have that, yes.

MR. HUBBARD: It's not a memorandum that's full of case law. I have relied really a lot on what happened here over the two days of the trial. We heard from the Prices of course, and Mr. Gilbert, and the Foxes, and Mr. Carter. But from that testimony and from the transcripts and the depositions I have reviewed, Eagle Harbor, Inc. did not play a role in this partnership. They did not play a role in the development of Phase 2.

And I think part of the confusion for me, you know, I have been involved in this case somewhat for several years now, but it went on for almost ten years before I got involved in it. But there are a myriad or three distinct areas within this master plan that was set up. You have the

children's home that was within the center. You have Phase 1 and you have Phase 2 of Eagle Harbor. Collectively, they are all referred to as Eagle Harbor.

Eagle Harbor, Inc., when this agreement came about to develop Phase 2 which is where Lot 20 is located, Eagle Harbor, Inc. had no interest in that property. It was agreed that the Foxes and the Winns would buy the property. And again, I think it's important to note as we'll get further into other issues, the Foxes, the Winns, Mr. Gilbert at this time 14, 15, 16 years ago were not real estate developers per se.

The testimony that Mr. Gilbert gave was that he spent four years in Alabama at a children's home and he wanted to move back to South Carolina and do this. And the way that he found to do this was to find some property, and with the assistance of the Winns and the Foxes, they were able to get the property. But the boys' home is a separate and distinct -- it bears a separate and distinct TMS number within the greater Eagle Harbor.

I know the point has been made regarding the Stantec lawsuit and the Stantec plat, but if you look at the lawsuit itself from

Charleston County, which Mr. Jackson has referred to, those three distinct TMS numbers are part of that lawsuit. It has nothing to do with Phase 2 as far as Eagle Harbor, Inc. is concerned. Eagle Harbor, Inc., I believe the testimony is shown and I believe the plat reveals, appears on the plat at least. Because in order to get to Phase 2 of Eagle Harbor, you must cross land from I think it's Haney Branch Road to Saddlehorn, which is a private road, to get to Phase 2. And Eagle Harbor owns that property, but they allow those residents to come and go on that. Of course, we have a whole other issue going with roads and roads are a problem out there. There is no doubt.

But Eagle Harbor, Inc. didn't participate in the development of Phase 2. I believe the evidence was clear on that. For those reasons, I would ask that the Court adjust its finding of facts and certainly the conclusions that Eagle Harbor, Inc. as a separate and distinct entity should not be part of this judgment or this order.

THE COURT: Mr. Hubbard, as to the instructions, those were outlined instructions and I think they had --

MR. HUBBARD: Certainly.

THE COURT: -- the standard language about it's not an order until it's an order.

MR. HUBBARD: I certainly understand that. But you --

THE COURT: Okay.

MR. HUBBARD: Coming from my perspective, I hope you understand, I don't see one of my client's names in there and then all of a sudden they're everywhere.

THE COURT: I understand.

MR. HUBBARD: I may move back to Eagle Harbor, but I'm going to move on to a couple of the other -- well, I'll pick up where Mr. Ferrara left off on the Unfair and Deceptive Trade Practices Act which affects all of the defendants.

Again, I think you have, back when this was going on when the lot was sold, you had neophyte folks that were trying to do this. More importantly, I think, there has been no evidence that these folks have ever before then or after been involved in any sort of real estate development. The purpose, as the evidence showed, to put this together was really to get the children's home established. And they found a way

to sell lots.

And Mr. Gilbert testified that part of the idea behind having the children's home out there and having a residential area all around it was so that those children would feel like they were part of a community. That was part of the development. That was part of the development that these kids would ride the bus to school and come back from school with the kids from the neighborhood, those sorts of things.

I don't believe that the evidence has been tendered that this has a possibility of being repeated or as stated under the act or meted out in case law, a potential or repetition. Even if one gives the notion that these -- some of these acts were hurtful or caused damages, these were many years ago. Lots have been bought and sold in the development. There have been no other claims brought forth regarding the development of the Eagle Harbor Phase 2.

And so, for those reasons, I would ask the Court to please reconsider the finding of the Unfair and Deceptive Trade Practices count in the fact that no evidence has really been shown that -- not even hypothetical evidence -- that this has a

potential for repetition. These folks are all, with the exception of this litigation I think, have tried to move on in a way and have been doing different things, but never have they been involved in developing residential real estate.

A couple of things with Mr. Gilbert. And I've seen Mr. Jackson's brief on this one point, and I'll stand corrected if I need to be, but it was my recollection from the testimony given by Mr. Gilbert, and this is speaking specifically to his work on Lot 20 for the plaintiffs, that he got started, he had a foundation begun, and then things fell apart. The Prices moved on. They had somebody come in and look at the foundation. They hired two more subcontractors after that or two more contractors after that to finally get their house completed, but it was my recollection from the testimony and again, I apologize if I have got this wrong, but that foundation that Mr. Gilbert put in, part of it anyway, was used later by the Prices for the building of a foundation for an outbuilding and their actual residence was located somewhere else on the property.

So his testimony was that he valued that foundation that they used at $3,500. There

was no cross-examination regarding that to my recollection, no objection to it. And so if the Court's certainly going to find that Mr. Gilbert is liable for certain damages or for that matter Heritage Classic Homes, I would ask that that portion of it be given a credit for that amount of money that -- Mr. Jackson has indicated it's a circular argument. But again, if I'm wrong about where it is, then I stand corrected. But if I'm not wrong, then they got the benefit of that foundation in some capacity that they did not pay for and it wouldn't be rolled back into the construction of the house.

THE COURT: But you agree that it would potentially be rolled back in if it was part of the foundation of the house?

MR. HUBBARD: I would say, Your Honor --

THE COURT: Only if it was a separate outbuilding.

MR. HUBBARD: It's my recollection and I believe that was his testimony, that it was not part of the residence. It was -- it became -- additionally, it was begun as that, but then it became an outbuilding that was built on that

portion of that foundation, not all of it.

I'm going to speak a little bit to the -- my agreed last-minute motion for a violation of the Right to Cure Act under South Carolina law. I've cited a case in my memorandum and which I think speaks to it. There's another case that I believe the last I looked which was today in Charleston County has been appealed. And it certainly is a lower court decision and one that it doesn't hold any precedence. However, the matter was heard by a former chief justice of the Supreme Court, so it might want to be given some sort of look to for guidance for lack of anything else.

And in both of those cases, you have a homeowner who becomes, for whatever reason, upset with their builder and they get rid of the builder or the builder leaves and they proceed to build or fix what has been wrong, and then they subsequently sue that builder. And in those cases, both courts or certainly the supreme court, and this is the Grazia case that I refer to, hold a strict interpretation of that statute. That there are certain things that a claimant, in this case that would be the plaintiffs, should go through to perfect, for lack of a better term, what they need

to do before they bring a lawsuit and provide notice either by certified mail or personal service.

I very specifically asked both of the plaintiffs on the stand if they had done that, and at the end of the day, I came away with the notion that they did not do that specifically under the statue. But then they filed the lawsuit before doing that. And the Court's made the point in its order that, you know, this was 14 years ago. Again, I don't read the statute, and that is the 49-59-810-860 [sic] as explaining anything other than the claimant must do these things before they can bring the lawsuit.

The plaintiffs in this case finished their home, filed a lawsuit, and therefore foreclosing any way for the contractor in this case Mr. Gilbert and Heritage Classic Homes to have that opportunity. They foreclosed that themselves. As the Court will consider that, I hope it will, I have got copies of the order that was filed in the Charleston County case, which I'm happy to share if you would like to review later. It's certainly available online. It's McIntire -- Andrew and Kimberly McIntire versus Seaquest Development and

many others. It's a 2016 case, CP-10-1833. That was -- the order was filed May 10, 2017. Not a case that was known to me. The right to cure was not known to me, I'll readily admit it. Just a day or so before trial it came to my attention. But there was nothing in that statute that indicates that there is any type of waiver or that you lose a certain right. The burden is on the plaintiffs or the claimants, the homeowners, to follow proper procedures in order to get this done.

THE COURT: What would the remedy be?

MR. HUBBARD: The remedy is they have to give the notice and then the burden then comes to the contractor to within a certain amount of time respond and either say I'm not doing anything or go and review the -- it doesn't take away any rights later on. If they don't want to accept what the contractor does, I believe that they can proceed, but they must give that contractor the opportunity, as I read the statute in the case law, before they should file suit. And I think evidence showed that that did not happen here.

THE COURT: Well, that's what I'm asking. So if this was not done as indicated here, it's not done at all and the suit is filed, what is

the appropriate response from the builder or the contractor?

MR. HUBBARD: I think the response would be what I attempted to do here at trial was make a motion that the case should be dismissed. If they can't -- if the statute can't be fulfilled, and that is what -- that is what Justice Toll, former Chief Justice Toll wrote in her order was I'm bound by the statutory language. This is a strict statute and she --

THE COURT: I appreciate you sharing that case number and I certainly want to look at it as well. Was that raised in a situation where it was as an affirmative defense or as a defense?

MR. HUBBARD: It was raised only as a motion, I believe. I have read the final order that goes through some of the history of the case. Again, I'll certainly stand corrected, but my -- perhaps when the complaint was filed the motion was filed shortly after that. And on hearing about a motion they never got to a trial. The judge dismissed the case.

THE COURT: Okay. Thank you.

MR. HUBBARD: May I approach? I have got copies.

THE COURT: If you have got copies, great. I'll take them.

MR. HUBBARD: Thank you.

THE COURT: Thank you.

MR. HUBBARD: Thank you, Judge.

THE COURT: All right.

MR. JACKSON: May it please the Court?

THE COURT: Mr. Jackson, yes, sir.

MR. JACKSON: A couple of things. First of all, on Eagle Harbor, Inc., in terms of them being a partner, the test of being a partner is, "Where their acts, conduct, or agreement showed they intended to combine either the property, labor, skill, experience or some of these elements on one side and some on the other to carry on as principals or co-owners of a common business, trade, venture, or operation. It can be implied without express intention and it exists by implication from their conduct."

Here there is a lot of examples where Eagle Harbor, Inc. directly impacted or was -- acted as a partner in this case. First of all, the subdivision plat for Phase 2, I'm emphasizing Phase 2, was signed by Eagle Harbor, Inc. Mr. Gilbert himself who was the executive director of Eagle

Harbor, Inc. testified that the development was a joint effort by several folks and described EHI as an oversight developer. Those were Mr. Gilbert's words, not mine, oversight developer.

Eagle Harbor, Inc. actually paid expenses of development and there are exhibits or records that were evidenced. There are exhibits in evidence that showed that they paid expenses in the development. And we referenced a lawsuit that Mr. Hubbard is saying is limited to the -- like the road situation.

But actually, Paragraph 7, it actually states that they, meaning the Winns, the Foxes, Danny Gilbert, and Eagle Harbor, Inc. entered into an agreement with Stantec to provide certain subdivision development services including the development of a master plan. So that is more than just, hey, I have a road so I guess I have to be to be in this lawsuit. They contracted with Stantec to be part of the subdivision development.

If you look at some of the records and some of the letters received from the OCRM, which is also into evidence, they address the letter for the violations to Eagle Harbor, Inc. care of Danny Gilbert. And the findings in that admissions

letter say Eagle Harbor, Inc. is the developer and Eagle Harbor, Inc. herein as the developer is responsible for the land disturbance activities at the location.

One of the points that Mr. Hubbard made, and I guess in his earlier motion, was that there was no evidence that they received any profits. But I would point out to the Court there is evidence in the exhibits that Troy Winn -- Mr. Gilbert in a letter said your responsibility was to donate these two lots to Eagle Harbor, Inc. So they may not have got a direct dollar for dollar profit share, but they did get some profits.

And again, it's not a requirement that all of these elements are proven. Some of these elements can be proven are still via partnership, and I think that there is evidence of that in there as well. There is also evidence that Danny Gilbert blended his own personal role with Eagle Harbor, Inc. I cite to the Court a specific letter after the Prices had, you know, moved on because of Gilbert's failure to, you know, breach of contract and his unwillingness to work with them in saying that he is done, they sent him a letter and they were trying to resolve the situation with the

architectural review committee.

In that letter he specifically says, you can't speak to the head of the homeowners association. He goes on to say, "Ms. Evans has not been given the authority by the developer (declarant) Eagle Harbor, Inc. to handle such matters." So this is Gilbert talking about Eagle Harbor, Inc. as being the developer.

But in the same letter he says, "It's because of my relationship with the architect and because I am the developer the construction was even started on your home." So he was blending the two right there in the same letter. And also, of course, Eagle Harbor, Inc. is listed as the declarant in both of the covenants that were recorded twice. So I think there is ample evidence that Eagle Harbor, Inc. is entwined either in property or the oversight developer or through Gilbert. You know, of course, Eagle Harbor, Inc. can only act through its agents and Gilbert is its executive director. So I would say ample evidence of all of that.

In terms of the impact on the public interest, believe we have a little bit of the tail wagging the dog there. I mean, the focus on --

it's not capable of repetition that this is a one off. I mean, all of that capable of repetition is designed -- is one way of showing an impact on the public interest. So we can't lose sight that that's ultimately what you have to prove, not necessarily a potential for repetition.

I would submit to the Court, all the Court needs to do to see the impact on the public interest is look at the caption in this case and they can see the impact of the public interest. But beyond that, there was certainly testimony by Merrill and Diane Cox who were different homeowners as to how the representations affected them. I mean, in fact, Ms. Cox was crying on the stand because of how she was treated in that situation, and that's actual repetition.

All of the homeowners were affected by the fact that the covenants are not enforceable because of the roads and other situations. So there is ample evidence to satisfy the impact of the public interest, and I cite to more specifically in my brief. For example, Gilbert was selling these lots even though he was not a real estate broker or licensed broker, and he had sold most of those lots before he had actual subdivision

approval. So there's a lot of examples on the impact on public interest.

In terms of the $3,500, quite frankly, to be honest, Your Honor, I believe it's an accurate testimony that the Prices used some of the foundation material. I'm not sure off the top of my head whether it was in the house or in some outbuilding. If it was not part of the contractual obligation that Gilbert had with my clients, if it was separate, I would agree that he was entitled to a credit. If it was part of his contractual obligation, that foundation, then I would say it's the circular and he's not entitled. So that's our position. I can establish that and I can follow up with anybody for sure on that.

So just to clarify, if it was part of his contractual obligation to my clients, that $3,500, it would be a mitigation of their damages to use that. If it was something else that was not part of the contract and they used it, he is entitled to a credit. That would be our position.

Moving on to the right to cure, I think it's important to understand the sequence a little bit about what has happened. You know, Gilbert up to this time had contracted with them and he

delayed and delayed in getting the project going. He misrepresented to the Prices that he actually had a valid septic tank and a building permit, and that was -- that actually became revoked. The foundation was built, you know, Mr. Price's testimony that it was blown over. So there was a lot of problems that the Prices were having and they sent him a letter. They said, we'll work with you, we'll still work with you. And the response by Mr. Gilbert was not, okay, let's roll up our sleeves and reach common grounds. It was to say, I'm done. You know, I'm done, and later to file a mechanic's lien on their property. So to me, when he filed the mechanic's lien and says, I'm done, that waives any kind of right-to-cure situation.

So you have that and plus you have just the shear delay. I mean, there is no evidence that he offered that he tried to send them a letter afterwards saying, let me fix this, I'll repair that, let me do this, or whatever. He just filed a mechanic's lien and then started playing these little games about you can't have your property out of the storage shed or whatever else in trying to collect.

So I would say the right to cure

doesn't apply on that. And then again, the shear delay, a motion could have been filed in any of that timeframe and to file it actually during the trial itself I would submit, the Court correctly ruled it was just too late. And I believe I addressed all of these points. And again, I have a return that addresses the rest of it more fully, Your Honor, and I would stand on that.

THE COURT: I have received that. All right. Mr. Ferrara, any follow up?

MR. FERRARA: Very briefly, Your Honor, and respectfully I -- Ms. Baig, my associate, addressed this point with me and I apologize. I just wanted to -- I made reference earlier, Your Honor, in the motions and to use that as a basis for today and like that to be incorporated, but one of the points that I made in the motion that I didn't talk about earlier, Your Honor, was the Court's ruling on res judicata. Your Honor did rule that res judicata didn't apply, and I understand the Court's ruling, but respectfully, Your Honor, I just would like I guess an order or maybe in your order for today, Your Honor, just address the previous element of res judicata and then I outlined that in the motion. In essence,

Your Honor, the Foxes assert that the investor's title was a privy or they were in privity with the Foxes.

So on that point, just in follow up to Mr. Jackson's argument, Your Honor, you know, when I listen to Mr. Jackson, it establishes the point, the overall point, that I'm here before you today on, Your Honor, which is what were the representations that these defendants made and when did they know. Well, if you look carefully at what Mr. Jackson is saying, he says that on Lot 20 Mr. Gilbert knew that there was a septic tank problem because of the 2002 letter. There was reference about the water table and the requirements in that 2002 letter. And I apologize, Your Honor, I don't know which Court's exhibit. It is one of the first DHEC letters that's in evidence.

But that establishes the point that I have made to Your Honor respectfully in that representations about something to happen in the future or not happen in the future are not actionable. It's not enough just to say, see, this letter from 2002 says there was a problem and later on we established there was a problem.

In reality, on that point, we know that there was a septic tank and that the perc issue that the 2002 letter referenced was cleared. And that was cleared to DHEC's satisfaction and the permit was issued. The permit was revoked due to the DOT encroachment issue, which was not really a septic issue.

Ultimately, we know today, Your Honor, as we sit here now, a septic tank was allowed to be put on the property and the property did perc. But if you listen to Mr. Jackson and take the 2002 letter, it appears that Mr. Gilbert, you know, sold them a piece of property that was worthless and they could never build their house on. So that is not accurate.

The second point, Your Honor, in rebuttal, is partnership. The Court cannot just simply say, ah, a partnership, a partnership is established here because two or more people worked together for common purpose. Now, you can do that in an isolated situation, Your Honor, but in this particular situation with all of the moving parts and as complex as this litigation is, the plaintiffs have the burden to establish what partnership they're talking about, and when it was

established and what it was.

Mr. Jackson put in the Court's order and Your Honor signed the order, but the first sentence of the findings of fact say in 2001 the Foxes, EHI, HCH, and Gilbert all formed a partnership. There is no testimony as to that basis. There is no reference in your order, Your Honor, about how that's established. That is something Mr. Jackson wanted Your Honor just to summarily make a finding of because there is money moving around and that must establish something. That doesn't meet the requirements.

When I listened to Mr. Jackson just now testify about Eagle Harbor was the developer, that is true. There is evidence in the Court's file and in the exhibits that Eagle Harbor was the developer. I submit to to you, Your Honor, that the developer of all of this property was Eagle Harbor. Danny Gilbert was an agent of Eagle Harbor. Belinda and Gerry Fox were not an agent of Eagle Harbor, Incorporated and do not sit on their board.

Troy and Sarah Winn were not sitting on their boards either. They have been dismissed from the lawsuit. And the reason that they were

appropriately dismissed was because they weren't connected with any of this. Unfortunately, my clients were involved with the sale of this property.

However, importantly, the partnership that the plaintiffs asked the Court to underpin all of these findings on is what? It really is a partnership between Belinda and Eagle Harbor, but they haven't established that that happened. What happened is, is that Belinda had her lot, purchased a large tract of land, that was established. Mr. Gilbert sold off the land. Heritage Classic Homes received money on the settlement statement for building the home, and that is really the extent of Belinda Fox. Gerry Fox, other than putting money with his wife to purchase the property, is not connected either.

And so the plaintiffs have not established the partnership. I understand that a partnership existed, but as to the representations and the actionable conduct that the plaintiffs are being awarded damages on, the plaintiffs have failed to establish that some partnership created these damages.

They have established that Mr. Gilbert

made representations to them that they relied upon. They're asking you, Your Honor, to assume that those representations are falsely made and I understand the Court's ruling, but those are representations by Mr. Gilbert. Those were not representations by Belinda or Gerry or even the partnership. They have just not met that element on that, Your Honor.

I don't understand, Your Honor, how the plaintiffs can have their cake and eat it, too. On one hand, Eagle Harbor is the declarant over here against Mr. Hubbard and his client, but on the other hand, they're not and it's a different partnership. If we start at the beginning and go through the cause of action for negligent misrepresentation, respectfully, Your Honor, and follow that through and find out who made the representations, whether it was false, and whether Your Honor believes it's actionable, I think you'll get to the right results.

Finally, Your Honor, very briefly, on Mr. Carter's exhibit, trial exhibit, it's in evidence as Plaintiff's 38. On Page 42, of Plaintiff's 38, Your Honor, there is a finding that the retrospective value of a 2 acre lot in Eagle

Harbor on December 3, 2003, which was shortly after closing, was $37,000.

I think that does help the Court answer the question. That would be consistent with Your Honor's findings that 2 acres of property were impacted, and I would respectfully request Your Honor to look at Mr. Carter's report to -- and if Your Honor is so inclined to, I guess, relook at those dollar amounts as it relates to the wetlands acreage. I think that that does answer the question. And he says that, in the trial, and I can forward the trial transcript, I specifically asked him again, Your Honor.

I'll represent to Your Honor I have read the transcript and I recall in the trial I specifically asked him about the value of a 2 acre tract and he referred me to that page. There is live testimony about the 2 acres being worth $37,000. And I think that helps the Court make the finding. Your Honor has already made a finding that 2 acres of wetlands were impacted, that the Prices suffered damages as a result of 2 acres of wetlands that they didn't know that they were purchasing. So I would submit to Your Honor that there is adequate testimony, without going to the

necessity of a new trial, that the property was $37,000 if it were not wetlands, and I think that's actually in the trial transcript.

Finally, Your Honor, Mr. Jackson mentions that willful and malicious conduct is not required unless damages are trebled, but I don't -- as I understand Your Honor's order, you are trebling the damages. And so for that reason, that's why I mentioned that willful and malicious conduct is required to be demonstrated by the Prices.

I think I do agree with Mr. Jackson in that the Unfair Trade Practice Cause of Action does allow a remedy where there may not be one at law if there is unlawful, deceptive, willful conduct by a party, and that Your Honor could make that finding. It's up to Your Honor whether you determine those damages to be trebled or not, but I do agree that because Your Honor has trebled the damages in this case, that that is why I mention that willful and malicious conduct be required.

Finally --

THE COURT: Your position regarding willful and malicious conduct is as to everyone, as to each member of the partnership? Only as to

Mr. Gilbert? Not as to your folks, that those -- that that willful and malicious, if I find that to be against Mr. Gilbert, you're saying that doesn't -- that is not imputed over to the Foxes if they're acting in concert, if they're acting in partnership?

MR. FERRARA: Yes, Your Honor, for two reasons. One, the partnership that they had which really wasn't established except by implication and conjecture, that partnership, if the Court finds that there was a partnership, there still needs to be a scope. For willful and malicious conduct to be part of the partnership, there has got to be some proof by the plaintiff like an e-mail that says, hey, Danny, this is from Belinda, I want you to do whatever means necessary to sell the property. I want you -- and he says, I'm making representations that aren't exactly true. That's fine. If they have that, if the plaintiffs establish that, I wouldn't make this argument, but the plaintiffs don't have that.

THE COURT: Of course you're not going to have that. That would be too much fun to have that.

MR. JACKSON: Could you produce that

for me, Paul?

THE COURT: I mean, here we have got representations that are considering and I'm probably considering to be willful misrepresentations by Mr. Gilbert. I have got his partners who sit in the scope of or acting as a salesman for a developer. So you're saying that the Unfair Trade Practices Act, because they're not authorized or ratified, because they're false, because he didn't give them permission or they didn't give him permission to make false statements there is no liability? It's not imputed back to the partnership?

MR. FERRARA: Well, yeah, sure.

THE COURT: I'm still trying to wrap my head around that.

MR. FERRARA: Your Honor, because unfair trade practices is not your plain, vanilla common law cause of action that exists for everyone involved in a transaction except and until such willful and malicious conduct is established. I would submit to Your Honor that there must be, to meet that element, the first element, there must be evidence of that conduct. If the testimony was that Belinda made representations that the Court

deemed to be false, then she would be liable.

Likewise, Mr. Gilbert would not be liable for representations Belinda made in connection with the sale of her lot. This may or may not be connected to the development. That's what I was saying, Your Honor, when we consider all of the moving parts in this case with Eagle Harbor being the developer, with Danny Gilbert being Heritage Classic Homes, and Danny Gilbert developing as I presume Eagle, I haven't looked at that, Your Honor, but I believe Mr. Jackson that Mr. Gilbert was a -- was the authorized agent on behalf of Eagle Harbor. He was wearing several different hats and it's hard to tell what he is doing what and when and for whom.

What is clear, Your Honor, and I don't know, I think it's in the Court record, is that when there were wetlands discovered in the Eagle Harbor neighborhood, Belinda nor Gerry Fox paid any fines for wetlands, it was Eagle Harbor. Eagle Harbor, Incorporated, I believe, I think Mr. Gilbert testified about fines as it relates to the -- there was -- after the neighborhood was developed, Your Honor, the Army Corps of Engineers came through and identified that --

THE COURT: As to Phase 2.

MR. FERRARA: I believe as to this, yes.

THE COURT: So that would be evidence of the partnership of Eagle Harbor --

MR. FERRARA: Right.

THE COURT: -- being a partner --

MR. FERRARA: Eagle -- but the --

THE COURT: -- in the development of Phase 2 to the detriment of Mr. Hubbard's argument, right?

MR. FERRARA: I think so. I think that Eagle Harbor -- I think there was some trial testimony about Eagle Harbor and the wetland fine for the neighborhood, but my point is, Your Honor, is that if Eagle Harbor is the developer and Belinda nor Gerry are on the board of Eagle Harbor, then what is being done on behalf of the development can't be imputed to them.

THE COURT: Well, what was their role? They put money into it. They had to have some role. They were in partnership in some fashion, and they said to Gilbert and/or the developer, whoever that may be, go sell my lots. You're saying that they didn't authorize him to say

anything false, but if they stood back and -- you're saying that they're not going to have any liability for false or misleading statements or misrepresentations on behalf of the salesman that they hired? Isn't that just agency law that requires them to be responsible?

MR. FERRARA: It does, but it's not -- whenever you have a willful con -- the line of demarcation, respectfully, Your Honor, is the willful conduct. That's why I didn't make the argument with respect to negligent misrepresentation. I think that representations that Mr. Gilbert may or may not have made associated with the negligent misrepresentation cause of action, Your Honor, I think are the agency law allows what Mr. Jackson talked about earlier, a general conduct, a course of just general conduct of selling the lots.

When it comes to willful or malicious conduct that requires a heightened level of intent and representation, that's where the line is drawn right there, Your Honor, respectfully, and that's what I'm submitting to the Court. That's where the plaintiffs have to establish that the Foxes crossed that line in order to be liable and subject

themselves to treble damages.

I mean, Your Honor, that cause of action is just not available just because two parties interact. There's strict standards of proof, and while I understand Mr. Gilbert's conduct may be -- may cause liability for the Foxes under negligent misrepresentation, what I am saying is that absent their willful or malicious conduct, there is the liability and vis-a-vie agency and partnership just doesn't automatically flow. So thank you, Your Honor.

THE COURT: Mr. Jackson, in response to that argument?

MR. JACKSON: A couple of things, briefly. I think it was misstated that the lot perced and that a septic tank was capable on the lot. What actually happened was they had to get a drain field across the road from Haney Branch Road and pump the sewage across to the drain field. That is what the Prices ended up with rather than the septic tank on their lot, which is why they couldn't subdivide in the first place.

The second point was, you know, he makes it sounds as if the Foxes just kind of bought the land and let the thing spring into existence.

You saw all the evidence in the exhibits where Gilbert carefully figured out and divided by two and they shared the expenses, Mr. Fox himself testified that $40,000 on the Prices' closing that was paid to Gilbert was his share of the profits. So I mean, there is abundance of that that they were truly partners.

In terms of the unfair trade practice argument, the State versus McLeod case which I cite in there in the brief, Your Honor, specifically says why should it be more difficult to prove an unfair trade practice, you know, to the elements of unfair trade practice rather than just a mere principal and agent they specifically say that. They say, we're not here to put obstacles up and make unfair trade practices be more difficult in regular principal and agent law. I mean, that's right there in the case in the State versus McLeod. So I believe that was some of the main points I was going to address of his arguments.

THE COURT: All right. Thank you, sir. Mr. Hubbard?

MR. HUBBARD: Thank you, Judge. I have to be careful. I feel like the bus is coming down the road. Now Mr. Ferrara has turned on me. The

Court notes in his final order that, and this is Paragraph 72, of Page 14, I think. And this is getting back to the restrictive covenants. Again, Mr. Gilbert was relying on, and his testimony showed you that. His deposition testimony was showing that he relied on instruction and help he was getting from an attorney to get restrictive covenants put in the neighborhood because restrictive covenants would benefit the neighborhood, as I think we can all agree for many reasons.

But you cannot put restrictive covenants on property you don't own, and the order states that they didn't own the property. That neither Gilbert nor EHI owns the property. Yet here they're told -- here Gilbert is told go and file it, I think as a stopgap measure to try and get something down.

Again, I come back to the notion of an unsophisticated person who is trying to get these things done, to get the subdivision in place so everybody is happy. I mean, as you know, it's gone on for quite some time and there have been contentious meetings among the homeowners and there are still pending -- certain members of the

subdivision are still suing folks for the roads in the subdivision.

So I just think it's pretty -- to lay that all at Mr. Gilbert or certainly EHI or Eagle Harbor, Inc. following the instructions of counsel to try and get these things done.

THE COURT: He held himself out as the developer and he --

MR. HUBBARD: Mr. Gilbert did have himself out. Mr. Jackson just made reference to the line out there. Here is what you're going to get, here is what you're going to get, here is what you're going to get. EHI is not on that. Eagle Harbor, Inc. is not on that. Yes, Mr. Gilbert is the executive director of Eagle Harbor, Inc., but to bring all of these claims against Eagle Harbor, Inc., when it just seems or appears that the evidence is not there to show the involvement of Eagle Harbor, Inc. in this. I'm done. Thank you. Thank you, Mr. Gilbert sayeth.

THE COURT: All right. Gentlemen, do you have more for me, Mr. Ferrara?

MR. FERRARA: I do. I just wanted to ask the Court's direction on something. Mr. Jackson and his clients submitted affidavits of

attorneys fees and I had, and I guess I can file a memo or whatever Your Honor would like me to do, but I had some comments on those.

THE COURT: As to the attorneys fees?

MR. FERRARA: Yes, sir.

THE COURT: I think that is probably premature. I'm going to take care of this order first. I know y'all would probably like to take care of that today to the extent that you can, but my thinking was I wanted to get this done first, but I will be happy to hear more on that.

MR. JACKSON: Your Honor, there are two points, and this will proceed to this one. It will cut and dovetail into what Paul was saying. Number one, is I think Carl may not have gotten a copy.

MR. HUBBARD: I was going to say, I haven't seen any attorney fees.

MR. JACKSON: For some reason, Carl, in your favorite e-filing world, you're not getting the electronic notifications.

MR. HUBBARD: Well, that was going to be a question. I'm sorry. That was going to be a question I had, too. Do I need to actually -- I guess I do need to sign up and then I'll get e-filings?

MR. JACKSON: You have to file a notice of appearance.

THE COURT: Notice of appearance.

MR. HUBBARD: I planned to do that when I filed this memo and then I tried and it and couldn't get it -- I'll work on it.

MR. JACKSON: I didn't realize that until today. When I was looking through the electronic notification, I did not see your name listed. So that's number one. Number two, I think what was intended was if you had objections we could talk about them. If we couldn't resolve them, then we bring them to the Court's attention.

THE COURT: Yes. I certainly want everybody to have an opportunity --

MR. JACKSON: That would be idea first --

THE COURT: -- before we start discussing it, even though I know y'all would like to keep it moving. All right. Well, my inclination is to deny the relief. I think there is enough as to the agency regarding misrepresentations, the capacity for representation, the capacity for the effect on the public interest, I think it's been satisfied.

I understand your request for the ruling on the equitable indemnity so that that can be something that can be out there in the order. I don't think under the circumstances if there is any entitlement to equitable indemnity at this point because there hadn't been any payment on it. So that is something for another day. So I have not addressed that. However, I think that, again, I think it's tied to what's been actually paid, but nothing has been paid so that may need to be addressed later.

As to the representations, the falsehood of representations, there was the letters out there about the inability for it to pass the apparent tests and so forth well in advance of the closing itself. There was the 2 acres that were mentioned, but that information was all out there. My understanding of it was it's a before and it is, what is the value as represented, not as represented, but although part of that was the portion which would be attributable to wetlands, that that was adequately disclosed. And if it didn't change as to the value, therefore it's one of those things that goes really to the weight of it.

Res judicata, I think there is no privies element. I don't think they were privy to that. I think they failed as to that argument and should probably be included in the order if it wasn't already so that you have that clear in the order, and that it was ruled on. As to Eagle Harbor, Inc., they may have been novices at it, but he, Mr. Gilbert, was acting on behalf of Eagle Harbor. There was a series of things that were done that would make, I think, any person in the public believe that Eagle Harbor, Inc. was involved in the development of the Phase 1 and Phase 2, that they were the developer and there was this blending of Mr. Gilbert into these various roles on there.

As to the right to cure, I mean, my initial ruling is to go with the ruling that I made originally that there was the waiver, mention, and timing. I'm going to review the order that you provided, and I appreciate that. Because although not precedential, it certainly provides some clarification as to the way the law has been looked at. But I'm just not sure and I will have to look at the statute as well. I'm not sure what the remedy is on that. I don't want to be in a position where there would be a party who cannot

raise it on a responsive pleading or by motion and then wait until trial use it as an offensive tool at that point.

Regarding the $3,500, I don't have a copy of the transcript. If y'all want to talk about that and decide whether to include it or not include it, that's fine. If there is a dispute and then y'all provide me with the testimony that you-all think is appropriate as to $3,500, and then I can modify it so there is no duplication on the recovery on that. Certainly, if it was something separate for an outbuilding or something like that and used separately, then that would be potentially considered duplication. If it was developed into the foundation of the main building, then I think it would be a situation where it's part of or it's actually a mitigation of the damages. And so I will look to hear from y'all. Y'all square away the $3,500 --

MR. JACKSON: Yes, sir.

THE COURT: -- first on that. Share the information regarding the attorneys' fees and then y'all can decide whether I need to step into that. Mr. Jackson, I'll ask you to draw the order and provide a copy to these gentlemen before you

send it to me and address any discrepancies in there or variations in there and send it to me. Send it to me by e-mail not by way of the proposed order filing that's capable through the electronic filing.

MR. JACKSON: Yes, sir.

THE COURT: That way I can have it and make changes and so forth as necessary.

MR. JACKSON: Yes, sir.

THE COURT: Okay. So does that address everything we have got today, gentlemen?

MR. JACKSON: I think so, Your Honor.

MR. FERRARA: Yes, Your Honor.

MR. HUBBARD: Yes, Your Honor.

THE COURT: I know we don't have anybody else here regarding the road portion of it. Any suggestions as or hints as to what y'all have in store for me so we can get the road portion moving?

MR. HUBBARD: Mr. Jackson made it clear that he is not part of that, right?

MR. JACKSON: Well --

MR. HUBBARD: Here we go.

MR. JACKSON: That may be an issue going forward for me at least on that, on that

portion for me, but I will touch base with my clients. We can discuss that. You know, again, it might be a good thing again for Richard and the concerned citizens to all get together on that.

THE COURT: Well, what I probably want to do is my understanding was we need to address and quite thankfully y'all decided, thought it would be a good thing to bifurcate it.

MR. JACKSON: Yes, sir.

THE COURT: So not to tie the whole thing up together and maybe there would be some element of being able to work it out after this part is concluded. But as we get a little closer to resolving this part of it, I'm going to put out there that we need to --

MR. JACKSON: Yes, sir.

THE COURT: -- have some sort of a pretrial.

MR. JACKSON: Yes, sir.

THE COURT: To deal with that. And I'm trying to do that sooner rather than later.

MR. JACKSON: Sure.

THE COURT: So that it doesn't continue to get away. That adds other additional steps makes the service and publication need to be done

as well to make sure those involved in that should be. Okay?

MR. JACKSON: Okay.

THE COURT: Thank you, gentlemen. I appreciate it.

MR. FERRARA: Thank you.

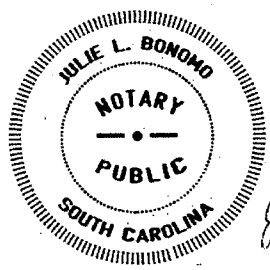
(The hearing concluded at 3:48 p.m.)

CERTIFICATE OF REPORTER

I, Julie L. Bonomo, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 6th day of October, 2018, at Charleston, Charleston County, South Carolina.



Julie L. Bonomo
Court Reporter
My Commission expires
July 28, 2027

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State of South Carolina) In the Court of Common Pleas
)
County of Berkeley) Case No: 2004-CP-08-1855, 1150

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

Plaintiff(s),

vs.

Belinda Fox, Danny L. Gilbert and Eagle Harbor, Inc.,

Defendant(s).

Knight's Redi-Mix, Inc.,

Plaintiff,

vs.

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

Defendants,

and

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

Third Party Plaintiffs,

vs.

Danny L. Gilbert, Individually,

Third Party Defendant.

Transcript

of

Proceeding

The within trial was taken before Heather R. Landry, CVR, Nationally Certified Verbatim Court Reporter and Notary Public in and for the State of South Carolina, scheduled for May 3, 2018, through May 4, 2018, 9:00 a.m. and commencing at the hour of 9:38 a.m., Thursday, May 4, 2018, at the Berkeley County Courthouse, Monks Corner, South Carolina.

Reported by:

Heather R. Landry, CVR

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The Honorable Dale Van Slambrook

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Defendant Fox Exhibits (Click tab to left to view)

DEFENDANT HERITAGE'S EXHIBITS

Exhibit No. 1 Contract 107
Exhibit No. 2 Transaction Document 492

Defendant Heritage Exhibits (Click tab to left to view)

COURT'S EXHIBITS

Exhibit No. 1 Settlement Agreement 60
Exhibit No. 2 Insurance Title Policy 60
Exhibit No. 3 Letter 66
Exhibit No. 4 Complaint 70

Court's Exhibits (Click tab to left to view)

-- [denotes interruption/change in thought]
... [denotes trailing off/incomplete thought or statement]
[sic] [denotes word/phrase that may seem strange or incorrect; written verbatim]
(ph) [denotes phonetic spelling]
(unintelligible) [denotes not capable of being understood]
(indiscernible crosstalk) [denotes] multiple speakers at the same time, not capable of being understood]

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P R O C E E D I N G S

(Begin 9:35 a.m.)

THE COURT: All right, everyone. Are we all set to go?

MR. JACKSON: Plaintiff's ready to proceed, Your Honor.

MR. HUBBARD: Yes, Your Honor.

MR. FERRARA: Yes, Your Honor. Good morning. We're ready to proceed as well. And I did have, I guess, a preliminary matter of a witness I had under subpoena, but I wanted the Court's help with her, just an agreement from everybody to accommodate his schedule if you're ready to hear that.

THE COURT: Yes. Let's hear that.

MR. FERRARA: Okay.

THE COURT: And then we'll make sure we got all the preliminary stuff out of the way. The first was to make sure we have everybody identified for the record, and we got who's representing who, so I can make sure and keep track of everybody, okay.

MR. JACKSON: Your Honor, I'd be glad to proceed. I'm Derrick Jackson. I represent Ronald

and Diana Price, the plaintiffs.

MR. FERRARA: Good morning, Your Honor. Paul Ferrara. I'm representing Belinda Fox and Gerry Fox and -- individually.

THE COURT: Individually?

MR. FERRARA: Yes, sir.

THE COURT: All right.

MR. HUBBARD: Your Honor, Carl Hubbard for Heritage Classic Homes, Inc., Danny Gilbert, Eagle Harbor, Inc.

MR. FERRARA: Additionally, Your Honor, just for clarity to the extent the plaintiffs have claimed that Belinda and Gerry Fox were agents on behalf of Eagle Harbor Development Partnership, and I'm representing my clients to that end as well.

THE COURT: All right. And what limitations -- you're qualifying the representation as to Ms. Fox. What qualifications or limitations or tell me about that.

MR. FERRARA: Your Honor, as it's set out in this case, my clients were disputing that agency connection, and I'm not sure how the plaintiff was going to proceed. So that's why I was just mentioning that. But to the extent that that's

brought up today, I just wanted it to be clear that I am representing Belinda Fox and Gerry Fox as it relates to their involvement with Eagle Harbor Development Partnership.

THE COURT: You're representing them in full?

MR. FERRARA: Yes.

THE COURT: Maybe I'm reading too much into it. I just want to make sure that there is no qualification or limitation, that you're limiting your representations.

MR. FERRARA: Just to be clear, Your Honor, I'm just representing my clients to the extent of their agency connection with the development, with the partnership. And so . . .

THE COURT: Again, I'm not sure what that means. Are you saying that you're not representing them in full today? Is there some category, some portion of the case that we're going to be approaching today where you're not representing them?

MR. FERRARA: No. No, I'm not.

THE COURT: Okay. It's the wording. I just want to make sure I was clear.

MR. FERRARA: Yeah.

THE COURT: Okay. Mr. Hubbard, you were

standing up. You had something --

MR. HUBBARD: Your Honor, the named partnership, this was just something that came about as this case progressed. This entity, which really is not a formal entity, just became named as a named defendant. But all of the people that are here allegedly are involved in that claim, I guess, by the plaintiffs. But there's a partnership, but it's not, for lack of a better term, it's not a formal partnership.

THE COURT: Okay. That was my understanding as well.

MR. HUBBARD: Okay.

THE COURT: Okay. All right. And the other folks that are involved in other portions of the case are not here because we are proceeding in a bifurcated fashion to address the construction litigation claims and the partnership development claims not the road issues. Is that correct?

MR. JACKSON: That's correct, Your Honor. There was a bifurcation for that. And largely that would involve the Concerned Citizens of Eagle Harbor, Inc., and the Winns and the Foxes. But the road -- yeah, the road claims are bifurcated. And I would also note for the Court, we did have

originally slated a mechanics lien case issue with Knights Redi-Mix. And as I indicated in the e-mail to the Court, that was resolved. So not needing to be tried. And we agreed to do mutual leases on that part of the case.

THE COURT: Is there anything in that regard -- thank you. That was my next question. Is there anything in that regard that needs to be put on the record?

MR. JACKSON: I don't think so, Your Honor. I think we'll paper it up after we get through this and get -- because Steve Smith who represents Knights Redi-Mix is not here, and I'll paper it up with him on the mutual lease because I don't think anything has to be put on the record beyond that.

THE COURT: Okay. Plaintiff is ready to go?

MR. JACKSON: Go ahead.

MR. FERRARA: Yes, I'm sorry. I didn't mean to interrupt. Yes, Your Honor. I didn't want to interrupt Derrick in his case. Just as a preliminary matter, Your Honor, Ty Adley with Berkeley County Zoning is under subpoena. And I spoke with Mr. Jackson about it, and he's anticipating his case in chief to go throughout the day and possibly maybe have an opportunity

late this afternoon for the defendants to start their case. So with the Court's permission, I wanted to just release Mr. Adley back to his office. And then I'll be back in touch with him later on today and advise him to come back if that's permissible with the Court.

THE COURT: All right. Mr. Adley. Where's Mr. Adley? Mr. Adley, you're subpoenaed for today. I'm going to release you for now, but we'll call you when we need you. Could possibly be later today, it doesn't sound likely, but more likely tomorrow.

Okay. And you got contact information for him, Mr. Ferrara? Is that right?

MR. FERRARA: Yes, I do.

THE COURT: Okay. All right. Thank you, sir.

MR. FERRARA: Thank you.

THE COURT: Any other preliminary matters?

MR. FERRARA: Your Honor, as a preliminary matter I recently filed a motion to dismiss for res judicata and I didn't forward a copy to your office. And I'm not sure if the Court's aware of that. I didn't know if Your Honor would want to entertain that motion before we started, or if you

would want to reserve that for a later time.

THE COURT: Since I haven't seen it, wasn't aware of it, I'll reserve that. Give me a copy of it today so I can take a look at it.

MR. FERRARA: Okay.

THE COURT: And consider that while we're looking at the whole thing, okay.

MR. FERRARA: Thank you, Your Honor.

THE COURT: All right. Anything else that we need to take care of, gentlemen?

MR. JACKSON: I don't think so.

MR. FERRARA: No, Your Honor.

THE COURT: Okay.

MR. JACKSON: Yeah. I would note that the exhibits have been stipulated to. I think all of the exhibits that I'm going to offer this morning I think has, so . . .

THE COURT: All right. And is that correct, Mr. Ferrara and Mr. Hubbard?

MR. FERRARA: Yes. I think that -- that is correct. The only exception, Derrick, was the -- and I think we can maybe just bring it up with the Court at the time -- is -- I apologize, what the number is. There's an Army Corps of Engineers letter, Your Honor, that is the only exhibit that

I had a concern with. And it may be resolved by the time we get to that part of the testimony.

THE COURT: What number is that one?

MR. JACKSON: I'd have to go to the marked number -- find out which one it is.

THE COURT: Essentially, y'all are agreeing to the admissibility --

MR. JACKSON: Yes, Your Honor.

THE COURT: -- of everything except for that one. And that one is --

MR. JACKSON: Yeah, to aid time.

THE COURT: -- not necessarily objectionable but maybe. It is that right?

MR. FERRARA: Correct, Your Honor.

THE COURT: Okay.

MR. JACKSON: Twenty-six and 27 are the ones that we may have an issue with, Your Honor.

THE COURT: And that was the total number?

MR. JACKSON: Twenty-six and 27 are exhibits; Plaintiffs' 26 and 27. They're letters from the Army Corps of Engineers addressed --

THE COURT: What's the total number of the exhibits that you've got there?

MR. JACKSON: Oh, in the stack I think we have, like, 31 total.

THE COURT: Okay. So we're going to say 1 through 31 with the exception of 26 and 27 will be admitted by agreement. And we'll address 26 and 27 as it comes up. Okay.

(Whereupon, Plaintiffs' Exhibit Nos. 1-25 and 28-31 were premarked and were received into evidence.)

THE COURT: Anything else preliminary that we need to address?

MR. JACKSON: I don't think so, Your Honor.

THE COURT: Okay. I'll be happy to hear from you, Mr. Jackson.

MR. JACKSON: Your Honor, I would call Ronald Price to the stand.

THE COURT: Mr. Price, come on up.

(Whereupon, the witness, RONALD E. PRICE, was duly sworn.)

THE COURT: Put your hand down, sit right there, give your name and spell your last name for the court reporter, please.

THE WITNESS: Ronald E. Price, P-R-I-C-E.

THE COURT: Mr. Jackson.

MR. JACKSON: Thank you, Your Honor.

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DIRECT EXAMINATION

BY MR. JACKSON:

Q Mr. Price, where do you live?

A 1104 Saddlehorn Road in Summerville.

Q And how long have you lived at that address?

A Since November of '04.

Q Okay. And where did you live before that?

A I had a lot of temporary residences in that prior year to that. But an apartment complex and then some temporary lodging places.

Q Okay. And are you married?

A I am.

Q And who are you married to?

A Diana Price.

Q And how long have you been married to Ms. Price?

A Since '02.

Q Okay. Can you tell me about your educational background?

A High school graduate. Got a college degree while I was in the service.

Q Okay. You said the service. What military service do you have?

A United States Air Force, 30 years.

Q And what's your current rank?
A Chief master sergeant, retired.
Q Okay. And where are you employed?
A Where am I employed?
Q Yes.
A I'm presently retired.
Q Okay. Why did you come to South Carolina?
A I came down here for an employment opportunity. I was working on a project, Scott Air Force Base. That project used some of the SPAWAR folks. And eventually that project transferred to SPAWAR so I transferred with it.
Q So what were your plans for housing when you came to South Carolina?
A We were going to buy some sort of permanent residence. A place to live, not rent. It was either going to be a home that was already together or built.
Q Okay. And about when did this occur? When did you come to South Carolina?
A We were coming down here periodically. I came down here on temporary duty as part of that project from probably 1998. And then we saw that it was going to be a more permanent employment down here in late '02 and then starting in '03.

So around May '03 we started looking for a home.
Q Okay. Describe that process to me.
A We just started going around to different areas that we ran across while we were here on weekends and evenings. From Mount Pleasant to Hanahan, Moncks Corner, and eventually out to Eagle Harbor.
Q Okay. So what were some of the places you looked at?
A They were all single-family dwellings. And we were hoping to get a little acreage with them.
Q Okay. How did you learn about Eagle Harbor?
A We were in Hanahan looking around and saw a real estate sign in a yard. And people were out front mowing the grass. So we stopped and talked to them a little bit. And it turned out to be the daughter of Doug Cotton's. And Doug Cotton's daughter actually built a home in Eagle Harbor. And Doug talked to us a little bit about what was going on out here.
Q What did he tell you?
A Well, he said it was a subdivision that was going up. And part of that was in support of a boys home.
Q Okay. Was it called Eagle Harbor back then?
A Yes.

Q Okay. Did you ever meet with anybody at Eagle Harbor to further your looking for a home?
A We did. We contacted Danny at his structure at Eagle Harbor.
Q And where did you meet with him?
A He had a building at Heritage Classic Homes. It's right inside of Eagle Harbor.
Q Do you know how many times that you met with him?
A At least two, but I think it was more than that, especially as we progressed and had a contract with him to build our home.
Q Okay. What time frame was this?
A We had a ten-day house hunting trip in September. We spent more time with him then.
Q Okay. What, if anything, did he tell you about Eagle Harbor at that time?
A Well, he said they were putting up a boys home and that construction had started. And this facility was going to be a gated facility. And there would be hiking trails and they were going to try to build a gymnasium, and they had a lake there. And that the boys home would use that and so would the people in the neighborhood be able to use that as well.
Q Okay. Let me show you what has been previously

marked as Plaintiffs' Exhibit No. 1.

MR. JACKSON: And, Your Honor, did I give you a set of those already?

THE COURT: If not, I will -- if you have a set, I'll take them.

MR. JACKSON: Yes, sir. I do have a complete set, which I put up there to give to you. These are the ones we're talking about now in order. May I approach?

THE COURT: Thank you.

MR. JACKSON: Thank you.

Q Show you what's been marked as Plaintiffs' Exhibit No. 1 and ask can you recognize that?

A Yes.

Q Was that presented to you at one of your meetings?

A It was actually in Danny's office. He showed us the master plan.

Q And did he talk to you about that plan or anything that's gonna be going on?

A Oh, yeah. Just like -- you can see the lake. He discussed the homes that he anticipated going in. And then he showed the properties that were still available and not sold.

Q Okay. Did you ask him anything about the soil conditions or the conditions of the property?
A The only thing I asked him is -- when we were doing the contract, there's a comment in there about soil conditions. And I asked him what is that? And he said that's already done, taken care of.
Q Okay. Let me go ahead and show you what's been marked as Plaintiffs' Exhibit No. 2. Is this a copy of that contract?
A Yes, it is.
Q And can you publish what -- what time you had a question about that that prompted that question.
A (No response.)
Q Well, let's go back to --
A Actually, it's this -- go ahead while I look.
Q Okay. Sure. So what did he tell you about the soil condition when you had that question?
A He said that the test had been done and it was okay. I didn't know what the testing was about.
Q Did he tell you it would perk?
A He did tell us it would perk when we were out there at the property. And I had no idea what that meant at the time. I never heard that term.
Q Did you ask him what that meant?

A Yeah. He said that means you can put a septic tank on there.
Q Okay. Now, did you intend to buy 7.86 acres, that large amount of acres?
A Actually, we were looking at something maybe a little bit smaller. And then as we discussed that, he indicated well maybe we could sell -- subdivide and sell a lot to help pay for that.
Q Okay. And did that become part of one of the conditions you wanted to place in the contract?
A It did.
Q And what were you told and what did you put in the contract about subdivisions?
A It says that we could subdivide into two pieces. And with the approval of the homeowners, we could probably subdivide into a third as well.
Q Okay. When was that contract executed?
A This was executed on the 13th of September, '03.
Q Okay. And who was the seller?
A To me, Danny was the seller.
Q Okay.
A But actually at the top of the contract it says Belinda Fox.
Q Did you ask about who Belinda Fox was?
A He said that she was part of -- he was doing that

on her behalf.
Q Okay. Did he refer to her as a partner?
A He referred to himself as a representative for her.
Q Okay. What was the purchase price?
A The purchase price of the lot was 90,400.
Q Okay. And how did y'all plan on paying for that?
A Well, we were going to finance the lot and the house.
Q Okay. So you were going to build on the lot?
A Yes. To me it was all a part of the same thing.
Q Okay. And where did you find a financing company or how did you find a financing company?
A Danny knew Patty Zerbst, I believe her name was, from a finance company here locally and pointed us to them.
Q Okay. So how many acres did you end up buying?
A 7.8.
Q And what was the lot number?
A Twenty.
Q Now, I see it has listed on there in a preprinted form Jeff Spell as the closing attorney. Did you know Jeff Spell?
A Did not know Jeff Spell.
Q Did you ask about Jeff Spell?

A I think Diana is the one that actually asked him who Jeff Spell was, and he said it was the attorney that handles the closings.
Q Okay. Now, did you understand that this was supposed to be a restricted, gated community?
A Yes. In fact, the brick structure to hold the gates were going up while we were there.
Q Did you understand there was supposed to be restrictive covenants?

MR. FERRARA: Objection, Your Honor. He's leading the witness.
THE COURT: Refrain from leading, please.

Q Were there supposed to be restrictive covenants?
A Yes.
Q Okay. Now, when did the closing take place?
A The closing took place the 25th of November.
Q Okay. Where did it take place?
A At Jeff Spell's office.
Q Did you receive any prior notice of this closing?
A I received notice of the closing because I went there. Did I get a piece of paper about that? I'm not sure.
Q How much notice did you get for the closing?

A It was pretty quick.
Q Okay. And who was present at the closing?
A Danny was there, I was there, the staff for Jeff Spell was there.
Q Okay. Was Jeff Spell there?
A No.
Q Okay. Let me go ahead and show you what's been marked as Exhibit No. 3 and ask do you recognize this?
A Yes. That's the . . .
Q What's that?
A That's a statement from the closing.
Q Okay. And what was the date?
A The date of that was -- 25th of November is when we closed. When we -- and it is on here.
Q Okay. Was there a disbursement to Heritage Classic Homes from the closing?
A There was.
Q How much was that disbursement?
A It was 41,000.
Q Okay. Let me show you what's been marked as Plaintiffs' Exhibit No. 4. Is this a copy of the deed to your property?
A Yes, it is.
Q Let me back up. Was Belinda Fox at the closing?

A No, she was not.
Q And who signed for Belinda?
A They kept everything and said she would sign it later.
Q Okay. Was Danny Gilbert present?
A He was.
Q Okay. Now, at the time that you signed the agreement to buy and sell, did you sign any other contracts with Mr. Gilbert?
A Well, we signed a contract to build the house.
Q Okay. And how you find out that Danny was the builder?
A Well, when we went out to see Eagle Harbor at his office, he was kind of the umbrella. I mean, he was the guy that was developing. He was the guy that was selling. He's the guy that was building. And so it was all put together with Danny in his office.
Q Okay. Let me show you what's been marked as Plaintiffs' Exhibit No. 5 and ask do you recognize this document?
A Yes.
Q What is Exhibit No. 5?
A It's a standard form of agreement between the owner and contractor.

Q So is it a construction contract?
A It is.
Q What kind of construction contract is it?
A It's a stipulated contract.
Q So what was your understanding of that contract in the terms of the stipulated sum?
A That it was a fixed priced.
Q How much was the fixed price?
A It was originally for $160,000 and we increased it to 185.
Q Why did you increase the price?
A To take care of any possible increase in a parsed cost.
Q Okay.
A And to handle some of the things that we were going to provide.
Q Okay. Who suggested the increase?
A Actually, it was the mortgage company that actually suggested the increase.
Q Okay. Now, how did y'all decide on that particular price, the original price?
A Danny worked it up in his computer. He had a CAD system to do the drawings. And he had a format that he went through for everything in building the house and delineated out what each of those

things would cost that came out to a total.
Q Okay. And when was construction supposed to commence?
A It was -- we were supposedly going to close on the 30th of October. And construction would commence immediately. And the house was supposed to be done in 90 days. And . . .
Q Did you extend the completion date?
A We had to extend the completion date because we didn't close until the 25th of November. So we extended the completion date to the 25th of February to take care of that delay in the closing.
Q So what was your understanding as to when the house was to be complete?
A Twenty-fifth of February, substantially completed.
Q Was time of the essence for you?
A Well, it was for us because we -- Diana was living in Ohio at my grandmother's home. And I was living in pretty substandard housing here in temporary quarters waiting for this all to take place. And we had household goods to be delivered that had to be shipped, that had been shipped and were put into storage. So time was critical. The end of February would fit all that for us to move

her down here, get me out of the temporary structure that I was in, and to close out the storage materials.

Q Okay.

A Household goods.

Q So were you paying rent during this time?

A I was.

Q Did you end up paying storage fees?

A We did. We paid storage fees through the government for the government storage and we also paid storage fees for other things that we had.

Q Okay. Now, how was Gilbert to be paid on this contract?

A He was going to get the draws for each. And each draw has a series of things that had to be accomplished before he got paid for that draw.

Q What were some of those things?

A Well, there is a list here somewhere that gives exactly what had to be done for each one of those draws.

Q Is it attached to the contract?

A Is it here? Actually, that's the document that you're talking -- that I was talking about that Danny made, is right here in the back of this for the price of the house.

Q Okay.
A And there's a draw schedule in here too for the first draw.
Q Okay. And it contains requirements to get the draw?
A It does.
Q Okay.
A Building permit, septic permit, soil treatment, request for a disbursement form, a foundation survey, inspection of property, and a title update.
Q Okay. Now, what other attachments are there besides the draw schedule and the cost estimate?
A There are drawings in here.
Q Where did those drawings come from?
A Danny had a CAD system on this computer and he drew up the drawings and then eventually converted those to blueprints.
Q Okay. Now, does the contract refer to other documents that make up the contract? What other documents does it reference? You can publish that.
A There's a -- publish which?
Q I was gonna say you can publish 9.1.2.
A Yeah. The general conditions are the general

conditions of the contract for construction AIA document A201, 1987 division.

Q Okay. I'll show you that document. Is that the general conditions?

A That is the one, yeah.

Q What did you understand those to be as part of this contract?

A That this is the way that the work would be carried out.

Q Okay. And was there also a description of materials referenced in the contract?

A In the contract here, description of materials. If that description is this spreadsheet that you're talking about in the back.

Q In terms of 9.1.2.

A Right. It comes over here --

Q Was there also supposed to be a description of materials? I'll go ahead and show you that exhibit.

A Okay.

Q Who came up with the description of materials?

A Well, Danny provided these to us. We didn't come up with the description of the materials.

Q Okay. All right. And when did Danny start work?

A Well, he had a guy start clearing a lot almost

immediately after we signed the contract.
Q Did he have a building permit at that time?
A I can't answer that.
Q Okay.
A I don't know.
Q All right. So what else did he do?
A Well, he just started clearing the lot, had a guy clearing the lot.
Q Okay. Let me show you what's been marked as Plaintiffs' Exhibit No. 8 and ask if you recognize that e-mail?
A I do.
Q What prompted that e-mail?
A Well, Danny was dragging his feet a little bit in the construction in getting it going. And in this letter, we're telling him, now that the closing is taking place, we're ready to construct the house and we wanted that to happen. And he wasn't building the house at that time.
Q Okay. Let me show you what has been marked as Plaintiffs' Exhibit No. 9. And did -- first of all, publish the date of the previous exhibit.
A The date of the letter was 1 December.
Q Okay. And now this e-mail, did Mr. Gilbert respond?

A This is 30 December.
Q Okay. But Mr. Gilbert's part below that, did he respond?
A He did on the 29th of December.
Q What did he say?
A The following is an update on the project and answers to your questions. Verification of windows from Boozer is being done today. Important that we did that right because they are special order items. He's receiving the framing plan -- he received the framing plans last week. He's reviewed them and delivered your approvals back to Boozer. The new price came in on the fax, $55,732, which is quite an increase in price over that Boozer package.
Q What was the cost estimate originally?
A Originally it was -- we have that on another document for it by itself. But it . . .
Q If you don't remember, that's fine. We can --
A Yeah. I don't remember the exact number.
Q Okay.
A But I thought it was in the 20s.
Q Okay. All right. Now, what did Mr. Gilbert say about the septic tank in that e-mail?
A The septic tank will be put in by a different

company. I have given many opportunities to the first company and was continually stood up. Currently, we're waiting for the design of your septic tank to be completed by DHEC.

Q Okay. And what did he say about the building permit?

A The building permit has been approved but not picked up yet. I will do that before I call for my first inspection.

Q Okay. So up at this point, what work had been done on your home?

A At this point, we just had the lot cleared.

Q Okay. Let me show you another e-mail and ask that you . . .

A Actually, that's -- yeah. Go ahead.

Q I'll show you another e-mail and ask that you look at that. Do you recognize it and what prompted you to send that?

A Well, this is about we need to know where you stand in preparation for the first draw. Is the weather changing your expectations? We're using the contract cost estimate with the attached draw procedures information you gave us from National City Mortgage and the draw schedule as basis for our expectations. We are expecting copies of the

following: document and receipts for permits, invoices, receipts for work done, lot prep, porta-john, dumpster, temporary utilities, power pole, footings, foundation, garage slab. And that is all the same things that are outlined in the other document for a draw.

Q Was Danny pushing to be paid?

A He was. He was starting -- he was pushing to be paid. He wanted to get paid. And at this point, yeah, he was asking to be paid.

Q Okay. Why didn't you pay him?

A Things weren't done. He needed to provide these things, which he did not do. And the second thing is the structure was questionable.

Q Okay.

A The -- yeah, go ahead.

Q It's okay. I'm just going to show you this last exhibit and we'll talk about a few other things. Do you recognize this as Plaintiffs' Exhibit No. 11? Oh, can you publish the date of the previous exhibit. When did you send an e-mail about the draw?

A January 9th.

Q Okay. And how about the next?

A This is January 13.

Q Okay.
A And this is to Patty Zerbst.
Q And who is Patty Zerbst?
A She's the National City Mortgage representative.
Q And what's the substance of that e-mail?
A The first draw and plan to completion. And would you like me to publish one and two?
Q Sure.
A (As read): "We understand Danny will be ready with all applicable documents submitted to you in the first phase of construction completed by 16 January. We further understand the critical aspect, information draw procedures, construction loans, the draw schedule, and contractor's rules defined in our contract with Danny. On January 20th after receiving and reviewing copies of building and septic permits, termite treatments, builders' risk general liability insurance, receipts and invoices for work, and a copy of the frame-up contract, and the request for authorization from Danny, we will sign it. We understand it will not ensure all actions and documents are in order. We take the chance of failed inspection resulting in delay of disbursement."

What we're saying here is we want all these things provided --

Q Okay.

A To us as outlined originally.

Q And that was your expectation of the schedule that he had?

A It is our -- the schedule was running late.

Q Okay. Now --

A And what we're also saying here, we say that on January 26th, as per our contract with Danny and outlined in the disbursement instructions, a check will be cut.

Q Okay. So you were prepared to pay him if he met the conditions?

A Exactly.

Q Okay. Now, was a foundation ever poured or set up on your lot?

A One of the conversations Danny and I had when he was pushing for payment, the pad had not yet been poured. And that was one of the things that had to be done yet. And then he did pour that pad and they did do some work.

Q Okay. What kind of work?

A They were putting up the walls, the concrete walls, which is part of that, and the concrete

pad, and the supporting concrete block structures. And I went out to that property and we had a little wind storm. And one of the concrete columns had actually blown over.

Q Okay. All right. Did you subsequently terminate Mr. Gilbert's --

A We did.

Q Okay. Now, did you hire another contractor to finish the job?

A We did.

Q And who was that?

A That was Johnny Kahler.

Q Okay. And what happened with that contract?

A John started work and he was doing a good job. He was arguing with me about everything. But he was -- his subs were working and they were putting the structure together. And he continued to argue with me and wanted a special meeting with me in a cul-de-sac by myself. And we had a big issue that happened between him and the framer. And he told the framer to stop working. And so we ended up firing him, John Kahler.

Q Okay. Did you hire a contractor after that?

A We did.

Q Who was that?

A Todd Seibel.
Q Jump out of order here.
A It would've been great if we hired him to start with.
Q Show you -- and I'm jumping ahead -- to Plaintiffs' Exhibit No. 31 and ask do you recognize that document?
A Yes.
Q Is that your contract with Mr. Seibel?
A It is.
Q And what was the contract price for that?
A The contract price is $20,000.

MR. JACKSON: Your Honor?
THE COURT: What number is this?
MR. JACKSON: This is 31.
THE COURT: Thank you.

Q And why was it different than the contract price you had with Mr. Gilbert?
A Mr. Gilbert's contract price for him was around 15.
Q Okay.
A And the construction of the house contract, is that --

Q Yeah. What's the construction price?
A 20950.
Q Why is that higher than the 185?
A Because some things had changed. I mean, the cost of the Boozer package was substantially different.
Q Okay. All right.
A And we continued on with the original drawings in that package that Danny had put together.
Q Okay. So is that contract or the scope of work any different than the Gilbert contract?
A The scope of work is the same.
Q Okay.

MR. JACKSON: That's all I have of this witness, Your Honor.

THE COURT: Mr. Ferrara?

MR. FERRARA: Thank you, Your Honor. May it please the Court?

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CROSS-EXAMINATION

BY MR. FERRARA:

Q Mr. Price, as you know, I'm representing Mr. and Mrs. Fox in this action. And what I'd like to do is go back to your testimony earlier about your conversations with Mr. Gilbert.

A Okay.
Q And let's take a look at -- let's see. You may have it before you, Plaintiffs' Exhibit No. 2, which is the contract. And those first initial meetings with Danny, you testified that Mr. Gilbert showed you Lot 20, and you and your wife ultimately decided to enter into this contract, correct?
A That is correct.
Q Okay. Now, I've heard your testimony. And you understand -- I've heard your testimony on the stand this morning, and you understand the importance of these written contracts, correct?
A Yes.
Q Okay. And you understand that the words in these contracts have meaning and explain the rights and obligations of all the parties that are party to the contract?
A Yes.
Q Okay. So let's look at Plaintiffs' Exhibit No. 2. And 8.A, is it not true that you and your wife purchased Lot 20 as is?
A We did.
Q Okay.
A With the as is meaning that it would be a

buildable lot in a subdivision and all the laws of a subdivision would apply to that.

Q Sure. And we're going to get to that. But, additionally, your testimony was that Mr. Gilbert told you that the property would perk, meaning a septic system would be approved on Lot 20, correct?

A Yes.

Q Okay. Now, when we look at the contract, is it not true -- we flip to page 2, sir, under paragraph 21 -- you and your wife also have here that this contract is contingent upon drain field site (soil test)?

A And that's what I was looking for with Derrick's question.

Q Sure.

A And that's when I asked him what about the soil test?

Q Right.

A And he said that's been done.

Q Okay.

A It's been taken care of.

Q Well, if you just relied upon Mr. Gilbert's representation at the time of signing the contract with the soil test as a nonissue, why would you

put it in the contract?
A I didn't write the contract.
Q Okay.
A He wrote it.
Q Well, now --
A I didn't ask that that be put in there.
Q Sure.
A That was just part of it.
Q And you and your wife did carefully review this two-page contract before signing it, correct?
A When you say carefully review, it sounds like that's a loaded question. And we reviewed it and with the knowledge we had at the time, we signed that contract, yeah. We thought we understood it.
Q Sure. Sure. I mean, I know that you wouldn't have signed this contract if you didn't understand the terms in it, correct?
A We thought we did.
Q Sure. Now, if we look at paragraph 10, doesn't the contract require, despite being as is, require you and your wife to have the responsibility of inspecting environmental concerns and performing a wetland study? If we look at the first two lines of paragraph 10.
A Yeah, I see that.

Q I know you see it. But I'm saying if you look at the contract, you would agree with me that you and your wife, pursuant to this contract, had the responsibility to inspect and perform a wetland study on this property before you purchased it, correct?
A Yes.
Q Okay.
A But, may I add something to that?
Q Sure. Sure.
A It's our understanding that those things were taken care of in the subdivision.
Q Sure. Well, and that's my question. Is if you --
A I'm not -- go ahead.
Q If you and your wife were understanding that these things that are in the contract were already done, why wouldn't you just line through those and say, well, that doesn't apply because we think those are already completed?
A I normally don't go lining through contracts to start with.
Q Well, let's be clear to the Court. In this particular two-page contract, you and your wife carefully reviewed every paragraph before you signed it, right?

A We read every paragraph before signed it.
Q And it's true that you and your wife also added in language to this contract, did you not?
A The language about the subdivision?
Q Yes -- no. The language about the subdivision, did you add that in? Paragraph 8, 8.I.
A We asked about -- yes.
Q Okay.
A We had -- we did add that. We didn't add it to here. He already put it on there. We had a discussion. And in that discussion when we were talking to Danny, said he could divide it. He put that in the contract.
Q And, additionally, you and your wife agreed that -- and I understand your testimony that Mr. Gilbert had agreed, and it's in the contract, 8.I, to allow the subdivision of the lots. And that was part of your understanding. But you made sure it was in the contract and that was my point. Now, sir, if you look at paragraph 10, do you agree that you and your wife, considering this property being purchased as is, that if you failed to notify the seller or the listing agent -- and this is the last sentence of paragraph 10, sir -- of any results of any inspections or studies that

you or your wife would've done or could've done, that you deem to waive those privileges of any inspections if you proceed forward to closing?
A That's what it says.
Q Right. And that's what you understand, correct?
A I understood that we didn't really need to do that.
Q Okay. And so, the exhibit, which I believe -- the settlement statement exhibit, you and your wife, I believe you testified, proceeded forward to closing despite paragraph 10. And, finally, sir, if you could turn to page 2, did you also understand that any changes to this contract must be in writing?
A Does it say that?
Q I believe it does. But I was also asking your understanding. You understood -- you and your wife understood when you signed this agreement that any changes to the contract would be required to be in writing. Was that your understanding?
A Normally, that's what we did.
Q Okay. And so, the agreement that you and your wife had with Mr. Gilbert on behalf of Belinda Fox, the complete agreement is contained in Exhibit 2, is it not?

A The complete agreement meaning that we have a buildable lot in phase two of Eagle Harbor. That we could put a house up there, and Danny will put that up there with this other contract.
Q Sure. And let's go through that. You do have a buildable lot, do you not? Lot 20 is buildable. You house is on there today, correct?
A My house is on there today.
Q Okay. And if we look at paragraph 8.I, it says that the developer, and you understood that to be Danny at the time as I understand your testimony, agreed to allow subdividing that property, meaning Lot 20, into two separate lots with the possibility of three lots upon approval of homeowners' association?
A Right.
Q Okay. And I understand your testimony, you and your wife relied upon Danny and you relied upon the fact that the lot could be subdivided when deciding to move forward with the contract.
A Yeah. And buildable lots.
Q Okay. Well, sir, can you tell me in paragraph 8 or anywhere in the contract where Mrs. Fox or Mr. Gilbert represented to you in writing that the lot, the additional lots, meaning the additional

subdivided lots, would be buildable?
A That's all we understood about lots in a subdivision is that they would be buildable lots. You wouldn't have a lot if it wasn't buildable in a subdivision.
Q But let's be clear with the Court, though. You and your wife understood that if the lots would be subdivided, you assumed they would be buildable lots. But when you look at the contract, it doesn't say that the additional subdivided lots would be buildable, correct?
A Correct. And then it does -- those words are not there, but it's implied. It's in a subdivision. It's a lot you're separating in a subdivision.
Q Well, and I apologize. Earlier I didn't reference you -- paragraph 11, which is right below paragraph 10, does it not say, Mr. Price, that the complete agreement is set forth in these two pages and that -- and I'm paraphrasing -- that only a subsequent written signed, you know, document by both parties could change that agreement?
A Yes, it says that.
Q And it further says that the buyer and seller, meaning you and your wife being the buyers, Mrs. Fox being the seller, acknowledge that they

have not received or relied upon any statements which are not expressly stated herein.
A That's what it says.
Q Right. So everything --
A But your term of what you're arguing about right now is a separate lot. And our interpretation of a separate lot is a buildable lot.
Q Sure. Right. I'm not trying to argue with you, sir. I'm just asking you that to see if you would agree that this last sentence of paragraph 11 says that you and your wife agreed that you have not relied upon or received any statements which are not contained in these two pages before you signed that agreement. Do you see that today?
A I see that today.
Q Okay. Now, let's talk a little bit about Jeffrey Spell. Your attorney just presented some testimony and you testified about Jeffrey Spell being Mr. Gilbert's attorney, I believe. And he --
A I testified that he was the closing attorney.
Q He was the closing attorney. Okay. Now, did you or your wife contact Mr. Spell about reviewing this contract before you signed it?
A No.

Q Okay. You would agree that you're sophisticated and experienced in general?
A No.
Q You would not. I think you're quite articulate. Would you agree you're at least articulate?
A I can sometimes express myself.
Q Sure. Sure. I mean, when we look at exhibits that you've already introduced in this case, in this lawsuit, it's pretty clear that you and your wife understand the importance of contracts, the importance of holding Mr. Gilbert, you know, to his AIA contract that you testified. You agree to that?
A We learned all that. That was not the knowledge that we had when we signed this contract for sure.
Q Okay. Sir, Exhibit No. 2 that you have in your hand, 8D -- or 8C -- C rather says you're going -- that buyer is to receive a copy of the covenants from closing attorney at closing?
A That did not happen.
Q That didn't happen because you nor your wife asked Mr. Spell to give you a copy of those documents?
A He wasn't there.
Q Okay. Will you agree that you paid -- if we look at Exhibit No. 3 -- you actually appeared on

behalf of your wife as power of attorney in closing, and you agreed to the settlement statement and paid Lowcountry Title Services for closing?

A Yeah, we paid them.

Q On Exhibit No. 3, sir, there is a signature that says Jeffrey T. Spell by Brian W. Badger. Was Mr. Badger, another attorney, at Mr. Spell's office handling --

A Badger was there, yes.

Q Okay. And so he was filling in for Mr. Spell?

A He signed for him, yes.

Q And he's an attorney?

A I don't know whether he's an attorney or not. He may be, he may not be. I don't know. He was at that office.

Q Okay. But you agree he was an agent on behalf of Mr. Spell that was representing you and your wife in this transaction?

A I agree he signed this, yes.

Q Well, you know, up until you signed the settlement statement, you or your wife could have told Mr. Gilbert, hey, we don't have the covenants, we haven't performed any studies, and we don't want to move forward with this closing. Correct?

A Of course that's correct. But also we were under a lot of pressure to do something to move here and to get the building going.
Q Sure.
A And this had already been delayed. We were trying to have a place to live.
Q Sure. I understand. Now --
A And -- go ahead.
Q Looking back at the settlement statement, sir, which I think is Exhibit No. 3, you and your wife or you paid -- you paid for title insurance on Lot 20, correct?
A Yes.
Q And is it not true that you and your wife filed a title claim claiming the exact same damages that you're claiming in this suit --

MR. JACKSON: Your Honor, I object to any testimony about insurance in this matter. It's clearly independent, wholly independent, under collateral source rule. That's not relevant to this trial. What they did with their insurance company based on the premiums they paid, what they did with that is not relevant to this trial. And I would object to the introduction of any evidence

about their insurance and their title insurance claims.

THE COURT: So who is the -- Mr. Ferrara, how is insurance, if it is separate, be relevant today?

MR. FERRARA: It's relevant, Your Honor, to the damages. The claim to damages by the prices in this action are the identical damages that they sought in the other lawsuit. And I would proffer, Your Honor, that the testimony will establish that the other lawsuit, the damages that were paid, are the same damages. And the collateral source rule doesn't apply when the fact that the damages have already been paid in a separate action are the purpose of the admission of the information, not that a third party paid information. And it's a bench trial, Your Honor. So the word insurance is not prejudicial, I don't believe. But the damages that they are claiming are the same damages. Damages in this lawsuit are the same damages that they've been paid for in that lawsuit.

MR. JACKSON: Your Honor, if I may address that quickly.

THE COURT: Sure.

MR. JACKSON: The collateral source rule --

and I've got a copy of the case here I'll be glad to hand Your Honor -- provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damage owed by that wrongdoer. That's the purpose of it. And he's trying to elicit testimony about what damages as some kind of set-off or something. It's simply not allowed because my client has paid for title insurance. They paid for an owner's policy. They paid the premiums. It's wholly independent of what Mr. Fox or Mr. Gilbert or any of these other defendants did. And so there's no relevancy to this proceeding to go into what the title insurance damages is.

MR. FERRARA: If, Your Honor, I could just briefly. I have one more thing. The title policy included in the title policy and that's already admitted in the other action has the rights and the obligations of the parties, and it has that there are subrogation interests. The title insurance company pursuant to that contract stands in the shoes of the seller, which was Belinda Fox, on this Lot 20. And they have a power of subrogation that's implicit in that. To be candid

with the Court, in the title insurance settlement, there was a carve-out or a waiver of subrogation rights. But that still doesn't negate the fact that the damages that are being sought in this action are damages for which the prices have already been paid for.

THE COURT: All right. What we'll do, gentlemen, is I'll go ahead and hear the testimony subject to the objection and clarification that I may need to flesh that legal issue. I want all the information in front of me because some of that information may be important to determine --

MR. JACKSON: Well, Your Honor, the other point I'd like to raise. There is a confidential settlement that is involved with that case. That was one of the terms that my clients executed with the title company. And his point about the subrogation rights still applying, that might be applicable if title -- Investors Title were suing his clients, but they're not. And as he mentioned, there's an expressed carve-out and waiver of subrogation rights to my clients and a waiver -- and, you know, an expressed non-release of these defendants.

THE COURT: I think that's why I need all

that information to be able to understand the argument. Because if his argument is such that it's not independent because of the subrogation rights, and your position is that it's carved out and, therefore, that doesn't apply, then I need all that information to make that.

MR. JACKSON: Your Honor, I can furnish you an in-camera copy of that settlement agreement so you can see that it's carved out for yourself before you take his testimony.

THE COURT: All right. Mr. Ferrara, your position on that?

MR. FERRARA: My position, Your Honor, I would request Your Honor to do what your initial ruling was, was to hear the testimony. Because my client's position is that even though the subrogation issue might've been carved out, it still does not resolve the issue about the damages. And that if the damages that the Prices are seeking in this action have already been paid in another action, then the testimony is relevant at least on that point, Your Honor. It's not -- I'm not trying to get around the collateral source rule, Your Honor. But the testimony is offered for an additional purpose which is to the damages

that the Prices are seeking in this case.

MR. JACKSON: Your Honor, again, the collateral source clearly applies. There's no relevancy to the damage. I don't see how damage could even be claimed as a set-off unless his client somehow had a way that they paid to this policy. And I have excerpts I'd be glad to show the Court that would show the carve-outs that I've already furnished to Mr. Ferrara.

THE COURT: All right. Let me take a look at the documents regarding the carve-out.

MR. JACKSON: This is not a full document. This is the part that shows the carve-out, Your Honor. And would direct the Court's attention to subparagraph C and to the release provisions. And here's the confidentiality provision.

MR. FERRARA: And, Your Honor, if I might approach, I also have the title policy that I could pass up to Your Honor and reference the section I was referring to.

THE COURT: And where's the carve-out?

MR. JACKSON: Your Honor, if I may show the Court subsection C, the waiver of the subrogation rights.

THE COURT: Okay. I see it now.

MR. JACKSON: And there's also a part in the release that says it doesn't release those specific parties. If it's not on that page, I have it on another page. I have a full copy of the agreement.

On page 3, I would show the Court this as well. Second paragraph, Your Honor.

(Brief pause.)

THE COURT: All right, gentlemen. What I'm going to do is I should -- I believe they call these exhibits on there -- I think I want to go ahead and hear from Paul's testimony. You know, I'll of course hear the argument. I'm not ruling at this time as to the effect of all that. I'm going to listen to all the testimony and then I'll listen to -- after having had a chance to look at it more closely, because I wasn't aware this was coming down the road.

MR. JACKSON: Your Honor, because of the confidentiality provision, can we have an in-camera, just Mr. Ferrara and Mr. Hubbard, on the testimony because of the confidential provision?

THE COURT: All right. That sounds reasonable. Any objection to that, Mr. Ferrara?

MR. FERRARA: No, Your Honor.

THE COURT: Okay.

MR. FERRARA: Just, let's see, Your Honor, I guess -- would Your Honor wanting us to mark the -- mark these exhibits, the settlement agreement and the title policy, maybe Court's exhibit?

THE COURT: Court's exhibits, yes, please.

MR. JACKSON: Yes.

THE COURT: That's a good idea.

MR. JACKSON: Yes.

THE COURT: We'll get those marked and we'll proceed the in-camera hearing, and we'll excuse everybody else while we take care of that. All right.

(Whereupon, Court's Exhibit No. 1, Settlement Agreement, was marked for identification.)

(Whereupon, Court's Exhibit No. 2, Insurance Title Policy, was marked for identification.)

THE COURT: All right. We can proceed. We're proceeding in-camera regarding the issue regarding the confidentiality and the testimony related to that. Go ahead, Mr. Ferrara.

MR. FERRARA: Thank you, Your Honor. May it please the Court?

BY MR. FERRARA (In-Camera):

Q Mr. Price, I was asking you -- we've talked about it, but I'll ask you now. It's true that you and your wife filed a title claim for damages that you and your wife claimed that you suffered as a result of the Lot 20 deficiencies, correct?

A Yes. There was a title insurance claim.

Q Okay. And --

MR. FERRARA: Your Honor, I'm permitted to be able to ask him the amount?

THE COURT: Yes.

MR. FERRARA: Okay.

Q Mr. Price, how much was -- what was the amount of the settlement that you and your wife had with Investors Title?

A I don't know.
Q Okay. I believe that we have the Court's document, the Court's exhibit, to maybe refresh your recollection. I'll hand that --

MR. FERRARA: Your Honor, may I hand this to the witness?
THE COURT: Which court exhibit --
MR. FERRARA: Court's Exhibit No. 1.
THE COURT: Exhibit No. 1. Okay.

Q Sir, I'm handing you Court's Exhibit No. 1. And if you'd flip to page 2, you and your wife received a $125,000 settlement for your title insurance claim for Lot 20 deficiencies, correct?
A That's what it says. This is the first time I've seen this document.
Q Well, if you go to page -- the signature page of that document, is that your signature on the document?
A It is. My wife asked me to sign and I signed it.
Q So you didn't read it?
A I did not.
Q Okay. All right. But you do agree that you and your wife received the $125,000 for damages

associated with Lot 20, correct?
A That's what it says.
Q Well, now I'm asking you -- you said you couldn't remember. But I'm asking if you could tell the Court from your memory, did you and your wife receive money for damages from Lot 20 deficiencies?
A We got a check, right. I don't know. I didn't see the check.
Q You don't know. Okay. Now, that $125,000 that's referenced on page 2, you and your wife had instituted a lawsuit pro se at some point, correct? Meaning without an attorney.
A Against -- yes.
Q Okay. And as I understand in that action, you and your wife initially reached a settlement agreement. And then that settlement agreement was set aside and you went back and negotiated a new settlement agreement that resulted in this $125,000 settlement, correct?
A I would assume so.
Q Okay. Now, the $125,000 that Investors Title paid to you and your wife, that was for the wetland issue on the two acres of Lot 20, correct?
A I can't tell you that. I don't know.

Q Okay. Do you recall writing Investors Title and explaining to them what damages you were seeking under that title insurance policy?
A No.
Q You don't. Okay. Do you recall -- would your wife have handled that, that communication with Investors Title?
A Yes.
Q Okay. Did you speak with your wife about her letter to Investors Title in 2004 about the title claim?
A I'm sure I spoke to her.
Q Okay.

MR. JACKSON: Your Honor, may I suggest something? Just I'm trying to move this along. Obviously, Ms. Price was the primary one who dealt with this claim. This is an in-camera hearing. I don't have an objection if you want to put her on the stand and let him ask these questions to the more knowledgeable person so we can move this along.

THE COURT: All right. Do you want to do that, Mr. Ferrara?

MR. FERRARA: Yes, Your Honor.

MR. JACKSON: Ms. Price.

THE COURT: We're going to let you step down, Mr. Price. You're still under oath and you're still a witness. We're just going to substitute in your wife, okay.

(Mr. Ronald Price exits the witness stand at 10:46 a.m.)

(Whereupon, the witness, DIANA RAE PRICE, was duly sworn.)

THE COURT: Thank you, ma'am. Sit down, give your name, spell your last name for the court reporter.

THE WITNESS: Diana Rae Price, P-R-I-C-E.

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DIRECT EXAMINATION

BY MR. FERRARA (In-Camera):

Q Mrs. Price, I'm just going to limit my questions at this time to the title claim. Did you handle, primarily handle, the title claim with Investors Title regarding Lot 20?

A I did.

Q Okay. And did you write a letter to Investors Title detailing the problems you and your husband

had with --

MR. JACKSON: Your Honor, I object to this on relevancy grounds. We have a copy of the complaint that was filed by an attorney on behalf of the Prices in the case detailing their claims. So what my client wrote a letter about is just simply not relevant.

THE COURT: I'll go ahead and hear from him. Go ahead, Mr. Ferrara.

MR. FERRARA: Thank you, Your Honor. Your Honor, I guess at this time what I'll do is maybe mark this as Court's Exhibit No. 3 for identification at this moment.

THE COURT: What was Court's Exhibit No. 2?

MR. FERRARA: Your Honor, Court's Exhibit No. 2 was the five-page Investor Title -- excuse me -- six-pages -- Investors Title insurance policy.

THE COURT: So 3 will be the letter?

MR. FERRARA: Yes, sir.

THE COURT: Okay.

(Whereupon, Court's Exhibit No. 3, Letter, was marked for identification.)

MR. FERRARA: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. FERRARA (Continuing):

Q Mrs. Price, I'm handing you this two-page document that's identified as Court's Exhibit No. 3. It's a copy of a letter -- is that a letter written by you to Investors Title?

A It is.

Q Okay. And is it not true that in 2004, March of 2004, you advised Investors Title that you and your husband were defrauded -- and I'm paraphrasing -- defrauded and misinformed about the status of Lot 20, and that you believe that the covenants and the plat in this action, in that action, were not validly recorded, the title was unmarketable, that the restrictive covenants as to Eagle Harbor don't apply to your lot, and that the soil tests were not made aware to you and your husband?

A I don't see all that in this letter.

Q Okay. And I'm just referring to -- I apologize, if I could look over your shoulder. Okay. I apologize. I have the wrong letter there. The

letter that you have is March 14, 2004, correct?
A It looks like it.
Q Okay. And that's a letter -- that's a letter that you wrote to Investors Title?
A I did.
Q Okay.

MR. FERRARA: And at this time, Your Honor, I would move to just admit Court's Exhibit No. 3 as a letter, two-page letter, written by Diana Price dated, I believe, it's March 14, 2004.

MR. JACKSON: As a Court exhibit, my objection on relevance and grounds.

THE COURT: Agreed. That is a court's exhibit subject to the objections of the plaintiff.

A May I say something?
Q Sure.
A This page 2 is --
Q One second.

MR. JACKSON: Y'all can't be in here. I'm sorry.

THE COURT: Yeah. Not yet, folks.

A This page 2 is a different page 2 to a different letter.
Q Okay. I apologize.
A These are not -- these do not go together.
Q Let me take a look real quick.

THE COURT: Gentlemen, we got the -- we have the letter and then we'll have the complaint. That basically outlines what you contend, Mr. Ferrara, would be the claim for damages under that policy. Is that right?

MR. FERRARA: Additionally, Your Honor, there is a second letter, just the one page.

THE COURT: We got all the letters in there. And I think I understand the argument. I don't want to cut you short if you want to ask more questions. I'll certainly let you. I just want to make sure that I know where we're at and to make a suggestion that it's my understanding that that's the basis -- that will give me the information that I think I need to be able to make a determination on that. And it will allow us to basically take that portion under advisement and then proceed with the rest of the testimony as to

Mr. Price to keep it moving along.

MR. FERRARA: Okay.

THE COURT: Any problem with that?

MR. JACKSON: No, your Honor. I'd like to ask her one or two redirect questions to clarify the issue on collateral source rule. And I do have a copy of the complaint that was filed by the attorney that I can add as a court exhibit.

THE WITNESS: May I say something? I still have not got the --

THE COURT: Hang on.

MR. JACKSON: So this will be a court exhibit, whatever number we're up to know. This is a copy of the complaint filed February 22, 2007, by Mr. Joseph Ginn on behalf of the Prices against Investors Title. I would note for the Court that Investors Title was the sole defendant in that action.

(Whereupon, Court's Exhibit No. 4, Complaint, was marked for identification.)

MR. FERRARA: And, Your Honor, for clarity and to expedite the matter, if the parties would

agree to this stipulation, I think I'll be done -- I won't have any more questions at this time from Mrs. Price in that the -- let's see.

In the Court's file downstairs, Your Honor, in the other case, in the Court's file -- and has already in court documents that two letters that I -- we're seeking to advise the Court on. And -- let's see here. I just want to be clear. Yeah. Your Honor, in 2007-CP-08-458 there is -- in the Court's file downstairs, there's a binder in response to summary judgment with affidavits. And it contains the two letters that I would like the Court -- draw the Court's attention to -- in order to be able to make a ruling about that specific issue in the case. And that way there won't be any question about which page, page 1 or page 2, is right. But there are two letters and I've got the dates in the Court's file downstairs if the parties would agree that we could just --

MR. JACKSON: If that's part of the file, sure.

MR. FERRARA: Yeah. If we could just have Your Honor look at that.

THE COURT: You're suggesting that those are clear as to which page belongs to which?

MR. FERRARA: Yes.

THE COURT: I understand. Any objection?

MR. JACKSON: No objection, Your Honor.

THE COURT: Okay. All right. You said you wanted to follow up with some --

MR. JACKSON: Just real quick.

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CROSS-EXAMINATION

BY MR. JACKSON (In-Camera):

Q Mrs. Price, did you have an owner's policy for this property?

A We did.

Q And who paid the premiums for that owner's policy?

A We did.

Q Did anybody else provide any funds or source of funds for that owner's policy?

A We -- no.

Q And the suit that you hired a lawyer to do in your complaint, that was on that policy, correct?

A Correct.

Q For the contract and bad faith refusal to adjust your claim?

A Correct.

MR. JACKSON: That's it, Your Honor. And, Your Honor, I have a case I'd like to present to

the Court on the collateral source rule.

THE COURT: Thank you.

MR. FERRARA: Your Honor, if I may? Very tiny redirect in that --

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REDIRECT EXAMINATION

BY MR. FERRARA (In-Camera):

Q Mrs. Price, you and your husband also brought causes of action for negligent misrepresentation fraud in connection with Lot 20 and sought to include an unfair trade practices action in the 2007 08-458 too, correct?

A I do not remember that.

Q Well --

MR. JACKSON: Can you clarify? Was that the pro se version or was that the one drafted by the lawyer?

MR. FERRARA: I don't want to misrepresent anything to the Court. Maybe I'll just ask this.

Q Ma'am, would you agree that whatever actions you took in the Investors Title case that are in the Court's file downstairs were taken by either you or your attorney in that action?

A In the Court's file?
Q Yes.
A Yes.
Q Okay.

MR. FERRARA: That's all I have.

MR. JACKSON: Nothing further on this, Your Honor.

THE COURT: Mr. Hubbard, do you have anything?

MR. HUBBARD: I don't.

THE COURT: Didn't mean to ignore you.

MR. HUBBARD: No, I'm okay. I don't have any questions. Thank you.

THE COURT: If I try and ignore you, please speak right up, okay. You can step down, Mrs. Price.

Discontinue, I guess, the in-camera portion of that. I have enough information now to make a ruling on that once I get a chance to study up on it.

MR. JACKSON: Okay.

THE COURT: Mr. Price, come on back up. Make sure we got those properly marked, gentlemen, because I'm trying to keep track, but I hope y'all

are.

MR. JACKSON: Yes, sir.

(Mr. Price resumes the witness stand at 10:58 a.m.)

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CROSS-EXAMINATION

BY MR. FERRARA (Continuing):

Q Mr. Price, we were talking about the closing. And I think I'd asked you that -- let's see. I asked you about the wetland study or maybe I did not. Did you or your wife have a wetland study done on Lot 20 before you purchased it?

A No.

Q Okay. And did you and your wife have any type of boring samples completed or a soils test completed before closing?

A No.

Q Did you or your wife contact a septic company or anyone to determine the location, the appropriate location, of a septic permit on Lot 20?

A No.

MR. FERRARA: Your Honor, I don't believe there's an objection and I would seek to move into

evidence Defendant Fox's Exhibit No. 1 which is a plat dated, or recorded rather, Your Honor, 9/26/2002 in the Plat Cabinet P at page 281-A.

THE COURT: Any objection?

MR. JACKSON: No objection, Your Honor.

THE COURT: Admitted without objection.

MR. FERRARA: Your Honor, if I may approach, I have a small copy for the Court's reference during the testimony. I apologize. I should have brought a larger copy.

Your Honor, may I approach the witness?

THE COURT: Yes.

(Whereupon, Defendant Fox's Exhibit No. 1, Plat, was received into evidence.)

BY MR. FERRARA (Continuing):

Q Mr. Price, taking a look at this plat that's in evidence, Lot 20 on Saddlehorn at the end of the cul-de-sac, that's the lot that you and your wife purchased, correct?

A It is.

Q Okay. Did you or your wife refer to the plat prior to closing?

A I don't think so.

Q If you take a look at it, would that help refresh your recollection about whether you've looked at it before?
A I've looked at it, but I don't think we looked at it before closing.
Q Okay.
A We looked at it a lot since.
Q A lot since. Okay. And you agree that on the right-hand side of that plat that's recorded in Berkeley County that the engineer noted that no wetland study had been completed?
A No wetland delineation or environmental studies have been done.
Q And do you know if Mr. Spell, your attorney for closing, in connection with the title search would've reviewed that plat on your behalf?
A I have no idea. I never talked to Mr. Spell.
Q What about the attorney that you did speak with at closing, Mr. Brian Badger?
A He did not discuss this with me.
Q Okay.
A If he saw it. I don't know whether he did or not.
Q Okay. Now, when we look, sir, to the deed that's already in evidence -- which I believe is Plaintiffs' Exhibit No. 4, and I'll hand that to

you. Looking at the legal description, does it not reference the plat that is Defendant Fox's Exhibit No. 1?

A I'm sure it does. The description sounds right.

Q Okay. And, sir, what I was referring to was just -- I'll help you here -- was just page 1 about halfway down where it says Exhibit A?

A Okay.

Q Exhibit A has a legal description. I know that --

A It does.

Q -- Mr. Spell to handle that. But it references a plat. It says it's the final plat of Eagle Harbor.

A In Plat Book P at page 281-A?

Q Right.

A Yes.

Q And Defendant's Exhibit No. 1 that's before you, that is a full-size copy of that plat, correct?

A I assume that it is. I mean, I can't -- I don't see a number on here that corresponds to this.

Q Oh, sure. The P 281?

A Page 143 of 2382.

Q Yeah, it's really tiny.

A Page 281, okay?

Q Yeah. Yeah. And so that's what was recorded at

Berkeley County of the time you and your wife closed on Lot 20 in November 2003, correct?

A Yes. That's what this says.

Q Sure. Now, we talked about the no wetland delineation done. And also, if you look carefully, sir, at the plat, it states that the roads -- that there's a private ingress/egress easement on the roads. Now, I can help you there and ask if you agree with that?

A Yeah. It says private 50-foot ingress/egress.

Q Right. And so if you look -- if you and your wife or your attorney looked at that plat, you would see that the roads in Eagle Harbor at the time of your closing were private, correct?

A I see that description.

Q Are you and your wife seeking damages against my client Belinda or Gerry Fox or Eagle Harbor Partnership for the roads in Eagle Harbor being private or are you not?

A In the separate road issue not . . .

Q Right. And I apologize. Just for clarity, I think, Your Honor, I wasn't trying to get to the general road claims. I'm talking about on this action here today, sir. It's just about Lot 20 and any claims you and your wife might have. And

my question is that in this action today, are you and your wife seeking any damages for the roads of Eagle Harbor, meaning the road attaching to Lot 20 being public or private?

A In this here today?

Q Yes, sir.

A I don't know exactly what you're trying --

Q You don't?

A No.

Q Okay. Well, today, do you know if you and your wife are seeking damages against my client for the Eagle Harbor roads going to Lot 20 being private or not? I know that was an allegation in the case.

A Are we complaining that they're private? Is that what you're trying to say?

Q Yes.

A I think the real complaint was that they were not private.

Q Right. Are you and your wife today in this action seeking damages for that point --

A I can't clarify that for you. I don't know.

Q Okay.

A You're confusing me a little bit with all this.

Q Now, I know you testified about suffering some

damages that are already into evidence for delay. Do you have any knowledge about your delay damages with respect to Lot 20?

A Yes.

Q Okay. And what is your knowledge?

A The knowledge is that it was delayed. It was supposed to have been completed the 25th of February. It was not able to be completed until the 25th or sometime in November of '04. And the reason for the delay was no septic permit caused the stop of construction.

Q Okay.

A And when the construction stopped and they had to do a -- had to get a permit for an easement to cross the road and to get the septic permit issued, all that caused us some delay. On top of the fact that when that happened, simultaneously we found out that the construction that Danny did do was unusable and we had to tear it down. That caused delay because we couldn't continue building. We had to start building over.

Q And just for the Court's clarifications, Mr. Hubbard -- or for your clarification, Mr. Hubbard, I'm going to let him ask you questions about you and your wife's claims against

Mr. Gilbert and the building delays. I was just going to focus your attention just on Belinda Fox's claim to damage by you and your wife. I understand your testimony to be that you're claiming damages against Belinda Fox for the delay on the construction of your house because she sold you the lot?

A Because the permit was unavailable.

Q The septic permit?

A That's correct.

Q Okay. And --

A The work had not been done to allow that to happen.

Q Okay. Now, I understand that in one of the Court's exhibits, you and your wife applied for a permit on January 21, 2004, correct? Does that sound about right?

A We did.

Q Okay. And prior to the application -- or at the time of application, you were under the understanding that it would be granted quickly. Is that correct?

A We thought it would be.

Q And --

A In fact, it was. They gave it to her. And then

they rescinded it.
Q Right. So Berkeley County or DHEC did give you and your wife a permit, but then it later got rescinded?
A The next day. Was it the next day?
Q A couple of days later, right. And so how much of it -- so when -- when, if you recall, were you and your wife able to obtain the permit from DHEC?
A That was May. Later than that, wasn't it? When was it?
Q I believe in one of these court documents here, I believe you got an approval on May 18, 2004. Does that sound correct?
A Yes.
Q Okay. So what damage are you and your wife claiming against Mrs. Fox from two -- from 1/22 of '04 to 5/18 of '04?
A We would have interest on the loan that increased because of the delay in construction. We have the delay in storage.
Q Okay.
A And the delay in my rent.
Q Now, even though the contract, which is Plaintiffs' Exhibit No. 2 says the property was sold to you as is, and you and your wife had the

ability to get -- to check out all of the permit statuses. Are you and your wife still claiming that Belinda Fox would owe you any money for the four months of damage that you testified about?

A Yes.

Q Okay. Do you think that you and your wife bear any of that responsibility or should share in any of the damages of interest or delay in rent that you testified about?

A I'd say no, but we share anyway. I mean, we still had to pay all that.

Q Right. Now, the interest that you're claiming, you guys have attached a bunch of spreadsheets. Did you compile the spreadsheets or did your wife?

A My wife did.

Q Okay. Do you have any firsthand knowledge of the line items in the spreadsheet or should I ask her?

A Some of them, but not all of them.

Q Okay.

A She's more expert on it.

Q We talked about it earlier, sir, but part of this lawsuit, you and your wife are claiming damages for an alleged two acres of wetlands that you later determined are on Lot 20 after closing, correct?

A Right.
Q Okay. And what is your understanding about the value that you and your wife are claiming about the two acres of wetlands that you later discovered?
A That you can't do anything with it. It's unusable.
Q And do you know what dollar amount you're claiming for the two acres of loss of use?
A Approximately $80,000.
Q Okay. I think we're gonna have Mr. Carter come in and testify later today. But is that -- is your basis of the $80,000 from Mr. Carter's appraisal?
A It is.
Q Okay. Are there any other damages that you or your wife are claiming against Belinda Fox other than what you've testified about just now?
A Just what's in the lawsuit.
Q Well, and I'm trying to be clear that other than what you've testified to on the witness stand, correct?
A Yes.
Q Okay.
A All of those things are in that spreadsheet that you want to talk about.

Q Now, you would agree, sir, that there were some delay damages between January and May of '04 due to weather? Because I think one of your e-mails references that.
A Yeah. Yeah, that's correct. In January.
Q All right. And --
A Like the 5th or 6th.
Q And the December one, e-mail, that's in evidence, which is Plaintiffs' Exhibit No. 8 -- I apologize. Strike that. I believe in one of the e-mails that's in evidence might be in exhibit -- let's see -- 9, Plaintiffs' Exhibit No. 9. I apologize. Maybe you'll agree to this. In your e-mail to -- or Diana's -- I guess it's your e-mail to Danny that you testified about earlier, Exhibit No. 9, you did acknowledge that there was some delay with the footing and rain and there were some construction delays as well. But my question is is that you're not seeking damages for those delays against Belinda Fox, are you?
A For the rain?
Q Yeah.
A No.
Q Okay. And in Plaintiffs' Exhibit No. 11, see if could, Mr. Price, if you recall this. You noted

to prime lending that you were hoping after considering the delays at that point that you and your wife would be moved in by March 31st of 2004. Does that sound right?

A Yeah. That was our desire, yeah.

Q Okay. And so it appears that neither you nor your wife went back and amended the building contract, which is Plaintiffs' Exhibit No. 5, to change the completion date from February 25th to March 31st. Is there a reason?

A What is the date of the letter that you're talking about?

Q Plaintiffs' Exhibit No. 11 is January 13, 2004.

A None of these are numbered.

Q They've got a red stamp on them.

A And your question is we note that we expect to be moved in March 31st, and we did not go back and change the contract. That's what your question is?

Q Yes.

A That's true. We didn't do that.

Q Did you or your wife have a conversation with Danny about the March 31st deadline?

A I don't know whether we had a conversation with him about that or not.

Q The reason I say that is because that date --
A I'm sure we must have. We wouldn't have pulled that out of the air.
Q Right. Right. And so there were some delays but -- I'm just trying to understand the agreement between you and your wife and Heritage Classic Homes and Danny in that. So is it fair to say if Danny would've completed the house by March 31, 2004, that you and your wife would've been satisfied?
A I'm sure we wouldn't be sitting in here today.

MR. FERRARA: Your Honor, at this time I would move into evidence Defendant's Exhibit No. 2, I believe, Fox.

THE COURT: Any objection?

MR. JACKSON: No objection, Your Honor.

THE COURT: All right. Without objection. And what is that again? Defendant's 2?

MR. FERRARA: Yes, sir. These are covenants, restrictive covenants, for Eagle Harbor dated February 2, 2003.

THE COURT: All right.

(Whereupon, Defendant Fox's Exhibit No.

2, Covenants, was received into evidence.)

Q Mr. Price, I'm handing you Defendant Fox's Exhibit No. 2, which are recorded covenants. Prior to closing, did either you or your wife take a look at those restrictive covenants?
A No. We didn't have them.
Q Okay.
A Danny gave me some later.
Q Did Danny give you any restrictive covenants before closing?
A No.
Q No. Okay.

MR. FERRARA: Thank you, sir. That's all the questions I have.

THE COURT: Mr. Hubbard?

MR. HUBBARD: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. HUBBARD:
Q Mr. Price, I'm going to go back to the agreement to buy and sell. And I apologize, I don't know if that's -- that's Defendant Fox's Exhibit No. 2

or -- it is. You mentioned earlier in your testimony that you've read this. You and your wife both had an opportunity to read this contract?

A We did read it.

Q Okay. I'm going to direct your attention to the very bottom of page 2. Is that language that you and your wife added to this contract?

A Fifteen, closing cost?

Q No. It's below the signatures, actually. The very bottom of page 2.

A Oh. On the back?

Q Yeah.

A Did we add this?

Q Yes.

A Not that I know of.

Q Okay.

A We asked about VA financing, yes.

Q But you didn't ask that upon execution of this document, buyer will be consulting an attorney as well as Jeff Spell concerning correctness and duplication of items listed above?

A The next sentence I remember we did.

Q Okay. All right.

A We asked for that VA.

Q But you did read the contract?
A We read it.
Q Okay. I want to get a little bit of background on your time in the service. I see -- I understand you retired as a master sergeant?
A Chief master sergeant.
Q Okay. I'm sorry. Chief master sergeant. And how long were you in the service?
A Thirty years.
Q And what was one of your last jobs with the Air Force?
A One of my last jobs?
Q Yes, sir.
A Preparing a wing initial communications package for deployment overseas.
Q Was that Cannon Air Force Base?
A It was.
Q New Mexico?
A It was.
Q Okay. And what was your responsibilities with that job?
A My responsibilities include the maintenance of all the radios, nav sites, radar, communications on the base.
Q Did it involve reading contracts at all?

A I did read contracts.
Q Okay. So you were familiar with contracts?
A In terms of seeing if a contractor had provided the service to us.
Q Okay. I'm gonna go back now to the contract, Exhibit No. 2. Would you agree that this is -- I'll say this. And a lot of folks, like, from buying a house or building a house or buying property, it's a big deal. Wouldn't you agree?
A It is a big deal.
Q For a lot of folks it's one of the biggest deals they'll ever face, probably, financially. Would you agree with that?
A I would agree with that.
Q Okay. So wouldn't it be prudent to really take your time and go through a contract to buy and sell and pay attention to everything that's in it? Would you agree with that?
A I would today.
Q Well, you wouldn't have agreed then?
A There's a lot of trust involved in this particular thing. And where I've bought homes before, seems like I'm always pressed for time when it's happening. But when I bought homes before, I put a lot of faith in the people that put that

contract together and said we're gonna build you a house over here on this lot and you're gonna pay this amount of money for it. Yeah, go do that. I'm not a lawyer. And I normally don't contact lawyers in the purchase of something, anything. Buying a car is pretty expensive today. You don't contact a lawyer about that. But it's -- Danny presented himself -- he's a very personable guy. He's a smart guy. And when we talked to Danny and he has faith involved in this business, that was good for us. That's what we thought. And he presented himself as the guy for Eagle Harbor: the developer, the builder, the designer. And he was putting this together for us and we trusted him.

Q Okay.

A I trusted him that he was on our side to get this done.

Q All right. When did you lose that trust?

A I lost that trust when he started pushing for that first draw and poured the concrete and things started falling apart. That's when I lost trust with him.

Q And when was that? Do you recall?

A That was in -- we had so many things and I'm getting old here.

Q This thing has been going on for quite a while. So I understand. There are a lot of documents floating around. Well, I'll --
A Anyway, it was right at -- I lost faith in him when we were in this draw of business and also when we were trying to get him to start the construction. There seemed to be a little bit of a delay there.
Q Okay. But you mentioned earlier in your testimony that he did get started right away. Got the land cleared --
A He did start immediately with the clearing. And I thought, wow, this is going to be done. And when he said -- talked to us and told us in the contract he could build that house in 90 days, I asked him about that. I thought that was pretty quick. He said you got this pre-built framing and things from the Boozer package that can go up really quick.
Q Right.
A I believed that.
Q Okay. So we're back to September 13th of 2003. That's when you --
A That's when we signed this.
Q Sign off on this. And then you closed on

November 28th of '03?
A Twenty-fifth.
Q Twenty-fifth. Okay. And on January 30th, I believe, you terminated --
A Yes.
Q -- Heritage Classic Homes, correct?
A Yes.
Q Okay. And then you hired John Kahler.
A That's correct.
Q Okay. And that was February 9th of '04?
A That's probably about right.
Q So nine days later, you had a new contractor on the site and up and moved. When did you first contact Mr. Kahler?
A After Danny was terminated.
Q So you had no contact, didn't know who he was?
A I knew about him because he was building Mike Cable's (ph) house.
Q And where is that?
A That's in the phase one subdivision.
Q Okay. So there are other builders in Eagle Harbor. Danny Gilbert or Heritage Classic Homes does not have an exclusive to build in that subdivision?
A He does not.

Q Okay.
A When I first talked to him I thought that he was the guy that did everything. But he was not.
Q You talked to other people about him?
A Not before.
Q Okay. So you guys came in for a ten-day visit and came out to the site and liked what you saw and liked Danny and liked Heritage Classic Homes and rode around and said this is us?
A That's it.
Q Okay. For $185,175?
A That's right.
Q All right. What happened with Mr. Kahler? And what was his price?
A His price was -- I don't recall exactly what his price was.
Q Okay. Anything that would help you remember what his price was?
A I think we have a document somewhere.
Q Would it be a contract to --
A Yeah, we had a contract.
Q What part of your --
A We had a contract with him.

MR. HUBBARD: I didn't see it. Derrick, is

that part of your --

THE WITNESS: It's part of his --

MR. JACKSON: No. We don't have that contract into evidence. It's the same price as in the -- contract which is in evidence.

Q Two hundred and --

A 209.

Q Fifty?

A Yeah.

MR. HUBBARD: May I approach, Your Honor?

THE COURT: Yes.

Q This is just for purposes of identification, Mr. Price. If you would take a look at that and see if you're familiar with that contract?

A Okay.

Q And you can go to the next to the last page. It's dated February 9, 2004?

A Okay.

Q Was that your signature on there?

A It is.

Q Okay.

A Well, actually, that's my wife's signature for me,

but yeah.
Q Okay. Would she recognize that? Was there some negotiation that took place to come to this document? I mean, did y'all --
A Yes. There was -- yeah.
Q Okay.
A There was some talk.
Q All right. Tell me about that.
A Well --
Q Well, you got nine days is what I'm trying to get at. You're moving, you know, as you said earlier, you don't like -- seems like you're getting rushed all the time.
A Yeah. And I'm not sure where I was exactly when this happened.
Q Did you meet with Mr. Kahler?
A I did meet with him. But I don't know whether I had to go somewhere or something after that. But I met with him, and we talked with him. And Diana and he put the contract together. Not that I wasn't familiar with what was going on, but I didn't -- I was not there for all of that.
Q Okay. And that's -- and I think you did a revision with him. You changed that contract sometime in May. Does that sound right?

A Yes, that happened.
Q Okay. What were the reasons for the revisions?
A He wanted the revisions.
Q Okay. And then on July 15th, I believe, is it true that you terminated his employment with you?
A That's correct.
Q Okay. And how did you do that?
A How did I do that?
Q Sure. Sent him a letter? I mean, you sent -- you sent Mr. Gilbert for Heritage Classic Homes --
A Yeah. There was a letter that went to John Kahler telling him he wasn't -- but I told him face-to-face wasn't -- he was fired.
Q Okay. And then August 6th you hired Mr. Siegel?
A We found Mr. Seibel, yeah.
Q Seibel. Sorry. I apologize. All right. I think your initial lawsuit to get this whole thing started was filed in August, August 23rd of 2004. Does that sound about right to you?
A Could be. Yeah.
Q Okay. Do you recall ever sending to Heritage Classic Homes --
A Actually -- let me stop.
Q Sure.
A I think -- we were sued first. And then we

started the lawsuit.
Q Okay. You think that was August? Does that sound about right? August -- ballpark?
A It could be.
Q When you terminated, did you give Heritage Classic Homes a formal opportunity to fix what you perceived to be defects in the construction? And by that I mean did you send to Heritage Classic Homes or Mr. Gilbert for them a letter? Either give it to him or certified mail that laid out exactly -- basically, a right to cure letter that you want him to fix what you perceive to be wrong? Do you recall ever doing that and asking him to come and fix what you thought he did wrong?
A We had a conversation with him.
Q But you never sent him a letter or --
A And in that conversation, he says, I'm done.
Q This is important. I'm just asking you did you give him a letter or -- you can look at me, please, sir. I'm going to ask Ms. Price the same question. But I'm asking you right now --
A I don't know if we gave him a letter or not.
Q Okay. All right.
A I know we gave him a termination letter.
Q Okay. So you fired him?

A Yes.
Q Okay.

MR. HUBBARD: I don't have any further questions for you.

THE COURT: Any follow-up?

MR. JACKSON: Briefly, on redirect, Your Honor.

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REDIRECT EXAMINATION

BY MR. JACKSON:

Q Now, I believe Mr. Ferrara asked you about, you know, you're not claiming delay due to weather. What was the time frame in which you -- well, let me back up. Is it your understanding that to get a building permit you have to have a septic tank permit?

A It is now, yes.

Q Okay. And when did you first get your septic tank permit?

A The first one was when Diana filed for it.

Q The one that was not invalidated or rescinded or all that?

A That one was invalidated. When did we get the real one? I don't know the date. We have it here

somewhere in these documents.
Q Okay. Would that have -- show you this. It's been marked as Plaintiffs' Exhibit No. 22. Does that refresh your recollection as to when you were finally approved for a septic tank permit?
A Yes. That was dated 18 May.
Q Okay. So from the time you originally started until May the 14th, you legally didn't have a septic tank permit. Is that correct?
A That's correct. We didn't have one.
Q So whether it rained or not, you couldn't build without a building permit?
A That's true. Not legally.
Q Now, the agreement that all these questions were asked of you about, the Agreement No. 2, did you draft that agreement? The agreement to buy and sell, Plaintiffs' Exhibit No. 2.
A No. We didn't draft that.
Q And who gave that to you?
A Danny.
Q Okay. Now, did you have trust and faith in Mr. Gilbert in the representations that he made?
A We did.

MR. JACKSON: No further questions.

THE COURT: Mr. Ferrara?

MR. FERRARA: Very briefly, Your Honor.

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RECROSS-EXAMINATION

BY MR. FERRARA:

Q Mr. Price, just to be clear -- we're throwing a lot of dates around. To be clear to the Court, you and your wife were under the impression and actually had received communication from Mr. Gilbert that he did have an approval from DHEC initially, correct?

A He said he did.

Q And, in fact, to be clear with the Court, he did, correct? He did initially and then they later revoked it?

A No. I don't know that.

Q Okay. Well, I understood your testimony earlier that the permit that you and your wife --

A That's what his letter said to us that he had the building permit. And he was waiting on DHEC to design the septic. That's what he said.

Q Right.

A He didn't have the permit, though. He didn't have the building permit in his hand either. I testified to that as well --

Q But you do know that he did have the building permit in order to get the foundation inspected the first time?
A I agree with that, yeah.
Q Sure.
A He had a building permit.
Q So let's be clear to the Court. When was that? When did the first foundation inspection occur?
A That would've been January, December.
Q Right. So Mr. Gilbert did have a building permit in January at the time he put the foundation in?
A Yeah. He had a building permit.
Q Well, let's be clear with the Court. I mean, Mr. Gilbert did have a building permit and Mr. Gilbert did have assurances from DHEC that the septic for Lot 20 was preliminarily approved and then they later revoked it. Is that fair?
A He said that they had that.
Q Well, and I'm not trying to parse words. I just want you to be honest with the Court.
A Well, you do with me during this whole testimony here. You're parsing words.
Q I understood your testimony --
A And he did have a building permit. I saw the building permit.

Q And he had a DHEC permit as well that was later rescinded. Did he not?
A I did not see the DHEC permit.
Q Well, let's just be clear with the Court. You didn't see it, but you testified earlier that DHEC, and I think Mr. Bozardt, wrote you and your wife a letter that said the septic permit or approval was rescinded. Did I misunderstand your testimony earlier?
A What you misunderstood was I don't know that he ever had a septic permit. He said he had talked to them in his letter to us, and he said he had a building permit and had the number. I actually saw the building permit later when it was posted on the property.

Right here it is, Plaintiffs' Exhibit No. 9.

MR. FERRARA: Your Honor, may I approach the witness?

THE COURT: If you wish.

A There's the building permit.
Q Oh, yes, sir. Yes, sir.
A On here, he says he's talked to them. He does not have a septic permit number.

Q Right. I understand that, sir, about your e-mail. But -- and tell me if I'm --
A That's his e-mail to us.
Q Sure. I understand that testimony. But is it not true that DHEC communicated with you or your wife and advised you that while a septic permit had been provisionally issued, it was going to be rescinded?
A That is the one that we got. It's not the one that Danny got because he didn't have one.
Q Right. And I apologize. So just the one that you and your wife got that you applied for --
A When we found out --
Q -- in January 2nd of 2004.
A Yes. When we found out there was no septic permit and we applied for one, she did, she got it. The next day they revoked it.
Q Right. The reason she got it, though, was because Danny had already communicated with DHEC and had gotten a preliminary approval for Lot 20?
A That's what you're saying. I don't know that.

MR. JACKSON: I object to --

A That's hearsay.

Q You don't know that? Okay. That's what I was trying to find out if you did. So you don't know?
A I don't know what he talked to DHEC about.
Q Okay. But you do know that DHEC did issue a permit to you and your wife on January 22, 2004, for the septic?
A They did and revoked it immediately.
Q Okay.

MR. FERRARA: Thank you, sir.
THE COURT: Mr. Hubbard?
MR. HUBBARD: Just one housekeeping, Your Honor. I move the John Kahler contract be admitted into evidence.
THE COURT: Any objection?
MR. JACKSON: No objection, Your Honor.
MR. FERRARA: No objection, Your Honor.
COURT REPORTER: Will you show me which one that is so I can mark it? I don't see it.
MR. HUBBARD: Sure.
COURT REPORTER: Is that the correct one?
MR. HUBBARD: That's it.
COURT REPORTER: Thank you.

(Whereupon, Defendant Heritage's Exhibit

No. 1, Contract, was received into evidence.)

THE COURT: Mr. Price, you can step down.

THE WITNESS: Thank you, sir.

THE COURT: All right. We've been at it for a little while. It's an appropriate time for a break. How log do y'all need before we resume? Y'all tell me.

MR. JACKSON: Short break is fine with me, Your Honor. It's whatever y'all -- I'm open. I do have witnesses scheduled to come at one o'clock. And I can call to try to push them back or reschedule or do whatever I can do with them. But I'm open to the Court. Whatever the Court would suggest.

MR. FERRARA: Whatever the Court would like to do, Your Honor. I'll just defer to Mr. Jackson.

MR. JACKSON: I say 15 minutes and then we can resume.

THE COURT: Do y'all want to take a break for lunch now and just come back at 1:00? Do it that way?

MR. JACKSON: We can do that.

MR. HUBBARD: I would prefer that, Judge.

THE COURT: Okay. All right. Let's do that. It's a quarter to twelve now. We'll resume at one o'clock with the rest of the plaintiffs' case.

MR. JACKSON: Okay.

THE COURT: Okay.

(Lunch recess was taken from 11:44 a.m. to 1:02 p.m.)

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THE COURT: Is everyone ready to proceed?

MR. JACKSON: I'm ready to proceed, Your Honor.

THE COURT: Okay. All right. Mr. Jackson?

MR. JACKSON: I would call Hank Jackson to the stand.

THE COURT: Mr. Jackson, come on up.

(Whereupon, the witness, HANK JACKSON, was duly sworn.)

THE COURT: Thank you, sir. Go ahead and have a seat. Give your name, spell your last name for the court reporter, please.

THE WITNESS: My name is Hank Jackson,

J-A-C-K-S-O-N.

THE COURT: Thank you.

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DIRECT EXAMINATION

BY MR. JACKSON:

Q Mr. Jackson, what is your current profession?

A Currently, the building official for Berkeley County since July 1, 2010.

Q Okay. And what did you do before that?

A Eight years prior to that, I was a building inspector working for the past building official.

Q Okay. And in that capacity as a building inspector, did you have the occasion to inspect Lot 20 of Eagle Harbor?

A I did. I actually did a deposition quite a while back in regards to that, but yes.

Q Okay. And what, if anything, did you find upon your inspection of -- first of all, what were you inspecting on Lot 20?

A Foundation. I think it was pre-slab inspection, that type of inspection, looking for reinforcement in the slab.

Q Okay. And what did you find, if anything, in regard to your inspection?

A According to my records, I had an inspection that

had failed due to vapor barrier not being in place.

Q Okay. Did you find anything else?

A I think that was pretty much it.

Q Okay.

A It's been quite a while.

Q Okay. And did you -- and so, it did not pass inspection?

A It did not.

MR. JACKSON: Okay. That's all the questions I have of this witness.

THE COURT: Mr. Ferrara?

MR. FERRARA: Your Honor, at this time, I don't have any questions.

THE COURT: Yes, sir. Mr. Hubbard?

MR. HUBBARD: Thank you, Judge.

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CROSS-EXAMINATION

BY MR. HUBBARD:

Q Mr. Jackson, Carl Hubbard. When you went out to the Lot 20, what did you see actually? Your affidavit that you gave indicated that the land had not -- or the earth had not been compacted. How did you make that determination?

A Usually, during that type of inspection, we would

walk across it, see if it's a -- what kind of soil it is, if it's spongy. Being able to -- just see if it meets any kind of compaction. If not, a question would arise and we about would ask a geotechnical expert to come in and verify the 2,000-pound soil compaction required.

Q Okay. So was that done?

A It was not that I know of.

Q Okay. I want to understand. The slab was actually poured when you were out there?

A No. It was before it was poured.

Q Okay. All right.

MR. HUBBARD: I don't have any further questions. Thank you.

THE COURT: All right. Anything further?

MR. JACKSON: That's it, Your Honor. Unfortunately, my next witness is not scheduled to be here until 1:30. I didn't anticipate this to be quite so quick.

THE COURT: All right. Mr. Jackson, you can step down. Is Mr. Jackson under subpoena?

MR. JACKSON: He was. I would ask him to be released.

THE COURT: All right. You are released from

your subpoena. Thank you, sir.

THE WITNESS: Thank you.

THE COURT: So we do not -- you don't have your next person ready to go?

MR. JACKSON: I could call -- the person I would call would be -- I know what I could do, Your Honor. I would call Danny Gilbert to the stand.

THE COURT: All right. Mr. Gilbert.

(Whereupon, the witness, DANNY GILBERT, was duly sworn.)

THE COURT: Thank you, sir. Have a seat. State your name and spell your last name for the court reporter, please.

THE WITNESS: Danny Gilbert, G-I-L-B-E-R-T.

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DIRECT EXAMINATION

BY MR. JACKSON:

Q All right. Mr. Gilbert, I'm going to show you a couple of documents here that were produced to me by document production.

MR. JACKSON: Carl, I'll show these to you. I got copies from you. I'll give those to you.

(Brief pause.) May I approach, Your Honor, for your copies?

THE COURT: Thank you.

MR. JACKSON: Go ahead and mark these for identification. You'll do these at whatever is next. I guess we're at 32?

COURT REPORTER: Uh-huh, 32.

MR. JACKSON: 32, 33, and 34.

Q Mr. Gilbert, I'm going to show what has been marked as Plaintiffs' Exhibit No. 32. If you take a second and look through those.

A Sure.

Q Do you recognize those documents?

A Sure do.

Q And what are those documents?

A These are just some expenses for -- looks like for part of the development.

Q Okay. Whose handwriting is that? Is that your handwriting?

A That is my handwriting.

Q So you prepared those documents?

A Yeah.

Q Okay.

MR. JACKSON: I would offer Plaintiffs'

Exhibit No. 32 into evidence.

THE COURT: Any objection?

MR. FERRARA: Your Honor, just for clarification, is that -- Derrick, is that everything that you've handed me?

MR. JACKSON: No. I've to -- well, let me show you how I separated them.

(Brief pause.)

MR. FERRARA: No objection, Your Honor, to Exhibit No. 32.

(Whereupon, Plaintiffs' Exhibit No. 32, Cost and Expenses Document, was received into evidence.)

Q Can you explain to me why these calculations and what they mean?

A Yeah. These are exclusive costs for Gerry Fox. This is what Gerry paid for their part of phase two, I guess, up to this point.

Q Okay.

A So exclusive was costs just for Gerry where there was also costs for Troy, but those are the costs.

These are the figures down here. Because my agreement with Gerry and Belinda was after all the -- after the lots -- when the lots start being sold, as he pays himself back, once he breaks even, and then my agreement with Gerry was we were splitting the money to help me do the children's home.

Q 50/50?

A After all the expenses were paid.

Q Okay. Now what about the second page to Exhibit No. 32?

A That's just lot sales, I guess.

Q Okay. And that was -- okay. And what was the total of the income from lot sales that you projected?

A Well, it says 730,954.

Q Okay.

A That's probably gross, no doubt.

Q And the next document appears to show expenses and construction costs. Is that for phase two?

A Yeah.

Q Who all was involved in paying construction expenses on phase two?

A The Foxes and the Winns.

Q Okay. Were you responsible for paying any

expenses?
A No.
Q So what was your part of the deal?
A To organize and facilitate things, you know, things happening and the development getting done.
Q Okay. All right. Let me show you this summary here. Are you familiar with that? That's part of . . .
A Looks like lots listed, original owner, who they were sold to, and the purchase price.
Q Would it be fair to say that most of the lots had been sold in phase two by the time the Prices bought their lot?
A Yeah. I would say so. I think so, yeah.
Q Okay. Let me ask you about this. Projection of net income?
A Okay.
Q Did you prepare that?
A I did.
Q And how much net profit did you project there to be?
A Well, on this it's projected at 324,153.
Q Okay. And who was the -- divide part of that property with?
A The Foxes and myself.

Q Okay. And then does it say your wife, Elizabeth Gilbert, as well?
A It does have her name on there, yeah.
Q Okay. And let me ask you about the last document here where it says road construction costs.
A Yes, sir.
Q The second item at the very bottom there, it says change order. Explain that to me. First of all, publish it to the Court?
A Change order one says road construction to increase by 50,000 due to excessive dirt removal.
Q What was the excessive dirt removal?
A Well, I think when they got engineer drawings, it required the road construction company to remove more dirt than originally anticipated.
Q Okay. All right. That explains that. Let me show you what has been marked as Plaintiffs' Exhibit No. 33. Do you recognize that?

THE COURT: Which one is 33?

MR. JACKSON: It's the one, Your Honor, that has the dates to Stantec by the various parties.

A It's not my handwriting. So I don't necessarily recognize it.

Q Okay. Well let me ask you about the facts that are on there.
A Sure.
Q Okay. It says -- this appears to be -- dates in one column, correct?
A Yeah.
Q And it appears to be amounts of money in another column?
A I see that.
Q Okay. And this appears to be who's paying. Is that accurate?
A Yeah. It says, you know, 5,000 to Stantec from Winn; 2500 to Stantec from EH; 10,000 to Stantec from Fox. Yeah.
Q That would be consistent with your understanding of the various parties involved in this deal paying?
A Sure.
Q So EH, does that stand for Eagle Harbor?
A It does.
Q So they contributed as well?
A Well, probably to the Eagle Harbor part, which is the front part. We still own that property.
Q Okay. Let me show you this other document and see if you recognize it.

A It's my handwriting.
Q Okay. And what were those calculations?
A Just the same thing. Just a preliminary rundown of the numbers.

MR. JACKSON: So, Your Honor, I believe I would like to offer -- 32 has already been admitted. And I'd offer Exhibit No. 34. He didn't recognize 33, so I won't offer 33.

THE COURT: Showing me 34?

MR. JACKSON: I'm sorry. This is -- Exhibit No. 34 is the one-page handwritten division.

THE COURT: I got it. Any objection to Plaintiffs' Exhibit No. 34?

MR. FERRARA: No objection from the Foxes, Your Honor.

MR. HUBBARD: Your Honor, may I look at it real quick? Because I got -- is this 34, Derrick?

MR. JACKSON: No. That's the one he didn't recognize. Exhibit No. 34 is the one-page handwritten document.

MR. HUBBARD: Okay. No objection.

THE COURT: Thirty-four is in with no objection.

(Whereupon, Plaintiffs' Exhibit No. 33, Payment Information, was marked for identification.)

(Whereupon, Plaintiffs' Exhibit No. 34, Total Expenses, was received into evidence.)

MR. JACKSON: Okay. Let's go ahead and mark this. I'm gonna show you . . . (Brief pause.) Give a copy to the Court. Mark that for identification.

Q Let me show you and see if you recognize this document.
A Definitely my handwriting. And -- yeah.
Q What is that document?
A It says it's an application for a subdivision approval.
Q Okay. With who? What bureau?
A DHEC.
Q Okay. Would that be a septic tank application?
A No.
Q Okay. Is it approval for the plat? The plans?
A It's an application for approval for the various

septic systems for each lot out there at that phase.

Q Okay.

MR. JACKSON: I'd offer Plaintiffs' Exhibit No. 35 into evidence.

THE COURT: Any objection to 35?

MR. HUBBARD: No.

MR. FERRARA: No objection, Your Honor.

THE COURT: Thirty-five without objection.

(Whereupon, Plaintiffs' Exhibit No. 35, DHEC Application, was received into evidence.)

Q And could you describe to the Court what you understood your arrangement to be with the Foxes and the Winns and Eagle Harbor relating to phase two?

A Yeah. Gerry had helped with phase one, Gerry Fox. And it went real well. Sold several lots by word of mouth. And Gerry was able to give me the residual property that wasn't in lots for the boys home to help the boys home kick off. Then, I don't know who noticed it, one of us noticed that

there was another parcel that was available that was adjacent to the Eagle Harbor property. And then we found out at the same time another piece was available. So there's two additional pieces. They were all adjacent. And Troy Winn bought one and the Foxes bought one. And then we were going to do the same thing that we did on the first phase, just subdivide it and sell it for Troy. Troy was to give two lots, which are across the street from the Prices. It was a big empty pit. And it wasn't worth any money, but Troy was going to give that to the boys home. And we were going to fill that pit up with dirt that was dug from the lake. And then in addition to those two lots and -- you know, we reclaimed those two lots with dirt from the lake. There was an additional lot. Lot 11 was to given to the boys home for a director's house. That was the deal with Troy. The deal with Gerry and Belinda was, hey, you know, this went real quick to the allotment. You know, phase one went real well. We want to help the boys home. So, you know, I'll pay the expenses. When they're all paid then we'll split the money. You can do with the money, basically, what you want. You know, 50/50.

Q Okay.

MR. JACKSON: That's all the questions I have of this witness at this time.

THE COURT: Mr. Ferrara?

MR. FERRARA: Very briefly.

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CROSS-EXAMINATION

BY MR. FERRARA:

Q Danny, you know I represent the Foxes. And looking at Exhibit No. 35 -- I'll hand that to you, sir, for reference.

A Yes, sir.

Q You testified that this was more than just a septic permit. This is actually the start of the development process of the Eagle Harbor that you started with DHEC to apply for what ultimately was a plat, a final plat, for subdivision, correct?

A Yeah. We filled this out. We hired the sales consultant. He and myself walked every piece of property on the whole -- you know, these two parcels together. It says right here the TMS numbers, 194-00-02-30 and 31. We walked those. There was an existing path down the middle, so that felt to be a good division point. But we --

our job or our goal was to find, you know, 20 or 30 septic systems.

Q Let's go back because you mentioned it earlier, but the judge may or may not be aware. But what was the grand plan, in general, with Eagle Harbor as it -- you mentioned the boys home. But what's the overall master plan if there is one for Eagle Harbor Subdivision?

A Well, it's a unique thing. We were nominated for a social entrepreneurship award because we took raw land, developed raw land, made money, and created a nonprofit. So that was a goal to -- and something that could be duplicated. So people could go into, you know, into the country to buy land, subdivide it, sell it, and take the profits or the proceeds and start a charity, which is what we did. We had nothing. We had -- we had nothing.

Q And the Eagle Harbor Boys Home, if you could tell the Court what that is, in general.

A Can I do a little history first? Is it okay?

Q Sure.

A So, you know, like Ron, I was, you know, I was a SPAWAR contractor. So did that for 13 or 14 years. And I was involved with, you know, my

church and missions and things like that. So I helped somebody move to Gaston, Alabama. It was to a children's home. And I saw the children so I'm gonna call my wife on the phone and say this is what we're supposed to be doing. This is it. This is what I know for certain this is what we were made for. We sold everything we owned. Had a nice house in Crowfield and sold that and sold our cars and sold everything. Moved to Alabama for four years. I got paid, you know, 5,000 bucks a year. My wife got paid five. And they gave us a thousand-dollar education. But that's what we had. Had three boys under five years old. I mean, that's what I had. And we did that for four years. We couldn't afford to do it any longer. You know, my kids were growing old. I couldn't afford a baseball bat because I was making $11,000 a year. So we just felt like we couldn't do less so we were gonna come back to Charleston and start a children's home here. I spoke at a church. They gave me a thousand dollars to come home on. And I took that thousand bucks and we moved home. Moved in with my in-laws. I took a job at an architectural firm. And we lived with my in-laws and then we began the process of starting a

nonprofit. So we got our nonprofit approved June 1999. And then Troy Winn told me, well, you're looking for --

MR. JACKSON: Objection about what a third party said. Hearsay.

Q Yeah, and without --
A Troy showed me some property in the country that him and his wife had looked at, but it really wasn't fitting for them. And it was -- basically, it was ideal for us. It was, you know, in an area that was kind of bad so we could get it at a good price, you know. So didn't know how to get it. And through church, I met Gerry and Belinda. And, you know, we hit it off. I shared my vision. I shared our hope, what we wanted to do. And somehow we created a plan.
Q And you started -- you mentioned Eagle Harbor, 501(c)(3) nonprofit.
A Yes, sir.
Q With the secretary of state, 1999?
A Yes, sir.
Q And then when did you become a licensed builder in South Carolina?

A Well, we -- the first price we got to build the first boys home -- you know, boys homes are about 7,000 square feet. So we got a price that was over $700,000 to build it. And my background being architectural, I have always done building. I decided to get my own license and build the house. We built it for 330,000.

Q Right.

A With a Boozer package.

Q And the Boozer package that's been testified today, that's an engineered prefabricated wall system?

A Yeah. So they just take any drawing and they create the panels and deliver them on a flatbed.

Q I thought it was quite aggressive that you'd agree to build the Prices' house in 90 days. I've gone through that, so -- gone through that process many times. But with that Boozer-type package, you can achieve those type of quick results?

A Sure. You can throw it up real quick.

Q Yeah. Anyway, back to this here, Exhibit No. 35. So in 2001 you have Eagle Harbor the 501(c)(3) nonprofit as your entity. But you have named the neighborhood Eagle Harbor of that plan. So you've applied with DHEC, and this is the first time,

Exhibit No. 35, when you've given the State of South Carolina DHEC --

A Right.

Q -- Department of Health and Environmental Control --

A Do you want to know why we named it?

Q No, no. Well, I'm just asking real quick. This application is the start of the subdivision for Eagle Harbor? And that's my question.

A Yeah. Absolutely.

Q Yeah. And so, why did you call it Eagle Harbor?

A Because with kids that are in foster care, there's a stigma on where they live or what they drive in, what they ride in. When we lived in Alabama, you know, there was a big ol' ranch on the side of the bus, and we didn't want that. So now we got a subdivision that there's people -- you know, there's 300,000 to 1.4 million-dollar homes in the neighborhood. And where do they live at? They live at Eagle Harbor. They live in the same place that a kid that lives in a children's home lives at. There's no stigma whatsoever. And it, you know, it tears that wall down.

Q And that Eagle Harbor, it's still a going concern and it's still an ongoing business and nonprofit

today, correct?
A We've had 300 kids call Eagle Harbor home.
Q Okay. Now, you talked about phase one. And we're here on Lot 20, specifically, today, phase two. After you apply with DHEC for the subdivision of Eagle Harbor, phase two, which is Exhibit No. 35, you let the State know that you planned on using a well and a septic system as far as the water and sewer in this document. And, ultimately, was it your understanding that DHEC did give you an approval to subdivide the lots?
A Yeah. I think that was something that was required by the County Planning and Zoning as well. They had that letter.
Q Right. And Planning and Zoning, you apply with Berkeley County and got an approval to subdivide Eagle Harbor into the various lots, correct?
A Yes, sir.
Q And Lot 20 was in phase two. And then you and your company hired Stantec, I believe, which became Trico Engineering here in North Charleston to handle the engineering for the neighborhood, correct?
A Yes.
Q And it's your understanding that Stantec, being

professional engineers, would assist you and Eagle Harbor with all of the engineering and governmental approvals necessary to get the neighborhood developed?

A Absolutely.

Q From a legal standard, meaning where you could take what phase two was, 62 acres, and a one-chunk TMS and divide that up into how many ever lots so that you could sell them?

A Sure.

Q And I'll ask you since you're on the stand, Mr. Price testified earlier today, and maybe you can clarify this. Did you at the time that the Prices purchased Lot 20, had you had communications with DHEC about the septic system for Lot 20 having a preliminary approval?

A Yes.

Q And that was your understanding at the time that you spoke with the Prices?

A Yeah. Plus, I knew that -- I had walked their lot with Mike Parker, the soils consultant. And we couldn't find a drain field. And that's why the lot was so big. Because it would be more advantageous to the investors if they were all small lots and they would make a lot more money.

But this lot had to be ten acres because we couldn't find a drain field. And there was only so many off-site drain fields to go around. And for that ten acres, you know, it had one drain field.

Q There's some exhibits in evidence, Danny, that, you know, the Prices put into evidence that DHEC has written Eagle Harbor and said we're putting you on notice that there are soil concerns prior to, you know, 2003 when that closing occurred. You're familiar with those in general?

A Yeah. The first was we had the original -- it was the preliminary lot layout. And then they came back and said those aren't going to work because the soils, you know, not suitable for drain fields. So we had to change property lines. So I think one -- the first one will show that there was more lots than there was in the second one, or vice versa; one of the two.

Q Sure.

A But we had to change the lot lines, move things around just to facilitate the limited amount of drain fields that we had. And Gerry, obviously, had -- his side of the road had the best soil so we had given the lot to Troy to get his lots

sellable.
Q Is it not true, Danny, that ultimately Eagle Harbor, as the developer, you were able to obtain permission from DHEC to get this plat which is Exhibit No. 1 approved with the idea or with the approval of DHEC even implicitly that the drain field would be off-site for Lot 20 over to Lot 21?
A Yeah. Yeah, I think so. Lot 21 is being the one on Leisure?
Q Yes.
A Yeah. Absolutely. And there was three other additional drain fields over there. And there were multiple that were crossing the road going to different lots and stuff. But, yeah, that's true.
Q And, Mr. Gilbert, taking a look, because I'm not a developer, at the plat which is Defendants' Exhibit No. 1, and we look at these little dotted lines on Lot 20 that show easements. Are those dotted lines on Lot 20 the easements for the septic system for Lot 20?
A Yeah. There's two sets of dotted lines on Lot 20. One is for Lot 19 and the other one is for 20. Those easements are like 11-feet wide specifically for the width of a backhoe so that they can dig and repair or put in the septic system pipe going

to the drain field that is Lot 21.
Q Mr. Price testified earlier about the septic permit for Lot 20 being revoked. Do you have any knowledge about that?
A I might've received something in the -- I don't know. I can't confirm that. I might've had some mail come in.
Q Okay. Do you recall that after closing the septic system there being a delay with the septic system for Lot 20 as Mr. Price testified about earlier?
A Well, I think they experienced a delay after maybe because I had everything kind of moving. The delay that -- you know, the delay -- part of the delay is that they spoke about, you know, when you close then you got to apply for permit. When you apply for a permit, it takes numerous weeks. In addition to that, if you see the e-mail that they used for evidence, it had multiple changes to the drawing. You can't change a drawing structurally and -- you know, it's going to cause a delay. All that stuff causes delay.
Q Right. So the closing happened on November 26th, I believe. Must've been around Thanksgiving. And to the best of your recollection or can you estimate when you applied or the Prices were ready

to construct?
A I'm sure they're ready right away. I think that we did what we could without a permit to the point where we got a permit then we could start. So that's what we did.
Q Okay.
A Clearing the lot. We had a backhoe over there. I think I even lent the backhoe out to Ron, you know, to let him use it to mess with his lot.
Q Okay. The gentleman that just came in and testified from Berkeley County about inspecting the footing and --
A Mr. Jackson.
Q Mr. Jackson, yeah. That gentleman did an inspection for work that your company did, Heritage Classic Homes?
A Sure. Pre-inspection to pouring the slab.
Q Right. And that doesn't involve Gerry or Belinda Fox, correct?
A No. I don't think so.
Q Okay. And isn't it common whenever you're getting an inspection for a slab, for a footing, footing inspection, that an inspector may have a comment that the ground is too soft or that rock needs to be added or something needs to be done before an

inspection will be approved?
A Yeah, absolutely. In this case -- Oh, I'm sorry.
Q And in this case -- that's what I was gonna get to. In this case, you actually --
A He said there was no plastic. There's receipts. And I guess it will be entered later, but there were 6 mil plastic bought. So if you fail inspection, they just give you a list and then you go back and you do the list.
Q Right. And that's what I needed --
A And then you get it reinspected.
Q That's what I needed your help with --
A Absolutely.
Q -- to explain to the Court. So Mr. Jackson just came in and testified that initially there were some concerns with the footing. But, obviously, your company handled his initial concerns and were able to pour a concrete slab out there?
A Sure. Purchased 6 mil plastic. Put it -- or first we pretreated the soil. There's a receipt for that. We rented a wacker packer and compacted the soil. And then put the plastic down.
Q But, clearly, you were able to meet the County's concerns at the time of inspection otherwise you would not have released the concrete from Knight's

Redi-Mix to be poured into the slab and to the footing, correct?

A Yeah. We would've had a reinspection. Absolutely, yeah.

Q Right. So, obviously, Mr. Jackson came and testified. But do you recall satisfying his objections at the time so that you could pour the concrete slab?

A I don't recall it, but we would've done that. I mean, it was 14 years ago.

Q You wouldn't have poured the concrete slab without having approval --

A No, sir.

Q -- from Berkeley County?

A No, sir. No, sir. We would've went to -- bought the plastic.

Q Okay. The Prices -- or Mr. Price testified earlier today about sending some certified mail to you. You're not aware of any certified letters you might've received that were directed to Gerry or Belinda Fox in connection with Lot 20?

A No. No, sir.

Q Yeah. If you would have received something from the Prices regarding the Foxes and Lot 20, you would've forwarded that on to Belinda or Gerry?

A Absolutely.

Q Okay.

MR. FERRARA: Thank you, sir. That's all the questions I have.

THE COURT: Mr. Hubbard?

MR. HUBBARD: Your Honor, I don't have any questions at this time. Mr. Ferrara has done a great job of introducing the Court to Mr. Gilbert. And I would wait until we put up our -- after the plaintiffs are through and we'll have him back.

THE COURT: Okay. Plaintiffs have anything further?

MR. JACKSON: Your Honor, I'll reserve redirect for when they put him on the stand. We'll reserve cross when you put him back on the stand.

THE COURT: All right. You can step down. Thank you.

MR. JACKSON: I believe we have our next witness here, Your Honor.

THE COURT: All right. Who is that?

MR. JACKSON: Mr. Schweikhardt. Schweikhardt, I hope I didn't butcher your name.

THE WITNESS: No, Schweickhardt.

MR. JACKSON: Schweickhardt, okay. Thank you.

THE COURT: Come on up here.

(Whereupon, the witness, ALAN JOHN SCHWEICKHARDT, was duly sworn.)

THE COURT: Have a seat there. Give your name, spell your last name for the court reporter, please.

THE WITNESS: Alan, A-L-A-N, John, J-O-H-N, Schweickhardt, S-C-H-W-E-I-C-K-H-A-R-D-T.

THE COURT: Mr. Jackson.

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DIRECT EXAMINATION

BY MR. JACKSON:

Q What's you occupation, Mr. Schweickhardt?

A I'm a licensed professional engineer, licensed structural engineer.

Q Okay. And how long have you done that?

A Became a licensed professional engineer in 1994 when I was working for Davis and Floyd.

Q Okay.

A So that's 20 -- 24 years.

Q Okay. And what's your educational background?

A I've got a bachelor's of science in ocean engineering, which is a wet civil engineering from United States Naval Academy, 1986, and a master's in structural engineering from Clemson in 1994.

Q Okay. And what is your professional qualifications?

A I became a professional engineer in 1994, and a structure -- licensed structural engineer just in 2017.

Q Okay. Are you familiar with building code standards?

A Yes, sir.

Q And masonry construction?

A Yes, sir.

Q And I think CMU, does that stand for concrete masonry unit?

A That's correct.

Q Okay. And walls and piers and things of that nature?

A Yes, sir.

MR. JACKSON: I would move to qualify Mr. Schweickhardt as an expert in the field of structural engineering.

THE COURT: Any objection?

MR. FERRARA: Your Honor, if I might just be able to do a very brief question about the structural engineering designation. That's kind of a broad designation.

THE COURT: Any requests to qualify him as an expert in structural engineering? Is that correct?

MR. JACKSON: Yeah. Yes. And masonry construction, building code standards.

THE COURT: And masonry construction and building code standards.

MR. JACKSON: Yes.

THE COURT: All right. Mr. Ferrara, if you wish.

MR. FERRARA: Okay. Very briefly, Your Honor.

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VOIR DIRE EXAMINATION

BY MR. FERRARA:

Q Let's see. I was looking over your document. I apologize, sir, is it okay if I call you Alan?

A Sure. Al.

Q Al? Okay, Al. Al, you can call me Paul.

A All right.

Q I apologize, and you might have testified to this

and I apologize. I did hear you say that you're a professional, licensed professional engineer in the state of South Carolina, correct?

A Right. I became licensed as a professional engineer by taking the structural engineering professional engineer exam. And that's what's required in the state of South Carolina.

Q And how long have you been doing that, sir?

A Twenty-four years.

Q Okay. And with respect to the building code, the portion of your anticipated testimony, are you familiar with the building code that was in effect at the time that this property was constructed?

A I understand it is a 1995 CABO code, so yes.

Q Okay. Okay.

MR. FERRARA: Thank you, Your Honor. That's all the questions I have. I don't have any objection to him being qualified as an expert in structural engineering.

THE COURT: Thank you. Mr. Hubbard?

MR. HUBBARD: No, Your Honor.

THE COURT: We'll qualify him as an expert in structural engineering and masonry concrete building and building code standards.

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DIRECT EXAMINATION

BY MR. JACKSON (Continuing):

Q Mr. Schweickhardt, can I call you Al, too? That would be sort of simple.

A That would be fine. Sure.

Q Thank you. Were you employed by the Prices to inspect their foundation?

A In 2004, yes.

Q Okay.

A But the foundation walls, yes. And the concrete slab on grade as stated in the report.

Q Okay. And let me show you a copy of that report and ask if you can identify that as being the report and your signature and your seal?

A Yes, that is it.

Q Okay.

MR. JACKSON: I'd offer this as plaintiff's next exhibit.

THE COURT: 36.

MR. JACKSON: 36.

THE COURT: Any objection to 36?

MR. FERRARA: No objection, Your Honor.

THE COURT: Admitted without objection.

(Whereupon, Plaintiffs' Exhibit No. 36, Engineer's Report, was received into evidence.)

Q When did you inspect -- I just handed you a copy of the report. When did you inspect the Prices' foundation concrete slab?
A April 19, 2004.
Q And what, if anything, did you observe during that inspection?
A I observed the concrete slab on grade. I observed the concrete masonry until walls and piers and the rebar that was visible, that I could detect with, like, a tape measure and such.
Q Okay. And did you discover any problems with that work?
A Yes.
Q And can you tell the Court what those problems were?
A To the best of my recollection, with the concrete slab on grade, there were some slopes to the center of the garage floor surface that were not in accordance with what's called the Residential Construction Standards.

Q Okay.
A That would cause, possibly, water to accumulate. Other items with the CMU walls and piers, there was some vertical rebar that exceeded the 4-foot spacing. There was evidence of lacking vertical rebar at some of the corners, the major wall corners, I think in the report. I list the northwest and southwest corners, and the second opening from the right side on the front elevation, that's page 3. These locations, rebar was not observed at spacings of 4 foot or less.
Q Why is rebar required? Was does it do?
A The rebar is required for when the building is subjected to wind loads, earthquake loads. When it shakes back and forth, that rebar will help keep the CMU walls and piers upright.

Then you've got also some evidence of some poor workmanship there at the bottom of page 3. At one location of the northeast corner where the water was not properly struck off from the inside surfaces, CMU wall, and some mortar protrusions greater than one-half inch were observed in the cells where there was vertical rebar dowels. Again, from the best of my recollection, the CMU wall piers were constructed out of 8-inch block

and exceeded the CABO code section 604.54 for the 9-foot, 4-inch desired height of piers needed to be constructed of 12-inch CMU block.

Q And how does that affect the structure?

A Again, that's for lateral loads, shaking back and forth under wind and seismic.

Q Okay.

A I think I've already talked about the horizontal rebar required at the bottom and the top of wall openings extending at least 24 inches past the openings. And that the existing condition of the CMU walls and piers will prevent construction in accordance with section 607.4.1 of the CABO code. Specifically Item 3 of this section requires that the vertical rebar be held in position at the top and the bottom at a vertical -- and at vertical intervals not exceeding the 8 foot, 4 inches. So the piers being taller than that, the vertical rebar, if it was gonna be installed in place, couldn't be held in position at a vertical height that wouldn't exceed that distance.

And then, of course, there was at least one pier at the northwest corner that had already fallen over at some point most likely due to wind. That the piers during construction, walls and

piers, hadn't been braced. Other piers and walls I could push by hand. And the bond at the bottom of the mortar bed could be broken. So although it was still under construction, the walls and piers where in -- at least one pier had fallen and the other walls and piers were in danger of falling. And I did not verify it. There's random cracking in the concrete slab on grade. Random cracking will occur in slabs on grade. And I don't know if somebody came in after me to determine if there was welded wire mesh or fiber mesh in the slab. I couldn't detect that. But I just pointed out in my report that, at the time, Berkeley County required that in the slab.

Q Okay. Now, did you take photographs of your observations?

A Yes.

Q And is that a copy of the photographs that you've taken?

A Right.

Q While Mr. Hubbard is looking at those, so it is fair to say then that you discovered multiple violations of the building code in your observations?

A Yes.

Q Is it fair to say you observed examples of poor workmanship and construction?
A Yes.

MR. JACKSON: Your Honor, I'd offer this as the next exhibit, the photographs.
THE COURT: And that's as a group, No. 37. Is that right?
COURT REPORTER: 37.
THE COURT: Any objection to photographs, gentlemen?
MR. FERRARA: No objection, Your Honor.
MR. HUBBARD: None, Your Honor.
THE COURT: Without objection.

(Whereupon, Plaintiffs' Exhibit No. 37, Photographs, was received into evidence.)

Q So, ultimately, what did you recommend to the Prices about the foundation? Was it salvageable or should it be torn down?
A Well, I didn't have evidence that -- of course, remove the concrete slab on grade or footings. But I recommended removal and replacement of the

existing CMU walls and piers.

Q Okay.

MR. JACKSON: Please answer any questions counsel may have.

THE WITNESS: Yes.

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CROSS-EXAMINATION

BY MR. HUBBARD:

Q Mr. Schweickhardt, I'm Carl Hubbard. I represent Heritage Classic Homes and Danny Gilbert. You were there, I think you said, on April 19, 2004?

A Yes, to the best of my recollection.

Q Was there anyone else there? Was there a contractor on-site or anybody with you?

A Mr. Price was present and a contractor, Mr. John Kahler.

Q Okay. All right. The items you went through, you indicated it looked like poor workmanship, but you did agree -- did agree it was under construction at the time?

A Yes.

Q And the things you mentioned regarding the rebar and blocks could have been fixed. Is that a proper assessment?

A It would take an extensive rebuilding of the CMU piers and walls to properly reinforce them, yes.
Q Do you do have any idea what that would cost or are you qualified to do that?
A I haven't had time to prepare for that. I have performed estimates. But I have not and I haven't asked.
Q All right. No problem. Do you know if the Prices notified the former contractor on the job, who was there when this was done, whether they gave him an opportunity or sent him a letter or asked him to come back and cure these problems?
A I don't know the answer to that. I don't have my notes anymore and I don't recall that.
Q Okay.

MR. HUBBARD: Thank you. I don't have any more questions. Thank you.
THE COURT: Any follow-up, Mr. Jackson?
MR. JACKSON: No follow-up, Your Honor. And I ask the witness be excused.
THE COURT: All right. Yes, sir. Thank you very much. You are excused.
THE WITNESS: Thank you, Your Honor.
MR. JACKSON: I scheduled my next witness to

be here by 2:15. It's not quite that time yet. We can take a brief recess.

THE COURT: That is fine. We'll take a break and recess until 2:15. If the person shows up earlier and y'all are ready to go before that --

MR. JACKSON: Yeah, we'll come straight back in.

THE COURT: Otherwise, we'll stand at ease until 2:15.

MR. JACKSON: Thank you, Your Honor.

THE COURT: Okay. Thank you.

(A brief recess was taken from 1:52 p.m. until 1:55 p.m.)

THE COURT: All right. Y'all go ahead and have a seat. Thank you. Do we have the next witness ready to go? Is that right?

MR. JACKSON: That's correct, Your Honor. Walked outside, he was standing right there.

THE COURT: Excellent. Okay. If you would like to call him, you can.

MR. JACKSON: The plaintiff calls Ed Carter to the stand.

THE COURT: Mr. Carter, come on up.

(Whereupon, the witness, EDWARD B. CARTER, was duly sworn.)

THE COURT: Thank you, sir. Have a seat right there. Give your name, spell your last name for the court reporter, please.

THE WITNESS: My name is Edward B. Carter, Ed, last name, C-A-R-T-E-R.

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DIRECT EXAMINATION

BY MR. JACKSON:

Q Mr. Carter, what's your current occupation?

A Appraisal Services of South Carolina.

Q And how long have you been with them?

A It is our business and we have had it for 20 years.

Q Okay. And what's your educational experience?

A Graduated from the Citadel in 1966. And I have a master's degree in aeronautical science from Embry-Riddle.

Q Okay. And what is your professional qualifications and experience as an appraiser?

A Had to go through all the educational courses for an appraiser, then you had to apprentice for two

years. You have to bill so many experience points, pass so many tests to be licensed by the state.

Q Okay. Now, I see a bunch of fancy initials after your name: MSA, MFLA, MRA. Can you explain --

A Those are professional designations.

Q Okay. And are you familiar with appraising lots in residential subdivisions?

A Yes.

Q Okay.

MR. JACKSON: I would move that Mr. Carter be qualified as an expert in appraisals, residential appraisals.

THE COURT: Any objection, gentlemen?

MR. FERRARA: No objection, Your Honor.

MR. HUBBARD: No, Your Honor.

THE COURT: Admitted without -- identified as an expert, qualified as an expert, without objection.

Q Now, were you retained by a Warren Parker to do an appraisal or answer certain questions for the Prices' attorney?

A GW Parker, yes. He retained me to do some

consulting work on behalf of Eagle Harbor.
Q Okay. I'm going to show you a copy of a document and see if you can identify it. You may have a copy in your hand.
A I do.
Q All right. Okay. We'll just mark this one as the next exhibit, 38.

THE COURT: That's the appraisal?
MR. JACKSON: Yes, sir.
THE COURT: Any objection to 38?
MR. FERRARA: No objection, Your Honor, to the appraisal. There's some attachments to it. And I would just like to admit just the appraisal and have Mr. Carter testify about, I guess, the attachments he relied upon that were outside of his appraisal.
MR. JACKSON: I have no objection to -- well, first, let's identify what attachments you're talking about. Because the appraisal, I believe, is 50 -- 62 pages.
THE COURT: It looks like all those are part of, included in the appraisal.
MR. FERRARA: Okay. No objection, Your Honor. I'll just ask Mr. Carter about those.

THE COURT: Okay. Any other objections, Mr. Hubbard?

MR. HUBBARD: No, Your Honor. No objections.

THE COURT: Plaintiffs' Exhibit No. 38 without objection.

(Whereupon, Plaintiffs' Exhibit No. 38, Appraisal Report, was received into evidence.)

Q Mr. Carter, what was the scope of your engagement with Mr. Parker?

A This scope of work was to analyze the previous sales in Eagle Harbor. Look at those by year and then answer certain hypothetical questions, which he posed in a letter, which is attached to the appraisal.

Q And is that on page 61 and 62 of your appraisal?

A Yes. That is correct.

Q Okay. How did you go about answering -- well, first of all, can we publish each of those questions? Those six questions.

A The first series of questions was number one: "Using the comparable sales approach, what would the value of the entire 7.86-acre track as of

December 3, 2003, if in fact this property had been properly subdividable by the prices into three separate residential lots with each estimated two-acre tract being fully capable of use as a single-family residence." That was number one.

Q Okay.

A Number two: "Using the comparable sales approach, what could the Prices expect to realize and gross proceeds from the sale of an otherwise unimproved, residential two-acre lot in the Eagle Harbor subdivision on the following dates, to wit."

Q You don't have to hame the dates.

A Okay. Then number three: "Using the comparable sales approach, could you determine the average yearly percentage increase and the price per acre of a typical residential lot in the Eagle Harbor subdivision from December 3, 2003, through to the present." Number four: "Using any acceptable valuation means at your disposal, could you please determine the approximate appraised value of the residential tract actually purchased by the Prices as of the dates indicated above assuming the truth of the following facts: A, the land is situated such that county water and sewer service is not

available and land is otherwise incapable of supporting a septic system for more than one single-family residence; B, approximately one-third to one-half the 7.86-acre tract is located in an area designated as protected wetlands and is thus incapable of being subdivided or further improved for residential and/or agricultural purposes; C, the property is located in a subdivision that is not gated and the roads contained in that subdivision are private and likely not to be accepted by the County in the foreseeable future for public maintenance; D, no valid homeowner's association exists so as to aid in the preservation and maintenance of the private roads and common areas located in the subdivision; E, no enforceable restrictive covenants are in place that would otherwise contain those usual restrictions deemed necessary and proper to preserve and protect the value and continued integrity of the properties comprising the subdivision."

Q Okay. How did you go about trying to answer those questions?

A Pulled all the sales from Eagle Harbor subdivision going back, I believe, to 2001 up to, at the time,

the present which is the date of the report. All the ones up to there. Analyzed each one of them, wetlands versus highlands, size, what they sold for, what they sold for per acre. Then once we had all the previous sales identified, we could then look at answering those hypothetical questions in the letter defining the scope of work.

Q Okay. And what were your conclusions on each of those questions?

A Well, the answer to each one of those, or answer within the appraisal, we came up with, based on the period of time, what the average straight-line increase, the value, was over the years. We came up with what we thought were the value per acre on each given year.

Q Okay.

A And answered the questions accordingly to the best of our ability.

Q Okay. Let's turn to page 42 of your appraisal. And can you tell me how you -- what your value conclusions were in answering those questions?

A Okay. Value conclusion. That was based on the data analyses developed in this appraisal. We have reconciled to the following retrospective

values as requested in the attached scope of work. One, what is the value of the entire 7.86-acre tract as of December 3, 2003, if in fact this property had been properly subdividable into three separate residential lots with each estimated two-acre tract being fully capable of use as a single-family residence? Okay, in order to address this question -- and you got to know this 12 years ago. This is 12 years old. I have a hard time remembering what I did last week much less 12 years ago. In order to address this question, we need to find a sale of approximately two acres of highland. A comparable sale would be, going back to the different sales we identified, Comps 1, 2, 4, 13, 18, 24, and 25, all of which are highlands only. And they're generally the same acreage, approximately, as the subject.

Q Okay. And so what was the total value you concluded and answered in question one?

A Well, Comp 1 gave us 18,670. Each comp gave a slightly different, so we came up with Comps 18, 25 were outside the statistical mean, and an acre value of 18,500 would be considered reasonable. Multiplying that by the acreage comes up with

$145,410.

Q Okay.

A For that question.

Q Okay. How about for question two? The two-acre lot, how much would the two-acre lot be?

A Now, that was on different dates; hypothetically, on different dates.

Q Okay.

A And you have to understand when you look at a value increase over a period of time, it's straight lined.

Q Okay.

A You're not going to do it separately by month. It's going to be an average over that period of time. So what is the retrospective value of a two-acre lot in Eagle Harbor on the following dates: December 3, 2003 was 37,000; July 1, 2004, 41,662; 12/31/2004, 46, 161; July 1, 2005, 51,146; November 1, 2005, 54, 829; April 19, 2006, 59,764. And again, noted this as a straight-line appreciation using a regression analysis chart.

Q Okay. And so you determined the average yearly increase was what?

A If I remember right, it's 1.8 percent per month.

Q Okay. And I think that's on your value -- on page

43, I think you list the straight-line increase?
A That would be correct. The average yearly percentage increase and the price per acre of a typical lot in the Eagle Harbor subdivision from December of '03 to present -- present being that time -- 21.6 percent straight line, 1.8 percent per month.
Q Okay. What about for question four? How did you go about determining the answer to that question?
A Again, the approach is the same as it was on the other. You've got your hypothetical questions. You have to address each one differently based on the comps, previously identified sales, that best fit that situation.
Q And just the value for December 3, 2003, what did you determine based on your analysis?
A December 9th?
Q I'm sorry. December 3rd on page 44.
A Oh, okay. The retrospective value of the 7.86-acre tract in Eagle Harbor on the following dates: December 3, 2003, 62,880.
Q Okay. So if I understand these value conclusions correctly, value one said -- assumed that it was probably subdividable, three separate residential lots, with estimated two-acre tract being fully

capable of using a single family -- that was 145?
A That was a hypothetical that it had no wetlands, it was subdividable, and you could have three fully developable two-acre lots.
Q Okay. And the last hypothetical assumed all those conditions, those three or four conditions. No restrictive covenants and the other things that we've talked about before?
A That were in --
Q Right. That was in the question on the scope.
A As a hypothetical.
Q Right. And you determined that the value there was 62,880?
A That's correct.
Q Okay.

MR. JACKSON: Please answer any questions counsel has.
THE COURT: Mr. Ferrara?
MR. FERRARA: Yes, Your Honor. May it please the Court?

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CROSS-EXAMINATION

BY MR. FERRARA:
Q Mr. Carter, my name is Paul Ferrara. We haven't

met. But I'm representing Belinda and Gerry Fox in this action that the Prices are litigating against them. Are you familiar with any of the background information about this case?

A Absolutely not.

Q No? Okay. You mentioned earlier that Mr. Parker of Chellis and Frampton initially contacted you and hired you to perform this appraisal?

A To answer hypotheticals based on previous sales in Eagle Harbor.

Q Okay. And --

A It was more of a consulting job than it was an appraisal.

Q Okay. And you testified about the assumptions that Mr. Parker asked you to make when performing these calculations, correct?

A He asked for a value given that set of circumstances that are hypotheticals.

Q Right. Now, I'll ask you this: Wouldn't your opinion and your report change if your hypothetical or the basics -- your basic understanding and the hypothetical were to change? Meaning if Lot 20 in this case were capable of subdivision, would your opinion be different than what you testified to?

A I can't answer that without -- I'd have to sit down and analyze it and go through it --
Q Sure.
A -- to come up with a value.
Q Did anyone at your office contact Berkeley County to determine whether Lot 20 was subdividable at the time you did this report? Into three separate lots.
A At the time we did the report, based on the wetlands and where they're located on it, and per calling the County, which they had basically no knowledge of subdividable nor would they render an opinion on whether it was subdividable or not, we dealt with it strictly the way the hypotheticals are.
Q So -- is it okay if I call you Ed?
A Yes.
Q Ed, it's easier for me to remember that. You can call me Paul. So, Ed, as I understand your testimony that your professional opinion that Berkeley County would not render an opinion about whether Lot 20 would be subdividable considering wetlands?
A Called planning and zoning and asked them. And they said we don't know.

Q They said we don't know?
A Sure.
Q Do you remember who you spoke with at Zoning and Planning?
A I do not.
Q Okay. But I guess my question is, Ed, would your opinion that you've offered today, would it change if in fact Zoning and Planning did say in 2018 the lot would be subdividable? Is that a fair statement?
A Back in 2006 you mean? When it was done.
Q Right. I'm saying today as we're sitting here and testifying in court, if Zoning and Planning said that the lot is subdividable today, your opinion would change, correct?
A I don't understand because this was done 12 years ago. Why would I be looking at it currently?
Q Sure. If they testified that 12 years ago it could be subdividable, would your opinion change about the values?
A I would have to sit down with them and see where they're coming from, how they say it's dividable, then -- quite honestly, the letter from the Corps of Engineers defines the wetlands in it. All of that would have to be relooked at.

Q Right. That's what I wanted to ask you about. Your report, you're making a lot of different assumptions, but let's see if I understand. And if you could turn to page 42 of your report. You've mentioned just now about the two-acre wetland concern, correct?
A Yeah. The Corps of Engineers have a letter estimating two acres worthy.
Q Right.
A Wetlands.
Q Now, you just took the letter at face value. You didn't contact the Army Corps of Engineers to see if an actual jurisdiction determination had been completed, did you?
A Well, to my knowledge, the wetlands delineation had not been accomplished.
Q Okay.
A In fact, the Corps in their letter suggested if you want to get it exactly to commission a wetlands delineation.
Q Right. And so, Ed, in your expert review, you just assumed question two, which is what is the respected value of the two-acre lot, you assumed the fact of the presence of a wetland to be true when determining that, correct?

A Yes.
Q Okay.
A You have to make assumptions.
Q Sure. Sure. And I haven't seen it. Because you're qualified as an expert, I'm asking you these questions, Ed. Are you aware in this case if a jurisdiction determination, a final jurisdictional determination, by the Army Corps of Engineers was ever done for Lot 20?
A I do not.
Q Okay. You testified -- thank you -- earlier about you understood the Army Corps' letter to direct the Prices to actually accomplish that if they wanted to figure out the location and the preciseness of wetlands?
A Well, my understanding is what they did was an estimate based on FEMA maps, and whatnot, and their knowledge. And they said if you need to know exactly what it is, then you need a wetlands delineation.
Q Right. Ed, have you ever assisted clients or generally aware of that process?
A Wetlands delineation?
Q Yes, sir.
A I know several surveyors and engineers that do

them, and I've commissioned them to do them on other cases. But myself, no, I'm not qualified.

Q Sure. But in general, what you've testified to about just now is the process in that a homeowner actually makes an application to the Army Corps of Engineers for a preliminary determination. The Corps comes out and makes the determination. And then a follow-up final jurisdictional evaluation is done where everything is confirmed.

A If they so choose to do.

Q Okay. So back to your question two on page 42, you say that the two-acre lot in Eagle Harbor would be worth $37,000. Per total or per acre?

A Where are you looking? You looking down at two?

Q Yes, sir. And I apologize.

A December 3, 2003.

Q Yes, sir. If I'm understanding your report, your testimony is that on December 3, 2003, a two-acre lot in Eagle Harbor would be worth --

A Value 37,000, correct.

Q And, Ed, that's the total amount for the two acres? Meaning 18,500 an acre?

A Correct.

Q Okay. And so wouldn't it -- and I'll ask you since you're qualified as an expert. If in fact

the Prices had two acres of wetlands, assume that to be a fact, that they still owned on Lot 20, would it be your opinion that the loss that they would incur would be the value of a two-acre tract of land in the neighborhood, meaning $37,000?

A Let me see if I got this right. You're saying that two-acre -- the two acres of wetland would be valued the same as two acres of highland?

Q Well, I'm asking you. Is it?

A No.

Q It's not? Okay. You did a determination about wetland versus upland in your report. Do you remember that?

A Yes. We discussed that.

Q So if you could help the Court understand, and I'll ask you this question: Can you just give us the answer on what two acres of wetland would be worth in 2003? In December of 2003.

A I don't know. That wasn't one of questions.

Q So two acres of non-wetlands are worth 37,000?

A Correct.

Q You've already testified about that. Now, in your report, you did make a note about the value of a wetland acre versus an upland acre. Do you remember that?

A No, I don't.
Q Okay. One second.
A What page are you on?
Q One second. Let me look through it. (Brief pause.) Sorry, Ed, one second. I've got my notes here. (Brief pause.)

Okay, Ed, I found it. On page -- and I think you did a good job going through -- thorough job going through all the lots in Eagle Harbor and identifying the upland or high ground and the lowland. But page 36, sir, I was just referring in general to Comp 52, which is about two thirds of the way down on page 36.

A Got it.
Q And you mentioned here at the last sentence, and maybe I'm reading it wrong, you say that approximately half -- this is a one-acre parcel nearby.
A And it's not in Eagle Harbor. It's the ones nearby.
Q Nearby, yes, sir. One-acre parcel had a sale price of $5,000. And it was half an acre highland and half an acre lowland. I guess you didn't break down the exact split there. But does that reflect your recollection on looking at the

highland price and the lowland price?
A What split are you talking about?
Q Well, you've got here that on a one-acre parcel nearby --
A It's half and half.
Q Half and half. And the sale price was 5,000.
A So are you trying to say that the value of highland and the value of wetlands would be what?
Q Well, you're the expert. I know that -- I'm assuming that the value of the wetlands is less than the value of the highlands.
A It is. And when property is sold, property doesn't sell wetlands, highlands.
Q Right.
A It's a blended rate. You know, if you sell 50 acres and ten acres of it is lowland, you don't do a listing with MLS saying lowlands valued at this, highlands valued at that. You're selling the entire tract for X amount, and that is what is known as a blended rate. It reflects highlands and lowlands. And if you chart, like a scatter analysis based on the amount of lowlands at different sales, it will clearly break out for you the fact that the more wetlands you have the less per acre price sold.

Q Sure. So if we look at Comp 54, which is on page 36 and 37 of your report.
A Correct.
Q That was nearby off of Leisure Lane and it was pretty close -- it's 7.95 acres. And this subject property is pretty close to that. I think it's 7.86 acres.
A 7.68.
Q 7.68. I apologize. Yeah. And that had a blended rate, did it not, Ed, of 13,836 an acre?
A Per acre sale price of 13,836.
Q Right. And that had a blended rate. And that property did, according to you, had a 1.2 acre lowland and 6.67 highland?
A Yes. Estimated.
Q So that appears to be a rough approximation on the blended acreage rate.
A Maybe not because that is in a different subdivision. There are different things to consider, the differences between them: gated, non-gated, covenants, non-covenants. There are different things that impact. In Eagle Harbor, everything is going to be the same there.
Q Right. But you're assuming for this purpose that everything is not the same, that it's not a valid

restricted covenant community. There's no valid covenants, there's no valid restrictions, correct? That was what you were asked to assume, or did I misread that?

A These are the comps going through. Then there's the assumptions in the letter, and which assumption would you be referring to?

Q All of the assumptions on Mr. Moore's letter in paragraph 4, which is starting on 61 and on page 62 of your report. Basically, A through E, Ed, there.

A So you're saying on page 62, B?

Q A, yeah. A -- and I was asking you specifically about B. But A through E, I understood your testimony just a minute ago, Ed, to be that you, when calculating this report, were asked to assume A through E and do this report. Maybe I'll clarify, Ed. Specifically, let's look at question four on page 61.

A Yep.

Q That's what -- I understood that to be the scope of your report. That you were assuming that what is the approximate appraised value of a residential tract purchased by the Prices assuming A through E.

A Again, if you look at C, it says the property is located in a subdivision that is not gated. So we're dealing with different assumptions here. Eagle Harbor is gated.
Q Well, I think at the time -- it might be gated now. But at the time, I don't think there was a gate yet.
A No, it was gated.
Q It was?
A Yeah. But it was open during the day.
Q Okay. Maybe I'm confused on that. But your assumptions, Ed, ask you to assume that even though it's in a subdivision that's not gated, the roads are private, and there's no valid covenants or restrictions?
A That's what the assumptions are.
Q Right. And so that -- assuming those facts and then considering Comp 54 that it's nearby on Leisure Lane with a blended acreage price of 13,836 per acre.
A Go ahead.
Q It would appear that somewhere between that number and the 18,500 number you talked about earlier would be a reasonable value for the two acres of wetlands in this case?

A No.
Q No? Well, you've already testified that on page 40 -- 42 that your opinion is that a two-acre lot in Eagle Harbor was worth $37,000, correct?
A That's highland.
Q Highland.
A That was no wetlands, subdividable, that each one could perk or have sewer available to it. Totally different scenario.
Q If we take the Leisure Lane blended rate of $13,800 an acre, that yields about 27,600 bucks?
A Let's go back and look at Comp Leisure Lane. And take it over -- okay, it's Comp 54. If we go over to 42 -- if we look at Comp 54 on page 43 where we're talking about A through E. On Comp 54 we say it's 7.95 acres and sold June 14, 2005, for 18,836 per acre. It is on a publicly maintained paved road which makes it superior to Eagle Harbor which are private roads.
Q Okay. Okay. So --
A It was like the subject and all their characteristics. The lot is comprised of 43 percent lowlands.
Q So the Eagle Harbor lot, in your professional opinion, would be less valuable per acre than Comp

54, the 13,836?

A What I'm saying is you got to make an adjustment where roads are publicly maintained and where they're not.

Q Sure. Sure. And so what is your best estimate of the adjustment on what the two acres of wetlands on Lot 20 would be worth considering that it's not on a private road?

A I have absolutely no idea without sitting down and doing an analysis of that. Because now you're doing different assumptions.

Q Well, help me understand this, Ed. I understand -- is it not true that whenever you do appraisals there's a range of value. People speak in absolutes, but in truth, an appraisal is an estimated range of an acceptable value based upon --

A That is correct.

Q -- all of your accounting and professional standards that you adhere to. And so, just if we could help the Court, would it be your opinion the two acres of wetlands on Lot 20, the value of those two acres is less than the 18,500 per acre that you've testified that the highlands in the same neighborhood would be worth?

A Ask that again.
Q Two acres of wetlands in Eagle Harbor.
A Lot 20.
Q Yeah. Would be less than the 18,500 per acre that you testified that a regular, typical two-acre highland lot in Eagle Harbor would be worth?
A Of highlands?
Q Yes, sir.
A Yes. The lowlands, obviously, are worth less than that.
Q So if the price per acre was less -- it's hard to figure to an exact science. It's not 50 percent less, is it?
A No. Again, like I said, when you sell, they're always sold as a lump. You don't sell lowlands and highlands separate at a different price. They're always sold at a blended rate. What are the lowlands worth? I don't know. There's a lot of different opinions on that. You know, lowlands don't have a lot of use other than maybe a detention pond or for green space or those sorts of things. But the value of wetlands versus highlands is all over the place.
Q But we do know that the value of wetlands --
A Is less than highlands.

Q -- would be less than the 18,500 based upon your expert review of the neighborhood in 2003?
A Yes.
Q Okay.

MR. FERRARA: Thank you, Ed. That's all the questions I have.

THE COURT: Mr. Hubbard?

MR. HUBBARD: Your Honor, I don't have any questions.

THE COURT: All right. Any follow-up, Mr. Jackson?

MR. JACKSON: Just one -- one or two things.

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REDIRECT-EXAMINATION

BY MR. JACKSON:
Q Mr. Ferrara asked you about the final determination of wetlands having surveys and stuff. And you said you didn't do that. Is it going to vary a whole bunch from what their initial determination is when they -- that you have attached in your report that they drawed out -- that they drew out for the Prices?
A I can't say definitively. But in my backgrounded and experience dealing with the Corps of

Engineers, when they do those, their estimate is normally pretty right on.

Q Okay. And you mentioned the private roads, public roads. If the entrance to Eagle Harbor was not up to DOT standards, would that affect the value of the lots in Eagle Harbor?

A We've run into this in several subdivisions where the roads were tested -- to take them in for public maintenance, they have to meet the DOT standards. And when they didn't, normally what happens is they get them up to standard so that they can get them publicly maintained.

Q Right. But if they're not -- if the fact is that the entrance is not up to DOT standards, would it affect value of the lots in Eagle Harbor negatively?

A You would think yes. But I can't definitively prove that from the sales.

Q Okay.

MR. JACKSON: That's all I had, Your Honor.

THE COURT: All right. Thank you, sir. You can step down.

MR. JACKSON: Your Honor, my next witness is not scheduled to be here until 3:15. However, I

CERTIFICATION BY COUNSEL

I, the undersigned counsel, do hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted this 16th day of June 2019.

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