

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2011-CP-23-63768

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

SHB
#1

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.

AFFIDAVIT OF STEPHANIE H. BURTON

The undersigned, being duly sworn, states as follows:

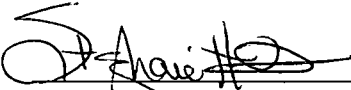
1. I represent S&ME, Inc. in the above-referenced matter.
2. On or about August 8, 2011, Jack R. Harrell, Jr. and Tina W. Harrell v. Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC and S&ME, Inc. (C.A. No. 2011-CP-23-5300), was filed in the Greenville County Court of Common Pleas. The *Harrell* case involves lot 31 in Jasmine Cove of the Cliffs at Keowee Falls South. The *Harrell* Plaintiffs alleged that their lot was experiencing a deep seated slope failure.

3. On or about January 4, 2013, McCollum 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), was filed in the Greenville County Court of Common Pleas. The *McCollum* case involves lot 30 in Jasmine Cove of the Cliffs at Keowee Falls South. The *McCollum* plaintiff alleges that lot 30 was experiencing a deep seated slope failure. SHB
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4. On September 27, 2011, Appellants filed the Complaint in the present action in Greenville County relating to lot 32. Attached hereto as Exhibit A is a true and accurate copy of Appellant's Complaint.
5. 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. Attached hereto as Exhibit B are true and accurate copies of the April 24, 2012 Orders.
6. On October 24, 2013, Appellants filed a Motion to Consolidate this action with the *Harrell* action. Attached hereto as Exhibit C is a true and accurate copy of Appellants' Motion to Consolidate Cases.
7. On December 13, 2013, at the hearing on the Motion to Consolidate, the motion was denied but the Court directed and the parties agreed that discovery could be consolidated. Attached hereto as Exhibit D is a true and accurate copy of the April 5, 2013 Order denying the motion to consolidate.

8. On January 3, 2013, McCollum Business, LLC filed a Motion to Intervene in this case. Attached hereto as Exhibit E is a true and accurate copy of the Motion to Intervene.
9. On January 16, 2013, Respondent filed a Motion for Summary Judgment in this case. Attached hereto as Exhibit F is a true and accurate copy of S&ME's Motion for Summary Judgment.
10. On January 16, 2013, Respondent filed a Motion for Summary Judgment in the *Harrell* case. Attached hereto as Exhibit G is a true and accurate copy of S&ME's Motion for Summary Judgment.
11. 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 deposition excerpts and exhibits from depositions taken in the *Harrell* case prior to consolidation of discovery.
12. On May 3, 2013, Respondent filed a Motion to Strike Portions of Plaintiff's Memorandum in Opposition to S&ME, Inc.'s Motion for Summary Judgment. Attached hereto as Exhibit H is a true and accurate copy of Respondent's Motion to Strike.
13. On May 3, 2013, a hearing was held on Respondent's Motions for Summary Judgment both in this case and in the *Harrell* case. The Trial Court also heard Respondent's Motion to Strike. The Trial Court denied the motion to strike at the hearing. Attached hereto as Exhibit I is a true and accurate copy of the Transcript of the hearing of May 3, 2013, page 65.

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14. On May 7, 2013, the Trial Court filed a Form 4 Order denying Respondent's Motion to Strike. Attached hereto as Exhibit J is a true and accurate copy of the May 7, 2013 Order.
15. On May 7, 2013, the Trial Court issued an Order denying McCollum Business, LLC's Motion to Intervene. Attached hereto as Exhibit K is a true and accurate copy of the May 7, 2013 Order.
16. 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.


Stephanie H. Burton

SWORN to before me this
28th day of August, 2014.



Notary Public for South Carolina
My Commission Expires: 01/13/2024

Exhibit A

Greenville County, South Carolina, and has as a subsidiary Defendant Keowee Falls Investment Group, LLC. The Cliffs Communities, LLC does business as The Cliffs at Keowee Falls South.

3. Upon information and belief, Defendant Keowee Falls Investment Group, LLC is a limited liability company existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina. Upon information and belief, Keowee Falls is controlled by The Cliffs Communities.

4. Upon information and belief, Defendant Cliffs Real Estate, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina, and who acted as the dual real estate agent for the Plaintiffs and Cliffs Defendants for the sale of the subject Lot to the Plaintiffs and for a subsequent listing agreement with Plaintiffs.

5. Upon information and belief, Defendant The Cliffs Golf and Country Club, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina who was a party to the subject Real Estate Sale and Purchase Agreement and was paid monies, and has continued to be paid monies, in consideration of the Plaintiffs entering said contract.

6. The Cliffs Defendants were all involved, as seller- and/or as agents of the seller- in the acts surrounding the sale described herein to Plaintiffs of Lot 32, Jasmine Point, said Lot being located in the subdivision known as The Cliffs

at Keowee Falls South in the County of Greenville, State of South Carolina (the "Lot").

7. Upon information and belief, Defendant S&ME is a North Carolina corporation doing business in South Carolina, maintaining a place of business in Greenville, South Carolina, and operating an engineering firm that conducted investigations and offered professional opinions related to property in The Cliffs at Keowee Falls South subdivision, including Plaintiffs' Lot.

8. The Court has Jurisdiction over the parties and subject matter in this action, and Venue is proper in this Court.

STATEMENT OF THE FACTS

9. Prior to June 6, 2005, Plaintiffs toured the Cliffs at Keowee Falls South subdivision with a Cliffs Defendants' employee, J. Scott. Plaintiffs desired to purchase the vacant Lot, which is the subject of this action.

10. Prior to purchasing the subject Lot, the Cliffs Defendants gave the Plaintiffs a H.U.D. Report dated May 5, 2004 (a copy of said HUD Report is attached hereto and incorporated herein by reference as **Exhibit "A"**). The report contained express representations about the subdivision, including the build-ability of the lots in the subdivision (including the Lot at issue) and that unsuitable subsurface conditions were not present that would warrant the use of special construction techniques to build on the lots (including the Lot at issue).

11. On or about June 20, 2005, the Plaintiffs and the Cliffs Defendants executed a "Real Estate Sale and Purchase Agreement" (a copy of said contract is attached hereto and incorporated herein by reference as **Exhibit "B"**).

12. As evidenced by the terms of said contract, the Cliffs Defendants understood that the Plaintiffs, in consideration of purchasing the Lot, intended to build a house on the Lot for use as a second home, or that if Plaintiffs sold the Lot, that purchaser would be able to build a residence on it.

13. The H.U.D. Report and the contract with the Cliffs Defendants contained an express representation that if DHEC had not previously approved the installation of a septic system on the Lot, or the Plaintiffs were unable to obtain a septic permit, and if the Cliffs is unable to secure such approval, the Cliffs Defendants would refund Plaintiffs' purchase price.

14. The contract also included a provision whereby the Defendant Cliffs Real Estate, Inc. was paid a portion of the sales price as its purported commission for selling the Lot to Plaintiffs upon the express premise (and understandings described herein) that the Lot be suitable for residential construction.

15. The contract also obligated the Plaintiffs to, *inter alia*, pay monies to Defendant The Cliffs Golf and Country Club, Inc. for a membership to the Cliffs Golf and Country Club based on the Plaintiffs purchase of the subject Lot- the basis of said Lot purchase (suitability for residential construction) being known to The Cliffs Golf and Country Club, Inc. by virtue of its inclusion as a party in the subject contract.

16. Sometime in April or May of 2011, Plaintiffs were contacted by an adjacent property owner, Jack Harrell ("Harrell") about a subsurface condition

that was effecting Harrell's lot and the *cul de sac* which is located above and adjacent to both the Plaintiffs' Lot and Harrell's lot.

17. Harrell shared with Plaintiffs an engineer's report dated July 2005 from Defendant S&ME that was submitted to, and for the benefit of, the Cliffs Defendants concerning abnormal geological conditions on Harrell's lot that extended to Plaintiffs' Lot (a copy of said S&ME report is attached hereto and incorporated herein by reference as **Exhibit "C"**). Harrell also shared the results of his own engineer's investigation which identified a geological condition known as a "scarp" or slope failure that was occurring on not only Harrell's lot, but on both of Harrell's neighboring lots, including the Lot owned by Plaintiffs. (See copy of Carroll L. Crowther, P.E.'s engineering report ["Harrell Report"], attached hereto and incorporated herein by reference as **Exhibit "D"**).

18. Carroll L. Crowther, P.E. ("C. Crowther") was hired by Plaintiffs and conducted a site investigation on Plaintiffs' Lot. C. Crowther determined the scarp or slope failure caused an unstable soil condition on Plaintiffs' Lot. C. Crowther determined that normal, reasonable construction techniques could not be used to build a house on Plaintiffs' Lot ("McCarthy Report"). (See copy of Carroll L. Crowther, P.E.'s McCarthy Report attached hereto and incorporated herein by reference as **Exhibit "E"**).

19. C. Crowther opined that the "scarp" or slope failure on Plaintiffs' Lot made the site unsuitable for a septic system (See **Exhibit "E"**).

20. Based on C. Crowther's findings, Plaintiffs are unable to build a house on their Lot because of the unstable soil conditions located thereon.

Further, Plaintiffs understand they would not be able to sell the Lot for a value comparable to the amount they paid for the Lot because no house can be built on it.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract – The Cliffs Defendants)

21. The allegations of the preceding paragraphs are incorporated herein by reference.

22. Plaintiffs entered into a contract with the Cliffs Defendants for the purchase of Lot 32, Jasmine Cove in The Cliffs at Keowee Falls South subdivision (See Exhibit "B").

23. The Cliffs Defendants expressly warranted that no unstable soils were on the Lot such that the use of any special construction techniques would not be required to build a residence thereon.

24. The Cliffs Defendants also expressly warranted that if DHEC would not approve of an individual sewage treatment system on the Lot, then the Cliffs Defendants would refund the purchase price in exchange for Plaintiffs deeding the Lot back to Defendant Cliffs.

25. The Cliffs Defendants also expressly warranted that there were no unusual natural hazards on the Lot.

26. The Cliffs Defendants breached the contract in one or more of the following particulars:

- (i) the Lot contains unstable soils such that no residence can be reasonably built thereon, or at a minimum, special construction techniques would be required;

(ii) a DHEC permit for an individual sewage treatment system will not be possible because of the unstable soils on the Lot;

(iii) despite the Cliffs Defendants' knowledge of the Plaintiffs inability to obtain a permit for an individual sewage treatment system, the Cliffs Defendants have not agreed to refund the purchase price as they were required under the contract;

(iv) the Lot contains an unusual natural hazard; and

(v) the Cliffs failed to disclose the knowledge they had about the unstable soil condition on the Lot from 2005-2011.

27. Because of the nature of the unstable soil condition, it effectively nullifies any value having been transferred by the Cliffs Defendants to the Plaintiffs. In consideration of the representations made by the Cliffs Defendants, the Plaintiffs and the Cliffs Defendants entered into the subject contract with the mutual understanding and agreement that the value paid by the Plaintiffs to the Cliffs Defendants was representative of the Plaintiffs' ability to reasonably build a house on the Lot, was representative of the Lot's suitability for normal residential construction techniques, and, regardless of whether the Plaintiffs ever built a house on the Lot, was representative of the marketability of the Lot upon which the Plaintiffs could rely in transferring it for comparable value to any potential grantees of the Plaintiffs. These representations made by the Cliffs Defendants being false are further breaches of the contract.

28. Because of the nature of the Cliffs Defendants' breaches of the contract, the Plaintiffs seek rescission of the contract, the value paid by Plaintiffs for the Lot, all other monies paid by the Plaintiffs to the Cliffs Defendants and all direct and consequential damages, plus attorneys' fees, costs and interest.

29. As an additional, alternative request for relief, the Plaintiffs seek a refund of the purchase price pursuant to the provisions of the above referenced H.U.D. Report and contract, which provide for the refund of Plaintiffs' purchase price, and other costs, plus attorneys' fees, since the Lot cannot be permitted for an individual sewage treatment system nor can a residence be built without using special construction techniques.

FOR A SECOND CAUSE OF ACTION
(Fraud – The Cliffs Defendants)

30. The allegations of the preceding paragraphs are incorporated herein by reference.

31. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could effect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of that Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

32. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted the Plaintiffs' Lot and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot, materially affecting the sales contract.

33. The Cliffs Defendants either knew of the falsity of its material misrepresentations or recklessly disregarded the truth or falsity of the misrepresentations.

34. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of and, pursuant to their right to rely thereon, did rely thereon in consummating the purchase of the Lot that is now worthless.

35. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered actual, consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation – The Cliffs Defendants)

36. The allegations of the preceding paragraphs are incorporated herein by reference.

37. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

38. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot, materially affecting the sale contract.

39. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Plaintiffs justifiably relied upon in consummating the purchase of the Lot that is now worthless.

40. The Cliffs Defendants had a pecuniary interest in making the misrepresentation to the Plaintiffs, and the Cliffs Defendants owed a duty of care to see that truthful information was communicated to the Plaintiffs.

41. The Cliffs Defendants breached its duty by failing to exercise due care.

42. The Plaintiffs suffered a pecuniary loss as a direct and proximate result of their reliance on the Cliffs Defendants' misrepresentations in an amount of consequential, special and punitive damages to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

FOR A FOURTH CAUSE OF ACTION
(Constructive Fraud – The Cliffs Defendants)

43. The allegations of the preceding paragraphs are incorporated herein by reference.

44. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005, materially affecting the sales contract.

45. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot.

46. The Cliffs Defendants ought to have known of the falsity of its material misrepresentations.

47. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of; and, pursuant to the Plaintiffs right to rely thereon, did rely thereon in consummating the purchase of the Lot that is now worthless.

48. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

FOR A FIFTH CAUSE OF ACTION
(Professional Negligence - S&ME)

49. The allegations of the preceding paragraphs are incorporated herein by reference.

50. Defendant S&ME was engaged by the Cliffs Defendants to investigate subsurface conditions affecting the (Harrell's) lot adjacent to Plaintiffs' Lot for the purpose of accurately reporting subsurface conditions in light of the affect of same on the suitability of the property for residential construction,

recommending proper testing, and recommending proper methods of remediation, if any.

51. Defendant S&ME issued a report identifying that there was abnormal geological conditions (the scarp) on Harrell's lot that extended to Plaintiffs' Lot and that there was evidence that a "scarp" existed on Harrell's lot as well as the *cul de sac* which is located above (in elevation) and adjacent to both the Plaintiffs' Lot and Harrell's lot – the *cul de sac* serving as the points of vehicular ingress/egress to/from the roadway and both lots.

52. Upon information and belief, S&ME's professional opinion was sought in order to determine whether residential construction could reasonably take place on the property next to Plaintiffs. Based on S&ME's conclusions regarding the existence and location of the "scarp" feature together with S&ME's knowledge of its purpose in issuing a professional opinion, S&ME knew or should have known that the "scarp" feature would materially impact the viability of residential construction on the surrounding property, to include the property of the Plaintiffs.

53. S&ME owed a duty of care to the owners (including without limitation the Cliffs, Harrells and Plaintiffs) of the properties upon which S&ME discovered the "scarp" to perform further testing, or recommended additional testing on adjacent lots, and/or to inform such owners of S&ME's knowledge regarding the "scarp", and the material impact this feature could have on the viability, or lack thereof, of reasonable, residential construction taking place on

said properties and the impact this feature could have on the value of the property.

54. Upon information and belief, Defendant S&ME did not further investigate, or recommend additional investigation, the extent in which the scarp affected the Plaintiffs' Lot, or otherwise notify the owners of said properties of the abnormal geological conditions and the impact the same could have on the value of the property and the viability of reasonable, residential construction taking place on the property.

55. Defendant S&ME, without conducting any further meaningful tests on the Harrell lot or on the Plaintiffs' Lot and without otherwise notifying the owners of the potential significance of the abnormal geological conditions, simply opined that a residence could be built on the Harrell lot.

56. Defendant S&ME's silence as to Plaintiffs' Lot amounted to a material omission as to a condition known to Defendant S&ME that could materially effect the use of, value of, and the viability of reasonable residential construction on the Plaintiffs' Lot.

57. All of the above violates the standard of care of Geotechnical Engineers in South Carolina, particularly in the Upstate of South Carolina, where Plaintiffs' Lot is located.

58. In compliance with S.C. Code Ann. 15-26-100, *et. seq.* Plaintiff is filing as a part of this Complaint an affidavit based on the available evidence at the time of the filing of the affidavit. This affidavit, executed by Carroll L. Crowther, P.E. is attached hereto and incorporated herein by reference as

Exhibit "F".

59. As a consequential and proximate result of Defendant S&ME's failure to adhere to the standard of care, Plaintiffs have been damaged as they paid over \$1 million dollars for a Lot that cannot be used as represented, for which the Plaintiffs hereby sue, together with consequential, special and punitive damages in an amount to be determined by a jury, and costs, attorneys' fees and interest.

FOR A SIXTH CAUSE OF ACTION
(Violation of the Interstate Land Sales Full Disclosure Act;
15 U.S.C.A. § 1701, *et. seq.* (the "Act")
- The Cliffs Defendants)

60. The allegations of the preceding paragraphs are incorporated herein by reference.

61. This cause of action is brought by Plaintiffs against all Cliffs Defendants under the provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701, *et. seq.*, for rescission, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot.

62. This Court has jurisdiction over this claim pursuant to 15 U.S.C.A. § 1719, which provides concurrent non-removable jurisdiction on actions brought under the Act that are filed in state court. State courts have concurrent jurisdiction over suits in equity and actions at law brought to enforce any liability or duty created by this title. In accordance with the Act, "Any suit or action may be brought ... in the district where the offer or sale took place, if the Defendant participated therein... No case arising under this chapter and brought in any

State court of competent jurisdiction shall be removed to any court of the United States”.

63. The Plaintiffs are “purchasers” within the provisions of the Act. The Defendants, as defined above, collectively and individually are the “Developer”, or agents of the “Developer” within the context of the Act. At the time of the sale, Mr. McCarthy resided in Georgia and Ms. McCarthy resided in North Carolina.

64. The Act prohibits the sale or lease of “lots” in a “subdivision” using any means of interstate commerce, unless the lots are either exempt or registered with the United States Department of Housing and Urban Development (“HUD”). The Act applies, if, by means of interstate commerce (e.g. print media, television, internet, etc.) are used to solicit offers to buy or to make offers to sell, regardless of whether the owner/developer has engaged in any advertising or other marketing or sales activities directed outside the state where the property is located.

65. The subject Lot is located in a subdivision and was sold by the Cliffs Defendants using means of interstate commerce such that the Act applies to the Lot. Furthermore, the subject Lot is not considered “exempt”, as defined in the Act.

66. Unless a particular sale or lease is exempt from the registration requirements, the Act requires preparation and filing of a “Statement of Record” with HUD’s Office of Interstate Land Sales Registration. The Statement of Record consists of two parts: a detailed disclosure document referred to as the Property Report, and an Additional Information and Documentation section (or

"AID") that provides additional information and documentation to support the representations made in the Property Report.

67. Upon information and belief, the Cliffs Defendants did not provide the Plaintiff a full Statement of Record, but only a Property Report.

68. Pursuant to the Act, the Cliffs Defendants were to provide a statement of record that included, *inter alia*, an accurate statement of the topography of the subdivision, a statement of the existence of any unusual conditions relating to safety which affect the subdivision and are known to the developer, and such other information and documents as being reasonably necessary or appropriate for the protection of the purchasers. Moreover, the Act required the Cliffs Defendants to provide the Plaintiffs with a Property Report that contained information necessary or appropriate in the public interest of for the protection of the purchasers such as the Plaintiffs.

69. Further in accordance with the Act, "it shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails ... to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein... to employ any device, scheme, or artifice to defraud; to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or

lease) not misleading, with respect to any information pertinent to the lot or subdivision; to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser...”.

70. The Property Report provided by the Cliffs Defendants contained untrue statements of material facts and omitted to state material facts required to be stated therein. Specifically, the Cliffs Defendants failed to make any statement to the Plaintiffs regarding the abnormal geological condition of the property despite the fact that such a statement and associated facts were material and pertinent in light of the circumstances and within the context of the overall offer and sale. Moreover, the Cliffs Defendants made the following misrepresentations in the Property Report (see **Exhibit “A”**):

GENERAL TOPOGRAPHY

The general topography of the land within Keowee Falls South is a combination of gently rolling hills and valleys.

...
None of the lots in the subdivision contains any steep slopes, rock, outcropping, unstable or expansive soil conditions that could necessitate the use of special construction techniques to build.

DRAINAGE AND FILL

None of the lots require draining or fill prior to being used for the construction of residences.

FLOOD PLAIN

The subdivision is not located within a flood plain or an area designated by any federal, state or local agency as being prone to flooding. ...

FLOODING AND SOIL EROSION

We will provide temporary and permanent control measures within the subdivision which will aggressively control storm water, erosion and sediment control, including sodding and seeding in

areas of heavy grading or cut and fill, along with construction of diversion ditches and sediment control basins as necessary. ...

HAZARDS

We are not aware of any unusual safety factors or hazards that affect the subdivision or any proposed plans for construction that may create a future nuisance or safety hazard.

The lots covered by this Property Report are not subject to unusual natural hazards, and no federal, state or local agency has formally identified the area as one subject to the frequent occurrence of natural hazards.

71. The above referenced representations made by the Cliffs Defendants and their agents were misleading, and operated as a fraud and deceit upon the Plaintiffs, and were made in violation of the Act, for which the Plaintiffs hereby sue.

FOR A SEVENTH CAUSE OF ACTION **(Violation of the S.C. Unfair Trade Practices Act- The Cliffs Defendants)**

72. The allegations of the preceding paragraphs are incorporated herein by reference.

73. The above described misrepresentations made by the Cliffs Defendants to the Plaintiffs were unfair and deceptive, as defined in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et. seq.* (the "UTPA"), and have proximately caused the Plaintiffs to suffer an ascertainable loss of property and money.

74. The actions of the Cliffs Defendants affect the public interest because their actions are capable of repetition in the deception and defrauding of others, and, in fact, have been repeated in the deception and defrauding of

others, to include without limitation, the Plaintiffs' neighbors. The repeated actions of the Plaintiffs affect the public's interest.

75. The actions of the Cliffs Defendants were willful within the meaning and interest of § 39-5-140 of the UTPA.

76. As a direct and proximate result of the actions of the Cliffs Defendants, the Plaintiffs paid funds greater than the actual value of the Lot. As such, the violation of the UTPA entitles Plaintiffs to treble damages and reasonable attorneys' fees, for which the Plaintiffs hereby sue.

WHEREFORE, Kevin McCarthy and Courtney E. McCarthy pray for the following relief:

- a) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the First Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- b) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Second Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- c) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Third Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- d) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Fourth Cause of Action in an amount to be determined by a

jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;

- e) Judgment against Defendant S&ME, Inc. for the Fifth Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- f) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Sixth Cause of Action for rescission, and judgment in an amount to be determined by a jury, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot, together with interest at the legal rate as determined and disbursements of this action;
- g) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Seventh Cause of Action for treble damages and attorneys' fees, together with interest at the legal rate as determined and disbursements of this action;
- h) For an award of attorneys' fees;
- i) For an award of the costs of this action; and
- j) For such other and further relief that this Court deems just and proper.

Respectfully submitted this 23 day of September, 2011.

KENISON, DUDLEY & CRAWFORD, LLC



Thomas E. Dudley, III (SC Bar # 66154)
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Attorneys for Plaintiffs

Exhibit B

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT
 COUNTY OF GREENVILLE) MOTION AND ORDER FOR CASE ASSIGNMENT
 FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 JACK R. HARRELL, JR. AND TINA HARRELL)
 Plaintiff)
 vs.)
 Keowee Falls Investment Group, et al.)
 Defendant) CASE NO. 2011-CP-23-5300

TO THE BUSINESS COURT
 PILOT PROGRAM

1. As counsel for a party who has appeared in this action, we move for an order of the Chief Justice assigning this case to the Business Court Pilot Program of the South Carolina Circuit Courts. We certify that as of the date of this Motion, no more than 180 days have passed since the commencement of this action. In addition, we certify that all parties have been notified of this request.

2. The principal claim or claims made in the above-referenced matter are made under the following Titles of the South Carolina Code and the matter is appropriate for assignment to the Business Court Pilot Program. (Note: Please check all that are applicable, and attach a description of the claims made in the above-referenced lawsuit.)

- Title 33—South Carolina Business Corporation Act of 1988;
- Title 35—South Carolina Uniform Securities Act of 2005;
- Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
- Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or
- Other Appropriate Matter determined by the Chief Justice.

3. Insert name and contact information of moving party or parties:

Party:	Jack R. Harrell, Jr. and Tina Harrell	Party:	
Name:	T. S. Stern, Jr. And V. Elizabeth Wright	Name:	
Bar No.:	5337/76029	Bar No.:	
Address:	211 Pettigru Street, Greenville, SC 29601	Address:	
Phone:	864-24-9000 Fax: 233-9777	Phone:	
Email:	sstern@covpatlaw.com, bwright@covpatlaw.com	Email:	
Signature:		Signature:	
Date:		Date:	

*Add additional signature lines and contact information as necessary.

4. Indicate whether the non-moving party or parties consents, does not oppose, opposes; position on assignment is unknown.

Recommendation of the Business Court Judge: Recommends Declines to Recommend


 Signature of Business Court Judge 2/13/12
Date

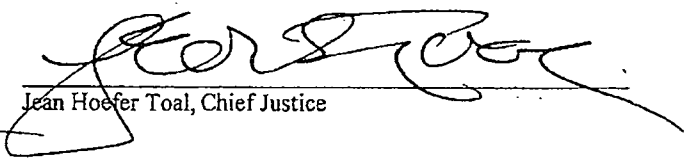
Assignment to the Business Court Pilot Program for GREENVILLE County is hereby ORDERED
 DENIED.
 SCCA BC Form 101 (Rev. 12/2009)

Case has been assigned to Judge Clifton Newman as complex litigation

It is further ORDERED DENIED that exclusive jurisdiction over this case be assigned to the Honorable EDWARD W. MILLER to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

This 29th day of April 2012
Columbia, South Carolina



Jean Hofer Toal, Chief Justice

STATE OF SOUTH CAROLINA,) IN THE CIRCUIT COURT
 COUNTY OF GREENVILLE) MOTION AND ORDER FOR CASE ASSIGNMENT

Kevin McCarthy, et al.,) TO THE BUSINESS COURT
 vs.) PILOT PROGRAM

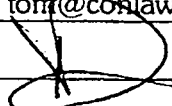
Plaintiff)
 702 100 27)
 Defendant.) CASE NO. 2011-CP-23-6376

1. As counsel for a party who has appeared in this action, we move for an order of the Chief Justice assigning this case to the Business Court Pilot Program of the South Carolina Circuit Courts. We certify that as of the date of this Motion, no more than 180 days have passed since the commencement of this action. In addition, we certify that all parties have been notified of this request.

2. The principal claim or claims made in the above-referenced matter are made under the following Title of the South Carolina Code and the matter is appropriate for assignment to the Business Court Pilot Program. Please check all that are applicable, and attach a description of the claims made in the above-referenced lawsuit.

- Title 33—South Carolina Business Corporation Act of 1988;
- Title 35—South Carolina Uniform Securities Act of 2005;
- Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
- Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or
- Other Appropriate Matter determined by the Chief Justice.

3. Insert name and contact information of moving party or parties:

Party: Kevin & Courtney McCarthy	Party:
Name: Thomas E. Dudley, III	Name:
Bar No.: 66154	Bar No.:
Address: 704 E. McBee Ave, Greenville, SC 29601	Address:
Phone: 242-4899 Fax: 242-4844	Phone: Fax:
Email: tom@conlaw.com	Email:
Signature: 	Signature:
Date: 2/8/12	Date:

*Add additional signature lines and contact information as necessary.

4. Indicate whether the non-moving party or parties consents, does not oppose, opposes; position on assignment is unknown.

Recommendation of the Business Court Judge: Recommends Declines to Recommend


 Signature of Business Court Judge 3/1/12
Date

Assignment to the Business Court Pilot Program for GREENVILLE County is hereby ORDERED DENIED.

It is further ORDERED DENIED that exclusive jurisdiction over this case be assigned to the Honorable EDWARD W. MILLER to hear and handle all pretrial motions and other matters pertaining to this case.

Case has been assigned to Clifton Newman as complex litigation

PAUL J. KENNEDY
 CLERK OF COURT
 GREENVILLE, S.C.
 2012 FEB 10 AM 10:00

And it is SO ORDERED.

This 20th day of April 2012
Columbia, South Carolina

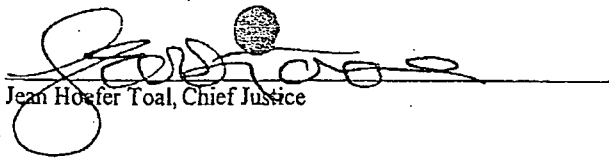

Jean Hofer Toal, Chief Justice

Exhibit C

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	THIRTEENTH JUDICIAL CIRCUIT
)	
Jack R. Harrell, Jr. and Tina W. Harrell,)	C. A. No. 2011-CP-23-5300
)	
Plaintiffs,)	
)	
v.)	
)	
Keowee Falls Investment Group, LLC,)	
The Cliffs Communities, LLC, and)	
S&ME, Inc.,)	
)	
Defendants.)	
)	
<hr/>)	
Kevin McCarthy and Courtney E.)	
McCarthy,)	C. A. No. 2011-CP-23-6376
)	
Plaintiffs,)	
)	
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 County)	
Club, Inc., and S&ME, Inc.,)	
)	
Defendants.)	
)	
<hr/>)	

**MOTION TO
CONSOLIDATE CASES**

WILL YOU PLEASE NOTICE the Plaintiffs in Civil Action No. 2011-CP-23-6376, Kevin McCarthy and Courtney E. McCarthy (collectively hereinafter “McCarthy”), by and through their undersigned counsel, hereby move this honorable Court on the tenth (10th) day hereafter, or as soon thereafter as counsel might be heard, for an Order consolidating the above-referenced cases pursuant to Rule 42(a) of the *South Carolina Rules of Civil Procedure*. In support their Motion to Consolidate, McCarthy would show the following:

1. On or about April 23, 2012, the Supreme Court of South Carolina assigned Civil

Action No. 2011-CP-23-5300 and Civil Action No. 2011-CP-23-6376 (collectively hereinafter the "Actions"), and exclusive jurisdiction thereto, to the Honorable Clifton Newman;

2. The matters at issue in the Actions are related and involve common questions of law and fact;

3. A consolidation of the Actions will not unduly delay or prejudice the adjudication of the rights of the parties to either action;

4. A consolidation of the Actions will decrease costs and delays to the parties and promote judicial economy.

Wherefore, Kevin McCarthy and Courtney E. McCarthy pray this Court grant their Motion to Consolidate the Actions.

Respectfully submitted this 24 day of October, 2012.



Thomas E. Dudley, III (SC Bar # 66154)
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, S.C. 29601
Phone: (864) 242-4899
Fax: (864) 242-4844
Counsel for Kevin McCarthy and Courtney E. McCarthy

Exhibit D

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS
 2011-CP-23-6376

FORM 4
 FILED CLERK OF COURT
 GREENVILLE, CO., S.C.
 PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
 CASE NO. 2011 CP-23-5300-
 6376

2013 APR -5 P 1:32

Jack R. Harrell, Jr. and Tina Harrell;

Keowee Falls Investment Group, LLC, et. al

Kevin McCarthy and Courtney McCarthy

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

The motion to consolidate McCarthy v. Keowee Falls Investment Group, LLC, et. al (2011-CP-23-6376) and Harrell v. Keowee Falls Investment Group, LLC, et. al (2011-CP-23-5300) is denied.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

Exhibit E

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE 2013 JAN -7) AM 11: 39

IN THE COURT OF COMMON PLEAS

Kevin McCarthy and Courtney McCarthy,

C.A. NO.: 2011-CP-23-3676 ⁶³⁷⁶

FILED-CLERK OF COURT
GREENVILLE CO S C
PAUL B. WICKERSTYF

Plaintiffs,)

vs.)

**MOTION FOR INTERVENTION BY
McCOLLUM BUSINESS, LLC**

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 County
Club, Inc., and S&ME, Inc.,)

Defendants.)

TO: PLAINTIFFS KEVIN MCCARTHY AND COURTNEY E. MCCARTHY AND THEIR ATTORNEY THOMAS E. DUDLEY, III, M. STOKELY HOLDER, AND F. LEE PRICKETT, III; DEFENDANTS KEOWEE FALLS INVESTMENT GROUP, LLC, THE CLIFFS COMMUNITIES, LLC, d/b/a CLIFFS AT KEOWEE FALLS SOUTH, CLIFFS REAL ESTATE, INC., THE CLIFFS GOLF AND COUNTRY CLUB, INC., AND THEIR ATTORNEY ELIZABETH M. MCMILLIAN; AND DEFENDANT S&ME, INC., AND THEIR ATTORNEY STEPHANIE H. BURTON.

PLEASE TAKE NOTE that the undersigned attorney for McCollum Business, LLC will move before the presiding judge in the Court of Common Pleas of Greenville County, South Carolina, ten (10) days after service hereof or as soon thereafter as counsel may be heard, for an Order for Intervention pursuant to Rules 24(a) and (b) of the *South Carolina Rules of Civil Procedure*.

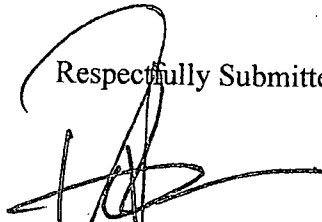
In support of this motion, McCollum Business, LLC ("McCollum Business") will show that it has filed a Complaint in the Court of Common Pleas for Greenville County, 2013-CP-23-0072, a copy of which is attached, against Defendants common to this action, alleging that it

purchased Lot 30, Jasmine Cove, in a subdivision known as The Cliffs at Keowee Falls South, and has been damaged as a result of said Defendants' failure to disclose a scarp, slope failure, site instability, or geological or subsurface conditions necessitating specialized construction techniques. McCollum Business is further informed that the scarp or slope failure affecting Lot 30 that forms the basis of its action is the same scarp or slope failure affecting Lots 31 and 32, which forms the basis of this action. McCollum Business is further informed and believes that there is a limited pool of insurance or other forms of remuneration for damages.

As a result of the foregoing, McCollum Business respectfully submits that it is entitled to intervention as matter of right pursuant to Rule 24(a), *SCRCP*, because it claims an interest relating to the property or transaction that is the subject of the above-captioned action, and it is so situated that the disposition of the above-captioned action may as a practical matter impair or impede its ability to protect that right. In the alternative, McCollum Business respectfully submits that it is entitled to permissive intervention pursuant to Rule 24(b), *SCRCP*, because its claim and the claim in the above-captioned action have a question of law or fact in common.

This Motion will be based on the statutory and case laws of the State of South Carolina, together with the attached Summons and Complaint and such other and further evidence as may be submitted by McCollum Business, LLC.

Respectfully Submitted,



David R. Price, Jr. (S.C. Bar # 75140)

DAVID R. PRICE, JR., P.A.

318 West Stone Avenue (29609)

Post Office Box 2446

Greenville, South Carolina 29602-2446

(864) 271-2636 office

(864) 271-2637 fax

David@GreenvilleLegal.com

Attorney for McCollum Business, LLC

Greenville, South Carolina

Date: January 7, 2013

Exhibit F

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

2013 JAN 16 PM 4: 56

IN THE COURT OF COMMON PLEAS

Kevin McCarthy and Courtney E. McCarthy,

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL A. WICKERSHED

Plaintiffs,

DEFENDANT S&ME, INC.'S
MOTION FOR SUMMARY JUDGMENT

vs.

C.A. No.: 2011-CP-23-6376

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.

SHB
#1

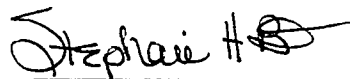
TO: THOMAS E. DUDLEY, III, ATTORNEYS FOR PLAINTIFFS AND ELIZABETH M. MCMILLAN, ATTORNEY FOR DEFENDANTS KEOWEE FALLS INVESTMENT GROUP, LLC AND THE CLIFFS COMMUNITIES, LLC D/B/A THE CLIFFS AT KEOWEE FALLS SOUTH, CLIFFS REAL ESTATE, INC., AND THE CLIFFS GOLF AND COUNTRY CLUB, INC.:

Defendant S&ME, Inc. ("S&ME") will move the Court, at such date and time as the Court shall direct, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting summary judgment in its favor as a matter of law. This motion is based upon the following grounds:

1. There is no genuine issue as to any material fact.
2. There is no evidence that S&ME owed Plaintiffs any duty of care.
3. There is no evidence that any alleged professional negligence of S&ME proximately caused the damages claimed by Plaintiffs.
4. Plaintiffs' negligence claim is barred by the economic loss rule.

5. There is no evidence that S&ME acted in a willful or wanton manner or in reckless disregard to Plaintiffs' rights.
6. Plaintiffs have not asserted any legal claim which would entitle them to an award of attorney's fees against S&ME.
7. Plaintiffs cannot recover the purchase price of the lot because the evidence establishes that a repair is feasible.
8. Plaintiffs cannot recover for any loss of investment opportunity because their claims are unduly speculative.
9. S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

This motion is based upon the pleadings filed in this action, the affidavit of Walker Birdsong filed herewith, upon the excerpts of depositions attached hereto, and upon applicable common and statutory law.



Stephanie H. Burton (#13089)
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: 864-327-5000
Facsimile: 864-327-5001

Attorneys for Defendant S&ME, Inc.

January 15, 2012
Spartanburg, South Carolina

Exhibit G

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

2013 JAN 6

IN THE COURT OF COMMON PLEAS
PM 3:32

Jack R. Harrell, Jr. and Tina W. Harrell)

Plaintiffs,)

vs.)

Keowee Falls Investment Group, LLC, The)
Cliffs Communities, LLC and S&ME, Inc.)

Defendants.)

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

DEFENDANT S&ME, INC.'S
MOTION FOR SUMMARY JUDGMENT

C.A. No.: 2011-CP-23-5300

SHB
#1

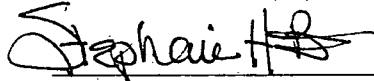
TO: T.S. STERN, JR. AND V. ELIZABETH WRIGHT, ATTORNEYS FOR PLAINTIFFS
AND ELIZABETH M. MCMILLAN, ATTORNEY FOR KEOWEE FALLS
INVESTMENT GROUP, LLC AND THE CLIFFS COMMUNITIES, LLC:

Defendant S&ME, Inc. ("S&ME") will move the Court, at such date and time as the
Court shall direct, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an
order granting summary judgment in its favor as a matter of law. This motion is based upon the
following grounds:

1. There is no genuine issue as to any material fact.
2. There is no evidence that S&ME owed Plaintiffs any common law duty of care when it prepared its report of May 15, 2009 for Resort Custom Homes as alleged in Plaintiffs' Third Cause of Action.
3. Plaintiffs' negligence claim is barred by the economic loss rule.
4. There is no evidence that S&ME otherwise owed Plaintiffs any duty of care.
5. There is no evidence that any alleged negligence of S&ME in preparing the May 15, 2009 report as alleged in Plaintiffs' Third Cause of Action proximately caused the damages claimed by Plaintiffs.

6. There is no evidence that S&ME ever made a false representation to Plaintiffs.
7. There is no evidence that S&ME owed any duty to Plaintiffs when it issued the May 15, 2009 report to Resort Custom Homes.
8. There is no evidence that Plaintiffs suffered any pecuniary loss as the result of their reliance on any representation made by S&ME.
9. Plaintiffs have not asserted any legal claim which would entitle them to an award of attorney's fees against S&ME.
10. Plaintiffs cannot recover the damages alleged in their complaint because the uncontroverted evidence establishes that a repair is feasible and such repair constitutes a betterment.
11. S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

This motion is based upon the pleadings filed in this action, the excerpts of depositions attached hereto, and upon applicable common and statutory law.



Stephanie H. Burton (#13089)
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: 864-327-5000
Facsimile: 864-327-5001

Attorneys for Defendant S&ME, Inc.

January 15, 2012
Spartanburg, South Carolina

Exhibit H

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

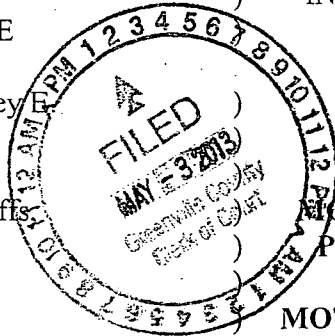
Kevin McCarthy and Courtney E. McCarthy,

Plaintiffs

vs.

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.



DEFENDANT S&ME, INC.'S MOTION TO STRIKE PORTIONS OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO S&ME, INC.'S MOTION FOR SUMMARY JUDGMENT

C.A. No.: 2011-CP-23-6376

Handwritten initials and the number 1.

TO: THOMAS E. DUDLEY, III, ATTORNEYS FOR PLAINTIFFS AND ELIZABETH M. MCMILLAN, ATTORNEY FOR DEFENDANTS KEOWEE FALLS INVESTMENT GROUP, LLC AND THE CLIFFS COMMUNITIES, LLC D/B/A THE CLIFFS AT KEOWEE FALLS SOUTH, CLIFFS REAL ESTATE, INC., AND THE CLIFFS GOLF AND COUNTRY CLUB, INC.:

Defendant S&ME, Inc. ("S&ME") will move the Court, at such date and time as the Court shall direct, pursuant to Rules 7(b) and 56 of the South Carolina Rules of Civil Procedure, for an order striking portions of Plaintiffs' Memorandum in Opposition to Defendant S&ME, Inc.'s Motion for Summary Judgment and certain exhibits attached to Plaintiffs' Memorandum in Opposition to Defendant S&ME, Inc.'s Motion for Summary Judgment. This motion is based upon the following grounds:

- 1. On August 8, 2011, Jack R. Harrell, Jr. and Tina W. Harrell filed a civil action in the Greenville County Court of Common Pleas against The Cliffs Communities, LLC, Keowee Falls Investment Group, LLC, and S&ME, Inc, C.A. No. 2011-CP-23-5300 (the "Harrell" case).

2. On September 27, 2011, Plaintiffs filed the above-referenced civil action in the Greenville County Court of Common Pleas.
3. On October 24, 2012, Plaintiffs filed a Motion to Consolidate this case with the Harrell case.
4. This Court held a hearing on Plaintiffs' Motion to Consolidate Cases on December 13, 2013. At the hearing, the Court denied the motion. However, after that date, the parties agreed to consolidate the cases for purposes of upcoming depositions to be taken thereafter.
5. Plaintiffs have improperly filed excerpts from depositions taken in the Harrell case prior to December 13, 2012, in opposition to S&ME's Motion for Summary Judgment. These materials include:
 - a. Exhibit D, Cliffs 000728, June 3, 2003 emails between Scott Beville and Brandon Smith;
 - b. Exhibit F, June 22, 2005 Proposal from S&ME to The Cliffs Communities;
 - c. Exhibit G, Excerpts from deposition of Don Nickell taken on November 5, 2012;
 - d. Exhibit H, June 22, 2005 Agreement for Services between S&ME, Inc. and The Cliffs Communities, Inc.;
 - e. Exhibit Z, Excerpts from deposition of Walker Birdsong taken on November 26, 2012; and
 - f. Exhibit AA, Excerpts from deposition of Michael Revis taken on November 28, 2012.

S&ME #2

6. Plaintiffs have also improperly filed materials in connection with their opposition to S&ME's Motion for Summary Judgment that are not properly authenticated by affidavit, deposition testimony, or otherwise:
 - a. Exhibit A, Satellite images
 - b. Exhibit D, Cliffs 000732, 000726, 000728, 000723, 000716, 000717, June 2005 emails between Cliffs employees;
 - c. Exhibit I, July 6, 2005 letter from Sandra Hyder to Plaintiffs;
 - d. Exhibit K, Keowee Sales Contract Info folder;
 - e. Exhibit M, August 8, 2005 letter from Sandra Hyder to Plaintiffs;
 - f. Exhibit N, October 10, 2005 letter from Vickie Little to Kevin McCarthy; and
 - g. Exhibit O, June 12 – June 16, 2008 emails between Cliffs employees.
7. These materials are not and cannot be part of the record in this case. Defendant S&ME is entitled to an order striking the materials and information identified above.
8. Defendant S&ME is also entitled to an order striking those portions of Plaintiffs' Memorandum in Opposition to S&ME, Inc.'s Motion for Summary Judgment that rely on the above-referenced exhibits, which are not properly part of the record. Specifically, S&ME is entitled to an order striking the following text from Plaintiffs' Memorandum in Opposition to S&ME's Motion for Summary Judgment:



Page 3:

The attached photos are Google earth photos of the Jasmine Cove point with the approximate location of the lots' property lines, as **Exhibit "A."**

Pages 4-5:

Cliffs Agrees To Trade Lot 31

- 06/03/05 **Cliffs 732** Tom Salisbury to Scott Beville, and Brad Childs. Rockwell (actual owner of Lot 31) hired engineer upon recommendation of surveyor Builder Larry Hutchinson mentioned to Jim Anthony who said "would buy it back or allow them to trade:" ...
- 06/03/05 **Cliffs 726** - (2:49pm) email from Scott Beville to Tom Salisbury, "I talked with Jim and we will trade Rockwell into another lot."

Cliffs Starts Looking At Jasmine Cove Lots

- 06/03/05 **Cliffs 728** - (2:57pm) email from Tom Salisbury to Scott Beville, "I think it might be a good idea to have someone check out the lots JC-31 and 32 and the Emerald Bay 35-39. They are falling into the lake pretty bad lately and represent a huge investment for Jim."
- 06/08/05 **Cliffs 723** Brandon Smith to Tom Salisbury, Scott Beville, "I'm going to have a crew on Lots 30, 32, 34, and 35."
- 05/14/05 **Cliffs 716** - 717 emails between Cheryl Miller, Cliffs and Dick Rockwell

-Asking for permission for Cliffs to have core samples of Lot 31.
Rockwell agrees but asks if engineering firms have differing opinions he wants option to trade.
(A copy of each of the above referenced Cliffs bates numbered documents are attached hereto as **Exhibit "D"**)

Sub
#4

Pages 5-6

S&ME Proposes To Evaluate "3 Lakefront Lots"

- 6/22/05 S&ME proposal to The Cliffs Communities, Don Nickell, Jr. P.E. (a copy of the S&ME proposal is attached hereto as **Exhibit "F"**)

Nickell gives S&ME the AES report and asks them to evaluate Lot 31 (D. Nickell Deposition, pp. 33, 46) (a copy

of all excerpts referenced herein of D. Nickell's Deposition are attached hereto as **Exhibit "G"**)

-references evaluation of "3 lakefront properties"
-include:

- (1) exploration of subsurface condition
- (2) analysis
- (3) opinions regarding the cause of unusual features on properties
- (4) geotechnical engineers recommendation

-Based on initial walk of lots, S&ME notes "...it appears that about 3 sloughs have occurred..."

"These surface features are very unique"

-report will present finding...regarding the cause of subsurface features and grading and foundation recommendations

-Project - "three lots" - Cliffs at Keowee Falls South (a copy of the S&ME Agreement for Services is attached hereto as **Exhibit "H"**)

07/06/05

Cliffs letter to Kevin & Courtney congratulating on contract and enclosing fully executed contract. The letterhead says "The Cliffs" at bottom www.cliffscommunities.com, no reference to KFIG (a copy of said letter is attached hereto as **Exhibit "I"**)

S&M
#5

Page 13

Walker Birdsong (S&ME): Agrees slope failure does not stop at property lines (Ex. Z, p. 42).

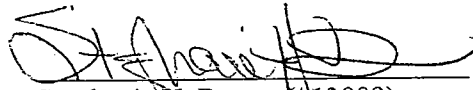
Pages 14-15

S&ME had worked for the Cliffs for fifteen plus years. (Ex. Z, p. 52; Ex. G, p. 32). Don Nickell of the Cliffs asked S&ME to look at the Alpha Environmental Sciences, Inc. ("AES") report and evaluate the lots (Ex. Z, p. 38; Ex. G, pp. 34, 53). The purpose of the report on Lot 31 in July 2005 was "to determine if the lot would be suitable to support a residential structure". (Ex. AA, p. 16, l. 4-6). Walker Birdsong of S&ME had a copy and reviewed the AES report when S&ME did their work on Lot 31 in 2005. (Ex. Z, p. 37; Ex. G, p. 46). Walker Birdsong was told by the Cliffs that a geological firm had looked at the lot (31) and was concerned and that owner was given another lot. (Ex. Z, p. 26).

Walker Birdsong visited the lots (Lots 30, 31 and 32) to generate a proposal. (Ex. Z, p. 43). Don Nickell assumed the S&ME proposal intended to look at Lots 30, 31 and 32 because they were the ones mentioned in the AES report. (Ex. G, pp. 46, 171, 173, 174). Walker Birdsong testified that he did not base the proposal on AES report. (Ex. Z, p. 42). Accordingly, it is clear that Birdsong's own walk of the property led to his proposal to evaluate the 3 lots. He at least initially recognized the condition spread across all 3 lots and that to do a thorough examination would require testing on all 3 lots. Yet in July, S&ME submitted a report to The Cliffs Communities only on Lot 31 and made zero reference to the conditions extending onto Lots 30 and 32; a clear violation of the statute and industry practice. Don Nickell could not explain why or how it went from 3 lots (Lots 30, 31, and 32) to one 1 (Lot 31). (Ex. G, pp. 173-174). After unsuccessfully trying to sell another person Lot 31 after disclosing the S&ME report, Jim Anthony of the Cliffs takes Lot 31 off the market because it had issues. (Ex. G, p. 57).

Sub
#6

This motion is based upon the pleadings and motions filed in this action and upon applicable common and statutory law.

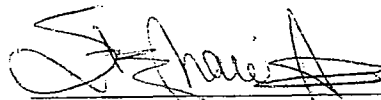


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Attorneys for Defendant S&ME, Inc.

May 3, 2013
Spartanburg, South Carolina

Defendant S&ME, Inc.'s counsel states that she has not consulted with Plaintiffs' counsel to resolve the matter contained in this motion because consultation would serve no useful purpose under the circumstances.



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May 3, 2012
Spartanburg, South Carolina

SAB
#7

Exhibit I

1 first of all, with regard to the motion to strike,
2 I am denying that motion. I believe that it's, uh,
3 -- the posture of this case and the nature of the
4 discovery would allow the use of exhibits from one
5 case in the other case. Of course, I say that
6 without knowing specifically who a couple of folks
7 are. A couple of names, I'll mention here. Where
8 is that motion to strike? It would extend to any
9 statements by employees of Cliffs, uh, --

10 **MR. DUDLEY:** And SME -- S&ME?

11 **THE COURT:** Yes. But the, uh, Sandra Hyder,
12 who is she?

13 **MS. McMILLAN:** She, Your Honor, was in the,
14 uh, -- I think she worked with Cliffs Real Estate,
15 Inc. and handled closings.

16 **THE COURT:** Okay. That would cover her.
17 Vickie Little?

18 **MS. McMILLAN:** I'm not sure who Vickie
19 Little is.

20 **THE COURT:** October 10, a letter from
21 Vickie Little to Kevin McCarthy.

22 **MS. McMILLAN:** Probably somebody that was
23 involved with helping the closing to take place.
24 Cliffs Real Estate, Inc. I would imagine, Your
25 Honor, but I'm not --

Exhibit J

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2306376

Kevin McCarthy	Courtney R. McCarthy	Cliffs Communities LLC	Cliffs At Keowee Falls South
		Keowee Falls Investment Group LLC	Cliffs Real Estate Inc
		Cliffs Golf And Country Club Inc	S&ME Inc
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order, (formal order to follow) Statement of Judgment by the Court:

Defendant's S&ME's Motion to Strike is denied.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

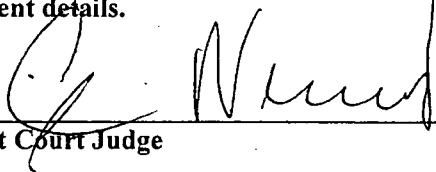
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2127

Judge Code

5/3/2013

Date

For Clerk of Court Office Use Only

517113

517113

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Elihue Dudley III Kenison, Dudley & Crawford,
LLC 704 East McBee Avenue Greenville, SC 29601

Stephanie Holmes Burton Gibbes Burton, LLC 308 East
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Elizabeth McDaniel McMillan McAngus Goudelock &
Courie, L.L.C. PO Box 2980 Greenville, SC 29602
David R Price Jr David R. Price, Jr., P.A. P.O. Box 2446
Greenville, SC 296022446

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Judge Newman

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

Exhibit K

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2306376

2013 MAY - 7 3:10

Kevin McCarthy Courtney R McCarthy	Cliffs Communities LLC Cliffs At Keowee Falls South Keowee Falls Investment Group LLC Cliffs Real Estate Inc Cliffs Golf And Country Club Inc S&ME Inc
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Motion for Intervention by McCollum Business, LLC is denied

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

ENTERED COMPUTER

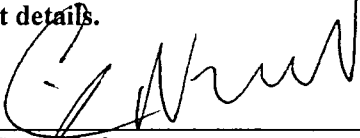
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Circuit Court Judge

2127

Judge Code

5/3/2013

Date

For Clerk of Court Office Use Only

5/7/13

5/7/13

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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LLC 704 East McBee Avenue Greenville, SC 29601

Stephanie Holmes Burton Gibbes Burton, LLC 308 East
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Elizabeth McDaniel McMillan McAngus Goudelock &
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David R Price Jr David R. Price, Jr., P.A. P.O. Box 2446
Greenville, SC 296022446

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

copy to Judge Newman

Paul B. Wickensimer Greenville County Clerk Of



Court - Clerk of Court

Court Reporter