

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

68249

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable C. Victor Pyle, Jr., Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case Number: 2009-CP-23-5079

Martha Lynne Angradi and Donald Scott McLorie,
individually and on behalf of their minor child,
Jessie M., Respondents,

v.

Edgar Jack Lail and Leola Lail, Sylvester Golden,
Golden Property, LLC, Nationwide Homes and
Faysoux Real Estate Defendants,

Of Whom Sylvester Golden and Golden Property, LLC are the Appellants/Petitioner

PETITION FOR REHEARING

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May 1, 2013

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PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Sylvester Golden and Golden Property, LLC (hereinafter "Golden Property") respectfully petitions this Court for a rehearing of this appeal.

ARGUMENT

I. THE PER CURIAM DECISION IN THIS MATTER MISAPPLIES EXISTING SOUTH CAROLINA LAW IN AFFIRMING THE TRIAL JUDGE'S ERRONEOUS DENIAL OF GOLDEN PROPERTY'S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON MARTHA LYNNE ANGRADI AND DONALD SCOTT MCLORIE'S (HEREINAFTER "PURCHASERS") FRAUD CLAIM AT THE TRIAL OF THIS MATTER AND A REHEARING IS NECESSARY

The *per curiam* decision of this Court finding no reversible error in the trial court's denial of Golden Property's motion for directed verdict and motion for judgment notwithstanding the verdict on Purchasers' fraud claim is a misapplication of South Carolina law and a rehearing of Petitioner's case is warranted. In support of its finding of no reversible error in the trial court's denial of Petitioner's motion for directed verdict and judgment notwithstanding the verdict, this Court relies on two grounds; that all but one of Petitioner's arguments were not properly preserved on appeal, and that the argument that was preserved on appeal failed as evidence supported a finding that the Purchasers reasonably relied upon Petitioner's representations regarding the condition of the house.

In addressing this Court's ground that all but one of Petitioner's arguments were not properly preserved on appeal, this Court relies on *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 189, 708 S.E.2d 787, 796 (Ct. App. 2011) and Rule 50(a)

SCRCP. Specifically, this Court points to the holding that a failure to raise a particular issue in its directed verdict motion precludes appellate review of that issue. This point is undisputed; however this assertion by this Court that all of Petitioner's arguments on appeal were not preserved in his directed verdict motion is misplaced. It is clear from a review of the record that counsel for the Petitioner based his directed verdict motion on the Purchasers' failure to prove all elements of the fraud cause of action in that there was no testimony placing Petitioner in the position to defraud Purchasers. Petitioner's trial counsel articulated this argument through the theory that Petitioner's role in this transaction did not lend itself to liability on the part of the Petitioner for his statements, and that Purchasers had no right to rely on any statements made by Petitioner. (R. p. 198, lns. 6-24). It is also clear from the record that the trial court judge promptly denied Petitioner's motion for directed verdict, which did not allow trial counsel for Petitioner any further exploration on his arguments. (R. p. 198, ln. 25, p.199, ln.1). Petitioner then renewed his motion for a directed verdict at the close of the evidence which was again promptly denied by trial counsel, presumably on the same grounds as Petitioner's prior motion for directed verdict. (R. p. 273, lns. 22-25, p.274, ln.1). In regards to Petitioner's motion for judgment notwithstanding the verdict, which was also promptly denied without explanation from the trial court judge, in reading the record as a whole it is apparent that Petitioner was relying on his previous arguments in support of directed verdict for this motion. (R. p. 329, lns. 17-21). As such, Petitioner would contend that his arguments on appeal regarding the trial court's erroneous denial of Petitioner's motion for directed verdict and motion for judgment notwithstanding the verdict all stem from the grounds stated by trial counsel and, as such, are properly preserved.

South Carolina courts have been clear that, “an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.” *Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006). Based on this well settled holding, Petitioner is charged with ensuring that all issues raised on appeal were properly raised and ruled upon by the lower court in order argue said issues on appeal. Based on the brief recitation of the Petitioner’s motions for directed verdict and judgment notwithstanding the verdict as well as the record as a whole, Petitioner properly and timely raised the issue of the Purchasers’ failure to prove all necessary elements of their fraud cause of action, causing it to fail as a matter of law. On appeal, Petitioner argued this failure of the Purchasers to prove all elements of their cause of action by expanding on Petitioner’s trial counsel’s argument for directed verdict. Although Petitioner’s appellate counsel used different language in arguing the issue, the grounds remained the same; Purchasers failed to prove all necessary elements of the fraud cause of action, and the trial court erred in denying Petitioner’s motion for directed verdict and judgment notwithstanding the verdict.

Further review of the record demonstrates that Petitioner’s trial counsel argued for directed verdict by attempting to list all the ways in which Petitioner was not involved in the transaction that formed the basis of the lawsuit brought against Petitioner, as well as bring to light the issue of the Purchasers’ inability to have relied on Petitioner’s statements. (R. p. 198, lns. 6-24). This specific argument forms the basis of Petitioner’s appellate counsel’s arguments which were clearly more in depth than what was presented at trial as appellate counsel had unrestricted time to lay out case law and statutes related to the issue. However, every argument predicated by Petitioner’s appellate counsel had

basis not only in the record of the trial, but also in the grounds raised by Petitioner's trial counsel; Purchasers failed to prove all necessary elements of the fraud cause of action, and the trial court erred in denying Petitioner's motion for directed verdict and judgment notwithstanding the verdict. Forcing trial counsel to list every possible detail of an argument would be unduly burdensome, and would cause most trials to lag on for days and weeks longer than necessary. As South Carolina case law states, counsel is only required to preserve an issue for appeal by raising the issue and having the trial court rule on said issue in order for it to be properly raised and argued on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006). *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006).

Because Petitioner's trial counsel argued the issue of Purchasers' failure to prove all necessary elements of a fraud cause of action in his directed verdict motion and motion for judgment notwithstanding the verdict and the trial court denied both motions, it was clear and prejudicial error for the trial judge to deny Petitioner's motion for a directed verdict on the fraud cause of action. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

While Petitioner would incorporate all previously made arguments regarding the trial court's error in denying Petitioner's motion for directed verdict and motion for judgment notwithstanding the verdict, since this Court addressed this specific argument from Petitioner in detail, Petitioner feels it is important to address this Court's concern separately. In addressing the ground that evidence supported a finding that the Purchasers reasonably relied upon Petitioner's representations regarding the condition of

the house, and therefore the trial court did not err in denying Petitioner's motion for directed verdict and motion for judgment notwithstanding the verdict, this Court relies on *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) and *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). In looking at this Court's analysis of the standard for Purchasers' right to rely on statements made by Golden Property, the court quotes the holding of *Armstrong v. Collins* which states that, "[t]he right to rely must be determined in light of the plaintiffs['] duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to [them]." 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005). The specific language of this holding is essential to the case at hand in that it requires that the right to rely be balanced with a plaintiff's duty to use reasonable prudence and diligence under the circumstances. In the case at hand, there exists no evidence in the record, when balanced with reasonable prudence and diligence, which would support a finding that Purchasers reasonably relied on alleged statements made by Petitioner. While on cross-examination, Ms. Angradi admitted that prior to the sale of the house becoming final, she was in possession of several documents detailing that Petitioner was **not** the owner of the house. (R. p. 115). (R. p. 89). (R. p. 90). Based on this knowledge, even assuming *arguendo* that Petitioner stated to Purchasers prior to closing that he was the owner, following that statement being made and prior to obtaining ownership of the house in question, Purchasers were made aware of the true owner of the house. Armed with this knowledge, Purchasers were not able to reasonably rely on statements made by Golden as coming from the owner of the house, but only as coming from the builder. It is undisputed that as a builder, Petitioner's statements would not

constitute fraud and Purchasers would have no right to rely on said statements. This court has addressed issues such as this one in the past by stating that, “a party may not rely upon a misstatement of fact when the truth is easily within his reach.” Armstrong v. Collins, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) *quoting* King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). Even if Purchasers relied on Petitioner’s statements regarding the quality of the house, the truth was clearly within their reach both through their personal real estate agent and through an offered inspection; options the Purchasers’ refused. (R. p. 96, lns. 14-25, p. 97, lns. 1-22). These facts conclusively bar any reliance on Petitioner’s statements as Purchasers did not act reasonably but, based on the record, acted spontaneously and recklessly.

This court offers that due to Petitioner’s relationship with the owner of the house possibly being construed as more akin to a partnership, the Purchasers were able to reasonably rely upon his representations concerning the house. This assumption is misapplied when placed in the context of the matter at hand not only due to the above argument that the Purchasers’ reliance was not reasonable as they chose not garner the truth within their reach, but also in the light of the fact that the Purchasers were aware that Petitioner’s representations concerning the home were based on his knowledge of the house as it was when it was built, not at the time of the sale. This home in question was almost two years old at the time of the Purchasers’ acquisition of the house. This assertion of the Purchasers’ knowledge that this home had been sitting vacant is supported by Ms. Angradi’s testimony that she saw the vacant house “many months” prior to engaging in negotiations over the house. (R. 51, lns. 1-10). Purchasers also would have been aware of, or should have been aware of, the fact that this house was

inspected by Greenville County authorities following its being built, and given a seal of approval. In summary, Purchasers had multiple avenues available to them to allow for full disclosure in regards to the quality and status of the house, none of which they opted to take. As such, Purchasers had no right to rely on any alleged assertions of Petitioner, and if they chose to rely, their reliance was not reasonable. Due to the failure of Purchasers to prove all necessary elements of the fraud cause of action, it was clear and prejudicial error for the trial judge to deny Petitioner's motion for a directed verdict and motion for judgment notwithstanding the verdict on the fraud cause of action. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

As this Court based their decision to affirm the trial court's denial of Petitioner's motion for judgment notwithstanding the verdict on the same basis as their decision to affirm the trial court's denial of Petitioner's motion for directed verdict, Petitioner would crave reference to all above stated arguments as relating to Petitioner's motion for judgment notwithstanding the verdict in support of a rehearing for a detailed analysis of this issue being warranted and necessary.

II. THE PER CURIAM DECISION IN THIS MATTER MISAPPLIES EXISTING SOUTH CAROLINA LAW IN AFFIRMING THE TRIAL JUDGE'S ERRONEOUS SUPPRESSION OF SYLVESTER GOLDEN'S TESTIMONY ON THE HOUSE IN ISSUE PASSING AN INSPECTION BY GREENVILLE COUNTY AUTHORITIES AT THE TRIAL OF THIS MATTER AND A REHEARING IS NECESSARY

The *per curiam* decision of this Court finding no reversible error in the trial court's suppression of Sylvester Golden's testimony on the house in issue passing an inspection by Greenville County authorities is a misapplication of South Carolina law and a rehearing of Petitioner's case is warranted. In support of its finding of no reversible error in the trial court's suppression of Sylvester Golden's testimony on the issue of the

house passing inspection, this Court relied on the ground that Petitioner failed to preserve the issue for appellate review by proffering testimony at trial.

In addressing this Court's ground that Petitioner's testimony was not properly preserved for appeal, this Court relies on *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 83 n.2, 431 S.E.2d 625, 627 n.2 (Ct. App. 1993). Specifically this case holds that "even where a motion in limine is granted, it is not the final ruling on the admissibility of the evidence," and that a party opposing a motion in limine must proffer evidence during trial to preserve the issue for appellate review. However, this holding, when applied to the record in this matter, is misapplied as Petitioner attempted on multiple occasions to proffer evidence regarding the house in question passing inspection and each time was denied by the trial judge. The first instance in which Petitioner attempted to proffer evidence regarding the house passing inspection, the subject of the pre-trial motion in limine, was on direct examination during which he testified that a seal would be present in a house to let people know that it was approved, and that this house in question had this particular seal. (R. p. 209, lns. 15-20). Following this testimony, opposing counsel objected on the grounds that this testimony went to his motion in limine. (R. p. 209, lns 24-25). The trial court sustained the objection and ordered Petitioner's trial counsel to move on. (R. p. 210, lns. 1-2). The second instance in which Petitioner attempted to proffer testimony regarding the house in question passing inspection came on cross-examination when he began to state that this house was inspected by Greenville County before being interrupted by opposing counsel. (R. 251, lns. 20-21). Opposing counsel stated in his objection that this testimony was against the motion in limine, and that Petitioner had just violated an Order of the Court. (R. p. 251,

lns. 22-25). The trial court not only sustained the objection, but instructed the jury to disregard the last answer by Petitioner. (R. p. 252, lns. 2-3). It is clear that these two instances were attempts by Petitioner to proffer testimony regarding the house passing inspection, the very nature of the motion in limine, and in both instances, the trial court sustained opposing counsel's objection, erroneously suppressing substantial evidence and denying Petitioner the opportunity to present all relevant evidence in defense of this matter. This constitutes clear and prejudicial error as well as an abuse of discretion. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

In the same vein as *Galbreath, State v. King*, 367 S.C. 131, 136-37, 623 S.E.2d 865, 868 (Ct. App. 2005), held that, "it is well settled that a reviewing court may not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." In a review of the record on appeal in this matter, it is apparent that the trial court knew exactly what the testimony from Petitioner would be as the judge was informed during the motion in limine arguments what the proffered testimony would entail. This testimony was presented not only in written form in Purchasers' submitted motions in limine, but was also discussed on the record prior to the beginning of the trial. (R. p. 26, lns 1-10, R. p. 28, lns. 20-25). The trial court in fact granted the motion in limine to suppress Petitioner's testimony on the inspection by citing to what can only be deduced by the record as being the best evidence rule. Based on the clear recitation of the proposed testimony of the Petitioner regarding the inspection prior to trial as well as the above discussed attempts by Petitioner to present his testimony during trial, a proper proffer was made and this issue preserved for

appellate review. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

Even assuming *arguendo* that Petitioner's attempt at testifying regarding the house in question passing inspection does not qualify as a proper proffer, South Carolina case law has held that when prejudice is clear from the record, the issue is preserved on appeal despite the absence of a proffer. *State v. King*, 367 S.C. 131, 136-37, 623 S.E.2d 865, 868 (Ct. App. 2005), held that, "when it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer. See *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990). Upon review of the record in this matter, it is clearly prejudicial to Petitioner's entire defense that the jury failed to be able to consider the basis of Petitioner's opinion and knowledge of the structure and livability of the house in question involved the fact that this same house passed inspection by Greenville County authorities prior to sale. This position rings especially true in a case in which the cause of action levied against a person is fraud, a cause of action that would force a jury to consider the person's frame of mind and knowledge at the time of the alleged defrauding. As such, the trial court's suppression of this testimony constitutes clear and prejudicial error as well as an abuse of discretion. Accordingly, a rehearing for a detailed analysis of this issue is warranted.

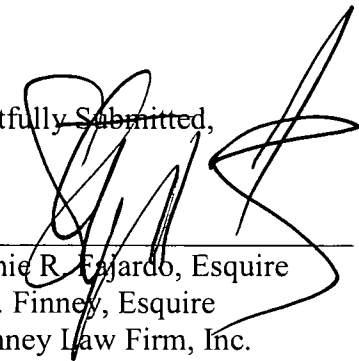
CONCLUSION

Because the *per curiam* decision of this Court finding no reversible error in the trial court's denial of Petitioner's motion for directed verdict and judgment notwithstanding the verdict nor in the trial court's suppression of Petitioner's testimony regarding the house in question passing inspection, a rehearing of Petitioner's case is

warranted. This court has held the Petitioner to an unrecognized, more onerous and unconstitutional standard of issue preservation and proffering of testimony in determining that the Petitioner failed to preserve all arguments supporting the contention that Purchasers' failed to prove their fraud cause of action and that Petitioner's testimony was erroneously suppressed. As these erroneous standards precluded analysis of the Petitioner's issues, the Petitioner would respectfully request a rehearing in this matter.

Furthermore, when analyzing the trial court's erroneous denial of Petitioner's motion for directed verdict and judgment notwithstanding the verdict, in light of the glaring lack of evidence on behalf of the Purchasers to prove the fraud cause of action, the trial court's decision must be reversed and the judgment currently outstanding against Petitioner must be terminated.

Respectfully Submitted,



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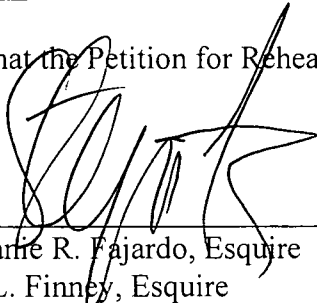
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Of Whom Sylvester Golden and Golden Property, LLC are the Appellants/Petitioner

CERTIFICATE OF COUNSEL FOR APPELLANTS/PETITIONER

Counsel for Appellants/Petitioner hereby certifies that the Petition for Rehearing
complies with Rule 221(a), SCACR.



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May 1, 2013

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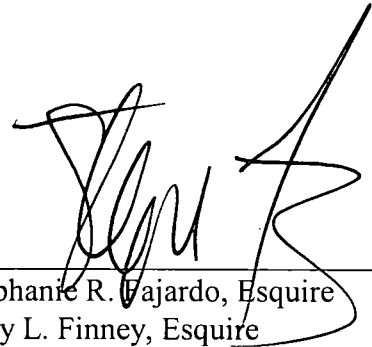
Of Whom Sylvester Golden and Golden Property, LLC are the Appellants/Petitioner

PROOF OF SERVICE

I certify that I have furnished a copy of the **Petition for Rehearing** in the above matter by
depositing a copy of the same in the United States Mail, postage prepaid, on May 1, 2013
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A handwritten signature in black ink, appearing to read 'Stephanie R. Fajardo', written over a horizontal line.

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