THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Op. No. 2013-UP-066 (S.C. Ct. App. filed Feb. 6, 2013)

Charles L. Measter and
Barbara P. Measter

Petitioners,

v.

Dudley N. Carpenter and Jane
G. Carpenter,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 20, 2013.

INTRODUCTION

Pursuant to Rules 240 and 242, SCACR, the Petitioners Charles L. Measter and Barbara P. Measter ("Sellers") hereby request that his court issue a Writ of Certiorari to review the Court of Appeals' decision in *Measter v. Carpenter*, Op. No. 2013-UP-066 (S.C. Ct. App. filed February 6, 2013). The Court of Appeals affirmed the circuit court's order in part by finding that Sellers' were not entitled to a directed verdict on the breach of contract action. The Court of Appeals also reversed the circuit court's order finding there was evidence sufficient to hold the Sellers liable under the South Carolina Real Estate Disclosure Act despite the explicit exclusion of common elements from the reach of that statute.

Sellers request that this Court grant this petition, reverse the Court of Appeals' decision, and remand the matter to the circuit court with instructions to dismiss the remaining breach of contract claim.

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN HOLDING THAT A SELLER IS RESPONSIBLE FOR DISCLOSING ALLEGED DEFECTS IN CONDOMINIUM COMMON ELEMENTS WHERE THOSE ELEMENTS ARE CONNECTED TO THE INDIVIDUAL UNIT?**

II. **DID THE COURT OF APPEALS ERR IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DENIAL OF DIRECTED VERDICT WHERE THERE IS NO EVIDENCE OF A BREACH OF CONTRACT?**

STATEMENT OF THE CASE

Sellers sold their condominium ("Apartment") in the Bohicket Marina Village Horizontal Property Regime ("Bohicket") to Dudley and Jane Carpenter ("Buyers") pursuant to an Agreement to Buy and Sell Real Estate Condominiums ("Agreement") dated May 18, 2007. (R. pp. 416-421). The real estate transaction was closed on July 18, 2007. Subsequently, the Buyers became aware of alleged defects in the structure and foundation of the condominium building. On January 7, 2008 Buyers brought suit against Sellers alleging breach of contract, breach of contract accompanied by a fraudulent act, breach of the Residential Property Condition Disclosure Statement, fraud, negligent misrepresentation, and breach of the South Carolina Unfair Trade Practices Act (SCUTPA) (R. pp. 21-30).

The circuit court granted summary judgment to Sellers as to all causes of action save for that under SCUTPA on September 3, 2009. (R. p. 3). Subsequently, Buyers agreed to voluntarily dismiss the remaining SCUTPA claim. (R. p. 4). Sellers then filed a motion to revise Judge R. Markley Dennis's Order Granting Summary Judgment pursuant to Rule 54(b) SCRCP.

On February 23, 2010, Judge Dennis issued an order revising his September 3rd Order, holding that only the Buyers' tort causes of action were dismissed, but that he did not intend to dismiss Buyers' contract based or statutory causes of action. (R. pp. 5-6).

The matter came to trial by jury before Judge Dennis on the breach of contract and statutory causes of action on June 1, 2010. At the close of the case, the Court directed verdict for Sellers on Buyers' claims for breach of the Residential Property Condition Disclosure Act and breach of contract accompanied by fraudulent act. Sellers' Motion for Directed Verdict on the remaining cause of action was denied. (R. p. 462, lines 20-24; R. p. 475, lines 9-10).

an action for the breach of contract, the burden is upon the plaintiff to prove the contract, its breach, and the damages caused by such breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602 (1962); Baughman v. S'ern. Ry Co., 127 S.C. 493, 121 S.E. 356 (1924).

In reviewing the denial or grant of a motion for directed verdict, this Court must consider the evidence and all reasonable inferences in the light most favorable to the opposing party. Dalon v. Golden Lanes, Inc., 320 S.C. 534, 538, 466 S.E.2d 368, 370 (Ct. App. 1996). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001). This Court may not pass upon the veracity of witnesses or determine the case according to what it may believe is the weight of the evidence. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984); Godfrey v. Little River Fishing Fleet, 302 S.C. 426, 396 S.E.2d 828 (1990).

ARGUMENTS

I. THE COURT OF APPEALS SHOULD NOT HAVE REVERSED THE CIRCUIT COURT'S DIRECTED VERDICT IN FAVOR OF THE SELLERS ON BUYERS' CLAIM FOR VIOLATION OF THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT

A. The Real Estate Disclosure Act Clearly Excludes Common Areas Owned by a Condominium Regime From the Sellers' Duty to Disclose.

The Court of Appeals erred in finding that an owner has a duty to disclose information related to the condition of common elements owned by a condominium regime. The Real Estate Disclosure Act specifically excludes common areas from the required disclosure. S.C. Code Ann. § 27-50-10(4). Additionally, the Sellers only had a duty to disclose the existence of litigation that affected the title to the apartment.

The Real Estate Disclosure is "not a warranty," and it is "not a substitute for any inspections

[Buyers] may wish to obtain." Chastain v. Hiltabidle, 381 S.C. 508, 512, 673 S.E.2d 826, 828 (Ct. App. 2009) The Legislature placed the duty of performing such an inspection or investigation squarely on the shoulders of the buyers. Id. at 519-520, 673 S.E.2d at 828. S.C. Code Ann. § 27–50–80 further provides "This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article."

The Real Estate Disclosure Act expressly limits the disclosure 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.) The South Carolina Horizontal Property Act defines common elements as:

> (f) "General common elements" means and includes:
>
> (1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;
>
> (2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
>
> (3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;
>
> (6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;
>
> (7) All other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety
>
> S.C. Code Ann. § 27-31-20(f).

Similarly, the Master Deed for the Bohicket Marina Village Horizontal Property Regime also

defines "common elements" as "the foundations, crawl spaces, . . ." and provides that any "bearing wall, bearing column, or other fixture . . serving more than one (1) Apartment or the general common elements is a part of the general common elements." (R. p. 517, § 2.05). The Master Deed starts the definition of Apartment at the "unfinished inner surface of the ceilings and floors" and the "unfinished inner surface of the perimeter walls." (R. p. 516, § 2.03)

At trial the Buyers submitted the following evidence of alleged defects:

- The floors in building 8 were sagging and had to be repaired to make them level. (R. p. 232, l. 17-19).
- The entire building was "jacked up." This moved the entire building and impacted the flooring in apartments. (R. p. 231-232).
- Holes were cut in walls and floors throughout the apartment to check and repair framing affected by the foundation problems. (R. p. 236-237; R. p. 200, line 18-p. 201, line 5).

All of the defects complained of by the Buyers were caused by a pervasive problem with the foundation and slab of the condominium building. The Buyer's expert testified that the "sagging floors" and framing issues were caused by defects in the original construction and framing of the building. (R. p. 229, lines 3-19). The foundation, beams, joists, and framing of the walls are clearly common elements as defined by the HPR statute and the Master Deed for the regime. As common elements, these areas are not subject to disclosure under the Real Estate Disclosure Act.

Terms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced

the potential resulting special assessment. However, this ruling is not supported by the plain language of the statutory form. Sellers were not required to disclose the pendency of the class action suit because the Disclosure form only asked for lawsuits that "could affect title to the property." (R. p. 424, ¶ 20). The class action suit dealt with allegations of the breach of fiduciary duties by prior boards and their failure to aggressively pursue litigation on behalf of the members of the Association for common element defects. It is undisputed the class action suit did not involve any questions affecting **title** to individual units. (R. p. 378, lines 1-20).

Additionally, there is no evidence in the record that a special assessment had been proposed or was pending. The evidence cited by the Court of Appeals and the Buyers is simply that the Sellers were aware of the class action litigation and that eventually repairs would need to be made. The Sellers cannot possibly disclose the existence of a special assessment that has not been proposed, established, or levied. Accordingly, the failure of the Sellers to warn the Buyers of a potential special assessment cannot give rise to liability under the Real Estate Disclosure Act.

II. THE TRIAL COURT ERRED IN ITS FAILURE TO FIND AS A MATTER OF LAW THAT THERE WAS NO BREACH OF CONTRACT ON BEHALF OF APPELLANTS

The Court of Appeals held there was sufficient evidence that the Sellers breached the covenant of good faith and fair dealing implied into the contract between the parties. Specifically, the Court cited evidence that the Sellers "knew of structural problems with the regime's building and the resulting class action litigation that ultimately yielded funds with which to reimburse unit owners for repairs." Carpenter v. Measter, Op. No. 2013-UP-066 (S.C. Ct. App. filed Feb. 6, 2013). However, neither the contract between the parties nor the Real Estate Disclosure Act required Sellers to disclose this information. There is no breach of an implied covenant of good faith where a party to a contract has

encumbrances. (R. p. 416, ¶ 3). There is no allegation or evidence that Sellers conveyed anything other than marketable title.

The Agreement addresses special assessments by requiring the Seller to pay special assessments levied before closing and requiring Buyers to pay special assessments levied after closing. (R. p. 417, ¶ 13). There is no requirement that the Sellers provide any information related proposed assessments or other regime business.

While the Agreement does require the Sellers to repair any HVAC or structural problems, the duty is only triggered after the Buyers notify the Sellers as a result of the home inspection. (R. pp. 418-419, ¶ 19). Additionally, as discussed above, these items were owned by the Association and not the Sellers. Because the Sellers did not own the HVAC or foundation, they could not possibly be responsible for defects or repairs. These items were more properly presented to the Association for correction.

The Sellers complied with all terms of the Agreement between the parties. The Agreement did not call for any disclosures by the Sellers of pending litigation or potential condominium assessments. The Agreement itself only purported to cover the residential unit owned by the Sellers. The breaches alleged by the Buyers related to common elements owned by the property regime, not the Sellers. Additionally, despite information available to them from multiple property inspections, the Buyers never notified the Sellers of any alleged defects as required by the Agreement. Because the Sellers did exactly what the contract asked of them, they cannot be liable for breaching the covenant of good faith and fair dealing.

CONCLUSION

For the reasons stated, this Court should reverse the ruling of the Court of Appeals and

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Proof of Service

The undersigned herby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Petition for Writ of Certiorari* and *Appendix* by depositing a copy in the U.S. Mail, postage prepaid, to the following address:

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April 19, 2013