

REL: February 28, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180718

**Mark Rosenthal, as personal representative
of the Estate of Richard Rosenthal, deceased**

v.

JRHBW Realty, Inc., d/b/a RealtySouth, and Charles Valekis

**Appeal from Jefferson Circuit Court
(CV-15-902544)**

MENDHEIM, Justice.

Mark Rosenthal ("Mark"), as personal representative of the estate of Richard Rosenthal, deceased ("Richard"), appeals from a summary judgment entered by the Jefferson Circuit Court

1180718

in favor of JRHBW Realty, Inc., d/b/a RealtySouth ("RealtySouth"), and Charles Valekis on Richard's claims alleging breach of contract and negligence/wantonness. We affirm.

I. Facts

In early June 2013, Richard retained RealtySouth through its agent Valekis to assist him in selling his residence.¹ At the same time, he asked Valekis to assist him in locating a new house to purchase. Valekis told Richard about an unlisted property located at 4335 Cliff Road in Birmingham ("the home") that Valekis believed would meet Richard's needs. Valekis was aware that the owners of the home, David and Lori Cooper, had previously listed it for sale, and, when Valekis contacted them on Richard's behalf, the Coopers were still interested in selling the home.

Around June 18, 2013, Richard first viewed the home with Valekis along with Richard's mother and stepfather. Richard

¹Richard died in 2018 while this action was pending below. Mark Rosenthal, in his capacity as personal representative of Richard's estate, was substituted as the plaintiff in the action on October 3, 2018. It is unclear from the record what Mark's relationship was to Richard. The appellant's brief refers to him as Richard's son; the appellees' brief refers to him as Richard's brother.

1180718

testified in his deposition that on that visit he noticed a pile of rocks in the basement as well as some jacks. Richard testified that he

"asked Mr. Valekis if he knew of any structural problems with the house because the underneath [--] just something didn't look quite right. [Valekis] said no. Then we asked him about the jacks and he said the [Coopers] had done work on the foundation of the house and now it's been taken care [of], so there are no longer any issues of structural problems."

Richard testified that he told Valekis that he would not buy the home without having a structural engineer examine it. In response "Mr. Valekis [said] don't worry. I will take care of that for you. I know structural engineers. No problem." Richard stressed that Valekis "said that he would be responsible for getting the structural engineer on my behalf." In affidavit testimony, Richard's stepfather corroborated Richard's recollection, stating that "Richard informed Mr. Valekis that the home needed to be inspected by a structural engineer" and that "Mr. Valekis assured Richard that it would not be a problem and that he would take care of retaining and scheduling ... the structural engineer."

On a separate occasion, Richard viewed the home along with a friend, Chris Anello, a building contractor, and

1180718

Valekis. Richard testified that, when Annelo was in the basement,

"he made the suggestion that we have a structural engineer take a look at it, since he wasn't qualified to do that. And once again, Mr. Valekis told him as well that he knew of a structural engineer and that he would take care of handling that on my behalf."

Annelo corroborated Richard's testimony in an affidavit, stating that "Mr. Valekis informed Richard that he would handle retaining and scheduling the structural engineer."

For his part, Valekis testified by deposition that Richard

"wanted to make sure about the foundation and he wanted to make sure about water. And so we had a discussion about that. ...

"And he asked me if I knew anybody that could take a look at the foundation. And I told him yes, I could; it depended upon what he wanted to do. And he said, 'I just want to know the foundation -- have somebody look at the foundation.'

"So I explained to him there were companies that could come out, take a look and tell you whether or not you needed to go further than their look. And he said, 'Do they charge anything?' And I told him, 'Those companies do not.' He said, 'Well, do you know anybody in that profession?' I said, 'Yes, I do. I know a couple.' And he said, 'Give me one.'

"And I gave him the name of Foundations Unlimited, Garland Caudle And he asked, 'Does Garland charge?' And I said, 'No, sir, he doesn't,

1180718

but, you know, he will, you know, go out and do a courtesy look. Would you like for me to call him?' He said, 'Yes, please call him.'"

In other words, Valekis asserted that Richard had not specified that he wanted a structural engineer to inspect the home but had indicated that it was sufficient to have a foundation-repair contractor inspect the home. Valekis further testified that he "called Mr. Caudle on [Richard's] behalf, as he asked me to do. And I let [Richard] know that Mr. Caudle could come out."

Before the scheduled inspection by Garland Caudle, owner of Foundations Unlimited of Alabama, Richard informed Valekis that he would not be able to attend the inspection. On June 27, 2013, Valekis e-mailed Richard to inform him that the Coopers wanted him to make an offer on the home before Caudle's inspection occurred. Richard expressly declined to make such an offer.

On June 28, 2013, Caudle, accompanied by Valekis, inspected the home. In his deposition, Caudle testified that during his inspection he "notice[d] a partially failed rear foundation wall." Caudle stated that, with regard to the foundation of the home, he "suggested that a structural

1180718

engineer be obtained to do a proper professional evaluation. If repairs were needed, he would submit a repair plan. From a repair plan, I could give an estimate if repairs were needed." Caudle also testified that he "advised Mr. Valekis of a reputable structural engineer. I was not a structural engineer."

On the same day, following the inspection, Valekis e-mailed Richard concerning Caudle's inspection.

"Garland Caudle came out to the house today. Dave Cooper, owner, was at home. Garland looked at the basement and around the periphery of the exterior. Basically he suggested that as you face the back of the house (with your back to the alley) the concrete 'gully' at the rear of the home be extended to reach around the right corner of the house and that an extension be added to the gutter to help divert water. He said that he could suggest a contractor that could do this work for \$300 to \$400 (estimated) and would be glad to put you in touch with the contractor. Since Garland came out to the house as a courtesy and did not seem to find anything that needed to be written-up he only provided the information included in this email verbally. Garland welcomes a call from you to discuss further. Following is Garland's contact information:

". . . .

"As the information is being provided from a conversation with Garland the contents of this email is not guaranteed to be accurate. I suggest you give Garland a call to discuss his evaluation to make sure that you understand what he has proposed."

1180718

It is undisputed that Valekis did not tell Richard that Caudle was not a structural engineer, that Caudle had mentioned anything about foundation problems with the home, or that Caudle allegedly recommended that Richard should have the home inspected by a structural engineer.

Subsequently, Richard telephoned Caudle. With respect to that conversation, Richard testified under questioning from RealtySouth/Valekis's counsel:

"Q. With regard to the conversation with Mr. Caudle when you talked to Mr. Caudle, did he tell you that he was a structural engineer?

"A. No.

"Q. Did you ask him?

"A. No.

"Q. Why not?

"A. Because I was told by Mr. Valekis that he was a structural engineer. Mr. Valekis was my real estate agent who sold one of my house[s], made a nice commission on it, is in the real estate business, and I put my trust into him being a professional. And being my agent, when he says he was going to do something on my behalf, I assumed that he would be my fiduciary and would take care of things in the [manner] in which it was.

".....

1180718

"Q. And while you had Mr. Caudle on the phone it didn't dawn on you to ask him at some point whether he was a structural engineer?

"A. I assumed what Mr. Valekis told me was the truth.

"Q. Okay. Did Mr. Caudle tell you hey, you need to have a structural engineer look at this?

"A. He never did, no.

"Q. The only thing he said was that he didn't see a problem, or tell me again how he phrased it.

"A. Correct. He really didn't see any issues with the house other than the need for gutter extensions."

(Emphasis added.) Richard testified that, based on Valekis's representation that he had had a structural engineer inspect the home and on Valekis's representation that Caudle had not found any structural issues, he placed an offer on the home.

On June 29, 2013, Richard and the Coopers executed a "Real Estate Sales Contract" ("the sales agreement") whereby Richard purchased the home from the Coopers. The sales agreement clearly stated that Richard had the responsibility to inspect the home and that he was purchasing the home in "As Is" condition:

"10. NECESSITY OF INSPECTIONS: [Richard] acknowledges and agrees that Alabama law imposes a duty on [Richard] to thoroughly inspect a property,

for defects or otherwise, in accordance with the terms of this contract and prior to closing the sale. [Richard] further acknowledges and agrees that [Richard] is aware that professional inspection services and/or contractors may be engaged for this purpose and that RealtySouth and its sales associates strongly recommend the use of such professionals but endorse none of them. In fulfilling these duties [Richard] acknowledges that RealtySouth advises against utilizing previous [Coopers]-acquired inspection reports, allowing the [the Coopers] to pay for such inspection reports, or using an inspector recommended by [the Coopers]. [Richard] understands and agrees that RealtySouth and its sales associates do not possess the expertise to determine the condition of a property, and therefore, [Richard] will not rely on any statements or omissions made by RealtySouth or its sales associates regarding the condition of a property. [Richard] understands that if a sales associate accompanies [Richard] on an inspection or walk-through of the property it will be as a courtesy and not as a person qualified to detect any defects. After closing of this sale, (subject to [the Coopers'] obligations under Section 2 of this Contract, pertaining to [the Coopers'] post-closing occupancy of the Property, if any) all conditions of the property are the responsibility of [Richard].

"11. CONDITION OF PROPERTY: Neither [the Coopers] nor [RealtySouth] nor any Sales Associate makes any representations or warranties regarding condition of the Property except to the extent expressly set forth herein. [Richard] has the obligation to determine any and all conditions of the Property material to [Richard's] decision to buy the Property, including but not limited to, ... general home inspection, ... structural inspection, [Richard] shall have the obligation to determine the condition of the property in accordance with 'A' or

1180718

'B' below.^[2] Unless otherwise excepted, [the Coopers] will provide access and utilities for [Richard's] inspections, if any, until closing. NOTE: Lenders and/or public authorities may require certain investigations such as termite and septic tank inspections (for which repairs may be required). THIS DOES NOT REPLACE [RICHARD'S] DUTY TO THOROUGHLY INSPECT THE PROPERTY PRIOR TO CLOSING.

"(A) SALE OF PROPERTY NOT CONTINGENT UPON INSPECTIONS: [Richard] agrees to accept the property in 'AS IS' condition. [The Coopers] give[] no warranties on any systems or appliances being in good working order either now or at the time of closing and in consideration for this price. [Richard] accept[s] total responsibility for all repairs, improvements, and/or defects in the property. This provision does not apply to warranties of title to the Property evidenced by the Warranty Deed delivered to [Richard] pursuant to Section 8 of this Contract.

"...."

(Capitalization in original; emphasis added.) The sales agreement also contained a section in which both Richard and the Coopers agreed not to hold RealtySouth responsible for any claims that might arise from the sale of the home:

"14. [Richard] AND [THE COOPERS] HEREBY ACKNOWLEDGE AND AGREE: That RealtySouth, its officers, directors, employees, brokers, and sales associates

²Richard elected to proceed in accordance with subparagraph (A) of the sales agreement. Subparagraph (B) explains conditions for "Sale of Property Contingent upon Inspections."

1180718

shall not be held responsible or liable for any obligations or agreements that [Richard] or [the Coopers] have to one another hereunder and shall not be held responsible for any representation or the passing of any information to or from [Richard] or [the Coopers] and, agree to discharge and release RealtySouth, its officers, directors, employees, brokers, and sales associates from any claims, demands, damages, actions, causes of actions or suit at law arising from the sale of said property and shall include but not be limited to ... structural condition"

(Capitalization in original; emphasis added.) Finally, the sales agreement also contained the following merger clause:³

"20. ENTIRE AGREEMENT: This contract constitutes the entire agreement between [Richard] and [the Coopers] regarding the property, and supercedes all prior discussions, negotiations and agreements between [Richard] and [the Coopers], whether oral or written. Neither [Richard], [the Coopers], [RealtySouth], nor any sales associate shall be bound by any understanding, agreement, promise, or

3

"A 'merger clause' is 'a clause which states that all oral representations or agreements are merged into and subsumed by the written document of which the clause is a part.' Sunchase Apartments v. Sunbelt Serv. Corp., 596 So. 2d 119, 122 (Fla. Dist. Ct. App. 1992). 'A merger clause operates only to establish that a written agreement is a completely integrated document, into which all prior and contemporaneous negotiations are merged.' Crimson Indus., Inc. v. Kirkland, 736 So. 2d 597, 601 (Ala. 1999)."

Belmont Homes, Inc. v. Law, 841 So. 2d 237, 240 (Ala. 2002) (emphasis omitted).

1180718

representation concerning the property, expressed or implied, not specified herein. ..."

(Emphasis added.) The addendums to the sales agreement included a "Buyer's Disclosure Statement," which provided, in part:

"10. [Richard] understands and agrees that any recommendations by [RealtySouth] or [Valekis] [for a] professional contractor or inspectors are strictly as a courtesy to [Richard]; [Richard's] choice of contractors or inspectors is the responsibility of [Richard]; [RealtySouth] and [Valekis] do not warrant the performance of contractors or inspectors; [Richard] also agrees that [the Coopers], [RealtySouth] and [Valekis] are not responsible or liable for any condition of the property that may not be detected by inspections performed by [Richard], anyone acting on behalf of [Richard], including, but not limited to, contractors and inspectors."

On the same date, Richard and Valekis, on behalf of RealtySouth, executed a "Buyer Agency Agreement" ("the agency agreement"). The agency agreement also included a section addressing the condition of the home:

"3. CONDITION OF PROPERTY AND NECESSITY OF INSPECTION: [Richard] acknowledges and agrees that:

"a. In locating properties for [Richard], RealtySouth may rely on statements or representations of others, and that any given property may not satisfy all the requirements expressed by [Richard], and that RealtySouth makes no representations whatsoever regarding the condition of the

1180718

property or its suitability for [Richard's] intended purposes, and

b. RealtySouth and its associates (also sometimes referred to as licensees) lack the expertise to determine the condition of the property and, therefore, [Richard] will not rely on any statements or omissions made by RealtySouth or its associates regarding the condition of the property, and

"c. [Richard], and not RealtySouth, has the responsibility to determine or verify, either personally, or through, or with a licensed contractor or other representative of [Richard's] choosing, any and all conditions of the property material to [Richard's] decision to buy the property, and

"d. [Richard] is aware that professional inspection services and/or contractors may be engaged for this purpose and that RealtySouth and its associates strongly recommend the use of such professionals."

Valekis also provided Richard with a "Real Estate Brokerage Services Disclosure" ("the brokerage-services disclosure statement"), which they both signed and which is required by the Real Estate Consumer's Agency and Disclosure Act, § 34-27-80 et seq., Ala. Code 1975 ("the RECAD"), to inform consumers of the types of services that real-estate licensees may perform. The brokerage-services disclosure statement provided, in part:

1180718

"Alabama law imposes the following obligations on all real estate licensees to all parties, no matter their relationship:

"1. To provide services honestly and in good faith;

"2. To exercise reasonable care and skill;

". . . .

"5. Answer your questions completely and accurately."

Richard closed on the home on July 19, 2013, and he moved into the home soon thereafter. After he had lived in the home for several months, Richard concluded that the home was too small and that he needed a larger home. He again engaged the services of Valekis and RealtySouth to sell the home. After the home was placed on the real-estate market, Richard began to notice problems with it, such as cracks in the dining room next to the doorway, movement of a pillar on the deck, and the front steps shifting away from the main structure. Valekis subsequently informed Richard that numerous potential buyers were concerned with the condition of the home. Ultimately, Richard had the home inspected by a foundation-repair contractor, and that contractor recommended that Richard hire a structural engineer. The structural engineer Richard hired

1180718

concluded that the home was experiencing significant structural distress and settlement and estimated that fixing the issues in the home would cost over \$100,000.

On June 26, 2015, Richard sued RealtySouth, Valekis, Caudle, Foundations Unlimited of Alabama, and the Coopers in the Jefferson Circuit Court.⁴ Against RealtySouth and Valekis, Richard alleged claims of fraudulent inducement/misrepresentation, suppression, breach of contract, deceit, negligence and/or wantonness, and violations of the RECAD. Thereafter, RealtySouth and Valekis filed a motion to dismiss the complaint. The circuit court granted the motion in part, dismissing all the claims against RealtySouth and Valekis that involved fraud. Consequently, the remaining claims alleged breach of contract, negligence and/or wantonness, and violations of the RECAD. The parties then engaged in discovery.

On September 2, 2016, RealtySouth and Valekis filed a motion for a summary judgment as to the remaining claims. They contended that Richard's negligence and wantonness claims were

⁴Richard eventually voluntarily dismissed his claims against the Coopers, Caudle, and Foundations Unlimited of Alabama, leaving as defendants RealtySouth and Valekis.

1180718

foreclosed by the "As Is" clause in the sales agreement. They further argued that Richard's claims alleging breach of contract and violations of the RECAD were foreclosed by the agency agreement because it placed the responsibility for inspection of the home upon Richard.

On June 23, 2017, Richard filed a response in opposition to the motion for a summary judgment in which he argued that the "As Is" clause in the sales agreement could not bar his claims against RealtySouth and Valekis because only Richard and the Coopers were parties to that agreement. Richard also contended that neither the agency agreement nor the sales agreement foreclosed his breach-of-contract claim because, he said, Valekis had voluntarily assumed a duty to retain a structural engineer to inspect the home before either of those agreements was executed. Richard elected to withdraw his claim that RealtySouth and Valekis had breached a duty under the RECAD.

On April 29, 2019, the circuit court entered an order granting RealtySouth and Valekis's motion for a summary judgment. The circuit court concluded that, "[b]ased on the RECAD law, there are no 'implied' or 'assumed' duties of the

1180718

real estate broker/agent defendants, other than those duties explicitly contained in the written Buyer's Agency Agreement." The circuit court further reasoned that the agency agreement "contains language that RealtySouth and Valekis did not assume any responsibility to inspect the property or retain building experts to inspect the property," thus foreclosing Richard's breach-of-contract claim based on such a duty. The circuit court also agreed with RealtySouth and Valekis that "Alabama law is clear that the signing of an 'As Is' sales contract to purchase real estate bars a negligence claim against the real estate broker or its sales associate."

Richard died while this action was pending below, and Mark, as personal representative of Richard's estate, timely appealed the circuit court's judgment.

II. Standard of Review

"We review a summary judgment de novo. Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369 (Ala. 2001).

"We apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact. Once a party moving for a summary judgment establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial

evidence creating a genuine issue of material fact. "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw.'

"792 So. 2d at 372 (citations omitted)."

Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 922 (Ala. 2002).

III. Analysis

Mark's primary contention in this appeal is that the provisions in the agency agreement and the sales agreement that placed the responsibility for inspecting the home squarely on Richard -- which we have reproduced in the rendition of the facts -- do not foreclose the claims of breach of contract and negligence and/or wantonness because "Valekis undertook a voluntary, noncontractual duty to [Richard] to ensure that the Home's foundation was inspected before the parties executed the Agency Agreement and/or Purchase Contract."⁵ Mark's brief, p. 27. Mark's theory is

⁵On its face, this contention would appear to be an abandonment of Richard's breach-of-contract claim. However,

1180718

that Valekis voluntarily accepted a responsibility to retain a structural engineer to inspect the home on Richard's behalf but instead hired Caudle, who was not a structural engineer. According to Mark, Valekis then compounded this error by telling Richard that Caudle was a structural engineer and by failing to tell Richard that Caudle had recommended to Valekis that Richard should have a structural engineer inspect the home. Mark asserts that because of Valekis's failures in performing his voluntarily assumed duty, Richard was led to purchase a house with major structural issues. In sum, Mark essentially argues that this voluntarily assumed duty to retain a structural engineer was independent of both the agency agreement and the sales agreement because, he says, it was assumed, before those contracts were executed, that this duty "required [Valekis] to act with reasonable care" and

at one point in his brief Mark presents an argument based on Naramore v. Duckworth-Morris Realty Co., 669 So. 2d 946 (Ala. Civ. App. 1995), in which he seems to assert that there was an implied contract between Valekis and Richard. See Mark's brief, p. 37 (arguing that, "[l]ike in Naramore, the evidence in this case could reasonably lead to the inference that -- before Valekis provided the Agency Agreement to [Richard] -- an implied contract existed between them for the limited purpose of procuring an inspection of the Home's structure/foundation"). We address the applicability of Naramore later in this opinion.

1180718

"Valekis breached that voluntarily assumed duty by not acting with reasonable care." Mark's brief, p. 29.

"To meet the burden of proof in a negligence action, a plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach proximately caused the plaintiff to be injured." Martin v. Goodies Distribution, 695 So. 2d 1175, 1177 (Ala. 1997) (emphasis added). "In Alabama, the existence of a duty is a strictly legal question to be determined by the court." Taylor v. Smith, 892 So. 2d 887, 891 (Ala. 2004).

""[T]he concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered." [Stewart M.] Speiser [et al., The American Law of Torts], § 9:3 at 1008 [(1985)]. That judgment is at heart one that requires an analysis informed by precedent and principles. In other words, a duty analysis is inherently a legal analysis that entails an intellectual process of identifying, weighing, and balancing a number of competing factors -- the existing law of the jurisdiction, the practicability of imposing a duty, the demands of justice, and the interests of society. That is an analysis our legal system recognizes is best undertaken by a judge.'

". . . .

1180718

"... The judge should decide whether, assuming as truth all of the plaintiff's factual assertions, they are sufficient to give rise to a legal duty. If, even presuming that all of the plaintiff's facts are true, the judge determines that, as a matter of law, no duty was owed, then a summary judgment ... is appropriate."

Ex parte BASF Constr. Chems., LLC, 153 So. 3d 793, 802-04 (Ala. 2013) (quoting State Farm Fire & Cas. Co. v. Owen, 729 So. 2d 834, 839, 840 (Ala. 1998)). Thus, for purposes of deciding whether, in fact, a duty such as the one described by Mark exists, we will assume that Richard told Valekis that he wanted a structural engineer, rather than a foundation specialist, to inspect the home.

Mark is correct that this Court has held that one can assume a legal duty through voluntary action.

"This Court has stated: 'Alabama clearly recognizes the doctrine that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith.' Dailey v. City of Birmingham, 378 So. 2d 728, 729 (Ala. 1979). 'However, the existence of a voluntarily assumed duty through affirmative conduct is a matter for determination in light of all the facts and circumstances.' Parker v. Thyssen Mining Constr., Inc., 428 So. 2d 615, 618 (Ala. 1983). The relevant inquiry often involves the scope, as well as the existence, of the duty assumed."

1180718

Bryan v. Alabama Power Co., 20 So. 3d 108, 119 (Ala. 2009).

Mark argues that the specific division of duties between Valekis and Richard spelled out in the agency agreement has no effect on his claims because, he argues, Valekis voluntarily assumed a duty to retain a structural engineer on Richard's behalf to inspect the home before he was acting as Richard's real-estate agent. In his brief, Mark asserts:

"In this case, Valekis voluntarily assumed a duty to [Richard] before the agency relationship was created pursuant to RECAD. The fact Valekis was not [Richard's] legal 'agent' when he voluntarily assumed said duty to take care of the Home's structural/foundation inspection is irrelevant under Alabama law, as an agency relationship is not required for a person to voluntarily assume a duty to another."

Mark's brief, p. 32.

Mark's insistence that Valekis was not Richard's agent at the time Valekis allegedly volunteered to retain a structural engineer is based on § 34-27-82(b), Ala. Code 1975, a provision in the RECAD. Evaluating this argument requires a careful examination of the RECAD -- an Act our courts have not previously had an occasion to interpret.

Section 34-27-82, Ala. Code 1975, provides:

"(a) When engaged in any real estate transaction, the licensee^[6] may act as a single agent, sub-agent, a limited consensual dual agent, or as a transaction broker.^[7]

"(b) At the initial contact between a licensee and the consumer^[8] and until such time a broker^[9] enters into a specific written agreement to establish an agency relationship^[10] with one or more of the parties to a transaction, the licensee shall not be considered an agent of that consumer. An agency relationship shall not be assumed, implied, or created without a written bilateral agreement establishing the terms of the agency relationship.

"(c) As soon as reasonably possible and before any confidential information is disclosed to any other person by a licensee, the licensee shall provide a written disclosure form to a consumer for

⁶A "licensee" is defined as "[a]ny broker, salesperson, or company." § 34-27-81(10), Ala. Code 1975.

⁷A "transaction broker" is defined as "[a] licensee who assists one or more parties in a contemplated real estate transaction without being an agent or fiduciary or advocate for the interest of that party to a transaction." § 34-27-81(17), Ala. Code 1975.

⁸A "consumer" is defined as "[a] person who obtains information, advice, or services concerning real estate from a real estate licensee." § 34-27-81(5), Ala. Code 1975.

⁹A "broker" is defined as "[a]ny person licensed as a real estate broker pursuant to Articles 1 and 2 of this chapter." § 34-27-81(2), Ala. Code 1975.

¹⁰An "agency agreement" is defined as "[a] written agreement between a broker and a client which creates a fiduciary relationship between the broker and a principal, who is commonly referred to as a client." § 34-27-81(1), Ala. Code 1975.

signature describing the alternative types of brokerage services,^[11] as identified in subsection (a), that are available to clients^[12] and customers^[13] of real estate brokerage companies. The licensee shall also inform a consumer as to the specific types of brokerage services that are provided by his or her company. A broker shall not be required to offer or engage in any one or in all of the alternative brokerage arrangements specified in subsection (a). The licensee will provide a written form to the consumer for their signature describing the alternative types of brokerage arrangements available. All rental or property management services are excluded from the requirements of this subsection.

"(d) A licensee shall not be required to comply with the provisions of subsection (c) when engaged in transactions with any corporation, non-profit corporation, professional corporation, professional association, limited liability company, partnership, any partnership created under the Uniform Partnership Act (commencing at Section 10-8A-101[, Ala. Code 1975]), real estate investment trust, business trust, charitable trust, family trust, or any governmental entity in transactions involving real estate.

¹¹"Brokerage service" is defined as "[a]ny service, except for rental or property management services, provided by a broker or licensee to another person and includes all activities for which a real estate license is required under Articles 1 and 2 of this chapter." § 34-27-81(4), Ala. Code 1975.

¹²A "client" is defined as "[a] person who has an agency agreement with a broker for brokerage service, whether he or she be buyer or seller." § 34-27-81(6), Ala. Code 1975.

¹³A "customer" is defined as "[a] person who is provided brokerage services by a broker or licensee but who is not a client of the broker." § 34-27-81(7), Ala. Code 1975.

"(e) After disclosure, the consumer may make an affirmative election of a specific type of brokerage arrangement that is available from the real estate brokerage company. The brokerage agreement^[14] shall contain a statement of the terms and conditions of the brokerage services that the broker will provide. In the absence of a signed brokerage agreement between the parties, the transaction brokerage relationship shall remain in effect.

"(f) When serving as a transaction broker, the duties of the licensee to all the parties to a real estate transaction are limited to those which are enumerated in Section 34-27-84[, Ala. Code 1975]. A signed brokerage agreement between the parties or, in the absence of a signed brokerage agreement, the continuation of the transaction brokerage relationship, shall constitute informed consent by the consumer as to the services the consumer shall receive from the broker.

"(g) Disclosure forms shall be provided to buyers and sellers. All real estate brokerage firms operating within the State of Alabama shall use the same agency disclosure forms. Disclosure forms describing the alternative types of brokerage services identified above shall be written by the Alabama Real Estate Commission.

"(h) Nothing in this section shall prohibit the consumer from entering into a written contract with a broker which contains provisions for services not specifically identified in the written disclosure form."

¹⁴A "brokerage agreement" is defined as "[a] specific written agreement between a brokerage firm and a consumer which establishes a brokerage relationship. The brokerage agreement shall contain a statement of the terms and conditions of the brokerage services to be provided." § 34-27-81(3), Ala. Code 1975.

1180718

(Emphasis added.)

Mark argues that because § 34-27-82(b) in essence states that an agency relationship does not exist between a consumer and a licensee and/or broker until a written agreement specifically establishing the relationship has been executed by the parties, Valekis was not Richard's agent at the time Valekis volunteered to retain a structural engineer to inspect the home because the agency agreement was executed after that voluntary undertaking. There are at least two problems with this contention.

First, the text of § 34-27-82(b) refers to "a specific written agreement to establish an agency relationship" that establishes a licensee as "an agent of that consumer." Even though Valekis was not Richard's specific agent at the time in question, § 34-27-82 contemplates that Valekis was acting as a "transaction broker" at that time. A transaction broker is "[a] licensee who assists one or more parties in a contemplated real estate transaction without being an agent or fiduciary or advocate for the interest of that party to a transaction." § 34-27-81(17), Ala. Code 1975. Section 34-27-82(e) states, in part, that, "[i]n the absence of a signed

1180718

brokerage agreement between the parties, the transaction brokerage relationship shall remain in effect." (Emphasis added.) Section 34-27-82(f) states, in part, that "[a] signed brokerage agreement between the parties or, in the absence of a signed brokerage agreement, the continuation of the transaction brokerage relationship, shall constitute informed consent by the consumer as to the services the consumer shall receive from the broker." (Emphasis added.) The language in the foregoing subsections of § 34-27-82 indicates that a "transaction broker" relationship exists when a licensee is assisting a "customer" -- rather than a "client" who has executed a specific written agreement -- with a contemplated real-estate transaction.

Valekis, a licensee, was clearly assisting Richard with a contemplated real-estate transaction at the time in question. It is undisputed that Richard hired Valekis to sell his previous residence and then to help him find a new residence. It is also undisputed that Richard would not have known about the home -- which was unlisted when Richard was looking for a new house -- without Valekis's knowledge that the Coopers previously had listed the home for sale. The

1180718

Coopers agreed to show the home because Valekis contacted them, and Valekis showed the home to Richard because Richard was considering whether to purchase the home. In fact, Richard even referred to Valekis as his "agent" when addressing the period in which Valekis allegedly volunteered to retain a structural engineer on Richard's behalf. When Richard was asked in his deposition why he did not directly ask Caudle if he was a structural engineer, Richard responded:

"A. Because I was told by Mr. Valekis that he was a structural engineer. Mr. Valekis was my real estate agent who sold one of my house[s], made a nice commission on it, is in the real estate business, and I put my trust into him being a professional. And being my agent, when he says he was going to do something on my behalf, I assumed that he would be my fiduciary and would take care of things in the [manner] in which it was."

(Emphasis added.) Thus, although § 34-27-82(b) dictates that Valekis was not Richard's "single agent," § 34-27-81(15), before the agency agreement was executed, Valekis was acting as a "transaction broker."¹⁵ § 34-27-82(a).

¹⁵Indeed, the brokerage-services disclosure statement informed Richard that,

"even if you are working with a licensee who is not your agent, there are many things the licensee may do to assist you. Some examples are:

"Provide information about properties;

1180718

The "transaction-broker" designation matters because the RECAD is very specific about the duties of a transaction broker. Section 34-27-82(f) states, in part, that, "[w]hen serving as a transaction broker, the duties of the licensee to all the parties to a real estate transaction are limited to those which are enumerated in Section 34-27-84." (Emphasis added.) Section 34-27-84, Ala. Code 1975, does not list a duty to inspect a property or to procure any specific type of

"Show Properties;
"Assist in making a written offer;
"Provide information on financing."

professional on behalf of a customer to inspect a property.¹⁶

¹⁶Section 34-27-84 provides:

"(a) Licensees shall have all of the following obligations to all parties in a real estate transaction:

"(1) To provide brokerage services to all parties to the transaction honestly and in good faith.

"(2) To exercise reasonable skill and care in providing brokerage services to all parties.

"(3) To keep confidential any information given to the licensee in confidence, or any information obtained by the licensee that the licensee knows a reasonable individual would want to keep confidential, unless disclosure of this information is required by law, violates a fiduciary duty to a client, becomes public knowledge, or is authorized by the party in writing.

"(4) To account for all property coming into the possession of the licensee that belongs to any party to the real estate transaction.

"(5) When assisting a party in the negotiation of a real estate transaction, to present all written offers in a timely and truthful manner.

"(6) To act on behalf of the licensee or his or her immediate family, or on behalf of any other individual, organization, or business entity in which the licensee has a personal interest only

1180718

Moreover, § 34-27-87, Ala. Code 1975, specifically provides:

"The duties of licensees as specified in this article or in rules promulgated by the Alabama Real Estate Commission shall supersede any duties of a licensee to a party to a real estate transaction which are based upon common law principles of agency to the extent that those common law duties are inconsistent with the duties of licensees as specified in this article."

Thus, there are no common-law duties that would supersede the specifically listed duties provided in § 34-27-84. See also Fisher v. Comer Plantation, Inc., 772 So. 2d 455, 464 (Ala. 2000) (observing that, in deciding whether a defendant real-estate agent was the agent of the plaintiff and therefore had duties to the plaintiff, "we are bound by the common law as it

with prior timely written disclosure of this interest to all parties to the transaction.

"(b) A licensee may provide requested information which affects a transaction to any party who requests the information, unless disclosure of the information is prohibited by law or in this article.

(c) When accepting an agreement to list an owner's property for sale, the broker or his or her licensee shall, at a minimum, accept delivery of and present to the consumer all offers, counteroffers, and addenda to assist the consumer in negotiating offers, counteroffers, and addenda, and to answer the consumer's questions relating to the transaction."

1180718

existed before the enactment of the Real Estate Consumer's Agency and Disclosure Act" because the RECAD "became effective after the transactions that resulted in this lawsuit had occurred"). Therefore, as a transaction broker, Valekis could not have assumed a duty to retain a structural engineer on Richard's behalf.

Furthermore, even if we assume that Valekis was not Richard's agent or a transaction broker at the time in question, Mark's argument still fails. In essence, Mark's argument posits that Valekis was just an ordinary bystander, not a professional with any kind of relationship with Richard, at the time Valekis allegedly agreed to retain a structural engineer on Richard's behalf. However, as we already have noted, the existence of a duty is a question of law for the court. Mark has not cited a single statute or case that imposed on Valekis a voluntary duty to perform a house inspection or to retain a structural engineer outside an agency relationship. Cf. Somnus Mattress Corp. v. Hilson, 280 So. 3d 373, 382, 383 (Ala. 2018) (observing that the appellant had "failed to cite a single case" and this Court likewise had "been unable to find any Alabama authority holding that an

1180718

insurer may voluntarily assume a duty to advise a client regarding the adequacy of the client's insurance coverage"); Bryan v. Alabama Power Co., 20 So. 3d 108, 119 (Ala. 2009) (noting that the appellants "do not point to any Alabama law discussing the voluntary assumption of flood-control obligations").

We see no reason to impose such a duty in the first instance. The RECAD was adopted in an effort to clarify the duties of brokerage services and real-estate licensees toward consumers in the context of real-estate transactions. See J. Clark Pendergrass, The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency, 48 Ala. L. Rev. 277, 278-79 (1996) (explaining that, "[i]n an attempt to end consumers' confusion as to whom the broker represents and to clarify the broker-buyer-seller relationship, the Alabama Legislature recently enacted the Real Estate Consumer's Agency and Disclosure Act which, inter alia, codifies the roles and duties of real estate brokers and mandates agency disclosure to consumers" (footnote omitted)). Apart from the duties that arise in that context, there is no public-policy impetus to impose such a voluntary duty on nonprofessionals. Cf. Martin

1180718

v. Goodies Distribution, 695 So. 2d at 1179 (concluding that, "[a]fter reviewing the evidence in this case, and considerations of public policy, we hold that Goodies' act of including several safety precautions in the list of operating procedures it requested its drivers to follow did not amount to the voluntary assumption of a legal duty"); Parker v. Thyssen Mining Constr., Inc., 428 So. 2d 615, 618 (Ala. 1983) (finding that, "[u]nder the present facts, we are unwilling to impose on TMCI the duty of obtaining evidence needed to enhance Parker's potential third-party action"). "[W]here there is no duty, there can be no negligence." Parker, 428 So. 2d at 618. Because no voluntarily assumed duty such as the one describe by Mark exists in Alabama law, the circuit court correctly entered a summary judgment in favor of RealtySouth and Valekis on the negligence and/or wantonness claim.¹⁷

As we first noted in footnote 5 of this opinion, Mark also appears to argue, based on Naramore v. Duckworth-Morris Realty Co., 669 So. 2d 946, 950 (Ala. Civ. App. 1995), that

¹⁷Our conclusion pretermits the need to discuss the circuit court's alternative holding that the "As Is" clause in the sales agreement "bars a negligence claim against the real estate broker or its sales associate."

1180718

Valekis's alleged promise to have a structural engineer inspect the home created an implied contract between Valekis and Richard.

"In Naramore, this court concluded that an agency disclosure in a real estate purchase contract that identified a real estate agency as representing the sellers, rather than the buyers, of a residence would not automatically bar a breach-of-contract claim against the agency based upon the agreement of one of its agents to undertake, on behalf of the buyers, an inspection of the residence to be purchased. While we concluded in Naramore that the agency had had no initial duty to help obtain the house inspections for the purchasers, we also concluded that the agency in that case had gone beyond what was required and had created a 'special relationship' separate and apart from the fiduciary obligations that the agency owed to the seller. 669 So. 2d at 950."

Platt v. ERA Marie McConnell Realty, Inc., 774 So. 2d 577, 582 (Ala. Civ. App. 1999), rev'd on other grounds by Ex parte ERA Marie McConnell Realty, Inc., 774 So. 2d 588 (Ala. 2000).

One problem with relying upon Naramore as authority for finding an implied contract in this case is that there was evidence in Naramore indicating that the agency-disclosure provision in the sales contract was ambiguous, which led the plaintiffs to be confused as to whom the brokerage service was representing in the transaction. See Naramore, 669 So. 2d at 950 ("Despite reading and initialing this provision, the

1180718

Naramores, in their depositions, stated that they perceived that Duckworth-Morris was representing them. The Naramores' testimony could lead to the inference of an implied contract between them and Duckworth-Morris for the limited purpose of arranging inspections and reporting the results thereof."). In this case, there is no dispute regarding the clarity of both the agency agreement and the sales agreement in dictating that the responsibility to inspect the home and to ensure its condition was satisfactory was on Richard.

More important than any factual distinction between Naramore and this case, however, is the fact that, when Naramore was decided, the RECAD had not become effective. The Court of Civil Appeals released its opinion in Naramore on October 20, 1995; the RECAD became effective October 1, 1996.

"The requirement of a written brokerage agreement effects two changes to Alabama common law. First, by requiring a written agreement, the Act abrogates the common law rule, insofar as applied to real estate brokerage, that an agency relationship may be created by oral agreement or implied from the conduct of the parties. [Citing Naramore v. Duckworth-Morris Realty Co., 669 So. 2d 946, 950 (Ala. Civ. App. 1995); Bay Shore Props., Inc. v. Drew Corp., 565 So. 2d 32, 34 (Ala. 1990); and King v. Earley, 274 Ala. 116, 119-20, 145 So. 2d 831, 835 (1962), as stating the common-law rule.] Second, the requirement of a writing abrogates the common

1180718

law rule that a broker's listing agreement need not be in writing in order to be valid."

Pendergrass, 48 Ala. L. Rev. at 282 (emphasis added). In short, as § 34-27-82(b) makes clear, there cannot be an implied contract of agency between a broker and/or licensee and a consumer. Consequently, the principle upon which Naramore was based is no longer the law in the wake of the enactment of the RECAD. See generally Fisher, 772 So. 2d at 464. Accordingly, Mark's allegation of a breach of contract by Valekis apart from the agency agreement is without merit. As the circuit court concluded, the agency agreement "contains language that RealtySouth and Valekis did not assume any responsibility to inspect the property or retain building experts to inspect the property," so the agency agreement does not provide a basis for Richard's breach-of-contract claim. Accordingly, the circuit court correctly entered a summary judgment in favor of RealtySouth and Valekis with respect to any alleged breach of contract.

IV. Conclusion

Based on the foregoing, we affirm the circuit court's summary judgment in favor of RealtySouth and Valekis as to the

1180718

negligence and/or wantonness and breach-of-contract claims against them.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Bryan, Sellers, and Stewart, JJ., concur.

Mitchell, J., concurs in the result.

Wise, J., recuses herself.