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Property

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PROPERTY

I. EXPANSION OF THE FIDUCIARY DUTY OWED BY REAL ESTATE BROKERS

In *Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty*[1] the South Carolina Court of Appeals, in an opinion by Judge Goolsby, expanded the scope of the fiduciary duty owed by real estate brokers to sellers who have listed their property with those brokers. In holding that a real estate broker owes a fiduciary duty of full and prompt disclosure of material information to his principal, the court of appeals has expanded the fiduciary requirements to include the duty of timeliness. This expansion will enhance a seller's opportunity to obtain the highest price for his property.

The *Vacation Time* controversy arose out of appellant Lighthouse Realty's sale of respondent Vacation Time's property. Vacation Time listed a parcel of property for sale, indicating that at least $300,000 must be realized from the deal.[2] Westwood Developers submitted a bid for $335,000, which, after commissions were deducted, would net an amount of $300,000. John Reed submitted an additional bid, that would have amounted to a net of $306,000.[3] Unknown to Lowes, president of Vacation Time, Reed was an officer of Lighthouse. Lowes had set August 4, 1980, as the date by which he desired a contract. On August 2, Lowes was contacted by Wilson, Lighthouse's agent handling the Vacation Time account. Wilson pressed him for a decision between the two offers. Lowes orally assented to Reed's higher offer. The following day Greider, Westwood's president, said that he would increase his offer by an amount between $50,000 and $60,000.[4] Wilson relayed neither this infor-

1. 286 S.C. 261, 332 S.E.2d 781 (Ct. App. 1985).

2. Record at 64.

3. This was actually the second bid by these parties. An earlier bid resulted in each party offering $335,000 for the property. Lighthouse instructed the parties to rebid, resulting in the alleged impropriety that instigated this action. 286 S.C. at 264, 332 S.E.2d at 783.

4. Record at 46-48.

mation nor the fact that Reed was an officer of Lighthouse. He merely submitted the Reed contract to Lowes. Lowes signed the Reed contract on that same day.[5]

On August 4, 1980, before submitting the contract to Wilson, Lowes learned of Reed's affiliation with Lighthouse. Lowes, however, was not told of Greider's willingness to increase his offer. The next day, Lowes delivered the signed contract to Wilson. Vacation Time subsequently brought an action against Lighthouse for breach of its fiduciary duties as broker to act in good faith and inform Vacation Time of all material facts concerning the transaction. Claiming $150,000 in actual and punitive damages, Vacation Time received a jury verdict of only $50,000 in actual damages.

The court of appeals affirmed the judgment as well as the trial court's denial of Lighthouse's motions for nonsuit, directed verdict, and judgment *non obstante veredicto*. In making its determination, the court adopted a generally accepted principle of agency: "It is the broker's duty to keep the principal fully informed of all material facts which come to the broker's knowledge with respect to the transaction in which he is engaged and which affect the principal's interest and might influence his action, and the broker may be held liable in damages for his failure to disclose such information . . . ."[6] This principle is well established in South Carolina,[7] but the *Vacation Time* court added an additional requirement of "promptness."[8] The court, in fact, seemed to lessen the strict requirement of causation and permitted any colorable effect of a failure to disclose material facts in a timely manner that is inferable from the evidence presented to be an actionable breach of fiduciary duty.[9]

In other jurisdictions, the issue of a broker's breach of fiduciary duty has most often arisen when raised as a defense to a broker's action for his commission.[10] In several cases brokers have lost their licenses because the breach violated a specific

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5. *Id.* at 77.

6. 12 C.J.S. *Brokers* § 57, at 171 (1980).

7. *See* Lowrance v. Swaffield, 123 S.C. 331, 116 S.E. 278 (1923).

8. *Compare id. with Vacation Time*, 286 S.C. at 267-68, 332 S.E.2d at 785.

9. *See* 286 S.C. at 267-68, 332 S.E.2d at 785.

10. *See* Annotation, *Liability of Real Estate Broker to Principal for Negligence in Carrying Out Agency*, 94 A.L.R.2D 468, 478 (1964).

state real estate commission regulation.[11] In *Vacation Time* there was no allegation of any violation of real estate commission regulations. In fact, South Carolina regulations require only that brokers tender all *written* offers to the seller.[12] Nevertheless, the court found a common-law duty under agency principles[13] and, thus, expanded a broker's fiduciary duties under South Carolina law. The broker must now inform the principal if he knows that more advantageous terms could be obtained.[14]

The *Vacation Time* court did not address whether a broker is an agent for an entire firm when he is ostensibly acting in his own interests and the seller has another broker within the same firm who acts on his behalf with regard to all transactions. The failure to disclose Westwood's willingness to increase its offer was the primary breach.[15] The court of appeals left open for further interpretation whether, even if Westwood had not been willing to increase its offer, a breach of fiduciary duty took place because of the tardiness with which Lowes was informed of Reed's status as officer of Lighthouse.[16]

Vacation Time puts real estate brokers on notice that they must make timely notifications of more advantageous offers, whether oral or written. If they fail to do so, their liability seems to be *ex delicto*, which normally includes the possibility of punitive damages. Nevertheless, damages awarded will usually be limited to those actually incurred: the deficit between the price

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11. *See, e.g.*, Rattray v. Scudder, 28 Cal. 2d 214, 169 P.2d 371 (1946); North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981); Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 308 S.E.2d 123 (1983).

12. S.C. Real Estate Comm'n R., S.C. CODE ANN. (R. & REG.) 105-19 (1976) provides as follows: "A broker . . . shall promptly tender to the seller every written offer to purchase obtained on the property involved . . . ." *See* 286 S.C. at 272, 332 S.E.2d at 787 (Gardner, J., concurring).

13. RESTATEMENT (SECOND) OF AGENCY § 381 (1958) requires an agent "to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which . . . can be communicated without violating a superior duty to a third person. Comment d requires disclosure especially where the agent has adverse interests. *See also id.* §§ 389, 391.

14. 286 S.C. at 268, 332 S.E.2d at 785; *see* 12 AM. JUR. 2D *Brokers* § 89 (1964).

15. 286 S.C. at 267-68, 332 S.E.2d at 785.

16. Lighthouse contended that the trial court should have instructed the jury that a breach of fiduciary duty could be cured by disclosure. Brief of Appellant at 19. This may be inferred from S.C. Real Estate Comm'n R., S.C. CODE ANN. (R. & REG.) 105-20 (1976), which requires that an agent not acquire any interest from a listing owner without first making his true position clearly known to that owner.

that could have been received and what was actually received.[17] Future decisions must determine what constitutes "timely" notice sufficient to fulfill the broker's fiduciary duty.

Gregory F. Litra

II. PROPERTY REGIME GIVEN STANDING TO SUE ON BEHALF OF INDIVIDUAL OWNERS

In *Dockside Association v. Detyens, Simmons and Carlisle*[18] the South Carolina Court of Appeals held that a nonprofit corporation that managed and maintained the common elements of a condominium development did not have standing to bring an action against a contractor on behalf of the condominium unit owners. The South Carolina Supreme Court, in two recent decisions, *Roundtree Villas Association v. 4701 Kings Corp.*[19] and *Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp.*,[20] also considered whether a condominium association has standing to maintain such an action. *Dockside* is consistent with the majority rule in jurisdictions that do not provide a statutory right for a condominium owners' organization to maintain an action in its own name for the benefit of the co-owners of the condominium.[21] The decision, however, has been overruled by the recent supreme court case of *Queen's Grant Villas*, which reaffirmed the principles adopted in *Roundtree*.[22]

Dockside Association was a nonprofit corporation that managed and maintained the common elements of a condominium development located in Charleston, South Carolina. Although the common elements were owned by the unit owners pursuant

17. Lowrance v. Swaffield, 123 S.C. 331, 116 S.E. 278 (1923). The court of appeals has subsequently limited recovery of punitive damages to "willful, wanton or reckless" misconduct. Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 519-20, 334 S.E.2d 834, 837 (Ct. App. 1985).

18. 285 S.C. 565, 330 S.E.2d 537 (Ct. App. 1985).

19. 282 S.C. 415, 321 S.E.2d 46 (1984).

20. 286 S.C. 555, 335 S.E.2d 365 (1985).

21. *See, e.g.*, Friendly Village Community Ass'n v. Silva & Hill Constr. Co., 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); Deal v. 999 Lakeshore Ass'n, 94 Nev. 301, 579 P.2d 775 (1978).

22. 286 S.C. at 556, 335 S.E.2d at 366.

to the South Carolina Horizontal Property Act,[23] Dockside brought suit against McDevitt & Street, Inc., the prime contractor for the condominium project, on its own behalf and on behalf of individual homeowners for damages caused to the common elements. In the circuit court proceedings, appellant McDevitt & Street demurred to all causes of action.[24] On appeal from an order overruling the demurrers, the appellant contended that Dockside lacked standing to maintain five of the seven causes of action. The South Carolina Court of Appeals agreed, reversing the circuit court judgment and dismissing the action.

The court of appeals concluded that Dockside Association did not have standing to bring the action since the association was not considered to be the "real party in interest" pursuant to section 15-5-70 of the South Carolina Code.[25] Although the court acknowledged that the association did have an interest in the subject matter, the individual unit owners were considered to have the "real" interest since they owned the common elements of the property.[26] The court noted that several states have allowed standing, but pointed out that in those states, a statute existed that expressly authorized the co-owner's organization to maintain an action in its own name for the benefit of the co-owners of the condominium.[27] Since no similar statute exists in

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23. This act, codified at South Carolina Code section 27-31-60, provides in pertinent part:

> An 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, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property.

S.C. CODE ANN. § 27-31-60 (1976).

24. The complaint alleged nine causes of action based on various tort and contract remedies. Dockside Association was the plaintiff in the first seven causes of action and the vice president and president of the Association were the plaintiffs in the last two causes of action. 285 S.C. at 568, 330 S.E.2d at 539.

25. S.C. CODE ANN. § 15-5-70 (1976), *repealed by* 1985 S.C. ACTS 277, No. 100, § 2 (replaced by S.C.R. CIV. P. 17(a)) provides in pertinent part: "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in § 15-5-80."

26. 286 S.C. at 556, 335 S.E.2d at 366.

27. *See, e.g.*, Imperial Towers Condominium, Inc. v. Brown, 338 So. 2d 1081 (Fla. Dist. Ct. App. 1976); Starfish Condominium Ass'n v. Yorkbridge Serv. Corp., 295 Md. 693, 458 A.2d 805 (1983); Siller v. Hartz Mountain Assocs., 184 N.J. Super. 450, 446 A.2d 551 (1981); Towerhill Condominium Ass'n v. American Condominium Homes, Inc., 66

South Carolina, the court concluded that Dockside lacked standing to sue the appellants.[28]

The respondents contended that they could maintain a class action pursuant to section 15-5-50 of the South Carolina Code,[29] even though no specific statute gives a co-owner's organization standing to sue. The court determined, however, that the parties in *Dockside* could not bring a class action because they were not united in interest. The court also found that actions were brought on damages sustained in individual apartments not included within the condominium's common elements.[30]

In holding that a condominium association does not have standing to maintain an action on behalf of the unit owners, the *Dockside* court distinguished the South Carolina Supreme Court decision of *Roundtree Villas v. 4701 Kings Corp.*[31] In *Roundtree* the supreme court held that a condominium association had standing to maintain a cause of action relating to the condominium's common elements, but did not have standing to maintain an action relating to condominium property that was not part of the common elements. The court in *Roundtree* addressed the standing issue and concluded that since the Roundtree Villas Association "owned" the common elements, it was the proper party to maintain the action.[32]

In distinguishing *Dockside* from *Roundtree*, the court pointed out that the Dockside Association merely managed and maintained the common elements, but had no ownership rights in the property.[33] Although the distinction drawn by the court of appeals appears to be valid, the rationale upon which it is based raises some questions about the conclusions reached in *Roundtree Villas*. The court states in *Roundtree* that "[t]he rights and authority of the Regime must be gleaned from the Horizontal

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Or. App. 342, 675 P.2d 1051 (1984); Brickyard Homeowners' Ass'n Management Comm. v. Gibbons Realty Co., 668 P.2d 535 (Utah 1983).

28. 285 S.C. at 569, 330 S.E.2d at 539.

29. S.C. CODE ANN. § 15-5-50 (1976), *repealed by* 1985 S.C. ACTS 277, No. 100, § 2 (replaced by S.C.R. CIV. P. 23(a)) provided: "When the question is one of a common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

30. 285 S.C. at 572-73, 330 S.E.2d at 541. *See generally* S.C.R. CIV. P. 23(a).

31. 282 S.C. 415, 321 S.E.2d 46 (1984).

32. *Id.* at 421, 321 S.E.2d at 49.

33. 285 S.C. at 570, 330 S.E.2d at 540.

Property Act and the master deed."[34] The pertinent portion of the Horizontal Property Act states that the common areas are owned on a pro rata basis by owners of the individual condominium units as tenants in common.[35] Since this ownership right is given to each unit owner by statute, the determination that the corporation in *Roundtree* owns the common elements is inconsistent with the tenancy in common provided by law. In addition, the master deed in *Roundtree* states that the common elements are to be owned in common by all co-owners of the condominium development.[36]

If the co-owners, rather than the corporation, in *Roundtree* owned the common elements by statutory right, the situations in *Roundtree* and *Dockside* appear to be identical. Under the court's reasoning in *Dockside*, if the corporation in *Roundtree* had not owned the common elements, the corporation would not have standing to maintain the action. This result would be consistent with the real party in interest requirement mandated by South Carolina statute[37] as well as with the decisions of other jurisdictions that have not amended their statutes to include this specific right.

The South Carolina Supreme Court, however, recently reaffirmed the *Roundtree* decision by overruling *Dockside* in *Queen's Grant Horizontal Property Regimes I-V v. Daniel International Corp.*[38] The court held in *Queen's Grant* that a property regime does have standing to bring an action for construction defects in the common elements which that regime has the duty to maintain.[39] By its ruling in *Queen's Grant*, the supreme court follows a minority of jurisdictions that have allowed an association to maintain standing solely as the representative of its members even absent a statute granting the right as a matter of law.[40]

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34. 282 S.C. at 418, 321 S.E.2d at 49.

35. S.C. CODE ANN. § 27-31-60 (1976).

36. Record at 741.

37. *See* S.C. CODE ANN. § 15-5-70 (1976).

38. 286 S.C. 555, 335 S.E.2d 365 (1985). The Supreme Court of South Carolina later reversed the court of appeals decision in *Dockside* by holding that a property regime does have standing to bring an action for construction defects in common elements that the regime has a duty to maintain. In reversing the decision, the supreme court cited both *Queen's Grant* and *Roundtree*. 287 S.C. 287, 337 S.E.2d 887.

39. 286 S.C. at 556, 335 S.E.2d at 366.

40. *See, e.g.*, 1000 Grandview Ass'n v. Mt. Washington Assocs., 290 Pa. Super. 365,

By overruling *Dockside*, the South Carolina Supreme Court has elected to employ general principles of standing to predominate in this confusing area of condominium law. Although the decision reflects a minority position, the court appears to have adopted a practical approach based on sound policy arguments. Because many owners of condominiums located along the South Carolina coast reside out of state and because of the recent popularity of condominium time-sharing plans, class actions to recover damages for defects to the common elements would be impracticable.[41] Since the association has the obligation to maintain and manage the common elements, they are the appropriate party to seek recovery for construction defects to the common elements. Therefore, although technical difficulties with the principle remain, the South Carolina Supreme Court appears to have chosen a practical solution to a complicated problem.

Kelly E. Shackelford

III. NEW STANDARD SET FOR REVIEW OF DEEDS

The South Carolina Court of Appeals recently set a standard to review the adequacy of deed descriptions when determining the validity of a deed as evidence of title. In *Bryan v. Bryan*[42] the court held that a deed, in order to be effective as evidence of title, must either in terms or by reference to another designation give a description of the subject matter intended to be conveyed that will be sufficient to identify the property with reasonable certainty.[43]

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434 A.2d 796 (1981). In *1000 Grandview Association* the Superior Court of Pennsylvania employed the principles enunciated in Warth v. Seldin, 422 U.S. 490 (1975), to hold that the association had representational standing to assert the rights of its individual members. 290 Pa. Super. at 366, 434 A.2d at 797. Finding precedent from other jurisdictions to be unpersuasive, the court based its holding on "the general principles of standing" which allow a representational action if an immediate, direct, and substantial injury is alleged to any member of the group. *Id.* at 367, 434 A.2d at 797. Since damage to the common elements was held to have met these injury requirements, the association was permitted to assert standing. *Id.*

41. Queen's Grant Villas, located in Hilton Head, South Carolina, would be an example of a condominium complex that would find a class action to be impracticable.

42. 285 S.C. 434, 330 S.E.2d 310 (Ct. App. 1985).

43. 285 S.C. at 437, 330 S.E.2d at 312 (quoting Whealton & Wisherd v. Doughty, 112

Bryan arose as an action to quiet title. Respondent Wilma J. Bryan claimed ownership of a thirty-acre tract against her ex-husband's son. Wilma Bryan's title originated in a 1947 tax deed to Lillian Christensen. The property, described in the tax deed in terms of adjacent land, was surveyed in 1947 and found to contain thirty acres. The deed was recorded in 1956, and Christensen's heir granted the parcel of land to Mrs. Bryan in 1957.

The son, the appellant in this action, claimed title pursuant to a deed of ten acres from his father, John Daniel Bryan. John Bryan acquired the "Rina Smalls tract" through a tax deed. The deed described the tract as south of the adjacent tract of Wilma Bryan; the description did not include any indication of acreage, metes, or references to an existing plat.

Upon their divorce in 1979, John Bryan agreed to convey to Wilma his interest in the Christensen tract. In the same year, however, a survey of John Bryan's plat indicated that the southern ten acres of the Christensen tract were, in fact, the Rina Smalls tract. John Bryan's belief that he had retained the southern portion of the property after the divorce led to this conflict over the ten acres.

The court of appeals upheld the special referee's finding that the tax deed description of the property purchased by Mr. Bryan in 1967 was "so vague" that it was not shown to be a part of the subject property in Wilma Bryan's action to quiet title.[44] The court restated two basic propositions of South Carolina law in support of its ruling. First, it pronounced that an appellate body should not disturb factual findings of the referee where there is evidence which reasonably supports the findings.[45] Second, the court reaffirmed the principle that an action in equity is the appropriate method of quieting title.[46]

On appeal Mr. Bryan had contended that the circuit court, by disallowing the purported conveyance, read the entire Rina Smalls tract out of existence.[47] The respondent disagreed, arguing that it was the ownership, not the existence of the tract,

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Va. 649, 72 S.E. 112 (1911)).

44. 285 S.C. at 436, 330 S.E.2d at 311.

45. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); *accord* Metze v. Meetze, 231 S.C. 154, 97 S.E.2d 514 (1957); Knight v. Hilton, 224 S.C. 452, 79 S.E.2d 871 (1954).

46. Van Every v. Chinquapin Hollow, Inc., 265 S.C. 474, 219 S.E.2d 909 (1975).

47. Brief of Appellant at 5.

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which was in question. The respondent contended that such a determination was factual in nature and had been decided by the trial court on the basis of ample evidentiary support.[48] The court of appeals agreed with the respondent, restating several concerns of the referee. The court noted that the sheriff, at the tax sale, had told the appellant that the location of the Rina Smalls tract was unknown. The court also noted that Mr. Bryan admitted his ignorance of the tract's existence, although he thought it adjoined the Christensen tract. The court pointed out that at no time prior to the divorce did Mr. Bryan claim any interest in the southernmost ten acres of Mrs. Bryan's tract, nor did he make any pretense to exclude those ten acres when he deeded his interest in Wilma's property pursuant to the divorce decree.[49] Finally, the court found that Mr. Bryan's evidence was sketchy, since his surveyor admitted that he had not researched the title to the property south of the Christensen tract,[50] and his equation of the Rina Smalls tract with the southernmost ten acres of the Christensen tract was "just an opinion."[51] Thus, the court affirmed the evidentiary conclusion reached by the lower court.[52]

The rule of the case, that a deed description must identify the subject property with sufficient certainty, is in accord with general South Carolina law. A case not cited by the court, *Brunson v. Graham*,[53] reflects this contention: where there is "no competent evidence whatsoever of any probative value as to the location of the . . . boundaries" of disputed property, a trial court's decree of ownership is not objectionable without suggestion of inequity.[54] In *Bryan* the court ruling was an adoption of a general principle of Virginia common law.[55] While South Caro-

48. Brief of Respondent at 7.

49. 285 S.C. at 438, 330 S.E.2d at 312.

50. *Id.*

51. Record at 118.

52. It is interesting to note that the court did not rule on the issue of adverse possession by Wilma Bryan, although this issue was addressed by both parties in their briefs. *See* Brief of Appellant at 4; Brief of Respondent at 7. The court determined that since proper title rested in Mrs. Bryan as a matter of law, there was no need to address that question. 285 S.C. at 439, 330 S.E.2d at 312.

53. 259 S.C. 298, 191 S.E.2d 713 (1972).

54. *Id.* at 299, 191 S.E.2d at 714.

55. Harris v. Scott, 179 Va. 102, 18 S.E.2d 305 (1942); Whealton & Wisherd v. Doughty, 112 Va. 649, 72 S.E. 112 (1911).

lina has put claimants on the same footing when they do not claim title from a common source,[56] this rule does not apply until one shows to the satisfaction of the trial court that the land claimed is what was conveyed. Hence, the rule was inapplicable in *Bryan.*

The precedential effect of *Bryan* is to expand the meaning of *Coleman v. Gaskins.*[57] In *Coleman,* as in *Bryan,* the plaintiff brought suit to remove a cloud from his title. *Bryan* adds a corollary to *Coleman* in its ruling that a defendant in such an action cannot refute a claim of title with a sufficiently vague description. The court's limitation on vagueness, however, does not disallow the use of the listing of adjacent tracts as a method of description.[58]

There are two practical consequences of *Bryan.* First, the decision alerts drafters of deeds that they must give a particular and accurate description of conveyed property, especially when the description is in the form of adjoining lands. Second, it brings South Carolina into line with the general rule of most jurisdictions that "[a] purported conveyance is not one in fact unless it contains a description from which a competent person can locate the land intended to be conveyed and can distinguish it from all other land."[59]

Gregory F. Litra

IV. UNDUE INFLUENCE IN THE EXECUTION OF A WILL

In *In re Last Will & Testament of Smoak*[60] the South Carolina Supreme Court held that the contestant of a will had not presented sufficient evidence to submit the question of undue influence to the jury.[61] The court concluded that since no reasonable inference of undue influence existed, the executor's motion for directed verdict should have been granted by the lower

56. Dickson v. Epps, 104 S.C. 381, 89 S.E. 354 (1916).
57. 165 S.C. 301, 163 S.E. 790 (1932).
58. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 11.2, at 725 (1984). There is, however, no particular South Carolina rule of decision on this point.
59. 4 AMERICAN LAW OF PROPERTY § 18.34 (1954).
60. 286 S.C. 419, 334 S.E.2d 806 (1985).
61. *Id.* at 428, 334 S.E.2d at 811.

South Carolina Law Review, Vol. 38, Iss. 1 [2020], Art. 13
court.[62] Although the court's holding in *Smoak* is typical of the recent decisions that have addressed this issue, the distinctions drawn by the court are tenuous. The court failed to set forth any clear-cut standard to determine whether undue influence had been exercised in the execution of a will.

In May 1979, when Mr. Smoak's wife died, he executed a will giving one-third of his estate to his niece Janette Martin, one-third to his niece Aubrea Westervelt, and one-third to his niece by marriage, Dorothy Smoak. Shortly after the execution of the will, because of his deteriorating health, Mr. Smoak moved into the home of Mrs. Martin and her husband. He then executed a power of attorney in favor of Mrs. Martin. In October 1979, just five months after the original will had been executed, Mrs. Martin had her own attorney draw a new will. Under the terms of this will, one-third of the estate went to Mrs. Martin and her husband, one-third to Aubrea Westervelt, and one-third to the children of Mrs. Westervelt. A $2000 dollar bequest was made to Dorothy Smoak.[63] When Mr. Smoak died fourteen months later, Dorothy Smoak contested the will contending that Janette Martin had exerted undue influence over Mr. Smoak in the execution of the new will.

In deciding whether a factual determination was required and whether the issue should be presented to the jury, the lower court considered the testimony of Dr. William Woodward, a psychiatrist and geriatric medical doctor who had ministered to Mr. Smoak's needs. Dr. Woodward testified that, in his opinion, Janette Martin had "impressed her will" upon Mr. Smoak and that the new will was the result of that influence.[64] The doctor's testimony caused the trial judge to submit the issue of undue influence to the jury.

The supreme court reversed the lower court's decision, reasoning that the burden on the contestants to prove undue influence had not been met. The court determined that the influence extended over Mr. Smoak was not so strong that it dominated

62. *Id.*

63. The new will changed the old one by providing that Mrs. Martin share her one-third with her husband, giving one-third to the children of Mrs. Westervelt, and reducing Dorothy Smoak's share from one-third to a $2000 bequest. *Id.* at 422, 334 S.E.2d at 808.

64. *Id.* at 426, 334 S.E.2d at 810.

his will and prevented the exercise of his judgment and choice.[65] The court acknowledged the testimony of Dr. Woodward, but concluded that his expert opinion testimony had no probative value since it related only to undue influence and not to the mental capacity of Mr. Smoak.[66]

In reaching its decision, the supreme court analyzed several recent South Carolina decisions that had addressed the issue of undue influence in the execution of a will. The court first noted the general rule set forth in *Calhoun v. Calhoun*[67] that a mere showing of opportunity and motive to exercise undue influence does not justify a submission of that issue to the jury. In *Calhoun* the chief beneficiary of the will was accused of exercising undue influence over her father because of his weakened physical condition at the time the will was rewritten. The court considered three issues in its determination that no factual issue existed. First, the *Calhoun* court noted that the testator's physician had testified that the testator was oriented as to time, place, and situation. Second, it emphasized that the alleged exerter of undue influence was not present during the testator's conferences with the attorney or during the execution of the will. Last, the court relied on the testator's "unhampered opportunity to revoke his will subsequent to the operation of any undue influence upon him."[68]

Although similarities between these two cases exist, the

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65. *Id.* at 424-27, 334 S.E.2d at 809-10.

66. The testimony to which the judge referred was as follows:

Q: Dr. Woodward, having known and treated Holly Smoak for the number of years which you treated him, having known him also intimately and his family, do you have an opinion as to whether or not his will and free control was diminished during the period that he stayed in the home of Janette Martin?

A: I do.

Q: And what is that opinion?

A: I think that - that he was taken over by Janette Martin, and I think that she impressed her will upon Mr. Smoak.

Q: Knowing Mr. Smoak and knowing the objects of his affection, do you believe that the Will executed on October 11, 1979, was the result of - do you have a medical opinion to a reasonable medical certainty as to whether or not this Will was the result of any undue influence?

A: I think so.

286 S.C. at 426-27, 334 S.E.2d at 810. The court also considered the fact that Dr. Woodward was angry with Mrs. Martin for having discharged him because of a disagreement over the sale of the testator's farm to the doctor. *Id.* at 427, 334 S.E.2d at 810.

67. 277 S.C. 527, 290 S.E.2d 415 (1982).

68. *Id.* at 533, 290 S.E.2d at 419.

facts in *Smoak* differ significantly from those in *Calhoun*. In *Smoak* the testator's physician testified that Mr. Smoak *had* been influenced by Mrs. Martin in the execution of the will. Mrs. Martin also called upon her own attorney to draft the October will and the testimony suggested that she may have, in fact, dictated that will.[69] Additionally, the time period allowed to revoke the will subsequent to the undue influence in *Calhoun* was longer than the time period in the present case.[70]

After comparing the instant case to *Calhoun*, the supreme court in *Smoak* distinguished the case from *Byrd v. Byrd*.[71] In *Byrd* the court held that the evidence of undue influence was sufficient to submit the issue to the jury. The court reasoned that undue influence was evidenced by the continuing threats of the principal beneficiary, the son, to place the testator in a nursing home, the heavy medication of the testator, the restricted communication allowed between the testator and members of his immediate family, and the fiduciary relationship that existed between the son and the testator. The similarities in *Byrd* and *Smoak* are obvious. In each case the testator had a weakened medical condition testified to by an expert witness, the testator was allegedly restricted from communicating with other members of his family, and the person allegedly exerting undue influence stood in a fiduciary relationship.[72]

The court distinguished the instant case from *Byrd* by noting that Mr. Smoak had remained mentally alert throughout his illness even though the testimony of Dr. Woodward indicated otherwise. The court further noted that the person who allegedly exerted undue influence was not benefiting financially from the change in the will. The court concluded its reasoning by discrediting the expert opinion testimony of Dr. Woodward.[73] The dis-

69. This fact is suggested in Justice Gregory's dissenting opinion. The opinion also points out that the attorney who drafted the October will was never called to testify and that his testimony would have been dispositive on the issues at trial. 286 S.C. at 430, 334 S.E.2d at 812 (Gregory, J., dissenting).

70. In *Calhoun* the testator had three years to revoke his will subsequent to the alleged undue influence. 227 S.C. at 530, 290 S.E.2d at 417. In *Smoak* the time period was 14 months. 286 S.C. at 426, 334 S.E.2d at 810.

71. 279 S.C. 425, 308 S.E.2d 788 (1983).

72. In his dissenting opinion, Justice Gregory pointed out that Mrs. Martin was in a fiduciary relationship with the decedent. 286 S.C. at 431, 334 S.E.2d at 813 (Gregory, J., dissenting). This relationship was not discussed in the majority opinion.

73. 286 S.C. at 427, 334 S.E.2d at 810-11.

tinctions made by the court, however, do not indicate a clear absence of a factual issue. Even though Dr. Woodward testified as to his opinion on undue influence rather than mental capacity, he was still the personal physician and friend of the testator and was aware of the circumstances surrounding the execution of the will. It is also clear that although Mrs. Martin did not benefit financially from the October will, she may have benefited indirectly from the exclusion of Dorothy Smoak.

Even if the supreme court was correct in deciding that no reasonable inference of undue influence existed, the opinion fails to set forth any clear-cut standards that would aid the practitioner in protecting against undue influence. Instead, the decision demands a constant weighing of facts and circumstances. Because it failed to denote guidelines by which a trial judge can decide whether the issue of undue influence should be submitted to the jury, the supreme court has left a great deal of discretion in the hands of trial courts, which may lead to incnsistent results.

Kelly E. Shackelford

V. Standard by Which to Imply Constructive Knowledge of Terms of Recorded Documents

In *Reid v. Harbison Development Corp.*[74] the South Carolina Court of Appeals ruled that constructive notice of recorded documents would not be imputed to a defrauded buyer where the facts support a jury finding that the buyer acted with reasonable prudence in relying upon the representations of the seller.[75] This decision aligns South Carolina with the majority of jurisdictions that have ruled on the question.

The conflict between the parties arose from the sale of residential property to the plaintiffs, the Reids, by defendant Harbison Development Corporation.[76] During negotiations a Harbison agent told the plaintiffs that Harbison would be responsible for the development and maintenance of a pond lo-

74. 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985).

75. *Id.* at 562, 330 S.E.2d at 535.

76. Since Coogler was involved in bankruptcy proceedings at the time of this trial, the action proceeded against Harbison alone. *Id.* at 558, 330 S.E.2d at 533.

cated on the property. Pursuant to Harbison's policy of selling lots to builders rather than homeowners, plaintiffs entered into a contract with Coogler, a builder, on April 29, 1979, to purchase the lot from him and have him construct the house.

The deed that Harbison then transferred to Coogler contained restrictive covenants concerning the mandatory membership in the homeowners' association and the maintenance of the pond. The deed was recorded on June 8, 1979. On July 26, 1979, Harbison and Coogler signed a "Declaration of Covenants" placing further restrictions on the property. The declaration was recorded on July 27, 1979, the day of the closing.[77] During the closing the existence of the homeowners' association was mentioned, but the Reids were assured that membership would be optional. A year after the sale, the Reids were informed that membership in the association was mandatory and that they were financially responsible for their share of the maintenance of the pond.[78]

Plaintiffs filed an action to recover damages on a theory of common-law fraud and deceit.[79] The jury found in favor of the plaintiffs, and defendants' motions for judgment *non obstante veredicto* and new trial were denied.[80]

On appeal defendants argued that plaintiffs failed to prove that they were ignorant of the falsity of the representation or that they had a right to rely on the representation. Defendants contended that constructive notice was imputed to the buyers because the deed containing the restrictive covenants was recorded.[81]

In rejecting the defendants' arguments, the court of appeals based its opinion on the majority rule concerning fraudulent

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77. *Id.* at 559, 330 S.E.2d at 533-34.

78. *Id.* at 559-60, 330 S.E.2d at 534.

79. Plaintiffs brought suit on three other theories as follows: (1) breach of contract accompanied by fraudulent acts; (2) breach of fiduciary duty; and (3) violation of the South Carolina Unfair Trade Practices Act. 285 S.C. at 560, 330 S.E.2d at 534. Harbison was granted directed verdicts on the first two theories by the trial court. The unfair trade practice theory was submitted to the jury which found in favor of plaintiffs. This theory was not addressed by the appellate court. *Id.*

80. The jury awarded plaintiffs $20,000 actual damages and $20,000 punitive damages. On appeal Harbison contended that the verdict was excessive and not supported by the evidence. The court of appeals upheld the award of punitive damages and remanded the issue of actual damages. 285 S.C. at 557, 330 S.E.2d at 532.

81. Brief of Appellant at 11.

misrepresentations.[82] First, the court found that at the time the representation was made no covenants regarding the pond had been recorded. Second, the court recognized that the buyers were laymen and would have needed expert assistance to investigate the records to obtain the truth. Last, the court found that the defendants induced the buyers to accept the title in spite of the recorded documents by additional representations made at the closing.[83]

Based on these findings, the court held that the jury could reasonably have concluded that plaintiffs had proved the necessary elements of fraud.[84] Additionally, the court held that since the jury found that the defrauded parties acted with reasonable prudence, constructive notice would not be imputed to them.[85]

Although the court based its decision on the majority rule concerning fraudulent misrepresentation, the court appears to apply established principles regarding fraud in South Carolina to the specific issue of whether constructive notice may be imputed to a buyer to defeat a fraudulent misrepresentation claim.

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82. 285 S.C. at 561, 330 S.E.2d at 534-35. The rule cited by the *Reid* court states:

> Where the fact misrepresented or the matters which are concealed are peculiarly within the representor's knowledge and the representee is ignorant thereof, it is generally held that, although the real fact appears on the public records, the representee is under no obligation to examine the records, and his failure to do so does not defeat his right of action. This is especially true where the very representations relied on induced the hearer to refrain from an examination of the records, where the employment of an expert would have been required to deduce the truth from an examination of the records, where confidential relations existed, or where the defrauded party was inexperienced. In such cases the doctrine of constructive notice is inapplicable.
>
> The true test of the hearer's right to rely on misrepresentations as to matters of record is whether or not he acted with reasonable prudence in his reliance.

Id. (quoting 31 C.J.S. *Fraud* § 34c (1943)).

Generally, the recipient of a fraudulent misrepresentation has a right to rely even though he might have ascertained the truth upon investigation. Tallevast v. Herzog, 225 S.C. 563, 83 S.E.2d 204 (1954).

A person committing fraud cannot defeat a claim for fraudulent misrepresentation solely on the basis that defrauded person had constructive notice. *See* Citizens Sav. & Loan Ass'n v. Fischer, 67 Ill. App. 2d 315, 214 N.E.2d 612 (1966); First Nat'l Bank v. Brown, 181 N.W.2d 178 (Iowa 1970); Cowles v. Johnson, 297 Ky. 454, 179 S.W.2d 674 (1944); Brandt v. Olympic Constr., Inc., 16 Mass. App. Ct. 913, 449 N.E.2d 1231 (1983); Heverly v. Kirkendall, 257 Or. 232, 478 P.2d 381 (1970).

83. 285 S.C. at 561-62, 330 S.E.2d at 535.

84. *Id.*

85. *Id.* at 562, 330 S.E.2d at 535.

In *Thomas v. American Workmen*[86] the South Carolina Supreme Court noted that while the policy of the courts is to suppress fraud and discourage negligence, the "unmistakable drift is toward the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary."[87] The court declined to adopt a strict rule prohibiting the party making the misrepresentations from defeating the claim by showing that the defrauded party could have ascertained the truth upon investigation.[88] The determinative issue in each case is whether the defrauded party acted with reasonable diligence. In *Thomas* the court noted that determination of reasonable diligence "will depend upon the various circumstances involved such as the form and materiality of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties."[89]

In *Tallevast v. Herzog*[90] the supreme court noted that the issue of reasonable reliance by the defrauded party was a proper issue for the jury. In addition, the court held that when the facts of the misrepresentation are peculiarly within the seller's knowledge, the buyer usually has a right to rely on the representation and is not precluded from asserting a claim even though he failed to investigate the facts.[91] The principles established in these cases support the holding in *Reid*. The courts accomplish the policy of suppressing fraud by prohibiting the wrongdoer from defeating the claim solely on the basis of constructive knowledge.

The jury in *Reid* determined that the reliance was reasonably based on the circumstances.[92] Since the first covenant was not recorded when the contract was executed and the second declaration was not recorded until the day of the closing, the facts were found to be peculiarly within the seller's knowledge. Furthermore, the seller induced the buyer to accept title by ad-

86. 197 S.C. 178, 14 S.E.2d 886 (1941).
87. *Id.* at 182, 14 S.E.2d at 887.
88. 285 S.C. at 560-61, 330 S.E.2d at 534-35.
89. 197 S.C. at 182, 14 S.E.2d at 888.
90. 225 S.C. 563, 83 S.E.2d 204 (1954).
91. *Id.* at 570, 83 S.E.2d at 207.
92. 285 S.C. at 562, 330 S.E.2d at 535.

ditional misrepresentations. Finally, the specific relation of the buyers to Harbison was as initial purchasers. The buyers' knowledge was merely laymen's knowledge. On the other hand, the sellers were agents with superior knowledge. Thus, the holding in *Reid* appears to be in accordance with established principles regarding common-law fraud in South Carolina.

Although the court did not specifically discuss a purchaser's duty to investigate recorded documents, it appears that this duty has remained unchanged. The purpose of the recording statutes is to protect subsequent purchasers and creditors.[93] Consequently, several South Carolina cases have held that constructive knowledge of recorded instruments affecting the chain of title is imputed to the purchaser.[94] None of these cases, however, involved fraudulent misrepresentations by the seller.

Reid does not change a purchaser's duty to investigate public records. It holds only that a claim for fraudulent misrepresentation cannot be defeated solely on the grounds that the purchaser failed to fulfill this duty.[95] Therefore, when a claim for fraudulent misrepresentation is involved, the crucial issue becomes whether the reliance on the representations was reasonable. The purchaser's failure to investigate the record will be a major consideration in making this determination. Thus, when the jury determines that the person defrauded acted with reasonable prudence and takes various circumstances into consideration, including the purchaser's failure to investigate the record, constructive knowledge will not be imputed to defeat a claim for fraudulent misrepresentation.

Virginia Ann Mullikin

VI. STANDARD OF ACQUIESCENCE IN BOUNDARY DISPUTES

In *Kirkland v. Gross*[96] the South Carolina Court of Appeals affirmed a circuit court's resolution of a boundary dispute. In

93. Epps v. McCallum Realty Co., 139 S.C. 481, 138 S.E. 297 (1927).

94. Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); First Presbyterian Church v. York Depository, 203 S.C. 410, 27 S.E.2d 573 (1943); Moyle v. Campbell, 126 S.C. 180, 119 S.E. 186 (1923).

95. 285 S.C. at 561, 330 S.E.2d at 534.

96. 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985).

reaching its decision, the court addressed three classic property issues: resurvey, acquiescence, and adverse possession. Although the court's reasoning concerning adverse possession[97] and resurvey[98] follows well-established rules, its treatment of the acquiescence issue raises several questions.

The appellants brought this action, *inter alia*, to determine their property line.[99] The conflict arose when Gross, the adjoining landowner and respondent in the action, cut and sold timber in an area claimed by Kirkland and other heirs of J. F. Carter. In reaching its conclusion, the court examined events in the 1950s to determine whether the parties' predecessors-in-title had acquiesced in settling a similar boundary dispute.

In the 1950s, Nummy, the respondent's predecessor-in-title, hired a surveyor to establish the boundary and cut timber in accordance with this line. Carter, the appellant's predecessor-in-title, became dissatisfied with the line drawn and complained to Nummy. On Nummy's advice, Carter hired her own surveyor who reached a different conclusion more favorable to the Carter tract. After Carter's surveyor established the second line, Nummy moved his fence out of the disputed area and paid Carter $250 for the timber he had cut there.[100]

The court, however, concluded that Nummy had no intention of establishing a new property line. The court pointed to testimony in which Nummy asserted that he had paid Carter only to pacify her and had moved his fence, not to establish a

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97. In dealing with adverse possession, the court reaffirmed the well-established South Carolina standard that to be adverse, possession must be actual, open, notorious, exclusive, hostile, continuous, and uninterrupted. *Id.* at 198, 332 S.E.2d at 549 (citing King v. Hawkins, 282 S.C. 508, 319 S.E.2d 361 (Ct. App. 1984)). In support of its conclusion that adverse possession had not been established, the court pointed to Kirkland's testimony that her family had never used the disputed property or cut timber from it.

98. Although the court dealt with several aspects of resurvey for the first time, its conclusion is similar to that of an overwhelming majority of states that have dealt with the issue. The court cited 11 C.J.S. *Boundaries* § 61 (1938) and 12 AM. JUR. 2D *Boundaries* § 61 (1964) for the following propositions: When lines of a senior and junior survey conflict, the lines of the senior survey control; and a resurveyor's duty is to relocate the courses and lines at the same place where originally located by the first surveyor and not to dispute the correctness of the original survey.

99. The appellants were also seeking damages for timber sold by the respondents and an injunction prohibiting the respondents from using a certain road. 286 S.C. at 195, 332 S.E.2d at 547.

100. Brief of Appellant at 6.

different boundary, but to enclose his cows.[101] Based on this testimony, the *Kirkland* court affirmed the trial court's finding of lack of acquiescence.

In concluding that no acquiescence existed, the court relied heavily on *Croft v. Sanders*[102] for the propositions that the mere existence of a fence between adjoining properties is not, in itself, sufficient to establish a boundary by acquiescence and that fences may be erected for purposes having nothing to do with establishing boundaries.[103] Although these propositions were applicable in *Croft*,[104] an important distinction makes their applicability questionable in *Kirkland*: Nummy paid Carter for timber he cut in the area she claimed and, at her insistence, removed his fence from the disputed area. These actions logically gave Carter valid reason to believe that Nummy had acquiesced to the line her surveyor had drawn.

In *Croft*, however, Croft took no action that would have reasonably led Sanders to believe a new boundary had been created.[105] The *Croft* court, sensing this very problem, specifically noted that "acquiescence depends upon the particular facts of the case. Generally, the question turns on 'the acts or declarations of the parties . . ., on inferences or presumptions from their conduct, or on their silence.' "[106]

Therefore, a strong inference of acquiescence can be drawn from Nummy's conduct since payment for timber cut in a disputed area and removal of a fence from the area are not acts that indicate Nummy's claim to full, undisputed possession. Even if Nummy's conduct had been insufficient to infer acquiescence, his silence after moving the fence at Carter's insistence

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101. 286 S.C. at 193, 332 S.E.2d at 548.

102. 283 S.C. 507, 323 S.E.2d 791 (Ct. App. 1984).

103. *Id.* at 510, 323 S.E.2d at 793.

104. *Croft* involved a similar dispute with the plaintiff asserting acquiescence and adverse possession to determine the boundary. The *Croft* court resolved both issues in the plaintiff's favor. *Id.* at 510-12, 323 S.E.2d at 793-94.

105. Sanders pointed to two acts by Croft indicating acquiescence to a new boundary: constructing a fence and hammering a galvanized pipe into the ground. The fence, however, was constructed in 1950 in order to obtain a farm loan and no testimony indicated otherwise. The galvanized pipe was used by Croft in order to serve as a point from which he could be certain the right-of-way granted him would lead to his property. Evidence existed that Sanders specifically knew the purpose of this pipe. *Id.* at 510, 323 S.E.2d at 793.

106. *Id.* at 509-10, 323 S.E.2d at 793 (citation omitted)(quoting 11 C.J.S. *Boundaries* § 79 (1938)).

gave Carter valid reason to believe Nummy had waived or abandoned any rights.[107] For these reasons, the court's treatment of acquiescence may have ignored an important aspect of the issue.

The court's conclusion also raises interesting policy questions concerning the weight given to secret intent. Although Nummy testified that he "really didn't accept anything" when he moved his fence, he testified at another point that he claimed only up to his fence, recognizing the land across the fence as the Carter property.[108] In *Kirkland* Nummy's questionable intent illustrates an inherent problem with such testimony: intent, while easy to state, is difficult to disprove—especially after the passage of thirty years. Here, Nummy's secret intent, although balanced against express acts and thirty years of silence, controlled and decided the issue.[109] The preferential weight clearly given to this testimony, even though inconsistent and weighted against objective acts, could raise problems in the resolution of future disputes.

Joseph Calhoun Watson

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107. *See* Olson v. Clark, 252 Iowa 1133, 109 N.W.2d 441 (1961). The court dealt with this issue, stating as follows:

> Acquiescence which will establish a boundary line is consent inferred from silence, a tacit encouragement involving notice or knowledge of the other parties' claim; it exists when a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for a length of time that under the circumstances the other party may fairly infer he has waived or abandoned his right.

Id. at 1138, 109 N.W.2d at 444.

108. Master's Transcript at 229-30. The relevant testimony is as follows:

> Q. And you moved your fence to a point, let's say as close as you can eyeball it into where the line was to be?
> A. That is correct.
> Q. And from that point forward, you claimed just up to the fence?
> A. That's right.
> Q. And everything on the other side of the fence would have been Mrs. Carter's or the Carter property?
> A. Yes.

Id.

109. 286 S.C. at 198, 332 S.E.2d at 549.