

THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM \* BEFORE EDWARD J. KELLEY,  
OF BARRY SCHOLI \* ADMINISTRATIVE LAW JUDGE,  
CLAIMANT \* OF THE MARYLAND OFFICE OF  
v. \* ADMINISTRATIVE HEARINGS  
THE MARYLAND REAL ESTATE. \* OAH No: LABOR-REC-22-23-31468  
COMMISSION GUARANTY FUND, \* MREC NO: 002-RE-2023 GF  
FOR THE ALLEGED MISCONDUCT \*  
OF KATHRYN HURD JULIAN \*  
RESPONDENT \*JI

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 12, 2024, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 6th day of September, 2024, ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, ADOPTED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, ADOPTED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;
- D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.
- E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the

twenty (20) day period, then this Proposed Order becomes final.

F. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND STATE REAL ESTATE COMMISSION

9/5/24  
Date

By:

  
Sandy Olson, Commissioner

IN THE MATTER OF THE CLAIM  
OF BARRY SCHOLL,  
CLAIMANT

v.

THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND,  
FOR THE ALLEGED MISCONDUCT  
OF KATHRYN HURD JULIAN,  
RESPONDENT

\* BEFORE EDWARD J. KELLEY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On June 28, 2022, Barry Scholl (Claimant) filed a claim with the Maryland Real Estate Commission (REC)<sup>1</sup> to recover compensation from the Real Estate Guaranty Fund (Fund) for an alleged actual loss resulting from a misrepresentation by Kathryn Hurd Julian (Respondent), a licensed real estate salesperson. The Executive Director of the REC issued a Hearing Order on the claim. On November 7, 2023, the REC forwarded the case to the Office of Administrative Hearings (OAH) for a hearing.

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<sup>1</sup> The REC is under the jurisdiction of the Department of Labor (Department).

On May 16, 2024,<sup>2</sup> I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408(a) (2018).<sup>3</sup> Hope Sachs, Assistant Attorney General, Department, represented the Fund. Ariel Scholl, Esquire, represented the Claimant, who was present. Neither the Respondent nor anyone authorized to represent the Respondent appeared.

On March 18, 2024, the OAH provided a Notice of Hearing (Notice) to the Respondent by first-class mail and certified mail to the Respondent's address on record with the OAH and the REC. Code of Maryland Regulations (COMAR) 28.02.01.05C(1). The Notice stated that a hearing was scheduled for May 16, 2024, at 10:00 a.m., at the OAH in Hunt Valley, Maryland. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The Notice sent to the Respondent via certified mail and regular mail were returned as undeliverable. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Fund confirmed that the Notice was sent to the Respondent's address of record. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice. After waiting over fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. COMAR 28.02.01.23A; COMAR 28.02.01.05A, C.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, the REC's procedural regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 09.01.03; COMAR 09.11.03; COMAR 28.02.01.

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<sup>2</sup> The hearing was initially scheduled for March 7, 2024, but that hearing date was postponed because counsel for the Claimant had a documented conflict.

<sup>3</sup> Unless otherwise specified, all citations to the Business, Occupations, and Profession Article are to the 2018 Replacement Volume.



## ISSUES

1. Did the Claimant sustain an actual loss based on a misrepresentation by the Respondent that occurred in the provision of real estate brokerage services, involving a transaction that relates to real estate located in the State?
2. If so, what amount should be awarded to the Claimant from the Fund?

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1: Residential Contract of Sale, June 11, 2019
- Clmt. Ex. 2: Exclusive Buyer Representation Agreement, November 11, 2018
- Clmt. Ex. 3: Lothorian Pool Inspection Agreement & Report, June 25, 2019
- Clmt. Ex. 4: Lothorian Revised Pool Inspection Agreement & Report, July 2, 2019
- Clmt. Ex. 5: Email from Zach Thompson, Lothorian, to the Respondent, July 2, 2019
- Clmt. Ex. 6: Email from Autumn Rose to the Claimant and the Respondent, July 2, 2019
- Clmt. Ex. 7: Photograph of Pool, undated
- Clmt. Ex. 8: Excalibur Leak Detection Report, July 15, 2020; Excalibur Invoice for \$562.00, August 30, 2021
- Clmt. Ex. 9: Excalibur Invoice for \$562.00, July 15, 2020; Aqua Wonders LLC Invoice for \$2,425.00, July 19, 2020
- Clmt. Ex. 10: Proposal, Membrane Concepts, April 20, 2022
- Clmt. Ex. 11: Proposal, Brighton Pools, September 10, 2023
- Clmt. Ex. 12: Letter from Lothorian to the Claimant, May 1, 2024

The Respondent did not appear and therefore did not offer any exhibits for admission.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1: Notice of Hearing, dated June 14, 2023; Order for Hearing, undated

Fund Ex. 2: Licensing information, April 17, 2024

Fund Ex. 3: REC Complaint Form, June 28, 2022

Testimony

The Claimant testified.

The Respondent did not appear.

The Fund did not present any witness testimony.

**PROPOSED FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the REC licensed the Respondent as a real estate salesperson under license number 668162.
2. On November 11, 2018, the Respondent and the Claimant executed an exclusive buyer's representation agreement.
3. Between November 2018 and June 2019, the Respondent and the Claimant communicated weekly in order to identify a residential property for the Claimant to purchase.
4. On June 11, 2019, the Claimant, with the assistance of the Respondent, submitted an offer to purchase a property in Owings Mills, Maryland (Property).
5. The Property has a pool.
6. The seller of the Property accepted the Claimant's offer.
7. Settlement was scheduled for July 12, 2019.
8. On behalf of the Claimant, the Respondent retained Lothorian to inspect the pool prior to settlement.

9. Lothorian inspected the pool on June 25, 2019, and sent an inspection report to the Respondent. Lothorian informed the Respondent that the water level was too low to perform a complete inspection.

10. The Claimant received a copy of this inspection report.

11. Lothorian conducted a second pool inspection on July 2, 2019, after the water level was elevated.

12. On July 2, 2019, Lothorian sent a second inspection report to the Respondent. The second inspection report emphasized that the pool was not level and documented that there were “structural issues” with the pool that had been the subject of repairs. (Clmt. Ex. 4).

13. On July 2, 2019, Lothorian’s pool inspector, Zach Thompson, sent the Respondent an email regarding the second pool inspection, which stated in relevant part:

The water level was up and I was able to test the skimmers, return line, and Polaris – everything checked out. And was working fine.

The only remaining issue is that the pool is technically out of level. The water level in the deep end house side was into the third tile, but on the hill side it was above all the tiles and into the coping stones. This means that part of the pool is technically higher than the other side.

My best guess is whoever did the structural work may have brought it up a bit too high. Nothing we can really do to test this theory, just have to monitor it but for inspection purposes I did note the pool was out of level.

Let me know if you need to discuss anything further. Thanks,

(Clmt. Ex. 5).

14. On July 2, 2019, the Respondent’s assistant, Autumn Rose, sent an email to the Claimant, with a copy to the Respondent, that stated the following with regard to Lothorian’s second pool inspection: “The pool inspector was able to go back this morning and here is what he said: ‘The water level was up and I was able to test the skimmers, return line, and Polaris – everything checked out and was working fine.’” (Clmt. Ex. 6).

15. The Respondent did not send the Claimant a copy of the second inspection report.
16. The Respondent did not inform the Claimant of Lothorian's warning that the pool was out of level and whoever performed the structural work did it incorrectly.
17. The Claimant did not communicate directly with Lothorian prior to settlement, and he was not aware that the pool was out of level when he settled on the Property.
18. The Claimant accepted and relied on the Respondent's assertion that Lothorian stated that "everything checked out and was working fine" with the pool.
19. Had the Respondent told the Claimant of Lothorian's warning that the pool was out of level, the Claimant would have further investigated the structural integrity of the pool before settlement.
20. Settlement occurred as scheduled and the Claimant assumed ownership of the Property on July 12, 2019.
21. The Claimant moved into the Property in late July 2019.
22. As soon as the Claimant moved into the Property, he noticed the pool was not holding water.
23. The Claimant contacted a pool maintenance service, which inspected the pool and reported that the pool was cracked and leaked water as a result.
24. The Claimant contacted Lothorian and spoke directly with Mr. Thompson, who told the Claimant that he reported to the Respondent that the pool was out of level, which could explain the cracking and leaking.
25. In July 2020 and September 2021, the Claimant paid Excalibur \$562.00 to inspect the pool. Excalibur reported that the pool had a substantial crack, which was causing the pool to leak.

26. In July 2020, the Claimant paid Aqua Wonders \$1,400.00 to replace the pool filter.
27. The measures taken by the Claimant did not fix the pool, which continued to leak water.
28. On April 20, 2022, Membrane Concepts estimated that it would cost \$32,150.00 to install a PVC<sup>4</sup> membrane to fix the pool.
29. On September 10, 2023, Brighton pools estimated that it would cost \$35,400.00 to install a PVC membrane to fix the pool.
30. To date, the pool has not been repaired.
31. The Claimant prefers the Membrane Concepts proposal for fixing the pool.

## **DISCUSSION**

### **LEGAL FRAMEWORK**

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Occ. & Prof. § 17-407(e) (2018);<sup>5</sup> State Gov't § 10-217. To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

A person may recover compensation from the Fund for an actual loss based on certain types of acts or omissions in the provision of real estate brokerage services by a licensee. A licensee “means a licensed real estate broker, a licensed associate real estate broker, or a licensed real estate salesperson.” Bus. Occ. & Prof. § 17-101(k) (Supp. 2023).

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<sup>4</sup> Polyvinyl chloride.

<sup>5</sup> Unless otherwise noted, all references to the Business Occupations and Professions Article are to the 2018 Volume of the Maryland Annotated Code.

The provision of real estate brokerage services is defined as follows:

(l) "Provide real estate brokerage services" means to engage in any of the following activities:

(1) for consideration, providing any of the following services for another person:

- (i) selling, buying, exchanging, or leasing any real estate; or
- (ii) collecting rent for the use of any real estate;

(2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

(4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;

(5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

*Id.* § 17-101(l) (Supp. 2023).

A claim against the Fund shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

- 1. a licensed real estate broker;
- 2. a licensed associate real estate broker;
- 3. a licensed real estate salesperson; or
- 4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

- 1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
- 2. that constitutes fraud or misrepresentation.

*Id.* § 17-404(a)(2). The amount recovered for any claim against the Fund may not exceed

\$50,000.00 for each claim. *Id.* § 17-404(b).

A negligent misrepresentation requires the following:

- (1) the Respondent's negligent assertion of a false statement;
- (2) the Respondent's intent that his statement will be acted upon by the Claimant;
- (3) the Respondent's knowledge that the Claimant will probably rely on the statement, which, if erroneous, will cause loss or injury;



- (4) the Claimant, justifiably, takes action in reliance on the statement; and
- (5) the Claimant suffers damage proximately caused by the Respondent's negligence.

*See UBS Fin. Services, Inc. v. Thompson*, 217 Md. App. 500, 525 (2014).

Licensees are subject to a code of conduct that imposes a duty to protect and promote the interests of the client. COMAR 09.11.02.02A. Additionally, licensees shall protect their clients and the public against misrepresentations and to make a "reasonable effort" to ascertain all material facts about the Property. As relevant here, the code of ethics, states:

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

D. The licensee shall make a reasonable effort to ascertain all material facts concerning every property for which the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.

COMAR 09.11.02.01C-D.

#### **THE PARTIES' POSITIONS**

The Claimant contends that the Respondent misrepresented the results of Lothorian's pool inspection, and he relied on this misrepresentation, which caused him to purchase the Property with a structurally defective pool that will cost over \$30,000.00 to fix. He seeks an award from the Fund to cover the financial damage caused by the Respondent's misrepresentation.

The Respondent did not attend the hearing or dispute the Claimant's assertion that she misrepresented the results of the pool inspection. She also did not dispute the Claimant's assertion that he was damaged by this misrepresentation when he purchased the Property with a structurally defective pool.



After evaluating the evidence presented at the hearing, the Fund agreed that the Respondent misrepresented the results of the pool inspection, which caused the Claimant to purchase the Property with a structurally defective pool. The Fund recommended that the Claimant receive a \$34,674.00 award from the Fund to cover the financial damage caused by the Respondent's misrepresentation.

I find that the Licensee misrepresented the results of the pool inspection, which caused the Claimant to purchase the Property with a structurally defective pool. I recommend awarding the Claimant the amount he was damaged by the Licensee's misrepresentation, \$34,674.00.

#### **ANALYSIS**

The Claimant testified thoroughly and credibly about his relationship with the Respondent and the purchase of the Property. He stated the Respondent became his exclusive buyer's agent in November 2018 and that he spoke with the Respondent weekly for the next seven months while they searched for a residential home to purchase. In June 2019, the Respondent submitted an offer to purchase the Property on the Claimant's behalf, which was accepted by the owner. The Claimant testified that prior to settlement, the Respondent independently arranged for a pool inspection by Lothorian, and she reported to him that the inspector found no defects with the pool when that was not the case. The Claimant testified that he did not communicate directly with Lothorian until after settlement, which is when he learned that Lothorian told the Respondent that the pool was out of level and that this signified a structural defect.

The Claimant testified that the pool's structural deficiency became apparent immediately after he moved into the Property because the pool would not retain water. The Claimant hired service people to inspect the pool, and he took steps to address the structural defect, but none of the reasonable fixes he attempted were successful. He testified that he has been told by two

different pool companies that there are no minimal repair options available to fix the pool. Both pool companies stated that the necessary repairs require installation of a PVC membrane that will cost over \$30,000.00.

The Claimant's credible testimony was fully corroborated by the Claimant's exhibits. The exhibits demonstrate that on July 2, 2019, following the second pool inspection, Lothorian sent the Respondent an email, which stated, in relevant part:

The water level was up and I was able to test the skimmers, return line, and Polaris – everything checked out. And was working fine.

The only remaining issue is that the pool is technically out of level. The water level in the deep end house side was into the third tile, but on the hill side it was above all the tiles and into the coping stones. This means that part of the pool is technically higher than the other side.

My best guess is whoever did the structural work may have brought it up a bit too high. Nothing we can really do to test this theory, just have to monitor it but for inspection purposes I did note the pool was out of level.

(Clmt. Ex. 5).

After receiving this email from Lothorian, the Respondent had her assistant, Ms. Rose, send the Claimant an email to report the results of the second inspection. The Respondent was copied on this email, which told the Claimant that Lothorian reported that "everything checked out and was working fine." (Clmt. Ex. 6).

While Lothorian noted that certain elements of the pool worked correctly, Lothorian's email to the Respondent did not conclude that "everything checked out and was working fine." Lothorian's inspector expressed serious concern regarding the pool's integrity, noting that whoever did the structural work "brought it up a bit too high," which caused the pool to be out of level. (Clmt. Ex. 5). Following settlement, Mr. Thompson told the Claimant that this structural deficiency could explain the cracking and leaking. The Claimant's evidence demonstrates that the pool had substantial structural deficiencies at the time the Claimant purchased the Property,

which the Claimant would have ascertained if the Respondent had not misrepresented Lothorian's inspection report. The Claimant spent \$2,524.00 in futile attempts to fix and maintain the pool.<sup>6</sup> The Claimant now must spend an additional \$32,150.00 to fix the pool.

Ultimately, the evidence in this case is undisputed. The Respondent was a licensed real estate salesperson, who engaged in real estate brokerage services for a Property located in the State of Maryland. The Respondent misrepresented the results of Lothorian's pool inspection, and the Claimant relied on the Respondent's misrepresentation to his detriment. The Fund argued, and I agree, that the Claimant suffered an actual loss because of the Respondent's misrepresentation and that the Claimant is entitled to reimbursement from the Fund.

There is no applicable statutory or regulatory calculation for recovery from the Fund. The Fund, by its counsel, recommended an award of \$34,674.00, which equals the proven amount to fix the pool, \$32,150.00, plus the proven costs of the Claimant's reasonable and unsuccessful efforts to fix and maintain the pool, \$2,524.00. I agree with the Fund's actual loss calculation and conclude that the Claimant should be awarded \$34,674.00 from the Fund. Bus. Occ. & Prof. § 17-404(b).

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has established by a preponderance of the evidence that he sustained an actual and compensable loss due to an act or omission of the Respondent that constitutes misrepresentation in the provision of real estate brokerage services. Md. Code Ann., Bus. Occ. & Prof. §§ 17-101(k) and (l) and 404(a) and (b) (2018).

I further conclude that the Claimant is entitled to recover \$34,674.00 from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404(b) (2018).

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<sup>6</sup> The Claimant proved he spent \$1,124.00 for inspections and \$1,400.00 for a new pool filter.


**RECOMMENDED ORDER**

I **RECOMMEND** that the claim filed by the Claimant against the Maryland Real Estate Commission Guaranty Fund be **GRANTED**.

I further **RECOMMEND**:

1. The Guaranty Fund award the Claimant \$34,674.00.
2. The Respondent shall reimburse the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Real Estate Commission. Md. Code Ann., Bus. Occ. & Prof. § 17-411(a) (2018).
3. The Respondent's license is suspended. The Maryland Real Estate Commission may not reinstate the Respondent's license until the Respondent repays in full the amount paid by the Guaranty Fund, plus interest, and the Respondent applies to the Real Estate Commission for reinstatement of the license. Md. Code Ann., Bus. Occ. & Prof. § 17-412(a), (b) (2018).
4. The records and publications of the Maryland Real Estate Commission reflect this decision.

July 12, 2024  
Date Decision Issued

  
\_\_\_\_\_  
Edward J. Kelley  
Administrative Law Judge

EJK/ja  
#212013

IN THE MATTER OF THE CLAIM  
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**FILE EXHIBIT LIST**

**Exhibits**

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