IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman

Appellate Case No. 2013-001843
(Trial Court Case No. 2011-CP-23-6376)

Kevin McCarthy and Courtney E. McCarthy, ... Appellants,

v.

The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Keowee Falls Investment Group, LLC; Cliffs Real Estate, Inc.; The Cliffs Golf and Country Club, Inc.; and S&ME, Inc.....Defendants,

Of whom

S&ME, Inc. is .....Respondent.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. RESPONDENT FRAMES THE QUESTION BEFORE THE COURT AROUND NUMEROUS FINDINGS OF FACTS IN DISPUTE.

Respondent contends that "the question presented in this case is whether an engineer (S&ME) owes a tort duty to a future purchaser of adjoining land (Appellants) on which the engineer performs no engineering services at its Client's request when that future purchaser buys that land from another entity (KFIG) which was not the engineer's client." (Brief of Respondent, pg. 12). As discussed more fully below and/or in Appellants' Initial Brief, viewing the evidence in a light most favorable to Appellants, which is required, the question before the Court is: whether an engineer (Respondent), who performs a preliminary investigation of real property and recommends further investigation of that real property, owes a tort duty to a known, concurrent purchaser of that real property (Appellants) when that engineer fails perform a further investigation that real property and never discloses to the known, concurrent purchaser of the known additional foundation work necessary to build a residence on that real property or of the active slope failure occurring on that real property.

II. RESPONDENT FAILS TO ADDRESS ITS OWN EXPERT'S OPINION THAT RESPONDENT'S DUTY EXTENDS TO PARTIES NOT IN PRIVITY OF CONTRACT SUCH AS APPELLANTS

While Respondent cites Colleton Academy v. Hoover Universal for the position that industry standards are probative in defining the standard or duty of care, not determining if the prerequisite duty of care is owed and, likewise, contends that it "did not owe any legal duty to Appellants be performing service on lot 31 for its client", Respondent's liability expert, Dr. Roy Borden, admitted that if an engineer sees a condition that "we believe endanger life, safety or property even if we are not

contractually involved with an individual we do have a professional duty to bring that to someone's attention". *Colleton Academy v. Hoover Universal*, 379 S.C. 181, 666 S.E.2d 247 (2008) (Brief of Respondent, pg. 15 and Memo in Opp Exhibit FF, pg. 33). Accordingly, in the matter at hand, Respondent's failure to investigate or warn that its recommendations for Lot 31 were also attributable to Appellants' Lot is a breach of its duty to disclose all relevant information and fully describe the geological conditions it observed.

III. RESPONDENT'S ARGUMENTS REST ON FACTUAL FINDINGS IN DISPUTE

A. WHETHER RESPONDENT WAS ASKED TO CONDUCT AN INVESTIGATION INTO APPELLANTS' LOT.

Respondent contends that "[Respondent] conducted a geotechnical investigation on only lot 31" and "[t]here is no evidence that [Respondent] was asked by its client, The Cliffs, to conduct any further investigation of any adjacent lots." (Brief of Respondent, pg. 8). As discussed in Section III(1), III(2) and III(3) of Appellants' Initial Brief, viewing the evidence in a light most favorable to Appellants, Respondent performed a preliminary investigation of the geotechnical conditions on three (3) lake front lot; including lot 32 (hereinafter "Appellants' Lot). This investigation was done for Respondent to make a proposal to its client, The Cliffs. In that proposal, Respondent notified The Cliffs that a further investigation was necessary on all three (3) lots and entered into an agreement to perform a full investigation of the geotechnical conditions on all three (3) lots; including Appellants' Lot. (Appellants' Brief, pgs. 11-13). Neither Respondent nor The Cliffs has produced any contractually required written amendments or modifications to Proposal No. 05471 wherein the scope of the work was limited to just Lot 31. Respondent conducted a preliminary investigation and identified

Appellants' Lot as in need of further investigation that it contracted with The Cliffs to perform. Respondent's position is not accurate and a material issue of fact exists whether, once Respondent identified Appellants' Lot as being in need of further investigation due the identified unusual features on it, Respondent could allow The Cliffs to opt out of the investigation. According to Respondent's liability expert, Dr. Roy Borden's testimony, Respondent could not.

B. WHETHER RESPONDENT PERFORMED WORK ON APPELLANTS' LOT.

Respondent would have the Court believe it had zero contact with Appellants' Lot and contends that it:

a) "conducted a geotechnical investigation on only Lot 31". (Brief of Respondent, pg. 8);

b) "performed *no* services on [Appellants' Lot]". (Brief of Respondent, pgs. 20, 24);

c) "did not perform a geotechnical engineering evaluation on [Appellants' Lot] and its client did not want or pay [Respondent] to do so. (Brief of Respondent, pg. 22).

Respondent did perform work on Appellants' Lot and identified it as in need of further investigation. In Respondent's Proposal to The Cliffs regarding Lot 30, Lot 31, and Appellants' Lot, Respondent stated from its initial walk of the property that "[i]t appears that about three sloughs have occurred at the property, approximately paralleling the water surface and the contour of the lots. These surface features are very unique". (Memo in Opp Exhibit F). It cannot be denied, therefore, that Respondent performed a preliminary investigation of Appellants' Lot and determined that very unique surface features, three sloughs, were present on Appellants' Lot. Respondent was concerned enough with what it observed on Appellants' Lot that it proposed further investigation

and in fact contracted with The Cliffs to perform that detailed investigation. If Respondent did not think further investigation was warranted, it would not have proposed and then contracted to do it. Respondent, therefore, did do work on Appellants' Lot and was concerned about the very unique features it initially saw.

C. WHETHER RESPONDENT KNEW OF APPELLANTS OR WHETHER APPELLANTS' LOT WAS UNDER CONTRACT.

Respondent contends that there is "no evidence that [Respondent] knew [Appellants] existed or that they has signed an agreement to purchase [Appellants' Lot]. (Brief of Respondent, pg. 21). It is undisputed The Cliffs knew it had signed a contract with Appellants to sell Appellants' Lot to them. As discussed in Section V(A)(12), an inference can be drawn that The Cliffs informed Respondent of Appellant and Appellants purchase of Appellants' Lot and requested that Respondent cease its investigation into Appellants' Lot. (Appellants' Brief, pg. 26). Further, an inference can be drawn that the reason The Cliffs directed Respondent to only do a full investigation on lot 31 was because it did not want to derail its contract with Appellants. Appellants contend that Respondent cannot allow a client to put professional blinders on it. Respondent's liability expert, Dr. Roy Borden's testimony agrees with this.

D. WHETHER THIS CASE INVOLVES RESIDENTIAL CONSTRUCTION.

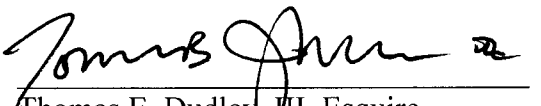
The Cliffs was a long standing client of Respondent. Respondent knew the lots, like Appellants' Lot, could only be used for residential construction. Despite The Cliffs engaging Respondent to evaluate the lots with respect to residential construction and the only use of the lots being residential construction, Respondent contends that this case is not in the residential construction context since "[Respondent] is not a residential home builder and did not build a house and place it into the stream of commerce." (Brief of

Respondent, pg. 24). In the case of *Ross Dress For Less, Inc. v. Lauth Construction Group, LLC,* the Court's analysis of Mac Tec, a geotechnical engineering firm similar to Respondent, did not address whether Mac Tec was a builder or whether Mac Tec had even built anything. *Ross Dress For Less, Inc. v. Lauth Construction Group, LLC* (unreported) 2012 WL 2572042 (D.S.C 2012). Instead, the Court's discussion regarding Mac Tec's duty to a third party with whom they were not in privity of contract concentrated on the case not being in the "residential home building context" since the property in question was "commercial real estate" and the purchaser was a "sophisticated commercial party". *Id.* Conversely, the matter at hand is clearly within this heightened residential home building context as contemplated by Terlinde since: 1) Appellants' Lot is in a planned residential development and the sole use for the lot is residential construction. (HUD); and 2) Respondent's Report focused solely on whether the lot was suitable for residential construction and specifically provided recommendations about the foundation requirements for a house on the lot. *Terlinde,* 271 S.E.2d at 770.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court reverse the Circuit Court and remand the case back to the Circuit Court.

Respectfully submitted,



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July 31, 2014
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IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001843
(Trial Court Case No.: 2011-CP-23-63768)

Kevin McCarthy and Courtney E. McCarthy, ... Appellants,

v.

Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South, Cliffs Real Estate, Inc., The Cliffs Golf and Country Club, Inc., and S&ME, Inc. ..... Defendants,

Of Whom

S&ME, Inc. is ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellants' Reply Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 31st day of July, 2014, addressed as follows:

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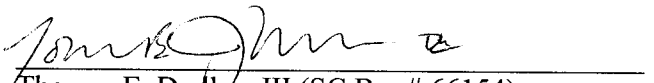

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Re: Kevin McCarthy, et al. vs. S&ME, Inc., et al.
Appellate Case No.: 2013-001843

To Whom It May Concern:

Please find enclosed an original and one (1) copy of Appellants' Reply Brief with Proof of Service in the above referenced matter.

By copy of this letter, we are serving same upon counsel for Respondent. Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Sincerely,

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