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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
Eleventh Judicial Circuit

Honorable Edgar W. Dickson

Case 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 RESPONDENTS ROBERT P. WILKINS, JR., RPW DEVELOPMENT, INC., AND SOUTHERN VISIONS REALTY, INC.

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STATEMENT OF THE CASE

Appellants R. Kent Porth ("Porth") and Panorama Point, LLC ("Panorama")(collectively the "Developers") filed this action seeking to claw-back compensation paid to the Respondents, Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. ("Realtors") in connection with the development and sale of Porth and his family members' real property located on Lake Murray (the "Property"). The Developers allege that because they did not execute a document with the Realtors specifically titled "listing agreement" that the Realtors should not have received any compensation for sales of the Property. The Developers claim that they are entitled to money damages in the amount of compensation earned by the Realtors.

Following commencement of the action, the Realtors filed a motion to dismiss on the grounds that (1) the statute of limitations bars the Developers' claims; and (2) no private right of action exists to recover monetary damages for an alleged technical violation of the statute governing licensed real estate agents and brokers in South Carolina. (R. pp. 120-129). The Realtors also filed an amended motion to dismiss (R. pp. 144-145), and a memorandum supporting their motion (R. pp. 157-186). In response, the Developers filed a memorandum in opposition (R. pp. 130-143), a supplemental memorandum in opposition (R. pp. 146-156), and a third memorandum in opposition to the motion (R. pp. 187-270). A hearing was held on the motion in front of Hon. Edgar W. Dickson. (R. pp. 351-375).

By order entered February 16, 2021, Judge Dickson granted the Realtors' motion. (R. pp. 1-21). Thereafter, Developers filed a motion to reconsider (R. pp. 271-292).

In response, the Realtors filed a memorandum in opposition to the motion to reconsider (R. pp. 293-303). Developers then filed a Reply in support of the motion to reconsider. (R. pp. 304-346). Realtors thereafter filed a memorandum in response to the Developers Reply. (R. pp. 347-

350). By order entered May 5, 2021, Judge Dickson denied the motion to reconsider. (R. pp. 22-25).

The Developers then filed and served their notice of appeal on June 4, 2021.

INTRODUCTION

A. Development of Property on Lake Murray and hiring of Realtors

In late 2005 and early 2006, Porth, an experienced tax attorney partner with the Nexsen Pruet law firm, began exploring options to best develop and sell all or a portion of his family's Property as a residential subdivision. (R. p. 30, 58). In furtherance of Porth's plan to sell a portion or all of his family's Property, the Developers engaged the Realtors to develop, market, and sell the Property in early 2006. (R. p. 39). Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006. ("Development Agreement") (R. p. 44). The Development Agreement contained provisions for the payment of fees for development activities as well as separate provisions for the payment of real estate commissions for listing and sales with Defendant SVR serving as the exclusive listing agent.

B. Sale of Properties and payment of compensation to Realtors

Thereafter, between January 2007 and May 2015, Developers sold off twenty-three (23) separate portions of the Property aided by the Realtors totaling sales in an amount of $6,179,215 (R. pp. 59-64). For their services as real estate agents, the Realtors received commissions totaling $267,035.37. (Id.). Additionally, pursuant to the Development Agreement, Developers paid "development fees" totaling $232,641.03. (R. pp. 64-67). In sum, the Realtors received $499,676.40 for real estate agent and development services pursuant to the Development Agreement. (R. pp. 59-67). The final sale under the arrangement between Developers and Realtors pursuant to the Development Agreement occurred on May 7, 2015. (R. pp. 63).

C. Developers file suit in January 2020 to recoup all compensation paid to Realtors for sales starting in 2007

Developers allege, however, that despite a written Development Agreement providing for compensation to the Realtors, they never executed a document specifically titled "listing agreement" with the Realtors[1]. (R. pp. 26-119). The Developers allege that a statute governing licensed real estate agents and brokers, South Carolina Code § 40-57-135(E)(1) and 137[2], requires "a written listing agreement between the property owner and the real estate brokerage firm with whom the licensee is associated." Since the Developers allege that there are no "listing agreements," the Developers contend they are entitled to repayment of all compensation earned by Realtors with respect to sales at the Property between 2007 and 2015[3]. (Id.).

In their lawsuit, Developers allege causes of action for (1) Breach of Fiduciary Duty; (2) Negligent Misrepresentation; (3) Negligence; (4) Conversion; (5) Quantum Meruit; (6) Constructive Fraud; (7) Restitution; and (8) Unfair Trade Practices. (R. pp. 96-118).

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[1] As this is appeal is related to a motion to dismiss, the allegations made by the Developers must be accepted as true. However, for purposes of clarity, the Realtors deny that listing agreements were not executed by the Developers.

[2] The statutory sections referenced in this Appeal are those in effect at the relevant time, but S.C. §40-57-350 in place of §40-57-137

[3] The Complaint acknowledges, and the Developers do not dispute, that a written agreement was entered into providing for compensation to the Realtors. Developers simply allege that, an agreement was not specifically titled "listing agreement," the Realtors were not entitled to any compensation and should be required to pay back the Developers for all compensation received in connection with sales of the Property.

Each cause of action, however, relies upon the same allegation—that the Realtors did not present a document specifically entitled "listing agreement[4]," which the Developers allege is a technical violation of the statute governing real estate agents in South Carolina. Based on this alleged technical violation, Developers allege that the Realtors should not have received any compensation for their work in selling 23 lots for over $6,000,000 for the benefit of the Developers. (Id.).

After hearing arguments on the Realtors' motion to dismiss, the trial court entered an order in favor of the Realtors finding the statute of limitations barred Developers' action, and the allegations in the Complaint did not assert any viable causes of action against the Realtors. (R. pp. 1-21). Thereafter, the trial court denied the Developers' motion to reconsider. (R. pp. 22-25). This appeal followed.

LEGAL STANDARD

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance,* 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995).

[4] Based upon the posture of the case, Respondents accept the allegations pled by Appellants as true. However, Respondents deny that they violated any South Carolina statute. The written Development Agreement, incorporated by reference in Appellants' Complaint, set forth the compensation to be earned by the Realtors, and thus, complied with South Carolina law.

ARGUMENT

I. The Trial Court correctly determined that the Developers' Complaint was time-barred

A. All acts relevant to this litigation occurred between January 2007 and May 2015; over three years prior to the filing of the lawsuit

Under South Carolina law, the causes of action asserted by Developers are each subject to a three (3) year statute of limitations. *See, Walbeck v. I'On Co.*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) ("The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to [ ] negligent misrepresentation claims."); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); *Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]"); *Dorman v. Campbell*, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive fraud); see also S.C. Code § 15-3-530(7) ("an action for relief on the ground of fraud" is subject to the three-year statute of limitations); S.C. Code § 39-5-150 (an action alleging violation of South Carolina's Unfair Trade Practices Act must be brought within three years); *Mazloom v. Mazloom*, 382 S.C. 307, 322, 675 S.E.2d 746, 755 (Ct. App. 2009)(Action for breach of fiduciary duty is subject to a three-year statute of limitations); *See,* S.C. Code § 15-3-530(1)(action for unjust enrichment or quantum meruit, based upon an implied contract or obligation, are subject to a three year statute of limitations).

Having established that each cause of action is subject to a three-year statute of limitations, when applying the allegations of the Complaint on their face, it is clear that all claims brought by the Developers are time barred.

The Complaint alleges that all activity between the Developers and Realtors with respect to the Property took place between 2006 and at the latest December 2016. (R. p. 59). Thus, all activity complained of by Developers occurred more than three years from the filing of the subject lawsuit on January 2, 2020.

Relevant to this appeal, however, the allegations of wrongdoing alleged by Developers occurred far earlier than December 2016. Indeed, to the extent that the Developers allege that the Realtors failed to provide them with a document entitled "listing agreement," or failed to comply with the statutes governing real estate licensees in South Carolina, this occurred at the outset of the relationship in 2006. (R. p. 44). Therefore, Developers' attempt to recover compensation they allege was unjustly paid to the Realtors beginning in 2006 was untimely in January 2020, and the Trial Court correctly ruled the statute of limitations had run.

i. The Developers' claims are each legal, not equitable

In an effort to circumvent the consequences of their untimely lawsuit, the Developers argue that their claims are equitable in nature, and therefore, are not subject to a statute of limitations. (App. In. Br. pp. 24-36). Developers argue that their claims for breach of fiduciary duty, restitution, quantum meruit, unjust enrichment and conversion are each equitable under *Thomerson v. Devito*, 430 S.C. 246, 844, S.E.2d. 378 (2020).

As an initial matter, *Thomerson* dealt with a certified question as to whether promissory estoppel was a legal or equitable claim subject to a statute of limitations. *Id.* In the current appeal, no cause of action for promissory estoppel was asserted.

Moreover, whether an action is legal or equitable is decided by the nature of the claim. *Insurance Fin. Servs., Inc. v. South Carolina Ins. Co.*. 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) ("The main purpose of the action should generally be ascertained from the body of the

complaint. . . . However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action."); *Bell v. Mackey*, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) (The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable).

Here, the nature of the Developers' causes of action are unequivocally legal. Although a request for money damages is not conclusive to establish a cause of action as legal, in the current action, the Developers allege that the Realtors breached a duty they owed to the Developers in their capacity as real estate professionals governed by the S.C. Code § 40-57-5 et seq., which in turn caused the Developers' money damages. (R. pp. 98-99). Thus, the relief the Developers seek is entirely economic resulting from alleged breaches of a duty or obligation by the Realtors.

To be clear, while the Developers seek a return of the commissions and fees earned by the Realtors, the basis for this relief relies on Developers' theory that the Realtors did not provide services to the Developers that met their professional standard of care, including the execution of written "listing agreements."

Thus, although the Developers attempt to characterize this relief as "restitution," restitution is not automatically classified as an equitable remedy. Indeed, "restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (internal citation omitted).

Here, whether styled as a cause of action for conversion, restitution, unjust enrichment, breach of fiduciary duty, or any other theory of recovery, the main purpose of an action is to recover

money damages "proximately caused" by the Realtors' breach of a duty or obligation allegedly owed to the Developers. Thus, each cause of action asserted by the Developers is an action at law, and subject to a three-year statute of limitations.

ii. The Developers knew or should have known of the alleged wrongful conduct well before January 2, 2020

The Developers' attempt to excuse their untimely Complaint by suggesting that they did not "discover" that the Realtors had breached their fiduciary duty by, inter alia, failing to provide a document specifically entitled "listing agreement" prior to 2017. (App. In. Br. pp. 27-30). To support this assertion, the Developers aver that they were unaware of the relevant South Carolina Statutes, S.C. Code. §§40-57-135(C)(4) and 40-57-139(B), prior to 2017, and thus did not discover that they had causes of action against the Realtors.

However, the Trial Court correctly ruled that ignorance of the law does not excuse the Developers' untimely Complaint. (R. pp. 8-9).

It is well established in South Carolina that ignorance of the law does not suspend the accrual of a statute of limitations. *See, Ott v. Maryland Dep't of Pub. Safety and Corrs. Servs.*, 909 F.3d 655, 661 (4th Cir. 2018) ("Ignorance of the law does not justify tolling, even when a party does not have legal representation); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). "Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." *American Legion Post 15 v. Horry Cnty.*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) ("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.").

Here, contrary to the Developers' arguments, the mere fact that they allege they were not expressly aware of a specific statutory section within the South Carolina Code does not mean that they were not aware of the underlying facts that make up the alleged wrong.

Moreover, the Trial Court correctly noted that the allegations of Developers' Complaint establish they knew that they of some alleged harm caused by the Realtors that could be redressed through legal action no later than May 2013[5]. (R. pp. 1-21). Thus, any allegation that the Developers were not on notice of alleged negligence or improper actions by the Realtors is expressly contradicted by their own Complaint.

Under South Carolina law, in determining when a cause of action arises under § 15-3-530, courts apply the "discovery rule." *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run "when a cause of action reasonably ought to have been discovered," or, in other words, "when a plaintiff has notice that he might have a remedy for a harm." Id.

"A party cannot escape the application of [the statute of limitations] by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. Thus, either actual or constructive knowledge of facts or circumstances, indicative of fraud, trigger a duty on the part of the aggrieved party to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom. *Burgess v. Am. Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (Ct. App. 1989).

[5] The Developers' Complaint alleges that by May 2013, they had discovered "evidence of [Realtors'] negligence, incompetence, and lack of attention in performing their duties. (R. p. 88).

"The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought, or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Brown v. Pearson,* 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997).

Here, the statutory sections relied upon by Plaintiffs were public and widely available to anyone of common knowledge. Certainly, a tax lawyer with over 22 years of business and prior real estate development experience by 2006 would have the wherewithal to be on notice of an alleged remedy for harm. *Rumpf,* 357 S.C. at 394, 593 S.E.2d at 187. It is inconceivable--even accepting the Developers' allegations as true--that the Developers were not aware that they paid commissions to the Defendants beginning in 2006. Indeed, the Complaint acknowledges that the Developers knew compensation was paid to the Realtors, and knew the amount of the Compensation. (R. pp. 59-68).

In other words, if the Developers believed at the time of these transactions that the Realtors may not have been entitled to compensation they received, or that the Realtors had not performed their services consistent with their standard of care, they could have easily looked into the South Carolina Code and identified the very same allegations asserted in their untimely Complaint. Yet, the Developers waited over 14 years to claim that the compensation agreement with the Realtors was "unlawful."

Furthermore, the allegations of the Developers' Complaint itself acknowledge that they had prior notice of alleged potential shortcomings by the Realtors but did not timely pursue a

remedy for alleged harm. For instance, the Developers allege that by May 2013, they had "evidence of [Realtors'] negligence, incompetence, and lack of attention in performing their duties for which they received the Development Fee." (R. pp. 86-88). Likewise, on December 31, 2013, in connection with the sale of "Lot 15," Developers discovered that Respondent Wilkins allegedly had an undisclosed conflict of interest in the form of a prior business relationship with the purchaser, for whom an alleged unnecessary $2,500 credit was negotiated by Wilkins. (R. pp. 68-70). Each time, the Developers were on notice of alleged failures or wrongdoings by the Realtors, but did not act promptly or diligently to determine if they had a "right that had been invaded." *Snell,* 276 S.C. at 303 278 S.E.2d at 334.

Here, it is indisputable that the allegations of Developers' Complaint acknowledge being on notice of alleged "negligence" or "incompetence" of the Realtors long before filing of this action in January 2020. Thus, the Trial Court did not err in holding the statute of limitations barred the Developers' Action.

B. The Trial Court correctly held that laches also bars Developers' Claims

As an alternative sustaining ground, to the extent that any claims are deemed to be equitable, the Trial Court also held that the doctrine of laches barred such claims.

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums,* 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those

rights." *Chambers of S.C., Inc. v. County Council for Lee County,* 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

Here, the allegations of the Complaint expressly acknowledge that despite notice of the Realtors' alleged "negligence" and "incompetence," the Developers did not pursue any action against the Realtors while the Realtors were making the Developers millions of dollars in sales. Rather, only after the Realtors were no longer useful to the Developers did they belatedly pursue this lawsuit[6]. This inequity was specifically noted by the Trial Court in ruling that laches barred the Developers claims, the Trial Court specifically noted:

> Accepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property.

(R. p. 4).

Furthermore, a specific element of laches is the prejudice resulting from the claimant's delay in asserting their rights. *Id.* In the matter at bar, the Developers' belated lawsuit prejudices realtors in two obvious ways.

First, it is established in the Complaint that compensation earned by the Realtors extends back to January 2007, fourteen years prior to commencement of the lawsuit. (R. p. 59). The last payment was earned by the Realtors in May 2015, approximately five years prior to commencement of the action. (R. p. 63).

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[6] The Trial Court specifically noted that the Developers continued to accept the benefit (i.e. millions of dollars) of the Realtors work, despite knowledge of alleged "negligence," "incompetence" and "breaches of duties" no later than 2013. Based upon these actions, the Trial Court determined that the Developers' claims were also barred under the theory of unclean hands and/or *in pari delecto*. (R. p. 19). Although the Developers set forth a separate issue on appeal objecting to the Court's dismissal for unclean hands and/or *in pari delecto*, the reasoning for dismissal under those doctrine is the same as for the Trial Court's application of the doctrine of laches.

Under the Developers' theory, real estate agents would effectively never be able to realize any compensation, as the threat of a client seeking to disgorge the realtor's commission based upon an alleged technical violation of S.C. Code §40-57-5 et seq would go on in perpetuity. Such a result is precisely what the equitable doctrine of laches seeks to avoid.

Furthermore, under S.C. Code § 40-57-135(D)(1), brokers-in-charge are only required to retain documents related to a transaction, including listing agreements, for a period of five (5) years. In this action, the Developers seek to use the alleged lack of "listing agreements" as evidence of their claim, despite the fact that the Realtors had no legal obligation to retain such documents as of the date the Developers' lawsuit was filed. This too supports a finding that laches bars the Developers' claims.

Accordingly, the trial Court correctly held that as an additional sustaining ground, laches barred the claims being asserted by the Developers. (R. p. 18).

II. The Trial Court correctly held that no private cause of action exists under S.C. Code §§40-57-135 and 40-57-137

In sum and substance, Developers' 92 page, 473 paragraph Complaint can be summarized in a simple manner. Plaintiffs allege that if a real estate agent does not obtain a specific document entitled "listing agreement," then the seller of real estate, *who benefits from the realtor's services*, does not need to pay the real estate agent. In other words, under the Developers' theory, a seller can exploit the hard work of a real estate agent, and then refuse to pay their realtor once the sale is closed. The Developers seek to obtain this windfall despite no allegation that they were actually injured due to the alleged lack of document entitled "listing agreement."

The allegations in the Complaint do not allege that the Developers incurred any damages caused by the lack of a document entitled "listing agreement," nor does the Complaint allege that the compensation paid to the Realtors was not known to and agreed upon by the Developers. Rather, the Developers' lawsuit is a blatant attempt to obtain a windfall to which they had no expectation at the time of the subject sales, based upon the Developers' perception that they discovered a loophole (an alleged technical violation of the statute).

However, the statute does not allow private actions to punish alleged technical violations, nor does it provide for statutory damages to private parties. This is consistent with long standing South Carolina law. *Overcash v. South Carolina Elec. and Gas Co.*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005)(A private party may not use the statute alone as her basis for a civil action seeking damages absent specific authorization in the statute).

Rather, the statute expressly provides that enforcement of the statutory requirements is vested exclusively in the South Carolina Real Estate Commission.

The statutory section relied upon by the Developers states:

> A licensee may not advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner and when advertising or marketing in any medium including site signage, a licensee clearly shall identify the full name of the company with which the licensee is affiliated. Brokers-in-charge who are members of a multiple listing service must be allowed to make their company listings available for any cooperative marketing or advertising program, subject to the rules and regulations of the multiple listing service and with the consent of the owner. Consent may be contained and obtained from the owner through the listing agreement.

S.C. Code § 40-57-135(C)(4)(2004).

As is clear from its plain text, the purpose of this statute is the protection of the public from improper behavior by a class of professionals who are licensed by the State of South Carolina. For

example, a real estate agent could be disciplined by the South Carolina Real Estate Commission if she advertised a property to the public that is not actually for sale. The statute is not intended to act as a mechanism for sophisticated, wealthy developers to avoid paying their real estate agents.

Furthermore, nothing in §40-57-135(C)(4) suggests that a compensation agreement between a realtor and the seller must specifically be titled "listing agreement," as long as the realtor and the seller have agreed in writing to the representation and compensation[7]. Likewise, nothing in § 40-57-135(C)(4) suggests that a realtor who markets and sells property for the benefit of a seller (such as the Developers) is not entitled to a commission simply because the realtor and seller do not execute a specific document entitled "listing agreement."

In fact, the question of whether the Code authorizes a private cause of action for such an offense is answered by the Code itself. S.C. Code § 40-57-790 (Civil Actions) expressly provides that "[a] civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210." Section 40- 1-210 allows only the Department of Labor, Licensing and Regulation to institute civil actions through the Administrative Law Court, in the name of the State, "for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board," and further

[7] The same statute upon which Plaintiffs rely recognizes multiple alternative relationships between realtors and sellers other than a strict written "listing agreement." See, S.C. Code §40-57-350(L)(1) (recognizing transactional brokers who may give one or both parties customer service or facilitate the transaction without representing either party); S.C. Code §40-57-350(L)(3) (recognizing that sellers who do not choose to establish an agency relationship but who use the services of the [brokerage] firm are considered customers). Likewise, South Carolina common law has long held that a real estate broker need not have a written commission agreement to be entitled to compensation. *United Form Agency v. Malanuk*, 284 S.C. 382, 384, 325 S.E.2d. 544, 546 (recognizing oral commission agreements for real estate agents as enforceable).

provides "[f]or each violation the administrative law judge may impose a fine of no more than ten thousand dollars[8]."

The Trial Court correctly held that an alleged statutory violation on its own is insufficient to support a private cause of action. (R. p. 10). Therefore, the Trial Court properly dismissed the Developers' action.

III. Developers' remaining arguments are immaterial, and do not allege facts supporting a cause of action under any theory

The Trial Court ruled that, even when accepting all allegations in the Complaint as true, the Developers' action was untimely. Furthermore, the Trial Court held that the Developers failed to state facts sufficient to plead a cause of action recognized under South Carolina law. (R. pp. 1-21). The reasoning for the Trial Court's ruling was simple.

First, the facts alleged in the Complaint demonstrated unequivocally that the action was not timely brought. (Id.).

Second, the Developers did not allege facts that would satisfy the elements of any common law cause of action. Rather, each cause of action asserted by Developers relied on the same central argument—that the Developers were entitled to money damages for an alleged technical violation of S.C. Code § 40-57-135. As a technical violation of S.C. Code §40-57-135 on its own does not provide for a private cause of action for damages, the Developers did not state a claim for relief under any theory of recovery. (Id.).

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[8] The statute gives the South Carolina Real Estate Commission exclusive jurisdiction over enforcing the Act, but it expressly allows an injured party to bring common law claims such as negligence or fraud against a licensee. S.C. Code § 40-57-350(M). Thus, an injured party who can satisfy the elements of a common law cause of action is free to pursue a licensee. However, an individual cannot sue a licensee solely on account of a violation of the licensing statute.

Nonetheless, the Developers' attempt to shield the simplicity of the Court's ruling by suggesting that the Trial Court ignored the standard of review on a Rule 12(b)(6) motion, and ignored certain immaterial allegations. (App. In. Br. Issues I, III, VI, IX, and X, pp. 11-15, 20-23, 30-32, 37-39). These arguments do not have any relationship to the Court's statute of limitations and laches ruling, nor the existence of a private cause of action under S.C. Code §40-57-5 et seq. Therefore, the arguments are insufficient to support reversal of the Trial Court's ruling.

A. Developers' allegations of extrinsic fraud are immaterial to the Trial Court's grounds for dismissal

In Developers' first issue on appeal, they allege that the Trial Court ignored and did not address alleged "extrinsic fraud" related to alleged "concealment of two alleged listing agreements that the Developers allege were created after-the-fact. (App. In. Brief pp. 11-15). This argument is without merit, as it had no connection to the Trial Court's decision.

Here, the Developers' lawsuit revolves around their allegation that *no* "listing agreements" were ever executed between the Developers and Realtors. In ruling on the motion to dismiss, the Trial Court accepted those allegations as true. (R. p. 4). After accepting those allegations as true, the Court determined that the action was untimely and furthermore, that no private cause of action existed to enforce S.C. Code § 40-57-135, which the Developers allege requires a "listing agreement" in order to receive compensation for a real estate sale. (R. pp. 9-10).

Whether or not any allegedly fraudulent listing agreements were created after-the-fact had no bearing on the Trial Court's decision, as the Court was required to accept as true the Developers' allegation that no document entitled "listing agreement" existed. *Stiles*, 318 S.C. at 298, 457 S.E.2d 602-603 (In considering a 12(b)(6) motion, the trial court must construe all facts alleged and inferences reasonably deducible therefrom in favor of the nonmoving party.).

Accordingly, the Trial Court did not ignore the Developers' argument that two listing agreements were allegedly created after-the-fact. Rather, the Trial Court construed the Complaint with the broadest possible deference to the Developers—accepting that no "listing agreements" existed in the first place. Even accepting those allegations as true, however, the Trial Court correctly determined that the Developers' action was not viable. (R. pp. 9-10).

B. Allegations of "unclean hands" by the Realtors did not bar Realtors from asserting a statute of limitations defense

The Developers' third issue on appeal appears to suggest that the Realtors were precluded from asserting the affirmative defense of the statute of limitations based upon "the failure of the Respondents to provide the Required Listing Documents prior to January 10, 2017." (App. In. Br. Pp. 20-24). This argument, likewise, is without merit.

The doctrine of unclean hands "precludes a *plaintiff* from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998).

Here, the Realtors are not plaintiffs making any claim for affirmative recovery. Furthermore, the Developers cite to no legal authority supporting their contention that the Realtors were barred from asserting a statute of limitations defense based on "unclean hands[9]." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008)("[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Thus, Developers' argument asserting that allegations of "unclean hands" bars a statute of limitations defense is without merit.

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[9] Developers cite the case of *Vicary v. Town of Awendaw*, 427 S.C. 48, 828 S,E,2d 229 (Ct. App. 2019). It is unclear how this case applies to the current dispute as (1) the Court of Appeals decision cited was reversed by the South Carolina Supreme Court; and (2) the subject matter of the *Vicary* case was standing, not the statute of limitations.

The Developers also argue that the Court erred by not equitably tolling the statute of limitations.

"Equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 117, 687 S.E.2d 29, 33(2009).

In *American Legion Post 15 v. Horry County,* this Court highlighted the extraordinary nature of equitable tolling. The Court held:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.
>
> Equitable tolling has been deemed available where—
>
> —extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> —the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> —the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

Here, the Trial Court did not ignore, but rejected, the Developers' assertion that they were thwarted from pursuing a cause of action against the Realtors. (R. pp. 1-21). The grounds for equitable tolling of the statute of limitations simply do not exist in this case. Indeed, the Trial Court specifically noted that the Developers' Complaint admits they were aware of alleged "negligence" or "incompetence" of the Realtors as of no later than 2013. (R. pp. 13-14). Yet, the developers did not pursue claims against the Realtors on account of such "negligence" or "incompetence or investigate the propriety of the Realtors actions any further.

Similarly, the Developers were aware that they were compensating the Realtors for sales of portions of the Property. (R. pp. 59-67). The Developers knew that Wilkins was a realtor licensed under South Carolina law. There are no allegations in the Complaint that the Realtors prevented the Developers, including Porth--an experienced attorney at one of South Carolina's largest firms--from consulting the South Carolina Code or more specifically, those statutes governing real estate licensees.

Accordingly, the Trial Court correctly rejected the Developers' assertion that the allegations of their Complaint stated "extraordinary circumstances" warranting the application of equitable tolling. *Id.*

C. The Rules of Professional Responsibility governing lawyers have no relationship to this this Appeal

Developers' sixth issue on appeal alleges that the Developers' untimely Complaint should be excused because Respondent Wilkins—who served as Developers' real estate agent—is a retired member of the South Carolina Bar. (App. In. Br. at pp. 30-33). It is unclear what connection Wilkin's status as a retired attorney has to the present action. There is no allegation that Wilkins and the Developers were in an attorney-client relationship, nor any allegations of legal malpractice.

Furthermore, Developers cite no authority supporting their argument that Wilkins' status as a retired attorney is an excuse for Developers' delay in filing this action[10]. *Bryson,* 378 S.C. at 510, 662 S.E.2d at 615 (Ct. App. 2008).

Finally, as a licensed attorney himself, Appellant Porth was fully capable of reviewing the relevant statutes and undertaking sufficient due diligence to assess claims that he may have against the Realtors. In other words, Wilkins' status as a retired attorney is not an "extraordinary circumstance" that thwarted the Developers' ability to bring an action against the Realtors. *American Legion Post 15*, 381 S.C. at 583, 674 S.E.2d at 184.

D. The Trial Court did not improperly consider documents outside of the record

The Developers' ninth issue on appeal suggests that the Trial Court improperly (1) considered documents that were repeatedly referenced in the Complaint, but not attached as exhibits, and (2) took "judicial notice of the knowledge of Appellant Porth." (App. In. Brief pp. 37-39). This argument is, likewise, without merit.

First, the Trial Court did not take judicial notice of Porth's state of mind or knowledge. Rather, the Trial Court simply stated that based upon the facts alleged in the Complaint, the Developers were at least on notice of potential claims no later than 2013. (R. pp. 13-14). Specifically, the Trial Court held:

> I find that the Plaintiffs, by their own allegations, knew or should have known of acts of "negligence, incompetence, dishonesty and/or breaches of duty" by the Defendants as early as 2013, yet no action was commenced until January 2, 2020. The Plaintiffs' contention that they had not "determined conclusively" that they had claims against the Defendants until sometime in 2017 is unavailing as it pertains to the commencement of the running of the applicable statutes of limitations under South Carolina law. To the contrary, the Plaintiffs

[10] The cases cited by Developers are legal malpractice lawsuits which deal with equitable tolling in a claim between a client and the client's lawyer. As legal malpractice is not alleged in this action, those cases have no application to the current matter.

> were on actual or reasonable notice as early as 2013 that a right of theirs had been invaded by the Defendants. Based upon their own allegations of the Complaint, the notice was more than sufficient to have constituted a cause of action at that time and cause the Plaintiffs to make reasonable inquiry into the conduct of the Defendants. This would have led to the discovery of the same facts that give rise to the present action.

(Id. at 13).

Indeed, the Trial Court's decision was based exclusively on the Developers' own allegations taken from the Developers' Complaint. The fact that these alleged facts resulted in a legal conclusion adverse to the Developers does not mean the Court improperly took judicial notice of "the knowledge of Appellant Porth."

Furthermore, the Trial Court's reference to certain documents, including the contracts of sale, deeds and HUD-1 statements was proper. (R. p. 3). The real estate transactions, closings, and compensation disbursements made in connection with closings are the subject of extensive allegations in the Developers' Complaint. (R. pp. 59-68). The Court's judicial notice that such documents are a part of the closing process, required the Developers' signature, and disclosed the compensation paid to the Realtors is wholly proper and has been acknowledged as such by the South Carolina Supreme Court. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009)("allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

Accordingly, the Trial Court did not err by referencing certain documents that were repeatedly referenced in the Developers' Complaint, and upon which the Developers' claims were based.

IV. The Trial Court correctly dismissed the Complaint with prejudice

In their final issue on appeal, the Developers argue that the Trial Court erred by dismissing the Complaint with prejudice. While ordinarily, it is true that a motion to dismiss is granted without prejudice, in this case, since the statute of limitations has expired, and the Developers did not identify any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted, the dismissal with prejudice was proper.

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. *Spence v. Spence*, 368 S.C. 106, 129, S.E.2d 869, 881 (2006). However, when a plaintiff fails to show how they would amend their complaint to avoid dismissal and presents no additional factual allegations or a different theory of recovery which may give rise to a cause of action, then the Trial Court dismissal with prejudice will be upheld. *Id.* at 130-131, 628 S.E.2d at 882.

Here, the Trial Court's Order Granting the Motion to Dismiss clearly dismissed the action with prejudice. (R. pp. 1-21). In Developers' motion to reconsider, they did not challenge this part of the Order. Thus, they waived appellate review of this issue.

Furthermore, the Developers did not provide any additional facts in the motion to reconsider, or their Initial Brief that would support a viable claim if they were allowed to amend re-file their action. Indeed, as the relief sought by the Developers is barred by the statute of limitations, and the statute that is forms the basis each of Developers' claims does not provide for a private right of action, there are no additional facts or theories that could save the Developers' lawsuit.

Therefore, the Developers' Complaint was properly dismissed with prejudice. *Spence*, 368 S.C. at 131, 628 S.E.2d at 882.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Court affirm the Trial Court's dismissal in its entirety.

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January 4, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Eleventh Judicial Circuit

Honorable Edgar W. Dickson

Case 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 COMPLIANCE

I certify that the *Final Brief of Respondents Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc.* complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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