

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

Appellant Case No. 2019-001822

Civil Action No. 2018-CP-22-00956

RECEIVED
May 12 2020
SC Court of Appeals

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.

REPLY BRIEF OF APPELLANTS

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BRIEF INTRODUCTION TO REPLY BRIEF

Rory and Kim Isaac unknowingly bought a house that has a history of flooding and related damages. Respondent Laura Kopchynski was the licensed listing agent. The Isaacs sued Kopchynski for fraud, misrepresentation, violations of the South Carolina Disclosure Act, and civil conspiracy. The lower court order (drafted by Respondent's Counsel), dismisses all claims against Kopchynski by concluding the Isaacs only relied on one expert report, and Kopchynski is not responsible for the content or interpretation of it.

On Appeal, Appellants assert the lower court's limited factual review ignores important facts outside of the Isaacs' expert report, and it applies the wrong statutory standards to a few improperly construed facts. In other words, the chronology in Appellants' brief presents clear and convincing evidence that Kopchynski knew of flooding and water damage, knowingly failed to truthfully disclose these defects, and profited by overtly helping her clients conceal water damage. Appellants' detailed chronology presents a litany of facts supported by citations to Kopchynski's own testimony and the documents and communications she shared with her clients and others, in addition to other witnesses.

First, this Reply addresses Respondent's erroneous assertion that Appellants failed to contest the lower court's sole reliance on one subsection of a statute, that is, S.C. Code § 40-57-350(G)(2). Respondent's entire argument seeks to avoid a thorough review of the facts so they may conveniently disregard those sections of S.C. Code § 40-57-350(G)(1)-(3), which mandate honesty, prohibit the giving of misleading or incomplete information, and require "truthful disclosure." Additionally, Respondent's brief completely ignores the Residential Property Condition Disclosure Act, S.C. Code § 27-50-10, *et seq.*, which establishes liability

where an agent knew or *had reasonable cause to suspect the information provided was false, incomplete, or misleading*. Finally, Respondent's case law citations is easily distinguished.

Second, this Reply responds to Respondent's mischaracterization of Appellants' factual arguments and their repeated assertion that facts may be labeled conclusory, unsupported, and simply ignored. The referenced facts present clear and convincing evidence that Kopchynski knew or had reasonable cause to suspect that information provided to the Isaacs (including the report provided by Lane's) was false, incomplete, or misleading.

Contrary to Respondent's brief, Appellants' factual chronology also presents clear evidence that Defendants' conspired to conceal problems by forwarding false, incomplete, and misleading information.

Finally, this Reply defines the specific prejudice caused by Respondent's violation of the established briefing rules and procedures of this Court.

STANDARD OF REVIEW

Summary judgment is a drastic remedy, only to be invoked cautiously, and properly denied even where only a scintilla of evidence supports the non-moving party. *Gibson v. Epting*, 426 S.C. 346, 352-53, 827 S.E.2d 178 (Ct. App. 2019). All ambiguities, inferences, and conclusions arising from the evidence must be construed against the movant. *Gilbert v. Miller*, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003); *Laurens Emergency Med. Specialists, P.A. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003).

REPLY ISSUES

1. RESPONDENT'S BRIEF FAILS TO ACCURATELY ADDRESS THE CORRECT STATUTORY STANDARDS OF DISCLOSURE FOR LICENSED REALTORS

A. RESPONDENT'S WRONGFULLY RELY UPON FACTUAL FALLACIES TO ASSERT THE ONLY APPLICABLE STATUTE IS S.C. CODE § 40-57-350(G)(2)

The lower court Order (drafted by Respondent's Counsel) relies exclusively on S.C. Code § 40-57-350(G)(2), which provides that no cause of action may be brought against a real estate licensee for information contained in a termite inspector's report. Respondent's brief asserts that Appellants' failed to sufficiently address the lower court's sole reliance on this subsection of the statute. (Resp. Br., p. 11) On the contrary, Appellants' brief confronts this issue head on and in detail, by explaining that Respondents and the lower court Order ignore critical facts and is based upon the wrong statute. (Br. of App., pp. 18-20). More specifically, Respondent's brief and the lower court's Order, make at least three grossly erroneous factual findings which pave the way for an argument that there is only one relevant statute.

Respondent's first factual fallacy is to assert Appellants' entire case is based upon Kopchynski's failure to disclose just two reports, that is, failing to disclose Andy Ward's report issued on May 16, 2019 (the "Stark Report") and failing to disclose the first CL-100 report issued by Defendant Lane's Professional Pest Elimination (Lane's) in June of 2019 (the "June CL-100"). Oddly enough, neither Respondent nor the lower court reviewed the contents of those reports or the testimony of the authors and other witnesses concerning of those reports. Instead, the lower court wrongfully opines that both the disclosure of these two reports, and all of the facts within and surrounding them, became irrelevant because Appellants' realtor, Ed

Kimbrough, testified that he did not want to see the June CL-100.¹ Instead, Mr. Kimbrough elected to obtain a new CL-100 report, issued by Lane's just a few weeks later, in July of 2019 (the "July CL-100"), (Resp. Br., p. 9; Order, pp. 3-4). According to Respondent and the lower court, even if the July CL-100 from Lane's was incorrect in any way, S.C. Code § 40-57-350(G)(2) states Respondent cannot be responsible for any error in it. (Resp. Br., p. 9-10; Order, p.7).

The next factual fallacy invented by Respondents is the assertion that the only facts the Appellants relied upon were in Lane's second report, the July CL-100. In other words, after Appellants obtained the second report from Lane's, the July CL-100, Respondent's knowledge that the Appellants initially had been given false, misleading, or incomplete information was irrelevant. Appellants' brief presents clear and convincing evidence the Respondent knew of a material defect through a litany of facts, each properly supported by citations to the record. As just one example, Kopchynski personally called, Andy Ward. (Aff. of Ward, ¶ 4) Mr. Ward testified that he told Respondent that the property had significant problems, including excessive moisture, wood decay fungi, and existing visible damage. (*Id.* at 7). For purposes of Summary Judgment, these facts confirm Respondent's knowledge of material defects.

The final factual fallacy created and relied upon by Respondents and the lower court Order is the erroneous assertion that Respondent could not have known the July CL-100 was incorrect, misleading, or incomplete. (Br. of Resp., p. 16-17). Respondent's own testimony

¹ Appellants' Realtor, Ed Kimbrough, testified that he did not want the June CL-100 because Kopchynski represented to him that the contents of the report "was good." (Br. of App., pp. 12-13); Kimbrough testified that he would definitely would have wanted to know of any and all negative reports: "“And perhaps [if] she would haave reported that it was bad, I would have probably said, yeah, let us see it. But the fact is she reported it was good.” (Dep. of Kimbrough, p. 57).

confirms she knew Lane's June CL-100 found excessive moisture, and her text messages from the very next day confirm Respondent had the repair contractor postpone his scheduled visit to conceal ongoing remediation as well as the failure of prior "verified repairs." (Dep. of Kopchynski, p. p. 136-41, Br. of App., p. 13-15). Kopchynski's own testimony proves she worked with the homeowners to steer Appellants toward using Lane's (and away from Andy Ward). (Dep. of Kopchynski, pp. 136-141). Respondent's own testimony proves she knew that Appellants did not know the Lane's June CL-100 was not good, that the Lane's inspector documented excessive moisture and had extensive discussions with the homeowners² where he suggested temporary repairs. (Dep. of Kopchynski, p. 185-89). Most importantly -- Respondent knew that none of this information was included in the July CL-100.

For purposes of Summary Judgment, these facts confirm Respondent knew the July CL-100 was misleading and incomplete.

Respondent's assertion that Appellants' failed to sufficiently address S.C. Code § 40-57-350(G)(2) is wrong, because Respondent's assertion that Appellants exclusively relied upon Lane's July CL-100 is wrong. The licensing statutes do not permit or excuse any knowing lies, half-truths, or misleading omissions. Laura Kopchynski knew of and helped to conceal the material defects. The very existence of the July CL-100 by Lanes is a product of her conspiring and fraud. In sum, and therefore, other subsections of S.C. Code § 40-57-350 apply.

² The homeowners purchased the June CL-100 despite having no obligation to do so, and had extensive discussions with the Lane's technician.

B. S.C. CODE § 40-57-350(G)(1), (G)(2), AND (G)(3) MANDATE HONESTY, PROHIBIT THE GIVING OF MISLEADING OR INCOMPLETE INFORMATION, REQUIRE “TRUTHFUL DISCLOSURE,” AND MUST ALL BE READ TOGETHER.

Respondent’s entire argument seeks to avoid a thorough review of the facts so they may conveniently disregard those sections of S.C. Code § 40-57-350(G)(1)-(3), which mandate honesty, prohibit the giving of misleading or incomplete information, and require “truthful disclosure”:

- (1) 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. A licensee is not obligated to discover latent defects or to advise parties on matters outside the scope of the licensee’s real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a licensee who has **truthfully disclosed** to a buyer a known material defect.
- (2) 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 other similar reports.
- (3) A licensee, the real estate brokerage firm, and the broker-in-charge are not liable to a party for providing the party with **false or misleading information** if that information was provided to the licensee by the client or customer and the licensee did not know the information **was false or incomplete**.

As discussed in detail within the totality of the factual chronology in Appellants’ brief, the Isaacs’ claim is based upon more than the two documents Respondent didn’t disclose (the Stark Report and the June CL-100), and the Isaacs relied upon more than the July CL-100.

Appellants’ claims are based in part upon Respondent’s breaches of her statutory obligations requiring honesty, requiring truthful disclosures, and prohibiting the conveyance of false, misleading, or incomplete information.

C. UNDER THE DISCLOSURE ACT, S.C. CODE § 27-50-70, THE LEGISLATURE PURPOSEFULLY ESTABLISHED LIABILITY WITH A BROAD STANDARD, BECAUSE KOPCHYNSKI HAD REASONABLE CAUSE TO SUSPECT INFORMATION WAS FALSE, INCOMPLETE, OR MISLEADING

Appellants forwarded a claim against Respondent as the listing agent based upon a violation of the South Carolina Residential Property Condition Disclosure Act, found at S.C. Code 27-50-10, et seq. (the "Disclosure Act"), asserting that Respondent knew of the several false, incomplete, and misleading representations in each of the Property Condition Disclosure Statements ("Disclosure Statements"). (*See Br. of App.*, p. 18).

Respondent and the lower court order ignore the Disclosure Act by suggesting the Disclosure Act has been subsumed by S.C. Code §40-57-350 and their arguments thereunder:

Finally, S.C. Code §§27-50-50(C), 27-50-70(B) and 27-50-80, discusses the responsibility and liability of a real estate licensee under the South Carolina Residential Property Disclosure Act. These sections reference and reaffirm the obligations of real estate licensees under the statute governing real estate licensees, S.C. Code §40-57-350. More particularly, these statutes provide that an agent cannot be liable for the statement of an owner, even allegedly false statements, if the licensee does not have **actual or constructive knowledge of the alleged falsity of the statements**.

(*Resp. Br.*, p. 10; *Order*, p. 19, *Emphasis added*)). Even worse, Respondent's brief and the lower court both continually recite the applicable statutory standard incorrectly. (*Id.*)

As to the statutory standard, S.C. Code § 27-50-70, entitled as Listing Agent Liability for Inaccuracy of Disclosure Statement, provides in pertinent part:

- (B) This article does not conflict with or alter the duties of the real estate licensee pursuant to the regulations of the commission. The real estate licensee, whether acting as the listing agent or selling agent, is not liable to a purchaser if:
- (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information; and,
 - (2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading.

S.C. Code § 27-50-40 provides that the Disclosure Statement must contain the language and be in the form promulgated by the South Carolina Real Estate Commission, which states the listing agent “must disclose material adverse facts about the property if actually known by the licensee, regardless of owner responses on this disclosure. (*See e.g.*, Br. of App., p. 18).

While the Disclosure Act does state a listing agent may be liable where they actually know a statement on the owners’ disclosure statement is false, the language used by the legislature creates a statutory standard which is far more broad. First, liability for a listing agent can exist where the agent only has a reasonable suspicion, which is dramatically less than actual or constructive knowledge. Second liability doesn’t hinge on a determination of whether a statement was objectively false, because the statute states liability may exist when information provided is only incomplete or misleading.

Contrary to Respondent’s assertion, the Supreme Court has never held that the Disclosure Act has been subsumed by S.C. Code Ann. § 40-57-350. In *Gladden v. Boykin*, the Supreme Court noted that the “General Assembly has already provided specific protection for the consumer risks associated with undisclosed defects, and we must defer to its judgment.” *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013).

D. DISTINGUISHING *CHASTAIN V. HILTABIDLE* WHERE THE SELLERS HAD MARKED YES TO PROVIDE NOTICE OF PRIOR FLOODING

Respondent asserts the only applicable statute in this case is S.C. Code § 40-57-350(G)(2), because the Appellants obtained the July CL-100 report from Lane’s. (Resp. Br., p. 9-10). In support, Respondent cites to *Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673

S.E.2d 826, 832 (Ct. App. 2009) for the proposition that “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.” (Resp. Br., p. 16).

While the Chastain Court dismissed claims against a listing agent at the summary judgment stage, Chastain is easily distinguished and supports the Appellants in this case in several important ways. (*Id.* p. 512, 828) First, the lower court in Chastain actually reviewed the statements made on a Disclosure Statement and applied the correct statutory standard from the Disclosure Act to those facts. (*Id.* p. 520-21, 832-33) Second, and most importantly, the selling homeowners **had responded “yes” and offered substantive explanation** to inquiries on the Disclosure Statement concerning prior flooding and moisture intrusion. (*Id.* p. 512, 828) Following Buyers' purchase of the Property, two days of rain resulted in flooding. The Chastains sued on the ground that the realtor should have known the seller's substantive explanations were inaccurate. (*Id.* p. 513, 828) The Court held that the Seller had put the Buyers on notice of past flooding, and even if the agent knew of past flooding, there was no evidence the realtor knew the substantive explanations were false or inaccurate. (*Id.* p. 520-21, 832-33).

The key distinguishing facts in the case at bar are that the homeowners unequivocally lied on both of the Disclosure Statements that Respondent tendered to Appellants,³ and Respondent has uncovered a litany of facts which clearly and convincingly show that Respondent knew that statements in the Disclosure Statements were false, and she conspired to conceal the truth.⁴

³ See Dep. of T. Onions, p. 51-54. (Defendant Thomas Onions admitted numerous incidents of flooding and that mechanical pumps were installed to remove floodwaters, however, did fail to note any drainage issues or that pumps had been installed).

⁴ See e.g., Aff. of Andy Ward, ¶¶ 6-10. (Mr. Ward verbally informed Kopchynski that the property had material defects).

2. RESPONDENT'S KNOWLEDGE SHOULD BE ESTABLISHED BY THE TOTALITY OF THE CIRCUMSTANCES

A. MISCHARACTERIZATION OF ONE FACT: KOPCHYNSKI'S CONNECTION TO THE PARTIES AND THE NEIGHBORHOOD.

Respondent's brief makes a few cursory attempts to avoid a substantive review of relevant facts, by mischaracterizing Appellants' arguments and labeling them generic, unsupported, unreasonable, and conclusory. For example, Respondent states that "since Sellers' Agent lived in the same community as the Property, they are entitled to an inference Sellers' Agent was aware of flooding at the Property." (Br. Resp., p. 13) First, this is not an accurate recitation of Appellants' argument or the statutory standard:

Due to her extremely close personal and professional relationship to both the Onions and their neighborhood, coupled with a significant financial incentive, the lower court should have acknowledged the inference: (1) that if the Property flooded or had severe drainage problems, she would know about or have reasonable cause to suspect them; (2) that Mr. Onions, Kopchynski, and their handyman Emery Custer knew each other well; and (3) that Kopchynski had viable personal and financial motives to help or allow the Onions conceal adverse information when she listed the property.

(Br. of App., pp. 5-6). Respondent erroneously argues these arguments were not raised to the lower court and they are therefore without merit. (Br. Resp., p. 13) Respondent is wrong because each assertion before the lower court and was based upon and supported by references to Kopchynski's own testimony. (*See* Mem. in Opp. to Summ. J. and Mem. in Sup. of M. to Am. (*See e.g.*, Dep. of Kopchynski pp. 34-36, 68-69, 78, 81-82, 113-114, 149; Aff. of Cromartie (Depicting flooding at entrance of subdivision)).

B. APPELLANTS RELIED UPON KOPCHYNSKI'S STATUTORY DUTIES TO TRUTHFULLY DISCLOSE WHAT SHE KNEW AND HER STATUTORY PROHIBITION FROM PROVIDING INFORMATION WHICH IS FALSE, MISLEADING, OR INCOMPLETE.

Respondent also repeats the key mischaracterization that Appellants' entire case is based upon two written reports, one of which is Andy Ward's May 16, 2019 Report ("Inspection Graph"). Respondent's mischaracterizations are stated as follows: Appellants argue "Seller's Agent had actual knowledge of misrepresentations since the inspection graph provided by Andy Ward identified elevated moisture levels" and "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." (Br. Resp., p. 13-15) Aside from any legal obligation, Kopchynski could have and should have disclosed the document for a number of practical reasons - perhaps to protect herself from any claim of wrongdoing, to avoid the appearance of impropriety, or just to be an honest person.

Appellants' position as to this issue are accurately stated as follows: (1) a jury could find that the Andy Ward Report ("Inspection Graph") did impart the knowledge or suspicion of a material adverse condition; and, (2) there is no question there is cogent evidence that Laura Kopchynski had or obtained knowledge (or a suspicion) that a material adverse condition existed which rendered the Disclosure Statements inaccurate because **THERE IS AN AFFIDAVIT FROM A DISINTERESTED WITNESS THAT SAYS THAT IS EXACTLY WHAT HE TOLD HER.** (Aff. of Ward, ¶¶ 7-10). Respondent forwards no argument as to why the sworn testimony of Andy Ward is patently without merit as a matter of law.

C. RESPONDENT'S BRIEF INTENTIONALLY IGNORES THE CLEAR AND CONVINCING EVIDENCE OF FRAUD, MISREPRESENTATIONS, VIOLATIONS OF THE DISCLOSURE ACT, AND A CIVIL CONSPIRACY.

The totality of the factual circumstances provides highly probative evidence that Kopchynski had knowledge of (or a suspicion of) adverse material facts and information which was incomplete and misleading and took actions to help her clients conceal them. Respondent's decision to discuss the two facts above, omits at least fifty (50) other facts as set forth in the initial sections of Appellants' Brief. (*See App. Br.*, pp. 4-17).

3. CIVIL CONSPIRACY

Respondent's Brief wrongfully states Appellants failed to address the lower court Order dismissing the civil conspiracy cause of action on the grounds that there was no evidence to suggest Kopchynski concealed any conditions related to the property. (*Resp. Br.*, p. 19). This assertion is patently false, as set forth above in this Reply, Appellants have repeatedly addressed Kopchynski's overt conspiratorial acts, including the fact that the second report by Lane's, that is, the July 2019 CL-100 was a product of her fraudulent and conspiring actions, in which everyone except for the Appellants knew the report was both misleading and incomplete. (*See also App. Br.*, pp. 4, 14-15, 21-22).

4. RESPONDENTS VIOLATION OF PROCEDURAL RULES RELATED TO FILING OF MOTIONS PREJUDICED APPELLANTS IN THE DEFENSE OF SUMMARY JUDGMENT.

The lower court should have stricken Respondent's Memorandum in Support of Summary Judgment because it was filed just before the Court had scheduled two Motions for Summary Judgment. Neither of the Motions set forth grounds for Summary Judgment, and

therefore Appellant was forced to anticipate the grounds for each Defendant's Motion and attempt to establish and defend every element of every claim at the hearing.

Respondent's Motion did not even cite to S.C. Code § 40-57-350(2), which ended serving as the sole basis for the lower court's Order finding that every fact outside of Lane's July CL-100 was irrelevant. The reason the this argument could not be easily defended was due to the fact that Defendants introduced one portion of deposition testimony from Appellants' real estate agent Kimbrough at the hearing for the first time, and since the testimony was not timely identified prior to the hearing and taken completely out of context, Appellants were only able to address the testimony after the Order Granting Summary Judgment was entered.

This rules related to the filing of motions promulgated by the Supreme Court should be enforced, requiring the parties to identify the issues so that Motions can be properly briefed and argued in the lower courts.

CONCLUSION

Appellants pray this Honorable Court will properly construe all of the evidence presented in this Action in their favor as the non-moving party. Appellants pray this Honorable Court will apply the proper statutory standards which acknowledge the liability of listing agent who knows, or has reasonable cause to suspect, that information conveyed is false, misleading, or incomplete. The Appellants pray this Honorable Court will reverse the decision of the lower court and deny Respondent's Motion for Summary Judgment.

Respectfully Submitted,


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May 11, 2020.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Fifteenth Judicial Circuit

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Lane's Professional Pest Elimination, Inc.

Of Whom Laura Kopchynski is Respondent.

PROOF OF SERVICE

I certify that I have served the Appellants' Reply Brief and Supplemental Designation of Matter on Respondent Laura Kopchynski by electronic mail, on May 11, 2020, addressed to its attorneys of record, Steven R. Kropski at steve.kropski@earhartoverstreet.com.

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Mr. Kropski:

Pursuant to the Supreme Court of South Carolina’s recent order, 2020-000447, please allow this correspondence to serve a service of Appellants’ Initial Reply Brief and Supplemental Designation of Matter which is being sent via facsimile to the South Carolina Court of Appeals today. If you have any trouble opening the attachment, please let us know.

Thank You,

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May 12 2020

SC Court of Appeals

Re: Rory M. Isaac and Kimberly J. Isaac, Appellants vs. Thomas C. Onions,
 Jacqueline Onions, Laura Kopchynski, and Lane's Professional Pest Elimination
 Of Whom Laura Kopchynski is the Respondent.
 Appellate Case No. 2019-001822

Dear Ms. Kitchings:

Please find enclosed Appellants' Reply Brief, Supplemental Designation of Matter, and Proof of Service in regard to the above-referenced matter. Please note this Reply Brief and Proof of Service is being submitted via facsimile only, and is made pursuant to the Supreme Court Order 2020-000447. Should you have any questions or require any additional information, please do not hesitate to contact our office.

With kindest regards,

**BELLAMY, RUTENBERG, COPELAND,
 EPPS, GRAVELY & BOWERS, P.A.**

George W. Redman, III
 S.C. Bar No. 72365

GWR:kel
 Enclosures, as noted

cc: Steven R. Kropski (via e-mail only)