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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC……Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.……..…Respondents.

FINAL BRIEF OF APPELLANTS

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XI. Did the Lower Court err in granting the Respondents' Motions to Dismiss since the dates of discovery of the facts and circumstances of the Appellants' various injuries are questions of fact?

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XIII. Did the Lower Court err by dismissing the Appellants' claims with prejudice?

Procedural History

R. Kent Porth and Panorama Point, LLC (the "Appellants") filed a civil action for breach of fiduciary duty, violations of the South Carolina Unfair Trade Practices Act (the "UTPA"), and other related causes of action on January 2, 2020 in the Court of Common Pleas for Lexington County (the "Complaint") against Robert P. Wilkins, Jr. ("Wilkins"), RPW Development, Inc. ("RPW"), and Southern Visions Realty, Inc. ("SVR")(collectively the "Respondents"). The

Consolidated Multiple Listing Service (the "CMLS") was named in the Complaint, but the Appellants did not serve the CMLS, and are not pursuing any claims against the CMLS. The Appellants granted an extension of time to file an answer to the Complaint pending a voluntary mediation which occurred on August 6, 2020, and which was unsuccessful.

On May 6, 2020, prior to filing an answer to the Complaint, the Respondents filed their original Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure seeking to dismiss the Complaint based on the assertion that all causes of action were barred by the statute of limitations (the "First Motion to Dismiss"). On September 18, 2020, the Appellants filed their first brief in opposition to the First Motion to Dismiss ("Appellants' Brief No. 1") in response to the Respondents' Motion to Dismiss. On October 9, 2020, the Respondents filed an Amended Motion to Dismiss reasserting the statute of limitations defense, and moving to "dismiss the Complaint on the grounds that the facts as stated do not give rise to a cause of action." On October 20, 2020, the Appellants filed a brief specifically in opposition to the Amended Motion to Dismiss ("Appellants' Brief No. 2"). On November 16, 2020, the Respondents filed a Memorandum of Law in Support of their First Motion to Dismiss and their Amended Motion to Dismiss (the "Respondents' November 16, 2020 Memo"). On December 10, 2020, the Appellants filed a third brief (Appellants' Brief No. 3") addressing the additional grounds and arguments set forth in the Respondents' November 16, 2020 Memo.

Oral arguments on the Respondents' Motions to Dismiss were heard on December 16, 2020 by Judge Edgar W. Dickson. On February 16, 2021, Judge Dickson entered an Order Granting Motion to Dismiss (the "Order"). On February 26, 2021, the Appellants filed a Motion to Reconsider under Rule 59(e)(the "Rule 59(e) Motion"). On March 11, 2021, the Respondents filed a brief opposing the Rule 59(e) Motion (the "Respondents Rule 59 Brief"). On March 23, 2021,

the Appellants filed a brief in support of their Rule 59(e) Motion (the "Appellants' Brief No. 4). On March 31, 2021, the Respondents filed a sur-reply opposing the Appellants' Rule 59(e) Motion. On May 5, 2021 the Lower Court denied Appellants' Motion to Reconsider an issued an order leaving the Order in effect (the "Rule 59 Order"). On June 4, 2021, the Appellants filed a Notice of Intent to Appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules.

In this appeal, the Appellants seek reversal of the Lower Court's Order which dismissed the Appellants' Complaint with prejudice prior to the Respondents filing an answer.

Factual Background of Case

This case arises from alleged fraudulent, unlawful, and deceptive acts of self dealing by the three separate Respondents, acting in concert and in violation of their respective fiduciary duties, related to the development, marketing and sale of various properties in the Panorama Point subdivision on Lake Murray in Lexington County (hereinafter the "Properties").[1] The Properties had been owned by various members of Appellant Porth's family since 1950, and the Properties comprised one of the most valuable undeveloped tracts of lakefront real estate on Lake Murray in 2006 when the development of the Properties began. In 2006, the Porth and Wilkins families had maintained a decades' long friendship which materially influenced the Appellants' trust in the Respondents with respect to the development, marketing and sale of the Properties.

The Appellants were first put on inquiry notice of the Respondents' various fraudulent, unlawful and deceptive conduct and the corresponding breaches of fiduciary duty and acts of self dealing which form the basis of this litigation on January 10, 2017. Although the development

[1]The Appellants allege that the Respondents' fraudulent, illegal and deceptive conduct goes far beyond the Respondents conduct with respect to the Properties. Specifically, the Appellants allege that the pattern of conduct alleged in this case has occurred in several other real estate developments, and has damaged other unrelated sellers and competing CMLS members for many years and in hundreds of additional transactions. (R. p. 90 ¶354, p. 117 ¶ 468).

and marketing efforts of the Respondents with respect to the Properties had been ongoing since 2006, their wrongful conduct had been fraudulently and intentionally concealed from the Appellants prior to January 10, 2017. The Respondent's involvement with the Properties continued through May 11, 2017, when the relationship was terminated by the Appellants as a result of the findings of the Appellants' due diligence efforts which began on January 10, 2017. (R. pp. 55-59 ¶¶142-165). The Properties subject to this litigation were sold in 23 different transactions totaling over $6,100,000 in gross proceeds. (R. pp. 59-64 ¶¶166-198).

On January 10, 2017, after the closings of all 23 transactions which are the subject of this litigation, the Appellants "relisted" their remaining 3 parcels of the Properties with a different licensed real estate agent who for the first time (i) provided the Appellants with the "agency disclosure" mandated by S.C. Code Ann. §40-37-139[2], (ii) requested that the Appellants execute the written agency agreements (also referred to as "listing agreements") and other forms mandated under the various provisions of Title 40, Chapter 57 of the South Carolina Code Annotated, and (iii) requested that the Appellants execute forms required under the rules of the CMLS through which the Properties were to be marketed (collectively the "Required Listing Documents"). (R. pp. 55-59 ¶¶142-165). The purposes of the Required Listing Documents were to (i) provide material and statutorily mandated disclosures of the Appellants' legal rights and the fiduciary obligations of the real estate professionals, (ii) to set forth the material terms of the agency relationship being entered into, and (iii) have the Appellants make elections and choices as to certain material terms of the listings and the methods to be used in the marketing of the

[2] All references herein to the South Carolina Code Annotated are to the Code as in effect at the relevant times. For example, Title 40, Chapter 57 was substantially amended effective as of January 1, 2017 (after all of the conduct subject to this action), and many of the relevant sections were renumbered (i.e. §40-57-139 was renumbered as §40-57-370 effective as of January 1, 2017).

Properties. Prior to January 10, 2017, the Appellants had been denied these material, fiduciary disclosures, and the opportunity to make the material elections and choices set forth therein.

As a result of having been presented for the first time with the Required Listing Documents on January 10, 2017, the Appellants began performing factual and legal due diligence as to why the Required Listing Documents had never been presented to the Appellants by the Respondents. (R. p. 58 ¶¶159-160). As part of their due diligence in early 2017, the Appellants requested the Respondents to provide copies of all documents relative to their work on the Properties, and to provide full and immediate disclosure of all previously undisclosed acts of the Respondents in their fiduciary capacities related to the development, marketing and sale of the Properties (all requested documents and disclosures referred to herein as the "Disclosure Request"). (R. pp. 73-74 ¶¶277-279). On or around May 24, 2017, the Respondents retained Rex Casterline ("Casterline") of Blair Cato Pickren Casterline, LLC ("Blair Cato") to handle the Appellants' Disclosure Request. (R. p. 75 ¶¶284-286). The Respondents, with Mr. Casterline's assistance, delayed the response to the Disclosure Request for over 15 months until August 28, 2018. (R. pp. 75-82 ¶¶286-317). A full response to the Disclosure Request has not yet been made. (R. pp. 81-82 ¶¶315-317).

During the Appellants' due diligence, and as specifically set forth in the Complaint, the Appellants discovered that the Respondents' development, marketing and sales efforts related to the Properties had been expressly prohibited under multiple provisions of Title 40, Chapter 57. The Appellants also discovered that the Respondents had engaged in acts of self dealing in violation of the Respondents' various fiduciary duties to the Appellants. For example, the Appellants discovered that the Respondents had violated the rules of the CMLS in all 23 transactions involving the Properties. The CMLS rule violations promoted the self interest of the

Respondents (i.e. larger commission payments) over the financial interests of the Appellants (i.e. higher sales prices and quicker sales) by hiding the available listings of the Properties from competing members of the CMLS for the vast majority of the time the Properties were available for purchase. (R. pp. 43-44 ¶¶83-86, pp. 52-54 ¶¶129-141). Under the clear and unambiguous rules of the CMLS, the Properties could not be withheld from the CMLS data base (and other CMLS members) without the informed and written consent of the Appellants. Informed and written consent of the Appellants was not obtained in direct violation of CMLS Rule 1(b)(3), and in breach of the Respondents' fiduciary duties of disclosure and loyalty. (R. pp. 42-44 ¶¶77-86).

The Respondents' failure to expose the Properties to the full real estate market materially damaged the Appellants by generating below fair market value sales prices, and a substantially slower rate of sales. The several thousand competing members of the CMLS[3] were damaged by the lack of access to the hidden listings of the Properties as they had paid several hundred dollars a year in annual CMLS dues for access to all listings of other members in strict accordance with the CMLS rules. (R. pp. 43-44 ¶¶83-86, p. 54 ¶141, p. 85 ¶¶328-330, p. 116 ¶464-465). The Appellants were not members of the CMLS, and had no access to the rules, bylaws or website of the CMLS. (R. pp. 58-59 ¶¶161-165). As part of the their due diligence efforts after January 10, 2017, the Appellants arranged for access to the CMLS rules, bylaws and historical database for periods prior to January 10, 2017 to determine the extent of the Respondents' wrongful conduct under the CMLS rules. (R. p. 58 ¶¶159-160).

The Appellants allege the purpose of the Respondents' fraudulent, unlawful and deceptive conduct was to wrongfully increase the amount of, and total percentage of the commissions paid to the Respondents on the sales of the Properties. (R. p. 54 ¶141). Essentially, the Respondents

[3] The CMLS website currently claims over 500 member real estate firms and over 3,500 member agents.

attempted to limit the marketing of the Properties to individuals within the Respondents' sphere of influence who could be represented by SVR. By representing both the seller and the purchaser in a transaction, SVR would receive one hundred percent (100%) of the available commission instead of only fifty percent (50%). The Respondents illegally represented both the Appellants and the purchasers in 18 of the 23 transactions without the dual agency agreements mandated by S.C. Code Ann. §40-57-137(M)(1) or any of the other required fiduciary disclosures. The Respondents' wrongful conduct in marketing the Properties violated the clear and unambiguous provisions of SVR's Policy Manual which was required by S.C. Code Ann. §§40-57-135(A)(8) and 137(B), thereby proving the knowing and willful nature of all of the Respondents' violations relative to the Properties. (R. pp. 67-68 ¶¶219-223, pp. 89-90 ¶¶351-352).

The Appellants allege that the three Respondents in the aggregate (i) violated over 20 sections of Title 40, Chapter 57; (ii) violated at least 5 provisions of Title 40, Chapter 1; (iii) violated at least 9 different rules of the CMLS; (iv) violated CMLS rules specifically modified by at least 4 provisions of Judge Solomon Blatt, Jr's Final Order (the "Blatt Final Order") dated August 17, 2009 approving a voluntary settlement in the matter of *United States v. Consolidated Multiple Listing Service,* Case No. 3:08-CV-01786-SB, a United States Dept. of Justice action against the Columbia/Lexington CMLS for anti-competitive practices and violations of the federal Sherman Act; (v) constituted willful and knowing violations of Title 39, Chapter 5 (the South Carolina Unfair Trade Practices Act "the UTPA"); (vi) violated the common law of agency and fiduciary duty in South Carolina; (vii) violated numerous provisions of the SVR "policy manual"; (viii) violated multiple rules of the South Carolina Rules of Professional Conduct (the "SCRPC") since Respondent Wilkins was a licensed attorney in South Carolina; and (ix) constituted fraud

under South Carolina law (all such alleged violations collectively referred to herein as the "Respondents' Violations"). (R. pp. 187-188, 225-237).

The Appellants brought equitable actions for breach of fiduciary duty, restitution, unjust enrichment, quantum meruit, and conversion seeking disgorgement and restitution of all unlawful compensation with prejudgment interest. The Appellants brought additional claims for constructive fraud, negligence, negligent representation, and an action under the UTPA. In addition to disgorgement and restitution of the unlawful compensation, the Appellants seek additional damages arising from the below fair market value sales prices, increased interest costs on infrastructure loans resulting from delayed sales, and other damages such as increased legal and accounting fees arising from the delayed sales; all of which were the direct result of the Respondents' breaches of fiduciary duty and acts of self dealing. Due to the "knowing and willful" nature of the Respondents' fraudulent, unlawful and deceptive conduct, the Appellants seek mandatory treble damages and attorney fees under their UTPA claim pursuant to S.C. Code Ann. §39-5-140.

On November 21, 2019, a mere 42 days prior to the filing of the Complaint, Respondents' current attorney, Mr. Eric Bland of Bland Richter, LLC, voluntarily produced 2 "examples" of fraudulent "listing agreements" (the "Fraudulent Documents") which had been previously concealed from the Appellants. (R. pp. 189, 206-207, 219-221, 240-244, 324). The documents are fraudulent in that they were created and executed by the Respondent Wilkins and others without any authority from the Appellants, were created for the purpose of "papering the files", were factually inaccurate, and the mere existence of the Fraudulent Documents was intentionally and

fraudulently denied and concealed from the Appellants until November 21, 2019.[4] (R. p. 82 ¶317). On August 27, 2018, in response to a specific due diligence question from the Appellants, Mr. Casterline stated in writing that "my client has made a diligent search of all files related to Panorama Point and **does not have copies of the listing agreements during the applicable time period**."(emphasis added)(the "Casterline Representation"). (R. p. 82 ¶319). The November 21, 2019 production of the Fraudulent Documents by Mr. Bland irrefutably proves the Casterline Representation was false as the two Fraudulent Documents are dated May 16, 2011 and November 11, 2012, and were in the possession of the Respondents on August 27, 2018 when the Casterline Representation was made. Based on the dates of the Fraudulent Documents, they had been concealed from the Appellants for at least 7 years.[5] After filing the Complaint and engaging in informal settlement negotiations, the Appellants' attorney sent a formal written request to Mr. Bland on July 14, 2020 requesting the immediate production of the balance of the Fraudulent Documents and all other documents created and signed "on behalf of" the Appellants (the "Fraudulent Document Request"). (R. pp. 201-202). The Respondents have refused to respond to the "Fraudulent Document Request", therefore this incident of "extrinsic fraud" is ongoing as of today.[6]

[4] The dates on the two Fraudulent Documents correspond to the dates the two subject parcels were published to the CMLS database, not the date the two parcels were first marketed by the Respondents as required by S.C. Code §40-57-135(C)(4).

[5] Without Discovery, the Appellants lack sufficient knowledge at this point to determine if the Casterline Representation was a knowingly false statement by Mr. Casterline, or whether the Fraudulent Documents had been concealed from Mr. Casterline by the Respondents.

[6] By voluntarily producing the two Fraudulent Documents, the Respondents' attorney waived any claim of confidentiality or privilege with respect to those and any other similar fraudulent documents. Such Fraudulent Documents were never confidential or privileged under SCRPC Rule 1.6, and were at all times subject to disclosure under Rule 1.6.

Standard of Review

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431 (S.C. 2009). The decision to grant a pre-answer Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. 2019). A motion to dismiss pursuant to Rule 12(b)(6) "is not a vehicle for addressing the underlying merits of the claim." Skydive at 180. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses" Id. at 180 (internal citation omitted). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the Appellant, would entitle the Appellant to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (S.C. 2006).[7] "An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518 (S.C. 2000).

ARGUMENTS

Issue I.

Did the Lower Court err by failing to address the specific incidents of extrinsic fraud involving the Fraudulent Documents?

The Lower Court erred by failing to address the effect of the ongoing extrinsic fraud involving the creation and concealment of the Fraudulent Documents with the assistance, knowing

[7] Respondent Wilkins is the estate developer/attorney who "slip sheeted" the two deeds in Spence v. Spence and which improper act was the key issue in that case.

or unknowing, of at least two of the Respondents' attorneys on the application of any statute of limitations.[8] The Lower Court was briefed on the November 21, 2019 production of the Fraudulent Documents, and was provided copies of the Fraudulent Documents which contained the true signature of Respondent Wilkins, a licensed attorney. (R. pp. 141-142, 189, 201-202, 206-207, 220-221, 240-244, 272, 308-309, 322, 324). The Appellants are informed and believe that the Fraudulent Documents, and other substantially similar fraudulent documents, were created by the Respondents to "paper the files" to survive any compliance audits by the CMLS after the entry of the Blatt Final Order. (R. pp. 189, 201-202). The Appellants' written Fraudulent Document Request has not been honored to date; therefore the extrinsic fraud is continuing. (R. pp. 201, 245-247).

With respect to the Respondents' Motions to Dismiss, the existence of the Fraudulent Documents proves that the Respondents actively and intentionally concealed their fraudulent, illegal and deceptive conduct from the Appellants, the CMLS and others.

The definition of "extrinsic fraud" in South Carolina involving licensed attorneys – as officers of the court – was fully developed by the Supreme Court in Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d 605 (2003). "Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court"(emphasis added). Id. at 82. In Stoney v. Stoney, 425 S.C. 47, 819 S.E.2d 201 (S.C. Ct.App. 2018), the court addressed extrinsic fraud by a licensed attorney who was a party to a family court proceeding. The husband, a licensed

[8] While the Appellants first address the facts related to the Fraudulent Documents and their concealment in this Issue I as "extrinsic fraud," the effect of these same facts on the application of various statutes of limitations under additional legal principles (i.e. estoppel, fraudulent concealment, unclean hands, etc.) are discussed in Issue II *infra.*

attorney, misrepresented to his wife that certain relevant documents did not exist, and concealed those documents from his wife in an attempt to gain an advantage in the divorce proceeding. Id. at 69. The court ruled that such conduct by a party who was a licensed attorney constituted extrinsic fraud. Id.

In response to a specific due diligence inquiry from the Appellants, Mr. Casterline made the Casterline Representation that the Respondents had no copies of any listing agreements prior to January 1, 2017. This representation was known to be false by Respondent Wilkins, a licensed attorney, on the day it was made as his true signature was on one of the two Fraudulent Documents. As specifically pleaded in R. p. 93 ¶363, p.94 ¶¶ 368-369, Mr. Casterline made other false statements about an "unknown" person removing a "file where they were kept" in an attempt to provide a "cover story" for the missing listing agreements, and to assist in the ongoing concealment of the Fraudulent Documents. This demonstrably false statement was an act of extrinsic fraud. Under the 5 year document retention requirement of S.C. Code Ann. § 40-57-135(D)(1), on May 24, 2017 when Mr. Casterline acknowledged in writing the Appellants' Disclosure Request, at least 13 listing agreements should have still been in the files of the Respondents.[9] The Appellants specifically pleaded that the files produced by Mr. Casterline, on information and belief, had been "purged" of various documentation such as the Fraudulent Documents. (R. p. 82 ¶317). The production of the Fraudulent Documents on November 21, 2019, proved this allegation to be true.

The Casterline Representation was an irrefutable incident of extrinsic fraud by Respondent Wilkins, and court sanctioned discovery will determine Mr. Casterline's knowledge and involvement in the extrinsic fraud. The refusal by the Respondents' current attorneys to provide all other fraudulent documents in response to the Fraudulent Document Request is a continuation

[9] There were 13 parcels closed after May 24, 2012, the beginning date of the 5 year document retention rule as of May 24, 2017.

of this incident of extrinsic fraud. In the Respondents' oral argument to the Lower Court, their attorney "contend[ed] that we had signed listing agreements" and admitted that "[s]ome of them [signed listing agreements] do [exist]". (R. p. 355, lines 7-9). This statement to the Lower Court directly and unequivocally contradicts the Casterline Representation made on August 27, 2018, and is a separate incident of extrinsic fraud. The "signed listing agreements" which the Respondents' attorney contended "do" exist, other than the two Fraudulent Documents, have never been given to the Appellants despite numerous requests. The Appellants briefed the Lower Court on the currently available evidence that other Fraudulent Documents, other than the two produced by Mr. Bland, "do exist," and that those additional fraudulent documents are currently being actively concealed by the Respondents and their attorneys. (R. pp. 201-202).

In the Lower Court's Rule 59 Order, the Lower Court specifically acknowledged that the "Appellant alleges that this Court's Order (1) did not rule on Appellants allegations of intrinsic fraud, (2) did not address Appellants' allegations that Respondent Wilkins signed a "fraudulent listing agreement," … (4) did not address Appellants' allegations that various attorneys representing the Respondents allegedly concealed fraud,…" (emphasis added). (R. p. 23). While acknowledging the Appellants' specific allegations of the elements of the extrinsic fraud, the Lower Court's Rule 59 Order then stated "[a]fter careful consideration of the parties respective positions, and review of the submissions made to this Court, the Court is unable to find any fact or issue of law that was misapprehended or overlooked in its February 16, 2021 Order"(emphasis added). (R. p. 24). Neither the Order nor Rule 59 Order issued by the Lower Court devotes a single word to discussing these incidents of extrinsic fraud. The Appellants assert that the failure to address these acts of extrinsic fraud, and to address the effect of that and other fraud on the application of any statute of limitations was an abuse of discretion by the Lower Court. The

incidents of extrinsic fraud evidenced in the record thus far may operate to preclude the application of any statute of limitations to the Appellants' causes of action. Robinson v. Estate of Harris, 388 S.C. 616, 625, 698 S.E.2d 214 (S.C. 2010) (cites to companion decisions in the Robinson v. Estate of Harris matter omitted).[10]

Issue II.

Did the Lower Court err by failing to take the allegations of the Complaint with respect to the dates of discovery of each of the Appellants' various injuries as true, and by failing to make all reasonable inferences from those allegations in favor of the Appellants, in response to the Respondents' pre-answer motion to dismiss under Rule 12(b)(6)?

The Complaint specifically alleges that the Appellants' various causes of action arise from separate and distinct acts of three separate individuals and entities. Each of the three Respondents violated multiple provisions of law, of which many violations were unique to a single Respondent. Respondents Wilkins and SVR are alleged to have also violated, with the assistance of Respondent RPW, the rules of the CMLS. These separate and distinct violations give rise to a multitude of discrete and independently actionable wrongs.[11] For example, the various and separate violations of Title 40, Chapter 57 (i.e. failure to obtain listing agreements and failure to obtain dual agency agreements) provide separate and distinct, but independently adequate foundations for all of the Appellants' various causes of action. The various violations of the rules of the CMLS provide completely different, but equally adequate foundations for those same causes of action. The various and distinct statutory violations, as well as the CMLS rule violations are pleaded separately throughout the Complaint. E.g. compare (R. pp. 42-43 ¶¶77-79, p. 97 ¶380, pp. 44 ¶¶85-86, p.98

[10] The Supreme Court issued 4 separate but related opinions in the Robinson v. Estate of Harris matter.

[11] The Respondents complain about the length and volume of the Complaint in their two Motions to Dismiss. The Appellants assert that it was necessary to plead the necessary foundations for all of the various and diverse claims which, on a transaction by transaction-Respondent by Respondent basis, number in the hundreds. (R. pp. 225-237).

¶386). Knowledge of the facts and circumstances of one actionable wrong does not constitute knowledge of the facts and circumstances of a separate and independently actionable wrong; therefore each actionable wrong has its own separate statute of limitations.

As specifically pleaded in the Complaint, the presentation of the Required Listing Documents to the Appellants on January 10, 2017, for the first time raised a red flag as to the possibility that (i) the Respondents' had violated the fiduciary disclosure and agency provisions of Title 40, Chapter 57, and (ii) the Respondents had also violated the rules of the CMLS. (R. pp. 55-59 ¶¶142-165). The Appellants began appropriate factual and legal due diligence immediately after receiving the Required Listing Documents (including gaining access to the rules of the CMLS), and the Complaint was filed within 3 years of January 10, 2017, thereby satisfying any and all potentially applicable statutes of limitations.

A discovery statute of limitations in South Carolina "runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct"(emphasis added). Dean v. Ruscon Corporation, 321 S.C. 360, 363, 468 S.E.2d 645 (S.C. 1996)(internal citation omitted). The beginning of a discovery statute of limitations requires "notice" of the injury or wrongful conduct which is the basis of the litigation. Id. at 363-364. The failures of the Respondents, acting in their fiduciary capacities, to comply with the statutory requirements of Title 40, Chapter 57, and to comply with the rules of the CMLS are the only "wrongful conduct" which is the basis of the claims in this litigation. As more fully discussed in Issue III *infra*, the Respondents' breaches of their fiduciary duties of disclosure and loyalty in this matter concealed their wrongful conduct until at least January 10, 2017.

In holding that all of the Appellants' various claims were barred by the statute of limitations, the Lower Court's Order erroneously relies on the fact that the various real estate

commissions and development fees "were disclosed on closing statements for each sale and were signed off on by [Appellant] Porth." (R. p. 3). The Order never explains how the disclosure of the amount of the fees and commissions constituted notice of the Respondents' wrongful conduct which forms the basis of this litigation. For example, the Lower Court's Order never discusses how a HUD-1 form put the Appellants on notice of the CMLS rule violations. Moreover, this statement in the Order mischaracterizes the Appellants' various causes of action by referring to the "development fees and realtor commissions of which the Plaintiffs now complain"(emphasis added). In this litigation, the Appellants "complain" of the Respondents' breaches of fiduciary duty, acts of self dealing, and acts of unfair competition; they do not "complain" of the fees and commissions, nor do they "complain" of the actions of the various purchasers in the 23 transactions.

The HUD-1 forms contain no red flags as a matter of law with respect to the Respondents' breaches of fiduciary duty, fraudulent and illegal acts of self-dealing, or acts of unfair and deceptive competition. Although unclear, the Lower Court's Order appears to hold that the Appellants ratified the payment of the unlawful compensation by "signing off on" the HUD-1 forms and being "aware" of the fees and commissions. (R. p. 3, fn. 4). This is clear legal error as "[o]ne asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts, (2) **the principal's full knowledge of the facts**, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements." (emphasis added). Lincoln v. Aetna Casualty Surety Co., 300 S.C. 188, 191, 386 S.E.2d 801, 803 (S.C.Ct.App. 1989). The "agent has the burden of establishing that the principal consented" to the agent's improper material benefit. Restatement Third, Agency §8.06 at Official Comment (c). "The rule entitles the principal to assume that the agent will make

the disclosures requisite to effective consent by the principal"(emphasis added). Id. The Respondents' duty to disclose all of the material facts is heightened by their pecuniary interest in the transactions, and their "conflict of interest due to the large commission[s] they anticipated." Anthony v. Padmar, 320 S.C. 436, 450, 465 S.E.2d 745 (S.C.Ct.App. 1995). The court in Anthony rejected the theory of estoppel by ratification as "without merit" in the absence of full disclosure of the facts. Id. at 452-453.

The Order also states "the [Appellants] were aware as early as 2013 that the [Respondents] had breach their fiduciary duties, yet no action was brought until January 2, 2020." (R. p. 17). The Lower Court relies on allegations in the Complaint with respect to the Lexington County refund issue (R. p. 86 ¶¶333-334) and the Lot 15 issues (R. pp. 68-70 ¶¶225-254)(collectively referred to herein as the "2013 Issues") to hold that the various statutes of limitations on the Appellants' unrelated causes of action were triggered in 2013. In reference to the 2013 Issues, the Lower Court states that the Appellants had been put on actual notice that "some right of theirs had been invaded by the Respondents." (R. p. 4). Knowledge of a prior, distinct breach of fiduciary duty does not trigger the statute of limitations for other unrelated and separately actionable breaches by the same party, and certainly does not trigger the running of the statute of limitations on breaches of fiduciary duty by separate and distinct parties. McAlhany v. Carter, 415 S.C. 54, 66, 781 S.E.2d 105, 112 (S.C.Ct.App. 2015)(knowledge of termite damage was not knowledge of mold damage for purposes of statute of limitations); Holly Woods Ass'n of Owners v. Hiller, 392 S.C. 172, 184-185, 708 S.E.2d 787 (S.C.Ct.App. 2011)(litigation was based on development problems discovered years later than similar problems which plaintiffs had discovered earlier in different areas of the development); see also State v. Ortho-McNeil-Janssen Pharms, Inc., 414 S.C. 33, 78, 777 S.E.2d 176 (S.C. 2015)(discussing the "inequities that would arise if the expiration of the statute of

limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct.").

Furthermore, the Lower Court is factually incorrect in stating that the Appellants "took no action" with respect to the 2013 Issues. (R. p. 5). This negative inference against the Appellants is without evidentiary support as the Appellants specifically pleaded that they successfully obtained a refund of the Lexington County cash bond amount from RPW. (R. p. 88 ¶344). The Appellants did not pay the Lot 15 rock removal expenses thereby fully addressing the 2013 Issues without the need for litigation.[12] The 2013 Issues were expressly pleaded for the purpose of laying a factual foundation for the possibility of repetition of the unfair and deceptive acts forming the basis of the Appellants' UTPA claim. (R. p. 117 ¶469).

The Lower Court's Order also lacks evidentiary support for its statement that "[a]ccepting the allegations of the Complaint as true, it is clear that the [Appellants] knew that there were no written listing agreements as required by South Carolina law." (R. p. 4). This improper negative inference by the Lower Court directly contradicts the specific allegations of the Complaint that (i) the Appellants did not know that written listing agreements were required by S.C. Code Ann. §40-57-135(C)(4) and (D)(4), (ii) that the Respondents represented that no such written agreements were necessary, and (iii) that the Appellants did not know of the other legal requirements applicable to the Respondents.[13] (R. pp. 53 ¶136, pp. 96-97 ¶¶379, p. 111 ¶441).

The statute of limitations on the Appellants' UTPA Claim is 3 years from the date of "discovery of the unlawful conduct which is the subject of the suit." S.C. Code Ann. §39-5-150.

[12] The Appellants did not learn of the business relationship between Respondent Wilkins and the purchaser of Lot 15 (closed in 2013) until sometime in 2017 as part of their due diligence, and still do not know the details or extent of that relationship. (R. p. 71 ¶¶262, 265).

[13] The requirements of Title 40, Chapter 57 did not apply in any respect to the Appellants' conduct or to the conduct of the various purchasers of the Properties. The transactions in which title to the Properties was transferred by the Appellants to the various purchasers was not governed or impacted in any manner by the provisions of Title 40, Chapter 57.

In the present action, the "unlawful conduct" which forms the basis of the Appellants' UTPA claim consists of the Respondents' violations of the statutory disclosure provisions of Title 40, Chapter 57, and the intentional violations of the rules of the CMLS. (R. pp. 43-44 ¶¶82-86 , pp. 47-48 ¶¶106, p. 67 ¶222). The Lower Court's Order never states that the Appellants were put on notice of the CMLS rule violations prior to January 10, 2017. The Appellants were not licensed real estate professionals, and were not members of the CMLS. (R. pp. 58-59 ¶¶161-165). The CMLS rule violations alone independently support all of the Appellants' causes of action as they are independently actionable breaches of the Respondents' fiduciary duties. The Respondents' violations of the CMLS rules to hide the Properties from the full real estate market and competing CMLS members in order to market primarily to purchasers who could be represented by SVR was a breach of the Respondents' fiduciary duties of disclosure and loyalty, and clearly constituted an unfair and deceptive trade practice which also affected thousands of competing real estate professionals. (R. pp. 116-117 ¶¶464-467).

The Lower Court's holding that the Appellants' various causes of action were barred by the statute of limitations based on the allegations of the Complaint was an abuse of discretion, and the Order dismissing the Complaint with prejudice should be reversed.

Issue III.

Did the Lower Court err by failing to address the Appellants' arguments that the fraudulent and illegal acts of the Respondents, all of which constitute unclean hands, either tolled or equitably barred the Respondents from raising any statute of limitations defense?

The statute of limitations is an affirmative defense which is subject to the equitable doctrines of estoppel and equitable tolling, and the defense is not an automatic bar to claims. Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (S.C.Ct.App. 2019). Fraudulent

conduct, fraudulent concealment and illegality of conduct are equitable bars to the assertion of the defense of the statute of limitations under well settled South Carolina law. Id. at 56. Despite these legal arguments being briefed to the Lower Court on three different occasions, the Order failed to devote a single sentence to addressing these relevant and controlling legal arguments.[14] (R. pp. 134-135, 138-142, 187-188, 200-207, 214-217, 219-221, 308-309, 322-326, 329-330). The Rule 59 Order specifically acknowledged Appellants' assertion that these arguments had been raised and not been ruled on by the Court, but yet the Lower Court failed to devote a single word to these arguments. (R p. 23).

The Respondents are estopped from claiming the statute of limitations as a defense because the delay that otherwise could give operation to the statute had been induced by the Respondent's conduct. Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (S.C.Ct.App. 1998); Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (S.C. 2000). The failure of the Respondents to provide the Required Listing Documents prior to January 10, 2017, and the Respondents' various acts of extrinsic fraud and fraudulent concealment are the direct cause of the Appellants not discovering the Respondents' fraudulent, illegal and deceptive conduct prior to January 10, 2017.

The Respondents' various violations of their fiduciary duty of disclosure constitute fraud under well settled South Carolina common law. "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud"(emphasis added). Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (S.C.Ct.App. 2004); Anthony v. Padmar *supra* at 449. Section 40-57-

[14] The allegations in the Complaint with respect to fraud, illegal activity and "unclean hands" are not just conclusory statements of fact or law. Instead, they are specific factual allegations which identify the specific actor, the specific law or rule violated, and the time the conduct occurred. The Appellants assert that these specific factual allegations are more than sufficient to survive any Rule 12(b)(6) challenge.

135(D)(4) expressly provides that the enumerated, required terms of a written agency agreement are "material" in nature. "Nondisclosure is fraudulent when there is a duty to speak" Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C.Ct.App. 1993). "Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). "The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent" (emphasis added). Darby at 347-348.

"Where a statute sets a limitation period for an action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental fairness." Hooper v. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 114, 687 S.E.2d 29, 32 (S.C. 2009). Equitable tolling does not require evidence that the Respondents made any misrepresentation to the Appellants, silence is sufficient. Magnolia N. Prop. Owners Association, Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (S.C.Ct.App. 2012).

The 3 year statute of limitations applicable to an action for fraud runs from the "discovery by the aggrieved party of the facts constituting the fraud" (emphasis added). S.C. Code Ann. §15-3-530(7). The "facts constituting the fraud" in this case were the various acts of fiduciary nondisclosure by the Respondents (i) in violation of the specific disclosure requirements of §§40-57-135, 137 and 139, (ii) in violation of the specific rules of the CMLS, and (iii) in the creation and active concealment of the Fraudulent Documents with the assistance of various attorneys.

Courts should employ restraint in the application of the statute of limitations in situations involving allegations of fraud and fraudulent concealment to avoid "the statute of limitations becoming an instrument of fraud." Limon v. Sandlin, 200 So. 3d 21 (Ala. 2015)("A party cannot

profit by his own wrong in concealing a cause of action against himself until barred by limitation. The statute of limitations cannot be converted into an instrument of fraud" (internal citation omitted).

The Appellants argued to the Lower Court that the Respondents' "unclean hands" arising from their fraudulent and illegal conduct precludes the Respondents from asserting the affirmative defenses of the statute of limitations. (R. pp. 140-142, 202-203, 322-326, 272, 276-277).

In Vicary *supra*, the court invoked a similar analysis stating that the passage of time cannot transform an invalid or unlawful act into a valid or lawful act. Vicary at 56. The court stated that the Town of Awendaw's failure to comply with applicable statutory requirements and the Town's failure to provide statutorily mandated notices constituted grounds for estopping the Town from asserting a statute of limitations defense which would have the effect of rendering the Town's illegal activity valid. Id. The court held that these statutory disclosure and notice violations constituted "unclean hands." Id.

The law in South Carolina is well settled and long standing that the courts will not assist parties who have acted unlawfully or in contravention of statutory public policy. White v. Bank, 66 S.C. 491, 503-4, 45 S.E. 94, (S.C. 1903 A "Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2nd 516 (S.C. 2010).

The Lower Court expressly relies on the Development Agreement which the court states "contained provisions for the payment of fees to the Developer as well as provisions for the payment of real estate commissions for listing and sales with Respondent SVR serving as the exclusive listing agent." (R. p. 2). The Lower Court's reliance on the Development Agreement is legal error as the Development Agreement was *void ab initio*. (R. pp. 46-47 ¶¶100-103). One who

"negotiates or attempts to negotiate the listing … of real estate…; [or] solicits a referral in order to conduct activities set forth in this section; …" is a "Broker" under the statutory definition, and must be licensed pursuant to S.C. Code Ann. §40-57-30(3). RPW, the only Respondent who was a party to the Development Agreement, was an unlicensed entity, and the Development Agreement was, therefore, illegal. S.C. Code Ann. §40-57-20; (R. pp. 46-47 ¶¶100-103). (Respondents SVR and Wilkins were not parties to the Development Agreement, nor did the Development Agreement meet the requirements for a valid listing agreement set forth in S.C. Code Ann. §40-57-135(D)(4).[15] (R. p. 44 ¶88, p. 47 ¶102). The Lower Court's improper negative inference that the Development Agreement was valid and lawful is legal error.

Issue IV.

Did the Lower Court err by holding that the Appellants' breach of fiduciary duty claims are not equitable, and therefore not exempt from the application of any statute of limitations defense under the South Carolina Supreme Court's holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020)?

The Lower Court's Order incorrectly held that the Appellants' claims for breach of fiduciary duty, restitution, quantum meruit, unjust enrichment, and conversion, all of which seek the disgorgement and return of all illegal real estate commissions and development fees (the "Disgorgement and Restitution Claims") are legal in nature, and not equitable. (R. pp. 11-19). The Appellants assert that their Disgorgement and Restitution Claims are inherently equitable, and not subject to any statute of limitation defense under the Supreme Court's recent holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020). In Thomerson the Supreme Court clarified

[15] The Development Agreement failed to satisfy any of the 12 distinct requirements of S.C. Code Ann. §40-57-135(D)(4).

that equitable actions, including equitable actions which seek the payment of money, are not subject to statute of limitations defenses. Id. at 259.

The Respondents expressly acknowledged to the Lower Court that the main purpose of the Appellants' Complaint is to seek "disgorgement" of the unlawful commissions and fees. (R. p. 121 ¶2, p. 125 ¶55, p. 126 ¶59). In their oral argument to the Lower Court, the Respondents' attorneys admitted three different times that the Appellants were seeking "disgorgement" of the unlawful compensation. (R. p. 354 line 20; p. 358, line 25; p. 374, lines 5-6)("the relief sought is returning of the commission fees and the development fees"). Despite the Respondents' acknowledgement, the Lower Court refused to apply the holding in Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010), where the Supreme Court specifically clarified that "[w]e now take this opportunity to stress that an action for breach of a fiduciary duty may sound in law or equity depending on the nature of the relief sought." Id. at 17, fn. 5. "Disgorgement is an equitable remedy,…" Id. at 18. As in the present case, in Verenes "[t]he remedy sought for the alleged breach of the fiduciary duty of loyalty is disgorgement." Id. at 19. "Disgorgement is an equitable remedy" and the fact that the Verenes appellant "will have to pay money to the trust if the allegations are proven, that does not mean Respondent's causes of action are legal in nature." Id. The Verenes court looked to the "body of the complaint" for the "main purpose" of bringing the action. Id. The main purpose of the Appellants' Disgorgement and Restitution Claims, as specifically set forth throughout the body of the Complaint, is to seek the disgorgement and restitution of all illegal compensation resulting from the Respondents' fraudulent, unlawful and deceptive conduct. (R. p. 96 ¶379, p. 99 ¶388-390 , pp. 101-102 ¶¶397-400, p. 103 ¶405, pp. 105-106 ¶¶412-415, p. 106 ¶417, p. 107 ¶¶ 419-422, p. 108 ¶425, p. 109 ¶430-431, pp. 111-112 ¶¶444-

448, p. 118 ¶471). "A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim." Thomerson at 259.

The Lower Court's Order cites Dereede v. Karp, 427 S.C. 336, 831 S.E.2d 435 (S.C.Ct.App. 2019) for the proposition that a "breach of fiduciary duty claim may be legal or equitable." (R. p. 14). In Dereede the court was dealing with action to compel a trustee to make a required distribution under the terms of a trust, and was not addressing a claim for disgorgement or restitution. Id at 339-340. The Dereede court expressly acknowledged that the Appellants in Verenes "sought the classic equitable remedies of restitution and disgorgement"(emphasis added). Id. at 341.

In an attempt to bolster its classification of the Disgorgement and Restitution Claims as legal and not equitable, the Lower Court incorrectly describes the basis for Appellants' claims by stating that "the basis for this relief is because the Realtor Respondents allegedly did not provide the services the Appellants paid for, including execution of written listing agreements." (R. p. 15). This statement by the Lower Court has no factual basis in the Complaint, and directly conflicts with the Lower Court's earlier statement that "[t]he Appellants advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor Respondents to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action"(emphasis added). (R. p. 2). The Lower Court's statement on page 15 (R. p. 15) directly contradicts the specific allegations of the Complaint that no valid contracts existed between the Appellants and any of the Respondents. (R. pp. 42-44 ¶¶77-86, pp. 44-49 ¶¶87-111).

Issue V.

Did the Lower Court err by holding that the Appellants are charged with "knowledge of the law" in direct contradiction to the statutory provisions of S.C. Code Ann. §§40-57-135, 137 and 139, and in direct contradiction of the statutorily enacted public policy of South Carolina?

The Lower Court's Order holding that all of the Appellants' various causes of action are barred by the statute of limitations is founded on the incorrect legal premise that the Appellants were "charged with knowledge of the law." (R. pp. 8-9). The Lower Court states that "[the Appellants argue that they should not be expected to have knowledge of law applicable to real estate professionals as if this law were locked behind some secret vault" (emphasis added). (R. p. 9). This improper statement by the Lower Court is legal error in that the Lower Court relies on law applicable to non-fiduciary contexts,[16] ignores the specific and unambiguous statutory language of Title 40, Chapter 57 to the contrary. The Lower Court also misstates the general rule of citizens being charged with knowledge of laws applicable to **their conduct** which is not without exceptions.

Pursuant to the clear and unambiguous language of S.C. Code Ann. §§40-57-139(A) and (B), a licensee must provide to a seller "at the first practical opportunity" a "meaningful explanation of agency relationships in real estate transactions" and "an agency disclosure form prescribed by the [S.C. Real Estate Commission]." S.C. Code §40-57-139(A).[17] Despite these unambiguous statutory provisions to the contrary, the Lower Court ruled that the Appellants are charged with knowledge of the very information the Respondents were required by statute to

[16] The Appellants address their justifiable reliance on the fiduciary status of the Respondents in Issue VI *infra*.
[17] Acknowledgement of receipt of the agency disclosure form must be contained in the written listing agreement mandated by §40-57-135(C)(4) pursuant to §40-57-139(B).

disclose, and which they fraudulently withheld from the Appellants in order to conceal their various acts of self dealing. This is legal error.

In S.C. Code Ann. §40-57-137(Q) the General Assembly expressly and unequivocally preempted all inconsistent common law by stating that "[t]he provisions of this section which are inconsistent with applicable principles of common law shall supersede the common law …" Any common law theory that citizens are generally charged with knowledge of the laws governing the conduct of licensed real estate professionals acting in a fiduciary capacity was expressly preempted by §40-57-137(Q) and the specific disclosure requirements of S.C. Code Ann. §40-57-139(A) and (B). Williams v. Gov't Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014)(In construing an insurance statute the Supreme Court stated that "The General Assembly is presumed to know the law, so in our view, the enactment of section 38-77-142 could be perceived as a response to these earlier decisions"); Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (S.C. 2012)("we presume the General Assembly is aware of the common law when enacting subsequent legislation").

The legislature clearly intended that clients of licensed real estate professionals not be charged with knowledge of the laws governing the conduct of those licensed professionals acting under a fiduciary duty. The text of a statute is considered the best evidence of the legislative intent or will. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (S.C. Ct. App. 2005). "Once the legislature has made [a] choice, there is not room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App. 1989). The "court's equitable powers must yield in the face of an unambiguously worded statute." Key Corporate v. Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (S.C. 2007)(internal citations omitted). "[I]t is beyond

this Court's power to effect a change in the statutes enacted by the Legislature." Id. at 61 (internal citations omitted).

By enacting S.C. Code Ann. §40-57-139 the legislature clearly intended to place on licensed real estate professionals the fiduciary burden of disclosing and explaining the various legal requirements of Title 40, Chapter 57 to their clients and customers. The Respondents were statutorily required to initially disclose the laws governing the permissible relationships with, and the fiduciary duties owed to the Appellants utilizing the specific "agency disclosure" form issued by the S. C. Real Estate Commission. S.C. Code Ann. §40-57-139(B). The "Agency Disclosure" approved by the Real Estate Commission contained specific discussions of the legal requirements for written agency agreements and dual agency agreements, as well as a discussion of the various fiduciary duties owed by the real estate licensee. The Respondents were statutorily required to make additional "material" disclosures through the terms of the written agency agreements as set forth in S.C. Code Ann. §40-57-135(D)(4).[18] When representing both the Appellants and a purchaser[19], the Respondents were required to make even more specific, material disclosures through a written dual agency agreement as set forth in S.C. Code Ann. §40-57-137(M). The Lower Court's Order, however, "render[s] the section[s] useless, and the General Assembly is presumed not to perform useless acts." Williams *supra* at 604. "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something" (internal citation omitted). Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (S.C. 2002). The Lower Court's Order charging the Appellants "with knowledge of the law"

[18] S.C. Code Ann. §40-57-135(D)(4) expressly states that the section's various requirements are "material" and sets forth nine (9) distinct written disclosures which must be contained in the listing agreement (subsections (a)-(f),(i),(j) and (l)), and sets forth three (3) additional requirements (subsections (g),(h) and (k)).

[19] Respondent SVR represented both the Appellants and the purchaser in 17 of the 23 transactions without a dual agency agreement required by S.C. Code Ann. §40-57-137(M)(1).

renders the legislature's statutory enactment of the various fiduciary disclosure obligations a "futile act."

Finally, the Lower Court's Order is in error in that it fails to address the Appellants' argument that "the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff'd in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986). In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the court cited the "often-cited case" of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915) for the proposition that one in a fiduciary position cannot "practice fraud" and then successfully defend on the ground that the victim of the fraud is "charged with knowledge" of the misrepresented facts. This is exactly what the Lower Court's Order does in this matter, and is therefore an error of law.

Issue VI.

Did the Lower Court err by failing to address the Appellants' argument that their reliance on the fiduciary status of the Respondents, and on Respondent Wilkins' status as a licensed attorney was a reasonable basis under South Carolina law for not performing due diligence on the legality of the Respondents' conduct prior to January 10, 2017?

The Lower Court's Order is in error in that it failed to address the Appellants' argument that an individual or entity in a fiduciary relationship with a licensed professional is justified in relying on the licensed professional even if reliance would not be justified in a non-fiduciary relationship. Epstein at 531; (R. pp. 137, 196-197, 328-329). The Appellants, therefore, were not required to initiate investigative due diligence into the fraudulent, illegal and deceptive conduct of

the Respondents until they were put on inquiry notice on January 10, 2017 that the provisions of Title 40, Chapter 57 and the rules of the CMLS may have been violated.

The Respondents expressly acknowledged that the Complaint alleges that the Appellants "justifiably believed that the Respondents were acting in compliance with the law …" (R. p. 128 ¶ 65, p. 111¶443). Respondent Wilkins was a licensed "broker-in-charge," and Respondent SVR was licensed as a "real estate office" pursuant to the provisions of Title 40, Chapters 1 and 57. (R. pp. 28-29 ¶¶7-10). Respondent Wilkins was also a licensed attorney. (R. p. 35 ¶41, p. 111 ¶443). The Appellants' reliance on the assumption that the Appellants' real estate matters would be handled by the Respondents in accordance with all applicable laws and rules was justified and manifestly reasonable. (R. p. 111 ¶443). The Appellants' specifically alleged that the purpose for requesting the services of the Respondents was to assure that matters entrusted to them would be handled in accordance with all applicable laws. (R. p. 39 ¶58).

In Holy Loch Distributors, Inc. v. Hitchcock, *supra*, the court addressed an issue factually analogous to the present case where the plaintiffs retained a law firm to assure compliance with applicable law to enable the plaintiffs' business to sell imported beer in South Carolina. Despite having retained the attorneys to handle compliance with all applicable laws, the plaintiffs in Holy Loch were cited for violations of federal laws applicable to their business. The court found that the "discovery" statute of limitations began to run on the date that federal ATF officers notified the plaintiffs that they were operating in violation of federal law. Despite the federal laws being directly applicable to the business of the plaintiffs[20] for over 2 years, the plaintiffs were not charged with knowledge of that law until actually being put on notice by the ATF agents as a result of their right to justifiably rely on their attorneys. Id. at 254.

[20] In the present litigation, the provisions of Title 40, Chapter 57 were not applicable to the Appellants' conduct in any respect, and did not create any duty, obligation or restriction on the conduct of the Appellants.

In True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997), the South Carolina Supreme Court addressed the application of the "discovery rule" in the context of a fiduciary relationship with a licensed attorney. The Court allowed a legal malpractice action filed in 1993 to proceed although filed 20 years after the conduct which occurred in 1973, holding that the Appellant properly brought the action within 3 years of the "discovery" of the cause of action even though the "injury" was apparent for at least 20 years. The Respondent attorney had failed to disclose conflicts of interest in accordance with applicable professional standards, and therefore the Appellant had no way of discovering that the injury, the lack of a cost of living clause in a lease agreement, was an actionable injury. The court stated that "knowledge of an injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by her attorney." True at 120. "Although petitioner knew of the lack of the cost of living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney." Id. "[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest" (emphasis added). Id.

The Appellants' justifiable reliance on Respondents SVR and Wilkins's licensed status is bolstered by S.C. Code Ann. §40-1-10(C)(3) where the General Assembly acknowledges the fact that the public has a need for "a substantial basis for relying on the services of the practitioner" when dealing with certain professions and occupations licensed under the various provisions of Title 40 such as real estate professionals.

The Lower Court's Order failed to address the fact that Respondent Wilkins' conduct, as a licensed attorney, was governed by the SCRPC. (R. pp. 37-38 ¶52). The Appellants specifically alleged that the SVR website contained a reference to Wilkins as a "licensed attorney in his own

right." (R. p. 36 ¶¶44-46).[21] The obvious purpose of such a reference was to induce clients and potential clients of SVR to rely on Wilkins' status as a licensed attorney.

Issue VII.

Did the Lower Court err by holding that Title 40, Chapter 57 of the South Carolina Code Annotated does not authorize private causes of action for breach of fiduciary duty for violations of its various statutory fiduciary requirements of disclosure and written consent set forth in S.C. Code Ann. §§40-57-135, 137 and 139?

The Order incorrectly holds that the South Carolina Real Estate Commission (the "Commission") is the only party authorized to bring a civil action for violations of the specific provisions of Title 40, Chapter 57. (R. pp. 9-10). The Lower Court's Order ignores the clear and unambiguous language of S.C. Code Ann. §40-57-137(Q) which expressly provides that "[e]xcept as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge"(emphasis added). As an example of the "except as otherwise stated" language of the statute, S.C. Code Ann. §40-57-740 contains specific prohibitions against causes of action in subsection (A) dealing with certain failures to disclose, and then provides specific authorization for causes of actions in subsection (B) for certain intentional misrepresentations. Section 137 contains numerous specific prohibitions against private actions, or other limitations on liability with respect to certain specified actions or inactions by licensees. E.g. §40-57-137(F), (K) and (O)(4)-(5). These specific limitations on private causes of action would be meaningless and unnecessary if private causes of action for violations of the agency and fiduciary provisions of Title 40, Chapter 57 were not otherwise permitted and authorized.

[21] The Appellants assert that this reference to Wilkins' status as a "licensed attorney" was improper under Rules 7.1 and 7.2 of the SCRPC as Wilkins' law license was in "inactive" status at all relevant times.

In S.C. Code Ann. §40-57-137(A) the legislature expressly provided that the fiduciary duties owed directly to clients are "the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting **as set forth in this chapter**."(emphasis added). The words "as set forth in this chapter" reference the entirety of Chapter 57, and clearly and unambiguously incorporate all of the various fiduciary requirements set forth in §§40-57-135, 137 and 139 which are at issue in this case. The Respondents' violations of these statutory provisions and the CMLS rules constituted breaches of their statutory and common law fiduciary duties[22], and provided a basis for the Disgorgement and Restitution Claims, the UTPA claim, and the Appellants' other causes of action.

In determining whether a statute creates a private cause of action in South Carolina, the main factor is legislative intent. Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 275-276, 802 S.E.2d 794 (S.C. 2017). In Fulbright the Supreme Court determined the legislature's intent with respect to statutory language used in the South Carolina Time Share Act (Title 27, Chapter 32) at S.C. Code Ann. §27-32-130 which states "[t]he provisions of this section do not limit the right of a purchaser or lessee or a vacation time sharing association to bring a private action to enforce the provisions of this chapter."[23] The Court held that the "unambiguous" language of §27-32-130 granted authority to bring a private action to enforce the statutory requirements of the Time Share Act. Id. at 276.

[22] The fiduciary and agency provisions of Title 40, Chapter 57 are based on, and provide contextual application to the general rules of agency as set forth in the Restatement Third of Agency. The Restatement Second of Agency was in effect in 1997 when Title 40, Chapter 57 was enacted, and was superseded by the Restatement Third of Agency in 2006.

[23] As in Title 40, Chapter 57 involved in the present case, Title 27, Chapter 32 contains an enabling provision which grants standing to the South Carolina Real Estate Commission to bring enforcement actions. In the absence of these enabling provisions, the Real Estate Commission would not have standing to bring such enforcement actions seeking injunctions and imposing other authorized disciplinary actions. The enabling language of S.C. Code Ann. §40-57-490, does not contain language stating that civil actions may only be brought by the Commission or LLR.

The Lower Court also ignored the official heading to S.C. Code Ann. §40-57-137 which contains the words "Real estate brokerage company duties to client" indicating a clear legislative intent to provide protection and rights to an individual client of a licensed real estate professional. The fiduciary duties of the Respondents under S.C. Code Ann. §40-57-137(A) in the present case were owed to the Appellants – not to the State of South Carolina; not to the South Carolina Department of Labor, Licensing and Regulation; and not to the South Carolina Real Estate Commission. The remedy for breaches of an agent's fiduciary duties is the forfeiture of the agent's compensation earned in the transaction in which the breach occurred. "An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty." Darby v. Furman *supra* at 348; see also Restatement Third, Agency §8.01, Official Comments (d)(2).

In Darby v. Furman, the real estate agent violated a fiduciary disclosure requirement now codified at §40-57-135(D).[24] Although the fiduciary breach in Darby occurred in 1987 prior to the enactment of the restatement of Title 40, Chapter 57 in 1997, the Supreme Court, indicated that the result under the new statutory framework would be the same.[25] Id. at 348. Not only did the Supreme Court affirm that a breach of fiduciary duty claim is a proper cause of action for violations of a real estate broker's fiduciary duty of disclosure and loyalty, but the Court held that the appropriate remedy for the broker's failure to make the legally mandated written disclosures was forfeiture of the commissions previously paid. Id.

The Lower Court's Order holding that Title 40, Chapter 57 does not authorize private causes of action for violations of its fiduciary duty provisions was legal error.

[24] The disclosure requirement involved in Darby is codified at §40-57-135(D), in the same section as the written agency agreement requirement involved in this litigation which is codified at §§40-57-135(C)(4) and (D)(4).
[25] The Darby Court referenced the violation of the "dual agent" prohibitions of §40-57-137(M) which occurred in 17 of the transactions involving the Properties.

Issue VIII.

Did the Lower Court err by holding that laches applies to the Appellants' based on the allegations of the Complaint?

The Lower Court erred by holding that with respect to the Appellants' Disgorgement and Restitution Claims, "based on the allegations of the Complaint, all such claims are barred by the doctrine of laches." (R. p. 18). This holding by the Lower Court evidences improper negative inferences against the Appellants in violation of the appropriate standard of review for a pre-answer motion to dismiss under Rule 12(b)(6). The Lower Court's holding has no evidentiary support in the Complaint as the holding is based on the Lower Court's incorrect statement that "[a]ccepting the allegations of the Complaint to be true, the Complaint alleges that the Appellants were aware of the Respondents alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property." (R. p. 19). In direct contradiction of the Lower Court's statement, the Complaint specifically alleges the discovery of the Respondents' fraudulent, unlawful and deceptive conduct occurred on January 10, 2017, which is after the last payment of unlawful commissions and fees to the Respondents on May 1, 2015[26]. (R. pp. 55-59 ¶¶142-165).

Under South Carolina law, "[t]o be charged with laches, a party must have knowledge of the facts upon which he bases his claim". Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (S.C. 1990)(internal citation omitted). "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." Robinson v. Estate of Harris, 389 S.C. 360, 698 S.E.2d 801 (S.C. 2010)(internal citation omitted). The creation and

[26] Appellants will amend the Complaint to add specific allegations that after the January 10, 2017 discovery of the Respondents' fraudulent, illegal and deceptive conduct, the Appellants notified the Respondents in writing that no additional real estate commissions or development fees would be paid. These written notifications were in relation to the sale of Lot 23 which closed on June 23, 2017. The Respondents were not involved in the sale of the Appellants' remaining two parcels after the closing of Lot 23.

subsequent concealment of the Fraudulent Documents, and the express provisions of the SVR Policy Manual prohibiting the Respondents' conduct irrefutably prove the Respondents were fully aware of the fraudulent and illegal nature of their actions. The Appellants contend that the Respondents could not, as a matter of law, be "prejudiced" by the success of their own intentional acts of illegal, fraudulent and deceptive conduct.

Issue IX.

Did the Lower Court err by considering documents not part or outside of the record, and by taking judicial notice of "the knowledge of Appellant Porth" from unreliable sources without compliance with Rule 201 of the South Carolina Rules of Evidence in considering a pre-answer Rule 12(b)(6) motion to dismiss?

The Lower Court's Order states that "[a]s the closings and Deeds were integral to the Complaint, the Court accepted for review copies of the Contracts of Sale, Deeds and HUD-1 statements which reflected that Appellant Porth executed the contracting and closing documents on behalf of Appellant Panorama Point, LLC" (emphasis added). (R. p. 3, fn 4). The Appellants attached no such documents to the Complaint, and were not provided notice of any such submission by the Respondents. This sentence, therefore, suggests an improper ex parte communication by the Respondents' attorneys to the Court in violation of SCRCP Rule 5(a) and (b)(3), and in violation of the South Carolina Rules of Professional Conduct Rule 3.5(b) and Comment 2. (R. p. 312). The Respondents did not deny this ex parte communication in their Sur-Reply to the Appellants' Rule 59 Brief. The review of such evidentiary documents, even if provided to the court with proper notice to the Appellants, when reviewing a pre-answer motion to dismiss under Rule 12(b)(6) is highly improper since the allegations of the Appellants' Complaint must be taken as true, and all doubts resolved in favor of the Appellants. The Lower Court failed to address this

ex parte communication in its Rule 59 Order, and the Appellants remain unaware of which documents were submitted to and reviewed by the Lower Court.

The Order further states "[a]additionally, the Court believes it proper to take judicial notice of the public record which would reflect [Appellant] Porth's knowledge and participation in the sales and marketing with associated listing prices which are the subject of this action" (emphasis added). (R. p. 3, fn. 4). The Court's unannounced intention to utilize South Carolina Rules of Evidence ("SCRE") Rule 201 to take judicial notice of a nonexistent "public record" to prove the "knowledge" of an individual Appellant in reviewing whether to grant the Respondents' pre-answer Motions to Dismiss was highly improper. (R. p. 312-314).

The Appellants assert that the Order's reference to an unidentified "public record which would reflect [Appellant] Porths' knowledge and participation in the sales and marketing with associated listing prices" lacks a factual foundation as such a "public record" does not exist. (R. p. 313). The Lower Court failed to identify (i) the identity of the public records being judicially noticed, (ii) the specific facts to be noticed from those records, (iii) the basis of the Court's determination that the public records meet the applicable standards for judicial notice as set forth in prior decisions such as State v. Odom, 412 S.C. 253, 265-266, 772 S.E.2d 149 (S.C. 2015) and Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610 (S.C.Ct.App. 2002); and (iv) how those judicially noticed facts prove the dates of the Appellants' discovery of the facts and circumstances of the various instances of unlawful, fraudulent and anticompetitive conduct by each of the separate Respondents which constitute the basis of the Appellants' various causes of action. Furthermore, the Appellants requested an opportunity to be heard pursuant to the requirements of SCROE Rule 201(e). (R. p. 313). The Lower Court never responded to the Appellants' request to be heard

pursuant to SCROE Rule 201(e), and further ignored the Appellants' objection to the improper taking of judicial notice in its Rule 59 Order.

Issue X

Did the Lower Court err in holding that the Appellants were *In pari delecto* with the alleged fraudulent, unlawful, and deceptive conduct of the Respondants based on the allegations of the Complaint?

The Lower Court is incorrect in holding that even if the Appellants' Disgorgement and Restitution Claims were equitable, the Appellants were *in pari delecto* with the fraudulent, unlawful and deceptive conduct of the Respondents. (R. p. 19). The Lower Court's holding is wholly without evidentiary support as the Complaint contains no allegations which could support an inference that the Appellants participated in the wrongdoing by the Respondents. The Appellants were not subject to the provisions of Title 40, Chapter 57; were not subject to the rules of the CMLS; and owed no fiduciary duties to the Respondents under applicable law. The Lower Court's holding is both factual and legal error, as the Lower Court provided no factual basis or legal authority for its holding, and provided no discussion of the rationale for its holding that the Appellants were *in pari delecto*.

Issue XI

Did the Lower Court err in granting the Respondents' Motions to Dismiss since the dates of discovery of the Appellants' various injuries under any applicable "discovery" statute of limitations are questions of fact?

The Order is incorrect in its holding that the Appellants' various claims are barred by various "discovery" statutes of limitations, even if they are applicable and not equitably barred or tolled, as the dates of "discovery" of the facts and circumstances of the wrongful conduct by the

three separate Respondents are questions of fact. As such, the Appellants various claims may not be dismissed pursuant to the Respondents' pre-answer Motions to Dismiss under Rule 12(b)(6). The allegations of the Complaint sufficiently pleaded satisfaction with any and all applicable three year "discovery" statutes of limitations. See Issue II *supra*. When the evidence of whether a person knew or should have known of a claim is conflicting, the question becomes an issue of fact. Maher v. Tietex, Corp., 331 S.C. 371, 500 S.E.2d 204, 207 (S.C.Ct.App. 1998). The Lower Court's Order was, therefore, without a factual foundation in the record, and was an error of law.

Issue XII

Did the Lower Court err in holding that the Complaint failed to state causes of action for unjust enrichment, quantum meruit, and restitution?

The Order erred by holding that the Appellants' claims for quantum meruit and restitution failed to state a valid causes of action. (R. p. 17). The Complaint specifically alleges facts supporting all of the elements of both causes of action under South Carolina law. The Respondents' collection and retention of unlawful commissions and fees through knowing, willful, deceptive, unfair and fraudulent means makes it unjust for the Respondents to retain the statutorily prohibited compensation. (R. p. 109 ¶431, p. 112 ¶447). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty" (emphasis added). SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (S.C. 1990).

"The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, …" Restatement Third, Agency §8.01, Official Comments (d)(1). "If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds. Id. "An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty." Id. at (d)(2).

These incorrect statements directly contradict the Lower Court's earlier acknowledgement that "[t]he Appellants advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor [Respondents] to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action"(emphasis added). (R. p. 2). The Complaint alleges that it was "inequitable" for the Respondents to retain the unlawful compensation in that the Respondents' conduct was (i) fraudulent, unlawful and deceptive; and (ii) was expressly prohibited under Title 40, Chapter 57; and (iii) was against the statutorily enacted public policy of South Carolina. (R. pp. 42-44 ¶¶77-86, pp. 45-48 ¶¶93-108, pp. 52-54 ¶¶129-141, pp. 85-86 ¶¶328-332, p. 112 ¶447). The Lower Court's dismissal of the Appellants' claims for unjust enrichment, quantum meruit, and restitution for failure to state a cause of action was legal error.

Issue XIII

Did the Lower Court err by dismissing the Appellants' Complaint with prejudice?

In its final holding in the Order, the Lower Court states "[n]o amount of discovery or repleading the allegations through an Amended Complaint would cure the legal impediments to Appellants' proposed claims." (R. p. 19). In the present case, the Lower Court engaged in no

analysis of what amendments could be made by the Appellants, and the record provides no evidentiary support for the Lower Court's holding that any amendment by the Appellants would be futile. Our Supreme Court has held that trial courts should allow plaintiffs the opportunity to amend any complaint deemed insufficient pursuant to a Rule 12(b)(6) motion to dismiss. Skydive *supra* at 183. "We can not imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like"(emphasis added). Id. The dismissal of the Appellants' various causes of action with prejudice was legal error.

CONCLUSION

For the reasons set forth above, the Appellants request that this Court reverse the Lower Court's Order in its entirety, and remand the case to the circuit court for reinstatement to the active Trial Roster, requiring an Answer to the Complaint and for the commencement of the discovery process regarding the matter.

Respectfully submitted,

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January 4, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC……Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.……..…Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief of Appellants complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

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January 4, 2022