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Morgan H. Rogers

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SLACK V. JAMES: CAN SOUTH CAROLINA'S REAL ESTATE INDUSTRY RELY ON NON-RELIANCE CLAUSES?

I. INTRODUCTION

In June 2005, the South Carolina Supreme Court issued its ruling in *Slack v. James*,[1] a decision that will cause significant problems for South Carolina's real estate industry and real estate practitioners. The decision makes it more difficult, if not impossible, to limit the tort liability of real estate sellers, and thus opens the door to real estate buyers' fraud and negligent misrepresentation claims. In *Slack*, the supreme court examined a residential real estate dispute over a sales contract the buyers and sellers entered into without legal representation.[2] Despite these limited facts, the majority issued a rule that indiscriminately affects a wide variety of real estate transactions—from boilerplate contracts signed by laymen for a small plot of land to multi-million dollar commercial real estate deals brokered by experienced business persons and attorneys.[3] Because of *Slack*, every seller of real estate in South Carolina has an increased risk of liability.

Prior to *Slack*, sellers of real estate had two principal contractual methods of limiting their liability: merger clauses and non-reliance clauses.[4] After *Slack*, they have the protection of only one. A "merger clause" or "integration clause" provides that all prior terms of the negotiation are "merged" or "integrated" into the writing of the contract.[5] *Slack* did not change the legal effect of merger clauses.[6] The parol

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1. 364 S.C. 609, 614 S.E.2d 636 (2005).

2. *Id.* at 611–12, 614 S.E.2d at 637.

3. The majority did not limit its holding concerning non-reliance clauses to the specific type of real estate transaction in dispute. However, the majority's analysis of the first issue in the case—the reasonableness of the buyers' reliance on oral statements made before the contract—characterized the contract as residential rather than commercial and stated that real estate agents, not attorneys, represented the parties. *Id.* at 615–16, 614 S.E.2d at 639–40. As this Note will discuss in more detail, neither the majority opinion nor Chief Justice Toal's dissent, in forming their proposed rules on the second issue—the non-reliance clause—noted a difference between these kinds of transactions. *Id.* at 617–20, 614 S.E.2d at 640–42. While the "right to rely" issue is not the focus of this Note, the majority's commentary on this issue sheds light on one of this Note's central themes—the consumer protection debate that arises with non-reliance clauses.

4. *See* Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644–45 (7th Cir. 2003) (comparing the legal protections of merger clauses and non-reliance clauses); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 470–72, 581 S.E.2d 496, 502–03 (Ct. App. 2003) (discussing the legal protection of merger clauses and non-reliance clauses for the withdrawing partner in a partnership dispute); Joseph Wylie, *Using No-Reliance Clauses to Prevent Fraud-in-the-Inducement Claims*, 92 ILL. B.J. 536, 537 (2004) (discussing how merger clauses and non-reliance clauses can help commercial litigators defend their clients); *see also In re* Hovis, 325 B.R. 158, 166–68 (Bankr. D.S.C. 2005) (expressing "doubts" over whether the plaintiff could have reasonably relied on a contract that contained non-reliance clause for fraud and negligent misrepresentation claims).

5. *See* Allen-Parker Co. v. Lollis, 257 S.C. 266, 272, 185 S.E.2d 739, 742 (1971) ("The general rule is that all conversations and parol agreements between the parties prior to or contemporaneous with the written agreement are considered to have been merged therein so that they cannot be given in evidence for the purpose of changing the contract showing an intention or understanding different from that expressed in the written agreement." (citing Charleston & W. Carolina Ry. Co. v. Joyce, 231 S.C.

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evidence rule provides that merger clauses will prevent the contracting parties from presenting any evidence outside the four corners of the contract to establish a breach of contract claim.[7] However, the parol evidence rule only limits the use of extrinsic evidence in contract cases.[8] Thus, merger clauses will not bar causes of action sounding in tort, such as fraud and negligent misrepresentation.[9]

493, 502, 99 S.E.2d 187, 192 (1957))); BLACK'S LAW DICTIONARY 824 (8th ed. 2004) (defining an integration clause as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract"); Wylie, *supra* note 4, at 536 (stating that an integration clause limits "the terms of the contract . . . to what appears in the written agreement").

6. *Slack*, 364 S.C. at 616, 614 S.E.2d at 640 (upholding the general rule that merger clauses do not preclude claims of fraud and negligent misrepresentation (citing Gilliland v. Elmwood Properties, 301 S.C. 295, 301–02, 391 S.E.2d 577, 580–81 (1990))).

7. *See* Formento v. Encanto Bus. Park, 744 P.2d 22, 25 (Ariz. Ct. App. 1987) ("The parol evidence rule precludes admission of any understandings or representations made prior to or contemporaneously with the written contract if the contract was intended as a final and complete integration of the parties' agreement." (citing Pinnacle Peak Developers v. TRW Inv. Corp., 631 P.2d 540, 544 (Ariz. Ct. App. 1980))); Wylie, *supra* note 4, at 536 (stating that "parol evidence is deemed inadmissible" where the contract contains an integration clause).

8. *See Gilliland*, 301 S.C. at 302, 391 S.E.2d at 580–81 ("'In a majority of jurisdictions the parol evidence rule bars oral testimony in certain contract cases . . . .'" (quoting Rempel v. Nationwide Life Ins. Co., 370 A.2d 366, 370 (Pa. 1977))); Bero Contracting & Dev. Corp. v. Vierhile, 796 N.Y.S.2d 808, 809 (App. Div. 2005) ("The merger clause in the purchase agreement bars the admission of parol evidence, including evidence of prior negotiations between the parties . . . to contradict or modify terms of the final written agreement." (citations omitted)); Absolute Mach. Tools v. Sw. Indus. Sales, No. 04CA008611, 2005 WL 1819518, at *2 (Ohio Ct. App. Aug. 3, 2005) (excluding parol evidence in machinery buyer's breach of contract action where integration clause stated that contract "constitutes the entire agreement between the Parties"); Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253–54, 359 S.E.2d 531, 532 (Ct. App. 1987) (holding the parol evidence rule bars extrinsic evidence in breach of contract claim where merger clause stated there were no other "'oral understandings, terms or conditions'" beyond those in the loan agreement).

9. In *Vigortone*, 316 F.3d at 644, a case that involved alleged greed, capitalists and pigs, Judge Posner opined that the legal effect of an integration clause depends on whether the cause of action arises in tort or in contract. *Id.* The plaintiff buyer of pigs, Provimi, alleged that it lost sixteen to seventeen million dollars because the defendant seller, PM, made fraudulent statements that caused Provimi to think there was no market risk in buying pigs without first contracting to sell them in order to protect against price fluctuations. *Id.* at 643. PM argued the integration clause in the sales contract precluded the use of parol evidence in Provimi's fraud claim. *Id.* at 644. Judge Posner retorted:

> The general rule is to the contrary. By virtue of the parol evidence rule, an integration clause prevents a party to a contract from basing a claim of breach of contract on [extrinsic evidence]. But fraud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced, or its price jacked up, by fraud.

Id. (citations omitted); *see also Formento*, 744 P.2d at 26 ("[I]t is well-settled that a party '[cannot] free himself from fraud by incorporating [an integration clause] in a contract.'" (alteration in original) (quoting Lusk Corp. v. Burgess, 332 P.2d 493, 495 (Ariz. 1958))); *Gilliland*, 301 S.C. at 302, 391 S.E.2d at 581 (holding that an integration clause does not prevent a plaintiff from proceeding on a negligent misrepresentation cause of action); MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) ("The 'as is' clause of the contract does not constitute an absolute defense to an action for

The second traditional protection against tort liability is the non-reliance, or non-representation, clause.[10] The non-reliance clause states the contracting parties have not relied on any representations other than those contained in the contract.[11] Reliance on representations made outside of the contract is a factual determination for the jury in determining fraud and negligent misrepresentation claims.[12] Non-

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fraud and deceit."); Allen-Parker Co. v. Lollis, 257 S.C. 266, 272, 185 S.E.2d 739, 742 (1971) (holding that if the contract was formed "with a fraudulent intent of the party claiming under it, then parol evidence is competent to prove the facts which constitute the fraud"); *Redwend*, 354 S.C. at 471, 581 S.E.2d at 503 ("It is axiomatic that there exists a well established exception to the parol evidence rule which allows extrinsic evidence by the party attacking an instrument on the ground of fraud."); Wylie, *supra* note 4, at 537–38 (summarizing Illinois and Seventh Circuit caselaw which indicates that integration clauses no longer provide protection against fraud-in-the-inducement claims). *But see* One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1286 (D.C. Cir. 1988) (holding that an integration clause that stated that a stock option contract "'supercede[d] any and all previous understandings and agreements'" precluded a securities fraud claim (alteration in original)).

10. *See* Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644 (7th Cir. 2005) ("One consequence of the rule [that integration clauses do not bar claims sounding in tort] is that parties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a 'no-reliance' clause into their contract, stating that neither party has relied on any representations made by the other."); Wylie, *supra* note 4, at 537 (discussing commercial litigators' use of non-reliance clauses as a "powerful tool for combating" claims sounding in tort).

11. For examples of a variety of non-reliance clauses, see Becker v. Allcom, Inc., No. C04-0958L, 2005 WL 1654524, at *4 (W.D. Wash. July 12, 2005) ("'Neither party has made any representation with respect to the subject matter of this Agreement to induce its execution except as specifically set forth herein.'"), and Danann Realty Corp. v. Harris, 157 N.E.2d 597, 598 (N.Y. 1959) ("'The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made . . . .'" (emphasis removed)), Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) ("'[N]one of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment . . . . (emphasis removed)). In *Rissman v. Rissman*, 213 F.3d 381 (7th Cir. 2000), the Seventh Circuit held the following statements of a stock-purchase agreement were valid non-reliance provisions:

> "The parties further declare that they have not relied upon any representation of any party hereby released [Defendant] or of their attorneys . . . , agents, or other representatives concerning the nature or extent of their respective injuries or damages.
>
> . . . .
>
> (a) no promise or inducement for this Agreement has been made to [Plaintiff] except as set forth herein; (b) this Agreement is executed by [Plaintiff] freely and voluntarily, and without reliance upon any statement or representation by Purchaser, the Company, any of the Affiliates or [Defendant] or any of their attorneys or agents except as set forth herein . . . ."

Id. at 383.

12. In *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005), the former president of a video game conglomerate brought claims for fraud and negligent misrepresentation, among others, against the conglomerate's owner. *Id.* at 212–13, 621 S.E.2d at 372. The South Carolina Court of Appeals outlined the elements of fraud and negligent misrepresentation. The court stated:

> To sustain a claim of fraud, all of the following elements must be proven: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its

reliance clauses have the legal effect of precluding fraud and negligent misrepresentation claims arising out of the contract.[13] After *Slack*, legal protection offered by non-reliance clauses is much more difficult to obtain.

In *Slack v. James*, a divided supreme court issued an opinion which first addressed the issue of whether the buyers of real estate in dispute reasonably relied on an oral representation made by the sellers' real estate agent.[14] The second issue—the focus of this Note—concerned a clause in the sales contract, and whether the clause was a valid non-reliance clause that would ultimately preclude the buyers' fraud and negligent misrepresentation claims.[15] The majority held the disputed clause was not a non-reliance clause, but merely an extension of the merger clause.[16] Thus, the sellers could not use the clause as a defense against the buyers' fraud and negligent misrepresentation counterclaims.[17] The majority further held that even if the clause was a non-reliance clause, it would not preclude these causes of action due to a lack of specificity.[18] In dissent, Chief Justice Toal argued the clause in question constituted a binding non-reliance clause.[19] While the majority noted the disputed clause's deficiencies, it failed to outline specific standards to guide the drafting of a valid non-reliance clause.[20] As the first published South Carolina opinion regarding non-reliance clauses in real estate contracts, *Slack* leaves real estate practitioners with little indication of how to create

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> truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury."

Id. at 218, 621 S.E.2d at 375 (quoting Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444–45 (Ct. App. 2003)). The court when on to state:

> In a negligent misrepresentation action, a plaintiff must prove the following: "(1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation."

Id. at 219–20, 621 S.E.2d at 375 (quoting Brown v. Stewart, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2002). The *Armstrong* court held the reasonableness of reliance is an issue for the jury. *Id.* at 221, 621 S.E.2d at 376.

13. *See Vigortone*, 316 F.3d at 644–45 (maintaining that non-reliance clauses preclude fraud claims by the contracting parties); *Rissman*, 213 F.3d at 384 (affirming summary judgment against a stock-purchaser in a securities fraud claim because "a written anti-reliance clause precludes any claim of deceit by prior representations"); *cf. Becker*, 2005 WL 1654524, at *4 (holding that, in a Washington State Securities Act claim, "the fact that an agreement includes a non-reliance provision is relevant but not dispositive of whether reliance on outside representations was reasonable"); *In re* Hovis, 325 B.R. 158, 167-68 (Bankr. D.S.C. 2005) (holding that fraud and negligent misrepresentation claims do not fail as a matter of law where contract contained a non-reliance clause, but the court "doubts" reasonable reliance existed).

14. Slack v. James, 364 S.C. 609, 613, 614 S.E.2d 636, 638 (2005).

15. *Id.* at 613, 614 S.E.2d at 638.

16. *Id.* at 617, 614 S.E.2d at 640.

17. *Id.* at 619, 614 S.E.2d at 641.

18. *Id.* at 618, 614 S.E.2d at 641.

19. *Id.* at 619, 614 S.E.2d at 641 (Toal, C.J., dissenting).

20. Slack v. James, 364 S.C. 609, 617–19, 614 S.E.2d 636, 640–41 (2005) (majority opinion).

valid non-reliance clauses and greatly diminishes the ability of real estate brokers to effectively limit their liability.

This Note focuses on the problems that will arise from the majority's holding in *Slack*, its effects on South Carolina's real estate industry, and the decision's imposition of additional requirements for the drafting of valid non-reliance clauses. Part I discusses the facts leading to the litigation and the case's procedural history, and summarizes the court's analysis. Part II examines the policies underlying the majority opinion and Chief Justice Toal's dissent. Part III analyzes the problems that will likely arise from the decision, and considers ways that the court could limit their holding in *Slack* to avoid those problems. Part IV concludes by summarizing the potential impact of *Slack* on the real estate industry in South Carolina.

II. THE DECISION

A. Facts

Mary and Stephen Slack (Sellers) owned a home in historic downtown Charleston.[21] Sellers listed the lot for sale with Historic Charleston Properties, LLC (Broker).[22] Catherine Lazenby (Realtor) showed the home to Lonnie and Shannon James (Buyers).[23] Buyers alleged they asked Realtor if there were any easements on the property, and Realtor replied there were not.[24]

Buyers subsequently contracted to purchase the lot for approximately $1,200,000.[25] Both parties retained licensed, experienced real estate agents, but neither party had legal representation when they entered into the sales contract.[26] The sales contract stated:

> "14. ENCUMBRANCES AND RESTRICTIONS. Seller shall convey marketable and insurable title to Buyer, in fee simple, free from all liens, except those Buyer has agreed to assume. Buyer agrees to accept property subject to: (1) existing zoning and government restrictions; (2) owner association assessments, if applicable; and (3) restrictive covenants and easements of record, provided they do not materially affect present use of said property.
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> . . . .
>
> 21. ENTIRE AGREEMENT. This written instrument expresses the entire agreement, and all promises, covenants, and warranties between the Buyer and Seller. It can only be changed by a

21. Brief of Petitioners at 2, Slack v. James, 364 S.C. 609, 614 S.E.2d 636 (2005) (No. 25998).
22. Brief of Respondents at 3, Slack v. James, 364 S.C. 609, 614 S.E.2d 636 (2005) (No. 25998).
23. *Id.*
24. *Id.*
25. Brief of Petitioners, *supra* note 21, at 4.
26. Slack v. James, 364 S.C. 609, 611–12, 614 S.E.2d 636, 637 (2005).

> subsequent written instrument (Addendum) signed by both parties. *Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statement or representations by either Broker or their agents which are not expressly stipulated herein.*"[27]

After entering into the sales contract, Buyers retained an attorney for the closing.[28] In preparation for the closing, Buyers' attorney hired a title examiner who discovered a "permanent four-inch sewer easement across the property."[29] Upon learning of the sewer easement's existence, Buyers refused to purchase the property.[30]

B. Procedural History

After Buyers refused to purchase Sellers' property, Sellers filed a complaint alleging Buyers breached the sales contract.[31] Buyers counterclaimed, alleging Sellers breached the sales contract, fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act (UTPA).[32]

The trial court dismissed Buyers' counterclaims for fraud, negligent misrepresentation, and UTPA violations.[33] The court also struck portions of Buyers' breach of contract counterclaim because the parol evidence rule and merger doctrine barred the oral statements concerning the sewer easement.[34] According to the court, even if the oral statements were not barred, Buyers' reliance on the alleged oral statements concerning the sewer easement was not reasonable because they "failed to exercise reasonable diligence to protect their interests."[35]

The South Carolina Court of Appeals reversed the trial court's holding on the reasonableness of Buyers' reliance.[36] The court of appeals stated that "[w]hile Buyers could have ascertained the existence of the easement through investigation of public records, they were not required to investigate the public record to assert a tort claim for fraud or negligent misrepresentation later on."[37] Despite the court's breadth of commentary in support of the reasonableness of Buyers' reliance, the court ultimately held the issue was a question of fact for the jury, not the court.[38]

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27. Brief of Respondents, *supra* note 22, at 3–4 (emphasis added and removed); *see Slack*, 364 S.C. at 611–12, 614 S.E.2d at 637.
28. *Slack*, 364 S.C. at 612, 614 S.E.2d at 637.
29. *Id.* at 612, 614 S.E.2d at 637.
30. *Id.* at 612, 614 S.E.2d at 637.
31. *Id.* at 612, 614 S.E.2d at 637.
32. Slack v. James, 364 S.C. 609, 612, 614 S.E.2d 636, 637 (2005).
33. *Id.* at 612, 614 S.E.2d at 637.
34. *Id.* at 612, 414 S.E.2d at 637–38.
35. *Id.* at 612-13, 614 S.E.2d at 638.
36. Slack v. James, 356 S.C. 479, 483, 589 S.E.2d 772, 774 (Ct. App. 2003).
37. *Id.* at 483, 589 S.E.2d at 774.
38. *Id.* at 483, 589 S.E.2d at 774.

The court of appeals did not discuss whether the non-reliance/merger paragraph of the sales contract constituted a valid non-reliance clause.[39] Instead, the court limited its analysis to the observation that "the merger and disclaimer provisions . . . afford no protection to Sellers to the counterclaims asserted against them for fraud and negligent misrepresentation."[40] This viewpoint was—at the time—consistent with South Carolina precedent that merger clauses do not bar extrinsic evidence for claims sounding in tort.[41] However, by failing to examine the construction of the non-reliance/merger paragraph, the court of appeals ignored the possibility that the non-reliance/merger paragraph contained a valid non-reliance clause which *would* have afforded protection to Sellers.[42]

C. The Supreme Court Majority's Holding and Reasoning

The South Carolina Supreme Court first discussed whether the Buyers reasonably relied on the Realtor's alleged statement even though the Buyers did not investigate the public records.[43] The supreme court upheld the court of appeal's judgment that the reasonableness of reliance was a question of fact for the jury.[44] The court noted two possible reasons why Buyers had a reasonable right to rely.[45] First, real estate buyers cannot easily discover the existence of easements without employing an expert.[46] Second, the court stated that "given the speedy nature of residential real estate contracts today, it is not feasible to expect a buyer to be able to research the title of the property they are buying before entering into a contract."[47]

On the second issue, the majority held the sales contract's non-reliance/merger paragraph of the sales contract did not constitute a valid non-reliance clause so as to protect Sellers from Buyers' fraud and negligent misrepresentation counterclaims.[48] The majority stated the general rule that merger clauses do not bar causes of action for fraud or negligent misrepresentation.[49] The majority then entered into a textual analysis of the following sentence from the non-reliance/merger paragraph: "'Both Buyer and Seller hereby acknowledge that they have not received or *relied upon* any statements or representations by either Broker or their agents which are not expressly stipulated herein.'"[50]

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39. *Id.* at 480–84, 589 S.E.2d at 773–75.
40. *Id.* at 483, 589 S.E.2d at 774.
41. *See supra* note 9.
42. *See supra* note 13.
43. Slack v. James, 364 S.C. 609, 613, 614 S.E.2d 636, 638 (2005).
44. *Id.* at 614, 614 S.E.2d at 639.
45. *Id.* at 615–16, 614 S.E.2d at 639.
46. *Id.* at 615, 614 S.E.2d at 639.
47. *Id.* at 615–16, 614 S.E.2d at 639.
48. *Id.* at 617–19, 614 S.E. 2d at 640–41.
49. Slack v. James, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (2005) (citing Gilliland v. Elmwood Props., 301 S.C. 295, 301–02, 391 S.E.2d 577, 580–81 (1990)).
50. *Id.* at 617, 614 S.E.2d at 640.

The Sellers relied on *Redwend Ltd. Partnership v. Edwards*,[51] a South Carolina Court of Appeals decision which stated a valid non-reliance clause must contain the words "rely" or "reliance."[52] However, the *Slack* majority held that this language is not dispositive of the validity of a non-reliance clause.[53] Furthermore, the majority found the clause at issue was an extension of the merger clause because it was "contained in a paragraph entitled, 'ENTIRE AGREEMENT.'"[54] The majority noted the *Redwend* court relied on a Seventh Circuit opinion,[55] *Rissman v. Rissman*.[56] Unlike the clause in *Slack*, the *Rissman* non-reliance clause and merger clause appeared in separate paragraphs.[57] The *Slack* majority further distinguished the contract at issue from the *Rissman* contract by stating the *Rissman* contract contained several reliance statements, whereas the contract at issue in *Slack* contained only one reliance statement.[58]

While the *Slack* majority did not express its policy reasons for creating additional requirements for non-reliance clauses beyond those outlined in *Redwend*, the *Slack* majority's requirements apparently all aim to raise the contracting parties' awareness that they are signing a clause that waives their right to rely on any representations made outside the contract.

The majority may have required the drafter to place the non-reliance clause and the merger clause in separate paragraphs to avoid confusion. If the two clauses are in the same paragraph, parties are more likely to believe they are only agreeing to a merger provision without realizing that they are also agreeing to a non-reliance provision. Placing the non-reliance clause under the title, "ENTIRE AGREEMENT," similar to the clause in *Slack*,[59] could further confuse parties into thinking that the clause is an extension of the merger clause because—by definition—merger clauses merge all the terms of prior negotiations into the

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51. 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). The Redwend Limited Partnership and one of its remaining partners brought suit against a withdrawing partner for misappropriating a partnership opportunity. *Id.* at 467, 581 S.E.2d at 500. The withdrawing partner argued the plaintiffs could not admit evidence relating to defendant's statements concerning the alleged misappropriation because the withdrawal agreement contained a non-reliance clause. *Id.* at 464–67, 581 S.E.2d at 499–500. The South Carolina Court of Appeals held the clause at issue was not a non-reliance clause and did not preclude plaintiff's introduction of extrinsic evidence. *Id.* at 471, 581 S.E.2d at 502.

52. *Id.* at 471, 581 S.E.2d at 502.

53. *Slack*, 364 S.C. at 617, 614 S.E.2d at 640.

54. *Id.* at 617, 614 S.E.2d at 640.

55. *Slack*, 364 S.C. at 617, 614 S.E.2d at 640 (citing *Redwend*, 354 S.C. at 470, 581 S.E.2d at 502). "The language used in the case *sub judice* neither includes the words 'rely' or 'reliance,' nor does it set forth any statement that the parties did not, or could not, rely on the representations of the other party." *Redwend*, 354 S.C. at 471, 581 S.E.2d at 502. *See also* Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 645 (7th Cir. 2003) (holding the clause at issue was a merger clause because "[i]t contains no reference to reliance.").

56. 213 F.3d 381 (7th Cir. 2000). In *Rissman*, the Seventh Circuit held the non-reliance provisions in a stock-purchase agreement precluded any fraud claims brought by a former minority shareholder of the family company against the majority shareholder. *Id.* at 383–84.

57. *Id.* at 383.

58. *Slack*, 364 S.C. at 617–18, 614 S.E.2d at 640–41 (citing *Rissman*, 213 F.3d at 383); *see also supra* note 11.

59. Slack v. James, 364 S.C. 609, 617, 614 S.E.2d 636, 640 (2005).

contract, making the contract the entire agreement.[60] Thus, the *Slack* majority's prohibition on placing a contract's non-reliance clause under the title, "ENTIRE AGREEMENT,"[61] further protects parties who would believe that such a paragraph contains a merger clause. The first requirement—that the contract contain several non-reliance statements[62]—is clearly aimed at raising contracting parties' awareness of non-reliance provisions. Again, the majority did not explain the policy for requiring several non-reliance statements, but multiplicity of statements would give more notice to the contracting party that it is agreeing to a non-reliance provision. Arguably, if several non-reliance clauses are included in a contract, they are more likely to "catch the party's eye" and force the realization that it is waiving its right to rely on prior representations. Whatever the majority's reasoning for requiring multiple non-reliance statements, the majority's ultimate holding provides that a single, general non-reliance statement is insufficient to waive the right to rely on prior representations to the contract.[63]

The majority concluded that even if the clause in the non-reliance/merger paragraph were a non-reliance clause, it would not preclude the counterclaims for fraud or negligent misrepresentation due to a lack of specificity.[64] The majority explained, "A general non-reliance clause, just as a merger clause, does not prevent one from proceeding on tort theories of negligent misrepresentation and fraud."[65] Without clearly stating its policy considerations on this issue, the majority left drafters of real estate contracts without a roadmap of how to create binding non-reliance clauses in the future.[66]

D. Chief Justice Toal's Dissent and Reasoning

In Chief Justice Toal's dissent, she argued the clause in the non-reliance/merger paragraph constituted a "binding non-reliance clause."[67] She stated the majority misconstrued the clause in the non-reliance/merger paragraph.[68] She found the clause in the non-reliance/merger paragraph fits the definition set forth in *Redwend*, which the majority adopted.[69] Justice Toal focused on the non-reliance/merger paragraph's language, while ignoring the clause's placement in the sales contract's "ENTIRE AGREEMENT" paragraph.[70] She argued the non-reliance/merger paragraph was a valid non-reliance clause because it contained the word "relied"

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60. *See supra* note 5.
61. *Slack*, 364 S.C. at 617, 614, S.E.2d at 640.
62. *Id.* at 617–18, 614 S.E.2d at 640–41.
63. *Id.* at 617–18, 614 S.E.2d at 640–41.
64. *Id.* at 618, 614 S.E.2d at 641.
65. *Id.* at 618, 614 S.E.2d at 641.
66. *See infra* Part III.
67. Slack v. James, 364 S.C. 609, 619, 614 S.E.2d 636, 641 (2005) (Toal, C.J., dissenting).
68. *Id.* at 620, 614 S.E.2d at 642.
69. *Id.* at 620, 614 S.E.2d at 642 (citing Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003)).
70. *Id.* at 619–21, 614 S.E.2d at 641–42.

and stated the contracting parties could not rely on statements of the other party or of third parties.[71]

Chief Justice Toal argued two important policy reasons for enforcing the non-reliance/merger paragraph.[72] First, she stated "the majority's view renders this language entirely useless and disregards the parties' original intention as indicated by the plain meaning of the contract's language."[73] Second, she argued the "Buyers effectively waived the right to argue reliance when they signed the sales contract. Therefore, as a matter of law, Buyers cannot satisfy [the reliance] element of fraud and negligent misrepresentation."[74] Based on those policy reasons, she concluded she would reverse the court of appeals and dismiss Buyers' fraud and negligent misrepresentation counterclaims.[75]

III. ANALYSIS OF THE POLICY UNDERLYING THE MAJORITY AND DISSENT OPINIONS

While both the majority and dissent have valid policy supporting their opinions, neither fully anticipates the possible effects of their proposed rules on the wide variety of transactions in the real estate market.

A. The Majority Opinion

While the majority did not explain its policy reasons for holding the non-reliance/merger paragraph did not create a valid non-reliance clause, its approach seems to protects buyers of real estate from sellers' dishonest practices. In *Slack*, Sellers stated that "professional real estate agents" protected both parties,[76] suggesting the court need not afford Buyers any additional consumer protection through judicial means. However, given the facts of *Slack*, a real estate agent's mere representation may not sufficiently protect some buyers.[77] The *Slack* Buyers did not realize that, to protect their interests, they should have investigated the title before entering into the sales contract.[78] Only after the Buyers entered into the sales

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71. *Id.* at 620, 614 S.E.2d at 642.

72. *Id.* at 620–21, 614 S.E.2d at 642.

73. Slack v. James, 364 S.C. 609, 620, 614 S.E.2d 636, 642 (2005) (Toal, C.J., dissenting); *see also* One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1287 (D.C. Cir. 1988) ("Were we to permit plaintiffs' use of the defendants' prior representations . . . to defeat the clear words and purpose of the Final Agreement's integration clause, 'contracts would not be worth the paper on which they are written.'" (quoting Tonn v. Philco Corp., 241 A.2d 442, 445 (D.C. Cir. 1968))).

74. *Slack*, 364 S.C. at 621, 614 S.E.2d at 642; *see supra* note 12.

75. *Slack*, 364 S.C. at 621, 614 S.E.2d at 642.

76. Brief of Petitioners, *supra* note 21, at 4.

77. However, sometimes neither an attorney nor a real estate agent represents the buyer. *See infra* note 83.

78. *See* Brief of Respondents, *supra* note 22, at 4. While a title search prior to the sales contract possibly would have avoided the lawsuit in *Slack*, common practice is for buyers to search title after entering into the contract. *See* Rizakos v. Kekos, 371 N.E.2d 896, 898 (Ill. App. Ct. 1977) ("We also do not find that the [purchaser] had an affirmative obligation or that it would have been convenient for him to search title prior to his signing of the contract. This additional effort was neither a provision in the contract nor a typical occurrence in real estate transactions.").

agreement and hired an attorney to search the title to the property had Buyers properly protected their interests.[79]

The majority's decision sends a message that South Carolina courts will not exculpate sellers of real estate for crafting contract provisions that take advantage of buyers. The decision gives purchasers of real estate the opportunity to prove fraudulent conduct despite a general non-reliance clause.[80] Thus, the majority rule protects buyers who are unaware of such provisions in the sales contract against the fraud of sellers.[81]

Despite the majority's justifiable protection of Buyers in the *Slack* sales contract, the majority failed to account for varied sophistication among parties in other types of real estate transactions.[82] Parties to a real estate transaction range from those having no real estate experience and no legal representation, like the parties in *Slack*, to business persons who have extensive experience and the assistance of an attorney.[83] Historically, courts have been more willing to give consumer protection to parties who lack experience in business and to allow sophisticated parties to freely negotiate the terms of the contract without interference from the court's "protective" measures.[84] Indeed, in *Slack*, the majority

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79. *Slack*, 364 S.C. at 612, 614 S.E.2d at 637.

80. *Id.* at 618, 614 S.E.2d at 641.

81. *See* Danann Realty Corp. v. Harris, 157 N.E.2d 597, 606 (N.Y. 1959) (Fuld, J., dissenting) ("Surely, the perpetrator of a fraud cannot close the lips of his victim and deny him the right to state the facts as they actually exist."); Allen-Parker Co. v. Lollis, 257 S.C. 266, 272, 185 S.E.2d 739, 742 (1971) ("[T]he falsity of a misrepresentation is not 'tolled' by a formal expression to the contrary.").

82. *See supra* note 3 and accompanying text.

83. *Compare* Reid v. Harbison Dev. Corp., 285 S.C. 557, 562, 330 S.E.2d 532, 535 (Ct. App. 1985) ("[The buyers] were laymen and would have required the assistance of an expert to ascertain from the public records the truth of [the seller's] representation."), *overruled in part by* O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993), *and* Davis v. Romney, 355 F.Supp. 29, 34, 38 (E.D. Pa. 1973) (holding that class action plaintiffs who lacked experienced in home-buying, the majority of whom did not have an attorney representing them at closing, had standing to bring an action for declaratory and injunctive relief to compel defendants to insure mortgages issued under National Housing Act), *with* Procter v. RMC Capital Corp., 47 S.W.3d 828, 833–34 (Tex. App. 2001) (enforcing integration clause where the buyer of an income-producing rental property was not only the president of a rental property management company but was represented by legal counsel during the negotiation process).

84. *See* Jackvony v. Riht Fin. Corp., 873 F.2d 411, 416 (1st Cir. 1989) (stating "[t]he sophistication and expertise of the plaintiff in financial and securities matters" constituted the first of eight factors in deciding whether an investor's reliance was reasonable (citing Kennedy v. Josephthal & Co., Inc., 814 F.2d 798, 803-05 (1st Cir. 1987))). *Compare* McDonald v. Mianecki, 398 A.2d 1283, 1289 (N.J. 1979) (recognizing that courts abandoned caveat emptor because "[t]he average buyer lacks the skill and expertise necessary to make an adequate inspection"), *and* Reid v. Harbison Dev. Corp., 285 S.C. 557, 562, 330 S.E.2d 532, 535 (Ct. App. 1985) (finding that buyers had no duty to investigate the truthfulness of a seller's misrepresentation because the buyers were "laymen and would have required the assistance of an expert to ascertain from the public records the truth of [the seller's] representation"), *with* Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 645 (7th Cir. 2003) ("Since reliance is an element of fraud, the [non-reliance] clause, if upheld—and why should it not be upheld, at least when the contract is between sophisticated commercial enterprises—precludes a fraud suit . . . ."), *and* Florentine Corp. v. Peda I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985) (finding that tenants of a space in a shopping mall had no right to rely on representations made outside of the contract because they were "college educated and experienced in matters of business").

suggested Buyers' lack of an attorney made their reliance on the alleged oral statement—denying the existence of the sewer easement—more reasonable.[85]

In *Slack*, the majority issued a sweeping holding on non-reliance clauses that treated the layperson, who is ignorant of contract law, the same as a business person, who is experienced in real estate transactions and represented by counsel.[86] The majority gave buyers of real estate a chance to show the seller took advantage of them because they were especially vulnerable; the buyers did not know how to protect their legal interests, nor did they have legal representation to protect these interests. The majority's failure to limit its holding gives business-savvy buyers the opportunity to bring fraud and negligent misrepresentation claims even where that vulnerability does not exist. Sophisticated buyers have greater awareness of the legal consequences that accompany real estate transactions because of their professional knowledge and the expertise of their legal counsel.[87] Thus, under the *Slack* rule, sophisticated buyers can escape contracts containing non-reliance provisions even though they may be fully aware of the existence and legal significance of the reliance provision. Therefore, while consumer protection of inexperienced buyers of real estate constitutes a valid reason for adhering to strict requirements for non-reliance clauses, those requirements unjustifiably place sophisticated buyers in a favorable position.

B. Chief Justice Toal's Dissent

Chief Justice Toal's proposed rule—to enforce non-reliance clauses like the non-reliance/merger paragraph—would limit the liability of sellers of real estate by allowing general disclaimers of fraud and negligent misrepresentation claims.[88] Consequently, her rule gives contracting parties more ability to freely negotiate the contract's terms; parties can negotiate non-reliance provisions, instead of leaving their enforcement up to the courts. With this freedom of contract, sophisticated parties could effectuate non-reliance clauses where both parties intend to disclaim any prior representations.[89]

The ability to include non-reliance provisions in a real estate contract protects the interests of buyers and sellers, especially where the contract is the culmination

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85. *See supra* note 3 and accompanying text.

86. *See supra* note 3 and accompanying text.

87. *See supra* note 83.

88. *See* Slack v. James, 364 S.C. 609, 619–21, 614 S.E.2d 636, 641–42 (2005) (Toal, C.J., dissenting).

89. *See* One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1287 (D.C. Cir. 1988) ("Were we to permit plaintiffs' use of the defendants' prior representations . . . to defeat the clear words and purpose of the Final Agreement's integration clause, 'contracts would not be worth the paper on which they are written.'" (quoting Tonn v. Philco Corp., 241 A.2d 442, 445 (D.C. Cir. 1968))); Danann Realty Corp. v. Harris, 157 N.E.2d 597, 600 (N.Y. 1959) (stating that if the court found the clause at issue was not a non-reliance clause, it would be "impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact"); Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[I]n some instances . . . people should be free to contract as they choose.").

of a lengthy negotiation process between sophisticated parties. For instance, if two companies each have several agents discussing the terms of a commercial real estate contract over a prolonged negotiation period, it benefits both parties to clearly state the terms of the deal in a final writing.[90] Allowing buyers and sellers to rely on the various terms the parties discussed in the negotiation phase and included in preliminary agreements, but ultimately did not include in the final contract would inevitably result in litigation. Over the negotiation period, the circumstances surrounding the agreement could change. For example, the city may have created an easement on the property, or the needs of the parties may change. Sophisticated parties are not likely to want to include unwritten prior representations in the final agreement. Thus, a non-reliance clause benefits both parties by clearly stating that each party will not rely on prior representations, thus avoiding misunderstandings as to the terms of the contract.

Although a non-reliance clause only protects the seller from liability, the clause may be in the buyer's financial interests. Like any other clause in a sales contract, a party offers a non-reliance in consideration for money or other provisions. In theory, a seller will increase the price of real estate if it must accept lingering liability without a non-reliance clause. If a seller estimates at the time of forming the sales contract there is a ten percent chance the buyer will successfully assert a fraud claim and recover $100,000, the seller may add $10,000 to the price of the real estate to cover the liability. However, if the contracting parties negotiate an effective non-reliance clause, the seller can avoid the lingering liability and the buyer can avoid the resulting price increases.

The rule proposed in Chief Justice Toal's opinion protects a seller of real estate from buyer fraud. In their brief in *Slack*, Sellers argued:

> The Court of Appeals's decision will [actually] encourage—not ameliorate—fraud . . . . [By] holding that a buyer may justifiably rely upon pre-contract oral statements even though he expressly represented to the seller in the contract that he did not rely upon any such representations, the Court's decision will reward unscrupulous buyers who manufacture alleged pre-contract oral

90. *See* Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000) (enforcing a non-reliance clause, stating, "Memory plays tricks. Acting in the best of faith, people may 'remember' things that never occurred but now serve their interests. Or they may remember events with a change of emphasis or nuance that makes a substantial difference to meaning. Express or implied qualifications may be lost in the folds of time. A statement such as 'I won't sell at current prices' may be recalled years later as 'I won't sell.' Prudent people protect themselves against the limitations of memory (and the temptation to shade the truth) by limiting their dealings to those memorialized in writing . . . ."); *see also* One-O-One Enters., Inc. v. Caruso, 668 F. Supp. 693, 698 (D.D.C. 1987) (precluding a fraud claim where "[a]fter eight months of vigorous negotiations, the parties reached a final agreement that was lengthy, detailed and comprehensive. During these eight months many offers, promises and representations were made and several preliminary agreements were drafted. To avoid a misunderstanding and to make clear that the only understanding between the parties was that expressed in the Agreement, the parties agreed that the Agreement 'supersede[d] any and all previous understandings and agreements'" (emphasis removed)).

> representations that have the effect of defeating clearly expressed contractual obligations.[91]

However, under the majority's rule, buyers who are aware of non-reliance clauses and the fact that the clause precludes fraud claims could argue they relied on fraudulent claims to escape the sales contract; such a rule favors buyers of real estate to the detriment of sellers.[92]

Chief Justice Toal's proposed rule would facilitate judicial economy. Enforcing non-reliance clauses and precluding fraud and negligent misrepresentation claims would prevent juries from having to make difficult factual determinations concerning witnesses' representations.[93] Non-reliance clauses also facilitate judicial economy by eliminating the need for expensive discovery.[94]

Although Chief Justice Toal's dissent accounts for many of the benefits of enforcing non-reliance clauses, her rule—like the majority's rule—ignores the various levels of sophistication that may exist between parties in a real estate contract.[95] Chief Justice Toal failed to distinguish between general non-reliance clauses and those that disclaim reliance of specific representations—like those made in reference to easements on the property. Under her rule, unrepresented buyers of residential real estate could become victims of crafty sellers who make fraudulent representations and incorporate a general boilerplate non-reliance clause to shield themselves from liability.[96]

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91. Brief of Petitioners, *supra* note 21, at 20.

92. *See Danann Realty Corp.*, 157 N.E.2d at 600 ("[T]he plaintiff made a representation in the contract that it was not relying on specific representations not embodied in the contract, while, it now asserts, it was in fact relying on such oral representations. Plaintiff admits then that it is guilty of deliberately misrepresenting to the seller its true intention. To condone this fraud would place the purchaser in a favored position."); *see also Rissman*, 213 F.3d at 383 ("Securities law does not permit a party to a stock transaction to disavow such representations—to say, in effect, 'I lied when I told you I wasn't relying on your prior statements' and then seek damages for their contents.").

93. *See Rissman*, 213 F.3d at 384 (stating that a non-reliance clause "ensures that both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication").

94. *See* AES Corp. v. Dow Chem. Co., 325 F.3d 174, 182 (3rd Cir. 2003) ("We fully appreciate that the avoidance of costly discovery is one of the objectives of negotiating [non-reliance] clauses."); Wylie, *supra* note 4, at 537 (stating that fraud and negligent misrepresentation claims "can allow intrusive discovery into matters far afield from the transaction at issue").

95. Slack v. James, 364 S.C. 609, 619–21, 614 S.E.2d 636, 641–42 (2005) (Toal, C.J., dissenting).

96. *See Danann Realty Corp.*, 157 N.E.2d at 606 ("Surely, the perpetrator of a fraud cannot close the lips of his victim and deny him the right to state the facts as they actually exist."); Brief of Respondents, *supra* note 22, at 14 ("Merger clauses, non-reliance clauses, disclaimer clauses, as-is clauses, etc. are ultimately all arrows from the same quiver. The body of South Carolina law addressing attempts to use contractual provisions to bar tort claims gives short shrift to the variations devised by the ingenuity of draftsmen to insulate themselves from liability for tortious conduct.").

IV. PROBLEMS ARISING FROM THE *SLACK* HOLDING AND POSSIBLE SOLUTIONS

A. Effects on South Carolina's Real Estate Industry and Practitioners

Adding requirements for drafting non-reliance clauses, the *Slack* court's holding will change the way parties write real estate contracts in South Carolina, yet the decision gives little indication of how to draft a valid non-reliance clause. The majority gave three general requirements for non-reliance clauses.[97] First, the drafter must place the non-reliance clause and the merger clause in separate paragraphs.[98] Second, a valid non-reliance clause must contain the words "rely" or "reliance" and must state that neither party relied on any representations of the other party besides those set forth in the contract.[99] Finally, a non-reliance clause must be specific.[100]

While the majority provided some textual and placement clues for drafting non-reliance provisions, it left real estate practitioners to guess the required degree of specificity. For instance, the *Slack* rule may require sellers to include a provision stating, "Both Buyer and Seller hereby acknowledge that they have not received or relied upon statements or representations by either Broker or their agents *concerning sewer easements* which are not expressly stipulated herein." This kind of statement may raise the buyer's awareness that he is disclaiming reliance on this specific representation. A rigorous specificity requirement would make it difficult, if not impossible, to draft valid non-reliance clauses in more complex real estate transactions. Given the number of potential representations that may occur in a major commercial real estate deal and the duration of negotiations, each party simply may not be able to include separate non-reliance clauses disclaiming every possible representation made during the negotiation process. As a result, parties in complex real estate contracts may have more difficulty drafting non-reliance clauses even though they are more aware of the legal significance of non-reliance provisions than average parties in residential transactions.

On the other hand, the *Slack* majority indicated the non-reliance clause at issue in *Rissman* was sufficiently specific to be effective.[101] However, the *Rissman* clause did not mention the specific representation it disclaimed.[102] Rather, the clause included several statements disclaiming all representations made prior to the contract.[103] In this way, the *Rissman* non-reliance provisions were not specific. Consequently, the majority's reliance on *Rissman* conflicted with the requirement of specificity in non-reliance clauses, leaving real estate practitioners with no clear indication of how to draft valid non-reliance clauses.

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97. *Slack*, 364 S.C. at 617–18, 614 S.E.2d at 640–41.
98. *Id.* at 617, 614 S.E.2d at 640.
99. *Id.* at 617, 614 S.E.2d at 640.
100. *Id.* at 618, 614 S.E.2d 641.
101. *Slack*, 364 S.C. at 617–18, 614 S.E.2d at 640–41 (2005) (citing Rissman v. Rissman, 213 F.3d 381, 383 (7th Cir. 2000)).
102. *Rissman*, 213 F.3d at 383.
103. *Id.*

Slack has the effect of diminishing the ability of real estate sellers to protect themselves from lingering liability. Even when prudent buyers and sellers negotiate the deal within the four corners of the document, sellers may still face liability. If sellers are unable to specifically disclaim every representation, and buyers claim reliance on representations that are not specifically disclaimed, the seller may be liable for fraud or negligent misrepresentation. Furthermore, *Slack* gives buyers a chance to fabricate oral representations to escape an otherwise binding contract.

B. Possible Solutions

The issues *Slack* presents require a solution that accounts for the varying degrees of sophistication of parties in different real estate transactions. An ideal rule would allow parties experienced in business or represented by legal counsel to include general non-reliance provisions in their contracts as long as the contract clearly identifies the provision. The provision should contain the words "rely" or "reliance" and should appear in a separate paragraph titled, "NON-RELIANCE PROVISIONS." This kind of rule would allow sophisticated parties to limit their liability while giving both parties ample notice they are disclaiming reliance on prior representations.

This ideal rule would also protect parties not experienced in business and not represented by legal counsel by allowing them to waive their rights to fraud and negligent misrepresentation claims only where they have included a clearly identified non-reliance clause which states the *specific* representation on which the parties have agreed not to rely. Under the ideal rule, if the parties in *Slack* wanted to eliminate liability for fraud based on representations relating to sewer easements, the contract should have contained a non-reliance clause explicitly disclaiming representations relating to sewer easements. The parties must include each representation they seek to eliminate in separate non-reliance clauses in the contract. These requirements would make the parties more aware they are disclaiming reliance on these specific representations. Eliminating the validity of catch-all clauses between unsophisticated parties would protect the ignorant and innocent party from a fraudulent party's craftmanship.

The difficulty in this proposed rule is deciding who constitutes a sophisticated party. If South Carolina courts draw the line between commercial and residential real estate buyers, they would create a rule that treats skyscraper developers and small business owners the same. This distinction could create problems where the small business owner is unaware they have no legal recourse for fraud after signing a non-reliance clause. On the other hand, if South Carolina courts define a "sophisticated party" as one with legal counsel, even experienced businesspersons could not negotiate a sales contract without incurring expensive legal fees. So where should South Carolina courts draw the line? Historically, courts have been willing to limit their holdings based on the sophistication of parties without creating hard and fast rules for determining "sophistication."[104] Where a party's level of

104. *See supra* note 84.

sophistication is questionable, courts should err on the side of allowing the party to bring a fraud or negligent misrepresentation claim. Thus, the jury decides the sophistication of the parties when it determines the reasonableness of reliance.[105]

V. CONCLUSION

Slack v. James will cause significant problems for South Carolina's real estate industry if the court does not limit its holding. The supreme court's non-reliance clause rule is detrimental to both buyers and sellers of real estate. Sellers cannot eliminate lingering liability, and buyers may face increased market prices to account for that uncertainty. The *Slack* holding leaves real estate parties powerless. In complex real estate deals, brokers cannot disclaim every possible representation made during the course of negotiations. As a result, sellers will incur more financial risk, which could lead to increased real estate prices for buyers.

In addition to its effects on the real estate industry, *Slack v. James* keeps South Carolina real estate practitioners guessing the degree of specificity required for a valid non-reliance clause. The facts of the case presented an opportunity for the court to fashion a clear rule to guide real estate lawyers in the drafting of non-reliance clauses, and the supreme court failed to take advantage of that opportunity. However, because the court's holding leaves real estate sellers helplessly exposed to liability, this exposure will probably lead to more litigation on this issue and more opportunities for the court to clarify the status of non-reliance clauses. Hopefully the court will create a rule that allows sophisticated parties to keep the terms of the deal within the four corners of the contract while continuing to protect the interests of parties who only have the assistance of a real estate agent. Until then, *Slack v. James* will cause significant problems for the real estate community and reward those parties who claim fraud by committing fraud themselves.

Morgan H. Rogers

105. *See supra* note 12.