

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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

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**S.C. Supreme Court**

Dudley N. Carpenter and  
Jane G. Carpenter,

Respondents,

v.

Charles L. Measter and  
Barbara P. Measter,

Petitioners

---

**APPENDIX**

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2008-CP-10-0069

Charles L. Measter and  
Barbara P. Measter

Appellants/Respondents,

v.

Dudley N. Carpenter and Jane  
G. Carpenter,

Respondents/Appellants.

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**FINAL BRIEF OF APPELLANTS/RESPONDENTS**

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SC Court of Appeals

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### STATEMENT OF ISSUES ON APPEAL

1. DID TRIAL COURT HAVE SUBJECT MATTER JURISDICTION TO REVISE PRIOR SUMMARY JUDGMENT ORDER AFTER ENTRY OF VOLUNTARY DISMISSAL?
2. DID THE TRIAL COURT ERR IN ITS FAILURE TO FIND AS A MATTER OF LAW THAT THERE WAS NO BREACH OF CONTRACT ON THE PART OF APPELLANTS?
3. DID THE TRIAL COURT ERR IN ITS FAILURE TO DISMISS RESPONDENTS' CLAIMS AS ESTOPPED BY THE PROVISIONS OF THE CONTRACT?
4. DID THE TRIAL COURT ERR IN ITS JURY CHARGE AND RULINGS THAT THE JURY COULD FIND A BREACH OF IMPLIED GOOD FAITH IN A CONTRACT WITH NO BREACH?
5. DID THE TRIAL COURT ERR IN SUSTAINING A JURY VERDICT OF DAMAGES AWARDED NOT IN ACCORDANCE WITH THE CONTRACT, EXCESSIVE, AND UNPROVEN AT TRIAL?
6. SHOULD THE DOCTRINE OF MERGER BE APPLIED BY THE COURT BECAUSE THE PROVISIONS OF THE CONTRACT WERE MERGED INTO THE DEED?

### STATEMENT OF THE CASE

Appellants/Respondents (hereinafter "Appellants") sold their condominium (hereinafter the "Apartment") in the Bohicket Marina Village Horizontal Property Regime (hereinafter "Bohicket") to Respondents/Appellants (hereinafter "Respondents") pursuant to an Agreement to Buy and Sell Real Estate Condominiums (hereinafter the "Agreement") (R. pp. 416-421) dated May 18, 2007. The closing took place on July 18, 2007. On January 7, 2008, Respondents commenced the instant action against Appellants alleging breach of contract, breach of contract accompanied by a fraudulent act, breach of the Residential Property Condition Disclosure Statement, fraud, negligent misrepresentation, and breach of

the South Carolina Unfair Trade Practices Act (SCUTPA) (R. pp. 21-30).

Although Respondents had other remedies available to them, the main thrust of Respondents' suit was that Appellants alone were responsible for alleged damages sustained by Respondents weeks after closing due to alleged defects in the structure and foundation of the condominium, common elements under the primary and direct control of the condominium association and of which Appellants testified at trial they were unaware (R. p. 330, lines 2-3; R. p. 365, lines 10-17). Respondent have never alleged or proved any undisclosed defect within the unit Appellants sold to Respondents; instead, Respondents have only alleged defects within common areas and/or units owned by persons other than Appellant.

Appellants were granted summary judgment as to all causes of action save for that under SCUTPA by Order of the Hon. R. Markley Dennis on September 3, 2009. (R. p. 3) The matter was called to trial by jury before the Hon. Deadre L. Jefferson on November 2, 2009. After some initial confusion as to the scope of Judge Dennis's prior order, Judge Jefferson and Respondents' counsel engaged in the following discussions on the record:

The Court:	I sought further clarity from Judge Dennis. His response is, since I did grant summary judgment as to negligent misrepresentation, he's assuming that he did dismiss that cause of as well, meaning the statutory cause of action. And that was his intention. So that leaves us then with unfair trade practices cause of action.
Mr. Stuckey:	Fine.
The Court:	Is there anything else we need to take up before we adjourn from the plaintiff?
Mr. Hildebrand:	Not unless you'd like me to rehash my arguments, Your Honor.

(R. p. 170, lines 4-19)

The Court: Is the plaintiff ready to proceed?  
Mr. Hildebrand: We stipulate that we are going to drop our unfair trade practices claim based on your ruling that's the only claim in the case.  
The Court: Actually, what I indicated was the Judge Dennis ruled. The Court was merely enforcing that ruling. I have not made a ruling in the case on any issue. That's his ruling, he granted summary judgment, [sic] I sought clarification of that ruling.

(R. p. 171, lines 1-9)

On November 9, 2009, Judge Jefferson issued a Form 4 ruling noting that Appellants' action had been dismissed pursuant to Rule 41(a), SCRCF. (R. p. 4). The remaining text of the Order reiterated that Respondents' UTPA was the sole remaining cause of action. It memorialized, *in dicta*, that Plaintiff was going to file a motion to clarify Judge Dennis's order "for appellate purposes." Respondents then filed a Rule 54(b) SCRCF motion as to Judge Dennis's order on Summary Judgment (R. pp. 89-145) and a Rule 59(e) motion as to Judge Jefferson's order on November 30, 2009 (R. pp. 34-87).

On February 23, 2010, Judge Dennis reversed his Order dated September 3, 2009 and held that only Respondents' tort causes of action were dismissed, but that he did not dismiss Respondents' contract-based or statutory causes of action. (R. pp. 5-6). Judge Dennis stated he was ruling "pursuant to SCRCF 54(b), revise that Order nunc pro tunc." (R. pp. 5-6).

The matter came to trial by jury before the Hon. R. Markley Dennis on the breach of contract and statutory causes of action on June 1, 2010. At the close of the case, the Court directed verdict for Appellants on Respondents' claims for breach of the Residential Property Condition Disclosure Act and breach of contract accompanied by fraudulent act. Appellants'

Motion for Directed Verdict on the remaining cause of action was denied. (R. p. 462, lines 20-24; R. p. 475, lines 9-10).

On June 3, 2010 the matter was sent to the jury on the sole remaining count of breach of contract that the jury could find by breach of "an unspoken but legally enforceable promise of good faith and fair dealing." (R. p. 403, lines 5-7). There was no instruction to the jury with respect to the laws affecting condominiums or disclosure or that there had been a Directed Verdict for Appellants as to the cause of action under The Real Property Condition Disclosure Act which underlay the entire suit. (R. pp. 391-413). After a short deliberation, the jury returned a verdict for Respondents in the amount of \$65,000 in actual damages and the Judgment of Judge Dennis issued on the same date. (R. pp. 10-11). On October 15, 2010, the Court denied Appellants' Motion for Judgment NOV. (R. pp. 12-19). On April 1, 2011 the Court denied Appellants' Motion for Reconsideration. (R. p. 20). The Order was filed April 6, 2011 and Appellants received written notice of it on April 12, 2011. Appellants served their Notice of Appeal on May 9, 2011 and filed it on May 11, 2011. Appellants seek the reversal as a matter of law of the Court's Order and the Jury Verdict of June 3, 2010 and the denial of their Motions for Directed Verdict (R. p. 376, lines 20-24; R. p. 389, line 10; R. pp. 9-16), and Reconsideration. In the alternative, Appellants asked for a new trial on the grounds that the Court's instruction to the jury was improper as a matter of law (R. p. 391, line 24-p. 443, line 6) and that the amount of damages awarded by the jury was excessive, unwarranted, and unproven at trial.

## STATEMENT OF THE FACTS

The Appellants sold the Apartment to Respondents pursuant to a negotiated Agreement. The Respondents were extremely sophisticated buyers. (R. p. 208, lines 13-p.209, line 2; R. p. 305, line 22; R. p. 307, line 17). The Respondents were represented by Leonard Krawcheck, Esq. who "did a lot of work" for them and was called on for "just about every real estate issue" that the Respondents had. (R. p. 220, line 18; R. p. 181, line 2). Attorney Krawcheck has represented Bohicket as counsel. He also represented Appellants, who were unaware of his joint representation until closing, in the matter at hand (R. p. 327, lines 16-19).

The closing took place on July 18, 2007 and the Respondents took possession. (R. p. 197, line 21).

The Agreement contained *inter alia* the following clauses and wording:

**3. CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing and transaction closed on or before July 18, 2007 . . .

**4. POSSESSION:** Possession of said property will be given to Buyer at time of closing. Seller agrees to deliver property free of debris and in a clean condition. . .

**9. CLOSING COSTS:** . . .

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfactions and property taxes to the day of closing.

13. **ADJUSTMENTS:** ... Special assessments approved prior to closing shall be the responsibility of the **SELLER**. Special assessments approved after closing shall be the responsibility of the **BUYER**.

**19. CONDITION OF PROPERTY:**

(A) **Seller's Property Condition Disclosure Statement:** ... Buyer and Seller agree that a Seller's Property Conditions statement, as required by South Carolina Code of Laws, as amended, Section 27-50-10, et seq., has been provided to Buyer by Seller... Buyer understands that the Seller's Property Condition Disclosure statement is not intended to replace a professional home inspection...

(B) **Inspection:** Buyer at Buyer's expense shall have the privilege and responsibility of inspecting the structure... including but not limited to... appurtenant buildings, heating, air conditioning, electrical and plumbing systems as well as built-in appurtenant equipment or appliances. All inspections shall be completed by June 8, 2007. In the event repairs are necessary to place the heating system, air conditioning, plumbing system to be conveyed in operative condition and to make the roof free of leaks, and the dwelling structurally sound the Seller shall be notified in writing of the specific defects or deficiencies within 48 hours after the inspection date mentioned above. **Time is of the essence.** If Buyer fails to notify Seller within this time, Buyer shall have waived any and all rights under the terms of this paragraph...

(C) **Maintenance:** ... the Seller agrees to maintain the heating, air conditioning, plumbing, and electrical systems, as well as all appliances to be conveyed in operative condition, normal wear and tear excepted, until the day of closing...

(D) **Wood Infestation Report:**... The Seller shall, at their expense, have the property inspected and shall obtain a current Wood Infestation Report ... on or before June 22, 2007.

(E) **Repairs:** The cost of all repairs to heating system, air conditioning, plumbing, and electrical system to be conveyed, and to make the roof free of leaks, to address environmental concerns and to make the dwelling structurally sound and provide wood infestation treatment, if any, required by section (B) and (D) above, to be paid by Seller... The obligations of Seller under paragraph 19 terminate on the day of closing or on the day possession is given, whichever occurs first.

(H) **Disclaimer:** The Buyer acknowledges the Seller, except as provided in

subparagraphs (B), (C), (D), and (E) of this section, gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of the property or to the conditions of or existence of improvements, services, appliances or system thereto, or as to merchantability or fitness for a particular purpose as to the property or improvements thereof, and any implied warranty is hereby disclaimed by the Seller.

**20. APPRAISED VALUE: ...**

This agreement is contingent on the lot or parcel with building and improvements thereon, if any, appraising according to the lender's appraisal ... for the selling price or more...

(R. pp. 416-422).

Six months later, the Respondents sued the Appellants with respect to the sale. The genesis of the problems and ensuing suit were the actions of an employee of a contractor hired by Bohicket, Herman Hatfield. Hatfield testified that he had a ninth grade education, (R. p. 227, line 9) that there was a structural problem that "only he could see", (R. p. 248, lines 10-12) and that the problem arose at the party wall between the Apartment and the adjoining apartment (R. p. 243, lines 3-4) where, following closing, the contractor had been making repairs. As alleged in Respondents' Complaint, the Respondents sustained damages due to a defect in the foundation (a common element for which Appellants had no direct and primary responsibility) and of which the Appellants testified they were unaware (R. p. 330, lines 2-3; R. p. 327, lines 10-17). As well, the President of Bohicket also testified at trial that he was unaware of any problems as to the Apartment. (R. p. 347, lines 13-14). The former Board of Directors of Bohicket had been sued for breach of fiduciary duty that involved insurance funds won in a suit that had been commenced in 1994 - Appellants bought the Apartment in 1998 - to repair structural issues in some of the buildings. The verdict in the

second suit was rendered in 2005, two years before the sale of the Apartment to Respondents. (R. p. 256, lines 23-24). Neither of the suits affected title to the property. The Court itself stated, “[t]o be candid with you, the only way you can talk about that [the earlier lawsuit] is affecting title.” (R. p. 378, lines 1-4). Furthermore, Attorney Krawcheck, Respondents’ attorney on the real estate matter, was fully aware of the prior lawsuit. (R. p. 324, line 3-p. 325, line 14). The Agreement contained no obligations as to any suits or settlements.

The Agreement between the parties was clear and unambiguous and Appellants fulfilled all of their obligations and conditions precedent under it. It is undisputed even by Respondents that Appellants met all the conditions of the Agreement and that it is the disclosure statement that they allege is the cause of Respondent’s damages. (R. p. 307, line 13-p. 308, line 18). The Agreement (R. pp. 416-421) included provisions for warranty disclaimers, waiver conditions, termination of Seller’s obligations at closing, and estoppels, any one of which should have warranted dismissal of Respondents’ claims. As well, numerous provisions of the Agreement bar any recovery by Respondents including those providing for Buyers’ inspection, no warranties by Sellers, and waivers by Buyers. Not only did the Respondents have a complete home inspection performed, there were several additional inspections of the Apartment as well as a bank appraisal. (R. pp. 485-513; R. pp. 210-224). The Respondents’ further testified as to their intent to remodel the Apartment following purchase, including moving walls. (R. p. 225, lines 12-14; R. p. 326, line 21-p. 327, line 12).

The suit against Appellants alleged breach of contract and tort causes based upon

Appellants' alleged failure to disclose defects in the structure containing the Apartment and an action under SCUTPA. Although Respondents had other remedies available to them (against *inter alia* the condominium association, the real estate agent, their building inspector, and their closing attorney), inexplicably only Appellants were sued.

The matter came to trial on June 1, 2010 before the Hon. R. Markley Dennis on the breach of contract causes of action only. During trial Respondents' testified as to their damages resulting from their inability to move their furnishings into the Apartment that included diminution of value of the Apartment over objection, (R. p. 300, lines 10-21) estimated by Appellants (R. p. 301, lines 12-13), cost of repairs to common elements and repairs that were reimbursed by Bohicket (R. pp. 297-298), and for an assessment (R. p. 310, line 20-p. 312, line 18) all of which took place **following** closing of title. There was no expert testimony. Despite the fact that the Court stated, "[b]ut clearly I haven't heard anything that puts everybody on notice that this unit had any problem, other than the fact of what was disclosed after they bought it", (R. p. 383, lines 4-7), the Court allowed the matter to go to the jury on Appellants' alleged breach of contract that the Court implied that the jury could find by breach of "an unspoken but legally enforceable promise of good faith and fair dealing" (R. p. 403, lines 5-7), later contradicted by the Court's subsequent statement that the Plaintiffs "must prove that the defendants breached or unjustifiably failed to perform under this contract." (R. p. 403, lines 14-16).

Appellants appeal on the grounds that, as a matter of law, they did not breach the contract as, *inter alia*, they had no responsibility for the structure and foundation, they sold

the Apartment subject to the easement of the common elements, and that they fulfilled all the conditions precedent to the contract. The provisions of the Agreement for disclaimer, waiver, termination, and estoppel mandate dismissal of Respondents' claims. In the alternative, as the damage award sustained by the Court was improper, excessive, and unproven, Appellants request remand and a new trial.

### STANDARD OF REVIEW

An action seeking damages for breach of contract is an action at law. Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). In an action at law tried by a jury, appellant review extends to correction of errors of law, and a factual finding of the jury will not be disturbed unless the record discloses no evidence which reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

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

(1984); Godfrey v. Little River Fishing Fleet, 302 S.C. 426, 396 S.E.2d 828 (1990). In an action for the breach of contract, the burden was upon the respondent to prove the contract, its breach, and the damages caused by such breach. Fuller v. Eastern Fire & Casualty Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602 (1962); Baughman v. Southern Railway Co., 127 S.C. 493, 121 S.E. 356 (1924)

### ARGUMENTS

**I. THE TRIAL COURT LACKED JURISDICTION TO REVISE PRIOR SUMMARY JUDGMENT AFTER ENTRY OF VOLUNTARY DISMISSAL OF REMAINING CAUSE OF ACTION.**

**A. Plaintiff's SCRPC Rule 54(b) Motion was untimely.**

There was no case over which Judge Dennis could exercise jurisdiction at the time Plaintiffs moved for him to review a prior order under Rule 54(b). Plaintiffs had voluntarily dismissed their sole remaining cause of action pursuant to Rule 41(a). (R. p. 4). A voluntary dismissal ordinarily leaves the situation as though no suit had ever been filed. Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 97, 651 S.E.2d 311, 314 (2007); Allen v. S. Ry. Co., 218 S.C. 291, 297-298, 62 S.E.2d 507, 511 (1950); Wright & Miller, *Federal Practice & Procedure* 2d § 2367, at 321 (1995). [A] partial summary judgment becomes a final judgment once the remaining parts of the case are dismissed or otherwise resolved." Hope v. Klabal, 457 F.3d 784, 790 (8th Cir. 2006); Porter v. Williams, 436 F.3d 917, 920 (8th Cir. 2006); Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 885 (9th Cir. Or. 2003); James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1070 (9th Cir. 2002);

SCRPC 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is **subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.** (Emphasis added.)

SCRCP 54(b).

In the instant matter, Plaintiff's voluntary dismissal ends the period under Rule 54(b), SCRCP for revision. This would be a logical extension of this Court's decision in Holroyd v. Requa, 361 S.C. 43, 53-54, 603 S.E.2d 417, 422 (Ct. App. 2004). In Holroyd, this Court extended the period of filing a notice of appeal on previously granted motions for summary judgment until after an UTPA claim that had been under advisement was withdrawn. Id. If the period to appeal a final ruling could be extended in Holroyd, it makes logical sense that it was the withdrawal of the remaining cause of action that rendered the previously granted partial motion for summary judgment final for the purposes of the appeal. The voluntary dismissal of the sole remaining cause of action rendered the previously granted motion for summary judgment final for the purpose of Rule 54(b), SCRCP, and it was error for the Court to revise the prior order. Once a final judgment disposing of all claims and all parties is entered, a Rule 54(b) order, entered either before or after the final judgment, has no role to play. Carver v. Condie (In re County of LaSalle), 169 F.3d 469, 472 (7th Cir. 1999).

Judge Dennis issued his Order dismissing all claims except the South Carolina Unfair Trade Practices claim on September 8, 2009. (R. p. 3). It was not until November 30, 2009 that Plaintiffs filed a Rule 54(b) motion to revise Judge Dennis's Order. (R. p. 89). Judge Jefferson's Order dismissing the only remaining cause of action prompted Plaintiffs to call into question Judge Dennis's Order. However, if the Plaintiffs were truly unclear as to Judge Dennis's Order they should have sought to clarify it immediately following its issuance. Plaintiffs did not show any extreme hardship or excusable cause for the delay. Plaintiffs' untimely use of a Rule 54(b) motion created the procedural confusion that has since lingered in this case.

Plaintiffs Rule 54(b) motion was also improper because the court was without jurisdiction at that point to further adjudicate the issue. Initially, it was error for Judge Jefferson to order Respondents to seek clarification of Judge Dennis's order after she had dismissed the only remaining cause of action. There is a long-standing rule in this State that one judge of the same court cannot overrule another. Charleston County Dep't of Social Services v. Father (in the Interest of Two Minors), 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995); Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950); Dinkins v. Robbins, 203 S.C. 199, 26 S.E.2d 689 (1943); Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984).

In Judge Jefferson's November 4, 2009 Order, she stated:

Defendant's Motion for Summary Judgment had previously been GRANTED as to the causes of action for Fraud and Negligent Misrepresentation pursuant to an order by the Honorable R. Markley Dennis on September 3, 2009. The parties are unclear as to the interpretation of Judge Dennis's Order. The

Court sought Judge Dennis's guidance on the issue and he advised that all causes of action save the Unfair Trade Practices Act were dismissed, however, in the interests of justice and for clarity of the record for appellate purposes Mr. Hildebrand will file a Motion to Clarify Judge Dennis's order.

(R. p. 4) (emphasis added).

Judge Jefferson's jurisdiction only extended to the trial of the sole remaining cause of action, and Judge Jefferson then accurately states that she was dismissing the only remaining cause of action. Judge Jefferson initially suggested the correct course of action: Respondent should have appealed Judge Dennis's prior grant of summary judgment after the dismissal of the remaining cause of action. (R. p. 171, line 1-p. 172, line 18). Judge Jefferson did not have the jurisdiction to order Respondent to seek clarification that she herself had already obtained once the last cause of action had been dismissed.

On November 30, 2009, Plaintiffs filed a Notice and Motion to Alter or Amend Judgment under SCRCP 59(e). (R. pp. 34-88). In their motion, Plaintiffs "request[ed] that the Honorable Deadre Jefferson alter or amend pursuant to SCRCP 59(e) her Order and Judgment dated November 4, 2009 . . . Plaintiffs request that the Court rule that the previous Form 4 Order of the Honorable R. Markley Dennis, Jr. dated September 3, 2009, dismissed only two of the Plaintiffs' claims in this case, those being for Fraud and Negligent Misrepresentation." (R. p. 35). Respondent did not file an appeal despite Judge Jefferson's clear ruling as to her interpretation of Judge Dennis's order.

Judge Jefferson denied Plaintiffs' Rule 59(e) motion by Order on April 5, 2010. (R. p. 7-10). In this Order, Judge Jefferson restated her November 9, 2009 Order: "The Order notes that Plaintiff advised that Court that it was withdrawing its remaining cause of action

pursuant to the Unfair Trade Practices Act,' which is supported by the record. The Order is clear and supported by the record as to all other matters, as well." (R. p. 8) (emphasis added). Once the final cause of action was dismissed, the orders on summary judgment became final and the Plaintiffs' only recourse was to appeal (which it did not do.) Because Rule 54(b) was improper here, Judge Dennis's Order of February 26, 2010 is void.

**B. Revision of Judge Dennis' Order nunc pro tunc was improper.**

Judge Dennis's nunc pro tunc Order of February 26, 2010 was also erroneous. (R. pp. 10-11). A prerequisite for a nunc pro tunc order "is some previous action by the court that is not adequately reflected in its record." Ex Parte Strom, 343 S.C. 257, 264-265, 539 S.E.2d 699, 703(2000). A nunc pro tunc entry cannot be made to serve the office of correcting a decision or of supplying non-action on the part of the court. Id. An error could not be corrected by nunc pro tunc order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action. Id. Judge Dennis improperly used the order to supply an omission of judicial action after the underlying action had been fully dismissed by previously by Judge Jefferson. For this reason, his February 26, 2010 Order should be declared void as a matter of law.

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

**A. No Contractual Duty to disclose issues with common areas**

The trial court erred by failing to appropriately rule concerning the nature of the

property conveyed to Respondent by Appellant and to correctly charge the jury on the Horizontal Property Regime Act. S.C. Code Ann. §27-31-20 provides in relevant parts as follows:

(a) "Apartment" means a part of the property intended for any type of independent use...

(c) "Condominium ownership" means the individual ownership of a particular apartment in a building and the common right to a share, with other co-owners, in the general and limited common elements of the property;

(f) "General Common Elements means and includes" *inter alia*: (2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed.

S.C. Code Ann. §27-31-20.

S.C. Code Ann. §27-31-40 further provides that individual units within a property regime may be independently conveyed. It is clear that, pursuant to the statutes, only the apartment may be conveyed; the common elements remain under the control of the council of co-owners. S.C. Code Ann. §27-31-60 states that each apartment owner "shall have the exclusive ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property." Each co-owner has the right to use the common area. S.C. Code Ann. §27-31-80. Common areas can be owned by a non-profit corporation consisting of the co-owners. S.C. Code Ann. §27-31-90. Thus, each individual unit owner owns a share of ownership of the non-profit corporation that owns the common area, but they do not directly own the common area. It is the Association that has the duty to maintain common areas, and a member of a condominium association may bring a tort action against the association for failing to properly maintain the common elements.

Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367, 345 S.E.2d 709 (1986). An owner's rights are governed by the restrictive covenants and bylaws, and they generally limited to paying assessments made by the Association. Id.

The main purpose of a condominium association is to control, regulate, and maintain the shared common elements of the property for which the individual apartment owner has no direct or primary responsibility. It is only "apartments" that can be purchased and conveyed. Appellants, pursuant to the Horizontal Property Act and the Agreement, conveyed their individual right to the Apartment only. There was no dispute that Appellants conveyed what they owned: the apartment. The rulings of the trial court that applied to anything other than the Apartment were in error.

The South Carolina Residential Property Condition Disclosure Act requires owners make certain specific disclosures to prospective buyers. S.C. Code Ann. §27-50-10(4) states, "[t]his disclosure is limited to the actual residential dwelling and does not address common elements for which the owner has no direct and primary responsibility." Pursuant to the statute, the Appellants' obligation under the Act was to disclose information with respect to the Apartment, and not with respect to areas considered to be common areas under the Horizontal Property Act: the building, its structure, or the foundation. §27-50-80 states, "This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article". It is undisputed that Respondents/Purchasers did inspect the property and did not notify Appellants/Sellers of any defects that are the subject of their Complaint.

Despite these facts and that the trial court directed verdict in favor of Appellants on Respondents' claim under the Act, the Court erred when it allowed the jury to consider testimony and photographs regarding the common elements and disclosure. The photographs entered, over Respondents' counsel's objections, depicted the HVAC equipment (located in the common elements) (R. pp. 426-427) that the Court advised counsels, but not the jury, that Respondents' could not rely on, based on inspections and prior knowledge. (R. p. 382, lines 11-14; R. p. 383, lines 2-5). All the pictures, entered over objection, (R. p. 202, line 6-p. 205, line 16) depicted elements of the Apartment damaged and subsequently reimbursed by Bohicket. All of the photos were made post closing of the Apartment during work being performed by Bohicket. The sole intent of these pictures was to prejudice and inflame the jury.

It was inconsistent with South Carolina law and the judge's own rulings to send this case to the jury. Under the laws of South Carolina Appellants had individual ownership of the apartment, not the common elements including the foundation, and their right to sell was subject to the common elements. Any disclosure was limited to the actual dwelling unit. As well, in his Order denying Appellants' Motion for Judgment NOV. (R. pp. 12-19). Judge Dennis' bases for doing so are limited to a discussion of the Disclosure Statement and testimony with respect to alleged structural issues and repairs to the building thus disregarding the limitation to the "actual dwelling unit" and his own Directed Verdict in favor of Appellants as to the breach of contract on violating the disclosure (R. p. 385, lines 17-19) and despite the fact that the disclosure law specifically excludes common areas or any

actions except those affecting title. As a matter of law, the trial courts' rulings should be reversed or, in the alternative, the matter remanded with instructions.

**B. The trial court erred in imposing new terms within an unambiguous contract.**

The trial court erred when it failed to direct a verdict on Respondent's Breach of Contract action. Respondent's Breach of Contract alleged "for failure to disclose known problems and issues with the residence..." (R. pp. 26-27, ¶ 12; R. p. 317, lines 9-21). Respondent's Complaint then elucidates issues only with the common areas and a neighboring unit, and there was no proof concerning any undisclosed defects in what Appellant sold to Respondent. Instead, the Court erred by imposing additional duties to disclose facts and circumstances outside the ones imposed by the contract and satisfied by Appellants.

At no time did the trial court ever rule or find the subject contract was ambiguous in any way. Thus, the trial court had no cause on the directed verdict to interpret the contract. It merely needed to apply the contract to the parties. "Where the contract's language is clear and unambiguous, the language alone determines the contracts force and effect. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491,495, 579 S.E. 2d 132, 134 (2003). "It is not the function of the court to rewrite contracts for parties." E. Bus. Forms. Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) In Ward v. West Oil Co., 379 S.C. 225, 239, 665 S.E.2d 618, 625 (Ct. App. 2008). "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial

construction.” Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (S.C. Ct. App. 2007). It is well established that, “[i]f a contract’s language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument’s force and effect.” Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997) states, “[t]he court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent, unreasonableness, or the parties’ failure to guard their rights carefully.” There is no breach of an implied covenant of good faith “where a party to a contract has done what the provisions of the contract expressly gave him the right to do.” First Fed. Sav. & Loan Ass’n of S.C. v. Dangerfield, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (Ct. App. 1992).

The title conveyed by Appellants/Sellers was, *inter alia*, as all conveyances of apartments established under the South Carolina Horizontal Property Act (See S.C. Code Ann. §27-31-30 & S.C. Code Ann. §27-31-100), subject to the covenants of record, to wit, the Master Deed of Bohicket Marina Village Horizontal Property Regime. As well, the Master Deed states (in conformity with Horizontal Property Act §27-31-20(c) and (f)), in §2.06 thereof “General Common Elements. The general common elements consist of the land described in §2.01, the foundations, crawl spaces... and §5.07 states that general common elements are “Easements Appurtenant to Apartment Ownership.” In accordance with the Agreement, the laws of South Carolina, and the covenants of record, the Apartment conveyed by Appellants/Sellers to Respondents/Buyers was the dwelling unit only, subject to the easement of the shared common elements. See Cedar Cove Homeowners Assoc. Inc. v.

DiPietro, 368 S.C. 254, 628 S.E. 2d 284 (Ct. of Appeals, 2006) (as to the supercedence of restrictive covenants).

Further, as Appellants/Sellers complied with all of the requirements of ¶3, pursuant to ¶3 marketable title to the dwelling unit, together with Appellants/Sellers' share of common elements was conveyed via deed to Respondents/Buyers on July 18, 2007. The only alleged "breach" was Appellants failed to make proper disclosures of the conditions of the property. The trial ruled as a matter of law that Appellant had made all of the required disclosures under the Disclosure Act. (R. p. 385, lines 8-19). The only alleged defects concerned common areas, and Appellants were not required to disclose defects in the common areas.

**C. No Duty to disclose pending lawsuit against Board of Directors.**

The only other remaining issue was whether Appellant was required to disclose a prior lawsuit against the former board of directors for the HOA. (R. p. 385, line 8-p. 388, line 5). The trial court erred when it failed to direct a verdict on the grounds that Appellants breached the agreement by failing to disclose an ongoing class-action lawsuit concerning an alleged breach of fiduciary duty by the former HOA board. However, the trial court correctly recognized (before incorrectly ruling) the prior lawsuits did not affect title. (R. p. 378, lines 1-20; R. p. 386, line 24-p. 388, line 5).

There is no general duty to disclose matters of public record. A vendor of a residence must disclose to the purchaser material facts that are known only to the vendor and not available to the purchaser through diligent inquiry. Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972). The relationship between the buyer and

the seller in a property transaction is "ordinarily not fiduciary." LoPresti v. Burry, 364 S.C. 271, 278, 612 S.E.2d 730, 734 (Ct. App. 2005). Nondisclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction and that such a duty arises only if there are indications that the relationship between the parties is fiduciary in nature. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Ct. App. 2002)

Constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. Spence v. Spence, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006). It is well established that "there can be no liability for causal statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence. Robertson v. First Union Nat'l Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). "It is well settled law in South Carolina that when person has notice of facts as are sufficient to put him on inquiry, and those facts, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts. Multimedia Publishing of S.C., Inc. v. J.R. Mullins, et. al., 314 S.C. 551, 555, 431 S.E.2d 569, 572 (1993). "Because of the doctrine of constructive notice, there is little duty, outside the avoidance of affirmative misleading acts, which is imposed upon the holder of an interest in property, where his or her interest in land is disclosed by the public record." Binkley v.

Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (S.C. Ct. App. 2001)

In the instant case, the pending litigation involving an alleged breach of fiduciary duty by a prior board, and this prior lawsuit did not affect title. This would have required Appellants to disclose pending lawsuits such as one founded on a fraudulent conveyance theory or an action to quiet title. Windsor Props., Inc. v. Dolphin Head Constr., 331 S.C. 466, 470-471, 498 S.E.2d 858, 860 (1998); Hilton Head Plantation Prop. Owners' Ass'n v Donald, 375 S.C. 220, 223, 651 S.E.2d 614, 616 (Ct. App. 2007). Thus, the Court erred when it denied Plaintiff's motion for directed verdict on the notice of the pending lawsuit. Upon the foregoing, Appellants ask the Court to find that they did not breach the Agreement as a matter of law.

**D. Appellants/Respondents fulfilled all conditions precedent under the contract.**

The Appellants fulfilled each and every obligation of Sellers as set forth in the provisions of the Agreement and under the laws of South Carolina and controlling case law. Appellants satisfied all of the conditions precedent within the plain terms of the contract: 3. Conveyance; 4. Possession; 9. Closing Costs; 13. Adjustments; 19.(A) Seller's Property Condition Disclosure Statement 19.(C) Maintenance; 19.(D) Wood Infestation Report; and 19.(E) Repairs. (R. pp. 416-421).

As such, Appellants/Sellers fulfilled all conditions precedent of the Agreement and cannot be found to have breached the contract. A condition precedent is defined as "an act which must occur before performance by the other party is due." Alexander's

Land Company, LLC et al v. M&M&K Corporation et al, 390 S.C. 582, 596, 703 S.E.2d

207, 214 (2010); McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009). The McGill

Court states as follows:

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm, 353 S.C. at 495, 579 S.E.2d at 234. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Id. 353 S.C. at 495, 579 S.E.2d at 134. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence of cause. Id. It is a question of law for the court whether the language of a contract is ambiguous. S.C. Dep't of Natural Res. V. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

McGill v. Moore, 381 S.C. at 185, 672 S.E.2d at 574.

In the instant matter, there has been no question presented to the trial court or any other forum as to an ambiguity in the language of the Agreement. All of Appellants/Sellers' duties under the Agreement and the laws of South Carolina were fulfilled. Had Appellants/Sellers not satisfied the condition precedents under the Agreement, performance by Respondents/Buyers would not have been due. As a matter of law, Appellants did not breach the Agreement.

**E. Actions taken by Respondents/Appellants pursuant to the contract as well as the provisions of the contract itself negate Respondent's/Appellant's claims as to Appellants/Respondents breach.**

The Agreement's provisions for disclaimer, waiver, termination, and estoppels mandate dismissal of the Respondents' breach of contract claims as a matter of law.

1. Waiver

Waiver is the "voluntary and intentional relinquishment or abandonment of a known

right," Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Generally the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. Janasik v. Fairway Oaks Villa Horizontal Property Regime, 307 S.C. 339, 342, 415 S.E.2d 384, 387 (1992). The Janasik Court goes on to state that waiver is protective only, and is to be invoked as a shield, and not as an offensive weapon. Id. The operation of waiver in all cases should be limited to saving harmless or making whole the party in whose favor they arise..."

Paragraph 19(B) of the Agreement states as follows:

(B) **Inspection:** Buyer at Buyer's expense shall have the privilege and responsibility of inspecting the structure... including but not limited to... appurtenant buildings, heating, air conditioning, electrical and plumbing systems as well as built-in appurtenant equipment or appliances. All inspections shall be completed by June 8, 2007. In the event repairs are necessary to place the heating system, air conditioning, plumbing system to be conveyed in operative condition and to make the roof free of leaks, and the dwelling structurally sound the Seller shall be notified in writing of the specific defects or deficiencies within 48 hours after the inspection date mentioned above. **Time is of the essence.** If Buyer fails to notify Seller within this time, Buyer shall have waived any and all rights under the terms of this paragraph...

(R. p. 418)

As presented at trial, Respondents had a home inspection done by The Home Team Inspection Service on June 5, 2007. Home Team issued a comprehensive Home Inspection Report dated June 5, 2007 that included, among numerous other items, the "Foundation", "Structural System", and "HVAC Systems". The inspection found "Debris under home needs removal" and "Vapor Barrier under home needs replacement" but no problems were

noted with either the structure or flooring. As also established by the evidence presented, “[t]he buyer was present during the inspection.” (R. p. 207, lines 10-12; R. pp. 416-425) should be added after Home Team Inspection Report. It is undisputed that Respondents/Buyers did not notify the Appellants/Sellers within the 48 hour “**Time is of the essence**” period or at any other time that there were “defects or deficiencies” or repairs need with respect to the structural soundness of the dwelling, the flooring, or the HVAC system, all subjects of the breach of contract action. Thus, Respondents had at least constructive knowledge of the issues involving the common areas prior to the consummation of the purchase agreement.

Respondents waived whatever defects it could have found when it was afforded the opportunity to do a thorough inspection of the premises. The failure to take action when such action is afforded either by contract or circumstance is also waiver. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 453 (2009)(failing to independently resolve accounting issue when afforded access to records was waiver.) By the Disclosure Agreement’s own terms, a Residential Property Condition Disclosure Statement is not “a substitute for any inspections [Buyers] may wish to obtain.” (R. p. 410, ¶ 19(A); Chastain v. Hiltabidle, 381 S.C. 508, 512, 673 S.E.2d 826, 828 (Ct. App. 2009). The failure to act appropriately after the inspection acted as waiver.

## 2. Disclaimer

Paragraph 19(H) of the Agreement states as follows:

(H) **Disclaimer:** The Buyer acknowledges the Seller, except as provided in subparagraphs (B), (C), (D), and (E) of this section,

gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of the property or to the conditions of or existence of improvements, services, appliances or system thereto, or as to merchantability or fitness for a particular purpose as to the property or improvements thereof, and any implied warranty is hereby disclaimed by the Seller.

(R. p. 419, ¶ 19(H))

3. Termination Agreement

Paragraph 19(E) of the Agreement states as follows:

(E) **Repairs:** The cost of all repairs to heating system, air conditioning, plumbing, and electrical system to be conveyed, and to make the roof free of leaks, to address environmental concerns and to make the dwelling structurally sound and provide wood infestation treatment, if any, required by section (B) and (D) above, to be paid by Seller. If the Seller refuses to make these repairs and treatment, the Buyer shall have the option to (1) accept the property in its present condition (2) negotiate with the Seller for the payment of these repairs and treatment, or (3) terminate this Agreement, subject to paragraph 7. The repairs to any other items are the sole responsibility of Buyer. The obligations of Seller under paragraph 19 terminate on the day of closing or on the day possession is given, whichever occurs first.

(R. p. 419, ¶ 19(E))

It is undisputed that Appellants/Sellers were not requested to make any repairs to the Apartment or to provide wood infestation treatment pursuant to the above paragraph. It is clear that any and all obligations of the Seller under paragraph 19 entitled “**CONDITION OF PROPERTY**” were terminated on July 18, 2007, the date of closing and when possession was given, and cannot furnish the bases for any action by Respondents/Buyers.

Upon the foregoing, Appellants seek reversal of the trial court’s rulings that did not dismiss Respondents’ breach of contract claims as a matter of law.

**III. THE TRIAL COURT ERRED AS UNDER CONTROLLING CASE LAW THERE CAN BE NO BREACH OF IMPLIED GOOD FAITH WITHOUT AN UNDERLYING BREACH OF CONTRACT.**

The Respondents also failed to prove any breach of the implied covenant of good faith and fair dealing. In his Order denying Appellants' Motion for Judgment NOV (R. pp. 12-19), Judge Dennis cited the matters of Adams v. G.J. Creel & Sons, 320 S.C. 274, 465 S.E.2d 84 (1995) and Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 473 S.E.2d 52 (1996) for the proposition that "[t]here exists in every contract an implied covenant of good faith and fair dealing." However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do. First Fed. Savings and Loan Ass'n. of S. C. v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct. App. 1992). An implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. RoTec Servs., Inc. v. Encompass Servs., Inc. 359 S.C. 467, 473, 597 S.E. 881, 884 (Ct. App. 2004).

**IV. THE TRIAL COURT ERRED IN SUSTAINING THE JURY VERDICT FOR DAMAGES WAS NOT CONSISTENT WITH THE LAWS OF SOUTH CAROLINA, THE AGREEMENT, OR WITH PROOF PRESENTED BY RESPONDENTS**

In a breach of contract action, a party may recover for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. Manios v. Nelson, Mullins, Rile & Scarborough, LLP, 389 S.C. 126, 146, 697 S.E.2d 644, 654-655 (Ct. App. 2010); Benford v. Berkeley Heating Co., 258 S.C. 357, 362-63, 188 S.E.2d 841, 842-43 (1972). The proper measure of damages for breach of contract is the loss that was actually suffered as the result of the breach. S.C. Fin. Corp. of Anderson v. West

Side Fin. Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

"In a breach of contract action, damages serve to place the non-breaching party in the position he would have enjoyed had the contract been performed. . . . In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc., 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct. App. 1990). "Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); Collins Entm't. Inc. v. White, 363 S.C. 546, 559-560, 611 S.E.2d 262, 268-269 (Ct. App. 2005).

Bald allegations of diminution in property value, even when made by the landowner, are insufficient to create a genuine issue of fact regarding damages absent any competent evidence showing the existence, amount, or causation of damages." Clark v. Greenville County, 313 S.C. 205, 208, 437 S.E.2d 117, 118 (1993); Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991); Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 561, 671 S.E.2d 79, 87 (Ct. App. 2008). There is no presumption that a person is competent to give his opinion as to the value of real property. His competency must be shown. City of Spartanburg v. Laprinakos, 267 S.C. 589, 230 S.E.2d 443 (1976). In Bowers v. Bowers, 349 S.C. 85, 92,

561 S.E.2d 610, 614 (Ct. App. 2002), this Court held that a "guesstimate" given to the wife by a third party was insufficient to establish the value of a property.

In the instant case, major items of Plaintiff's damages simply do not relate to the alleged breach of contract. The only testimony as to the diminution of value is as follows:

Q. Mr. Carpenter, do you have an opinion as to as the owner of the house, what it has been devalued because of the issues with the unit that were non-disclosed?

A. It was our estimate at the time that we tried to figure our damages for this case, and that was back a year later, based on the market, based on what we know and based on the cost of other units, you know, within the building, we estimated it. And it strictly is an estimation. We estimated that if everyone had known about the issues in the building that it probably would have sold at least for fifty thousand dollars less.

(R. p. 300, line 25-p. 301, line 13)

This testimony is merely bald speculation, and it is exactly the type of unduly speculative valuation that ran afoul of this Court in Gauld and Bowers. Respondent's testimony speculates as to what a prospective purchaser might have paid if that purchaser had "known about the issues in the building." The only issues with the building were issues with the common areas, and it was not an issue with the unit Respondents' purchased. Respondent himself qualifies his own testimony as "strictly an estimation" based on "the market." Therefore, there was no competent evidence upon which the jury could have based a verdict for diminution of value. Respondents likewise did not show by competent evidence how the alleged breach (particularly Appellants' alleged knowledge of the pending lawsuit) caused the value of property to decline. There was no testimony as to the proximate cause of Appellants' alleged breach and damage to the property. Baughman, 306 S.C. 101, 410

S.E.2d 537 (1991).

Respondents also submitted testimony as to assessments that were levied by the association in 2008. The trial court erred in allowing this evidence because it was not a proper item of damage. The contract between the parties clearly provided that Respondents were responsible for assessment levied after the closing. (R. pp. 416-421).

Finally, the following items of testimony related to work that had to be performed to repair elements of the common areas: (R. p. 292, lines 2-5) via exhibits or testimony:

1. Repacking invoice for \$1492.75 dated March 2008 (R. p. 432).
2. Storage invoice for \$263.40 (R. p. 433) together with testimony that it should be multiplied by four months (R. p. 295, lines 9-14).
3. Invoice for replacement of air handler and condenser for \$5,655 (R. p. 434).
4. Replace subflooring \$2961 (R. p. 297, lines 5-11).
5. Replace carpets \$5755 (R. p. 297, line 23-p. 298, line 2]
6. Replace ceramic tile \$5401 (R. p. 298, lines 3-8).
7. Check for \$7515 for 2008 assessment (R. p. 435; R. p. 298, lines 21-22).

With respect to 3 above, the Court stated in its denial of Respondents' Motion for Directed Verdict that Respondents' own inspection report accurately disclosed the information with respect to the air conditioning system and that it was "knowledge of the Plaintiffs." (Respondents herein) (R. p. 317, line 22-p. 318, line 3). If, in fact, Appellants were responsible for any of Respondents' out of pocket expenses whatsoever, that they claim they are not, the only expenses actually proven by Respondents are those represented by Plaintiffs' Trial Exhibits 9 and 10 totaling \$1,756.15. (R. pp. 432-433).

V. THE TRIAL COURT ERRED IN REFUSING TO MERGER DOCTRINE PROVIDES THAT THE PROVISIONS IN A CONTRACT FOR SALE OF REAL PROPERTY ARE MERGED INTO A SUBSEQUENTLY-EXECUTED DEED

Although the South Carolina Supreme Court has held that the implied warranty of fitness survives delivery of the deed in the sale of a new building, the merger doctrine is applicable to the instant case.

“The doctrine of merger is founded on the privilege, which parties always possess, or changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicate an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.” Davis v. KB Home of S.C., Inc., 394 S.C. 116, 128, 713 S.E.2d 799, 805 (Ct. App. 2011); Wilson v. Landstrom, 281 S.C. 260, 313 S.E.2d 130, 132-3 (Ct.App.1984). Once the deed is executed, “the written or oral agreement to convey is merged in the deed ... the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed.” Charleston & WC Rwy. Co. v. Joyce, 231 S.C. 493, 504-505, 99 S.E.2d 187, 193 (1957) citing 55 Am.Jur., Vendor and Purchaser, p. 756, ¶ 327. Once the deed was executed, the contract and the deed merged together. All past promises were merged into the final agreement, and Appellants’ time for performance was over. Therefore, the Court should have directed a verdict based upon the merger doctrine.

**VI. TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO ORDER RESPONDENTS/APPELLANTS TO PROVIDE APPELLANTS/RESPONDENTS WITH A COPY OF ITS PRETRIAL BRIEF.**

The trial court committed reversible error when it ruled Appellants were not entitled to a copy of Respondent's pretrial brief. Appellants' counsel plainly asked for a copy, but it was refused by the trial court. (R. p. 179). Rule 16(c) of the SCRPC clearly provides that "[t]he pretrial brief shall be provided to the judge and served on all parties of record..." SCRPC 16(c). Therefore, the trial court plainly erred in failing to order Respondents' counsel to give Appellants' counsel a copy of the pre-trial brief.

The presentation of Respondent's pre-trial brief without presenting a copy to Appellants amounts to an *ex parte* communication. Ex parte contacts are strongly disfavored, but prejudice must be shown to obtain a reversal on this ground. Ellis v. Procter and Gamble Distrib. Co., 315 S.C. 283, 433 S.E.2d 856 (1993); Burgess v. Stern, 311 S.C. 326, 330-331, 428 S.E.2d 880, 883 (1993). As the Burgess Court correctly noted:

It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" ex parte communications, but against *ex parte* communications.

Id.

This is not merely a proposed order or other stray communication to a trial court, but it was Respondent's brief advising the trial court as to legal and factual issues in the case. Appellants assert that the failure to provide the brief improperly and materially impacted

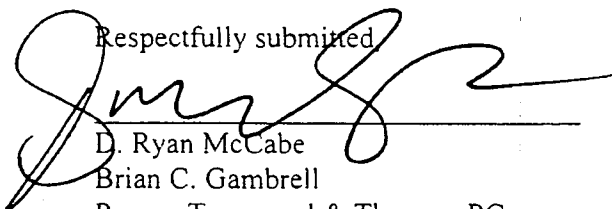
Appellants' defense was prejudiced because Appellants' counsel was unable to effectively counter the arguments made by Respondents' counsel to the Court.

Appellants should not have to show prejudice at any rate because Rule 16(c) clearly provides that Respondents' counsel and the trial court was required to give the pre-trial brief to Appellants. While prejudice is not generally presumed in an ex parte communication, it must be presumed in the instant case. This is more like situation where prejudice can be presumed by failing to properly respond to discovery. Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). If prejudice is presumed in the failure to provide discovery, it should be presumed if the Court fails to disclose opposing counsel's pre-trial brief.

#### CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit and direct a verdict in favor of Appellants.

Respectfully submitted,



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**ATTORNEYS FOR  
APPELLANTS/RESPONDENTS**

April 4, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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Case No. 2008-CP-10-0069

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Charles L. Measter and Barbara P. Measter,

Appellants/Respondents

v.

Dudley N. Carpenter and Jane G. Carpenter,

Respondents/Appellants

---

**FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS**

---

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**SC Court of Appeals**

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## LEGAL ARGUMENT

### I. The Measters' for Judgment *non obstante veredicto* (JNOV) was timely

Initially, The Carpenters raised the issue of the timeliness of Appellants/Respondents' motion for JNOV before Judge Dennis. In his Order dated October 15, 2011, Judge Dennis took up this issue and determined that Measters' Motion for JNOV was timely, based on the Supreme Court's holding in Curtis v. Blake, 381 S.C. 189, 672 S.E.2d 576 (2009); (R. pp. 13-15). The Carpenters did not raise this ruling in their appellant brief, and thus Judge Dennis's determination of the timeliness of Measters' motion for Judgment N.O.V. is the law of the case. Judy v. Martin, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009). An unappealed ruling, right or wrong, becomes the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

Nevertheless, Judge Dennis correctly ruled on this issue because Curtis is dispositive. Curtis involved the meaning of the word "made" under Rule 59(b) motion for new trial. The Supreme Court held in Curtis that "made" under Rule 59(e) meant "serve." Curtis, 381 S.C. 189, 672 S.E.2d 576 (2009). The Supreme Court in Curtis also reaffirmed prior precedent and stated "post-trial motions to amend alter and for a new trial must be served not later than ten days after entry of judgment." Diamond Jewelers v. Naegele Outdoor Advertising, 290 S.C. 260, 349 S.E.2d 888 (1985). The Carpenters' acknowledge the Measters served their counsel via hand delivery within the time allotted under the Rule. Therefore, the Measters "made" their motion properly.

The Carpenters' argument in regards to the timeliness of the Measters' Rule 50 motion and their attempts to distinguish Curtis are revealed to be specious when comparing the language

of the two rules. Rule 50(e) provides: "The motion for judgment N.O.V. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." SCRPC 59(e) (Emphasis added) Rule 59(b) similarly provides: "The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." SCRPC 59(b), (Emphasis added). The wording of both rules is obviously substantially the same, and the Supreme Court's ruling on the meaning of "made" in a nearly identical phrasing in a separate rule is controlling.

The Carpenters distinguish Rules 59 and 50 based on the rules' usages of the term "file" versus "made" and the Carpenters cite Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994), for the proposition that "[w]here there is any ambiguity in a post-trial rule concerning timeliness that can be answered in the Reporter's Notes to that rule, the prescriptions in the Reporter's Notes should be followed." (Initial Respondents' Brief of Respondents/Appellants, page 7). However, there is no patent ambiguity in the time prescriptions of Rules 59 and 50, thus no reason to dissect the Reporter's Notes to clarify the rules. They both clearly and unambiguously state that the motion shall be made within 10 days after the jury is discharged. But even if the court were to refer to the Reporter's Notes for clarification, it is clear that the rules on timeliness are treated the same. In a footnote, the Boone court states "There is a substantially similar note following Rule 50." It seems evident that the courts treat the time requirements in Rules 59 and 50 the same, as was indicated in Judge Dennis's Order of October 15, 2010. Judge Dennis ruled that the Measters' position was strengthened by the fact that they hand delivered a copy of their Motion JNOV on Carpenters' counsel within the required ten day period.

The Carpenters rely on the fact that the Reporter's Notes to Rule 50 state that "the parties may be allowed up to ten (10) days to **file** the motions . . . ." SCRPC 50 (Emphasis added). The

Reporter's Note following Rule 59 states: "In jury trials, post-trial motions are made promptly at the end of trial, or at that time the court, upon motion, may grant an additional ten days to make them." SCRCF 50. The phrase immediately following this in the Reporter's Notes states: "These amendments to Rules 59(b) and (e) and (f) conform the language to that of Rules 50 and 52 . . . ."

Based on the obvious similarities of Rules 59 and 50, the SC Supreme Court's holding in Curtis, and Judge Dennis's Order, the Measters' Motion for JNOV was indeed timely.

## II. The Measters' motion for JNOV specifically raised issues addressed on appeal

Despite the Carpenters' protestations to the contrary, the Measters' Motion for JNOV and other objections did raise the issues currently addressed in their appeal. Initially, the Measters did move for a directed verdict at the close of the Carpenters' case in chief (R. p. 329) and at the conclusion of the trial. (R. p. 376, line 20-p. 377, line 4). The issues raised by the Measters in their briefs have already been raised to the Court at different stages of the litigation; a Motion for Summary Judgment (the granting/withdrawing of which is the subject of the instant appeal).

The issues raised in the Measters' appeal in regards to the granting and reversal of the granting of summary judgment on the issues contract and the handling of that motion was addressed *ad nauseam* by the Courts below. Matters must be raised to and ruled upon by the trial court in order for the matter to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Each of the issues raised by the Measters was the subject of a final ruling by the circuit court. A Rule 59(e) motion is unnecessary where the trial court has already ruled upon an issue. Hardaway Concrete Co., Inc. v. Hall Contracting Corp. 374 S.C. 216, 226, 647 S.E.2d 488, 493 (Ct. App. 2007).

The Measters filed a specific Rule 59(e) Motion on the issue of the interpretation of Judge Dennis's order, and Judge Jefferson's failure to dismiss the case in its entirety. (R. p 34-88). The Measters also filed a Rule 59(e) Motion on October 25, 2010 wherein it raised the issues in their brief that had not been specifically ruled upon by the Court.

Finally, the Measters' made a motion in limine to restrict the admission of evidence concerning the repairs to the common areas and the issue of a payment from the prior lawsuit, and renewed those objections contemporaneously throughout the trial. (R. p. 175, line 21-p. 176, line 22; R. p. 177, line 10-p. 179, line 21; R. p. 181, lines 12-24; R. p. 182, lines 16-25; R. p. 202, lines 18-21; R. p. 204, lines 15-17; R. p. 205, lines 2-3, 15-16).

### **III. Carpenters failed to present competent evidence of a breach of contract or resulting damages**

There is no competent evidence as to any breach of contract or damages thereof, and the trial court erred when it failed to direct a verdict on behalf of the Measters. In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Collins Entertainment, Inc. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 269 (Ct. App. 2005); S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc., 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct.App.1990). The fact of damage is proved by showing (1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract; and (2) the loss was a natural consequence of the breach which may reasonably have been within the contemplation of the parties at the time the contract was made. Id.

The only breach alleged by the Carpenters' involved alleged failures to make disclosures of defects in the common area, the age of an air conditioning unit, and pending lawsuit regarding

the same. (R. p. 23-25, ¶¶ 6, 7, 9, 10; R. p. 29-30, ¶ 34) It is well established that “there can be no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.” Robertson v. First Union Nat'l Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct.App.2002); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct.App.2000).

The Measters had no contractual duty to inform the Carpenters of any of these alleged “defects,” but that was the sole evidence presented to the jury. There is no evidence in the record regarding a breach of contract apart from the Carpenters’ Residential Disclosure Act claim. The Carpenters’ attorney makes repeated references to breach of contract in connection with the disclosure form. (R. p. 186, line 14-p. 187, line 20; R. p. 190, line 1-p. 194, line 9; R. p. 196, lines 5-23; R. p. 197, lines 11-14; R. p. 205, lines 6-9; R. p. 288, line 19-p. 290, line 12; R. p. 317, lines 9-21; R. p. 377, line 9-p. 379, line 5). The Carpenters did not offer any evidence of a breach of contract apart from the Disclosure Act. The Court only found evidence of the breach in light of the Measters’ failure to disclose the pendency of an existing defect lawsuit. (R. p. 261, line 8-p. 263, line 4). This was a duty wholly imposed by the Court and not by the contract itself. A court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction. Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008).

The trial court noted the lawsuit in question, Kenneth G. Schneider et. al. v. Bohicket Marina Village Council of Co-Owners, et. al., 2002-CP-10-1671 did not involve any questions of defects of title. (R. p. 378, line 1-20). This Court should also take judicial notice of the content of the Schneider Complaint and the various orders therein. Rule 201, SCRE; Wise v. Wise 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); Masters v. Rodgers Dev., 283 S.C. 251,

256, 321 S.E.2d 194, 197 (Ct.App.1984). The Measters did not conceal the existence of this lawsuit; it was always a matter of public record. The Carpenters still do not point to any case law or rule which would have required the Measters to notify the Carpenters of a suit which had been pending at that point on and off for almost seven years prior to the closing that did not involve a defect in title. Likewise, the contract itself did not impose any duty on the Measters to share the proceeds of the Schneider litigation with the Carpenters. This was duty imposed upon the Measters by the trial court and not the contract.

The Carpenters also did not even point to a single case that requires a prospective condominium owner under any duty to disclose defects, whether known or unknown, in the common elements of a horizontal property regime. The Real Estate Disclosure Act specifically excludes common areas from the disclosure. S.C. Code Ann. §27-50-10(4). Additionally, the Measters only had a duty under the form promulgated by the Real Estate Commission to disclose the existence of litigation that affected the title<sup>1</sup>. It is undisputed the Schneider litigation did not.

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. Ellie, Inc. v. Miccichi, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004); Regions Bank v.

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<sup>1</sup> These issues are more fully discussed in "Respondents' Brief of Appellants/Respondents."

Schmauch, 354 S.C. 648, 673-74, 582 S.E.2d 432, 445-46 (Ct.App.2003). None of these situations are present in the instant action.

The relationship between the buyer and the seller in a property transaction is "ordinarily not fiduciary." State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct.App.2003) *rev'd on other grounds*, 363 S.C. 477, 611 S.E.2d 501 (2005). A vendor of a residence must disclose to the purchaser material facts that are known only to the vendor and not available to the purchaser through diligent inquiry. Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972). The Real Estate Disclosure Act states: "This disclosure is limited to the actual residential dwelling and does not address common elements or areas for which the owner has no direct and primary responsibility." S.C. Code Ann. § 27-50-10(4).

S.C. Code Ann. § 27-31-20(f) sets out the definition of common elements. The Covenants and Restrictions of Bohicket Marina Village further define "common elements" as:

"The vertical boundaries of the apartments are the unfinished inner surface of the perimeter walls as shown on the plans, and the horizontal boundaries are the unfinished inner surfaces of the ceilings and floors." (R. p. 516, §2.03).

Thus, a simple comparison between the list of common elements in S.C. Code Ann. § 27-31-20(f), the Master Deed, and Carpenter's list of damages from page 17 of their own brief reveals there was no competent evidence of a breach of contract:

Allegation of damage	Damage	Where defined as common element
"The floors in building 8 were noticeably sagging."	Floors	Master deed
"The floors had to be jacked up to make them level."	Floors	Master deed
"The jacking up moved up the entire building and impacted the flooring."	The entire building	S.C. Code Ann. § 27-31-20(f)(2)

"In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor."	Floors	Master deed
"Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing."	Interior walls	Master deed
"Large holes were cut in every single room and ruined all of the tile floors and floor coverings which the Carpenters had to replace."	Floors	Master deed
"When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors."	Floors	Master Deed
"Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors." [sic]	Floors	Master Deed

All of the alleged damages incurred by the Carpenters were as a result of the repairs made to common elements. (R. p. 200, line 22-p. 201, line 5; R. p. 296, line 5-p. 299, line 18). The air conditioning unit and interior flooring were replaced because of work done to the foundation and not because it was defective. (R. p. 205, line 20-p. 206, line 17). The only alleged defect in the air conditioner was its age, which the Carpenters had no right to rely upon that representation because multiple inspections prior to closing informed them of the age of the air conditioning unit. (R. p. 194, line 10-p. 195, line 6; R. p. 207, line 10-p. 208, line 12; R. p. 213, line 12-p. 216, line 16). There was no showing how the difference in the age of the air conditioner (2007

reported instead of the 2004 actual) was material in any way. The air conditioner had to be replaced due to repairs to the foundation (a common element) and not because of a defect or its age. (R. p. 205, line 23-p. 206, line 8). The Carpenters proved there were issues with the common elements, and the Measters were under no legal duty to disclose these defects. Likewise, the "stigma" damage involved the defects in the building and not in the Carpenters' unit. (R. p. 311, lines 5-13). Further, the damages allegedly sustained by the Carpenters to the interior of their unit were the result of repairs to common elements and not to their unit. There is no testimony in the record of damages apart from the repairs to the common elements. There is no causal connection between any breach and the alleged damages suffered by the Carpenters.

In short, the Carpenters never proved a breach of contract. Likewise, the Carpenters never proved any damages that were caused by the Measters. The Carpenters received good title and ownership of the unit per the contract. The Measters were under no legal obligation to disclose defects, whether known or unknown, in the common areas or a lawsuit that did not affect title to the unit.

**IV. The trial court specifically ruled the Measters were not entitled to a copy of Carpenters' Pre-Trial brief.**

The Measters were clearly prejudiced by the refusal of the trial court in handing over a copy of the pre-trial brief. The trial court's information about the case and rules were clearly formed by reading the Carpenters' pre-trial brief. (R. p. 178, line 12-p. 179, line 21; R. p. 181, lines 12-24). This was in clear violation of SCRPC Rule 16(c) which requires the brief to be provided to the judge "and served on all parties or counsel of record at the same time and by the same means." The pre-trial brief and conference serve an important purpose to inform the court as to the legal arguments and evidence to be presented. Hodge v Myers, 255 SC 542, 180 SE2d

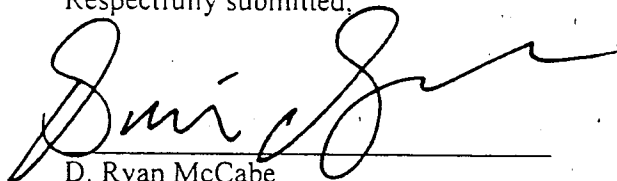
203 (1971). The communication goes beyond a stray comment or brief conversation. It is different from communications which occurred after the trial court had already made its decision.

Instead, the trial court's rulings (or failure to rule) on the issue of the breach of contract was partially controlled by whatever arguments were made by the Carpenters in their pre-trial brief. (R. p. 178, line 12-p. 179, line 21; R. p. 181, lines 12-24). It is clear from the transcript the trial court has swayed at least in part in arguments made by the Carpenters in their pre-trial brief. Therefore, this Court should find the Measters were prejudiced by their inability to know and effectively counter legal arguments which had been made to the trial court in writing.

#### CONCLUSION

For the reasons as set forth herein, Appellants/Respondents respectfully request this Court REVERSE the trial court and enter judgment on behalf of Appellants/Respondents.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS/RESPONDENTS

April 4, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2008-CP-10-0069

Charles L. Measter and Barbara P. Measter,

Appellants/Respondents

Dudley N. Carpenter and Jane G. Carpenter,

Respondents/Appellants

**FINAL RESPONDENTS BRIEF OF APPELLANTS/RESPONDENTS**

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APR 04 2012

**SC Court of Appeals**

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**LEGAL STANDARD:**

In reviewing a motion for directed verdict, the appellate court applies the same standard as the circuit court. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct.App.2000). The court must view the evidence and the inferences that can reasonably be drawn in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). In reviewing a directed verdict, the appellate court "must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

**LEGAL ARGUMENT:**

**I. The trial court correctly granted the Measters' motion for a directed verdict on the Residential Property Condition Disclosure Act.**

The trial correctly granted Measters' motion for direct verdict because the Real Estate Disclosure Act specifically excludes common areas from the required disclosure. S.C. Code Ann. §27-50-10(4). Additionally, the Measters only had a duty to disclose the existence of litigation that affected the title under the form promulgated by the Real Estate Commission.

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Ellie, Inc. v. Miccichi, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004); Regions Bank v. Schmauch, 354 S.C. 648, 673-74, 582 S.E.2d 432, 445-46 (Ct.App.2003). None of these situations are present in the instant action.

The relationship between the buyer and the seller in a property transaction is "ordinarily not fiduciary." State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct.App.2003) *rev'd on other grounds*, 363 S.C. 477, 611 S.E.2d 501 (2005). A vendor of a residence must disclose to the purchaser material facts that are known only to the vendor and not available to the purchaser through diligent inquiry. Lawson v. Citizens & S. Nat'l. Bank of S.C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972). A purchaser of real property is bound by both actual and constructive notice and has no right to shut his eyes or ears to the inlet of information. Spence v. Spence, 368 S.C. 106, 119-120, 628 S.E.2d 869, 876 (2006) "[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Id.

As the supreme court has explained:

Constructive or inquiry notice in the context of a real estate transaction **also** may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with **all** knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed.

Id. at 120, 628 S.E.2d at 876 (emphases added). In making these statements, the court emphasized "the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him," "noting also that "[t]here must appear to be, in the nature of the case, such a connection between the facts disclosed and further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter." "

Id. at 120–21, 628 S.E.2d at 876 (quoting Black v. Childs, 14 S.C. 312, 321–22 (1880)) (emphasis added).

The Real Estate Disclosure Act states: “This disclosure is limited to the actual residential dwelling and does not address **common elements or areas for which the owner has no direct and primary responsibility.**” S.C. Code Ann. § 27-50-10(4)(Emphasis added.) The Real Estate Disclosure is “not a warranty,” and it was “not a substitute for any inspections [Buyers] may wish to obtain.” Chastain v. Hiltabidle, 381 S.C. 508, 512, 673 S.E.2d 826, 828 (Ct. App. 2009) The Legislature placed the duty of performing such an inspection or investigation squarely on the shoulders of the buyers. Chastain, 381 S.C. at 519-520, 673 S.E.2d at 828. S.C. Code Ann. § 27–50–80 also provides “This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article.”

S.C. Code Ann. § 27-31-20(f) sets out the following definition of common elements:

(f) “General common elements” means and includes:

(1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;

(2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;

(3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;

(4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;

(5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;

(6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;

(7) All other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety

S.C. Code Ann. § 27-31-20(f).

The Covenants and Restrictions of Bohicket Marina Village further define "common elements" as:

"The vertical boundaries of the apartments are the unfinished inner surface of the perimeter walls as shown on the plans, and the horizontal boundaries are the unfinished inner surfaces of the ceilings and floors." (R. p. 516, §2.03)

This is the list of the alleged defects from pages 8 and 9 of the Carpenters' appellant brief:

Allegation of damage	Damage	Where defined as common element
"The floors in building 8 were noticeably sagging."	Floors	Master deed
"The floors had to be jacked up to make them level."	Floors	Master deed
"The jacking up moved up the entire building and impacted the flooring."	The entire building	S.C. Code Ann. § 27-31-20(f)(2)
"In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor."	Floors	Master deed
"Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing."	Interior walls	Master deed
"Large holes were cut in every single room and ruined all of the tile floors and floor	Floors	Master deed

coverings which the Carpenters had to replace.”		
“When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors.”	Floors	Master Deed
“Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors.” [sic]	Floors	Master Deed

As the trial court correctly noted:

THE COURT: No, sir. Listen, they make that disclosure consistent with the law. Your clients have to interpret it consistent with the law. Everybody's on notice of the law. So they don't have a duty to say, 'oh, by the way, there's some things going on that are not part of my control.' And that's your argument. I mean, that's your position. They knew that it existed. Sure, they did. But they didn't have a duty to disclose it under the law.

(R. p. 180, lines 16-25)

Terms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005) “Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.” City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) “An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute.” Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002).

As the Court correctly noted, the plain language of S.C. Code Ann. § 27-50-10(4) meant the portion of the Measters' responses only covered interior elements. The Carpenters had no right to rely on the Residential Disclosure Act Statement because that Statement is not absolute. The Disclosure must be viewed in the context of what is required to be statutorily disclosed. A party has no right to rely on representations made under the Residential Disclosure Act where they have received knowledge to the contrary. McLaughlin v. Williams, 379 S.C. 451, 459-460, 665 S.E.2d 667, 672 (Ct. App. 2008). The Measters' disclosure was limited by the scope of the statute to such items that are part of the interior elements. The Measters' had no duty under the act to disclose defects in the common elements. Therefore, the trial court correctly ruled the Measters did not violate the Act pursuant to S.C. Code Ann. § 27-50-10(4).

The Carpenters employed a professional inspector and received a report. (R. p. 194, line 10-p. 195, line 6; R. p. 207, line 10-pg. 208, line 12; R. p. 213, line 12-p. 216, line 16). The Carpenters raise the testimony of Herman Hatfield in regards to the floors in building 8 "noticeably sagging" in "building 8." (R. p. 232, lines 17-18). However, if it were so noticeable as to charge the Measters with knowledge, then it should have also been obvious enough to the Carpenters' multiple inspectors in a diligent inquiry. Lawson, 259 S.C. at 485, 193 S.E.2d at 128.

The Carpenters employed a real estate agent and an experienced closing attorney in the transaction as well. (R. p. 210, lines 1-5; R. p. 216, line 25-p. 217, line 6; R. p. 220, lines 12-p. 221, line 2; R. p. 304, line 22-p. 305, line 2; R. p. 311, lines 6-22). The Carpenters clearly knew they were purchasing a condominium that included an ownership interest in common areas and elements. (R. pp. 416-421). Any questions as to the scope and meaning of the Residential Disclosures should have been directed to their attorney and/or agent. Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests. Maw v.

McAlister, 252 S.C. 280, 166 S.E.2d 203 (1969); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 210-211, 470 S.E.2d 858, 860 (Ct. App. 1996).

Finally, the Carpenters have not pointed to a single case which requires a seller to notify a buyer about a pending lawsuit. The current Real Estate Disclosure Form mandates a seller inform a buyer of:

“Lawsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, proposed assessments or notice from any governmental agency that could affect title to the property.”

(R. p. 424)

The Carpenters repeatedly allege the Measters violated the Act because the Measters did not inform them of the pendency of Kenneth G. Schneider et. al. v. Bohicket Marina Village Council of Co-Owners, et. al., 2002-CP-10-1671. The form is clear this disclosure only covered such actions that could affect title. This Court should also take judicial notice of the content of the Schneider Complaint and the various orders therein. Rule 201, SCRE; Wise v. Wise 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011); Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct.App.1984) Essentially, the allegations in Schneider dealt with the breaches of fiduciary duties by prior boards and their failure to aggressively pursue litigation on behalf of the members of the Association for common element defects. However, it is undisputed Schneider did not involve any questions of defects of title. (R. p. 378, lines 1-20).

The Measters did not conceal the existence of this lawsuit; it was always a matter of public record. Thus, the rule in LoPresti v. Burry, 364 S.C. 271, 612 S.E.2d 730 (Ct.App.2005), is clearly applicable. The representation of the existence of litigation was limited to only those actions which affected title. The Measters had no duty, as a matter of law, to disclose the existence of the Schneider litigation because it did not affect title. It is undisputed the Measters

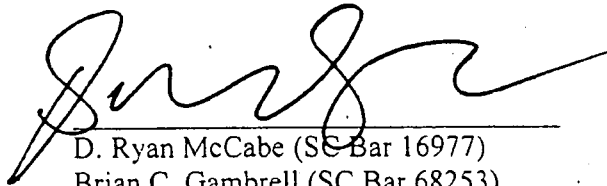
conveyed good title to the Carpenters. Thus, any reliance upon the representation made by the Measters was simply not reasonable. Id.

The Carpenters did not allege there was some sort of special relationship between the Carpenters and Measters. There was no fiduciary or agency relationship between the parties. The Measters and the Carpenters were parties to a contract, and the Carpenters simply failed to exercise due diligence of the public record prior to entering the contract with the Measters.

**CONCLUSION:**

For the reasons as set forth herein, Appellants/Respondents respectfully request this Court AFFIRM the trial court's grant of directed verdict on behalf of Appellants/Respondents.

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**ATTORNEYS FOR APPELLANTS/RESPONDENTS**

April 4, 2012

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2008-CP-10-0069

Dudley N. Carpenter and  
Jane G. Carpenter ..... Respondents/Appellants.

v.

Charles L. Measter and  
Barbara P. Measter ..... Appellants/Respondents,

FINAL APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

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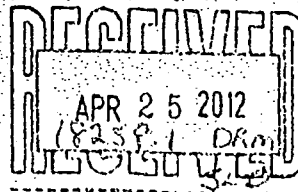


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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING THE MEASTERS' MOTION FOR DIRECTED VERDICT, AND DENYING THE CARPENTERS' MOTION FOR DIRECTED VERDICT, AS TO THE CARPENTERS' CLAIM FOR VIOLATION OF THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (SOUTH CAROLINA CODE §27-50-10, ET. SEQ.)?

STATEMENT OF THE CASE

Dudley "Chip" and Jane Carpenter (the "Carpenters") filed this action against the Measters on January 7, 2008 related to damages the Carpenters incurred with the purchase of a condominium on Seabrook Island, South Carolina. (R. pp. 22-30). The Complaint alleges six causes of action: breach of contract, breach of the South Carolina Residential Disclosure Act ("Disclosure Act") S.C. Code Ann. §27-50-10, fraud, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and breach of South Carolina's Unfair Trade Practices Act. (R. pp. 22-30)

Prior to trial, the Carpenters' claims for fraud and negligent misrepresentation were dismissed by way of summary judgment (R. p. 3) and the Carpenters voluntarily dismissed their claim for violation of South Carolina's Unfair Trade Practices Act. (R. p. 174, lines 16-19).

This matter went to trial on June 1, 2010, before the Honorable R. Markley Dennis, Jr. The case proceeded to trial on Plaintiffs' three remaining causes of action -- breach of contract, breach of the Disclosure Act, and breach of contract accompanied by fraudulent act.

At the end of their case and at the end of trial, the Carpenters moved for directed verdict on all causes of action (R. p. 317, lines 9-21, R. pp. 375, line 24-p. 376, line 18) and the Measters similarly moved for directed verdict dismissing the Carpenters' causes

of action. (R. p. 376). At the end of the Measters' case, the trial judge partially granted the Measters' motion for directed verdict and dismissed the Carpenters' claims for breach of the Disclosure Act and breach of contract accompanied by fraudulent act. (R. pp. 377-389).

The case went to the jury on the Carpenters' breach of contract action and the jury returned a verdict in favor of the Carpenters in the amount of \$65,000. (R. p. 414). The Measters then moved for JNOV (R. pp. 146-162) and then filed notice of appeal on May 9, 2011. The Carpenters filed their notice of cross appeal on May 16, 2011. The Carpenters notice of cross appeal was on the grounds that the trial court erred in dismissing the Carpenters' causes of action for violation of the Disclosure Act and for breach of contract accompanied by fraudulent act. The Carpenters hereby abandon their appeal related to the breach of contract accompanied by a fraudulent act and appeal only on the Disclosure Act issue.

#### FACTS

This matter arises out of the purchase of a condominium by the Carpenters from the Measters. The contract to purchase the residence (the "Agreement") is dated March 17, 2007, and the closing took place on July 17, 2007. (R. pp. 416-421). The Carpenters paid \$675,000 for the residence. (R. pp. 416-421).

The sellers are both attorneys (R. p. 274-275, R. pp. 281-282) and, in fact, Mr. Measter is a highly-credentialed international maritime arbitrator. (R. pp. 282-283). The Measters were required, and did, execute a Residential Property Disclosure Statement ("Disclosure Statement") related to the sale of the property as mandated by South Carolina law and the Agreement. (R. p. 418). Although the Measters could have

declined to provide a Disclosure Statement, or could have made "No Representation" as to any specific aspect of the residence, they chose to make a disclosure and explicitly stated that there were no problems related to the:

Foundation, floors or structural components.

Water seepage or leakage.

Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).

Violations of building codes.

Lawsuits or proposed assessments that could affect title to the property.  
(R. pp. 422-425)

Contrary to their express representations on the Disclosure Statement that there were no problems with the residence, the undisputed evidence at trial established that the Measters were members of an active class action lawsuit (R. p. 333, R. pp. 335-336) which alleged defects to both common and private elements related to the foundations, floors and water intrusion, and which sought damages, including loss-of-use damages, on behalf of individual class members (which included the Measters). (R. pp. 349-356, R. pp. 436-484). That class action lawsuit alleged that there were damages in excess of \$15 million suffered by the class members (R. p. 354) and, in fact, the Measters had received compensation of approximately \$16,000 because of their status as plaintiffs in that suit. (R. p. 257, R. p. 279). In addition, prior to the closing the Annual Meeting of the regime was held and the minutes were mailed to the Measters which stated that structural repairs were just about to commence to their particular building. (R. pp. 267-269). Moreover, the repair contractor who was about to commence repairs to the Measters' building met with Mr. Measter before the closing and advised him that the major structural repairs

were about to commence to the building. (R. pp. 238-240). The repairs that were actually performed to the Carpenter unit were extensive and included four-by-four holes that were cut through the floors of each room in the residence (R. p. 234); the floor finishes were ruined and had to be replaced (R. pp. 205-206) and the Carpenters were dispossessed from their unit from four months while those repairs were performed. (R. pp. 294-295). In fact, the day that the Carpenters were scheduled to move into their unit, they were approached by that same repair contractor who told them that the major repairs were about to start and that they would not be able to move in for an extended period of time. (R. pp. 197-199). Moreover, there was testimony that the Measters had made prior repairs to their particular unit to correct sagging floors. (R. pp. 244-245, R. pp. 271-272).

#### ARGUMENT

DID THE TRIAL COURT ERR IN GRANTING THE MEASTERS' MOTION FOR DIRECTED VERDICT, AND DENYING THE CARPENTERS' MOTION FOR DIRECTED VERDICT, AS TO THE CARPENTERS' CLAIM FOR VIOLATION OF THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (SOUTH CAROLINA CODE §27-50-10, ET. SEQ.)?

The undisputed evidence introduced at trial established as a matter of law that the Measters violated the Disclosure Act. As such, the Carpenters are entitled to remand of this action with instructions to the lower court to consider an award of attorneys' fees to the Carpenters as the prevailing party in this matter.

A disclosure statement is required unless the parties to the contract agree otherwise. S.C. Code Ann. §27-50-30 (13). In this action, Paragraph 19 of the Agreement To Buy and Sell Real Estate Condominiums (the "Agreement") provided that the Measters would execute a Seller's Property Condition Disclosure Statement. (R. pp. 416-421). The Measters had the option of providing a disclosure statement or not providing a disclosure

statement, and they elected to provide one. S.C. Code Ann. §27-50-60 of the Disclosure Act reads as follows:

If the owner discovers, after his delivery of a disclosure statement to a purchaser, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the owner shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the purchaser or make reasonable repairs necessitated by the occurrence before closing.

S.C. Code Ann. §27-50-65 goes on to state:

An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs. The court may award reasonable attorney fees incurred by the prevailing party.

The Disclosure Statement (R. pp. 422-425) defines what a "No" representation by the Measters on the form would mean. The Disclosure Statement reads:

If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "no" and you know there is a problem, you may be liable for making an intentional misrepresentation.

The Disclosure Statement then goes on to state, in all capital letters and in bold print "DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING"

The Measters checked "No" on several pertinent items, indicating they had no knowledge of any deficiencies with the following:

1. Foundation, floors or structural components.
2. Water seepage or leakage.
3. Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).
4. Violations of building codes.

5. Lawsuits or proposed assessments that could affect title to the property.

At trial, the following undisputed facts were introduced into evidence. These facts establish as a matter of law that the Measters violated the Disclosure Act.

1. The Measters were members of an active class action lawsuit that alleged claims for defects to all the buildings, and the Carpenters' building, for both the common elements and the private elements.

- The Measters bought their unit in 1998. (R. p. 323, lines 19-22).
- There had been general structural problems and water intrusion problems with all of the buildings as far back as 1990 that were generally known to the regime members. (R. p. 254, lines 6-20) (R. pp. 436-484).
- A class action was filed on August 18, 2000 (R. pp. 436-484) against the regime officers alleging that there were structural deficiencies and water intrusion in the buildings that had not been corrected. (R. pp. 257-258) (R. pp. 436-484).
- The Measters were members of that class action. (R. p. 333, lines 1-13).
- The class action lawsuit was still active at the time of the sale to the Carpenters, and there were motions regarding attorneys' fees and other issues. (R. pp. 335-336).
- There were known structural problems with all of the buildings, including building 8 (where the Measter/Carpenter unit was located), where all of the buildings had to be jacked up and repaired. (R. p. 258, line 22-p. 260, line 20).
- Interior problems because of the sagging buildings included cracked sheetrock on the inside and sagging floors. (R. p. 261, line 15-p. 262).
- The class action pleadings state that deficiencies exist in all the buildings that will cause deteriorating and sagging floors and walls, carpentry and doors out of trim and out of line, and with all conditions continuing to worsen. (R. pp. 351, lines 6-13). (R. pp. 448-450 and R. pp. 474-475);
- and that the damages would damage not only the regime but "the individual property of the plaintiffs' in the class." (which included the Measters) (R. p. 351, lines 21-24);

- and that it would cost in excess of \$15 million to fix all of the problems “and to compensate the class for the resulting loss of use for the apartments during said repairs.” (R. p. 354, lines 4-15).
  - One purpose of the class action was to compensate each of the individual owners for the amounts that they would be assessed to fund the repairs to the common elements. (R. p. 357, line 8-p. 358, line 17);
  - and it was specifically known that repairs and funds and assessments would be needed for the repair of building 8. (R. p. 359).
  - The Measters were active members of the community and with the HOA board, “they attended meetings and voiced their opinions on certain items”. They also attended the hearing where the funds for the class action settlement were disbursed. (R. p. 361, line 21-p. 362, line 12).
2. Regime documents, provided to the Measters prior to the sale to the Carpenters, explicitly documented that major repairs were about to begin on their particular building.

- The annual meeting of the HOA regime is a big deal. (R. p. 267) and Notice is given to all of the owners. (R. p. 267) and agendas are provided and meeting minutes are provided. (R. p. 267).
- The report for the Annual Meeting (R. pp. 428-431) held on June 2, 2007, was provided to each of the unit owners. (R. p. 267).
- At the time of that report, repairs to building 8 were to begin “immediately” (R. p. 270, lines 4-9) which included the “repair of the sagging, sinking three-bedroom stacked buildings” which contained the Carpenters’ unit. (R. pp. 268-269).
- The settlement proceeds from the class action (approximately sixteen thousand dollars) were supposed to be used to fund the repairs to the buildings. (R. p. 270, line 10-p. 271, line 1).
- Herman Hatfield, the contractor who did the repairs, talked with Mr. Measter in June, 2007, when Mr. Measter walked out of his unit. (R. pp. 238-240).
- Hatfield told Mr. Measter that he was going to do the repairs including jacking up of the entire building. (R. p. 240).
- Measter responded that “it wasn’t no worry of his, he’d sold his unit.” (R.

p. 240, lines 16-17).

- Hatfield saw Mr. Measter at the building a couple of weeks later and Mr. Measter asked when the repairs were going to start and Mr. Hatfield said he did not know when. (R. p. 241, lines 19-24).
- The Hatfield testimony is effectively undisputed by Mr. Measter. When repeatedly asked about the conversation, did not deny that it took place, he simply replied that he did not recall it. (R. pp. 284-286, line 6).

3. The repairs to the Measters' unit were extensive and included both the common elements and the interior private elements.

- The floors in building 8 were noticeably sagging. (R. p. 232).
- The floors had to be jacked up to make them level. (R. p. 232).
- The jacking moved up the entire building and impacted the flooring. (R. pp. 231-232).
- In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor. (R. p. 234).
- Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing. (R. pp. 236-237).
- Large holes were cut in every single room. (R. p. 200, line 18-p. 201, line 5) and ruined all of the tile floors and floor coverings. (R. p. 203, lines 9-25) which the Carpenters had to replace. (R. p. 205, line 20-p. 206, line 17).

4. There was testimony that prior repairs had been made to the Measters' unit to try to level the sagging floors in the unit.

- When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors. (R. p. 244, line 11-p. 245).
- Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors. (R. pp. 271-272, line 7).
- The Measters admitted that they had done renovations which included replacing all the floors in their unit. (R. p. 338, lines 10-15).

5. The Measters understood the significance of the disclosure statement and understood that they had to fill it out completely and list deficiencies whether or not they related to common elements or private elements.

- When Mrs. Measter filled out the disclosure statement she understood that it was her obligation to complete it as to the entire unit, regardless of whether the deficiencies related to common elements or private elements. (R. p. 276, line 9-p. 277, line 19).
- Mrs. Measter sent an email after the closing stating that the Carpenters were terribly upset and were consulting a lawyer about suing them about misrepresentations. "Not only do I not blame them, Charlie and I are very embarrassed that we knew nothing about this." (R. pp. 329-331).
- The Measters' real estate agent, Janice Franklin, understood the importance of the disclosure statement and sat down with the Measters and reviewed each of the disclosures before they were filled out. (R. pp. 341-343).
- If Ms. Franklin had known of any of the Measters' misrepresentations, she would have told the Measters to complete the form differently. (R. pp. 341-344).

The Measters were inarguably obligated to truthfully complete a Disclosure Statement and to correct any material disclosures that were inaccurate. They breached this obligation by failing to disclose any of the deficiencies discussed above. In light of the undisputed testimony, it is almost laughable that the Measters deny that they made "false, incomplete or misleading" disclosures.

Although the Measters argue that they had no obligation to disclose any of the above-referenced evidence because it affected only the "common elements" of the buildings, the facts established that the deficiencies impacted both the common elements and private elements, and individual claims for damages were being made on behalf of the Measters as members of the class. Moreover, a critical fact remains that the Measters

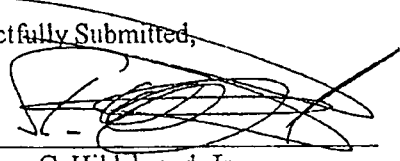
could have made no representation as to the deficiencies that existed; however, they explicitly and affirmatively misrepresented that the deficiencies did not exist when they in fact did. The fact that the Measters could have legally chosen not to have made representations did not release them under the contract or the Disclosure Form from making false statements. As such, the undisputed evidence introduced at trial established as a matter of law that the Measters violated the Disclosure Act.

The underlying case went to the jury only on the Carpenters' claim for breach of contract. The Carpenters' claim for breach of contract was based on the fact that the Measters made misrepresentations in the Disclosure Statement, and the Disclosure Statement was required to be completed as a condition of the contract. Therefore, the jury verdict in favor of the Carpenters for the breach of contract necessarily established the facts to prove that the Measters violated the Disclosure Act by making misrepresentations on it. As such, if this Court agrees with the Carpenters' appeal and finds that the trial judge improperly granted the Measters' motion for directed verdict on the Disclosure Act and improperly denied the Carpenters' motion for directed verdict under the Disclosure Act, the only issue remaining would be for a remand of this case solely for the determination of the propriety of attorneys' fees under the Disclosure Act Section 27-50-65. Therefore, the sole relief requested by the Carpenters is a finding that the trial judge's directed verdict rulings on the Disclosure Act were in error and that the case should be remanded for a determination of attorneys' fees under the Disclosure Act. The Carpenters do not seek a new trial under any circumstances.

CONCLUSION

As discussed immediately above, the Carpenters request a ruling from the court that the trial judge erred in granting the Measters' motion for directed verdict as to the Disclosure Act and in denying the Carpenters' motion for directed verdict as to the Disclosure Act, and the Carpenters seeks a remand only for the determination of attorneys' fees under that Act. The Carpenters do not seek a new trial and seek a remand only for the determination of attorneys' fees.

Respectfully Submitted,

By   
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April 24, 2012

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Re Markley Dennis, Jr., Circuit Court Judge

Case No. 2008-CP-10-0069

Dudley N. Carpenter and  
Jane G. Carpenter

Respondents/Appellants

Charles L. Mcaster and  
Barbara P.  
Mcaster

Appellants/Respondents

FINAL RESPONDENTS' BRIEF FOR RESPONDENTS/APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. WAS THE MEASTERS' MOTION FOR JNOV BARRED BECAUSE THEY WAITED MORE THAN TEN DAYS TO FILE THEIR MOTION?
2. DID THE MEASTERS FAIL TO PRESERVE THEIR ARGUMENTS ON APPEAL BY FAILING TO MAKE PROPER MOTIONS FOR JNOV OR FOR NEW TRIAL BEFORE THE TRIAL COURT?
3. DID THE TRIAL COURT PROPERLY PROCEED WITH TRIAL ON CARPENTERS' CAUSES OF ACTION?
4. WAS THERE EVIDENCE TO SUPPORT THE JURY VERDICT FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN A CONTRACT?
5. WAS THERE EVIDENCE TO SUPPORT THE TRIAL COURT'S AND JURY'S DETERMINATION THAT THE CARPENTERS' CLAIMS WERE NOT BARRED BY WAIVER, DISCLAIMER OR FORFEITURE/MERGER?
6. WAS THERE EVIDENCE TO SUPPORT THE JURY'S AWARD OF DAMAGES?
7. WAS THE TRIAL COURT CORRECT IN FINDING NO BASIS FOR A NEW TRIAL BASED ON THE MEASTERS' ASSERTION THEY SHOULD HAVE BEEN GIVEN ACCESS TO THE CARPENTERS' TRIAL BRIEF?

## STATEMENT OF THE CASE

Dudley "Chip" and Jane Carpenter (the "Carpenters" or "Respondents") filed this action against Appellants (the "Measters") on January 7, 2008 related to damages the Carpenters incurred with the purchase of a condominium on Seabrook Island, South Carolina. (R. pp. 22-30). The Complaint alleges six causes of action: breach of contract, breach of the South Carolina Residential Disclosure Act S.C. Code Ann. §27-50-10 ("Disclosure Act"), fraud, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and breach of South Carolina's Unfair Trade Practices Act. (R. pp. 22-30).

Prior to trial, Appellants moved for summary judgment asserting various arguments against Respondents' six causes of action. The Hon. Markley Dennis subsequently issued an order granting Appellants motion to dismiss two of Respondents' claims (for fraud and negligent misrepresentation) but denying their motion as to unfair trade practices. (R. p. 3). The order did not dismiss, or even address, Respondents' three other causes of action.

When this case was called for trial before a different judge, the Hon. Deadra Jefferson, the Measters filed a motion requesting that Judge Jefferson interpret Judge Dennis's order as dismissing all of the Carpenters' causes of action, including the causes of action that were not mentioned in the prior order. (R. pp. 32-33). Judge Jefferson acknowledged that the Carpenters' UTPA claim was clearly still in the case, but she directed the parties to obtain clarification from Judge Dennis as to the intent of his prior order regarding the three causes of action that were not addressed in that prior order. (R. p. 173, lines 12-14). It was confirmed that counsel for Respondents would voluntarily

dismiss the UTPA claim and seek clarification from Judge Dennis (as directed by Judge Jefferson) on the remaining causes of action. (R. p. 174, lines 16-19).

Judge Jefferson then issued a form order which requested clarification from Judge Dennis as to the intent of his order, and stated that after Judge Dennis' reconsideration, the matter would be restored to the trial roster (if there were any causes of action remaining), or the case would be dismissed with prejudice. (R. p. 4).

The Carpenters, as directed by Judge Jefferson, then moved for Judge Dennis to clarify his order under Rule 54(b), SCRCF. (R. pp. 89-145). Judge Dennis then issued an order dated February 23, 2010 which ruled nunc pro tunc to clarify his prior order and which stated that that prior order denied the Measters' motion for summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, *et. seq.* (R. pp. 5-6). Stated otherwise, Judge Dennis clarified that the Carpenters' claims for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10 were not and never had been dismissed and were still active. Judge Dennis then tried the case.

At the end of their case and at the end of trial, the Carpenters moved for directed verdict on all causes of action (R. p. 317, R. pp. 375-376) and the Measters similarly moved for directed verdict dismissing the Carpenters' causes of action. (R. p. 376). At the end of the Measters' case, the trial judge partially granted the Measters' motion for directed verdict and dismissed the Carpenters' claims for breach of the Disclosure Act and breach of contract accompanied by fraudulent act. (R. pp. 377-389). The case proceeded to the jury on the Carpenters' breach of contract action and the jury returned a verdict in favor of the Carpenters in the amount of \$65,000. (R. p. 414, lines 9-12). The

Measters then moved for JNOV (R. pp. 146-162) and filed this notice of appeal on May 9, 2011. No motions for new trial were filed by the Measters.

#### STATEMENT OF THE FACTS

This matter arises out of the purchase of a condominium by the Carpenters from the Measters. The contract to purchase the residence (the "Agreement") is dated March 17, 2007, and the closing took place on July 17, 2007. (R. pp. 416-421) The Carpenters paid \$675,000 for the residence. (R. p. 416). The sellers are both attorneys (R. pp. 274-275, R. pp. 281-282) and, in fact, Mr. Measter is a highly-credentialed international maritime arbitrator. (R. pp. 282-283). The Measters were required, and did, execute a Residential Property Disclosure Statement ("Disclosure Statement") related to the sale of the property as mandated by South Carolina law and the Agreement. (R. p. 418). Although the Measters could have declined to provide a Disclosure Statement, or could have made "No Representation" as to any specific aspect of the residence, they chose to make a disclosure and explicitly stated that there were no problems related to the:

Foundation, floors or structural components.

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Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).

Violations of building codes.

Lawsuits or proposed assessments that could affect title to the property. (R. pp. 422-425).

Contrary to their express representations in the Disclosure Statement that there were no problems with the residence, the undisputed evidence at trial established that the Measters were members of an active class action lawsuit (R. p. 333, R. pp. 335-336)

which alleged defects to both common and private elements related to the foundations, floors and water intrusion, and which sought damages, including loss-of-use damages, on behalf of the Measters as individual class members. (R. pp. 349-356 and R. pp. 436-484). That class action lawsuit alleged that there were damages in excess of \$15 million suffered by the class members (R. p. 354) and, in fact, the Measters received compensation of approximately \$16,000 because of their status as plaintiffs in that suit. (R. p. 257, 279).

In addition, prior to the closing, the Annual Meeting of the regime was held and the minutes were mailed to the Measters which stated that structural repairs were just about to commence to their particular building. (R. pp. 267-269). Moreover, the repair contractor who was about to commence repairs to the Measters' building met with Mr. Measter before the closing and advised him that the major structural repairs were about to commence to the building. (R. pp. 238-240). The repairs that were actually performed to the Carpenter unit were extensive and included four-by-four holes that were cut through the floors of each room in the residence (R. p. 234); the floor finishes were ruined and had to be replaced (R. pp. 205-206) and the Carpenters were dispossessed from their unit from four months while those repairs were performed. (R. pp. 294-295).

In fact, the day that the Carpenters were scheduled to move into their unit, they were approached by that same repair contractor who told them that the repairs were about to start and that they would not be able to move in for an extended period of time. (R. pp. 197-199). Moreover, there was testimony that the Measters had made prior repairs to their particular unit to correct sagging floors. (R. pp. 244-245, R. pp. 271-272).

## ARGUMENT IN REPLY

This case stems from a jury verdict finding the Measters breached their contract with the Carpenters. An action for breach of contract is an action at law. Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). As such, the jury's findings of fact must be affirmed on appeal unless there is no evidence to support them. Creighton v. Coligny Plaza P'ship, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1999).

1. THE MEASTERS' MOTION FOR JNOV WAS BARRED BECAUSE THEY WAITED MORE THAN TEN DAYS TO FILE THEIR MOTION.

As an initial matter, this appeal should be dismissed as untimely because the Measters failed to timely file their post trial motions. On June 3, 2010, the Carpenters were awarded a \$65,000 jury verdict. (R. p. 414). The Measters requested and were given ten additional days to file post-trial motions. (R. p. 415, lines 19-23). The only post-trial motion which the Measters submitted was a Motion for Judgment NOV (R. pp. 146-162). Rule 50, SCRCPP, which governs motions for judgment NOV, states that the motion shall be "made" promptly after the jury is discharged or within ten days in the discretion of the court. The language in Rule 50 differs from that found in Rule 59, SCRCPP, which governs motions for a new trial. The Reporter's Notes following the Rule 50 state that "[t]he parties may be allowed up to ten (10) days to file the motions." Rule 50, SCRCPP, Reporter's Notes. The ten day filing period for the Measters to file their Motion for Judgment NOV began to run on Thursday, June 3, 2010. Because the tenth day, June 13, 2010, was a Sunday, the period expired on Monday, June 14, 2010. Although Appellants served Respondents with their motion NOV on Monday, June 14 (by hand delivery) they inexplicably waited until the following day to file and serve (again, by hand delivery) their motion with the court. (R. pp. 146-162).

Respondents anticipate that Appellants will argue that service on Respondents on June 14, 2010 was effective to ensure their Motion was timely. However, any such argument would fail for two reasons. First, the Reporter's Notes to Rule 50, SCRPC plainly provide for parties to file their motions within ten days. Second, nothing in Rule 50, SCRPC suggests that service is effective to prolong the trial court's jurisdiction.

Where there is any ambiguity in a post-trial rule concerning timeliness that can be answered in the Reporter's Notes to that rule, the prescriptions in the Reporter's Notes should be followed. Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994).

The recent case of Curtis v. Blake, 381 S.C. 189, 672 S.E.2d 576 (2009) features procedural facts that are almost identical to the ones here, except that under consideration was the timeliness of a motion for a new trial under Rule 59(b), SCRPC as opposed to a written motion JNOV under Rule 50(b), SCRPC. Id. In Curtis, the petitioner served but did not file a Rule 59(b), SCRPC motion within ten days. Id. at 191. After acknowledging that the term "made" is not defined in Rule 59(b), SCRPC the South Carolina Supreme Court noted that "other portions of Rule 59, SCRPC utilize service as the effective date for making a motion." Id. Thus, it observed that "service" is clearly enunciated for compliance with Rule 59(c), SCRPC, Rule 59(d), SCRPC and Rule 59(e), SCRPC. Id. Reasoning that these three instances found elsewhere in Rule 59, SCRPC informed how motions are "made" in Rule 59(b), the Court concluded that written Rule 59(b), motions are timely when served within the allotted time period. Id.

Unlike Rule 59, SCRPC which contains numerous references to "service" as the effective means for moving under that rule, no portion of Rule 50, SCRPC provides, or suggests that written JNOV motions are effectively made when they are served. Rather,

the only place in Rule 50, SCRCP that provides guidance on how to effect a written motion JNOV occurs in the Reporter's Notes, which as already discussed herein, state that "parties may be allowed up to ten days to file their motions." (emphasis added).

Because Appellants' Motion JNOV was not filed within ten days, it was barred and the Appellants' Appeal should be dismissed.

2. THE MEASTERS FAILED TO PRESERVE THEIR ARGUMENTS ON APPEAL BECAUSE THEY FAILED TO MAKE PROPER MOTIONS FOR JNOV OR FOR NEW TRIAL BEFORE THE TRIAL COURT.

Appellants moved for JNOV only on the grounds that Respondents (1) waived, (2) disclaimed and (3) forfeited any rights that Respondents may have had under the contract. (R. pp. 147-152)

Appellants did not move for directed verdict and JNOV on the grounds that the cause of action for breach of contract was not properly in the case because of an earlier summary judgment order (Issue 1 on appeal), that there was no breach of contract (Issue 2 on appeal), that Respondents claims are barred by estoppel (Issue 3 on appeal), that there was an improper jury charge and that the jury could not find breach of implied good faith in a contract (Issue 4 on appeal), that there was an improper award of damages (Issue 5 on appeal), that Respondents claims are barred by merger (Issue 6 on appeal) or that the trial judge erred in failing to provide Appellants with Respondent's pre-trial brief (Issue 6 in Appellants Argument). As a result, all of those grounds for appeal should be dismissed.

Appellants did not file any motions for new trial. Therefore, Appellants have no basis for appeal regarding a jury charge (Issue 4 on appeal), that there was in improper award of damages (Issue 5 on appeal), or that the trial court committed error in failing to

require Respondents to provide Appellants with Respondents Pre-trial Brief (Argument 6).

3. THE TRIAL COURT PROPERLY TRIED ALL OF THE ACTIVE CAUSES OF ACTION IN THIS CASE.

Prior to trial, Appellants moved for summary judgment asserting various arguments against Respondents' six causes of action. Judge Dennis subsequently issued an order granting Appellants' motion to dismiss two of Respondents' claims (for fraud and negligent misrepresentation) but denying their motion as to unfair trade practices. (R. p. 3). The order did not address, much less dismiss, Respondents' three other causes of action, namely; breach of contract, breach of contract accompanied by fraudulent act or breach of S.C. Code Ann. §27-50-10, *et. seq.*

When this case was called for trial before Judge Jefferson, the Measters filed a motion requesting that Judge Jefferson interpret Judge Dennis' order as dismissing all of the Carpenters' causes of action, including the causes of action that were not mentioned in the prior order. (R. pp. 32-33). Judge Jefferson acknowledged that the Carpenters' UTPA claim was clearly still in the case, but she directed the parties to obtain clarification from Judge Dennis as to the intent of his prior order regarding the three causes of action that were not addressed in that prior order. As Judge Jefferson stated: "And so it seems to me it's in everyone's best interest that you all get clarity on Judge Dennis's ruling and that would be the court's position on it." R. p. 173, lines 12-14). It was confirmed that counsel for Respondents would voluntarily dismiss the UTPA claim and seek clarification from Judge Dennis (as directed by Judge Jefferson) on the remaining causes of action.

Judge Jefferson then issued a form order which stated, in pertinent part:

The parties are unclear as to the interpretation of Judge Dennis's Order....

[I]n the interests of justice and for clarity of the record for appellate purposes Mr. Hildebrand will file a Motion to Clarify Judge Dennis' order. After Judge Dennis's consideration of the motion if there is remaining any cause of action the matter will be restored to the jury trial roster for trial and if none remains the matter will be ended with prejudice so that the parties may avail themselves of the appellate process.

(R. p. 4).

In short, Judge Jefferson's order requested clarification from Judge Dennis as to the intention of his order, and stated that after Judge Dennis' ruled, the matter would be restored to the trial roster (if there were any causes of action remaining), or the case would be dismissed with prejudice. In effect, Judge Jefferson's order requesting clarification simply removed the case from the active roster and held that further handling would be contingent on Judge Dennis' subsequent ruling.

The Carpenters, as directed by Judge Jefferson, then moved for Judge Dennis under Rule 54(b), SCRCF to clarify his order. (R. pp. 89-145). In the meanwhile, both Appellants and Respondents moved pursuant to Rule 59(e), SCRCF for Judge Jefferson to amend her order of November 9, 2009 that sought clarification from Judge Dennis. (R. p. 7).

Before Judge Jefferson ruled on the Rule 59(e), SCRCF motions of both the Appellants and Respondents, Judge Dennis issued an order dated February 23, 2010 which ruled nunc pro tunc to clarify his prior order and found that that prior order denied the Measters' motion for summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, et. seq. (R. pp. 5-6). Stated otherwise, Judge Dennis clarified that the Carpenters' claims for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann.

§27-50-10 were not and never had been dismissed and were still active. Judge Dennis then tried the case on the remaining causes of action.

Rule 54(b), SCRCF specifically allows a Judge to revise an order that adjudicates fewer than all the issues in a case "at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." In this case, there was no order dismissing the Carpenters' causes of action for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, *et. seq.*, and Judge Dennis specifically ruled nunc pro tunc that that was never his intention. Judge Jefferson's order requesting clarification of Judge Dennis's prior order was simply that; a request for clarification that noted how the action would proceed depending on Judge Dennis' ruling. There was never an order dismissing all of the Carpenters' causes of action (as seen by Judge Dennis' two orders) and in any event Judge Jefferson's order seeking clarification was not a final order because her ruling on the Rule 59(e), SCRCF motions by both Appellants and Respondents came after Judge Dennis' order clarifying that three of Respondents claims were viable for trial.

Even if Judge Dennis had not issued his subsequent order nunc pro tunc clarifying his first order, it would have been improper to rule that the first order dismissed all of the Carpenters' causes of action.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety." 46 Am. Jur. 2d Judgments § 73 (1969). "If the language employed is plain and unambiguous, there is no room for

construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." 49 C.J.S. Judgments § 436 (1947).<sup>1</sup> However, if an order is ambiguous and uncertain, a reviewing court "must look to all parts of the order and to the record to ascertain the trial court's intent in issuing the order" and moreover "must construe the order in the light of what was before the court and the accompanying circumstances." Sunamerica Financial Corp. v. Equi-Data, Inc., 299 S.C. 175, 178, 383 S.E.2d 8, 10 (Ct. App. 1989), citing Drawdy v. Drawdy, 285 S.C. 159, 328 S.E.2d 133 (Ct. App. 1985); 46 Am. Jur. 2d Judgments § 73 at 363 (1969); 49 C.J.S. Judgments § 436 at 867 (1947) (emphasis added). Further, "the interpretation or construction of a judgment must be characterized by justice and fairness." Widewater Square Assocs. v. Opening Break of Am., 314 S.C. 149, 151, 442 S.E.2d 185, 186 (Ct. App. 1994), quoting Eddins v. Eddins, 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991) (quoting 46 Am. Jur. 2d Judgments § 73. (1969)).<sup>2</sup>

A hearing on the Measters' Motion for summary judgment was held before Judge Dennis on July 6, 2009. At the hearing, Judge Dennis indicated that he felt that the tort claims might be barred by the economic loss doctrine, but he stated there was sufficient evidence to proceed with the contract claims. (R. pp. 168-169).

At the hearing on the motion, the Measters' attorney argued primarily that the Carpenters' claims were barred by the economic loss rule and should proceed under the breach of contract claims unless the court found that the contract claims had been waived. (R. pp. 163-166). As stated by Mr. Stuckey, "The exclusive remedy of Plaintiffs in this

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<sup>2</sup> "In construing an ambiguous order . . . , the determinative factor is to ascertain the intent of the judge who wrote the order." Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991) (citing Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (1989)).

case is to proceed under the contract.... So we think those three tort causes of action should be dismissed and the Plaintiffs can then allegedly go forward on his remaining three causes of action." "So we think by those provisions, your Honor, that the Plaintiffs are limited to the provisions of the contract, the claim under the contract, and that the contract clearly provides that they have waived, that they have disclaimed and, accordingly do not have any remedy under the contract." (R. p. 163, line 22-p. 164, line 10).

Where a judgment is silent with regard to the disposition of a matter, it is presumed that the claim is denied. Sun Finance Co. v. Jackson, 525 So. 2d 532, 533 (La. 1988).<sup>3</sup>; 46 Am. Jur. 2d. Judgments § 94.

The record, including the transcript of the hearing on Summary Judgment, makes it patently clear that Judge Dennis's order only dismissed two of Respondents' six causes of action. As a result, this matter appropriately proceeded to trial.

4. THE RECORD CONTAINS EVIDENCE TO SUPPORT THE JURY VERDICT FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN A CONTRACT.

There was a host of evidence introduced at trial from which the jury rightfully found that the Measters breached their contract with the Carpenters. Paragraph 19 of the Agreement To Buy and Sell Real Estate Condominiums (the "Agreement") provided that the Measters would execute a Seller's Property Condition Disclosure Statement. (R. pp. 416-421). The Measters had the option of providing a Disclosure Statement or not

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<sup>3</sup> Moreover, other courts have noted "a judgment which grants part of the relief but omits reference to other relief put in issue by the pleadings will ordinarily be construed to settle all issues by implication." Wilson v. Wilson, 532 F.Supp. 152 (D. La. 1980). (emphasis added); 46 Am. Jur.2d. Judgments 94. Judge Jefferson construed the Order as disposing the other causes of action by implication.

providing a Disclosure Statement, and they elected to provide one. (R. p. 418). Paragraph 19 of the contract provides in pertinent part:

Buyer and Seller agree that a Seller's Property Condition Disclosure statement, as required by South Carolina Code of Laws, as amended, Section 27-50-10, et. seq. has been provided to Buyer by Seller prior to the ratification of this agreement. If the Seller discovers, after his delivery of a disclosure statement to a Buyer, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the Seller shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the Buyer or make reasonable repairs necessitated by the occurrence before closing.

The Disclosure Statement (R. pp. 422-425) defines what a "No" representation by the Measters on the form would mean. The Disclosure Statement reads:

If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "no" and you know there is a problem, you may be liable for making an intentional misrepresentation.

The Disclosure Statement then goes on to state, in all capital letters and in bold print "DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING"

The Measters checked "No" on several pertinent items, indicating they had no knowledge of any deficiencies with the following:

1. Foundation, floors or structural components.
2. Water seepage or leakage.
3. Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).
4. Violations of building codes.
5. Lawsuits or proposed assessments that could affect title to the property.

At trial, the evidence established the following facts which support the jury's finding that the Measters made misrepresentations in the Disclosure Statement:

1. The Measters were members of a class action lawsuit that was still active and which alleged claims for defects to all the buildings, and the Carpenters' building, for both the common elements and the private elements.

- The Measters bought their unit in 1998. (R. p. 323, lines 19-22).
- There had been general structural problems and water intrusion problems with all of the buildings as far back as 1990 that were generally known to the regime members. (R. p. 254, lines 6-20) (R. pp. 436-484).
- A class action was filed on August 18, 2000 (R. pp. 436-484) against the regime officers alleging that there were structural deficiencies and water intrusion in the buildings that had not been corrected. (R. pp. 257-258) (R. pp. 436-484).
- The Measters were members of that class action. (R. p. 333, lines 1-13).
- The class action lawsuit was still active at the time of the sale to the Carpenters, and there were motions regarding attorneys' fees and other issues. (R. pp. 335-336).
- There were known structural problems with all of the buildings, including building 8 (where the Measter/Carpenter unit was located), where all of the buildings had to be jacked up and repaired. (R. p. 258, line 22-p. 260, line 20).
- Interior problems because of the sagging buildings included cracked sheetrock on the inside and sagging floors. (R. p. 261, line 16-p. 262).
- The class action pleadings state that deficiencies exist in all the buildings that will cause deteriorating and sagging floors and walls, carpentry and doors out of trim and out of line, and with all conditions continuing to worsen. (R. pp. 351, lines 6-13). (R. pp. 448-450 and R. pp. 474-475);
- and that the damages would damage not only the regime but "the individual property of the plaintiffs' in the class." (which included the Measters) (R. p. 351, lines 21-24);
- and that it would cost in excess of \$15 million to fix all of the problems "and to compensate the class for the resulting loss of use for the apartments during said repairs." (R. p. 354, lines 4-15).

- One purpose of the class action was to compensate each of the individual owners for the amounts that they would be assessed to fund the repairs to the common elements. (R. p. 357, line 8-p. 358, line 17);
- and it was specifically known that repairs and funds and assessments would be needed for the repair of building 8. (R. p. 359).
- The Measters were active members of the community and with the HOA board, "they attended meetings and voiced their opinions on certain items". They also attended the hearing where the funds for the class action settlement were disbursed. (R. p. 361, line 21-p. 362, line 12).

2. The Measters were specifically aware, prior to the sale to the Carpenters, that major repairs were about to begin on their particular building.

- The annual meeting of the HOA regime is a big deal. (R. p. 267) and Notice is given to all of the owners. (R. p. 267) and agendas are provided and meeting minutes are provided. (R. p. 267).
- The report for the Annual Meeting (R. pp. 428-431) held on June 2, 2007, was provided to each of the unit owners. (R. p. 267).
- At the time of that report, repairs to building 8 were to begin "immediately" (R. p. 270, lines 4-9) which included the "repair of the sagging, sinking three-bedroom stacked buildings" which contained the Carpenters' unit. (R. pp. 268-269).
- The settlement proceeds from the class action (approximately sixteen thousand dollars) were supposed to be used to fund the repairs to the buildings. (R. p. 270, line 10-p. 271, line 1).
- Herman Hatfield, the contractor who did the repairs, talked with Mr. Measter in June, 2007, when Mr. Measter walked out of his unit. (R. pp. 238-240).
- Hatfield told Mr. Measter that he was going to do the repairs including jacking up of the entire building. (R. p. 240).
- Measter responded that "it wasn't no worry of his, he'd sold his unit." (R. p. 240, lines 16-17).
- Hatfield saw Mr. Measter at the building a couple of weeks later and Mr. Measter asked when the repairs were going to start and Mr. Hatfield said he did not know when. (R. p. 241, lines 19-24).

- The Hatfield testimony is effectively undisputed by Mr. Measter. When repeatedly asked about the conversation, did not deny that it took place, he simply replied that he did not recall it. (R. pp. 284-286, line 6).
3. The repairs to the Measters' unit were extensive and included both the common elements and the interior private elements.
- The floors in building 8 were noticeably sagging. (R. p. 232).
  - The floors had to be jacked up to make them level. (R. p. 232).
  - The jacking moved up the entire building and impacted the flooring. (R. pp. 231-232).
  - In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor. (R. p. 234).
  - Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing. (R. pp. 236-237).
  - Large holes were cut in every single room. (R. p. 200, line 18-p. 201, line 5) and ruined all of the tile floors and floor coverings. (R. p. 203, lines 9-25) which the Carpenters had to replace. (R. p. 205, line 20-p. 206, line 17).
4. There was testimony that prior repairs had been made to the Measters' unit to try to level the sagging floors in the unit.
- When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors. (R. p. 244, line 11-p. 245).
  - Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors. (R. pp. 271-272, line 7).
  - The Measters admitted that they had done renovations which included replacing all the floors in their unit. (R. p. 338, lines 10-15).
5. The Measters understood the significance of the disclosure statement and understood that they had to fill it out completely and list deficiencies whether or not they related to common elements or private elements.

- When Mrs. Measter filled out the disclosure statement she understood that it was her obligation to complete it as to the entire unit, regardless of whether the deficiencies related to common elements or private elements. (R. p. 276, line 9-p. 277, line 19).
- Mrs. Measter sent an email after the closing stating that the Carpenters were terribly upset and were consulting a lawyer about suing them about misrepresentations. "Not only do I not blame them, Charlie and I are very embarrassed that we knew nothing about this." (R. pp. 329-331).
- The Measters' real estate agent, Janice Franklin, understood the importance of the disclosure statement and sat down with the Measters and reviewed each of the disclosures before they were filled out. (R. pp. 341-343).
- If Ms. Franklin had known of any of the Measters' misrepresentations, she would have told the Measters to complete the form differently. (R. pp. 341-344).

The Measters had a contractual obligation to truthfully complete a Disclosure Statement and to correct any material disclosures that were inaccurate. They breached this obligation by failing to disclose any of the deficiencies discussed above. Although the Measters argue that they had no obligation to disclose any of the above-referenced evidence because it affected only the "common elements" of the buildings, the facts established that the deficiencies impacted both the common elements and private elements, and individual claims for damages were being made on behalf of the Measters as members of the class. Moreover, a critical fact remains that the Measters could have made no representation as to the deficiencies that existed; however, they explicitly and affirmatively misrepresented that the deficiencies did not exist when they in fact did. The fact that the Measters could have legally chosen not to have made representations did not release them under the contract or the Disclosure Form from making false statements. As such, there was ample evidence to support the jury's verdict that the Measters breached their contract with the Carpenters.

5. THE EVIDENCE SHOWS THAT THE CARPENTERS' CLAIMS WERE NOT BARRED BY WAIVER, DISCLAIMER OR FORFEITURE/MERGER?

The Measters argue that the Carpenters' claims are barred by the doctrine of waiver (Appellants Argument II.E.1.), disclaimer (Appellants Argument II.E.2.), forfeiture/termination (Appellants Argument II.E.3.) and merger (Appellants Argument V.). The Carpenters respond to these arguments in turn.

1. Waiver

The Measters argue that the Agreement contained a provision referencing waiver from which the jury could only conclude that the Carpenters waived their right to sue for breach of contract. Paragraph 19B, "Inspection," which mentions waiver, merely provides that the Carpenters will obtain an inspection and notify the Measters of any issues warranting repair that the inspection revealed by a certain date. The testimony conclusively established that the Carpenters both obtained an inspection and requested that repairs be made by the Measters within the time period specified under Paragraph 19B. However and in any case, their failure to have done either or both these things would only have resulted in a waiver of "rights under the terms of this Paragraph." Paragraph 19B, aptly entitled "Inspection," in no way limits the Carpenters' rights to sue under the contract for misrepresentations.

2. Disclaimer

The Measters argue that a provision in the Agreement entitled 19H, "Disclaimer," under which the Measters disclaimed certain warranties, precludes the Carpenters' ability to sue for breach of contract. This too is an incorrect reading of the cited provision. First, the Carpenters never filed or alleged a warranty claim. Moreover, a disclaimer of future warranties about property conditions would not foreclose a suit for breach of

contract for known misrepresentations made by the disclaimer during the course of the agreement.

### 3. Forfeiture/Merger

The Measters' argument on forfeiture/merger echoes testimony given by the Measters at trial, which was that, even if the Measters did make misrepresentations, they could not be liable. (R. p. 337, line 4-p. 338, line 9). The Measters cite Paragraph 19E, "Repairs," in support of their position that the Carpenters forfeited all rights to sue the Measters because the Measters' obligations under that paragraph terminated on the date of closing. The Measters seem to assert that, because the closing occurred without their misrepresentations having been discovered, they outmaneuvered the Carpenters and successfully navigated around any legal accountability. However, the Carpenters have not sued the Measters for wrongfully refusing to pay for repairs, but for unjustified and known misrepresentations which the Measters made and continued to make through the date of closing.

The Measters' argument regarding merger is misplaced. The Measters argue that when the closing took place, any past representations of the Measters were annulled. This argument ignores the fact that the Carpenters did not have standing and were not damaged by the misrepresentations until they took title to the property. Moreover, the contract required the Measters to correct any disclosure inaccuracies "before closing." (R. p. 418). This provision was therefore not breached until the property was closed without the Disclosure Statement corrections being made.

### 6. THE EVIDENCE SUPPORTS THE JURY'S AWARD OF DAMAGES.

There was ample evidence to support the jury's award of damages. The jury awarded \$65,000.00 in actual damages. Mr. Carpenter testified about damages well in excess of that amount consisting of the following:

Mr. Carpenter testified that they had significant out-of-pocket expenses related to the misrepresentations. (R. p. 292, lines 12-23). These included the costs to repack and reload their belongings when they could not move into the unit when they expected to, \$1,492.75, (R. p. 432); the cost to store their belongings while the unit was being fixed, \$263.00 for four months, for a total of \$1,053.16 (R. pp. 294-295, R. p. 433); the cost to replace the air handler and condenser unit because of the repairs, \$5,655.00, (R. p. 434); the cost to replace the subfloor, \$2,961.00, (R. p. 297, R. p. 434); the cost to replace carpets, \$5,755.00, (R. pp. 297-298, R. p. 434); the cost to replace ceramic tile, \$5,401.00 (R. p. 298, R. p. 434); an assessment that the Carpenters had to pay to fund the repairs for their building, \$7,515.00 (R. p. 298, R. p. 435).

Mr. Carpenter also testified that there was diminution in value of the structure because of the deficiencies of at least \$50,000. (R. p. 301, line 25-p. 301, line 13). Mr. Carpenter is a graduate of the University of Pennsylvania. (R. p. 287, lines 19-25). The testimony of Mr. Carpenter as to his estimation of the property value came after he had heard the testimony of five prior witnesses regarding the property and the damages, and after he had heard extensive testimony regarding the property. The diminution was testified to and was computed based on Mr. Carpenter's assessment of the market value and cost of other units in the building. (R. pp. 300-301). Mr. Carpenter was cross-examined about appraised values and tax values in relation to his assessment of the property value (R. pp. 301-303) and it was established that Mr. Carpenter was

experienced with buying and selling real estate. (R. pp. 305-307). It is clear that Mr. Carpenter knew of his property well and offered an appropriate opinion. In short, Mr. Carpenter had sufficient basis to offer an opinion and the trial judge appropriately let him testify and allowed the jury to afford it the weight they deemed appropriate. See Gould v. O'Shaunnessy Realty Company 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008) "Unless the landowner's want of qualification is so complete that his testimony is entirely worthless, it is for the jury to assess the value of his opinion." Id. at Headnote 8, p. 560. The air handler was twenty years old, not one year old as represented by the Measters. (R. p. 309, lines 9-25). Mr. Carpenter testified regarding fair rental value/loss of use of the unit for four months at \$2,400.00 per month totaling \$9,600.00. (R. p. 315, line 8-p. 316, line 8).

The out-of-pocket and loss of use damages totaled \$39,483.35. The diminution in value of the building, as testified by Mr. Carpenter, was \$50,000.00. These figures total \$89,483.35. There was also testimony that additional repairs would need to be made to the buildings in the future, and the jury could have awarded damages for what it anticipated those future costs would be. (R. pp. 358-361). Moreover, as discussed above, evidence was introduced that the total damages sustained to the buildings was approximately \$15 million (R. p. 354), so the jury may well have awarded damages for future repairs.

It was up to the jury's discretion as to the amount of damages to be awarded and there was ample evidence to support that award. Moreover, as noted above, the Measters filed no motion for a new trial regarding damages.

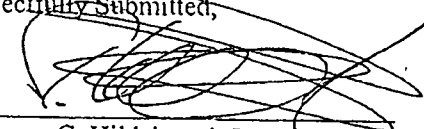
7. THE TRIAL COURT CORRECTLY FOUND NO BASIS FOR A NEW TRIAL BASED ON THE MEASTERS' ASSERTION THEY SHOULD HAVE BEEN GIVEN ACCESS TO THE CARPENTERS' TRIAL BRIEF.

The Measters claim that they should have been provided with a copy of the Carpenters' pretrial brief. However, they have shown no prejudice if they in fact did not get the brief, the pretrial brief was not introduced into evidence and there is no evidence that the Judge was impacted by it, there is no record of what the brief contained, and the Measters filed no motion for new trial based on this issue. The Carpenters submit that the Pretrial Brief issue was at worst harmless error.

#### CONCLUSION

Because the Measters did not timely file their Motion for Judgment NOV, this Court lacks jurisdiction to hear this appeal. Alternatively, because the record contains evidence providing a sufficient evidentiary basis for the jury's verdict that the Measters breached their contract with the Carpenters, the verdict should be upheld and the judgment of the lower court should be affirmed.

Respectfully Submitted,

By   
Thomas C. Hildebrand, Jr.

April 24, 2012

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Dudley N. Carpenter and Jane G. Carpenter

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Dudley N. Carpenter and Jane G. Carpenter,  
Respondents/Appellants,

v.

Charles L. Measter and Barbara P. Measter,  
Appellants/Respondents.

Appellate Case No. 2011-192366

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Appeal From Charleston County  
R. Markley Dennis, Jr., Circuit Court Judge

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Unpublished Opinion No. 2013-UP-066  
Heard December 12, 2012 – Filed February 6, 2013

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**AFFIRMED IN PART, REVERSED IN PART, AND  
REMANDED**

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D. Ryan McCabe and Brian C. Gambrell, of Rogers,  
Townsend & Thomas, PC, of Columbia, for  
Appellants/Respondents.

Thomas C. Hildebrand, Jr., of Haynsworth Sinkler Boyd,  
P.A., of Charleston, for Respondents/Appellants.

**PER CURIAM:** This case involves a contract to sell a condominium unit in Bohicket Marina Village, a horizontal property regime on Seabrook Island. Appellants/Respondents, Charles and Barbara Measter (Sellers), seek review of the circuit court's failure to grant a directed verdict or judgment notwithstanding the verdict (JNOV) on the breach of contract claim filed by Respondents/Appellants, Dudley and Jane Carpenter (Purchasers). In their cross-appeal, Purchasers challenge the circuit court's granting of Sellers' motion for a directed verdict on Purchasers' claim for violation of the Residential Property Condition Disclosure Act (Disclosure Act), S.C. Code Ann. § 27-50-10 to -270 (2007 & Supp. 2012). We affirm in part, reverse in part, and remand.

1. Initially, we reject Sellers' argument that the circuit court lacked jurisdiction to issue its order dated February 23, 2010 (Sellers' Issue 1). Sellers challenge this order as an untimely revision of the circuit court's previous decision granting partial summary judgment to Sellers. They argue that Purchasers' voluntary dismissal of their claim for violation of the Unfair Trade Practices Act ended the period provided by Rule 54(b), SCRCP, for revision of the previous decision. Rule 54(b), SCRCP, provides that an order or other form of decision adjudicating fewer than all the claims and omitting an express determination that there is "no just reason for delay," is subject to revision at any time before "the entry of judgment adjudicating all the claims . . . ."

Here, Circuit Court Judge Markley Dennis, Jr., issued a Form 4 judgment dated September 3, 2009, that granted Sellers' motion for summary judgment as to Purchasers' claims for fraud and negligent misrepresentation. The judgment expressly denied the motion as to Purchasers' claim for violation of the Unfair Trade Practices Act but remained silent as to Purchasers' remaining claims for breach of contract, breach of contract accompanied by a fraudulent act, and violation of the Disclosure Act. Judge Dennis's February 23, 2010 order clarified his intent, as it existed on September 3, 2009, to deny Sellers' summary judgment motion as to these remaining three claims. The February 23, 2010 order explained that (1) Judge Dennis's September 3, 2009 ruling was based on the economic loss rule; (2) as a result, he intended to grant summary judgment as to Purchasers' tort claims; and (3) he intended to deny summary judgment as to Purchasers' contract-based claims and statutory claims.

Because the February 23, 2010 order did not take any new action but merely placed in the record evidence of Judge Dennis's intent as it existed on September 3, 2009, Judge Dennis properly directed that the February 23, 2010 order was to take

effect "*nunc pro tunc*." See *Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702-03 (2000) ("*Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. A prerequisite for a *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record." (citation omitted)); see also *Black's Law Dictionary* 1174 (9th ed. 2009) (explaining that "*nunc pro tunc*" is Latin for "now for then" and that the phrase means having retroactive legal effect through a court's inherent power); *id.* ("When an order is signed '*nunc pro tunc*' as of a specified date, it means that a thing is now done which should have been done on the specified date." (quoting 35A C.J.S. *Federal Civil Procedure* § 370 (1960))).

The *nunc pro tunc* effect of the February 23, 2010 order was actually contemplated by a previous Form 4 judgment dated November 4, 2009, and signed by Circuit Court Judge Deadra Jefferson. Sellers contend that this judgment was a "judgment adjudicating all the claims" for purposes of Rule 54(b). However, this judgment indicated that although Purchasers were voluntarily dismissing their claim for violation of the Unfair Trade Practices Act, they were going to file a motion seeking clarification of Judge Dennis's September 3, 2009 judgment.<sup>1</sup> While Judge Jefferson checked the boxes next to the words "ACTION DISMISSED" and "Rule 41(a), SCRPC," she expressly conditioned such a dismissal on Judge Dennis's contemplated ruling on Purchasers' motion to clarify:

[I]n the interests of justice and *for clarity of the record* for appellate purposes [Purchasers] will file a Motion to Clarify Judge Dennis'[s] order. After Judge Dennis's consideration of the motion if there is remaining any cause of action the matter *will be restored to the jury trial roster* for trial and *if none remains the matter will be ended with prejudice* so that the parties may avail themselves of the appellate process.

(emphasis added). Hence, Judge Jefferson's Form 4 judgment was conditional and did not qualify as a "judgment adjudicating all the claims" for purposes of Rule 54(b). Therefore, Judge Dennis had jurisdiction to issue his order dated February 23, 2010, and he properly gave the order retroactive effect.

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<sup>1</sup> Notably, Purchasers agreed to file this motion at the urging of Judge Jefferson.

2. As to Purchasers' breach of contract claim (Sellers' Issues 2 and 4), the circuit court properly declined to rule as a matter of law that there existed no breach of contract. See *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006) (holding that in ruling on a motion for a directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motion); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (holding that the trial court should deny a directed verdict motion when either the evidence yields more than one inference or its inference is in doubt). There is ample evidence of Sellers' breach of the contract's implied covenant that the parties must act in good faith and deal fairly with each other. See *Williams v. Riedman*, 339 S.C. 251, 267, 529 S.E.2d 28, 36 (Ct. App. 2000) ("[T]here exists in every contract an implied covenant of good faith and fair dealing." (citation omitted)). We note that Purchasers did not attempt to assert the covenant of good faith and fair dealing as an independent cause of action, as argued by Sellers. See *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (holding that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract). Rather, Purchasers asserted a cause of action for breach of contract, and Sellers' liability may be based on a breach of any of the contract's terms, including the implied covenant of good faith, as long as the breach caused damage to Purchasers. See *Williams*, 339 S.C. at 274, 529 S.E.2d at 40 ("[T]he implied covenant of good faith and fair dealing has been viewed as *another contract term*." (emphasis added)).

In the light most favorable to Purchasers, the evidence shows that Sellers knew of the structural problems with the regime's buildings and the resulting class action litigation that ultimately yielded funds with which to reimburse unit owners for repairs. Further, in the light most favorable to Purchasers, Sellers' admitted consultations with multiple attorneys as to whether they had a duty to disclose this information to Purchasers demonstrates Sellers' awareness that the buildings' structural problems and impending repairs directly affected the unit they were selling to Purchasers. Therefore, we affirm the circuit court's denial of Sellers' motions for a directed verdict and JNOV on the breach of contract claim. See *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (holding that an appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law). Likewise, to the extent that Sellers adequately objected and assigned error to the jury instruction on the implied covenant of good faith, we

affirm the instruction. See *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 495-96, 514 S.E.2d 570, 574 (1999) (holding that a jury charge that is substantially correct and covers the law does not require reversal).

3. As to Sellers' argument that the contract's disclaimer and other provisions required dismissal of the breach of contract claim (Sellers' Issue 3), the remedy they seek is reversal of the circuit court's "rulings that did not dismiss [Purchasers'] breach of contract claims as a matter of law." However, the record does not show that Sellers raised these precise issues in their directed verdict motion because Sellers did not include in the record a copy of their pre-trial brief, on which they relied in seeking a directed verdict. Further, the circuit court did not address these precise issues in denying the directed verdict motion as to the breach of contract claim. Therefore, these issues are not preserved for review. See Rule 210(h), SCACR (stating that the appellate court will not consider any fact which does not appear in the Record on Appeal); *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (holding that a JNOV motion was not preserved because no grounds were raised in the requisite directed verdict motion); *Zaman v. S.C. Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (holding that the record must show the issue was raised in the trial court); *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) ("Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision."); *Weston v. Kim's Dollar Store*, 385 S.C. 520, 538, 684 S.E.2d 769, 779 (Ct. App. 2009), *aff'd and remanded*, 399 S.C. 303, 731 S.E.2d 864 (2012) (declining to address an argument because the court was unable to discern whether the appellant raised to the circuit court the issues on appeal; appellant's motion seeking amendment of the circuit court's order did not appear in the record); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

4. As to Sellers' challenge to the jury's damages award (Sellers' Issue 5), the record does not reflect Sellers' presentation of this issue to the circuit court after the jury returned the verdict. Therefore, the issue is not preserved for our review. See *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (citation omitted)).

5. As to Sellers' merger argument (Sellers' Issue 6), the record does not show that Sellers raised this issue in their directed verdict motion because Sellers did not include in the record a copy of their pre-trial brief, on which they relied in seeking a directed verdict. Further, the circuit court did not address this issue in denying the directed verdict motion as to the breach of contract claim. Therefore, this issue is not preserved for review. *See* Rule 210(h), SCACR (stating that the appellate court will not consider any fact which does not appear in the Record on Appeal); *Zaman v. S.C. Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (holding that the record must show the issue was raised in the trial court); *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) ("Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision."); *Weston v. Kim's Dollar Store*, 385 S.C. 520, 538, 684 S.E.2d 769, 779 (Ct. App. 2009), *aff'd and remanded*, 399 S.C. 303, 731 S.E.2d 864 (2012) (declining to address an argument because the court was unable to discern whether the appellant raised to the circuit court the issues on appeal; appellant's motion seeking amendment of the circuit court's order did not appear in the record); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

6. As to the trial court's failure to provide Sellers with a copy of Purchasers' pre-trial brief, Sellers did not set forth this assignment of error in their Statement of Issues on Appeal. Therefore, we need not consider it. *See* Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). In any event, the precise arguments set forth in Sellers' appellate brief to support this assignment of error were not presented to the trial court. Rather, Sellers' counsel acquiesced in the trial court's ruling on his request to order Purchasers to provide him with a copy of the brief. Therefore, Sellers' arguments on appeal of this ruling are not preserved for review. *See First Carolina*, 372 S.C. at 301, 641 S.E.2d at 907 ("[I]t is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error."); *id.* ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." (citation omitted)); *cf. State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that because counsel acquiesced in the trial court's ruling regarding his request for the solicitor's entire file on an eyewitness and made no other objections regarding wanting the criminal files, appellant was barred from raising the issue on appeal); *Hollins v. Wal-Mart Stores*,

*Inc.*, 381 S.C. 245, 251, 672 S.E.2d 805, 808 (Ct. App. 2008) (holding that because a party acquiesced in the trial court's denial of additional voir dire, she failed to preserve the issue for appellate review).

7. As to Purchasers' claim for violation of the Disclosure Act (Purchasers' Issue 1), we agree with Purchasers that the circuit court erred in granting Sellers' directed verdict motion and in denying Purchasers' directed verdict motion. Under the Disclosure Act, an "owner" who "discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs." S.C. Code Ann. § 27-50-65 (2007). The Act defines "owner" as "each person having a recorded present or future interest in real estate who is identified in a real estate contract subject to this article . . . ." S.C. Code Ann. § 27-50-10(4) (2007). Section 27-50-10(4) further states "This disclosure is limited to the actual residential dwelling and does not address common elements or areas for which the owner has no direct and primary responsibility." It is this "common elements exception" to the Disclosure Act on which the circuit court based its directed verdict ruling in the present case.

Sellers urge the court to consider the definition of "General Common Elements" set forth in the Horizontal Property Act, S.C. Code Ann. § 27-31-10 to -440 (2007 & Supp. 2012), for purposes of interpreting the common elements exception to the Disclosure Act. This definition is set forth in section 27-31-20(f) and includes the foundations and main walls. They also urge the court to consider the definition of "Apartments" in the regime's amended Master Deed, which designates the horizontal boundaries of each apartment unit as the "unfinished inner surfaces of the ceilings and floors." These definitions likely influenced the circuit court's ruling. However, to the extent that the foundations, floors, main walls, and ceilings are inextricably intertwined to a condominium unit such that they directly affect the unit's intended use and value, the legislature could not have possibly intended to include them in the common elements exception to the Disclosure Act. *See Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (holding that courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention).

Here, the structural problems with the regime's buildings directly affected the unit sold to Purchasers and required remediation construction that involved damaging the unit's flooring and displacing Purchasers from the unit for several months.

Further, there was evidence that these structural problems caused sagging floors in the unit. Moreover, the class action litigation concerning these structural problems resulted in the imposition of a special assessment on each unit for building repairs; each unit owner's share of the proceeds from the class action litigation was intended to compensate the owner for his or her share of repair costs exacted by the special assessment.<sup>2</sup> There was evidence from which one could reasonably infer that by the time of closing on the sale of the unit, Sellers were aware of this impending special assessment.

Notably, had Purchasers not timely paid the special assessment, their title to the unit would have been encumbered. *See Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 102, 459 S.E.2d 860, 862 (Ct. App. 1995) ("Covenants requiring property owners to pay fees for improvements, maintenance or other services to a homeowners association run with the land." (citation omitted)). Consistent with our opinion in *Mueller*, section 9.04 of the By-Laws of the regime's council of co-owners states that all assessments "chargeable to any Apartment [that] are unpaid after becoming due . . . shall constitute a lien against such Apartment . . . ." This invokes item 20 of Sellers' Disclosure Statement, which includes an inquiry into Sellers' knowledge of any "[l]awsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, *proposed assessments* or notice from any governmental agency that could affect title to the property[,] as well as item 21, which includes an inquiry into "[o]wners' association fees or 'common area' expenses or assessments." (emphasis added).

Although Sellers checked "Yes" next to item 21 to acknowledge routine regime assessments, they did not notify Purchasers of the council's announced repair plans, which necessarily generated the subsequent special assessment. The note "Check with seller before submitting offer" located at the bottom of the Disclosure Statement, without more, does not constitute an adequate disclosure, and the record does not show that Purchasers were provided with copies of minutes of past meetings of the council prior to or at closing.

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<sup>2</sup> Sellers' argument that the class action litigation was a matter of public record that Purchasers should have discovered is unavailing. The Disclosure Act requires disclosure of several matters of public record. *See* S.C. Code Ann. § 27-50-40(A)(5) (2007) (requiring disclosure of "the zoning laws, restrictive covenants, building codes, and other land-use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from a governmental agency affecting this real property").

The record unequivocally reflects the Sellers' awareness of the class action litigation, the allegations of the class action complaint, and the status of the litigation when they entered into the contract of sale with Purchasers. Under even a liberal construction of these undisputed facts in favor of Sellers, we see no reasonable possibility of a verdict for Sellers on Purchasers' claim for violation of the Disclosure Act. See *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006) ("In essence, the court must determine whether a verdict for the opposing party 'would be reasonably possible under the facts as liberally construed in his favor.'"). The circuit court's directed verdict for Sellers was not only unsupported by the evidence but also controlled by a mistaken interpretation of the Disclosure Act. Therefore, we reverse this directed verdict as well as the circuit court's denial of Purchasers' directed verdict motion on this claim. See *Steinke*, 336 S.C. at 386, 520 S.E.2d at 148 (holding that an appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law). We remand for the entry of a directed verdict for Purchasers on this claim as well as a determination of attorney's fees pursuant to S.C. Code Ann. § 27-50-65 (2007).

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**HUFF, THOMAS, and GEATHERS, JJ., concur.**

RECEIVED

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

SC Court of Appeals

Appeal from Charleston County  
Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2008-CP-10-0069

Dudley N. Carpenter and Jane G. Carpenter..... Respondents/Appellants

vs.

Charles L. Measter and Barbara P. Measter..... Appellants/Respondents

APPELLANTS/RESPONDENTS PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellants/Respondents Charles L. Measter and Barbara P. Measter (hereinafter "the Measters") file the following Petition for Rehearing regarding this Court's decision in Dudley N. Carpenter and Jane G. Carpenter v. Charles L. Measter and Barbara P. Measter, 2013-UP-066 (S.C. Ct. App. filed February 6, 2013). The Measters contend that in affirming the decision below, the Court overlooked or misapprehended the following points:

- I. No breach of contract because there was no contractual duty to disclose litigation unrelated to the title.

The Court's opinion states that the contract was breached because the Measters failed in bad faith to disclose the existence of Kenneth G. Schneider et. al. v. Bohicket Marina Village Council

of Co-Owners, et. al., 2002-CP-10-1671. However, neither the contract nor the Real Estate Disclosure Form required the disclosure of pending litigation that did not affect title. Therefore, the Court should have reversed the trial court's failure to grant a directed verdict on the issue of breach of contract.

There was no contractual obligation on the part of the Measters to disclose the pendency of that litigation. The contract itself does not impose any duty to disclose all pending litigation. The contract is silent as to the disclosures required beyond those required by Real Estate Disclosure Act, and the Court's opinion does not point to a contractual provision that required such a disclosure. There is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); First Federal Savings and Loan Ass'n. of South Carolina v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (Ct.App.1992). The Court's opinion is also silent regarding exactly how the pendency of the Bohicket litigation was "known only to the vendor" so as to require its disclosure.

Additionally, there is nothing in the Real Estate Disclosure Act form that required the disclosure of the litigation between the members and the board. The current Real Estate Disclosure Form mandates that a seller inform a buyer of:

Lawsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, proposed assessments or notice from any governmental agency that could affect title to the property.

(R. p. 424)

The form enumerates a few specific types of litigation that affect title: foreclosures, bankruptcies and tax liens. An action to quiet title is the classic example of an action affecting title

that would be covered under this required disclosure. Yelsen Land Co., Inc. v. State, 397 S.C. 15, 723 S.E.2d 592 (2012). Furthermore, a lawsuit for slander of title is litigation that a seller would be required to disclose. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). Additionally, an action to undo a fraudulent conveyance also affects title and would need to be disclosed. S.C. Code Ann. § 27-23-10; Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012). A proceeding to set aside a judicial sale is another example of a proceeding that affects title. Cumbie v. Newberry, 251 S.C. 33, 159 S.E.2d 915 (1968).

Contrary to the above examples, the Court's opinion does not explain how the Bohicket litigation affected title. The Bohicket litigation was brought in class to address the breach of fiduciary duty by a prior board of directors for failing to pursue defects in common elements. There is nothing in either the contract or the Real Estate Disclosure Form that required the Measters to pay the proceeds of that litigation.

The Court's opinion in footnote 2 points out that the Real Estate Disclosure Form requires the disclosure of other matters of public record such as zoning laws, restrictive covenants, etc. S.C. Code Ann. § 27-50-40(A)(5). This statement in the footnote misses the point. The Court correctly notes there are items which are contained are public record that a seller is required to disclose by the Real Estate Disclosure Act. The requirement to make the "lawsuit, foreclosure, etc." disclosure was imposed by the Real Estate Commission pursuant to its regulatory authority as granted by S.C. Code § 27-50-40(A). The General Assembly and the Real Estate Commission made a decision to limit those disclosures at that time to lawsuits that "affected title." However, the Court's opinion's requirement to disclose all litigation that may collaterally involve the subject property exceeds the requirements imposed by the Real Estate Commission.

The Court's opinion also imposed a duty on the Measters to gather board minutes for the property owners association and present them to the purchasers. An affirmative legal duty may be created by statute, contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). The Court's opinion does not point to a contractual provision or a provision in the Real Estate Disclosure Act that required this. The Court's opinion now extends the duties of disclosure to all litigation which may concern the property even if that property does not concern the title of an individual unit.

II. Statute did not require disclosure of defects in common elements.

In its opinion, the Court reversed the trial court's directed verdict ruling in regards to its application of S.C. Code Ann. § 27-50-10(4) to the facts of the instant case. This ruling is inapposite to the plain text of the statute and rules of statutory construction. The Court has imposed a duty to disclose defects in the common elements despite the fact these elements are clearly common areas as defined by the South Carolina Horizontal Property Act and the Master Deed which governs the property that was being sold. This is not an "absurd result" from a faulty understanding of the statutory scheme; instead, this is the precise result intended by the General Assembly. Thus, the Court erred when it reversed the grant of a directed verdict by the trial court.

S.C. Code Ann. § 27-50-10(4) specifically provides:

This disclosure is limited to the actual residential dwelling and does not address **common elements or areas for which the owner has no direct and primary responsibility.** (Emphasis added)

The term "common elements" within S.C. Code Ann. § 27-50-10(4) is not a defined term; however, this is not an ambiguous term that is incapable of discernment from its context. In

construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. Hodges, supra. Furthermore, the Court cannot, under the guise of statutory interpretation, overlook the plain meaning of the statute to imply instead a wholly different meaning than what was intended by the legislature. Davis v. Doc, 285 S.C. 538, 331 S.E.2d 352 (1985).

The term "common elements" has a very specific meaning to real estate held pursuant to the Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et. seq.*, which is part of the same overall statutory scheme as the Real Estate Disclosure Act. S.C. Code Ann. § 27-31-20(f), S.C. Code Ann. § 27-31-20(g). This Court previously held it was reasonable to resort to the definition of "dwelling unit" found under the Residential Landlord Tenant Act to understand the phrase as used in the Real Estate Disclosure Act, because this definition was also found in Title 27. Winters v. Fiddie, 394 S.C.

629, 716 S.E.2d 316 (Ct. App. 2011). The Horizontal Property Act, like the Residential Landlord Tenant Act and the Real Estate Disclosure Act, is found in Title 27. The Court's opinion fails to distinguish why it was reasonable in Winters to draw the definition from one section of Title 27 whereas it was unreasonable in the instant action.

The Supreme Court and this Court have routinely applied the definition from the Horizontal Property Act in other cases involving disputes arising out of the ownership or control of common elements. Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002); Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985); Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); Roland v. Heritage Litchfield, Inc., 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007).

An owner of a condominium does not have "direct or primary responsibility" for ownership of the common elements of a condominium building. Instead, condominium statutes, like South Carolina's Horizontal Property Act, merely created a new way to own and regulate airspace. Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006). The Measters had a duty to disclose the problems in the property that the Measters owed and could convey is necessarily limited to the Horizontal Property Act. Pursuant to Horizontal Property Act and the Master Deed, the Measters only had "direct or primary responsibility" for the slice of air that constituted their unit: from paint to paint, floor tile to ceiling paint. The disclosures under the Real Estate Disclosure Act has to be viewed in the context of the Horizontal Property Act and the Master Deed. Id.

Instead, the Court's opinion renders the "common elements" phrase within S.C. Code Ann. § 27-50-10(4) superfluous. To the contrary, the Court is required to construe a statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 728 S.E.2d 448 (2012). It is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing. Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012). The General Assembly plainly meant to exclude common element defects from the required disclosures. The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Hodges, supra. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed. Id. "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). The effect of the Court's opinion is to undo this exclusion and impose duties of disclosure not intended by the General Assembly.

Finally, the opinion states that reading the statute in the context of the Horizontal Property Act would lead to an absurd result. However, the Court never explains how or why the method suggested by the Measters is absurd. The opinion does not suggest an alternate definition which explains what the General Assembly meant or intended by the phrase "common elements." A merely conjectural absurdity is not enough; the result must be so patently absurd that it is clear that the

General Assembly could not have intended such a result. Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). The Court's opinion does not suggest alternative interpretations consistent with the legislative purpose are available. Hodges, *supra*.

III. Opinion ignores requirement of seller to exercise due diligence.

Finally, the opinion does not deal with the issue that a Real Estate Disclosure Form is not a substitute for due diligence on the part of a purchaser. A party has no right to rely on representations made under the Residential Disclosure Act where the party has received knowledge to the contrary. McLaughlin v. Williams, 379 S.C. 451, 459-460, 665 S.E.2d 667, 672 (Ct. App. 2008). The Real Estate Disclosure is "not a warranty," and it was "not a substitute for any inspections [Buyers] may wish to obtain." Chastain v. Hiltabidle, 381 S.C. 508, 512, 673 S.E.2d 826, 828 (Ct. App. 2009) The Legislature placed the duty of performing such an inspection or investigation squarely on the shoulders of the buyers. Chastain, 381 S.C. at 519-520, 673 S.E.2d at 828. S.C. Code Ann. § 27-50-80 also provides "[t]his article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article."

The Court's opinion overlooks the cases that state that a vendor of a residence must disclose to the purchaser material facts that are known only to the vendor and are not available to the purchaser through diligent inquiry. Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972)(Emphasis added). A purchaser of real property is bound by both actual and constructive notice and has no right to shut his eyes or ears to the inlet of information. Spence v. Spence, 368 S.C. 106, 119-120, 628 S.E.2d 869, 876 (2006) "[C]onstructive notice or inquiry

notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.” Id.

As the Supreme Court has explained:

Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed.

Id. at 120, 628 S.E.2d at 876 (emphases added).

In making these statements, the Supreme Court emphasized “the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him,” noting also that “[t]here must appear to be, in the nature of the case, such a connection between the facts disclosed and further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.” Id. at 120–21, 628 S.E.2d at 876 (quoting Black v. Childs, 14 S.C. 312, 321–22 (1880)) (emphasis added).

Furthermore, the relationship between a vendor and purchaser of real estate is not a fiduciary one. State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct.App.2003) rev'd on other grounds, 363 S.C. 477, 611 S.E.2d 501 (2005). Only if a contract or transaction itself is intrinsically fiduciary in its essential nature does one party owe another a duty of perfect good faith and full disclosure without regard to any particular intention of the parties. Regions Bank v. Schmauch, 354 S.C. 648, 673-74, 582 S.E.2d 432, 445-46 (Ct.App.2003)

The Court's opinion fails to explain why the purchasers were unable to discover for themselves the pendency of the Bohicket litigation.

**CONCLUSION**

For the foregoing reasons, the Measters respectfully request that the Court reconsider their opinion.

Respectfully submitted,



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**ATTORNEYS FOR APPELLANTS**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2008-CP-10-0069

Dudley N. Carpenter and Jane G. Carpenter,

Respondents/Appellants

v.

Charles L. Measter and Barbara P. Measter,

Appellants/Respondents

**PROOF OF SERVICE**

I, Brian C. Gambrell, an attorney with the Law Firm of Hamilton & Associates, LLC, attorneys for the Appellants, hereby certify that I have served a copy of the foregoing document(s) upon the below named individuals and/or counsel this the 21<sup>st</sup> day of February via U.S. Mail, postage prepaid and addressed as follows:

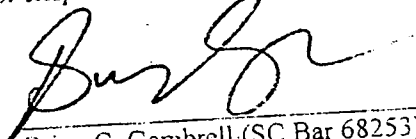
**DOCUMENT(S) SERVED:**

Appellants/Respondents Petition for Rehearing

**PARTIES SERVED:**

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# The South Carolina Court of Appeals

Dudley N. Carpenter and Jane G. Carpenter,  
Respondents/Appellants,

v.

Charles L. Measter and Barbara P. Measter,  
Appellants/Respondents.

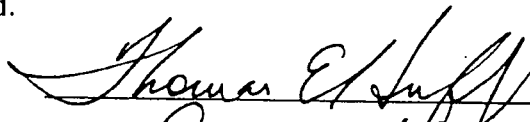
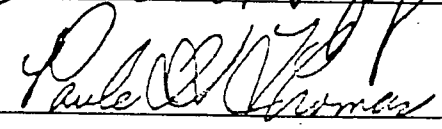
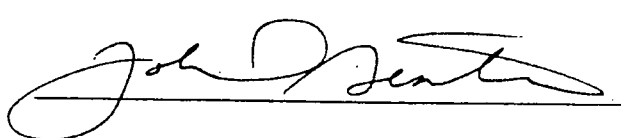
Appellate Case No. 2011-192366

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_  
J.  
  
\_\_\_\_\_  
J.  
  
\_\_\_\_\_  
J.

Columbia, South Carolina

cc:  
Thomas C. Hildebrand, Jr.  
Brian C. Gambrell  
Donald Ryan McCabe, Jr.

FILED

20-March-2013