

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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MAR 28 2011

S.C. Supreme Court

Opinion No. 4761 (S.C. Ct. App. filed December 1, 2010)

Robert Coake and Susan Coake.....Respondents.

v.

Kathleen Burt, n/k/a Kathleen Thomason.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

Harold P. Threlkeld
SC Bar No. 5568
P. O. Box 1385
Anderson, SC 29622-1385
Telephone: (864) 226-1305
Facsimile: (864)226-1685
E-mail: hptatty@bellsouth.net
Attorney for Petitioner

Other Counsel of Record:
James A. Blair, III, Esquire
Kristen E. Small, Esquire
Nexsen Pruet, LLC
P.O. Drawer 10648
Greenville, SC 29603-0648

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 28, 2011.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err by failing to hold that, as a matter of law, the Respondents waived any and all violations of the Residential Property Condition Disclosure Statement and any damages resulting from any violation thereof?
- II. Did the Court of Appeals err by failing to hold that, as a matter of law, the Respondents did not exercise reasonable diligence to protect their own interests in purchasing the residence?
- III. Did the Court of Appeals err by failing to hold that, as a matter of law, that Respondents sustained no damages as the result of any breach or violation of the Residential Property Condition Disclosure Statement?
- IV. Did the Court of Appeals err by failing to hold that, as a matter of law, the Residential Property Condition Disclosure Statement does not apply to detached buildings and improvements?

STATEMENT OF THE CASE

Respondents filed this action in the Court of Common Pleas for Anderson County on May 26, 2005 against the Petitioner seeking to recover damages allegedly sustained from violation by Petitioner of the Residential Property Condition Disclosure Act codified in S.C. Code Ann. §27-50-10 *et seq.* (2002) (the "Act"), and as a result of fraudulent acts committed by Petitioner. Petitioner duly filed her Answer setting forth a general denial and an affirmative defense alleging Respondents purchased the property with full knowledge of its condition and accepted every existing condition of the property.

The matter came on for trial before Honorable J. Cordell Maddox, Jr., Circuit Judge, and a jury on July 30, 2007. At the conclusion of the Respondents' case, the court directed a verdict against the Respondents on their claim for fraud and permitted the Respondents to go forward with their claim for violation of the Act. At the conclusion of the evidentiary stage, the trial court directed a verdict against the Respondents on the claim for violation of the Act. The ruling of the Court was embodied in a written Order dated April 28, 2008 (R. p. 5, Order).

The Respondents appealed the directed verdict Order on the grounds:

- I) The evidence permitted a conclusion that the Respondents conducted a reasonable inspection of the property; and,
- II) The Respondents established damages through evidence of the amount spent on repairs.

The Petitioner filed a cross-appeal whereby she appealed the Order of the Court denying her request for attorney's fees provided for in the Act. The Court of Appeals held that the trial court erred by granting a directed verdict to the Petitioner on the grounds:

- I) The evidence presented at trial permits more than one reasonable inference as to whether the Respondents reasonably inspected the property; and,
- II) The evidence of damage was sufficient to create a reasonable inference of damages sustained by the Respondents.

The Petitioner petitioned for rehearing in the matter because she contended the Court of Appeals erred in holding that:

- I) As a matter of law, the Respondents failed to exercise reasonable diligence or discretion to protect their own interest; and,
- II) As a matter of law, the Respondents waived any and all violations of disclosure statement and any damages resulting therefrom; and,
- III) As a matter of law, the Respondents sustained no damages from any breach or violation by the Petitioner; and,
- IV) The disclosure statement required by the Disclosure Act does not include detached buildings and improvements.

ARGUMENTS

I. As a matter of law, Respondents failed to exercise reasonable diligence or discretion to protect their own interest.

The Respondent, Robert Coake, an industrial instructor, (R. p. 59, l. 11-12) and the Respondent, Susan Coake, a realtor (R. p. 111, l. 21-24) made a conscious decision to close on the purchase of a large 75 year old residence relying solely on the disclosures made in the Residential Property Condition Disclosure Statement (Disclosure Statement, R. p. 183) and to disregard the contents of a home inspection report (R. p. 196) compiled by a professional home inspector and to forego any meaningful inspection of the property by the Respondents. (R. p. 94, l. 22-23; R. p. 116, l. 1-14; R. p. 94, l. 15-25) Had the Respondents reviewed the home inspection report and made a meaningful inspection of the property, they would have known about each and every violation and defect complained of in the residence and on the residential lot on which it was situated. (R. p. 117, l. 18-22)

The Respondents had unrestricted access to the vacant property for more than one month prior to the closing (R. p. 94, l. 2-6), but chose to spend less than two hours inspecting the property. (R. p. 114, l. 13-22; R. p. 115, l. 13-22) The Complaint of the Respondents is that they did not know of the conditions that they have complained about because they did not bother to either review the home inspection report or to make any meaningful observation or inspection of the property. (R. p. 94, l. 22-23; R. p. 116, l. 1-14; R. p. 116, l. 1-14; R. p. 94, l. 15-25; R. p. 104, l. 1-10; R. p. 110, l. 1-25)

The buyer of real property has a duty to inspect property the purchaser contemplates purchasing to ascertain defects that are patent from such inspection. River Pines, Inc. v. Jackson, 276 S.C. 29, 274 S.E.2d 912 (S.C., 1981). It is noted that “[A] buyer has the right in South Carolina to rely on a seller of a home to disclose latent defects or hidden conditions which are not discoverable on a reasonable examination of the property and of which the seller has knowledge.” May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 508 (S.C. App., 1986). If a reasonably diligent person could have known of a condition from an inspection, there can be no genuine issue of a material fact. McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (S.C. App., 2008).

The Respondents acknowledge that had they reviewed the home inspection report and made an inspection of all observable parts of the property, they would have discovered the conditions complained of by them. (R. p. 194, l. 3-10; R. p. 117, l. 18-22)

Since the Respondents could have known of each and every condition complained of by reviewing the home inspection report and making a diligent inspection the property, it cannot be claimed a reasonable inspection was made.

II. As a matter of law, the Respondents waived any and all violations of disclosure statement and any damages resulting therefrom.

The obligation of the Respondents to purchase the property was conditioned upon a “satisfactory home inspection”. (R. p. 194, Contract of Sale) The Petitioner spent \$2,500.00 to repair conditions identified in the home inspection report. (R. p.

107, l. 11-25) The Respondent, Robert Coake, acknowledged that purchase of the property after the home inspection report was issued signified the purchasers acceptance of each and every existing condition identified in the home inspection report. (R. p. 104, l. 3-10)

Every condition complained of by the Respondents relating to the residence and the lot was either identified in the home inspection report or readily observable from a diligent inspection of the property.

III. As a matter of law, the Respondents sustained no damages from any breach or violation of the Petitioner.

The Respondents purchased the property on July 13, 2004 for the gross price of \$299,900.00 and the Petitioner paid \$3,000.00 of the Respondents' closing costs making the net price \$296,900.00. (R. p. 107, l. 1-2) Eighteen months later, in January of 2006, the Respondents sold the property for \$440,000.00, thereby realizing a gross gain on the sale in the amount of \$143,100.00. (R. p. 106, l. 18-25; R. p. 107, l. 1-10) To realize this gain, the gross amount spent by the Respondents on the property was \$38,390.00. (Repair Estimate, Plaintiff's Exhibit No. 3, R. p. 187)

It is the well settle law of this state that the proper method for determining damages in such case is the benefit of the bargain approach, according to which the purchaser is entitled to the difference between the value he would have received if the seller's representation had been true and the value he actually received, together with approximately caused consequential or special damages. Schnellman v.

Rotteger, 645 S.E.2d 239, 373 S.C. 379 (S.C., 2007). The close proximity of the sales price and the price received proved the Respondents paid less than the market value of this property, therefore, the Respondents sustained no damages.

IV. The disclosure statement required by the Disclosure Act does not include detached buildings and improvements.

S.C. Code Ann. §27-50-10(4) provides in pertinent part: "...[T]his disclosure statement is limited to the 'actual residential dwelling' (emphasis added) and does not address common elements or areas for which the owner has no direct or primary responsibility."

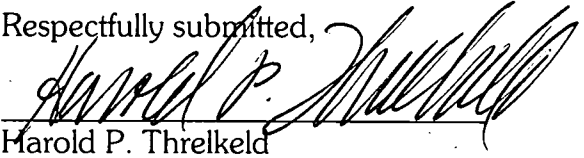
S.C. Code Ann. §27-50-10(8) provides "real property" means the lot or parcel and the "dwelling unit" (emphasis added) described in a real estate contract subject to this article.

The subject property relates to a residential lot containing approximately two acres of land containing a residential dwelling as well as several detached structures that included garages, pool houses, swimming pool and other structures that relate to the pool. (R. p. 73, l. 20-25; R. p. 74, l. 1-8) The manifest intent of the disclosure statement is to cover only the dwelling unit and the lot of land on which the dwelling unit is situated and to exclude from the scope of the disclosure statement all other structures including the detached garages, pool houses and other amenities related to the pool. S. C. Code Ann. §27-50-10(4) and (8).

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,



Harold P. Threlkeld

P. O. Box 1385

Anderson, SC 29622-1385

Telephone No.: 864.226.1305

Fax No.: 864.226.1685

Attorney for Petitioner

Anderson, South Carolina

Date: March 25, 2011

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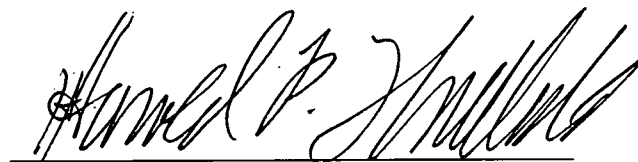
v.

Kathleen Burt, n/k/a Kathleen Thomason.....Petitioner.

PROOF OF SERVICE

I hereby certify that I have served a copy of the Petition for Writ of Certiorari and Appendix on Respondents' counsel of record listed below by depositing a copy of it in the United States Mail, postage prepaid, on March 25, 2011 addressed to:

James A. Blair, III, Esquire
& Kirsten E. Small, Esquire
Nexsen Pruet, LLC
P. O. Drawer 10648
Greenville, SC 29603



Harold P. Threlkeld
SC Bar No.: 5568
P. O. Box 1385
Anderson, South Carolina 29622-1385
Phone: 864.226.1305
Facsimile: 864.226.1685
Attorney for Petitioner