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

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.

FINAL BRIEF OF RESPONDENT S&ME, INC.

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY CONCLUDE THAT S&ME DID NOT OWE A DUTY OF CARE TO APPELLANTS?

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    b. DID THE TRIAL COURT CORRECTLY CONCLUDE THAT THERE IS NO SPECIAL RELATIONSHIP BETWEEN APPELLANTS AND S&ME?

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STATEMENT OF THE CASE

On September 27, 2011, Appellants Kevin and Courtney McCarthy filed this action against 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 Respondent S&ME, Inc. (R. pp. 28-176). Appellants asserted a single claim for professional negligence against S&ME. (R. p. 38, line 17–p. 41, line 7). On November 9, 2011, S&ME filed its answer. (R. pp. 177-186). By scheduling order dated July 9, 2012, the Trial Court established December 31, 2012 as the deadline for completion of discovery. (R. pp. 1-2). The order also established January 15, 2013 as the deadline for filing all motions. (Id.)

This case is one of three involving a contention that adjacent lots in Jasmine Cove of the Cliffs at Keowee Falls South are experiencing a deep seated slope failure. On August 8, 2011, the case of 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. (Harrell Complaint). The Harrell case involves lot 31. On 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) involving Lot 30 was filed in Greenville County. (McCollum Complaint). The plaintiffs in each of the three cases allege that S&ME was professionally negligent in failing to identify an active deep seated slope failure during a geotechnical investigation that it conducted in 2005 at lot 31.

On March 20, 2013, eighteen months after filing their lawsuit, Appellants filed a motion to amend the complaint. (R. pp. 208-238). Appellants proposed to amend their complaint to include an additional cause of action against S&ME for negligent misrepresentation. (Id.).

On May 3, 2013, the Trial Court heard the pending motions. (R. pp. 811-922). Subsequently, the Trial Court issued an Order dated July 9, 2013 denying Appellants' motion to amend the complaint as to S&ME. (R. pp. 3-6). By separate Order dated July 15, 2013, the Trial Court granted S&ME's motion for summary judgment. (R. pp. 7-26).

On August 2, 2013, the Appellants filed a motion to alter or amend the Order granting S&ME's motion for summary judgment. (R. pp. 797-810). On August 22, 2013, Appellants served notice of appeal with respect to the Trial Court's denial of Appellants' Motion to Amend their Complaint. (R. pp. 973-974).

The Trial Court issued an Order dated November 25, 2013 denying Appellants' motion to alter or amend the order granting summary judgment in favor of S&ME. (R. p. 27). On December 9, 2013, Appellants filed a second Notice of Appeal as to the Order granting S&ME's Motion for Summary Judgment. (R. pp. 975-976). On the same day, Appellants filed a motion to consolidate the two appeals. (R. pp. 977-978). By letter dated December 18, 2013, this Court consolidated Appellants' appeals. (R. p. 979).

FACTS

By deed dated December 16, 2002, Keowee Falls Investment Group, LLC ("KFIG") purchased approximately 2000 acres from Crescent Resources, LLC for $22,000,000.00. (R. pp. 960-961). A portion of that land was developed by The Cliffs Communities, Inc. ("The Cliffs") as the Keowee Falls South development. (R. p. 459). Lots 30, 31 and 32 are adjacent lots in Jasmine Cove of the Falls South development. (R. p. 482).

In May 2005, Alpha Environmental Services, Inc. ("Alpha") was engaged by Larry Hutchinson of the Paragon Group to conduct an investigation of lot 31 in Jasmine Cove on behalf of the then owners of the lot, Dick and Christine Rockwell. (R. pp. 395-398). Alpha performed two soil borings and issued a report dated June 2, 2005. (R. pp. 399-400). Alpha concluded that there were signs of prior movement of lot 31 which "appear[ed] to have been associated with the impoundment of Lake Keowee." (R. p. 399, line 21). Importantly, Alpha did not find an active deep seated slope failure on lot 31. Roger Moore of Alpha testified that he found circular movement near the shoreline which was related to the fluctuating water table associated with the impoundment of Lake Keowee, which occurred many years prior to the development of Keowee Falls South. (R. pp. 358-359, 386-387). Moore testified that the borings that Alpha conducted on lot 31 were not drilled deeper than fifteen feet because he did not think that a deep seated slope failure was occurring on lot 31. (R. p. 365).

In June 2005, Appellants met with Jay Scott of The Cliffs Real Estate, Inc. and looked at lakefront property at Lake Keowee, including lot 32 at Jasmine Point, which is south and adjacent to lot 31. (R. p. 928). At that time, Kevin McCarthy worked as an

investment banker in Atlanta, Georgia and Courtney McCarthy lived in Charlotte, North Carolina. (R. p. 12).

After touring and walking on lot 32 perhaps only once, Appellants decided to purchase lot 32. (R. pp. 930-931). On June 20, 2005, Appellants each executed a Real Estate Sale and Purchase Agreement which clearly identified KFIG as the Seller of lot 32. (R. pp. 295-305). Pursuant to the terms of the Agreement, Appellants agreed to purchase lot 32 for a purchase price of $1,105,000.00. (Id.). The Agreement provides in relevant part:

> 9.3 As-is Condition. Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition.
>
> . . . .
>
> 9.5 Purchaser's Acknowledgement Concerning Representations. Purchaser understands that any sales associate or other person representing Seller in this transaction does not have the authority to make any statements in conflict with or in addition to the information contained in this Agreement, and any other documents received from Seller, including without limitation, any representation made regarding the resale of Purchaser's Lot or its rental or investment potential, and that Seller, for itself and in behalf of any such agent, specifically disclaims any responsibility for such statements. Further, if any such statements were made, Purchaser acknowledges that by execution of this Agreement, Purchaser affirms that Purchaser has not relied upon any such statements, if any, and waives any rights that Purchaser might have as a result of such statements unless they are incorporated in this Agreement.

(Id. at 6.) Admittedly, Appellants talked with no one other than Jay Scott before deciding to purchase lot 32. (R. p. 20).

The Alpha report was provided to The Cliffs (R. p. 500). In June 2005, Don Nickell of The Cliffs retained S&ME, an engineering firm that provides geotechnical engineering services, to perform a geotechnical investigation. (R. pp. 198-199, lines 30-

38). Nickell either provided a copy of the Alpha report to S&ME or merely showed a copy to Walker Birdsong of S&ME. (R. pp. 720-721; R. p. 522).

On June 22, 2005, S&ME issued a proposal to the Cliffs which indicated that it was for three lakefront properties. (R. pp. 517-518). The Cliffs accepted the proposal and entered into an Agreement for Services with S&ME on June 27, 2005. (R. pp. 529-534). The Agreement for Services provides in relevant part:

> **7. Reports:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. **Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects**....
>
> Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client **and shall not be provided to any other person or entity without Consultant's written authorization**....
>
> **9. Confidentiality:** Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services to Client's authorized Representative(s) and to persons designated by the authorized representative to receive such information.

(R. p. 531)(emphasis added). It is undisputed that "Client" referenced in the Agreement for Services was The Cliffs, not the Seller KFIG and certainly not Appellants. Before S&ME began to perform services, the Cliffs decided to limit the investigation to lot 31,

the lot owned by the Rockwells, investigated by Alpha, and the subject of the Alpha report. In that regard, Don Nickell of The Cliffs testified:

> Q. [S&ME's proposal] [r]efers to three lots. What lots would these have been?
> A. I would assume that this would have been lots 30, 31 and 32 of Jasmine Cove.
> Q. Why those lots?
> A. I believe those were the ones that were referenced – if I can check the Alpha.
> Q. Sure. Go ahead.
> A. I believe those were the ones that were referenced in the Alpha. Yeah. They focused on lot 31, but they also said something about the one on either side, so I would imagine those were the three lots referenced here.
> Q. So who would have made the decision to have S&ME look at those three lots?
> A. I would have contacted them after consulting with Mr. Anthony. Jim Anthony.
> Q. So you and Mr. Anthony agreed that those are the three lots S&ME should look at?
> A. No. I sent the Alpha report over and got a proposal. . . .
>
> ***
>
> Q. Did you investigate lots 30 or 32 to see if undercutting would be necessary for those lots?
> A. Not that I recall. No.
> Q. Did you ask S&ME to investigate to see?
> A. No. I don't believe we did. . . .
>
> ***
>
> Q. At some point after the agreement for services was signed, did you talk with anybody at S&ME and indicate to them that you wanted to first start an investigation on the lot that was purchased by the Harrells?
> A. That's – I mean, I – I can't explain exactly why – how we went from three to the one, but that would be my assumption, is that we

> went – rather than do three, we wanted to see what happened on this first one.

(R. p. 522; R. p. 524; R. p. 528; R. p. 198).

S&ME conducted a geotechnical investigation on only lot 31, which included three soil borings and excavation of three test pits. (R. pp. 201-203). S&ME issued a report to Don Nickell dated July 18, 2005, plainly relating only to lot 31. (Id.). S&ME did not find a deep seated slope failure on lot 31 but concluded that there were low consistency soils on the lot. (R. p. 202). S&ME advised that a residence could be constructed on lot 31, but that it would require either construction of rammed aggregate piers or undercut and replacement of the low consistency soils found on the site. (Id.). There is no evidence that S&ME was asked by its client, the Cliffs, to conduct any further investigation of any adjacent lots. There is no evidence that S&ME was aware either that Appellants existed or that there was any contract to purchase lot 32 between KFIG and any person or entity. Appellants admit that they had no contact with and had never heard of S&ME before they purchased lot 32. (R. pp. 287-288; R. pp. 324-325). S&ME's report was not issued to or otherwise provided to Appellants. Consistent with the language in S&ME's Agreement for Services, both Bill Mathews of Bunnell-Lammons Engineering, Inc., who was hired by The Cliffs in 2010 to further investigate the lots, and Roger Moore of Alpha agree that an engineer is precluded from providing a client's report to a third party without the Client's consent. (R. p. 368; R. pp. 338-339).

The purchase of lot 32 closed on August 5, 2005 without any further investigation, due diligence, or other discussion by Appellants. (R. p. 278). By deed dated August 5, 2005, KFIG transferred title of lot 32 to Kevin McCarthy for the purchase price of $1,105,000.00. (R. pp. 306-307). By deed also dated August 5, 2005,

Kevin McCarthy conveyed a half interest in lot 32 to Courtney Roundtree. (R. pp. 308-309).

Appellants never built a house on lot 32. In November 2006, Kevin McCarthy moved to Charlotte, North Carolina, thus eliminating the need for an equidistant vacation home. (R. pp. 932-934). Building a house on lot 32 admittedly took a backseat after Appellants married and Kevin McCarthy relocated. (R. p. 934). As a result, Appellants listed lot 32 for sale in July 2008 for $1,399,000.00. (R. p. 935). No offers were made to purchase the land. (R. p. 936).

Appellants had no concerns about lot 32 until April or May 2011, when Kevin McCarthy received a telephone call from Jack Harrell, the then current owner of adjacent lot 31. (R. pp. 279-281). According to Kevin McCarthy, Jack Harrell advised him: "Well, I'm your neighbor down there, and we got a problem. The lots are falling into the lake." (R. p. 280).

Subsequently, either Jack Harrell or his counsel sent Appellants a portion of S&ME's July 2005 report. (R. p. 286). Until 2011, Appellants had never heard of S&ME. (R. pp. 287-288; R. pp. 324-325). In that regard, Kevin McCarthy testified:

> Q. Have you ever to this day talked to a human being about lot 32 that you thought worked with S&ME?
> A. Not to my knowledge.
> Q. Have you ever hired S&ME to perform any work on lot 32?
> A. Not to my knowledge.
> Q. Is it fair to say that your knowledge of S&ME is by obtaining documents, either from Mr. Harrell or his counsel and through the lawsuit process.
> A. And their website, after being made aware of them through the lawsuit process, correct.

(R. p. 288).

Appellants have never asked their expert, Carroll Crowther, to conduct the investigation or analysis necessary for remediation design. (R. pp. 957-959). S&ME's expert, Doug Chappell of Wurster Engineering, has examined lot 32 and prepared an estimate to stabilize the lot, assuming that the lot is experiencing deep seated movement. Chappell estimated a cost of $679,700.00. (R. pp. 626-628). Appellants have not presented evidence that such repair is not feasible. Moore and Mathews agree that remediation is possible. (R. pp. 392-393; R. p. 340).

On August 8, 2011, the owners of lot 31, Jack and Tina Harrell, filed a lawsuit against KFIG, the Cliffs and S&ME. (Harrell Complaint). In the Harrell case, just like Appellants here, the Harrells alleged that S&ME was negligent because it did not diagnose that a deep seated slope failure was occurring on lot 31. (Id. at 5). That case was tried before a jury for approximately two weeks commencing on February 14, 2014. Importantly, the jury returned a verdict in favor of S&ME. (February 17, 2014 Verdict Form and Form 4).

ARGUMENT

I. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF S&ME

A. S&ME DID NOT OWE A DUTY OF CARE TO APPELLANTS

In their Complaint, Appellants allege that when S&ME performed services for the Cliffs in 2005, S&ME owed **them** a duty to: (1) recommend to **The Cliffs** that additional testing should be performed on adjacent lots; and (2) investigate Appellants' existence and then tell them that there was a scarp on the lot that they had not yet purchased and that it might have an impact upon future construction. (R. pp. 39-40). In their brief, Appellants also argue that S&ME owed a duty to **them** to properly diagnose a deep seated slope failure during its investigation of lot 31. Appellants' argument makes no factual or legal sense.

Appellants must demonstrate that S&ME owed **them** a legal duty when it performed geotechnical engineering services on an adjacent lot before they even owned lot 32. It is clear that the question of whether S&ME owes a legal duty to Appellants is a question of law properly considered by the Trial Court. Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844, 845 (2011) ("A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine."). In an action for negligence like this one, the Trial Court must determine whether the defendant owed a duty of care to the plaintiff. If there is no duty as here, the defendant is entitled to judgment as a matter of law. Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275, 276-77 (2003). South Carolina's courts have held that a duty exists only if imposed by statute, contract, relationship, status, property interest, or other special circumstance.

McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007). The question presented in this case is whether an engineer (S&ME) owes a tort duty to a future potential 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. The Trial Court properly concluded that the answer to this question is no.

1. THE COURT CORRECTLY DETERMINED THAT THE LICENSING STATUTE AND REGULATIONS DO NOT CREATE A DUTY OF CARE OWED BY S&ME TO APPELLANTS

Appellants assert that Section 40-22-20(14) of the licensing statute for Surveyors and Engineers and Section 49-301 of the regulations promulgated by the South Carolina State Board of Registration for Professional Engineers and Surveyors create a duty of care by S&ME to them. Appellants reason that since the licensing statute and the associated regulations generally govern the licensing of engineers to protect the health, safety and welfare of the public, the statute and regulations somehow create a cause of action for professional negligence. Appellants' argument is flawed and the Trial Court correctly determined that the licensing statute and regulations do not create a duty in tort.

When a statute does not specifically create a private cause of action, such a claim can be implied only if the legislation was enacted for the special benefit of a private party. Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 28-29, 416 S.E.2d 641, 645 (1992). In determining whether a cause of action is implied, the Trial Court properly considered whether: (1) the essential purpose of the licensing statute is to protect from the kind of harm suffered by Appellants; and (2) Appellants are a member of the

class of persons that the statute is intended to protect. Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994).

Appellants incorrectly contend that the definition of "fraud or deceit" contained in the definitions section of the licensing statute, creates a tort duty. The Trial Court properly found that the purpose of the licensing statute and the associated regulations are to safeguard the public generally and that neither give rise to an implied right of action in favor of Appellants. The Trial Court properly relied upon this Court's decision in Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997), which squarely addressed this issue. Hurst involved allegations relating to the defective design of a residence. The plaintiffs contended that the defendant, who prepared plans for the house, was negligent per se for performing engineering services while not properly registered as an engineer, a violation of the state licensing statute. Id. at 477-78, 494 S.E.2d at 850-51. This Court rejected that argument and held that: "[t]he essential purpose of Chapter 22 is the regulation of the practice of a profession, rather than the imposition of civil liability to private individuals." Id. at 479, 494 S.E.2d at 851. This Court held that the provisions of Chapter 22 of Title 40 are intended to regulate the practice of engineering by licensing and registration requirements and further held that a licensing statute does not provide a basis for an action in negligence. Id.

More recently, in 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 747 S.E.2d 770, 773 (S.C. 2013), the South Carolina Supreme Court held that the trial court erred because it determined that the Residential Home Builders Act created a legal duty and a private cause of action. That case involved allegedly negligent construction of a condominium building. Id. The owner sued the construction contractor, who held a

residential home builder's license, after problems arose with a subcontractor. Id. The trial court found that construction contractor was personally liable for negligently failing to supervise subcontractors and that the statutes related to licensing created civil liability. Id. The Supreme Court rejected this finding and concluded:

> Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility 'is broad enough to include civil liability.'
>
> We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty, nor was this statute enacted for the benefit of a private party. . . . [W]e disagree with the court's conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court. . . . Thus, we decline to construe these statutes so broadly as to create a duty in tort.

Id. at 773-74.

These cases make clear that the purpose of the engineering statute and regulations relied upon by Appellants is to regulate how engineers are licensed, not to provide a private cause of action against engineers. Like the Residential Home Builders Act addressed by the Court in Jade Street, the licensing statute for engineers provides that the engineering board address violations of the statute. S.C. Code Ann. § 40-22-80 (2014). The engineering licensing statute is not intended to create and does not create a legal duty of care owed by S&ME to Appellants.

Although not addressed by the Trial Court in its order granting summary judgment for S&ME, Appellants also argue that industry standards create a legal duty by S&ME to them. This argument was addressed and squarely rejected in Colleton

Academy v. Hoover Universal, 379 S.C. 181, 666 S.E.2d 247 (2008), *overruled on other grounds by* Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009). In that case, the South Carolina Supreme Court addressed the application of the economic loss rule and the issue of when a duty in tort exists. The Court clarified its prior decision in Kennedy v. Columbia Lumber & Manf. Co., 299 S.C. 335, 384 S.E.2d 730 (1989), and specifically rejected the argument espoused by Appellants that industry standards create a duty of care. In that regard, the Court held:

> Industry standards are probative in *defining* the standard or duty of care; however, industry standards do not *determine* if the prerequisite duty of care is *owed*. In other words, a violation of industry standards is only helpful in determining that a duty owed has been breached.

Id. at 190, 666 S.E.2d at 252 (emphasis in original). S&ME did not owe any legal duty to Appellants by performing service on lot 31 for its client, The Cliffs, before Appellants bought lot 32 from KFIG. Accordingly, the Trial Court properly granted summary judgment in favor of S&ME on Appellants' claim for professional negligence.

2. THE COURT CORRECTLY DETERMINED THAT S&ME HAD NO "SPECIAL RELATIONSHIP" WITH APPELLANTS

Appellants incorrectly argue that there is a "special relationship" between them and S&ME which creates a duty of care. Appellants rely upon and misinterpret the cases relating to the economic loss rule, "special relationship" and residential home builders. The economic loss rule bars a plaintiff from recovering in tort where he merely fails to receive the benefit of his bargain, or where his expectancy interests are frustrated. See Sapp v. Ford Motor Co., 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). In Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989), the South Carolina Supreme Court stated this general rule as follows:

> [T]here is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where the damage done is to other property or is personal injury.

The rule demarcates the line between recovery in tort and recovery in contract:

> This rule exists to assist in determining whether contract or tort theories are applicable to a given case. Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses. Conversely, where a purchaser buys a product which is defective and physically harms him, his remedy is in either tort or contract. This is so, the analysis provides, because his losses are more than merely 'economic.'

Id. at 345, 384 S.E.2d at 736.

South Carolina's courts have adopted two narrow exceptions to the economic loss rule. First, the courts have held that where a non-contracting third party shares a "special relationship" with an alleged tortfeasor, a legal duty may exist. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995). Whether such a "special relationship" giving rise to an actionable tort claim exists depends upon "the facts and circumstances of each case." Id. at 55-56, 463 S.E.2d at 89. In design and construction cases, South Carolina's courts have found such a "special relationship" where there is either a close working relationship between the parties, or where the third party foreseeably relies upon the services of the professional in taking some action. See Id.; Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 544 S.E.2d 838 (2001); South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986).

For example, in Tommy L. Griffin, the low bid contractor for a water trunk project alleged that the project engineer wrongfully closed the job for a month, made

extra-contractual demands, wrote a disparaging letter to the bonding company, and incorrectly interpreted the terms of the contractor's contract with Charleston County. Tommy L. Griffin, 320 S.C. at 56, 463 S.E.2d at 89. The court held that the engineer who designed and supervised the construction of the water trunk project owed a duty to the contractor not to negligently design or negligently supervise the project. Id. The Tommy L. Griffin court noted that it was important that the engineer designed the project, supervised the construction and had the right to inspect and halt construction. Id. The close working relationship created a "special relationship." Id.

In Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 336 S.C 423, 520 S.E.2d 809 (Ct. App. 1999), this Court addressed a circumstance where the architect approved payment applications submitted by the general contractor even though it knew that the general contractor was not paying its subcontractors. In Cullum, a subcontractor alleged that the architect, whose contract was with the owner, breached its duty to the subcontractor when it failed to ensure that proper payment was made on the project. Id. at 427, 520 S.E.2d at 811. The subcontractor argued that the construction documents gave the architect effective control over all facets of the work and over all parties performing the construction, and, thus, the architect was required to use due care in the exercise of those duties. Id. at 433, 520 S.E.2d at 814-15.

This Court noted that the subcontractor was not arguing the traditional duty of architects to design and supervise construction with due care and that, unlike the engineer in Tommy L. Griffin, the architect did not have specific contractual authority to direct or halt construction. Id. at 432, 529 S.E.2d at 814. Thus, the Court found that no special

relationship existed and upheld a grant of summary judgment in favor of the defendant architect. Id.

The South Carolina Supreme Court subsequently granted certiorari in Cullum, 344 S.C. at 432, 544 S.E.2d at 842, and vacated the order for summary judgment stating:

> Generally, an architect does not have a duty to assure payment to subcontractors; however, special conditions in these contract documents may have given rise to a special relationship with subcontractors, and therefore a duty of care. We find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum, which would give rise to a duty on the part of Architect.

It is important to note that the Supreme Court did not hold that this Court's refusal to extend Tommy L. Griffin to the architect was incorrect. Id. Rather, the Court acknowledged that there are limits to the application of Tommy L. Griffin but that the complicated contractual documents needed more review. Id.

Contrary to Appellants' arguments, foreseeability alone will not support a duty in tort. Booz-Allen, 289 S.C. at 376, 346 S.E.2d at 325. See also First Fed. Savings Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) (applying Booz-Allen to claim for negligent preparation of appraisal). In Booz-Allen, the Georgia Ports Authority contracted with Booz-Allen & Hamilton, a consulting firm, to prepare a report comparing the merits of the Savannah, Georgia port with the Charleston, South Carolina port. Id. at 375, 346 S.E.2d at 325. Booz-Allen failed to obtain facts and figures concerning the Charleston port from the South Carolina Ports Authority and the completed report contained false facts concerning the Charleston port, such as depth of channels and bridge clearances. Id. As a result, the completed report was highly favorable to the Savannah

port. Id. The Georgia Ports Authority distributed the report to customers and potential customers, resulting in decreased traffic in the Charleston port. Id.

The Charleston Ports Authority and two unions, the Pilots Association and International Longshoremen's Association, filed a lawsuit in federal court alleging a claim for negligence against Booz-Allen. Id. The plaintiffs argued that Booz-Allen owed them a duty because it was foreseeable that the report falsely disparaging the Charleston port would have a direct economic impact on them. Id. at 376, 346 S.E.2d at 325. The district court granted Booz-Allen's motion to dismiss as to the negligence cause of action, finding that Booz-Allen owed no duty to the plaintiffs. Id. at 375, 346 S.E.2d at 325. On appeal, the United States Court of Appeals for the District of Columbia certified the following question to the South Carolina Supreme Court:

> Under South Carolina law, which, if any, of the following entities has a tort claim for negligence against a consultant who prepares a report intended for public distribution, comparing two ports, where the port authority of one port has contracted with the consultant for the report, and where the report sets forth statements of fact that reasonable investigation would have shown to be false, portraying the other port as inferior and causing traffic to avoid that port:
>
> (a) The governmental agency responsible for the administration of the port described as inferior?
>
> (b) The association of harbor pilots for that port?
>
> (c) Labor unions whose members are employees servicing vessels in that port?

Id.

Each of the plaintiffs argued that the consultant owed each of them a duty because it was foreseeable that the negligently prepared report would injure them. Id. at 376, 346 S.E.2d at 325. The Supreme Court rejected those arguments and held that

"[f]oreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability." Id. The Court held that the defendant owed a duty to the entity being critiqued by the report, the State Ports Authority, however the entities that merely relied on the port for profit were not owed a duty because "the relationship, if any, flowing between a consultant and someone distantly affected by his work is far too attenuated to rise to the level of a duty flowing between them." Id. at 376-77, 346 S.E.2d at 326.

Furthermore, Kennedy, 299 S.C. 395, 384 S.E.2d 730, and Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980), cases cited by the Appellants for the proposition that foreseeability creates a duty, are factually distinguishable from the present case. In these cases, foreseeability related to the subsequent purchasers of the properties on which the builder *had performed work.* S&ME performed *no* services on lot 32. (R. p. 198, lines 40-42). Furthermore, S&ME performed its work on lot 31 for The Cliffs, *not* KFIG. (R. pp. 529-534).

Other states which have considered similar cases have likewise concluded that no duty is owed in such attenuated circumstances. For example, in Hartman v. Urban, 946 S.W.2d 546 (Tex. App. 1997), the defendant surveyor was hired by a developer to create a subdivision plat. The developer recorded the plat which incorrectly showed that one of the lots had 53.12 feet of water frontage when in fact the lot only had 41.24 feet of water frontage. Id. at 547. Relying on the description in the recorded plat, the plaintiffs purchased the lot. Id. The plaintiffs brought a negligence claim against the surveyor, alleging that the surveyor had a duty to exercise reasonable care in the preparation of the plat, that the surveyor breached that duty, and that the plaintiffs were injured because the

lot was worth less than the purchase price. Id. Affirming the trial court's grant of summary judgment, the court held that even though the surveyor knew that the purpose of the subdivision was to sell lots to the public, the surveyor did not owe any duty to the plaintiffs. Id. at 551.

Likewise, in Essex v. Ryan, 446 N.E.2d 368 (Ind. App. 1983), the court rejected a similar argument. There, the plaintiff purchased a house and, relying on a survey performed for the previous owners, constructed an addition to the house. Id. at 369. However, the survey was erroneous and the addition encroached upon their neighbor's property. Id. The court quoted concerns expressed by Justice Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (N.Y. 1931):

> If liability for negligence exists, a thoughtless slip or blunder . . . may expose [professionals] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may exist in the implication of a duty that exposes to these consequences.

Id. at 373. The court found that the surveyor did not owe the plaintiffs any duty because the plaintiffs were not in privity with the surveyor and the surveyor did not have actual knowledge that the plaintiff would rely on the survey. Id. at 372-73.

Appellants do not and cannot identify any relationship between themselves and S&ME. They admit that they did not know that S&ME existed when they purchased their lot. There is no evidence that S&ME knew that Plaintiffs existed or that they had signed an agreement to purchase lot 32. The Trial Court properly determined that S&ME did not have a special relationship because there was no relationship with Appellants and Appellants did not rely upon S&ME in taking some action. S&ME had no right of

control over lot 32 or KFIG. S&ME was not hired by the Seller of the land; instead it was hired by The Cliffs. (R. pp. 529-534). Regardless of whether S&ME initially proposed to the Cliffs to investigate three lots and regardless of Appellants' nefarious inferences regarding the motivation of The Cliffs to limit the engineering investigation to Lot 31, it is undisputed that S&ME did not perform a geotechnical engineering evaluation on lot 32 and its client did not want or pay S&ME to do so. There is no legal obligation by an engineer to gratuitously perform engineering services. Accordingly, under the facts of this case, there is no "special relationship" between S&ME and these Appellants and the Trial Court granted summary judgment appropriately.

Appellants incorrectly rely upon cases involving residential home builders in support of their position. The courts have recognized a second exception to the application of the economic loss rule holding that a plaintiff may pursue tort remedies for purely economic losses against a residential home builder who breaches a legal duty when constructing a home. Kennedy, 299 S.C. at 345-46, 384 S.E.2d at 737. However, this exception does not apply outside of the residential homebuilder context. In Colleton Academy v. Hoover Universal, 379 S.C. 181, 666 S.E.2d 247 (2008), *overruled on other grounds by* Sapp, 386 S.C. at 147, 687 S.E.2d at 49, the court considered "whether the legal duties found in Kennedy are applicable outside of the residential home building area generally." Id. at 189, 666 S.E.2d at 251. The court acknowledged that "[t]he same policy considerations noted in Kennedy are arguably not present in the commercial construction arena." Id. at 190, 666 S.E.2d at 252.

One year later, the South Carolina Supreme Court reversed its holding in Colleton "to the extent that it expands the narrow exception to the economic loss rule beyond the

residential builder context." Sapp, 386 S.C. at 149, 687 S.E.2d at 50. In that case, the court reiterated the unique difficulties faced by the modern home buyer cited by Kennedy that warrant rejection of the economic loss rule in that context:

> A home is typically an individual's single largest investment and is a completely different type of manufactured good than any other type of product that a consumer will buy. Moreover, courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power. **For these reasons, we created this narrow exception to the economic loss rule to apply solely in the residential home context.**

Id. at 148, 687 S.E.2d at 49 (emphasis added).

Moreover, the court noted, "[a]t the time of our decision in Kennedy, we had no intention of the exception extending beyond residential real estate construction and into commercial real estate construction." Id. at 150, 687 S.E.2d at 51. Accordingly, the Court overruled Colleton and held that the framework adopted by Kennedy "is a narrow one," and is "applicable only in the residential real estate construction context." Id.

Cases subsequent to Sapp have reiterated that the Kennedy analysis is limited to the residential home building context. Recently in Gladden v. Boykin, 739 S.E.2d 882, 884 (S.C. 2013), the South Carolina Supreme Court rejected an opportunity to "expand our judicially crafted public policy affording heightened protection to home purchasers." In that case, the plaintiff contracted with a professional service provider, a home inspection service, to provide an inspection prior to her purchase of the home. Id. After the plaintiff purchased the home and discovered defective conditions, she brought an action against the inspection service for failing to conduct the inspection in a workmanlike manner and to report defective conditions in the home. Id.

In upholding a limitation of liability clause in the contract between the plaintiff and the inspection service, the Court declined to expand protections afforded to new home buyers:

> It is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering.

Id.

The residential home builder exception is clearly inapplicable in this case. Although Appellants contend that they intended to build a home on the land, this is not a case involving defective construction of a residence or a residential home builder. S&ME is not a residential home builder and did not build a house and place it into the stream of commerce.

Most importantly, S&ME performed no services on Appellants' lot. (R. p. 198, lines 40-42). S&ME is a geotechnical engineering firm that provided engineering services *on adjacent lot 31.* (R. p. 198, lines 30-38). Furthermore, none of the policy considerations cited by Kennedy are implicated here. Unlike a home buyer who must rely upon the builder to construct adequate housing, Appellants admittedly had no relationship with S&ME and did not know that S&ME even existed until years after their purchase. (R. pp. 287-288; R. pp. 324-325). The Trial Court correctly found that S&ME did not owe any legal duty to Appellants when it performed services for The Cliffs in 2005 and its grant of summary judgment should be affirmed.

B. THE COURT CORRECTLY DECIDED THAT S&ME'S ACTIONS WERE NOT THE PROXIMATE CAUSE OF THE APPELLANTS' DAMAGES

The Trial Court correctly determined that S&ME could not have proximately caused the Appellants' damages because: (1) any alleged soil condition was not caused by S&ME; and (2) the Appellants did not read or rely on S&ME's report when purchasing lot 32.

Negligence is not actionable unless it is a proximate cause of the injuries complained of, and only when, without such negligence, the injury would not have occurred or could have been avoided. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). If there is no genuine issue of material fact as to whether a defendant's actions were the proximate cause of a plaintiff's injury, then summary judgment is appropriate. Singleton v. Sherer, 377 S.C. 185, 203, 659 S.E.2d 196, 206-7 (Ct. App. 2008). Proximate cause consists of: (1) causation in fact; and (2) legal cause. Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing that the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability and that the injury occurred as a natural and probable consequence of the defendant's negligence. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996).

In this case, Appellants contend that there is an unknown geologic condition on the land – not that some party created a defective condition. As pointed out by the Trial Court, similar cases in other jurisdictions have found that when a consultant erroneously reports about conditions on real property, the cause of any damage is the condition itself and not the consultant's failure to identify the condition. For example, in Gagne v.

Bertran, 43 Cal. 2d 481, 275 P.2d 15, (1954), plaintiffs testified that they would not have purchased certain properties and constructed apartment buildings on them had they known that the presence of fill dirt was more extensive than soil tests previously revealed. There, the court found:

> Because of defendant's negligence plaintiffs erroneously believed [the property] was more suitable for their purpose than it actually was. The additional expense [in removing extra fill] they incurred, however, flowed from the condition of their land and not from defendant's report as to what that condition was.

Id. at 492.

Similarly, in Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (1960), the action concerned a surveyor who misrepresented the amount of dirt which could be removed in leveling a property. The court excluded damages related to an increase in leveling costs because they were caused by the condition of the land, rather than the surveyor's misrepresentation. Id. at 543-44.

The Supreme Court of Maine reached a similar result in Wendward Corp. v. Group Design, Inc., 428 A.2d 57 (Me. 1981). In that case, the defendant negligently took soil samples from the wrong construction site and, as a result, the tests failed to reveal defects in the actual site's soil, which rendered it unsuitable for construction. Id. at 59. The court rejected the plaintiff's claim for excavation and removal costs because it found that the plaintiff would have incurred the costs in any event even if it had it known about the actual conditions of the property. Id. at 60. The court pointed to evidence that the site's location made it attractive to the plaintiff, suggesting that it would have undertaken whatever work was necessary to continue even if he had been informed of the defects. Id. The court thus found that the trial court properly limited damages to "those costs that

the appellants incurred because of the delay in discovery of the true subsurface conditions." Id. at 61 (citing Gagne v. Bertran).

Likewise, the Supreme Court of New Hampshire found that plaintiff suffered no damages resulting from an erroneous surveyor's report. Progressive Survey v. Pearson, 120 N.H. 58, 410 A.2d 1123 (1980). In that case, Progressive intended to subdivide a property and hired Pearson to provide a topographical survey and contour profile to be used in designing a road for the subdivision. Id. at 58-59, 410 A.2d at 1125. The survey indicated that a straight road could be built, thus allowing Progressive to maximize the number of lots available for sale. Id. The survey also indicated that the proposed road would require little ledge removal and fill to meet the maximum grade regulations. Id. at 59, 410 A.2d at 1124. During construction, Progressive discovered that a brook over which the road had to pass was more than 13 feet lower in elevation than shown on defendant's plan, and that substantially more ledge removal and fill would be required to complete the road. Id.

The plaintiff argued that it was entitled to recover all expenses in excess of what it expected to incur as a result of defendant's plan. Progressive also argued that had the plaintiff known the true cost of the project, it would have chosen to develop the land by using a contour road rather than a straight one. Id. The Supreme Court of New Hampshire held: "Had the original contour survey been correctly drawn, plaintiff would have incurred the same expense that it ultimately did [. . .]. The elevation of the brook, and not defendant's erroneous survey, caused the increase in development costs." Id. at 60, 410 A.2d at 1125 (citing Gagne v. Bertran).

Appellants cannot show that their damages (the purchase price of the lot) flow from S&ME's failure to diagnose a deep seated slope failure when it investigated lot 31 in 2005. Appellants admit that S&ME did not cause the alleged slope failure on their lot. (Appellants' Brief p. 31). S&ME had no ownership interest in any of the lots in question. There is no evidence either that had S&ME gratuitously investigated lot 32, it would have concluded that a deep seated slope failure exists or that KFIG would not have sold the property to Appellants. Furthermore, it is abundantly clear that had S&ME discovered a soil condition on lot 32, it would not have born any responsibility to pay for a repair of a pre-existing geologic condition.

Appellants also incorrectly argue that they would not have purchased lot 32 had S&ME reported a slope failure on Lot 31. Because South Carolina lacks authority directly on point, the Trial Court properly examined cases in other jurisdictions. In Hughes v. Holt, 140 Vt. 38, 435 A.2d 687 (1981), the plaintiffs brought a claim against a bank and appraiser for negligence in the preparation of an appraisal. Specifically, the plaintiffs claimed that the appraiser failed to discover evidence of extensive termite damage at a house they purchased. Id. at 39, 435 A.2d at 688. The court held that to establish a claim for negligence against the bank or the appraiser, the plaintiff had to show that the appraisal was a proximate cause of their injury and loss. Id. at 41, 435 A.2d at 689. However, the court held that the plaintiffs had failed to establish proximate cause because "it was the testimony, and the unquestioned fact, that the plaintiffs had executed the purchase and sale agreement before the appraisal was ever done." Id. See also Williams v. United Community Bank, 724 S.E.2d 543, 549 (N.C. Ct. App. 2012) (holding that plaintiffs failed to establish a prima facie case of negligence because the

evidence showed that the plaintiffs signed the purchase contracts without reviewing the allegedly negligently prepared appraisals).

Here, the undisputed evidence shows that S&ME issued its report to The Cliffs on July 18, 2005, *after* Appellants signed the contract to purchase lot 32 on June 20, 2005. (R. pp. 201-207; R. pp. 295-305; R. pp. 326-335). Admittedly, Appellants did not rely on S&ME's July 18, 2005 report; they did not even know that such a report existed until years later. (R. pp. 287-288; R. pp. 324-325). Appellants simply cannot demonstrate that some omission of S&ME in failing to detect a geologic feature on an adjoining lot proximately caused their damages.

C. THE COURT CORRECTLY FOUND THAT THE APPELLANTS WERE NOT ENTITLED TO RECOVER THE PURCHASE PRICE OF THE LOT

In this case, Appellants seek to recover the entire purchase price of lot 32. (R. pp. 46-47). The Trial Court correctly determined that the purchase price is not the proper measure of damages. Instead, the reasonable cost of repair is the proper measure of damages for injury to real property. See Kincaid v. Landing Dev. Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Diminution in value is an alternative measure of damages only where the cost of repairing the defect is grossly disproportionate to the value of the property, or where the defect is permanent or otherwise impractical to cure. See Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 645-47, 529 S.E.2d 764, 767-68 (Ct. App. 2000) (diminution in value of property is proper measure of damages where the injury to real property is of a permanent nature); Scott v. Fort Roofing & Sheet Metal Works, Inc., 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before damage was inflicted.");

Joyner v. St. Matthews Builders, 263 S.C. 136, 140, 208 S.E.2d 48, 50 (1974) ("In the absence of evidence of specific damages, the measure of damages for injury to real property is the difference between the value of the entire premises before and after injury thereto."); John Thurmond & Associates, Inc. v. Kennedy, 284 Ga. 469, 470, 668 S.E.2d 666, 668 (2008) ("...damages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, are determined by measuring the cost of repairing or restoring the damage, unless the cost of repair is disproportionate to the property's probable loss of value").

Here, Appellants purchased lot 32 for $1,105,000.00. (R. pp. 295-305; R. pp. 326-335). The evidence establishes that even if a deep seated slope failure exists, remediation is feasible. (R. pp. 92-93; R. p. 340). As noted by the Trial Court, even Appellants' own expert conceded that remediation may be feasible, but testified that he had not been asked to design such a repair. (R. pp. 957-959). The only estimate for remediation prepared in this case is by Doug Chappell, S&ME's expert, who estimated a cost of repair of $679,700.00. (R. pp. 626-628). Moreover, Appellants have no evidence that a repair cost of $679,700.00 is grossly disproportionate to the value of the property.

Not only have Appellants proffered no evidence that a repair is impractical, they have also offered no evidence that their property's value was diminished. In the case of Gagne v. Bertran, 43 Cal. 2d 481, 487, 275 P.2d 15 (1954), plaintiffs testified that they would not have purchased certain properties and constructed apartment buildings on them had they known that the presence of fill dirt was more extensive than soil tests previously revealed. The court concluded that because the plaintiffs failed to prove that the lots were worth less than what they paid for them, they failed to establish damages flowing

from their decision to buy. Id. Appellants have offered no evidence to prove that lot 32 is worth less than what they paid for it because of a condition of the land. Accordingly, Appellants cannot recover for diminution in the value of the property. As the Trial Court correctly concluded, Appellants' damages, if any, are limited to the reasonable cost to repair and Appellants cannot recover the full purchase price as a matter of law.

D. THE COURT CORRECTLY FOUND THAT APPELLANTS WERE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST S&ME

In South Carolina, punitive damages are allowed when a defendant's conduct is willful, wanton, or in reckless disregard for the plaintiff's rights and plaintiff proves such damages by clear and convincing evidence. Mellen v. Lane, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). The decision whether to award punitive damages is within the discretion of the trial judge. Id. at 291, 659 S.E.2d at 252.

Appellants allege that S&ME misdiagnosed a pre-existing geologic condition on lot 31 and failed to recognize the potential effect on other properties. The Trial Court correctly concluded that even if this were true, this evidence fails to indicate behavior that rises to the level of willful, wanton or reckless disregard for the Appellants' rights. The Trial Court correctly determined that punitive damages were inappropriate in this case.

II. THE COURT CORRECTLY DENIED APPELLANTS' MOTION TO AMEND

Given the Trial Court's correct ruling on Defendants' motion for summary judgment, Plaintiffs' motion to amend is rendered moot. Appellants sought to amend their Complaint to add a cause of action for negligent misrepresentation. To assert such a claim, Appellants would have to allege:

(1) S&ME made a false representation **to Appellants**;

(2) S&ME had a pecuniary interest in making the statement;

(3) S&ME **owed a duty of care** to see that it communicated truthful information **to Appellants**;

(4) S&ME breached that duty by failing to exercise due care;

(5) Appellants justifiably relied on the representation; and

(6) Appellants suffered a pecuniary loss as the proximate result of his reliance on the representation.

Quail Hill, LLC v. County of Richland, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010).

As discussed above, S&ME did not make any representation to Appellants. Appellants have never communicated directly with S&ME and did not even obtain a partial copy of S&ME's 2005 report until 2011. In addition, as fully discussed above, S&ME owed no duty to Appellants. Permitting amendment of the Complaint to assert a cause of action for negligent misrepresentation would be futile and the motion was properly denied. Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010)("Although leave to amend should generally be 'freely given,' this court has held that it may be denied where the proposed amendment would be futile.").

However, even if the Trial Court's decision regarding summary judgment is not upheld, this Court should affirm the denial of Appellants' motion to amend. In reviewing a decision on a motion to amend, the trial court's finding "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Berry v. McLeod, 328 S.C. 225, 232, 599 S.E.2d 462, 465 (Ct. App. 2004). The Trial Court did not abuse its discretion in denying Appellants' motion to amend their

complaint to assert an additional claim and additional factual allegations given Appellant's inexcusable delay in seeking the amendment.

The Trial Court properly denied Appellants' motion to amend because Appellants inexcusably delayed filing the motion and the amendment would prejudice S&ME. Prejudice occurs when amendments include additional claims which would require the opposing party to introduce additional evidence. Ball v. Canadian Am. Express Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

On July 9, 2012, a status conference was held by the Trial Court, at which time certain deadlines were established. (R. pp. 1-2). The deadline for completion of discovery was established as December 31, 2012 and the deadline for filing **all** motions was January 15, 2013. (Id.). Appellants' March 20, 2013 motion to amend was not filed until three months after the close of discovery and two months after the motion deadline. (R. pp. 208-238). The Trial Court properly found that the motion was not timely filed and would require reopening of discovery and delay in the resolution of the case.

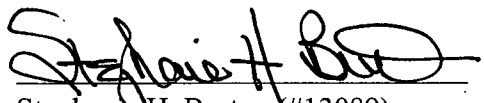
Appellants offer no excuse for the delay. As chronicled in the Trial Court's order, Appellants had a portion of S&ME's report in their possession for years prior to the motion and the applicable depositions were taken in November 2012, a month before the conclusion of discovery. Nothing prevented Appellants from timely filing the motion. Since both the discovery and motions deadlines had long passed by the time Appellants belatedly filed their motion, the Trial Court properly determined that S&ME would be prejudiced by the belated amendment. Accordingly, the Trial Court's denial of Appellant's motion to amend should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the Trial Court's grant of summary judgment in favor of S&ME, Inc. and affirm the Trial's Court's denial of Appellants' motion to amend.

Respectfully submitted,

September 16, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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,

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 16, 2014

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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.

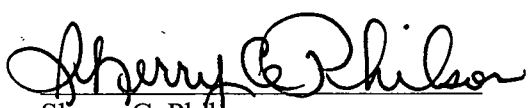
Of Which

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

PROOF OF SERVICE

The undersigned, Sherry C. Philson, certifies that she is an employee of Gibbes Burton, LLC and on the 16th day of September 2014, she served a copy of Respondent S&ME, Inc.'s Final Brief to be Included in the Record on Appeal by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed to:

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



September 16, 2014 Sherry C. Philson