

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Daniel E. Van Slambrook, Circuit Court Judge

Appellate Case No.: 2018-001993

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

vs.

Belinda Fox and Gerry Fox.....Appellants

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. **IS THE ISSUE OF THE STATUTE OF LIMITATIONS PRESERVED FOR APPEAL WHEN AN ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE EVEN AFTER TRIAL AND THE APPELLANTS DID NOT RAISE THE ISSUE AGAIN AT TRIAL OR IN A POST-TRIAL MOTION AND THE TRIAL COURT NEVER RULED ON THE ISSUE?**

2. **IN AN ABUNDANCE OF CAUTION AND ONLY IF THE COURT FINDS THE ISSUE IS PRESERVED FOR REVIEW DID THE TRIAL COURT ERR IN DENYING GERRY FOX'S MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS UNDER THE RELATION BACK DOCTRINE WHEN HE HAD NOTICE OF THE LAWSUIT FROM THE BEGINNING, HIS WIFE, WHO WAS A PARTY FROM THE BEGINNING, WAS USED BY HIM FOR ASSET PROTECTION AND TO MISLEAD BUYERS, AND HE SUFFERED NO PREJUDICE FROM BEING ADDED TO THE SUIT?**

3. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT WHEN THERE IS AMPLE EVIDENCE OF UNFAIR AND DECEPTIVE ACTS IN THE RECORD?**

4. **DID THE GENERAL ASSEMBLY INTEND FOR THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT TO COVER TRANSACTIONS IN WHICH A REAL ESTATE DEVELOPER MISREPRESENTS THE CONDITION OF THE PROPERTY AND SUBDIVISION TO THE PUBLIC?**

5. **DID THE TRIAL COURT ERR IN HOLDING THAT RES JUDICATA DID NOT BAR THE PLAINTIFFS' CLAIMS WHEN THE LAWSUIT AGAINST THE TITLE INSURANCE COMPANY INVOLVED DIFFERENT PARTIES, DIFFERENT CAUSES OF ACTION, WAS SETTLED WITHOUT TRIAL AND EXPRESSLY PROVIDED A CARVE OUT FOR THIS LITIGATION?**

6. **DID THE TRIAL COURT ERR IN GRANTING JUDGMENT FOR NEGLIGENT MISREPRESENTATIONS WHEN THERE IS AMPLE**

**EVIDENCE IN THE RECORD TO SUPPORT THE ELEMENTS OF
NEGLIGENT MISREPRESENTATION?**

- 7. DOES THE COLLATERAL SOURCE RULE BAR APPELLANTS' CLAIMS THAT THE PRICES RECEIVED A DOUBLE RECOVERY FOR THE SAME WRONG?**
- 8. IS THE ALLEGED ERROR BY THE TRIAL COURT IN NOT REQUIRING THE PLAINTIFFS TO IMMEDIATELY FILE AN ELECTION HARMLESS OR MOOT WHEN THE JUDGE SPECIFICALLY PROVIDED IN THE ORDER THAT THE PLAINTIFFS COULD NOT COLLECT DAMAGES FOR BOTH NEGLIGENT MISREPRESENTATION AND UNFAIR TRADE PRACTICES AND THE PLAINTIFFS SUBSEQUENTLY FILED AN ELECTION?**

STATEMENT OF THE CASE

Knight's Redi-Mix (Knights) commenced an action for foreclosure of a mechanic's lien for concrete delivered to the Respondents Ronald and Diana Price's construction site (1150)("Prices") The Prices answered, counterclaimed for negligence, filed a cross-claim against Heritage Classic Homes ("HCH") and a third-party complaint against Danny Gilbert ("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). This complaint was amended to add Eagle Harbor, Inc. ("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. (R. 97)

The Prices subsequently filed a motion to amend and supplement their 1855 complaint to add Gerry Fox, Troy and Sarah Winn¹, 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

¹ The Winns were granted summary judgment as to the Prices individual claims but not the road litigation claims.

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. (R. 178) The court granted the Prices' motion to amend and supplement their complaint. (R. 78)

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 all existing and former owners of lots in Eagle Harbor Subdivision as well as Concerned Citizens of Eagle Harbor, Inc. (CCEHI)² and EHHOA, Inc.³ (the "Road litigation"⁴).

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. (R. 60)

² CCEHI is represented by Hamlin O'Kelly.

³ EHHOA, Inc. has legal title to the roads and as alleged by the Prices is a shell corporation with no members other than its incorporator, Gilbert.

⁴ 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.

The case was called for trial on May 3rd, 2018 on all other claims except the road litigation and was tried in May 3rd and 4th, 2018. The trial court filed its order after trial on the merits ("Order") on June 29, 2018 entering judgment in favor of the Plaintiffs for breach of contract (HCH and Gilbert only), negligent misrepresentation and unfair trade practices (Gilbert, Foxes, EHI, and EH Phase II Development Partnership). (R. 20) All the Defendants filed post-trial motions. (R. 120) The court held a hearing on these motions on September 24, 2018 and denied these motions in separate orders on October 09, 2018. (R. 1)

On September 27, 2018, the Foxes filed a motion to require the Plaintiffs to elect their remedy. (R. 113) On November 5, 2018, the Foxes filed the present appeal. (R. 101) On February 08, 2019 the parties held a status conference on the remaining issues, at that conference it was agreed that the Plaintiff would file their election of remedy. The Plaintiffs filed their election of remedy for the unfair trade practice cause of action on February 15, 2019. (R. 118) This appeal followed.

FACTS

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. (R. 23, 1126, 1128-29, 1132) The partners would then split the profits after the lots were sold and expenses were paid. (R. 1128) 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. (R. 1019)

On August 13, 2001, Belinda Fox acquired approximately 62 acres of land to subdivide as part of Eagle Harbor Phase II subdivision. 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. (R. 1127-1128) 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. (R. 1026) 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." (R. 1027)

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. (R. 1140) 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 see roads under construction and land being cleared.” (R. 1140) 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. (R. 1151-1155, 1178 ¶10-13) 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.” (R. 1142) 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]. (R. 1142) 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.” (R. 1143)

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. (R. 1018) 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. (R. 1123 (p.38, lines 17-22), R. 1132, p. 77, lines 22-24, p. 78 lines 4-12).

In the summer of 2003, the Prices were looking for a lot of suitable location to build a house. Mr. Price had moved to South Carolina to work at SPAWAR Systems Center Atlantic in Charleston. (R. 334) They learned about Eagle Harbor from Doug Cotton and his daughter and met Gilbert at an office in Eagle Harbor Subdivision. (R. 335-336) Gilbert, in his role as marketing partner, showed the Prices Lot 20 and a master plan of Eagle Harbor. (R. 337). Gilbert held himself out as a developer with the requisite, knowledge, experience and skill to develop the subdivision. 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. (R. 1117, pp.54-55, 1118, 1133, 819, lines 10-15)

Gilbert, in his role as marketing partner, made several material representations to the Prices concerning the subdivision and Lot 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. (R. 26, 339, 541) Gilbert represented that the property could be subdivided into two lots, and three lots with homeowner's association approval. (R. 26, 339, 883) Also, despite the letter he received from DHEC, Gilbert represented to the Prices that the lot would perk. (R. 338, 339, 542) When the Prices inquired what that meant, he told them they could put a septic tank on the property. (R. 339, 542) 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. (R. 336, 341, 544) Gilbert promised various amenities would be built for the boy's home that could also be used by residents of Eagle Harbor Phase II. (R. 336, 544) Gilbert represented to the Prices that testing had been done and everything was fine. (R. 338) At no time did Gilbert disclose to the Prices that their lot contained wetlands or that the soil had such a high-water table. This condition was not readily apparent as it had been very dry when the Prices first looked at the property and most of their lot was still wooded. (R. 542) 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. Gilbert made similar representations to other purchasers of lots in the subdivision who also relied on the representations in purchasing lots. (R. 500, 505-506, 508-509, 516, 527, 530, 535) Gilbert as a marketing partner who would split the profits and the partnership itself had a pecuniary interest in making these representations. (R. 1019, 1128)

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. (R. 883) Gilbert signed the contract for Belinda Fox. Gilbert explained that the owner of Lot 20, Belinda Fox was his partner. (R. 545) Typed into the contract as the closing agent for the Prices

was Jeff Spell, who Gilbert testified was his good friend and in fact represented both Gilbert and the development. (R. 860, 862, 865) Gilbert drew up site plans on his computer and showed the Prices where the septic tank would go. (R. 1119)

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. (R. 342, 368) The Prices received the deed to Lot 20 on November 25, 2003 from Belinda Fox which was duly recorded on December 3, 2003. (R. 887) As part of the disbursements at closing, Heritage Classic Homes, Gilbert's wholly owned company received \$41,020.22. (R. 886) Gerry Fox testified that this was Gilbert's share of the profit. (R. 1134) Gilbert also received \$2,000 in earnest money which he directed that the Prices pay to him prior to the closing.

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. (R. 891) Time was of the essence in the contract. (R. 923) 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." (R. 938)

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." (R. 939) 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. (R. 1139-1145) Gilbert began demanding that the Prices pay him his first draw; however according to the requirements of NCM a copy of the septic tank permit was required among other items listed. (R. 898)

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." (R. 940) 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. (R. 945) 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. (Id.) Gilbert has been subsequently cited by Berkeley County Code enforcement for other instances of failing to obtain the proper building and related permits (R. 1202-1204) and had permits denied for not submitting required information with six months. (Id.)

On January 22, 2004, Ms. Price herself applied a septic tank permit from DHEC which was issued on February 12, 2004. (R. 947) The permit application contains language warning that construction cannot begin until a permit for construction of a sewage disposal system has been issued. (R. 952)

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. (R. 426-427) The Prices met with Gilbert on January 26, 2004 to discuss the problems with construction and were told by Gilbert, "I'm done." (R. 416, 558, 685, 954)

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. (R. 954) 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." (R. 955) Despite this plea, or perhaps because of it, 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 be 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..." (R. 956) 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." (Id.) Covenants, which are not valid.

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. (R. 957) Ms. Price testified she does not recall ever being served with a statement of account. (R. 562)

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. (R. 1106) 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." (R. 1107)

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. (R. 1174)

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. (R. 963)

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-month delay after their closing on the property. (R. 965)

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. (R. 994-1001) The property described in Exhibit A references the Final Plat for Phase II. (R. 1001) 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. (R. 1117-1118)

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." (R. 1004) 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." (R. 1004-1005)

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. (R. 983) 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.” (R. 1157) The approximate boundaries of wetlands are depicted on a copy of the survey plat the Prices submitted from their closing. (R. 1162)

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. (R. 1185, 1201)

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 subdivisible 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. (R. 1044, 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) (R. 1044, pp. 42-43). The Prices agreed with his value. No testimony as to value was offered by the Defendants.

STANDARD OF REVIEW

Negligent misrepresentation and violation of the S.C. Unfair Trade Practice Act are actions at law and in this case were tried before the court without a jury. In an action at law, on appeal of a case tried without a jury, the court views the trial court's findings of fact as equivalent to a jury's findings in a law action and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. *Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Thus, this Court's review generally extends merely to corrections of errors of law. *Moseley v. All Things Possible*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011).

The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). Because of this discretion, our review on appeal is limited to the correction of errors of law. *Kuznik*, 342 S.C. at 611, 538 S.E.2d at 32; *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 [*311] (Ct. App. 2000). Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. See *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

ARGUMENTS

- 1. THE ISSUE OF THE STATUTE OF LIMITATIONS AS TO GERRY FOX IS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE AN ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE EVEN AFTER JUDGMENT AND THE APPELLANT DID NOT RAISE THE ISSUE AGAIN AT TRIAL OR IN A POST-TRIAL MOTION.**

The Appellant's first argument is that the trial judge erred in denying Defendant's motion to dismiss Gerry Fox because the statute of limitation has expired. To the best of Respondent's knowledge, the Appellant never filed a motion to dismiss on this ground⁵. The Appellant did file a motion for summary judgment on this ground which was denied by the trial court in an order dated October 23, 2017 (R. 68) and reconsideration of the motion denied by Form 4 order dated November 28, 2017. (R. 64) Both orders were included in Appellant's Notice of Intent to Appeal. (R. 101) However, this court has repeatedly held that the denial of a motion for summary judgment is not appealable. Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994); *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997).

The reasons for this were explained in *Ballenger*, "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. (*citations omitted*). The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again

⁵ The Appellants did file a motion to dismiss on the eve of trial, but this was based on *res judicata* and the title insurance lawsuit.

later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. *Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380. Therefore, to preserve this issue for appeal, it was incumbent on the Appellants to renew this argument at trial and have the court rule upon it. However, Appellants did not renew the argument at trial by motion for nonsuit⁶ or in the Appellants' post-trial motions. Furthermore, other than the order denying summary judgment, the Prices are not aware of any instance where the trial court has ruled on the issue. Therefore, since an order denying summary judgment is not appealable, the issue was not raised again at trial on in a post-trial motion and the issue was not ruled upon, it is not preserved for appeal and should not be reviewed by this court.

2. **IN AN ABUNDANCE OF CAUTION AND ONLY TO THE EXTENT THE COURT DOES FIND THE ISSUE IS PRESERVED FOR APPEAL AND SUBJECT TO APPELLATE REIVEW, THE TRIAL COURT CORRECTLY APPLIED THE RELATION BACK DOCTRINE WHEN THE DEFENDANT HAD NOTICE OF THE LAWSUIT FROM THE BEGINNING, HIS WIFE, WHO WAS A PARTY FROM THE BEGINNING, WAS USED BY HIM FOR ASSET PROTECTION AND TO MISLEAD BUYERS, AND HE SUFFERED NO PREJUDICE FROM BEING ADDED TO THE SUIT.**

Gerry Fox⁷ argues that the Prices individual claims against him are barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530. Mr. Fox asserts the Prices knew about their claims for damages in 2004 and that at least by 2005 knew

⁶ The Appellants made a "directed verdict" motion at the conclusion of the Plaintiffs' case and renewed at the conclusion of the case, but the statute of limitations was not argued as one of the grounds. (R 740-743, 879)

⁷ This argument only applies to Gerry Fox as his wife, Belinda Fox was a Defendant from the beginning.

about their claims against Gerry Fox. The Prices do not contest that they knew about their claims in 2004 but assert that under the relation back provisions of Rule 15(c) their claims against Gerry Fox relate back to the original pleadings.

RELATION BACK UNDER RULE 15(c) SCRPC

Rule 15(c) SCRPC 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.

Mr. Fox does not contest these elements, but rather relies on a line of cases going back to *Jackson v. John Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (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 Respondent 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*, 342 S.C. at 558, 537 S.E.2d at 570. The other cases cited by Mr. Fox all rely on this single 2000 Court of Appeals decision.

The Respondent submits that the interpretation of the relation back doctrine under Rule 15(c) has changed or evolved in the seventeen years since *Jackson*. The trial

court agreed. 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 cases⁸.

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 Mr. 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, 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..." *Id.* .

⁸ The Trial Court was 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.

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 *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 Mr. 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)).” *Id.* at 471. In this case, Gerry 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.” *Id.* *McKnight v. Iceberg Enters. L.L.C.*, 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. (R. 1127-1128) 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, Defendant Gerry Fox filed an answer on January 6, 2016 so he had ample time to prepare his defense. (R. 103) In the event this court finds this issue is preserved for appeal, this court should affirm the trial court and find that the 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, the trial court did not err in denying Fox's motion for summary judgment based on the statute of limitations.

3. THERE IS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT SO THE TRIAL COURT PROPERLY DENIED APPELLANT'S "DIRECTED VERDICT"⁹.

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant; . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRPC; see Ducworth v. Neely, 319 S.C. 158, 159 n.1, 459 S.E.2d 896, 897 n.1 (Ct. App. 1995) Rule 41(b) allows the judge as fact finder to weigh the evidence and determine the facts. Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529

⁹ While Appellant's motion recited in argument and at the close of the evidence was couched as a "directed verdict" motion, governed by Rule 50, SCRPC, this was a non-jury action. As Rule 50 by its nature is applicable to jury trials, the proper motion for Appellant to have made was a motion for involuntary non-suit under Rule 41, SCRPC Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc., 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000)

(1992). Therefore, Appellant's appeal is from the master's factual findings as a judge in a non-jury action at law. See *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 310 S.C. 232, 235, 423 S.E.2d 114, 116 (1992) (stating an action seeking money damages for breach of contract is an action at law); *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) (same). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd.*, 266 S.C. at 86, 221 S.E.2d at 775. Thus, this court must affirm if there is any evidence to support the master's findings. *Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458-59, 536 S.E.2d 878, 880-81 (Ct. App. 2000). In this case, there is ample evidence to support the master's findings.

UNFAIR AND DECEPTIVE ACTS

As discussed by the master, 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 (R. 1107-1108) 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. (R. 1018)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. 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). (R. 1151-1154, 1176, ¶10-13).

Despite Gilbert's knowledge that the Prices lot would not perk or support a septic tank, and a high-water table (R. 1142-1143), Gilbert represented the Prices lot could have a septic tank and that the Prices lot could be further subdivided. (R. 339, 542) Indeed, Gilbert's testimony was that he showed them on the plans where the septic tank would be located. (R. 1119)

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 Spell actually represented both Gilbert and the development at the time. (R. 860, 862, 865)

¹⁰ 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 promised the Prices and others there would be amenities and valid, restrictive covenants. (R. 336, 544) The amenities were not developed or were late in being developed and the restrictive covenants were invalid. (R. 1117-1118)

The Appellant does not challenge the overall findings that unfair and deceptive acts were committed in trade and commerce; rather, the Appellant argues there is no evidence the Appellant Foxes committed these acts or should be liable for them as partners in the real estate development partnership. The Appellant argues that to be liable there must be evidence the Foxes consented to or directed Gilbert's unlawful actions. (App. Brief, p. 11). This is not a correct statement 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. (R. 1129) Belinda Fox testified in her deposition that Gilbert was the one who dealt with prospective buyers (R. 1123 (p.38, lines 17-22) The Foxes specifically allowed Gilbert to market and sell the properties. (R. 1132) Ms. Price testified that Gilbert told her Belinda Fox was his partner, they work together, and he was her salesman. (R. 545) Furthermore, the acts of Gilbert are consistent with that of a development partner selling lots within a subdivision.

Second, the Foxes misstate the law and what the Prices must prove to establish liability for Gilbert's misrepresentations. The Foxes argue the Prices must show that Gilbert was authorized to make representations for the partnership. Under the law, the

opposite is true, the Defendants must not only show that Gilbert was not authorized but also that the Prices knew he was not authorized. Every partner is an agent of the partnership. S.C. Code Ann. § 33-41-310 "The act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority. S.C. Code Ann. § 33-41-310 (Emphasis added.) In this case, Gilbert apparently did have such authority and there is no evidence that the Prices had any knowledge of facts to the contrary.

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 court should also note that a partnership is specifically included in the definition of “person” under S.C. §39-5-10.¹¹ The case of *Plowman vs. Bagnall*, 316 S.C. 283, 450 S.E.2d 36 (1994) is not applicable as that case involved a corporation and not a partnership and officers and directors and not partners. Moreover, there is evidence that the Foxes authorized the acts. (R. 1131-1132)

IMPACT ON THE PUBLIC INTEREST

Appellants also allege there is no evidence which satisfies the public impact requirement. 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

¹¹ (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 (emphasis added.)

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 subdivision. According to Gilbert's application for subdivision approval, Eagle Harbor, Phase II has 23 lots.¹² (R. 1026) He sold many, if not all these lots before receiving DHEC approval as required. (R. 1018) Gilbert also suggested to other owners to use Jeff Spell, Gilbert's own attorney for their closings. (R. 860-865, 1207) 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. (R. 497-536) Merrill Cox recalled a meeting of the owners to try and

¹² There is also a Phase 3 in Eagle Harbor Subdivision.

convince the owners they were bound by the defective covenants. (R. 505-506) The Prices also reference this in their April 3, 2004 letter to Gerry Fox. (R. 1174-1175)

There is also evidence to support the potential for repetition. Evidence was offered that Gilbert was cited for violations for other work and that the Foxes have real estate licenses. (R. 1202-1204, 766)

This court should find there is evidence of a public impact and affirm the master.

4. THE GENERAL ASSEMBLY INTENDED THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT TO PROTECT BUYERS FROM UNFAIR AND DECEPTIVE ACTS IN THE CONDUCT OF TRADE OR COMMERCE WHICH INCLUDES TRANSACTIONS IN WHICH A REAL ESTATE DEVELOPER MISREPRESENTS THE CONDITION OF THE PROPERTY AND SUBDIVISION.

The Appellant inexplicably argues that the South Carolina General Assembly did not intend to protect buyers against this type of transaction when the South Carolina Unfair Trade Practices Act was created. (See Argument III, Appellant's Brief.) This argument lacks merit. First, under the definitions section¹³, "Trade" and "commerce" shall include the 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 shall include any trade or commerce directly or indirectly affecting the people of this State. Thus, the South Carolina General

¹³ S.C. Code Ann. § 39-5-10

Assembly expressly made advertising and offering for sale real property subject to the Act.

Second, there are case precedents expressly applying the South Carolina Unfair Trade Practices Act to this exact type of transaction (misrepresentation in the sale of lots in real estate subdivision.) *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334, (S.C. Ct. App. 1984)(selling lots in violation of a county subdivision ordinance and sales agents in the employ of the realtor made false representations to induce the purchase of the lots); *Plowman v. Bagnal*, 316 S.C. 283, 450 S.E.2d 36, (1994) homeowners brought an action alleging that the corporation's officers and their agents utilized unfair and deceptive practices to induce the homeowners to buy homes). This court should affirm the trial court's judgment for unfair trade practices to this type of transaction.

5. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION TO DISMISS FOR RES JUDICATA FILED ON THE EVE OF TRIAL.

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 in a completely separate lawsuit in which they were not a party and 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. (R. 35-36) The Foxes now claim that they were in "privity" with Investors Title Insurance Company. This argument lacks merit.

The term "privity," 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 Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (1984). *Roberts v. Recovery Bureau*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). Privity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. 46 Am. Jur. 2d *Judgments* § 532 at 685-686 (1969). One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him. 50 C.J.S. *Judgments* § 788 at 327 (1947). *Roberts v. Recovery Bureau*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). A proper example of privity would be that of a guardian and ward. *First Nat'l Bank v. United States Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945). An adjudication against the guardian in that capacity would be binding on the ward. In this case, the Foxes and Investors Title are not so identified with one another that they represent the same legal right. The Foxes' rights against Investors Title arise out of 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.

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

The Foxes attempt to base their privity argument on the "Transfer of Rights" provision (Condition 7 of the title insurance policy) (R. 1304) 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)) (R. 1295)

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.

(R. 1295-1296).

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. (R. 1294)

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. (R. 1294)

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.

"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 v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *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 v. Travelers Ins. Co.*, 223 S.C. 150, 150 (1953). 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. Furthermore, res judicata is an affirmative defense that was not pled in the answer and was raised on the eve of trial. For all these reasons this court should affirm the ruling of the master, that res judicata does not apply to this suit against the Foxes.

6. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT FOR NEGLIGENT MISREPRESENTATION BECAUSE THERE IS EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S JUDGMENT.

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 L.P. v. Edwards*, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (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 Fed. 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 L.P.*, 354 S.C. at 474, 581 S.E.2d at 504

FALSE REPRESENTATIONS

In this case Gilbert made several materially false misrepresentations to the Prices which induced their purchase of Lot #20 in Eagle Harbor subdivision. The Foxes as Gilbert's partners are liable for his misrepresentations. Especially when they specifically authorized him to market the lots and subdivision for them.

SUBDIVISION

As found by the court (R. 26), 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. (R. 26, 339, 541) Gilbert represented that the property could be subdivided into two lots, and three lots with homeowner's association approval. (R. 26, 339, 883) 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 (R. 33) , "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." (R. 1004) 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." (R. 1004)

The Foxes argue and offered evidence that Lot 20 could be subdivided but not for any residential use and no homes could be constructed on the subdivided lots. It would be misleading to suggest to prospective homeowners that the large lot they were purchasing in a new subdivision could be subdivided and sold to help finance

construction costs 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.

SEPTIC TANK

Gilbert misrepresented to the Prices that their lot would perk and could support a septic tank (R. 338, 339, 542), 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, (R. 25) 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.” (R. 1142) 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]. (Id.) 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.” (R. 1143) Gilbert even showed the Prices on a drawing of the lot where the septic tank would go. (R. 1119)

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. (R. 26, 336, 341, 544) The representation was false when made because there were no valid restrictive covenants encumbering Phase II at the time. The covenants for Phase II were not even recorded until almost a year after the Prices had purchased their property and even then, the covenants were invalid because EHI the Declarant did not own the property it was trying to restrict. (R. 994, 1117-1118).

AMENITIES

The Prices, and Merrill and Dianne Cox testified that they were told there would be amenities which could be shared with the Boy's Home but were either never developed or added much later than represented. (R. 336, 508-509, 535, 544)

TESTING DONE AND EVERYTHING WAS FINE

In making their argument that this representation was not false, the Appellants confuse that the Prices eventually received a septic system which drained to an off-site drain field with the misrepresentation made to induce the purchase of Lot 20 that the lot would perk and support an on-site septic tank. While the testing was done, everything clearly was not fine." (R. 338) 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.” (R. 1142-1143) None of this was disclosed to the Prices at the time the misrepresentation was made, and they signed the contract.

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. (R. 1157)

Appellants first argue that DHEC found that Eagle Harbor, Inc. was the developer therefore, it was a factual error for the court to conclude that Gerry Fox and Belinda Fox were developers. (Appellants Brief, 25) This argument is without merit. DHEC never made a legal determination of a contested disputed fact after a hearing. Rather, it simply used the name Gilbert associated with the project. The trial court made a detailed factual determination that the Foxes were part of a real estate development partnership¹⁴. (R. 41 "Existence of Partnership). Further, 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 (R. 1177). Of note is that the contract with Stantec was entered in 2001 (two years prior to the Prices contract) and as alleged by the Plaintiffs including Belinda Fox, Stantec was to have performed wetland delineation as part of the Plan. (R. 1177, ¶7(c)) The court should further note that among the damages claimed by Belinda Fox was a fine by regulatory agencies for failure to secure a permit and for improper dredging of wetlands. (R. 1178-9, ¶13(b)). Finally, the court should note that

¹⁴ It does not appear this finding has been challenged as an issue on appeal.

the subdivision plat for Eagle Harbor, Phase II, which was signed by Belinda Fox in September 2002, over a year prior to the Price contract for Lot 20, specifically notes "No wetlands delineation or environmental studies have been done on the property being surveyed at this time." (R. 1003, last side note)

The Appellants next offer the court a series of red herrings hoping one will appeal to this court. First, they argue that violation of the permitting requirement for land disturbance does not equate to a requirement that Belinda Fox has a duty to investigate the presence of wetlands prior to her sale of the lot. However, wetland delineation is a requirement prior to land disturbance in a project this size as acknowledged by Ms. Fox in her lawsuit alleging Stantec breach its contract to the developers in part for not providing wetland delineation. See also S.C. Code Regs. 72-307 (requiring Federal Emergency Management Agency flood maps and federal and State wetland maps, where appropriate as part of the general submission requirements for stormwater management plan.) Appellants also argue that there is no evidence of land disturbance on Lot 20 prior to closing; however, this is simply not true. In a letter dated August 2001, DHEC wrote Gilbert and stated in part, "I was amazed to see roads being constructed and land being cleared." When asked about this on the stand, Gilbert exclaims, "That's faith." (R. 505) This is two years prior to the Price closing. See also Ms. Price testimony upon first looking at Lot 20 "It looked good" and "we walked around" and "was going to need some leveling." (R. 542)

Next, the Appellants argue that somehow the fact that the 2.0 acres of wetlands on the Prices land was non-navigable freshwater wetlands makes a difference. It does show that the wetlands do not fall under the jurisdiction of the U.S. Army Corp. of Engineers ("ACOE"), but this does not change the basic fact that the Prices property is encumbered by 2.0 acres of wetlands which should have been disclosed and could have been discovered had the developers properly performed the required wetland delineation prior to land disturbance activities. Furthermore, although not under ACOE jurisdiction, those wetlands still require special permitting for any use of those acres.

Third, the Appellants argue that the representation could not have been false because Gilbert did not know there was wetlands on the property. This point is debatable since soil testing and the letter from DHEC clearly indicated the property had a high-water table within 12" of the surface. Moreover, actual knowledge of falsity is not required, as that is one of the distinguishing characteristics of negligent misrepresentation versus fraud. Of course, if the developers had performed their statutory responsibilities prior to land disturbance, Gilbert would have known of the presence of the 2.0 acres of wetlands on the property and would not have misrepresented that all testing had been done and that everything was fine.

Fourth, remarkably, Appellants argue that they were somehow on equal footing with the Prices despite the fact that they were the developers of the property and had been in possession of the property for over two years prior to the Prices purchase. The

Appellants also argue the terms of the contract and integration clause prohibit this claim. The court addressed this argument in detail in the order. (R. 48-50) (“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.)

This court should find that there is evidence to sustain the finding of the trial court as to negligent misrepresentation.

7. THE COLLATERAL SOURCE RULE BARS APPELLANT’S CLAIMS THAT THE PRICES RECEIVED A DOUBLE RECOVERY FOR THE SAME WRONG.

Appellants argue that the Prices should not be able to recover against both their insurance company under their title insurance policy and the Foxes for unfair trade practices and negligent misrepresentation. This argument ignores the collateral source rule which understandably is not even mentioned in Appellants’ argument.

“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 Constr. Co. Grp.*, 450 S.E.2d 41 (S.C. 1994) (contractual right to indemnification not defeated by fact that loss was actually

paid by an insurance company); *Rattenni*, 298 S.C. 276, 379 S.E.2d 890 (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers*, 250 S.C. 149, 156 S.E.2d 759 (tortfeasor's liability for damages not reduced by disability payments from employer); *New Found. 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*, 173 Colo. 540, 481 P.2d 722 (1971), and when payments to the injured party were not made on behalf of the wrongdoer, *see Maduff Mortg. Corp. v. Deloitte Haskins & Sells*, 98 Or. App. 497, 779 P.2d 1083 (1989)" *Citizens & S. Nat'l Bank v. Gregory (In re W.B. Easton Constr. Co.)*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)

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

The Foxes claim this result is inequitable. 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*, 320 S.C. 174, 182, 463 S.E.2d 636, 640 (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." *Id.* at 182, 463 S.E.2d at 640. *Pustaver v. Gooden*, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002). This court should affirm the trial court that the collateral source rule applies, and the Foxes will not receive a double recovery for the same wrong.

8. **THE ALLEGED ERROR BY THE TRIAL COURT IN NOT REQUIRING THE PLAINTIFFS TO IMMEDIATELY FILE AN ELECTION IS HARMLESS OR MOOT BECAUSE THE JUDGE SPECIFICALLY PROVIDED IN THE ORDER THAT THE PLAINTIFFS COULD NOT COLLECT DAMAGES FOR BOTH NEGLIGENT MISREPRESENTATION AND UNFAIR TRADE PRACTICES AND THE PLAINTIFFS SUBSEQUENTLY FILED AN ELECTION.**

The Appellants argue that the Plaintiffs must elect between the remedies of negligent misrepresentation and unfair trade practices even though the Plaintiffs pled

and proved the entitlement to both¹⁵. The trial court recognized this when it held, “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.” (R. 59) Of course, the Plaintiffs agree with this, the only question was the timing of the election. The Appellants filed a motion to elect remedies. (R. 113) Before the hearing could be held, the Appellant filed the present appeal. (R. 101) However, at a subsequent status conference in the case, the Foxes agreed the Prices could file the election to simplify issues on appeal. The Prices filed an election of remedy for the unfair trade practices cause of action. (R. 118) The Prices agree the Form 4 Order of judgment should be modified now that the election has been filed to delete the judgment for negligent misrepresentation. However, depending on the ruling of this court on appeal as it relates to the unfair trade practice claim, the Prices reserve the right to request that judgment on negligent misrepresentation be entered.

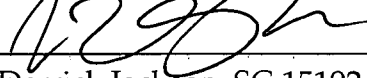
CONCLUSION

The trial took place over two days with multiple witnesses and experts testifying before the master who had the opportunity to observe the demeanor of the witnesses, receive the exhibits in context and hear the arguments of counsel. The master produced

¹⁵ The Appellants initial argument at this point recites to an older doctrine of pleading inconsistent remedies and by proceeding with one, you have made an election. This issue no longer applies under the Rules of Civil Procedure which allows you to plead alternative remedies. This does not apply here where there are two consistent remedies for the same damages.

a highly detailed forty-page order with findings of fact and conclusions of law carefully addressing the many issues in the case. The master considered and denied post-trial motions by the Appellants with another detailed order. Under the appropriate standard of review, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. Thus, this Court's review generally extends merely to corrections of errors of law. In this case, there are no reversible errors of law and there is ample evidentiary support for the master's findings. This court should affirm the master's order.

Respectfully submitted



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Dated: July 8, 2019

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BERKELEY COUNTY
Court Of Common Pleas

The Honorable Daniel E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2018-001993

RECEIVED
JUL 05 2019
SC Court of Appeals

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

vs.

Belinda Fox and Gerry Fox.....Appellants

**CERTIFICATE OF COUNSEL
PURSUANT TO RULE 211(b) SCACR**

The undersigned certifies that the Respondents' Final Brief is in compliance with
Rule 211(b) SCACR.



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