

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2011-CP-23-63768

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SEP 02 2014

SC Court of Appeals

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.

Of Which

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

RESPONDENT'S RETURN TO APPELLANTS' OBJECTION TO
RESPONDENT'S DESIGNATION OF MATTER

Respondent S&ME, Inc. hereby submits its return to the Appellants' Objection to Respondent's Designation of Matter to be Included in the Record on Appeal.

Factual Background

This case is one of three involving a contention that a block of land encompassing three adjacent lots located in Jasmine Cove of the Cliffs at Keowee Falls South are experiencing a deep seated slope failure. On August 8, 2011, Jack R. Harrell, Jr. and Tina W. Harrell v. Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC and S&ME, Inc. (C.A. No.

2011-CP-23-5300), was filed in Greenville County. (Burton Aff.). The *Harrell* case involves lot 31 in Jasmine Cove. (Burton Aff.). On September 27, 2011, Appellants filed the present action in Greenville County relating to lot 32, which is adjacent to lot 31. (Burton Aff. Exh. A). On January 4, 2013, McCillum Business, LLC 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., (C.A. No. 2013-CP-23-00072) involving Lot 30 was filed in Greenville County. (Burton Aff.). The plaintiffs in each of these three cases allege that S&ME was professionally negligent because it failed to identify an active deep seated slope failure during its 2005 geotechnical investigation of lot 31. (Burton Aff.). In fact, in their complaint in this case, Appellants refer specifically to the Harrell's lot and the report prepared by Respondent S&ME relating to that lot as the basis for this lawsuit. (Burton Aff. Exh. A ¶17, 50-56).

Procedural Background

By orders dated April 24, 2012, Chief Justice Toal designated both the *Harrell* case and this case as complex and assigned both cases to the Honorable Clifton B. Newman. (Burton Aff. Exh. B). On October 24, 2012, Appellants filed a Motion to Consolidate this case with the *Harrell* case. (Burton Aff. Exh. C). On December 13, 2013, the Trial Court held a hearing on Appellants' Motion to Consolidate. At the hearing, the Trial Court denied the motion but agreed that discovery in this action would be consolidated with discovery in *Harrell* from that date. (Burton Aff.). On January 3, 2013, McCillum Business, LLC filed a Motion to Intervene in this case. (Burton Aff. Exh. E).

On January 16, 2013, Respondent filed Motions for Summary Judgment in this case and in the *Harrell* case. (Burton Aff. Exhs. F & G). On May 1, 2013, Appellants filed a

Memorandum in Opposition to Defendant S&ME, Inc.'s Motion for Summary Judgment. Attached to Appellants' memorandum were excerpts and exhibits from depositions taken in the *Harrell* case prior to consolidation of discovery. (Burton Aff.) Accordingly, on May 3, 2013, Respondent filed a Motion to Strike those Portions of Plaintiff's Memorandum that were not part of the record in this case but were from the *Harrell* matter and certain documents which were not properly authenticated. (Burton Aff. Exh. H).

On May 3, 2013, the Trial Court held a hearing on the motions for summary judgment in both *Harrell* and in this case. The Trial Court also heard Respondent's motion to strike. The Trial Court denied the motion to strike at the hearing stating "I believe that it's . . . the posture of this case and the nature of the discovery [to] allow the use of exhibits from one case in the other case." (Burton Aff. Exh. I). On May 7, 2013, the Trial Court filed its order denying Respondent's Motion to Strike. (Burton Aff. Exh. J). On May 7, 2013, the Trial Court denied McCollum Business, LLC's motion to intervene. (Burton Aff. Exh. K). The Trial Court scheduled the *Harrell* case first for trial. The *Harrell* case was tried before a jury for nearly two weeks commencing on February 3, 2014. The jury returned a verdict in favor of S&ME. (Burton Aff.).

Following two extensions, on April 4, 2014, Appellants filed their Designation of Matter to be Included in the Record on Appeal. On April 8, 2014, Appellants filed a Supplemental Designation of Matter to be Included in the Record on Appeal. On April 22, 2014, Appellants filed a Motion for Extension of Time to File Supplemental Designation of Matter. On April 28, 2014, this Court extended the time for Appellants to file their supplemental designation.

On June 6, 2014, Respondent served its Designation of Matter to be Included in the Record on Appeal. More than two months later, on August 18, 2014, Appellants belatedly

served an Objection to Respondent's Designation of Matter. The Appellants' deadline to file the Record on Appeal is September 2, 2014.

Argument

Appellants seek to exclude items 1, 5, and 34 from Respondent's Designation of Matter. These include the *Harrell* Complaint filed on August 8, 2011, the *McCollum* Complaint filed on January 4, 2013, and the Verdict in *Harrell* filed on February 17, 2014. First, Appellants' motion is not timely. Respondent served its Designation on June 6, 2014. Respondents' motion more than two months later and on the eve of the deadline for compiling the Record on Appeal is not timely and the motion should be denied accordingly.

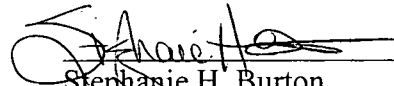
Second, Appellants incorrectly contend that these documents are not relevant. Such an argument is, at best, disingenuous. Appellants' entire action against S&ME (as alleged in their pleadings and as argued in their brief on appeal) is that S&ME was negligent when it performed engineering services on the *Harrell* lot and that S&ME somehow owed a duty to all adjacent future landowners when it performed these services. Not only does Appellants' Complaint specifically refer to S&ME's report prepared for the *Harrell* lot, Appellants relied upon evidence obtained in the *Harrell* action in opposing the motion for summary judgment and they continue to do so on appeal. Appellants' theory, using the same shared expert as the Harrells, is that the entire cul-de-sac in which these three lots are located is subject to a slope failure. It is inconsistent to argue that evidence in the *Harrell* case is relevant to Appellants' claims, yet the Complaint is somehow irrelevant.

In addition, it is abundantly clear that the Trial Court was well-aware of the *Harrell* and *McCollum* matters when it considered Respondent's motion for summary judgment. The cases

are all assigned to Judge Newman and he heard all of the motions at the same hearings. The motions for summary judgment were argued at the same time.

The documents should properly be contained in the Record on Appeal and Appellants' belated motion should be denied.

August 28, 2014
Spartanburg, South Carolina



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Inc.

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PROOF OF SERVICE

The undersigned, Sherry Philson, certifies that she is an employee of Gibbes Burton, LLC and on the 28th day of August 2014, she served copies of the following:

1. Respondent's Return to Appellants' Objection to Respondent's Designation of Matter; and
2. Affidavit of Stephanie H. Burton

by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed as follows:


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SEP 02 2014

SC Court of Appeals

Thomas E. Dudley, III
Townes Boyd Johnson, III
Kenison, Dudley & Crawford, LLC,
704 E. McBee Avenue
Greenville, SC 29601

August 28, 2014



Sherry Philson