THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2018-CP-22-00956

Appellate Case No. 2019-001822

Rory M. Isaac and Kimberly J. Isaac ..... Appellants

v.

Thomas C. Onions, Jacqueline Onions, Laura Kopchynski, and Lane's Professional Pest Elimination, Inc. .....Of Whom Laura Kopchynski is the Respondent.

RESPONDENT'S INITIAL BRIEF

Steven R. Kropski
Ryan M. Gunther
Earhart Overstreet, LLC
P.O. Box 22528
Charleston, South Carolina 29413
(843) 972-9400

Counsel for Respondent

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Introduction 4

A. Listing of the Property and termination of the first contract for reasons unrelated to the condition of the Property 4

B. Appellants' purchase of the Property 5

C. Appellants experience flooding on the Property and sue Respondent 6

Legal Standard 7

Argument 8

I. The trial court correctly held that S.C. Code §40-57-350(G)(2) barred Buyers' claims against Sellers' Agent 8

II. Appellants waived appellate review of the trial court's finding pursuant to §40-57-350(G)(2) 11

III. Appellants' remaining arguments fail to present any material issue of fact 12

i. Appellants' argument that Sellers' Agent had knowledge of prior flooding at the Property because she lived in the same residential community is conclusory, and was not raised before the trial court 13

ii. Appellants' argument that Sellers' Agent had actual knowledge of incorrect statements on the property condition disclosure statement is conclusory and unsupported by the law 13

iii. Sellers' Agent did not mispresent or conceal the June 18, 2018 CL-100 inspection report 17

iv. Appellants allegations that Sellers' Agent "steered" the Buyers away from hiring Stark Exterminators to perform the CL-100 is conclusory, without merit, and Buyers' Agent testified that Buyers' CL-100 inspector was his choice 18

IV. Appellants' failure to address the trial court's decision granting summary judgment on their civil conspiracy cause of action abandoned appellant review of this decision.....19

V. The trial court correctly granted summary judgment over Appellants' procedural objections.....21

Conclusion 22

TABLE OF AUTHORITIES

Cases

AMA Mgmt Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App 1992).....11

Amick v. Hagler, 286 S.C. 481, 334 S.E.2d 525 (Ct. App 1985).....11, 20

Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989).....11

Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007).....7

Bryson v. Bryson, 378 S.C. 502, 662 S.E.2d 611 (Ct. App. 2008).....12

Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009).....16

Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007).....13

Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).....7

Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 691 (Ct. App. 2001).....12

Langehans v. Smith, 347 S.C. 348, 554 S.E.2d 681 (Ct. App. 2001).....20

Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).....19

Link v. School District of Pickens, 302 S.C. 1, 393 S.E.2d 176 (1990).....21

Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).....7

McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014).....7, 12, 13, 16, 20

McMillian v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006).....19

Moseley v. All Things Possible, Inc., 388 S.C. 31, 694 S.E.2d 43 (Ct. App. 2010).....10

Pye v. Estate of Fax, 369 S.C. 555, 633 S.E.2d 505 (2006).....7, 19

State v. Lindsey, 394 S.C. 354, 714 S.E.2d 554 (Ct. App. 2011).....13, 14, 17, 20

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013).....7, 12

Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014).....14

Statutes

S.C. Code Ann. § 12-37-3130(1).....15

S.C. Code Ann. § 14-3-330.....21

S.C. Code Ann. § 40-57-30(16).....14

S.C. Code Ann. § 40-57-350(G)(1).....14, 19

S.C. Code Ann. § 40-57-350(G)(2).....8, 9, 10, 11, 12

Rules

Rule 220(c), SCARC.....20

Rule 54(b), SCRCP 21

Rule 56(c), SCRCP 7

§ 27-1085K(1), Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act 4,18

STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly found that S.C. Code §40-57-350(G)(2) barred Appellants' claims against Respondent.

II. Appellants' failure to address the trial court's grounds for granting summary judgment pursuant to S.C. Code §40-57-350(G)(2) in their appellate brief abandoned appellate review of this conclusion of law.

III. Appellants remaining arguments fail to present any material issue of fact.

IV. Appellants failure to address the trial court's decision granting summary judgment on their civil conspiracy cause of action abandoned appellate review of this decision.

V. The trial court correctly granted summary judgment over Appellants' procedural objections.

STATEMENT OF THE CASE

Plaintiffs, Rory and Kim Isaac ("Buyers" or "Isaacs") filed a civil action against three Defendants related to their purchase of a home at 24 Avenue of Live Oaks in Pawley's Island, South Carolina (the "Property") from Thomas C. Onions and Jacqueline Onions ("Sellers") alleging that a history of flooding and water intrusion in the crawlspace was concealed. In their action, the Isaacs sued the Sellers, the CL-100 inspectors, Lanes Professional Pest Elimination, Inc., ("CL-100 Inspectors" or "Lanes") and the Sellers' agent, Respondent Kopchynski ("Sellers' Agent"). The Buyers alleged that the Sellers' Agent did not disclose prior flooding and moisture issues in the crawlspace.

Following commencement of the lawsuit on November 16, 2018, Respondent Kopchynski timely answered the Complaint. (R.). The parties then conducted extensive discovery including the taking of nine depositions, including all party witness depositions. On July 8, 2019, Respondent Kopchynski filed her motion for summary judgment on the grounds that the undisputed facts showed that Kopchynski did not conceal any alleged flooding problems at the Property, and the Buyers did not rely on Respondent to inform them of crawlspace moisture conditions as they had their own CL-100 inspection performed. (R.).

Sellers' Agent's motion was supported by a Memorandum in Support of Summary Judgment with exhibits (R.). Buyers submitted a Memorandum in Opposition (R.), and the Affidavits of Andy Ward (R.), Henry Moore (R.), and Brad Cromartie (R.).

The Motion for Summary Judgment was heard by the Honorable Benjamin H. Culbertson on July 26, 2019. (R.. Tr. Jul. 26, 2019). Judge Culbertson issued a Form 4 Order on July 26, 2019 (R.), and entered the formal order granting summary judgment on august 12, 2019. (R.). Buyers timely moved to reconsider on August 5, 2019. (R.). Both parties submitted additional memoranda

in support of their respective positions. (R.). On September 25, 2019, Judge Culbertson issued a Form 4 Order denying Buyers' Motion to Reconsider. (R.). Buyers served a Notice of Appeal on October 25, 2019. (R.).

INTRODUCTION

A. Listing of the Property and termination of the first contract for reasons unrelated to the condition of the Property

On or about April 23, 2018, the Sellers, through Sellers' Agent, listed the Property for sale. (R.). Shortly thereafter, the Property went under contract with prospective buyers Randy and Suzanne Cole (the "Coles"). (R.). The Coles engaged a home inspector who provided the Coles a report dated May 10, 2018, a summary of which was provided to the Sellers and Sellers' Agent. (R.).

Relevant to this Appeal, the May 10, 2018 inspection report noted "dampness in the crawlspace," "missing vapor barrier," "wet debris on top of vapor barrier," and "damp ground." (R.).

Following the Coles' inspection report summary, the Onions requested that Stark Exterminators assess the dampness identified on the inspection report summary. On May 16, 2018, Andy Ward, an employee of Stark Exterminators, assessed the crawlspace, provided Sellers an "inspection graph" and proposed a "crawl space moisture management system" product[1]. (R.). The graph identified moisture levels in certain parts of the crawlspace between 22-25%. (R.) The "crawl space moisture management system" proposed installation of a dehumidifier for $4,595 and a $200 to renewal fee to maintain the service annually. (R.).

---

[1] Mr. Ward describes himself as a "registered pest control technician." (R.). Clemson Regulatory Services does not recognize this as a category of licensing. Furthermore, Section 27-1085K(1) of the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act states "Any wood infestation report issued for the purpose of describing the apparent absence of wood-destroying organisms from a building or structure in connection with a sale or mortgage of real property must be issued by an individual currently licensed in Category 7A, Industrial, Institutional, Structural, and Health-Related Pest Control and covered under a valid Pest Control Business License issued by the Department. The report must be signed by the licensed individual and include their applicator and business license number."

The Onions testified that they requested a second opinion from a contractor who had previously done work at their property, Emery Custer[2]. (R.). The Onions then hired Custer who added vapor barrier where it was missing, installed a fan in the crawlspace to lower moisture levels, and performed other repairs identified on the Coles' inspection report summary. (R.).

On or about June 18, 2018, the Coles hired Lanes to perform a South Carolina Wood Infestation Report inspection, commonly referred to as a CL-100. ("R.). The same day, however, the contract between the Coles and the Onions was terminated based upon the appraisal contingency in the contract. (R.).

Although the Coles' contract fell through, on June 20, 2018 the Onions paid for the June 18, 2018 CL-100 report in order to receive the report. (R.). The June 18, 2018 CL-100 identified moisture levels in the crawlspace ranging from 20-25%. (R.).

B. Appellants' purchase of the Property

Following termination of the contract with the Coles, Sellers' Agent contacted the Appellants' realtor, Ed Kimbrough ("Buyers' Agent" or "Kimbrough") to advise him that the prior contract had terminated, and the Property was available. (R.). Via email dated June 19, 2018, Sellers' Agent advised Buyers' Agent that the "CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the seller's paid for it." (R.). At the same time, Sellers' Agent provided an updated Property Condition Disclosure Statement which disclosed the repairs performed by Custer along with the Coles' inspection report summary. (R.).

On June 20, 2018, the Isaacs made an offer to purchase the Property. (R.). The Isaacs did not hire their own home inspector; however, they did hire Lanes to perform their own CL-100

[2] Custer is licensed as a specialty contractor in South Carolina under license number 56967.

inspection. (R.). Buyers' Agent testified that Buyers hired Lanes based on his experience and recommendation, and neither the Buyers nor Buyers' Agent were aware Lanes had performed a prior CL-100 on the Property. (R.). Lanes performed a CL-100 inspection for the Buyers on July 11, 2018. The July 11, 2018 Cl-100 identified moisture levels ranging from 8 to 18%. (R.).

On July 23, 2018, the Buyers and Sellers closed on the Property. (R.).

C. Appellants experience flooding on the Property and sue Respondent

Shortly after closing, the Buyers allege that they experienced extensive standing water on the Property including water in the crawlspace after a period of severe rain. (R.). The Isaacs allege that they have spent a significant amount of money to address flooding on the property and moisture issues in the crawlspace. (R.).

On November 16, 2018 the Isaacs commenced suit against the Sellers, Sellers' Agent and the CL-100 Inspector. (R.). The causes of action asserted against Sellers' Agent were fraud, negligent misrepresentation, civil conspiracy, and violation of the South Carolina Residential Property Condition Disclosure Act.

The Buyers alleged that Sellers' Agent had actual knowledge of chronic flooding issues at the Property as a result of Ward's May 16, 2018 inspection graph, and the June 18, 2018 CL-100. (R.). The Buyers allege that these reports constitute a "material adverse fact" concerning the Property, and allege Sellers' Agent violated the South Carolina Residential Property condition Disclosure Act by not providing the Buyers Ward's May 16, 2018 inspection graph and the June 18, 2018 CL-100 inspection report. (R.).

After hearing arguments on Sellers' Agent's motion for summary judgment, the trial court entered summary judgment for Sellers' Agent, and thereafter denied Buyers' motion to reconsider. This appeal followed. (R.).

LEGAL STANDARD

An appellate court's review of a grant of summary judgment is subject to the same standard that governs the trial court under Rule 56(c), SCRCP. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505, 509 (2006). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that 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 court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

"However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Bradley v. Doe*, 374 S.C. 622, 626, 649 S.E.2d 153 (Ct. App. 2007). Factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. *Gilmore v. Ivey,* 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

ARGUMENT

I. The trial court correctly held that S.C. Code §40-57-350(G)(2) barred Buyers' claims against Sellers' Agent

In the trial court's Summary Judgment Order, the trial court found that it was undisputed that, rather than relying on Sellers' Agent to disclose the conditions in the crawlspace of the Property, the Buyers relied on their own CL-100 inspection report. (R.). This report identified moisture levels between 8% and 18%. (R.). The trial court's finding was based on the deposition testimony of both the Buyer and the Buyers' Agent. (R.).

In particular, the Mr. Isaac testified that he reviewed the summary inspection report prior to making an offer and was aware that the inspection report showed dampness and moisture issues in the crawlspace. When presented with the summary inspection report Mr. Isaac testified:

> Q: picture one, dampness in crawl space. Picture two, dampness in crawl space. Picture three, missing vapor barrier, damp ground. Picture four, wet debris on top of vapor barrier. Picture five, missing vapor barrier/dead ground. Picture six, no vapor barrier, damp ground. We—you saw this before putting in the offer; correct?
>
> A: Correct
>
> Q: Okay. And you did not have a property inspection performed yourself?
>
> A: I did. By Lane's.
>
> Q: Okay.
>
> A: Who did a CL-100. And came back. And if all this stuff was there, it should have been noted in the CL-100. It was not. It came back. My attorney that I used to close this thing says one of the best—one of the best CL-100s he had ever seen. He said, you should be happy. This is a great CL-100. So all of this stuff, in my mind, this is what we depended on. When we saw this, we wanted a CL-100. If there was moisture down there, the CL-100 should of told us that. And that CL-100 not only didn't tell us that, it told us it was great.

(R.).

Likewise, the Buyers' Agent testified when asked whether he wanted the June 18, 2018 CL-100 referenced by Sellers' Agent in her June 18, 2018 email, that he did not. (R.). When asked why he did not want the June 18, 2018 CL-100, Buyers' Agent testified:

> A. I mean, well, because it is our responsibility to do it. It was going to be on our terms, not on their terms or anybody else's terms. I thought when she said "good," I thought, perfect. We're not going to have an issue with that. We will order our own CL-100 and we'll verify the information that we need to see regarding repairs. So, no, I mean, and it was –it was not even relevant from a date period. CL-100 reports are only good for 30 days. We would have had to have another one done prior to closing anyway. So, my thought is let's do it ourselves, and we'll verify what we're looking for.
>
> Q. Right.
>
> A. And there was no mention as to who performed that CL-100.
>
> Q. Okay.
>
> A. It could have been any fly by night company. I have no idea.
>
> Q. Okay. Just wasn't something that you were—you were not interested in getting it; you were doing your own CL-100.
>
> A. That's correct.

(R.).

Finding that it was undisputed that the Buyers closed on the Property in reliance on their own CL-100 inspection report, rather than any alleged representation by Sellers' Agent, the trial court held that S.C. Code §40-57-350(G)(2) controlled Buyers' Fraud, Negligent Misrepresentation, and violation of the South Carolina residential Property Disclosure Act causes of action. (R.).

S.C. Code §40-57-350(G)(2) states:

> No cause of action may be brought against a real estate brokerage firm or licensee by a party for information contained in reports or

> opinions prepared by an engineer, land surveyor, geologist, wood destroying organism control expert, termite inspector, mortgage broker, home inspector, or other home inspection expert, or similar reports.

(R.)(emphasis added).

Based upon the unambiguous reading of S.C. Code §40-57-350(G)(2), the trial court held that Buyers' Fraud, Negligent Misrepresentation, and violation of the South Carolina Residential Property Disclosure Act causes of action failed. (R.).

While the statutory grounds precluded an action against Sellers' Agent, the trial court also correctly determined that the Buyers could not establish an essential element of their causes of action as it was undisputed that the Buyers did not rely on any communication or alleged concealment by Sellers' Agent.

To establish fraud, a plaintiff must prove the following elements by clear, cogent, and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010).

Similarly, to establish negligent misrepresentation, "the plaintiff must allege and prove the following essential elements...: (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." *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)(emphasis added).

In their brief, Appellants generically conclude, without support, that the Buyers "had the right to rely" on the Sellers' Agent, and conclude that this "right to rely" on the Sellers' Agent created an issue of fact.

However, this conclusory statement does not create an issue of fact as it is undisputed that the Buyers hired their own of CL-100 inspector to assess the crawlspace, and therefore, they were not relying on the Sellers' Agent to inform them of the crawlspace conditions. (R.).

Accordingly, the trial court did not err in determining that the undisputed facts showed that the Buyers' relied on their own CL-100 inspection report, and pursuant to S.C. Code §40-57-350(G)(2), Sellers' Agent was entitled to summary judgment.

II. Appellants waived appellate review of the trial Court's finding pursuant to §40-57-350(G)(2).

The trial court's Summary Judgment Order, identifies his application of S.C. Code §40-57-350(G)(2) barred the Buyers' claims against Sellers' Agent based upon the July 11, 2018 CL-100 report ordered by the Buyers themselves. However, Appellants do not even address this conclusion of law in their Appellate brief, and have therefore, waived appellate review of this issue[3]. *Amick v. Hagler*, 286 S.C. 481, 486, 334 S.E.2d 525, 528 (Ct. App. 1985)("A provision of an order neither excepted to nor raised in the brief is not properly before the court on appeal").

[3] "An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989).

Indeed, Appellants only mention of S.C. Code §40-57-350(G)(2) is Appellants' inaccurate recitation of the text of the statute, in which Appellants add five words to the end of the statute that do not appear the statute's text. (App. In. Brief at pg. 19).

Accordingly, as Appellants did not challenge this part of the trial court's order, Appellants have waived appeal of this issue and the trial court's order should be affirmed.

III. Appellants' remaining arguments fail to present any material issue of fact

Appellants' initial brief suggests that the trial court erred by ignoring multiple disputed facts and failing to construe inferences in favor of the Buyers. However, these alleged disputed issues of fact were, in some cases, not raised to the trial court. Moreover, and in each case Appellants' arguments did not raise a *material* disputed issue of fact as to Sellers' Agent's liability. The alleged disputed issues of fact identified by Appellants in their brief are so generic, and conclusory, and unsupported by fact or law, that these issues are deemed abandoned on appeal.

"It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013))."

Furthermore, "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the

court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Here, Appellants' attempts to create factual issues are legally insufficient, and not preserved for appellate review.

i. Appellants' argument that Sellers' Agent had knowledge of prior flooding at the Property because she lived in the same residential community is conclusory, and was not raised before the trial court

Sellers allege that since Sellers' Agent lived in the same community as the Property, that they are entitled to an inference that Sellers' Agent was aware of flooding problems at the Property. This argument was not made before the trial court and is therefore abandoned on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007)("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Furthermore, Appellants cite no evidence or authority suggesting that Sellers' Agent had knowledge of prior flooding at the Property based upon her residence within the same residential community, Leitchfield Plantation. Accordingly, this argument is without merit. *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453–54 ("it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.").

ii. Appellants' argument that Sellers' Agent had actual knowledge of incorrect statements on the property condition disclosure statement is conclusory unsupported by the law

Appellants argue in their brief that Sellers' Agent had actual knowledge of misrepresentations on the South Carolina Residential Property Condition Disclosure Statement ("PCDS") since the inspection graph provided by Andy Ward identified elevated moisture levels.

Appellants go on to suggest that Sellers' Agent had a legal duty to provide Andy Ward's inspection graph to the Buyers.

As an initial matter, Buyers cite no law supporting its conclusory allegation that Sellers' Agent had a legal duty to provide Andy Ward's inspection graph to the Buyers. Accordingly, this argument is abandoned. *Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558. Moreover, under South Carolina law, Appellants' position is wholly without merit.

It is undisputed that Buyers hired their own real estate agent, Ed Kimbrough, and that Respondent represented only the Sellers. It is well established in South Carolina that no special "trust or confident" exists between a real estate agent for the seller and a non-client. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014)(buyer's of real property represented by their own real estate agent did not have special "trust and confidence" with seller's agent).

Moreover, S.C. Code Section 40-57-350(G)(1) states "[a] licensee shall treat all parties honestly and may not *knowingly* give them false or misleading information about the condition of the property which is known to the licensee." Furthermore, the PCDS states "the real estate licensee must disclose material adverse facts about the property if actually known by the licensee about the issue, regardless of owner responses on this disclosure." (R.)(emphasis added).

Appellants' contention that the physical inspection graph created by Ward was an adverse material fact that mandated production of the inspection graph to the Buyers is without merit[4].

[4] S.C. Code §40-57-30(16 defines an adverse material fact as "(a) a condition or occurrence that is generally recognized as: (i) significantly and adversely affecting the value of the real estate; (ii) significantly reducing the structural integrity of improvements to real estate; or (iii) presenting a significant health risk to occupants of the real estate; or (b) information that indicates that a party to a transaction is not able to or does not intend to meet an obligation under a contract or agreement made concerning the transaction.

Furthermore, it is undisputed that Sellers' Agent provided the prior inspection report summary showing dampness and moisture in the crawlspace to Buyers' Agent and disclosed the action taken by the Sellers' to address the crawlspace issues, i.e. the installation of a fan in the crawlspace[5]. (R.). Disclosure of this inspection summary report put the Buyers on notice that a home inspector had observed dampness in the crawlspace, and if Buyers had concerns about moisture in the crawlspace, they should conduct further due diligence concerning the crawlspace. Indeed, the Buyers did conduct further due diligence by engaging a CL-100 Inspector to inspect the crawlspace. (R.).

There is no evidence in this record that the structural integrity of any part of the home was reduced, However, S.C. Code §12-37-3130(1) defines "improvements" as "(a) new construction, (b) reconstruction, (c) major additions to the boundaries of the property or a structure on the property, (d) remodeling, or (e) renovation and rehabilitation, including installation." The crawlspace does not fall into any of these categories.

[5]Buyers allege the repair verification sent to Buyers' Agent was forged and Sellers' Agent knew of this forgery. Appellants cite to no facts or evidence supporting their allegation that Sellers' Agent knew Mr. Onions typed up the repair verification, that the repair verification was not created by Emery Custer, or that the repair verification was "forged.". Therefore, Appellants have abandoned this argument. In any event, it is undisputed Emery Custer did perform the repairs identified on the repair verification, including installation of the crawlspace fan. (R.). Nevertheless, Sellers' Agent testified:

> A: I found out later after this [lawsuit] was filed that Tim [Onions] typed [the repair verification] up for Emery."
>
> Q: At the time, did you understand---did you think [the repair verification] came from Emery?
>
> A: Yes
>
> Q: And after the lawsuit, you discovered that that's what Tim had typed?
>
> A: Yes

(R.).

Likewise, it was known by all parties that the purpose of the fan in the crawlspace was to deal with moisture issues found on the inspection report. (R.). Buyers' Agent testified:

> Q: But if you had an inspection, it would have been revealed if there was a problem [in the crawlspace]
>
> A: The inspection that we chose to go was to have the engineer look at the underneath part of the house. We followed up with that. The Cl-100 that was ordered and performed on 7/11 would have verified and confirmed that the repairs done on Number, what, 6 and 8 were working that being the vapor barrier, reducing the moisture by use of the fan system. So that was our follow -up.
>
> Q: Okay. And that was done?
>
> A: And that was done, yes.
>
> Q: And it came back clean?
>
> A: According to Lane's, it was clean.

(R.)(emphasis added)(objection to form omitted).

Buyers' assertion that Sellers' Agent should have been aware that the corrective action taken by the Sellers--having a fan installed in the crawlspace to address the moisture levels was insufficient--is conclusory, without evidence, and without merit as a matter of law[6]. *Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct. App. 2009)("a real estate licensee does not have a duty to inspect or investigate the physical condition of a piece of property for the purpose of confirming or denying statements made by a seller in a disclosure statement. Rather,

[6] Buyers also allege that a text message on June 21, 2018 between Sellers' Agent and Sellers demonstrates an attempt to conceal the Sellers' contractor, Emery Custer, from the Buyers. This allegation is also conclusory and relies on an unreasonable inference. *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453–54 ("it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine."). Moreover, this allegation is not material to Sellers' Agent's liability to the Buyers as Buyers were aware of the fan in the crawlspace and had their own CL-100 inspection of the crawlspace performed prior to closing. (R.).

the Legislature places the duty of performing such an inspection or investigation squarely on the shoulders of the buyer")(emphasis added).

Here, there is no evidence in the record suggesting that Sellers' Agent had knowledge that crawlspace moisture problems were pervasive and in existence when Buyers purchased the Property. Buyers' assertions to the contrary are based entirely on unreasonable inferences, and unsupported conclusory statements. Accordingly, Appellants allegations that Sellers' Agent violated a disclosure obligation under South Carolina law is without merit.

Furthermore, Appellants point to no facts in the record showing that Sellers' Agent had actual knowledge of false representations made by the Sellers on the PCDS, other than counsel's own unsubstantiated arguments. Therefore, this argument is abandoned. *Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558.

iii. Sellers' Agent did not misrepresent or conceal the June 18, 2018 CL-100 inspection report

Appellants allege that Sellers' Agent misrepresented a previous CL-100 inspection report regarding a prior inspection that occurred on June 18, 2018. This argument is rebutted by the unambiguous documentary evidence. (R.).

Via email dated June 19, 2018, Sellers' Agent advised Buyers' Agent that the "CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the seller's paid for it." (R.)(emphasis added). It is indisputable that at the time of the email, Sellers' Agent did not represent that she had reviewed the report, and clearly stated in the email "from what I understand it was good." (R.)(emphasis added). Accordingly, Appellants' allegation that this email represented a knowing misrepresentation by Sellers' Agent is without merit.

Moreover, this email went to Buyers' Agent prior to the Buyers submitting an offer. (R.). The email states that Sellers' Agent will obtain the report for the Buyers if they want it. (R.). Buyers' Agent, however, testified that he was not interested in receiving the prior CL-100 report as the Buyers were going to have their own CL-100 performed. (R.). Indeed, the Buyers did have their own CL-100 performed, and it was that CL-100 upon which the Buyers relied (R.).

As the trial court found, there is no merit to Appellants' suggestion that Sellers' Agent's June 19, 2018 email induced Buyers to close on the Property, nor the allegation that Sellers' Agent knowingly communicated false information to the Buyers. Accordingly, this allegation does not create a material issue of fact precluding summary judgment.

iv. Appellants allegation that Sellers' Agent "steered" the Buyers away from hiring Stark Exterminators to perform the CL-100 is conclusory, without merit, and Buyers' Agent testified that Buyers' CL-100 inspector was his choice

Appellants allege in their initial brief that Sellers' Agent fraudulently steered Buyers away from hiring Andy Ward with Stark Exterminators to perform the Buyers' CL-100. This allegation is unsupported by the evidence and does not amount to a reasonable inference creatin an issue of material fact.

First, the Stark Exterminators representative referenced by Appellants does not hold the requisite license to perform CL-100 inspections. Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act Section 27-1085K(1)("Any wood infestation report issued for the purpose of describing the apparent absence of wood-destroying organisms from a building or structure in connection with a sale or mortgage of real property must be issued by an individual currently licensed in Category 7A, Industrial, Institutional, Structural, and Health-Related Pest Control and covered under a valid Pest Control Business License issued by the

Department. The report must be signed by the licensed individual and include their applicator and business license number."

Furthermore, Buyers' Agent testified under oath that *he* selected the CL-100 Inspector for the Buyers based on his prior experience and had no recollection of any discussions with Sellers' Agent concerning Stark Exterminators. (R.). In other words, Sellers' Agent did not influence or steer the Buyers away from hiring Stark Exterminators to perform the CL-100.

Finally, the Buyers did have a CL-100 inspection performed by a license CL-100 inspection company. (R.). Thus, regardless of the company who performed the inspection, the Buyers did hire an inspector to inspect the crawlspace, and the inspector provided a report. (R.). As the trial court held, Sellers' Agent cannot be liable for alleged inaccuracies regarding the information in the Buyers' own CL-100 report. (R.); 40-57-350(G)(1).

Accordingly, this allegation does not create an issue of material fact necessary to defeat summary judgment.

VI. Appellants' failure to address the trial court's decision granting summary judgment on their civil conspiracy cause of action abandoned appellate review of this decision.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). It is essential that the plaintiff prove all of these elements in order to recover. *Pye v. Estate of Fox,* 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.,*289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct.App.1986).

In the Summary Judgment Order, the trial court ruled:

> Kopchynski argues that there is no evidence in the record supporting the elements of civil conspiracy. Kopchynski also cites deposition testimony from Lanes' inspector stating that he does not know Kopchynski and has not talked to her.
>
> In response, Plaintiffs do not identify any evidence showing collaboration between the Defendants to conceal an alleged adverse property condition. Likewise, Plaintiffs identify no evidence showing coordination amongst the Defendants to allegedly provide inaccurate moisture readings in the July 11, 2018 CL-100 report.

(R.).

In this appeal, the Appellants do not mention or challenge these findings. Therefore, Appellants have abandoned an appeal of this ruling. *Amick v. Hagler*, 286 S.C. 481, 486, 334 S.E.2d 525, 528 (Ct. App. 1985)("A provision of an order neither excepted to nor raised in the brief is not properly before the court on appeal"); *see also*, *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001)("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal").

Furthermore, to the extent that any argument in Appellants' brief could be considered as an attempt to address the civil conspiracy cause of action, Appellants' argument is conclusory and unsupported by evidence, facts or any authority. Indeed, Appellants point to no evidence showing a collaboration by any of the Defendants to injure the Appellants, nor do Appellants provide any evidence of special damages. Therefore, Appellants have waived appellate review of the trial court's decision granting summary judgment on the civil conspiracy claim. *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453–54; *Lindsey*, 394 S.C. at 363, 714 S.E.2d at 558; *see also*, Rule 220(c), SCARC ("The appellate court may affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal.").

IV. The trial court correctly granted summary judgment over Appellants' procedural objections

In opposition to Sellers' Agent's motion for summary judgment, Buyers argued that discovery was not yet complete. (R.). However, beyond this conclusory statement, Buyers did not identify any additional relevant evidence that would be uncovered through further discovery. *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)(stating "non moving party to summary judgment motion must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition").

Similarly, Appellants suggest that the trial court erred by considering Sellers' Agent's memorandum in support of summary judgment, filed several days before the hearing, citing the Supreme Court of South Carolina Civil Motion Pilot Program enacted by order of Chief Justice Toal on September 10, 2015.

However, Chief Justice Toal's order establishing the pilot program expressly states that "the court may extend or expedite the briefing schedule in its discretion."

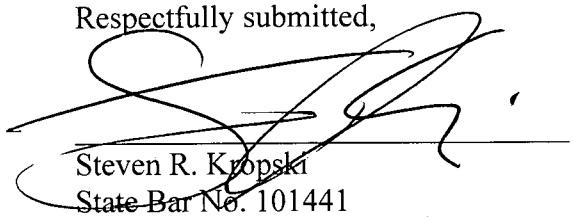
Here, the trial court exercised its discretion to consider all submissions provided to him, including submissions handed up to the Court at the hearing by counsel for Appellants. (R.). Thus, the Court did not err by considering Sellers' Agent's memorandum in support of summary judgment.

Finally, Appellants' argument suggesting that Rule 54(b), SCRCP mandates denial of an otherwise meritorious summary judgment motion is without merit. Rule 54(b) refers to certification allowing for an immediate appeal. Here, no such certification is needed as the current order is immediately appealable under S.C. Code §14-3-330. *Link v. School Dist. of Pickens*, 302 S.C. 1, 4-5, 393 S.E.2d 176, 177-178 (1990).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the trial court's order granting summary judgment should be affirmed.

Respectfully submitted,



Steven R. Kropski
State Bar No. 101441
Ryan M. Gunther
State Bar No. 104141
Earhart Overstreet, LLC
P.O. Box 22528
(843) 972-9404

Attorneys for Respondent Laura Kopchynski

March 13, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2018-CP-22-00956

Appellate Case No. 2019-001822

Rory M. Isaac and Kimberly J. Isaac ..... Appellants

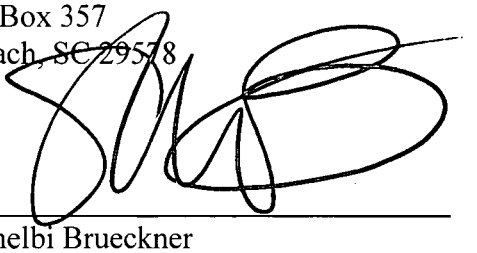
v.

Thomas C. Onions, Jacqueline Onions, Laura Kopchynski, and Lane's Professional Pest Elimination, Inc. .....Of Whom Laura Kopchynski is the Respondent.

PROOF OF SERVICE

I, Shelbi Brueckner, an employee of Earhart Overstreet LLC, paralegal for the attorney for Respondent Laura Kopchynski certify that I served a copy of the attached *Respondent's Initial Brief and Designation of Matter* by depositing a copy of it in the United States Postal Service, postage prepaid, on March 13, 2020, addressed to counsel for Appellants:

George W. Redman, III
Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A
P.O. Box 357
Myrtle Beach, SC 29578



Shelbi Brueckner

Earhart Overstreet
ATTORNEYS AT LAW

Main: 843.972.9400
www.earhartoverstreet.com
PO Box 22528, Charleston, SC 29413

Steve@earhartoverstreet.com
Direct: 843.972.9404

March 13, 2020

VIA U.S. MAIL
Jenny Abbott Kitchings, Clerk
V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Rory M. Isaac and Kimberly J. Isaac, Appellants v. Laura Kopchynski, Respondent
Appellate Case No.: 2019-001822

Dear Ms. Kitchings and Ms. Allen:

Enclosed please find one (1) original and one (1) copy of ***Respondent Laura Kopchynski's Initial Brief and Designation of Matter***. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

STEVEN R. KROPSKI

SRK/shb
Enclosures

cc: George W. Redman, III, Esquire (via U.S. Mail; P.O. Box 357, Myrtle Beach, SC 29578)

NEOPOST
FIRST-CLASS MAIL
$003.00[0]
03/13/2020 ZIP 29464
042M14847838
US POSTAGE

Earhart Overstreet
ATTORNEYS AT LAW
PO Box 22528
Charleston, SC 29413

Jenny Abbott Kitchings, Clerk
V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED
MAR 16 2020
SC Court of Appeals