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
Jun 30 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.

APPELLANTS' FINAL BRIEF

George W. Redman, III
BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400

Counsel for Appellants

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STATEMENT OF THE ISSUES ON APPEAL

(1) DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT BY IGNORING OR CONSTRUING ALL EVIDENCE AND INFERENCES AGAINST THE APPELLANTS AS THE NONMOVING PARTY, WHERE APPELLANT'S VIEW OF THE EVIDENCE WOULD PROVIDE CLEAR PROOF THAT RESPONDENT KOPCHYNSKI KNEW THE PROPERTY HAD A HISTORY OF FLOODING, DRAINAGE PROBLEMS, AND MOISTURE DAMAGE, AND SHE WAS COMPLICIT IN CONVEYING FALSE, MISLEADING, AND INCOMPLETE INFORMATION?

(2) DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI BECAUSE LICENSED REALTORS HAVE A STATUTORY DUTY OF HONESTY WHICH FORBID KOPCHYNSKI FROM CONVEYING INFORMATION SHE KNEW OR SUSPECTED TO BE FALSE, INCOMPLETE, OR MISLEADING?

(3) DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI WHERE THE ISAACS HAD A REASONABLE RIGHT TO RELY UPON A LICENSED REALTOR, AS LICENSED REALTORS HAVE A STATUTORY DUTY OF HONESTY, AND RELIANCE IS A QUESTION OF FACT FOR THE JURY?

(4) DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT WHERE DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT WAS SUBMITTED AFTER THE DEADLINE ESTABLISHED BY THE SUPREME COURT?

(5) DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT WHERE DISCOVERY AS TO RESPONDENT KOPCHYNSKI WAS NOT COMPLETE?

STATEMENT OF THE CASE

On Monday, July 23, 2018, Appellants, Rory and Kimberly Isaac, purchased the personal residence of Defendants Thomas and Jackie Onions, located in the Litchfield Plantation of Pawleys Island (the "Property"). Respondent Laura Kopchynski was the Onions' realtor.

Two days after their purchase, a rainstorm flooded the Property. The Isaacs filed their complaint on November 16, 2018, alleging the Onions, Kopchynski, and Lane's Professional Pest Elimination, Inc. ("Lanes") knew of and failed to disclose the Property's history of drainage and flooding problems. The complaint forwarded Fraud, Fraud in the Inducement, Negligent Misrepresentation, and Civil Conspiracy claims against Mr. & Mrs. Onions, Lanes, and Respondent Kopchynski; a claim for violation of the South Carolina Residential Property Condition Disclosure Act (found at S.C. Code 27-50-10, *et seq.*) against Mr. & Mrs. Onions and Respondent Kopchynski; and a Negligence claim against Lanes.

Written discovery is partially complete, and the depositions of the parties and key witnesses have been taken in the underlying action:

Deposition of Thomas and Jacqueline Onions .... March 26, 2019
Deposition of Respondent Laura Kopchynski .... March 27, 2019
Deposition Emery Custer (the Onions' "handyman") .... March 28, 2019
Deposition of Rory Isaac .... March 28, 2019
Deposition of Kimberly Isaac .... June 10, 2019
Deposition of Ed Kimbrough (Isaac's Realtor) .... June 10, 2019
Rule 30(b)(6) Deposition of Lane's Professional
Joseph Sheheen and Michael Coffey .... June 12, 2019

On June 28, 2019, Mr. & Mrs. Onions filed for Summary Judgment under Rule 56, SCRCP, asserting there is no genuine issue of material fact as to their liability. On July 8, 2019, Respondent Kopchynski filed her Motion for Summary Judgment arguing she did not have a

duty to inspect or confirm the Onions' statements about the Property, and that Plaintiffs had actual and constructive knowledge of the alleged defects before the closing.

Both Motions were heard by the Honorable Benjamin H. Culbertson on July 26, 2019. Counsel for Onions and Kopchynski filed supporting memoranda just before the hearing. Plaintiffs filed their memorandum opposing the motions, citing to the depositions noted above, as well as the filed affidavits of an expert entomologist, Henry Moore, IV, registered pest control technician, Norris Andy Ward, and the Onions' former neighbor, Brad Cromartie. At the conclusion of the hearing, the lower court denied the Onions' motion for summary judgment and granted Respondent Kopchynski's motion for summary judgment. The Court issued a Form 4 Order and instructed counsel for Kopchynski to prepare a formal order, which was later filed on August 12, 2019.

On August 5, 2019, Plaintiff's filed their Motion and Memorandum in support of altering and amending the order granting summary judgment in favor of Kopchynski. Kopchynski filed her memorandum in opposition on August 29, 2019. After receipt of the transcript of the hearing, Plaintiffs filed supplemental memoranda in support on August 30, 2019, and September 20, 2019. By way of Form 4 Order dated September 25, 2019, the lower court denied Plaintiff's motion on briefs without oral argument.

Plaintiffs served their Notice of Appeal on October 24, 2019.

STANDARD OF REVIEW

When reviewing a dismissal under Rule 56, SCRCP, this Honorable Court applies the same standard of review implemented by the circuit court. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). A trial court's decision to grant a motion for summary judgment is appropriate only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Gilbert v. Miller*, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003). 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). A scintilla "means a gleam, a glimmer, a spark, the least particle, or the smallest trace" of material evidence. *Id*.

The Court must liberally review the decision to construe the record in favor of Mr. and Mrs. Isaac as the non-moving parties. *Jackson v. Doe*, 342 S.C. 552, 555, 537 S.E.2d 567, 568 (Ct. App. 2000). 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). *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008).

"Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is a dispute as to the conclusions to be drawn therefrom." *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).

ARGUMENTS WITH STATEMENT OF FACTS RELEVANT TO EACH

(1) THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT BY IGNORING OR CONSTRUING ALL EVIDENCE AND INFERENCES AGAINST APPELLANTS AS THE NONMOVING PARTY, WHERE THE EVIDENCE WOULD PROVE THAT RESPONDENT KOPCHYNSKI KNEW THE PROPERTY HAD A HISTORY OF FLOODING, DRAINAGE PROBLEMS, AND MOISTURE DAMAGE, AND THAT KOPCHYNSKI WAS COMPLICIT IN CONVEYING FALSE, MISLEADING, AND INCOMPLETE INFORMATION

Defendants Thomas and Jackie Onions hired realtor Laura Kopchynski to sell their personal residence located in the Litchfield Plantation of Pawleys Island (the "Property"). Two days after Appellants Rory and Kimberly Isaac purchased the Property, a rainstorm flooded the Property. Before filing this lawsuit, Mr. and Mrs. Isaac came to learn that Mr. & Mrs. Onions and their agent, Laura Kopchynski, knew the Property had a history of flooding, drainage problems, and moisture-related damage. During discovery, the Isaacs were able to confirm Respondent Kopchynski actively conspired with the Onions to conceal material facts.[1] Under SCRCP, Rule 56, this Court construes all ambiguities, inferences, and conclusions arising from the evidence against Respondent Kopchynski.

Kopchynski's knowledge of these adverse material facts is important because licensed realtors in South Carolina have a legal duty to disclose known material adverse information, as well as legal duty to correct any known material representations which she knows, or has reasonable cause to suspect, to be false, misleading, or incomplete.

[1] Including adverse conditions known to have been covered up by repair instructions given to the Onions' handyman, ongoing repair efforts, as well as conspiring with the Onions to get the Isaacs to rely upon a CL-100 report Kopchynski knew to be materially incomplete and misleading.

A) KOPCHYNSKI LIVED IN LITCHFIELD PLANTATION FOR 10 YEARS AND WROTE AT LEAST 27 NEWSLETTERS FOR THE HOA, CREATING AN INFERENCE SHE KNEW THE HOA BOARD MEMBERS, SHE KNEW THE HOA HANDYMAN, AND SHE KNEW THE HOA HAD HIRED AN ENGINEER TO STUDY DRAINAGE PROBLEMS

The lower court denied the Onions' motion for summary judgment, which acknowledges evidence they knew the Property had flooded, poor drainage, and damage due to moisture. An extensive amount of evidence in the record proves that Kopchynski had actual knowledge of these problems, and conspired with the Onions to fraudulently conceal them, thus violating her statutory duty to be truthful, disclose, and correct information she knew, or **had reasonable cause to suspect**, was false, incomplete, or misleading.

Kopchynski testified that she lived in the Litchfield Plantation neighborhood for ten years, was a "close personal friend" of the Onions, and the author of at least twenty-seven (27) monthly Litchfield Plantation newsletters. (R. 460-61, 478) The neighborhood newsletters authored by Kopchynski include advertisements for her realty services, specifically identify HOA officers (including Mr. Onions), and list Emery Custer as a neighborhood handyman. (R. 477-81, 608-611) Kopchynski testified Custer was well known in the community as "the Onionses used him for much of their work and so did the HOA for Litchfield Plantation for several homeowners and some of the board members." (R. 475-76) Kopchynski also knew the HOA had hired an engineer to study flooding and drainage issues in the community. (R. 466-67) Kopchynski listed the Onions' property and earned a $15,625.00 commission from the sale to the Isaacs, that is, half of all the commissions she received in 2018. (R. 493-94)

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.

B) THE LOWER COURT SHOULD HAVE ACCEPTED THE INFERENCE THAT KOPCHYNSKI QUICKLY LEARNED THE INITIAL PROPERTY CONDITION DISCLOSURE STATEMENT WAS INCOMPLETE, MISLEADING, AND INACCURATE BECAUSE SHE PERSONALLY RECOMMENDED AND CONTACTED A CRAWLSPACE SPECIALTY INSPECTOR, SHE WAS PRESENT AT THE INSPECTION, THE INSPECTOR'S REPORT WAS PERSONALLY HANDED TO HER, AND HE SPECIFICALLY INFORMED HER OF THE SEVERE PROBLEMS.

As part of her representation, Kopchynski had the Onions fill out the requisite South Carolina Residential Property Condition Disclosure Statement (Disclosure Statement). (R. 468-69; 519). By and through the Disclosure Statement, the Onions represented they had no knowledge of any problem or conditions in the crawl space foundation, that Lanes had provided termite/pest treatment, they had not installed mechanical systems such as underground pumps to pump water under the street and onto the property of others; no knowledge of problems caused by wood destroying organisms, dry rot, or fungus; there were no prior violations or restrictive covenants or other land use restrictions affecting the Property; no knowledge of problems caused by water, drainage issues, or flooding during their ownership; and, there were no other known material issues. (R. 593, 602)

The Onions knew the Disclosure Statement was incomplete, misleading, and inaccurate when it was signed on April 23, 2018. (R. 508-10, 514-15; Aff. of Cromartie, ¶¶4-6, R. 414-24). Due to the close personal and professional relationship with the Onions and the neighborhood, a jury could reasonably infer Kopchynski knew the Disclosure Statement was inaccurate at that time as well. However, even if the lower court was correct in rejecting the inference Kopchynski

knew of problems with the Disclosure Statement in April, which it was not, there is clear proof she knew the Disclosure Statement was inaccurate a very short time later.

On May 10, 2018, prior prospective buyers, Mr. & Mrs. Cole (not a party to this Action), had entered into a contract to buy the Onions' Property. The Coles hired Cornerstone Home Inspections of SC, LLC (hereinafter "Cornerstone") to perform a general inspection. Their report noted issues in the crawl space, including hanging and missing insulation, missing vapor barriers, debris, and damp ground. (R. 616). The home inspection did not identify a cause of these issues, instead recommending further inspection by a "crawl space specialty company" (R. 471-72).

Respondent Kopchynski knew of and personally contacted a crawl space specialty inspector, Andy Ward of Stark Exterminating ("Stark"). (R. 471-73; Aff. of Ward, R. 435-39, ¶¶ 4-5). Kopchynski was present when Mr. Ward inspected the Property on May 16, 2018, and Mr. Ward personally informed Kopchynski and Mrs. Onions of very serious problems with the Property, including excessive moisture, wood decay fungi, wood to ground contact, existing visible damage, and areas of possible hidden damage. (R. 433-34, ¶¶ 6-11). Mr. Ward stated, "I also informed Mrs. Onions and Kopchynski that conditions would worsen during summer," and directly contradicted the deposition testimony of Kopchynski by stating, "I have NEVER and would NEVER tell anyone that a Property with excessive moisture conditions would 'pass a CL-100 inspection' because that is NOT true." (R. 434, ¶10 (*emphasis in original*)).

As soon as the Onions and Kopchynski heard Mr. Ward and viewed his report, they certainly knew or had reason to suspect the Property had problems, and that statements in the Disclosure Statement were inaccurate, misleading, and incomplete. (R. 433-34) At that time, Kopchynski would have had a legal duty to disclose Mr. Ward's report to make the suspected material adverse problems known to any purchaser, along with a legal obligation to correct the

Disclosure Statement representations which she knew, or had reasonable cause to suspect, to be false, misleading, and incomplete. Mr. Ward's Report and the problems it identifies were never disclosed; the incomplete, misleading and inaccurate responses of the Disclosure Statement were not corrected; and, Kopchynski took additional affirmative actions to help the Onions conceal these problems. The Isaacs would not have purchased the Property had they been told the truth as to the Property's problems with storm water drainage, flooding, their numerous failed remediation efforts attempted by the Onions and Kopchynski. (R. 508-10, 514-15).

C) KOPCHYNSKI EMAILED TWO VERSIONS OF A REPAIR VERIFICATION (WITHOUT MENTION OF THE DECEPTIVE CHANGES), PURPORTING TO HAVE BEEN PREPARED BY HANDYMAN EMERY CUSTER TO VERIFY PROPER REPAIRS; DURING DISCOVERY APPELLANTS LEARNED CUSTER HAD NEVER SEEN EITHER LETTER; THE LETTERS HAD BEEN FORGED BY MR. ONIONS; THE LETTERS FALSELY CLAIMED CUSTER WAS A LICENSED GENERAL CONTRACTOR AND THAT HE WAS GIVEN THE CORNERSTONE REPORT; AND EMERY'S WORK ONLY COVERED UP PROBLEM AREAS AND DAMAGE

Mr. Ward recommended installing an encapsulation and dehumidifying system in the crawlspace at the cost of $4,595.00. (R. 437-39). Mr. Onions was not home when Mr. Ward was contacted and inspected the Property, and he dismissed it as soon as he was informed of it by Mrs. Onions over the telephone. Upon his return, Mr. Onions elected to call upon his handyman, Emery Custer, and gave him simple verbal instructions to fix the issues identified by the Cornerstone Report. During his deposition, Mr. Onions described Emery Custer as "just a worker … a drone." (R. 533) Likewise, Emery Custer testified that he was "positive" that he was never given nor saw the Cornerstone report. (R. 539-41) Custer was simply told to install plastic where it was missing, to replace insulation where it was hanging down due to moisture, and to install an electrical box for an extension cord and a fan. (R. 531-33, 541) As discussed below,

his repairs were improper and only served to temporarily cover up and hide issues. (*See* Aff. of H. Moore, R. 425, 431-32)

On June 2, 2018, Kopchynski emailed the Cole's realtor "a list of repairs made by the Onions' contractor, in the form of a summary letter provided by the contractor,"[2] which stated repairs had been made "as per home inspection report." (R. 483-84; R. 297 (Aug. 5, 2019) The Isaacs were shocked to learn Emery Custer had not provided, had not created, and had never seen the summary letter prior to the day of his deposition. (Dep. of Custer, R. 546, ln. 23, to 548, ln. 11). Only after this action was filed did Mr. Onions reveal that he had secretly forged the first "summary letter." (R. 530-32, 600). While the summary letter states Emery Custer is a "licensed general contractor," the discovery of the underlying action revealed Mr. Custer is not only <u>not</u> a licensed general contractor, he had just moved to South Carolina and had no experience remediating moisture in crawl spaces in the Low Country of South Carolina, and the work he performed concealed and worsened damage in the crawl space, and it included several code violations. (R. 428-30, 431-32; R. 531-32, 534; R. 542-45, 546-47).

On or around June 20, 2018, the Onions' contract with the Coles fell through.[3] Kopchynski promptly contacted the Isaacs' realtor, Ed Kimbrough, because she knew the Isaacs were very interested in the Property. Kopchynski quickly scheduled a site visit, and rapidly fired off numerous emails with multiple attachments to Mr. Kimbrough. Kopchynski emailed approximately seven hundred (700) pages of documents, including the May 10, 2018 Cornerstone report, with the forged and falsified "summary letter" discussed above. (R. 369).

After a careful review of these emails in discovery, the Isaacs learned that Kopchynski had emailed a second version of the "summary letter" approximately 3 hours later on that same

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[2] Emery Custer was the contractor being referenced.

[3] The Cole contract was terminated due to an unrelated issue.

day. (R. 269-273) Kopchynski's email to Kimbrough falsely asserted it was "prepared by the contractor," and she did not mention any of the deceptive changes made to the summary letter, which included: (1) a title in bold and underlined font: "Repair Verification Form"; (2) a line in bold font indicating "Work Completed: May 25, 2018"; and (3) a signature line for the owners. (R. 273, R. 502)(identifying the second, signed "Repair Verification Form"). The changes made the purported repair verification even more misleading.

The lower court should have accepted the inference that the short time and manipulative edits to the forged and false contractor verification indicate that Kopchynski had a role in procuring the changes. The lower court also should have accepted the inference that all of these undisclosed changes, forwarded by Kopchynski, were made for the purpose of: (1) providing a false and misleading representation that the appropriately licensed professional made the proper and correct repairs to the Property to completely fix the issues raised in the Cornerstone report; and, (2) concealing the materially adverse information, including Andy Ward's report, and the Onions' inaccurate, misleading, and incomplete Disclosure Statement.

D) KOPCHYNSKI DID NOT DISCLOSE MATERIAL ADVERSE INFORMATION (THE STARK REPORT), NOR DID SHE CORRECT THE ONIONS' INITIAL DISCLOSURE STATEMENT

The Isaacs entered into a contract to purchase the Property on or around June 20, 2018 ("Contract"). The Contract was contingent upon an accurate disclosure statement from the Onions. Kopchynski delivered the original Disclosure Statement, dated April 23, 2018, which was only revised to refer to the second version of the Repair Verification Form forged by Co-Defendant Tim Onions. Thus, at that time, Kopchynski delivered the Disclosure Statement to Mr. and Mrs. Isaac, even though she knew or should have suspected that the following misrepresentations were inaccurate, misleading, and incomplete:

a. Failure to disclose moisture and fungi problems (Question #7);

b. Failure to disclose the installation of a non-engineered underground irrigation system discharging water on the property of others (Questions #12, 14);

c. Failure to disclose present or past infestation of wood-destroying fungus (Section IV);

d. Failure to disclose violations of zoning laws and restrictive covenants (Questions# 15, 16);

e. Failure to disclose problems caused by water (Question#19);

f. Failure to disclose flood and drainage problems (Questions #20, 21); and,

g. Forging a false, misleading, and inaccurate "Repair Verification Form (Section IX)."

At that time, Kopchynski would have had a legal duty to disclose Mr. Ward's report to make the suspected material adverse problems known to the Isaacs, along with a legal duty to correct the Disclosure Statement representations which she knows, or had reasonable cause to suspect, to be false, misleading, or incomplete. The lower court erred by failing to hold that the finder of fact

could have reasonably relied upon the impermissible misrepresentations and failures of Kopchynski.

E) THE 700 PAGES OF DOCUMENTS EMAILED TO REALTOR ED KIMBROUGH INCLUDES KOPCHYNSKI'S REFERENCE TO THE FIRST CL-100 REPORT CONDUCTED BY DEFENDANT LANES ON JUNE 20, 2018, ALONG WITH KOPCHYNSKI'S MISREPRESENTATION STATING: "IT IS GOOD"

Approximately one day prior to Mr. Kimbrough being contacted about the Property by Kopchynski, Lane's Professional Pest Control had conducted a CL-100 wood infestation report. Without having seen the report, Kopchynski emailed Kimbrough and erroneously stated the CL-100 "was good." (R. 274) It was not good. In fact, the first CL-100 performed by Lanes identified the persistence of severe problems in the crawl space over a month after Mr. Custer did his initial work on May 25, 2018. (R. 557-58) Kopchynski admits she did not disclose the first CL-100 after she obtained it, and she did **not** correct her misrepresentation (R. 485-86).

The lower court specifically pointed to Laura Kopchynski's "email dated June 19, 2018, [where] Kopchynski advised Kimbrough [the Isaacs' Agent,] the "CL-100 was done yesterday and from what I understand it was good …" along with an out of context statement from Mr. Kimbrough's deposition to reach the conclusion that the Isaacs waived their right to rely upon any of the numerous fraudulent statements and acts of active concealment of Kopchnski. (R. 5-6). The other fraudulent statements, acts of concealment of Kopchynski are discussed in this Brief above and below.

The lower court erred by construing the above-referenced fact against Mr. and Mrs. Isaac. Mr. Kimbrough testified that he did not think Lanes first CL-100 was relevant because Kopchynski specifically misrepresented the contents of that report by stating, "**It was good**." *Id.*

(*emphasis added*).[4] In Fact, this very issue was so critical that Mr. Kimbrough specifically testified he would not have relied upon a report purchased by the Onions -- **if that report suggested the Property was good**.

BY MR. OXNER:

Q. When I initially started asking you questions, or might have been Steve, correct me if I'm wrong, but it's my understanding your testimony was that you really didn't care about the original CL-100; is that correct?

A. I wouldn't say I wouldn't care about it, but the fact is it was reported that it was good and it was up to us to verify that it was good and the only way to verify it was to have -- take responsibility for the CL-100 ourselves, which is what we planned to do all along.

Q. Okay. My understanding was your testimony is you didn't have any interest in that first CL-100. You knew it was out there, but you were going to get your own; is that right?

A. Correct. And perhaps [if] she would have reported that it was bad, I would have probably said, yeah, let us see it. But the fact is she reported it was good.· So we're moving along at that point. Things look good, you know.

Dep. of Kimbrough, R. 590, ln. 1-22. (*emphasis added*)

The truth is that the first CL-100 of June 20, 2019 identified the persistence of severe problems in the crawl space a month after the sham repairs of an unlicensed contractor. (R. 556-58) Kopchynski acknowledged that she received the report, reviewed it, and did not disclose the CL-100, nor did she correct the material misrepresentation she had made to Mr. Kimbrough about it. (R. 485-86).

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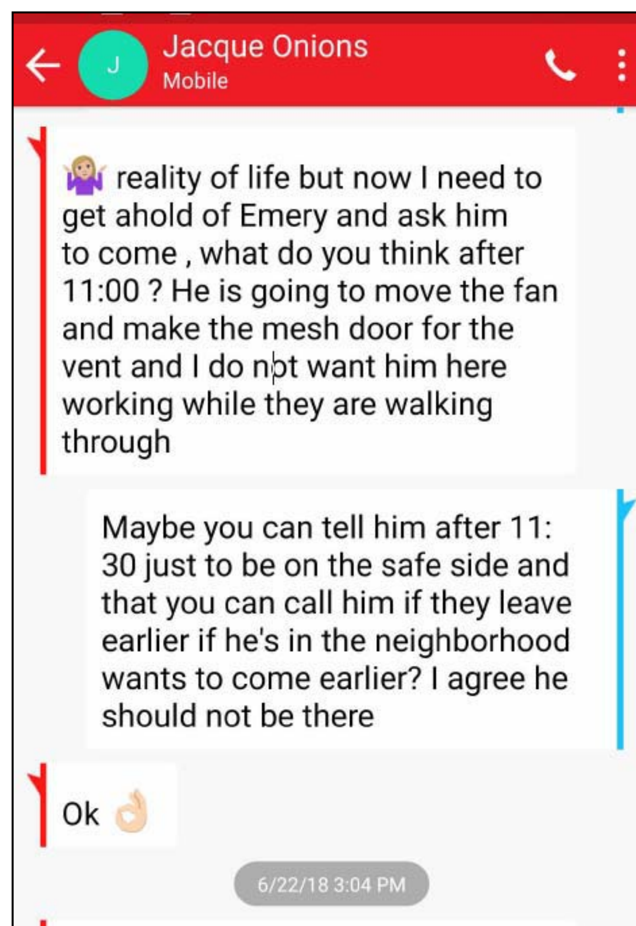
[4] For purposes of context, Kopchynski made this misrepresentation: (i) after Mr. Ward had personally explained numerous troubling findings to her, including excessive moisture, existing damage, and visible wood-decaying fungi; and, (ii) a month after the sham "repair procedure" performed by an unlicensed contractor, Emery Custer, had failed. Mr. Ward and Mrs. Kopchynski sharply dispute what was said during their interactions. (*See* Aff. of Ward, R. 433-344, ¶ 10 (Unequivocally stating he did not tell Kopchynski the house passed inspection)).

A licensed real estate agent would have known the CL-100 report of June 18, 2018, was not clear and would have stopped the closing because no mortgage lender or buyer would have closed on the purchase of that property until those issues had been resolved or the contract renegotiated. (*See* Aff, of Moore, R. 442).

F) ONE DAY AFTER THE FIRST LANES INSPECTION, KOPCHYNSKI HAD TEXT MESSAGE CONVERSATIONS WITH THE SELLERS CONSPIRING TO DELAY A PLANNED CRAWLSPACE REPAIR OF MOISTURE-RELATED ISSUES BECAUSE THE ISAACS WOULD BE VISITING THE PROPERTY. A REPAIR AT THIS TIME CREATES AN INFERENCE THE ONIONS AND KOPCHYNSKI KNEW EARLIER REPAIRS HAD FAILED & THE ONIONS AND KOPCHYNSKI WERE HIDING THE ONGOING PROBLEMS AND REPAIRS

In fact, Kopchynski's own text messages the very day after she represented Lanes' CL-100 was "good," reveal that she specifically told Mrs. Onions to make sure their improperly licensed handyman, Emery Custer, did not show up as scheduled to perform additional work in the crawl space because Mr. and Mrs. Isaac would be visiting the Property.



The lower court erred in granting summary judgment in favor of Kopchynski where this text message conversation creates a clear inference the Onions and Kopchynski knew or should have suspected that both the Onions and Kopchynski were aware the initial work performed by Custer did not work, as well as the clear inference they both knew of the ongoing repairs and conspired together to hide them.

G) KOPCHYNSKI AND THE ONIONS CONSPIRED TO CONVINCE THE ISAACS TO AVOID CONTACTING ANDY WARD OF STARK EXTERMINATORS BY FALSELY ASSERTING STARK WOULD BE UNPROFESSIONAL AND FALSELY CLAIMING LANES HAD ROUTINELY PERFORMED PEST CONTROL AT THE PROPERTY. THESE FACTS ALSO CREATE AN INFERENCE KOPCHYNSKI WAS DIRECTLY INVOLVED IN HIDING STARKS PRIOR REPORT

Kopchynski incredulously testified that she and Mrs. Onions conspired to steer the Isaacs away from Stark Exterminators, and toward Defendant Lanes for their CL-100 inspection.

A. The only time it came up with the Isaacs with the CL-100 is I was noticing it was time to schedule one. And I called Ed and said, you have to schedule the CL-100. And he thought it was the seller's responsibility. And I looked back over the contract, I said, no, the buyer is paying for it, and the buyer is choosing the provider and we're in that time frame. And that was the same time I had told -- when Jackie Onions and I had talked about we need to get -- that the CL-100 has to get done. I said, I'm going to find out who's going to do it and I'm going to let Ed know what happened with – **if Stark comes, that it could be awkward.**

Q. Okay. So there was a discussion with you and Jackie about I'm going to find out who it is and that if Stark shows up, it could be awkward because

A. **I'm going to let Ed know that it could be awkward if Stark comes**, but they are welcome to use Stark.

Q. And you had that conversation with Jackie?

A. Yes.

****

Q. Okay. So your testimony is that a discussion took place that having Stark back out there would be a problem?

A. No, not a problem. That it could be awkward, that's all.

Q. Okay. And after you had that conversation with Jackie and you were going to go and talk to Ed …

R. 488-90 (*emphasis added*).

Based upon the forgoing, there is simply no question. Competent evidence that Kopchynski actively conspired to misrepresent and conceal material facts which would have been disclosed if Mr. and Mrs. Isaac would have contacted Andy Ward of Stark Exterminators prior to their purchase of the Property.

H) KOPCHYNSKI VIEWED THE LANES #2 REPORT OBTAINED BY THE ISAACS, AND SHE KNEW THAT IT WAS MISLEADING AND INCOMPLETE BECAUSE IT DID NOT MENTION ANY PRIOR PROBLEMS, OR THE LANES #1 REPORT AND THE PROBLEMS IN IT, THAT INSPECTIONS AND REPAIRS WERE ONGOING, AND THAT THE LANES INSPECTOR HAD BEEN AT THE PROPERTY ONLY TWO WEEKS PRIOR.

Prior to closing, the Isaacs insisted upon having their CL-100 report to verify the absence of moisture issues in the crawl space. Unfortunately, discovery has revealed the CL-100 inspector Joseph Sheheen, of Lane's Professional Pest Control, actively worked to assist the Onions in concealing the flooding, drainage, and moisture problems. (R. 563, 577-79) As stated above, Kopchynski admits she and Mrs. Onions actively steered the Isaacs away from Stark Exterminators and toward Joseph Sheneen of Lanes by misrepresenting that Lanes routinely provided pest control for the Property (R. 559), and suggesting that Andy Ward and Stark Exterminators would be unprofessional or awkward. (R. 489-492).

While the Lanes inspector, Joseph Sheheen, admits that he had numerous recommendations for and discussions and agreements with Mr. & Mrs. Onions onsite about fixing excessive moisture in the crawl space, these discussions were denied by Mr. & Mrs. Onions. (R. 562-63, 577-79; R. 520) Mr. Sheheen also testified as follows:

a. His name was forged on the first and second CL-100 reports by Lanes, and that he did not see either until after this lawsuit was filed. (R. 567-68);

b. The Isaacs would be the **only people** who **did not know** that Lanes second report was misleading and inaccurate as it failed to disclose excessive moisture and the existence of wood decay organisms and damage noted "throughout" the Property just two weeks earlier by the same inspector from Lanes and that the inspector, Mr. Sheheen, had personally recommended measures to temporarily hide damage during his extended conversations with the Onions despite having been hired by the Isaacs (R. 561-572);

c. That his July CL-100 states moisture readings that were not possible (R. 564-66, 574);

d. That the wood decay fungi somehow disappeared on its own in two weeks (R. 575-76);

e. That the CL-100 has information in his report which could not have come from him (R. 554, 555, 559, 570, 571); and,

f. That Lanes did not routinely conduct pest control upon the property, as the only time it was done was during the first CL-100 inspection in June 2018 (R. 552-53, 560).

The lower court failed to consider these facts, let alone to construe them as evidence that Kopchynski actively worked to conceal moisture related problems and flooding. Kopchynski actually knew the Isaacs were relying upon incomplete and therefore misleading information, and instead of complying with her statutory duty of honesty, she successfully pressed the Isaacs to quickly close on the sale.

The lower court erred by concluding that Kopchynski's only alleged failures were her failures to disclose the Stark Report and the first Lanes CL-100 report. While Appellants have not yet completed discovery, they have uncovered a tremendous amount of evidence which the lower court simply ignored or impermissibly construed against Mr. and Mrs. Isaac.

(2) THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI BECAUSE LICENSED REALTORS HAVE A STATUTORY DUTY OF HONESTY WHICH FORBID KOPCHYNSKI FROM CONVEYING INFORMATION SHE KNEW OR SUSPECTED TO BE FALSE, INCOMPLETE, OR MISLEADING

S.C. Code § 27-50-70 provides that a licensed real estate agent may face liability to a prospective purchaser if the owner of real property provides a purchaser with a disclosure form that contains false, incomplete, or misleading information, where the real estate licensee knew, or **has reasonable cause to suspect**, the information is false, incomplete, or misleading. Simply stated, no provision of South Carolina law allows a real estate agent to claim truthful disclosure by forwarding information which she knows **or suspects to be false, incomplete, or misleading**. The lower court erred by failing to apply the "knew or has reasonable cause to suspect … information was false, incomplete, or misleading" standard to the numerous matters of which Respondent Kopchynski was involved.

Additionally, the instructions on the top of the Disclosure Statement form states that Kopchynski was required to have the Onions fill out clearly sets forth the law, providing in part:

> The South Carolina Code of Laws (Title 27, Chapter 50, Article I) requires that an owner of residential real property … shall provide to a purchaser this completed and signed disclosure statement prior to forming a real estate contract. This disclosure must be provided in connection with any sale ...
> . . . .
> If owner is assisted in the sale of property by a real estate licensee, owner remains solely responsible for completing and delivering this disclosure statement to the purchaser. **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**.

The lower court's Order erroneously excused Kopchynski from liability for fraud and conspiracy at summary judgment under S.C. Code Ann. § 40-57-350 by holding that a realtor cannot be responsible for latent defects or the contents of any expert report where she has partially disclosed information and told a number half-truths. In stark contrast, S.C. Code Ann.

§ 40-57-350(G)(1) starts by providing a real estate agent licensed by the State of South Carolina "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."

The lower court failed to construe facts in Appellants favor, which clearly demonstrated Kopchynski had knowledge of problems, and therefore a duty **to be honest with all parties**. The statute does provide protection for real estate agents by providing realtors are not required to know of latent defects, not required to interpret expert reports, and cannot be sued for **truthfully** disclosing information. Section 40-57-350 (G)(2) further provides no cause of action may be brought against a real estate 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 **of which they have disclosed**.

The lower court erred in granting Kopchynski summary judgment because she did not truthfully disclose a tremendous amount of information and in fact acted to help hide prior problems as well as repairs in progress. Kopchynski cannot and should not escape liability concerning the contents of the Stark Report, the Lanes CL-100 Reports, or the Disclosure Statement - because she chose to secret their contents. As to information Kopchynski did disclose, such as the Cornerstone Report, she cannot escape liability because she actively and repeatedly chose to vouch for repairs performed by a handyman to conceal the damage, to hide the impropriety and failure of the prior repairs, and to conceal and scheme to cover up ongoing repairs.

The Supreme Court in this State "has consistently rejected caveat emptor and adopted the civil law rule of caveat venditor [i.e., *Seller Beware*!] as part of the common law of South Carolina" in connection with the sale of houses. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 502,

229 S.E.2d 728, 730 (1976); *See also Gov't Emps. Ins. Co. v. Chavis*, 254 S.C. 507, 525, 176 S.E.2d 131, 140 (1970)(*citations omitted*). The law should not orphan the purchasers of a house, who are likely investing their life savings. *Lane*, 267 S.C. at 503. In South Carolina, the seller of real property must disclose material facts to the purchaser "[w]here material facts are accessible to the [seller] only and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser." *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 485, 193 S.E.2d, 124, 128 (1972). Non-disclosure becomes fraudulent concealment when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction. *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972). The seller of real property must disclose material facts to the purchaser where material facts are accessible to them. *Lawson*, 259 S.C. at 485, 193 S.E.2d at 128.

Indeed, an overwhelming majority of jurisdictions require that licensees disclose material facts known to them about a property. This is an area where bright-line rules do not exist. Presumably, a licensee should be held to a higher standard in observing defects than would be expected of the average home buyer.[5]

[5] 10 REAL ESTATE BROKERAGE LAW AND PRACTICE § 3A.10 (2018)(*Citing e.g., Williams v. Wells & Bennett Realtors*, 52 Cal. App. 4th 857, 863, 61 Cal. Rptr. 2d 34, 37 (1997) (broker has a duty to disclose known material facts); *Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. Ct. App. 2000) (citing statute and discussing broker's duty to disclose adverse material facts actually known by broker); *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 162, 109 Ill. Dec. 541, 510 N.E.2d 409, 413–414 (1987), appeal denied, 116 Ill. 2d 578, 113 Ill. Dec. 320, 515 N.E.2d 129 (1987) (brokers had duty to speak regarding known material information); *Bazal v. Rhines*, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999) (finding duty to disclose material facts); Binette v. Dyer Library Ass'n, 688 A.2d 898, 905 (Me. 1996) (citing regulations and stating that broker has duty to disclose known material defects); *Weintraub v. Krobatsch*, 64 N.J. 445, 453–454, 317 A.2d 68, 74 (1974) (noting rule that broker is liable for nondisclosure of defects known to him but unknown to buyer); *Gordon v. Skopos*, 2005 Ohio 4900, 2005 Ohio App. LEXIS 4414, at *7 (Sept. 16, 2005) (a real estate agent has a statutory duty to disclose any material defects of which the agent has knowledge); *Stebbins v. Wells*, 766 A.2d 369, 373 (R.I. 2001) (holding broker had duty to disclose known deficient conditions); *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728, 734–35 (1994) (agreeing that broker may be liable for failure to disclose known

(3) THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI BECAUSE THE ISAACS HAD A REASONABLE RIGHT TO RELY UPON A LICENSED REALTOR, AS LICENSED REALTORS HAVE A STATUTORY DUTY OF HONESTY, AND RELIANCE IS A QUESTION OF FACT FOR THE JURY

The right to rely must be determined in light of the duty to use reasonable prudence and diligence under the circumstances in identifying the truth concerning the representations made to him. *Florentine Corp.*, 287 S.C. at 386, 339 S.E.2d at 114. The determination of what constitutes reasonable diligence and prudence must be made on a case by case basis. *Slack v. James*, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005). As a general rule, questions concerning reliance and its reasonableness are factual questions that must be construed in favor of the nonmoving party and ultimately left for the trier of fact to resolve after hearing all of the evidence. *Id*.

In this case, Kopchynski's knowledge of and involvement in the fraud and conspiracy began with the misrepresentations in the statutory Disclosure Statement. Kopchynski's knowledge of problems became more certain on May 16, 2018, by and through her involvement in procuring, receiving, and being informed of the adverse information from the report of Stark Exterminators. Not only did she fail to disclose the Stark report or the information in it, she emailed two versions of Mr. Onion's forged "Repair Verification Form" dated May 25, 2018 which had been specifically edited just three (3) hours after the original verification had been sent on the day the Isaacs sought to contract to buy the property. The second form emailed by Kopchynski was designed to be a more professional and persuasive assurance that the

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material defects); *Eddy v. B.S.T.V., Inc.*, 696 N.W.2d 265, 2005 WI App 78 (2005), review denied, 2005 WI 134, 282 Wis. 2d 722, 700 N.W.2d 274 (2005) (every real-estate broker has a duty to disclose to each party all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law).

appropriate repairs had been made by a qualified general contractor. Kopchynski knew Emery Custer, just like she knew about the Property.

Kopchynski told Mr. Kimbrough that the first CL-100 report issued by Lanes on June 20, 2018, was good. Yet, she testified that she reviewed the report and noted that excessive moisture had been noted, and therefore that Emery Custer's repairs had failed. That report and the information within it remained undisclosed. Instead, Kopchynski worked with the Onions to make sure the Isaacs would not discover that additional repairs were in progress by telling them to make sure Emery Custer did not come to the property as planned, and by coming up with a plan to steer the Isaac's unsuspecting realtor away from Andy Ward of Stark Exterminators, and toward Defendant Lanes. Kopchynski actually contacted Ed Kimbrough to ask him not to use Stark and suggested that Lanes would appropriate because Lanes routinely provided pest control at the Property. In truth, the only time Lanes had provided pest control was when Mr. Sheheen was at the Property for the first Lanes CL-100, i.e., June 18, 2018.

Lanes was supposedly hired by the Isaacs, yet Mr. Sheheen's testimony indicates the Onions were able to convince him to issue what turned out to be an impossibly clean CL-100, without noting that he had personally found excessive moisture, wood decay fungi, and damage just two weeks earlier. Kopchynski, Onions, and Lanes all knew that the Isaacs were relying upon incomplete and therefore misleading information. Isaacs' reliance upon Kopchynski's duty to be truthful, to disclose, and to correct her misrepresentations was reasonable because the problems were hidden by the Onions and the repairs of their handyman, and in each instance, the truth was squarely in her control. As a result, Kopchynski's motion for Summary Judgment should have been denied.

(4) THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DEFENDANT'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT WAS SUBMITTED AFTER THE DEADLINE ESTABLISHED BY THE SUPREME COURT.

The Supreme Court of South Carolina set forth specific rules concerning the filing of Motions in the Fifteenth Judicial Circuit by way of Order issued on September 10, 2015, providing in pertinent part:

> A written motion shall be filed and served with a supporting memorandum of law. A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose. Affidavits and other materials supportive of the motion shall be filed and served with the motion.

Kopchynski's July 8, 2019 Motion only provided notice of three (3) bullet point citations as grounds for Summary Judgment, and thereafter, attempted to preserve the right to introduce last-minute information in direct violation of the Supreme Court's Order. Defendant's Memorandum was not filed until July 24, 2019, just two days before the hearing on Defendant's Motion.

Failing to strike the late Memorandum from the record was manifestly unjust because it facilitated the presentation of misleading deposition testimony from the Isaacs' realtor, Ed Kimbrough, to suggest the Isaacs' did not care about the first CL-100 report from Defendant Lanes. Subsequent deposition testimony from Kimbrough clarified his reliance upon Respondent Kopchynski's statutory duty to correct her misstatements about the contents of the report.

The lower court's Order also fails to comply with SCRCP, Rule 54(b) which provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties **only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.**

The dismissal of Laura Kopchynski forced the Isaacs to file this appeal and a stay upon the underlying action. Opportunistic and procedural irregularities should not have been allowed to render Supreme Court Orders meaningless and prevent the Isaacs from timely presenting their entire case to the trier of fact.

(5) THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DISCOVERY AS TO RESPONDENT KOPCHYNSKI WAS NOT COMPLETE

The Isaacs have requested documents from Mr. & Mrs. Onions, Emery Custer, Lane's Professional Pest Control, and Laura Kopchynski after their respective depositions. As to Respondent Kopchynski, Appellants requested the policy and procedure manual of her employer. It is anticipated these documents would show Kopchynski violated her employer's policies and procedures as to how the company's employees are to handle material adverse information, and would further contradict her sworn testimony as to how to properly advise clients in filling out property disclosure statements in South Carolina. Additionally, Appellants seek additional discovery from Laura Kopchynski, which could prove she has made other misrepresentations. All of this information would provide additional information that would justify the trier of fact in concluding that she was complicit in fraud, concealment, and conspiracy.

Summary judgment should not have been granted because the Isaacs had not yet had a full and fair opportunity to complete discovery. *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

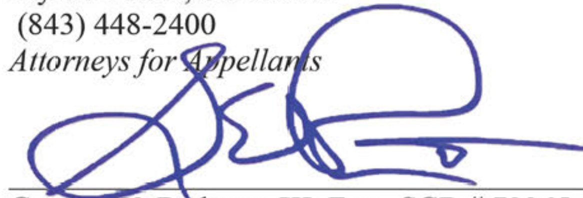
CONCLUSION

The Appellants pray this Honorable Court will properly construe the evidence in this Action in their favor, and as such, find there is competent evidence that Respondent realtor Kopchynski knew of the adverse conditions of the Property. Appellants further pray this Court will find that realtors in South Carolina have a legal duty to disclose known material adverse information; a legal duty to correct any known material representations which she knows, or has reasonable cause to suspect, to be false, misleading, or incomplete; and that a South Carolina realtor may not claim truthful disclosure where they have forwarded information she knows **or suspects to be false, incomplete, or misleading**.

The Isaacs pray this Honorable Court will reverse the decision of the lower court and deny Respondent Laura Kopchynski's Motion for Summary Judgment.

Respectfully Submitted,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Appellants



George W. Redman, III, Esq., SCB # 72365

June 30, 2020.