

RECEIVED

Jan 04 2022

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 REPLY BRIEF OF APPELLANTS

Clarence Davis (SC Bar I.D. #1581)
GRIFFIN | DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
cdavis@griffindavislaw.com

Attorney for Appellants

Table of Contents

Table of Authorities iii

Respondents’ Statement of the Case.....1

Appellants’ Issues on Appeal.....4

Issues.....4

 I. Did the Lower Court err by failing to address the specific incidents of extrinsic fraud involving the Fraudulent Documents?.....4

 II. Did the Lower Court err by failing to take the allegations of the Complaint with respect to the dates of discovery 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)?.....4

 III. Did the Lower Court err by failing to address the Appellants’ arguments that the fraudulent and illegal acts of the Respondents, constituting unclean hands, either tolled or equitably barred the Respondents from raising any statute of limitations defense?7

 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)?10

 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?11

 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?12

 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?13

VIII. Did the Lower Court err by holding that laches applies to the Appellants’ based on the allegations of the Complaint?15

IX. Did the Lower Court err by considering documents not part 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?16

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 Respondents based on the allegations of the Complaint?.....18

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?19

XII. Did the Lower Court err in holding that the Complaint failed to state causes of action for unjust enrichment, quantum meruit and restitution?19

XIII. Did the Lower Court err by dismissing the Appellants’ claims with prejudice?20

Conclusion21

Table of Authorities

Cases

American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct.App. 2009)9, 12

Black v. Childs, 14 S.C. 312 (1880)22

Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (S.C. 2009)16, 17

Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (S.C. 1985)15

Darby v. The Furman Co. Inc., 334 S.C. 343, 513 S.E.2d 848 (S.C. 1999).....6, 13, 14

Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017)13, 14

Great-West Life & Annuity v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002)10

Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C.Ct.App. 1999)15

Myatt v. RHBT Financial Corp., 370 S.C. 391, 635 S.E.2d 545 (S.C.Ct.App. 2006).....18

Paradis v. Charleston County School District, Appellate Case No. 2018-002025
(May 19, 2021).....22

Southern Development Land Golf Co. v. S.C. Public Serv. Auth., 311 S.C. 29, 426 S.E.2d
748 (S.C 1993)8

Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006)20, 22

Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020)10, 11

True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997)13

United Form Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (S.C. 1985)15

Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010)10

Vicary v. Town of Awendaw, 417 S.C. 631, 790 S.E.2d 787 (Ct.App. 2016) 8

Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (S.C. 2018)..... 8

Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (S.C.Ct.App. 2019)8

Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2d 516 (S.C. 2010).....20

Statues

S.C. Code Ann., Section 40-57-20 (1976)3

S.C. Code Ann., Section 40-57-135 (1976)2, 3, 11, 13, 14

S.C. Code Ann., Section 40-57-137 (1976)2, 5, 11, 13, 14

S.C. Code Ann., Section 40-37-139 (1976)2, 9, 11, 12, 13

S.C. Code Ann., Section 40-57-790.....14

Other Rules

SCRPC Rule 5.7.....13

SCRPC Rule 8.4(d).....13

The Appellants file this Reply to address the Respondents' Initial Brief filed on November 5, 2021 ("Respondents' Brief"). The Appellants call this Court's attention to the fact that the Respondents did not respond to the thirteen specific and well defined Issues on Appeal set forth in the Appellant's Initial Brief ("Appellants' Brief"), and instead set forth their own four Issues on Appeal. As a result, the Respondents do not directly address the Issues on Appeal as set forth by the Appellants.¹

Respondents' Statement of the Case

The Respondents' Initial Brief contains a "Statement of the Case" which misstates and mischaracterizes the Appellants' eight causes of action, and ignores the specific factual allegations of the Complaint supporting each those causes of action. The Complaint sets forth specific factual assertions of illegal, fraudulent and deceptive conduct by the Respondents while acting in a fiduciary context, and is accurately summarized in the "Factual Background of Case" section of the Appellants' Brief.

The Respondents' Statement of the Case ignores the illegal, fraudulent and deceptive acts alleged in the Complaint which support each cause of action, and inaccurately asserts that a single "technical violation" is the sole issue in this case. The Respondents state "that because [the Respondents]² did not execute a document with the Realtors specifically titled 'listing agreement' that the [Respondents] should not have received any compensation for sales of the

¹ As with the Appellants' Brief, all statutory references herein are to the referenced statute as in effect at the relevant time. Title 40, Chapter 57 was amended and substantially renumbered effective as of January 1, 2017 after the 23 transactions had been consummated.

² The Respondents refer to the Appellants as "Developers" and the Respondents as "Realtors" in an apparent attempt to influence the Court's perception of the parties to this action. These labels are inconsistent with the roles of the parties in the subject transactions. Specifically, in the Development Agreement, drafted by Respondent Wilkins and relied on by Respondents, Respondent RPW Development, Inc. is defined as the "Developer," and Appellant Panorama Point, LLC is defined as the "Owner."

Property”(emphasis added).³ (Respondents’ Brief at 5) This assertion ignores the specific allegations of the Complaint including, but not limited to (i) the Respondents’ knowing and willful violations of the rules of the Consolidated Multiple Listing Service (the “CMLS”), (ii) the Respondents’ violations of the “dual agency” provisions of S.C. Code §40-57-137(M)(1) in 18 of the 23 transactions, and (iii) the Respondents’ failure to make the Legislatively mandated disclosures, set forth in S.C. Code §40-57-139, of the laws governing the Respondents’ fiduciary obligations as licensed real estate brokers and agents. The Respondents’ Statement of the Case ignores the numerous allegations of the Complaint that the Respondents’ conduct produced below fair market sales prices due to the improper marketing of the Properties.

Without referencing the Complaint, the Respondents incorrectly state that the “Complaint acknowledges, and the [Appellants] do not dispute, that a written agreement was entered into providing for compensation to the [Respondents]” (emphasis added). (Respondents’ Brief at 4, fn. 3) To the contrary, the Complaint specifically alleges that the Development Agreement was “unlawful and void”. (R. pp. 44-45 ¶¶87-91, pp. 46-47 ¶¶100-103). The Respondents next reassert that “**each cause of action, however, relies upon the same allegation** – that the Realtors **did not present a document specifically entitled ‘listing agreement,’** which the [Appellants] allege is a technical violation⁴ of the statute governing real estate agents in South Carolina”(emphasis added). (Respondents’ Brief p. 5). This inaccurate assertion is an attempt to trivialize the serious allegations of the Complaint.

³ The Respondents make this false assertion at least 11 times despite the fact that no such allegation appears anywhere in the Complaint. The 11 statements are never referenced to any specific paragraph in the Complaint. S.C. Code §40-57-135(D)(4), however, does state that a listing agreement “must set forth all material terms of the parties agency relationship,” and then sets forth 11 specific disclosures which must be contained in the written listing agreement (which is mandated by S.C. Code §40-57-135(C)(4)).

⁴ The Complaint contains no allegation that any of the violations of Title 40, Chapter 57, the rules of the CMLS, or the South Carolina common law on fraud are “technical violations.”

The Appellants call this Court's attention to (R. pp. 85-86 ¶¶328-332) which reference public blog posts of the Respondents' prior legal counsel in the pre-litigation stage of this matter, Blair Cato Pickren Casterline LLC (law firm).⁵ The four blog posts specifically referenced in the Complaint were authored by one of its principals, Mr. Gary Pickren, and affirm the validity and seriousness of the allegations of misconduct set forth in the Complaint.⁶

The Respondents incorrectly assert that the "Development Agreement, **incorporated by reference in the Complaint**, set forth the compensation to be earned by the [Respondents], and thus, **complied with South Carolina law**" (emphasis added). (Respondents' Brief p. 5, fn. 4). The Development Agreement was not "incorporated by reference in the Complaint." (R. p. 44 ¶87). Additionally, the Development Agreement was illegal under South Carolina law as (i) it was signed only by RPW Development, Inc., an unlicensed entity prohibited from engaging in real estate "broker" activities by S.C. Code §40-57-20, (ii) it was not signed by Respondent Southern Visions Realty, Inc. as required by S.C. Code §40-57-135(D)(4)(g), and (iii) it failed to meet any of the eleven legal requirements of S.C. Code §40-57-135(D)(4).⁷ (R. pp. 44-45 ¶¶87-91, pp. 46-47 ¶¶100-103).

The Appellants assert that the "Factual Background of the Case" set forth at pages 4-10 of the Appellants' Brief is an accurate summary of the factual allegations contained in the Complaint to be taken as true for Rule 12 purposes, and accurately summarizes the various causes of action set forth therein.

⁵ The involvement of Blair Cato Pickren Casterline LLC is set forth in the Complaint. (R. pp. 73-84 ¶¶277-327).

⁶ Mr. Pickren is a current member of the Board of the South Carolina Real Estate Commission.

⁷ The Respondents' 12(b)(6) motions to dismiss were filed pre-answer and therefore the Respondents' assertion that the Development Agreement "complied with South Carolina law" has no foundation in the record. The Development Agreement was not incorporated by reference in the Complaint and is not part of the record.

APPELLANTS' ISSUES ON APPEAL

Issue I.

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

The Respondents' Brief fails to address the acts of extrinsic fraud by Respondent Wilkins, and provides no legal authority to counter the legal authorities cited in the Appellants' Brief at Issue I. The Respondents simply assert that the issue of extrinsic fraud is "immaterial" as it "had no connection to the Trial Court's decision." (Respondents' Brief at 18). As set forth in Issue I of the Appellants' Brief, the Appellants assert that the Fraudulent Documents are material to the pre-answer motions to dismiss as they prove intentional and ongoing concealment of wrongful conduct by the Respondents. The Respondents do not deny the fraudulent nature of the Fraudulent Documents,⁸ and do not address their intentional and ongoing concealment.

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)?

In response to this Issue II, the Respondents also do not address the Appellants' legal arguments and supporting legal authority. The Respondents simply reassert (i) that the date of each real estate closing is the starting date of all of the various statutes of limitations, and (ii) that the Appellants' knowledge of the "2013 Issues"⁹ constituted discovery of all unrelated illegal,

⁸ The Appellants refer to the description of the Fraudulent Documents set forth in the Appellants' Brief at pages 9-10 and 11-14.

⁹ The Appellants refer to the description of the "2013 Issues" at pages 18-19 of the Appellants' Brief.

fraudulent or deceptive acts and all fiduciary breaches of **any** of the three Respondents, **including later occurring acts**. The Respondents admitted to the Lower Court that the Appellants' knowledge of the 2013 Issues was that "someone stole sixty-five hundred dollars from them or double dealt him on some dynamite on a buddy's lot". (R. p. 364 lines 1-2). The Respondents do not assert that Appellants had knowledge of any other specific incidents of the Respondents' wrongdoing prior to January 10, 2017.

The Respondents' Brief does not address the Respondents' knowing and willful violations of the rules of the CMLS which are an independent and primary basis of the Appellants' claims. (R. pp. 43-44 ¶¶84-86, pp. 52-54 ¶¶129-141, p. 67 ¶¶221-222, p. 92 ¶359, pp. 98-99 ¶¶386-387, pp. 104-105 ¶¶409-411, p. 110 ¶437, pp. 113-118 ¶¶449-473, 452-454, 464-465)¹⁰. Neither the Lower Court nor the Respondents offered a single reference to the record to demonstrate that the Appellants had knowledge, or could have had knowledge, of the CMLS rule violations, and the injuries arising from those violations, prior to January 10, 2017.

The Respondents do not address the independent and separately actionable violations of S.C. Code §40-57-137(M)(1) with respect to the 18 transactions where Respondent SVR represented both the Appellants and the purchasers in a "dual agency" capacity in violation of applicable law, and in violation of their fiduciary duties of loyalty and disclosure. (R. pp. 88-89 ¶¶346-347, p. 97 ¶380, p. 104 ¶407, p. 113 ¶451).

The Respondents' argued to the Lower Court, and argue to this Court that the violations of Title 40, Chapter 57 were merely "hyper-technical violations" or "foot fails" of no consequence. (R. pp. 348, 354 line 5). Our Supreme Court has stated, however, that "[r]eal estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral

¹⁰ This is a prime example of the falsity of the Respondents' 11 separate assertions that the Complaint is based solely on the "technical" absence of a document titled "listing agreement." See footnote 2 *supra*.

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). Id. The Respondents’ repeated characterization of these fiduciary breaches as “hyper-technical violations” or “foot fails” trivialize these “fundamental” fiduciary duties owed by the Respondents to the Appellants.

The untenable result of the Lower Court’s Order is demonstrated by the fact that literally hundreds of sellers of real estate pay real estate commissions in closings. Each business day in South Carolina, the payment of a real estate commission is generally anticipated by any seller of real estate who is assisted by a licensed real estate broker. In those transactions, the purchasers are typically represented by a closing attorney whose fee is typically paid at the closing.

The inclusion of the brokers’ and attorneys’ compensation on the HUD-1 closing statements gives no indication to the sellers or purchasers as to whether or not the licensed professionals have violated their fiduciary duties, or engaged in acts of self dealing, fraud or professional malfeasance. Under the Lower Court’s Order, a client of a licensed real estate professional or closing attorney would need to hire and pay a separate, independent lawyer within 3 years of the real estate closing to review the conduct of their real estate agent or closing attorney to determine if any breaches of fiduciary duty, fraud or other improper conduct occurred.

The Respondents do not address the Appellants’ assertions that the Lower Court drew negative inferences from the Complaint in violation of the appropriate standard of review for a pre-answer motion to dismiss. The Lower Court’s improper negative inferences are nowhere more evident than in the Lower Court’s statements that SVR’s actions “successfully closed millions of dollars of transactions for the benefit of the [Appellants]” (R. p. 18, fn. 6); and that the Respondents

“earned” the various commissions and fees, and had “[made] the [Appellants] millions of dollars through lot sales” (R. pp. 5, 19). The clear and unambiguous allegations of the Complaint are that the transactions which are the subject of this litigation involved (i) violations of multiple sections of Title 40, Chapter 57; (ii) violations of multiple rules of the CMLS; (iii) violations of the Blatt Final Order; (iv) willful and knowing violations of the UTPA; (vi) violations of the Respondents’ fiduciary duties owed to the Appellants; (vii) violations of multiple rules of the SCRPC; (viii) acts constituting fraud under South Carolina common law; (ix) acts of self dealing which unfairly limited competition from thousands of competing members of the CMLS; and (x) the fraudulent concealment of the various fiduciary breaches and illegal conduct by the Respondents through actions such as the creation and concealment of the Fraudulent Documents. The Lower Court’s negative inference that the Respondents’ conduct was “successful,” or that the Respondents “earned” their compensation lacks a foundation in the record.¹¹

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 Respondents do not refute the Appellants’ legal authorities and analysis of the record with regard to the assertions that the Respondents’ fraudulent and illegal conduct constituted unclean hands, and on several theories bar the Respondents from asserting the statute of limitations as a defense, or in the alternative, equitably tolled any applicable statute of limitations.

¹¹ The Complaint alleges that the Respondents’ illegal, fraudulent and deceptive actions resulted in below fair market value sales prices from the failure to expose the Properties to the full real estate market as a result of the violations of the CMLS rules. (R. pp. 98-99 ¶¶387, 390 , pp. 116-117 ¶¶466-467 , p. 118 ¶472). The fact that the total sales were in excess of \$6 Million Dollars does not support the Lower Court’s negative inference that the 23 transactions generated adequate sales prices, and ignores the express allegations of the Complaint to the contrary.

The Respondents incorrectly assert that the doctrine of unclean hands only precludes a plaintiff from recovering in equity, and incorrectly assert that there is no legal authority supporting the Appellants' contention that illegal conduct and the doctrine of unclean hands may bar a defendant from asserting a statute of limitations defense. (Respondents' Brief at 19). The Respondents ignore Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (Ct.App. 2019), and incorrectly assert that this decision was reversed by the South Carolina Supreme Court, and only addressed the issue of standing.¹² (Respondents' Brief at 19, fn. 9). The Vicary decision cited by Appellants held that illegal conduct and the doctrine of unclean hands bars a defendant from asserting the statute of limitations as a defense.

The Respondents do not address the Appellants' argument that the Respondents' silence while under a fiduciary duty to speak constituted fraud, and therefore estopped them from asserting any statute of limitations as a defense. "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." Southern Development Land Golf Co. v. S.C. Public Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (S.C. 1993). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." Id.

The Respondents incorrectly assert that "ignorance of the law" is the basis for the Appellants' arguments that the running of the statute of limitations should be tolled.¹³ (Respondents' Brief at 9-10). The Respondents' false assertion appears to be an attempt to

¹² Vicary v. Town of Awendaw, 417 S.C. 631, 790 S.E.2d 787 (Ct.App. 2016) was the first case in a trilogy of cases. That first decision was decided on the issue of standing, and was reversed and remanded by the Supreme Court in Vicary v. Town of Awendaw, 425 S.C. 350, 822 S.E.2d 600 (S.C. 2018). On remand, the Court of Appeals considered the issue of the statute of limitations, and held that the defendant's violations of statutory notice requirements, and the defendant's unclean hands were a bar to the defendant asserting the statute of limitations as a defense.

¹³ The Appellants' basis for the "tolling" of any and all applicable statutes of limitations in this case includes fraud (extrinsic and intrinsic), illegality of conduct, intentional concealment, and unclean hands.

mischaracterize the Appellants' well founded legal arguments (i) that the Appellants are not charged with knowledge of the law in the context of the fiduciary relationship with the Respondents in light of the clear and unambiguous language of S.C. Code §40-57-139 (Issue V), and (ii) that the Appellants' reliance on the Respondents' fiduciary status was reasonable (Issue VI).

In their attempt to restate the Appellants arguments as an "ignorance of the law" argument, the Respondents cite American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct.App. 2009), and quote several paragraphs from that case in support of their assertion. (Respondents' Brief at 20-21). The last sentence of the quoted language actually supports tolling of the statutes of limitation on the facts of the present case by stating "[h]owever, 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." American Legion at 583. The clear implication of the court's statement is that equitable tolling **is** appropriate in cases of "fraud or misrepresentation" such as those alleged in the present case.

The Respondents' Brief actually admits the flaw in their legal arguments by stating that "**if the [Appellants] believed at the time of the transactions** that the [Respondents] may not have been entitled to compensation they received, or that the [Respondents] had not performed their services consistent with their standard of care, they could have easily looked into [the law]" (emphasis added). Respondents' Brief at 11. In this statement, the Respondents acknowledge that Appellants had to have been put on notice of some particular injury, fact or circumstance that would cause the Appellants to have "believed at the time of the transactions" that Respondents may have violated the Appellant's rights which are the basis of the Complaint. The Appellants specifically alleged that prior to January 1, 2027, they reasonably assumed that the Respondents

were acting in accordance with all applicable laws and rules. (R. p. 52 ¶128, p. 54 ¶137). The Appellants were first put on notice of the requisite violation of rights on January 10, 2017, and filed this action on January 2, 2020 within any potentially applicable statute of limitations.

The Lower Court's Order holds that the Appellants had an affirmative duty to assume, with no specific reason to do so, that the Respondents had violated the various laws and rules governing their conduct as licensed professionals and violated their fiduciary duties; thereby placing a greater burden on the Appellants to investigate the fiduciary conduct of the Respondents, than the burden placed on the Respondents to satisfy their fiduciary duties and legal disclosure obligations to the Appellants.

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 Respondents offer no legal authorities to contradict the legal authorities cited by Appellants, including Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (S.C. 2010). Despite Verenes being the seminal case on the equitable remedy of disgorgement in South Carolina, the Respondents do not attempt to distinguish the case.

The Respondents and the Lower Court's Order continue to rely on the United States Supreme Court's decision in Great-West Life & Annuity v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002), in support of its holding that the Appellants' Disgorgement and Restitution Claims¹⁴ are legal in nature. (Order at 15). The holding in Great-West addressed a claim "to impose personal

¹⁴ The Appellants refer to the Appellants Brief at 24-25 for a discussion of the Disgorgement and Restitution Claims.

liability on respondents for a contractual obligation to pay money” (emphasis added), and involved funds which had never been in the possession of Great-West, therefore the claim was based in contract and was legal in nature.¹⁵ Great-West at 214.

The Respondents attempt to distinguish Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020) by asserting that its holding was only applicable to an equitable claim of promissory estoppel. This assertion is incorrect as the fundamental issue in Thomerson was whether equitable claims, such as promissory estoppel, which sought “monetary relief” remained equitable in nature and not subject to statutes of limitations. Id. at 259 (“A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim” (internal citation omitted)). The Appellants’ appropriately rely on Thomerson for their assertion that equitable claims for disgorgement of illegally and fraudulently obtained compensation remain equitable even though “monetary relief” is sought.

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 Respondents do not address the legal impact of S.C. Code §40-57-139 and its mandatory requirement of fiduciary disclosure of applicable law by the Respondents. Instead, the Respondents cite to common law of general application which was expressly and unambiguously preempted by S.C. Code §40-57-139(Q). The legal authorities cited by the Respondents are cases in which individuals were being charged with knowledge of laws directly applicable to their own

¹⁵ The Supreme Court in Great-West actually acknowledged that where property is obtained through “unconscientious” means, a **claim for restitution is equitable in nature**. Great-West at 215-216 (internal citation omitted).

conduct. E.g. American Legion, *supra* (the plaintiffs in American Legion were charged with knowledge of the tax laws applicable to their operation of bingo games). The Respondents offer no legal authority for their incorrect assertion that the Appellants were charged with knowledge of the laws not applicable in any respect to the Appellants' conduct.¹⁶

The Lower Court's Order states that the Appellants "argue 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.**" (R. pp. 8-9). The Lower Court's criticism ignores the Legislature's clear and unambiguous mandate that the Respondents were legally required to disclose the applicable law in writing in accordance with the express requirements of S.C. Code §§40-57-139(A) and (B).¹⁷

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 Respondents do not dispute that the Respondents were acting in a fiduciary capacity under applicable law, or that Respondent Wilkins was a licensed attorney at all relevant times. The Respondents cite no legal authorities to refute the Appellants' assertion that it was inherently reasonable for the Appellants to rely on Respondent Wilkins' status as a licensed "broker in charge", and as a licensed attorney in good standing.

¹⁶ The provisions of Title 40, Chapter 57 did not apply in any respect to the 23 transactions in which title to real estate was transferred from the Appellants to the various purchasers.

¹⁷ S.C. Code §§40-57-139(A) and (B) mandate that the Respondents, in addition to explaining the South Carolina law of agency, had to provide the Appellants the "Agency Disclosure" issued and approved by the Real Estate Commission.

The Respondents attempt to distinguish True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997) on the basis that the court’s holding is applicable only to a legal malpractice claim which is not present in the present case. The Appellants assert that the analysis in True would apply to any licensed professional operating in a fiduciary capacity; especially when that licensed professional is, in fact, a licensed attorney in good standing. Respondent Wilkins’ status as a licensed attorney was a basis for Appellants’ initial decision to work with Respondents, and the Appellants’ reliance on their adherence to all applicable laws and rules. (R. p. 36 ¶44, p. 111 ¶443). The Respondents themselves invited this type of reliance as Respondent SVR’s website contained a reference to Wilkins’ status as a licensed attorney. (R. p. 36 ¶44). The Appellants allege that Respondent Wilkins actually provided legal advice in this matter. (R. p. 37 ¶51) The South Carolina Rules of Professional Conduct (“SCRPC”) apply to licensed attorneys, regardless of inactive or retired status, in the conduct of any business endeavor. See SCRPC Rule 5.7, Comments 9 and 11; and Rule 8.4(d).

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?

Despite the clear and unambiguous language of S.C. Code §40-57-137(Q), and our Supreme Court’s decisions in Darby, *supra*, and Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017), the Respondents’ assert that Appellants have no right to bring a private cause of action for violations of the fiduciary disclosure provisions of S.C. Code §§40-57-135, 137 and 139 set forth in the Complaint. Despite the Supreme Court in Fulbright addressing

almost identical statutory provisions involving the Real Estate Commission, the Respondents make no attempt to distinguish Fulbright, or to otherwise refute that it is the controlling precedent in this matter. See Appellants' Brief at Issue VII.

The Respondents provide no legal authority for their assertion that S.C. §40-57-790, which grants standing to the Real Estate Commission to bring actions in the Administrative Law Court, bars private causes of action in other courts based on violations of the fiduciary duty provisions of Title 40, Chapter 57.¹⁸ Under the Respondents' assertion, the plaintiff in Darby, *supra*, would now be barred from bringing a private cause of action due to the fact that the breach of fiduciary duty in addressed in Darby was codified in S.C. Code §40-57-135(D) in 1997 after the action in Darby was originally filed. It is absurd to suggest, however, that the Legislature intended to eliminate private causes of action such as that in Darby by statutorily enumerating the specific fiduciary disclosures required of licensed real estate professionals in Title 40, Chapter 57.¹⁹

Respondents incorrectly cite United Form Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (S.C. 1985) for the assertion that "South Carolina common law has long held that a real estate broker need not have a written commission agreement to be entitled to compensation." (Respondents' Brief at 16, fn. 7). United Form Agency was decided in 1985, 12 years prior to the Legislature's enactment of S.C. Code §40-57-135(C)(4) and (D)(4) in 1997, and was expressly preempted by those sections, and is, therefore, no longer valid precedent in South Carolina.

¹⁸ There is no wording in S.C. Code §40-57-790 which suggests that the Real Estate Commission has the "exclusive" right to litigate violations of the fiduciary duty provisions of Title 40, Chapter 57. Pursuant to Title 1, Chapter 23 of the South Carolina Code, the Administrative Law Courts (the "ALJ") may only hear certain limited types of "administrative" cases, and are statutorily prohibited from hearing private actions involving clients of licensed real estate brokers to address injuries arising from breaches of fiduciary duty. The ALJ is part of the Executive Branch of government and not the Judicial Branch.

¹⁹ Despite §40-57-137(A) expressly and specifically setting forth the classic fiduciary duties under the common law of agency (E.g. see Restatement Third of Agency §§ 8.01 through 8.15), the Respondents only list common law actions for negligence and fraud as being preserved under §40-57-137(Q). (See Respondents' Brief at 17, fn. 8).

Issue VIII.

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

The Respondents do not refute the legal authorities and analysis of the record set forth in the Appellants' Brief on the issue of laches. In this case, the Respondents were the architects and builders of their own problems. Every violation alleged in the Complaint was done knowingly and willfully as evidenced by the Respondents SVR's Policy Manual. (R. pp. 56 ¶153, p. 115 ¶461). In Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334 (S.C. 1985) our Supreme Court held an individual to his poorly worded deal and stated that "[o]ne is not entitled to judicial relief from the terms of a "slipshod agreement" of his own making "regardless of its wisdom or folly, apparent unreasonableness or failure to guard [his] rights carefully." Id. at 104 (emphasis added). In the present case, the Respondents engaged in intentional illegal and fraudulent acts of self dealing in violation of their fiduciary duties to the Appellants. The requirements for the application of the equitable doctrine of laches are not met since the Respondents cannot be prejudiced by the success of their own illegal, fraudulent and deceptive scheme of self dealing which was undertaken knowingly and willfully.

In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C.Ct.App. 1999), the court held that the party asserting laches must show it has been materially prejudiced by the other parties delay. Id. at 297. In the present case, the purpose of creating the Fraudulent Documents was to assure that the Respondents' scheme of self dealing was never discovered. The Respondents, therefore, cannot prove prejudice resulting from the temporary success of their intentional concealment.

Issue IX.

Did the Lower Court err by considering documents not part 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 Respondents do not directly address the Lower Court’s clear and unambiguous reference to an ex parte submission of “**copies**” of documents which the Lower Court “**accepted for review.**” (R. p 3, fn. 4). With no supporting basis in the record, the Respondents **falsely** assert that the Lower Court’s Order actually stated that it “**took judicial notice**” of the fact that such documents would exist and would have been signed by Appellants.²⁰ Despite the Appellants raising this issue first to the Lower Court, and again in this Appeal, **neither the Lower Court nor the Respondents have denied that the ex parte submission of documents actually occurred.** The Appellants have not been informed (i) which “copies of HUD-1 Statements, Contracts of Sale, and Deeds” were “accepted for review” by the Lower Court, (ii) when the submission of such copies occurred, or (iii) who submitted the copies to the Lower Court.²¹

The fact that the Lower Court allowed an ex parte acceptance of documents from the Respondents is bolstered by the Respondents reliance on Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (S.C. 2009). The Supreme Court in Brazell addressed a trial court’s review of a document actually submitted by the defendant’s attorney.²² In Brazell the complaint sought

²⁰ Instead of addressing the clear language of footnote 4, the Respondents attempt to divert this Court’s attention to other passages in the Lower Court’s Order which have no relevance to the highly improper ex parte submission of documents unambiguously referenced in footnote 4.

²¹ The Appellants assert that the Lower Court’s allowing the ex parte acceptance of documents, and the use of those documents as the foundation for the Lower Court’s Order, is a serious abuse of discretion which creates an overwhelming perception of prejudice against the Appellants.

²² In Brazell, the issue was not the impropriety of the submission of the HUD-1 statement as it was not done ex parte; but whether the court’s review of the document converted a Rule 12(b)(6) motion to a Rule 56 motion for summary judgment.

payment of an amount “as set forth upon the HUD-1 Settlement Statement attached to and incorporated herein by reference.” Id. at 515-516. The plaintiff’s attorney failed to actually attach the expressly referenced HUD-1 to the Complaint, and therefore the defendant’s attorney submitted the missing HUD-1 statement with his legal memorandum for the court’s review (with notice to opposing counsel). Id. at 516. The decision in Brazell has no application to the current case if the Respondents did not actually submit copies of the documents to the Lower Court as acknowledged in the Lower Court’s Order. The Appellants assert that Brazell is inapplicable to the present case since (i) the submission of copies in this case was done ex parte, and (ii) the “HUD-1 Statements, Contracts of Sale, and Deeds” were neither exhibits to the Complaint, nor were they incorporated by reference in the Complaint. (R. pp. 59-67 ¶¶167-218).

The Respondents’ response to the Lower Court’s acknowledgement of allowing an ex parte acceptance of copies for review is compounded by their demonstrably false assertion that the HUD-1 statements, contracts of sale, and deeds “were repeatedly referenced in the Complaint, but not attached as exhibits” and were documents “upon which the [Appellants’] claims were based”(emphasis added). (Respondents’ Brief at 22, 24). This assertion is false in that (i) the Complaint contains no references to HUD-1 statements, Contracts of Sale, or Deeds from the 23 subject transactions; and (ii) the Appellants’ claims are not based in any respect on HUD-1 statements, contracts of sale, or deeds²³. The Appellants’ eight causes of action are based exclusively on the various breaches of fiduciary duty, illegal conduct, acts of fraud, and acts of unfair and deceptive competition of the Respondents.

²³ The only deeds referenced in the Complaint are at (R. pp. 41-42 ¶¶72-74). While the HUD-1 statements, contracts of sale, and deeds to purchasers may have some evidentiary value in establishing the facts of this case, the referenced documents do not provide the basis for any of the eight causes of action. For example, the amount of compensation paid to the Respondents could be proven through other means (i.e. cancelled checks, bank records, wire transfers, etc.), and the contracts of sale and deeds are unnecessary to any of the Appellants’ causes of action.

With respect to the Lower Court’s allowing improper utilization of judicial notice, the Respondents again, with no support in the record, falsely assert that “the Trial Court did not take judicial notice of Porth’s state of mind or knowledge.” (Respondents’ Brief at 22). The Lower Court’s Order states that “the Court believes it proper to take judicial notice of the **public record** which would reflect **Plaintiff Porth’s knowledge**”(emphasis added). (R. p. 3 fn. 4). The Lower Court’s statement is unambiguous and irrefutable.

The Respondents do not address the Lower Court’s failure to grant the Appellants’ request for an opportunity to be heard pursuant to SCROE Rule 201(e). The Appellants assert that such a public record does not exist, and the Lower Court’s refusal to allow the Appellants to be heard in accordance with SCROE 201(e) reflects an abuse of discretion.²⁴

Issue X

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

The Respondents provided no reference to the record, and failed to provide any legal authority which could support the Lower Court’s holding that *in pari delicto* would bar the various claims of the Appellants. In Myatt v. RHBT Financial Corp., 370 S.C. 391, 635 S.E.2d 545 (S.C.Ct.App. 2006) the court defined the doctrine of *in pari delicto* as “the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” Id. at 395. “In South Carolina, this doctrine precludes one joint tort-feasor from seeking indemnity from another” (internal citations omitted). Id. Title 40, Chapter 57 by its express terms did not

²⁴ As with allowing the ex parte acceptance of documents, and again, the Appellants assert that the Lower Court’s refusal to grant the Appellants’ request to be heard under SCROE 201(e) violated Judicial Canon 3(B)(7) and created a perception of prejudice.

apply to the Appellants, and the Appellants were not members of the CMLS and not subject to its rules. The Appellants did not owe the Respondents a fiduciary duty in this matter.

For these reasons, there is no evidentiary basis in the Complaint, or elsewhere in the record, for the Lower Court's holding that the Appellants were *in pari delicto* as the doctrine is inapplicable to the allegations of the Complaint as a matter of law. The Respondents incorrectly assert that the foundations for the Lower Court's *in pari delicto* and laches rulings are the same. (Respondents' Brief at 13, fn. 6). This is incorrect as a matter of law, and the Respondents cite no legal authority in support of this legal assertion.

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 Respondents do not address Issue XI as discussed in the Appellants' Brief. The Respondents simply assert that the Appellants "should have known" of their various claims, and could have researched applicable law governing the fiduciary conduct of the Respondents with no apparent reason to do so. The Respondents do not address whether the dates of the Appellants' discovery of the Respondents' various illegal, fraudulent and deceptive conduct presents a question of fact in light of the clear allegations of the Complaint that the Appellants were not put on inquiry notice of the Respondents' illegal, fraudulent and deceptive conduct until January 10, 2017.

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 Respondents' do not offer any legal authority to counter the controlling legal authorities cited in the Appellants' Brief at Issue XII.

Issue XIII

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

The Respondents primarily assert that the Appellants did not raise this issue in their Motion to Reconsider filed with the Lower Court, and as such the Appellants waived appellate review of this issue. The Appellants assert that the rule of issue preservation on appeal "is inapplicable as the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy"(emphasis added). Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (S.C. 2010). Additionally, the Appellants have made a proven allegation of extrinsic fraud on the part of Respondent Wilkins which allows this Court to reach this issue. Appellants' Brief at Issue I.

The Respondents surprisingly rely on Spence v. Spence, 368 S.C. 106, 129 S.E.2d 869 (S.C. 2006) in support of their assertions on this issue. In light of the allegations of extrinsic fraud by Respondent Wilkins set forth in Issue I of the Appellants' Brief, the Appellants call this Court's attention to the fact that Respondent Wilkins was the "attorney at law and real estate agent" in Spence v. Spence alleged to have slip-sheeted the two deeds previously signed by the late Congressman Floyd Spence prior to recording the two deeds with the Lexington County Register of Deeds (i.e. a prior act of extrinsic fraud). Spence at 114-115; see (R. p. 91 ¶¶356-357) (referencing Respondent Wilkins' role in the Spence decision). As such, the Appellants request this Court to exercise its inherent power to address this issue due to the facts of this case.

Conclusion

The Appellants assert that the references to the record, and the legal authorities set forth in this Reply and previously in the Appellants' Brief adequately address the Appellants' thirteen Issues on Appeal. The Appellants, however, wish to address a final question. Why have the Respondents, in their various briefs to the Lower Court and in the Respondents' Brief in this Appeal, engaged in repeated attempts to ignore, trivialize²⁵ and misstate the Appellants' well founded and well pleaded allegations of misconduct by the Respondents? The Appellants assert that the answer to this question is contained in a single sentence contained in the record on Appeal. The Appellants allege in paragraph 354 (R. p. 90) of the Complaint that:

Upon **information** and belief, the Plaintiffs believe that the general form of the Development Agreement was used by Defendants Wilkins and RPW in one or more of the Other RPW Developments, and that the unlawful delegation of marketing authority contained in the Development Agreement creates the high probability that similar violations of applicable South Carolina law, the CMLS rules, and the CMLS Order have occurred on a **substantial number of occasions in the Other RPW Developments** (emphasis added).

The Respondents are aware of the likely consequences of court sanctioned discovery into the Other RPW Developments, and as the Appellants assert in Complaint ¶354, on **information** and belief, such targeted discovery would identify (i) other large scale occurrences of illegal, fraudulent and deceptive conduct by the Respondents against other sellers, and (ii) other occurrences of unfair and deceptive trade practices affecting literally thousands of competing CMLS members in hundreds of other real estate transactions.

While the Respondents attempt to use Appellant Porth's status as an experienced tax and ERISA attorney against him, it was his experience and knowledge which allowed him to "crack the code" of the Respondents' illegal, fraudulent and deceptive scheme of self dealing when no

²⁵ In the Respondents' November 16, 2020 (R. pp. 157-158), the Respondents referred to the Appellants' Complaint as "a Greek tragedy", as "a desperate and elaborate subterfuge", and as "vindictive and egomaniacal".

one had been able to do so previously.²⁶ He was able to accomplish this only because he was presented with an initial “clue” to the Respondents’ scheme on January 10, 2017. As our Supreme Court noted in Spence v. Spence, *supra* at 119, when dealing with the issue of what qualifies as “inquiry notice”, as far back as 1880 our courts have required that “[t]here must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as **furnishing a clue** to the latter”(emphasis added). Black v. Childs, 14 S.C. 312, 321-22 (1880). The Appellants do not know if anyone else was furnished with a clue in the Other RPW Developments, but the Appellants were “furnished with a clue” on January 10, 2017, and pursued that clue with all appropriate due diligence to timely discover their various causes of action, and to file this action within any and all applicable statutes of limitations.

Respectfully submitted,

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
GRIFFIN | DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
cdavis@griffindavislaw.com

Attorney for Appellants

January 4, 2021

²⁶ As alleged throughout the Complaint, this coordinated scheme of self-dealing involved two separate entities, RPW and SVR, and at least 2 licensed real estate professionals, Mr. Wilkins and his sister, Anne W. Brooks. The Supreme Court’s decision in Paradis v. Charleston County School District, Appellate Case No. 2018-002025 (May 19, 2021), had not yet been decided at the time the Complaint was filed, and therefore no cause of action for civil conspiracy was alleged due to the absence of “special damages.”

RECEIVED

Jan 04 2022

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 Reply Brief of Appellants complies with
Rule 211 (b) of the South Carolina Appellate Court Rules.

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
GRIFFIN | DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
cdavis@griffindavislaw.com

Attorney for Appellants

January 4, 2022