THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In light of the strict standard governing the grant of a directed verdict, the Court of Appeals correctly held that the Coakes' claims under the Residential Property Condition Disclosure Act, S.C. Code Ann. §§ 27-50-10 to -110 (2007 & Supp. 2010) ("the Disclosure Act"), should be decided by a jury. The evidence in the record permits more than one inference as to the three questions critical to liability under the Act: Whether the 2004 Disclosure signed by Ms. Davis contained material information that was false, incomplete, or misleading; whether the Coakes' inspection of the property was reasonable under the circumstances; and whether the Coakes presented sufficient evidence of damages.

Ms. Davis's Petition for a Writ of Certiorari does not satisfy any of the grounds identified by the Rules as bases for certiorari review. This case presents no novel question of law; the Court of Appeals was unanimous in its decision; Ms. Davis alleges no conflict between the Court of Appeals' decision and any prior decision of this Court; and no constitutional issue or federal question is involved. *See* Rule 242(b), SCACR. Rather, the Court of Appeals applied well-established rules to the circumstances of this case, and concluded that the Coakes are entitled to a jury trial of their claim under the Disclosure Act.

The Coakes respectfully ask this Court to deny the Petition.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE REASONABLENESS OF THE COAKES' INSPECTION IS A QUESTION OF FACT FOR THE JURY

The reasonableness of a party's actions is a question for the jury to decide. *See McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670-71 (Ct. App. 2008). As this court has explained,

> issues of reliance and reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are *preeminently factual issues for the trier of facts.*

Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387 401 S.E.2d 153, 155 (S.C. 1991) (emphasis added).

A. A jury could find that the Coakes' inspection of the property was reasonable.

Robert Coake testified that when he examined the property prior to making an offer, he spent about two hours walking around and examining the house and outbuildings. R. p. 112, line 10. His inspection of the property, and specifically of the undisclosed defects, was hindered in a number of ways. For example, Mr. Coake could not discern the water problem in the basement because the basement was so dark that he could not see anything. R. p. 92, lines 17-20. Furthermore, the basement only leaked during rainy periods. R. p. 118, lines 4-10. The Coakes could not inspect the wood rot in various outbuildings because the wood had been freshly painted; the only way to discover the rot was to poke at the wood with one's finger. R. p. 92, line 24 – p. 93, line 16. The choking overgrowth of the garden hid the spout for the underground oil tank. R. p. 92, lines 21-23. The Coakes did not discover the termite damage until they ripped out the floor of the pool house. R. p. 116, line 24 – p. 117, line 4.

In deciding whether the Coakes' inspection was reasonable, the jury also would have been entitled to consider their circumstances: Robert Coake was working in Greenville, living in a corporate apartment, and driving 1,100 miles to and from Orlando every weekend to be with his family, while Susan Coake was living in Florida and raising the Coakes' three children. R. p. 61, lines 5-9; R. p. 108, lines 21-23. The time the Coakes had to look over the house was extremely limited, a fact the jury would have been entitled to consider in deciding whether the Coakes acted reasonably.

B. **The record contradicts Ms. Davis's factual claims.**

Ms. Davis claims that the Coakes "had unrestricted access to the vacant property for more than one month prior to the closing" and that they "made a conscious decision ... to disregard the contents of a home inspection report." Petition at 6. These assertions are contradicted by the record.

First, Ms. Davis's claim regarding the Coakes' access to the property is based upon a hypothetical question by her counsel. R. p. 156 ("Let's suppose that you spent the 35 days [before the closing] ... look[ing] over the house ...."). Neither that question, nor any other evidence in the record, indicates that the Coakes had free access to the property. And, even if the Coakes had such access, it would not be reasonable to expect them to spend days inspecting the house during a time when Mr. Coake was working full time and traveling to Florida during the weekends to be with his family, and Mrs. Coake was in Florida raising their three young children. R. p. 90, lines 4-5; R. p. 108, lines 21-23.

Second, the Coakes could not disregard, consciously or otherwise, a home inspection report that was not available to them. Robert Coake testified consistently that the inspection report was sent by fax during or after the closing.

R. p. 94, line 22 – p. 95, line 3; R. p. 102, lines 11-13; R. p. 104, lines 9-10; R. p. 108, lines 6-8 ("I know we didn't get this inspection until after the fact. It was faxed during closing, something like that."). Moreover, as noted previously, the Coakes were under pressure to close due to their family circumstances and because the closing date specified on the purchase contract had already passed. R. p. 119, lines 5-20. It was for the jury to consider whether the fact that the home inspection report arrived during the closing should excuse the Coakes from calling the closing off so that they could review the report, when the circumstances virtually forced them to proceed with the closing. R. p. 108, lines 18-25.

C. Conclusion

Because the evidence presented at trial permits more than one inference as to whether the Coakes reasonably inspected the Property, the Court of Appeals properly reversed the circuit court's grant of a directed verdict.

II. MS. DAVIS'S "WAIVER" ARGUMENT IS NOT PROPERLY BEFORE THIS COURT; IN ANY EVENT, IT IS WITHOUT MERIT

Ms. Davis contends that the Coakes "waived" their claim under the Disclosure Act because (1) Ms. Davis repaired "conditions identified in the home inspection report," and (2) all of the problems with the property were observable or were identified on the home inspection report. This argument was raised for the first time in the Petition for Rehearing, and therefore is not properly before this Court. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not

preserved).

Further, Ms. Davis's factual allegations are not accurate. The items repaired by Ms. Davis—the air conditioning system and attic fan—were not identified in the home inspection report but rather were discovered by the Coakes and their realtor prior to making an offer:

> I know we didn't get this [home inspection report] until after the fact. It was faxed during closing, something like that. When we did the inspection on the property, we noted when we decided to buy the house, the attic fan did not work. We wanted that fixed. The realtor and ourselves noticed that the air conditioning upstairs didn't work. That's why the condenser outside, the air conditioning had to be replaced. Those are the items we found as we walked through the property the first time we inspected it back in June. That wasn't found by an inspector, no.

R. p. 108, lines 6-17 (emphasis added). Second, the Coakes did not have access to the home inspection report prior to or during the closing. Certainly, a buyer who obtains a home inspection within a reasonable period prior to closing, and who then proceeds to closing with no further comment, should be assumed to have reviewed the report and to be satisfied with its contents. Such an assumption is not warranted here, however, given that the report arrived during or after closing, and the Coakes' circumstances placed them under substantial pressure to proceed with the transaction without reviewing the home inspection report.

III. SETTLED LAW ESTABLISHES THAT THE COAKES' DAMAGES MAY BE PROVED BY THE AMOUNT SPENT ON REPAIRING UNDISCLOSED DEFECTS

The Court of Appeals correctly held that a jury could award damages based upon the amount the Coakes spent repairing the undisclosed defects to the property.

The Disclosure Act does not set forth a mechanism for determining damages due to a seller's failure to disclose. Relevant case law, however, indicates

that damages may be established by evidence of the amount spent repairing undisclosed defects. *See May v. Hopkinson*, 289 S.C. 549, 559-60, 347 S.E.2d 508, 514 (Ct. App. 1986). In *May*, the Court of Appeals held that one who claims a violation of a duty to disclose may present evidence of damages in either of two ways: (1) by comparing the value of the property as it was represented to be with the value as it actually was; or (2) by offering evidence of the costs of repairs. *See id.* What the plaintiff may not do is recover both the diminution in the value of the property and the cost of repairs. *See id.*

Here, the Coakes did not seek damages premised on the value of the home. Rather, they introduced specific evidence concerning the amount spent on repairs for items not reported by Ms. Davis on the 2004 Disclosure: $2,500 for the alarm system, $2,040 for filling and capping the underground fuel tank, $3,800 for repairing wood rot in the garage apartment and the pool house, and $600, plus 50-56 hours of labor, for repairing the rotted wooden garage doors. *May* establishes that such evidence is a sufficient basis for an award of damages.

Ms. Davis argues that because the Coakes realized a profit on the sale of the Property some 18 months after they purchased it, they cannot pursue a claim for violation of the Disclosure Act. This cannot be the standard; if it were, many (if not most) claims for violation of the Disclosure Act could be defeated by a simple showing that the property had appreciated in value between the time of the violation and the time of trial.[1]

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[1] This truth is easily illustrated. Suppose Buyer purchases a property that is represented (due to failure to disclose material defects) to be worth $100,000; in fact, the property is only worth $80,000. Buyer sells the property a few months later for $125,000. It is true that Buyer has profited from the sale of the property. However, had Buyer been aware of the defects and paid the actual value of the property ($80,000), his profit would have been $20,000 greater. It defies logic to

IV. THE DISCLOSURE ACT APPLIES TO ALL RESIDENTIAL PROPERTY "FOR WHICH THE OWNER HAS DIRECT AND PRIMARY RESPONSIBILITY," INCLUDING DETACHED STRUCTURES

Ms. Davis's argument that the term "actual residential dwelling" does not include detached structures such as garages is contradicted by the text of the Disclosure Act itself. The Act provides that its obligations apply to "the actual residential dwelling and does not address *common elements or areas for which the owner has no direct and primary responsibility.*" S.C. Code Ann. § 27-50-10(4) (emphasis added). If the statutory text did not include the italicized language, Ms. Davis's argument might be persuasive. However, statutory interpretation requires that all of the text be considered and read as a whole in order to discern the intent of the legislature. *See Peake v. South Carolina Dept. of Motor Vehicles*, 375 S.C. 589, 597, 654 S.E.2d 284, 289 (Ct. App. 2007). When the phrase "actual residential dwelling" is read in context, it is clear that the legislative intent was to protect home sellers from a duty to disclose defects in areas over which they have no "direct responsibility," such as the common areas of a condominium development. The legislature's intent manifestly was not to relieve sellers of the obligation to disclose defects in portions of the property which they own and for which they bear responsibility. This reading of the plain statutory language comports with the legislature's manifest purpose in enacting the Disclosure Act, namely, to protect unwitting home purchasers from latent defects known to the seller.

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suggest that Buyer could not recover under these circumstances, yet that is precisely what Davis argues.

CONCLUSION

The Coakes respectfully submit that this case was correctly decided by the Court of Appeals and that there is no basis for granting Ms. Davis's Petition.

Respectfully submitted,

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PROOF OF SERVICE

I, Kirsten E. Small, hereby certify that I served the Return to Petition for Writ of Certiorari on the Petitioner by depositing a copy of it in the United States mail, first-class postage prepaid, on May 6, 2011, addressed to her attorney of record, as follows:

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