

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

Clifford D. Holley and Sharon Holley,

Plaintiffs,

v.

Dan-Sa, Inc.; Charles E. Oman; Janis M. Niemi; Gina L. Pike; Dermac Contractors, LLC; Bluewater Development of South Carolina, LLC, and Blue Ridge Savings Bank, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT  
Civil Action No.: 2013-CP-28-00256

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ORDER GRANTING DEFENDANTS  
OMAN AND NIEMI'S MOTION FOR  
SUMMARY JUDGMENT

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CLERK OF COURT  
KERSHAW COUNTY, S.C.

This matter came before the undersigned judge on January 20, 2015 on the defendants, Oman and Niemi's motion for summary judgment. Present and appearing at the hearing were Freeman Belser, attorney for the plaintiff, and Catharine Garbee Griffin, attorney for the defendants. After hearing the argument of counsel, reviewing the memorandum of law, the deposition excerpts, the submitted affidavits, and the exhibits, this court grants the defendants' motion for summary judgment.

**FACTS**

On October 20, 2006, Oman and Niemi, residents of Minnesota, purchased a property with a modular home situated on 1.93 acres in Kershaw County, at Lake Wateree. After purchasing the property, Oman and Niemi divided the property to make two lots: one was 1.07 acres on which the modular home was located; and the other parcel was 0.86 acres. On March 2, 2007, Defendants obtained a building permit to move the modular home from the original site onto the site of the smaller lot. Defendants planned to sell the larger lot, and keep the smaller lot with the modular home on it for themselves to use it as their house. In January of February of

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*Debra N. Starnes*  
Clerk of Court Kershaw County

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2007, Oman hired a company, Bluewater Development, to clear the lot to prepare it for the footings on which to move the modular home.

Bluewater employee Altman testified that Oman directed that Bluewater move the debris which had been cleared off the property into an area on the left side of the property and bury it. Oman believed that the area to the left of the new home site cleared by Bluewater was not buildable due to the slope, terrain, erosion and the flood plain. The slope of the land to the left of the house was described as a forty five degree angle, sloping at a "pretty good little clip." The plaintiffs' contractor also concurred that where the slope started that "it was a pretty big hill" and estimated that it had a five to six foot slope. The plaintiffs' contractor agreed that it was "not practical to build a building in this sloped area" which Mr. Oman also described as "nonbuildable." Another contractor also commented that the land had a six foot slope which was so steep that he could not drive his backhoe on it.

Oman hired Der-Mac to pour the footings for the foundation for where the modular home would be relocated. On July 10, 2007, the Kershaw County building official approved the footings poured by DerMac. On the smaller lot, Mr. Oman built a retaining wall, at the County building official's recommendation.

After having the footings dug and completing a retaining wall, defendants decided not to move the modular home, but to return to Minnesota, due to health issues of Mr. Oman. On October 24, 2007, defendants entered into a "Land, Lots and Acreage Contract of Sale" with Dan-Sa, who purchased the smaller lot from Defendants. When Oman and Niemi entered into the contract with Dan-Sa to sell the lot with the footers, driveway, and retaining wall, they did not provide a Seller's Disclosure Form because no house existed on the property. Oman and Niemi provided a set of draftsman plans to Dan-Sa for a house which could be built on the



existing footers. The draftsman's drawings provided that the porch on the side of the house be supported by posts which had their own footings. Before buying the lot, Gibson had the right to inspect the property. Gibson was aware that the property had a driveway, septic tank, footers and retaining wall. He testified that he looked at the footers before buying the property and described them as "big footers" dug with a "two foot bucket." He testified that they were "good looking footers." Gibson also testified that there was no foundation built for the house at the time of his purchase of the lot. As required by his bank, Gibson had a survey done on the property to be sure that the footers on the lot were not in the flood plain.

On December 21, 2007, Oman and Niemi transferred the property to Dan-Sa. Danny Gibson, the owner of the building company, Dan-Sa, intended to build a spec home on the property. Gibson had worked in the construction business since 1973 and obtained a general contractor's license in 1987. Gibson had built five houses in the Lake Wateree area before purchasing this property. Gibson built seventy-five houses while a licensed contractor. Gibson applied for and received a building permit to build a home on the property on January 3, 2008. Gibson estimated his own construction costs.

After being issued the building permit, Gibson constructed the now Holley home in approximately five to six months. Dan-Sa built a house on the existing footings which had been poured by Der-Mac. Gibson had inspections completed by Kershaw County of the foundation, framing, plumbing, electrical and HVAC. Kershaw County issued a certificate of occupancy to Dan-Sa, the builder, on June 20, 2008.

During the construction of the home, Gibson modified the draftsman's plans. The plans provide that the porch on the house be supported by posts which had their own footings. However, Dan-Sa modified the plans and built the house with two stories instead of one story

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and a half. Additionally, Dan-Sa also built a two-story porch on the house, using the retaining wall to support at least part of the porch on it. The porch was also supported by some posts dug about two feet in the ground. Four months after finishing the construction, Gibson gave the deed in lieu of foreclosing to Blue Ridge Savings Bank. On June 23, 2010, Blue Ridge Savings Bank sold the property to Gina Pike almost two years after it had acquired the property. The contract of sale between the bank and Pike indicated the property was sold "AS-IS" and that "Buyer and Seller agree[d] that Seller will not complete nor provide a Residential Property Condition Disclosure Statement" pursuant to the applicable statute. Furthermore, the South Carolina Residential Property Condition Disclosure Act exempts certain transfers from its requirement of providing a disclosure form, including a transfer when the bank takes title from a mortgagor whose indebtedness was in default. See, S.C. Code Ann. § 27-50-30 (2).

The property was conveyed pursuant to a Special Warranty Deed. Gina Pike owned the house for one year. On June 29, 2011, Pike contracted with the Holleys to sell the property. Pike conveyed the property to the Holleys on July 8, 2011. Before purchasing the property from Pike, the Holleys had the home inspected. It is undisputed that there were no structural defects found in the home.

Soon after purchasing the house from Pike, the Holleys decided to build a pool to the left of the existing home in the yard. The Holleys contracted with Alaglass to build the pool. The Holleys did not test the soil to determine if the soil was suitable for a pool. The Holleys were aware when they began their project to build the pool that the project was more complex due to the slope of the land. The Holleys had the property surveyed three times to be certain that it was not in the flood plain. In undertaking the project, the Holleys knew that the slope of the property was so severe that they would need to build a six foot retaining wall around the deep end of the



pool, and fill it in with dirt to support the pool in order to accommodate the natural terrain.

In August of 2011, the plaintiffs started working on installing a pool in the portion of the yard to the left of the house. When their contractor, Alaglass, started work on the pool, they found debris -- timber, limbs, and other organic materials -- buried underground. During the digging out of the debris in the yard adjacent to the house, the retaining wall on the left side of the house was affected. After the retaining wall was affected, the roof of the porch began to sag. The debris found on excavating the pool extended from the side yard to under the porch. The plaintiffs complain that the construction of the upper porch was done incorrectly because it was supported by the retaining wall rather than a footer. The majority of the soil underneath the footers for the entire main house, not the porches, was considered to be reasonably compacted and did not have any debris underneath it. In removing the debris, there was no digging under the actual footers of the house. The contractor focused on stabilizing the porches and the roof on the second story porch. The contractor hired to stabilize the porches testified that there was no settlement in the house itself due to the debris. Likewise, the plaintiffs agree that there was no damage to the house itself.

The plaintiffs' only cause of action listed in the complaint is negligence. The duties allegedly breached by the insureds are the duty to act reasonably and with care in maintaining the property, dividing the property, and disclosing any defects or materials located on the property. Specifically, Plaintiffs alleged Oman and Niemi acted negligently in burying debris "on the property to be conveyed to Defendant Dan-Sa, Inc." and in failing to disclose the existence of buried debris to Dan-Sa and subsequent purchasers.

#### **STANDARD FOR SUMMARY JUDGMENT**

The purpose of summary judgment is to expedite disposition of cases which do not



require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). A trial court may properly grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, when triable issues exist, those issues must go to the jury. BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn there from in the light most favorable to the non-moving party. Worley Cos., Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000). The burden is on the moving party to clearly establish an absence of a genuine issue of material fact. Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Once the moving party meets the initial burden of showing an absence of evidentiary support for the non-moving party’s case, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In meeting its burden, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). It is not sufficient that a party create an inference which is not reasonable or an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). A trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party’s case. Harris v. Rose’s Stores, Inc., 315 S.C. 344, 433 S.E.2d 905

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(Ct. App. 1993).

**CONCLUSIONS OF LAW**

**I. OMAN AND NIEMI ARE NOT LIABLE TO PLAINTIFFS, SUBSEQUENT PURCHASERS, FOR FAILURE TO DISCLOSE BURIED DEBRIS ON LAND SOLD TO DAN-SA.**

As a matter of law, this court finds that the plaintiffs failed to present any evidence creating a genuine issue of material fact that the defendants, Oman and Niemi, had a duty to disclose to subsequent purchasers that there was buried organic material on their land. It is undisputed that the sellers, Oman and Niemi, were not in privity with the subsequent purchasers, the Holleys.

In their complaint, Plaintiffs asserted a cause of action in negligence against Oman and Niemi allegedly stemming from these Defendants' sale of the property at 2834 Lake Road to Dan-Sa, the builder of the home on the property. No South Carolina court has ever decided whether a subsequent purchaser of land can bring an action for negligent failure to disclose debris buried on a portion of land not built upon against a seller not in privity with them.

Pursuant to South Carolina law involving situations of non-disclosure in the context of contracts of sale,

The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (S.C. Ct. App. 1993) (quoting Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)); see also Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372, 376 (1942).

Plaintiffs purchased the property from Gina Pike in 2011 and had no relationship with these Defendants. In 2007, Oman and Niemi sold the lot located at 2834 Lake Road to defendant, Dan-Sa, the home residential builder, who eventually deeded it to their bank in lieu of foreclosure. In deeding the property to their bank, Dan-Sa made no disclosures about the home. The bank then sold it to Pike without any disclosures. This court finds that Plaintiffs do not have a cause of action against these Defendants because Plaintiffs were not in privity with them and this situation does not fall into any of the recognized three classes in which the duty to disclose exists.

The plaintiffs argued that the defendants would be liable under Pruitt v. Morrow, 288 S.C. 298, 301, 342 S.E.2d 400, 401 (1986) for failure to disclose to subsequent purchasers in which the court referred to “actions based upon negligent or reckless non-disclosure of land defects.” This case is inapposite to the instant case. In Pruitt, the Ervin Company (Ervin) purchased a tract of land and subdivided it, roughed in streets and laid utilities. Another company purchased these properties in 1974, and then sold a lot to Anthony Morrow upon which he built a “spec” house. Morrow sold this house to a couple, who subsequently sold it to Pruitt, the plaintiff in that case. The house began to shift and it was discovered that the house had been built over a gully filled with stumps and construction materials capped with fill dirt.

The single issue addressed in Pruitt was whether the doctrine of *caveat emptor* afforded a defense to Ervin’s successor against the causes of action in fraud and negligence/recklessness brought by Pruitt. Ervin’s successor argued that the exception to *caveat emptor* that applied to

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sales of new buildings did not extend to sales of undeveloped land. The court held that “the doctrine of *caveat emptor* is also inapplicable in actions based upon negligent or reckless non-disclosure of land defects,” relying on the two opinions in Lawson v. Citizens and Southern National Bank of South Carolina (Lawson I, 255 S.C. 517, 180 S.E.2d 206 (1971), in which the plaintiffs in that case appealed the trial court’s decision to sustain defendant’s demurrer and Lawson II, 259 S.C. 477, 193 S.E.2d 124 (1972), in which the defendant appealed the trial court’s decision declining to grant JNOV or new trial after the jury’s verdict for plaintiffs).

However, the court held “the remaining issues present no errors of law” and it is not apparent from the record what other issues were raised. Id. There is no indication that Ervin’s successor raised the issue that Pruitt did not have a cause of action based upon negligent non-disclosure of land defects against it. Therefore, the court did not decide whether Pruitt had such a cause of action against Ervin’s successor. Analyzing the language in Lawson I and II, on which the Pruitt court relied, and in the case law addressing the situations where the duty to disclose arises, this court finds that Plaintiffs could only bring an action for failure to disclose against Gina Pike, and Oman and Niemi would only be liable to Dan-Sa, if they are liable for a failure to disclose at all.

In Lawson, Mr. Lawson, purchased a lot in a residential subdivision from the developer of the property. He and his wife built their home on the lot. They subsequently divorced and Mr. Lawson conveyed the house to his wife. Afterward, Mrs. Lawson discovered the house was built over a ravine filled with unsuitable material and capped with clay and the house suffered damage. Mr. and Mrs. Lawson joined in bringing an action against the developer, asking for actual and punitive damages. In Lawson I, the court analyzed the specific allegations in the complaint, noting they “jumble[d] allegations appropriate to an action for deceit with allegations

appropriate to an action for negligence” but found:

. . . the complaint charges, by specific allegation or reasonable inference, that the defendant in developing and subdividing its land into lots to be sold for residential use only, filled an enormous gulley with stumps and other rubble to a depth of twenty to twenty-five feet and concealed this fill by covering it with soil. A large part of the lot sold to Mr. Lawson was comprised of this filled area, which the defendant knew was unstable and unsuited for the intended purpose. Knowing that the purchaser was ignorant of the condition, which was not apparent upon inspection, and knowing its materiality, the defendant failed to disclose the truth.

Lawson I, 255 S.C. at 520-21, 180 S.E.2d at 208.

However, on the issue of the subsequent conveyance of the property by Mr. Lawson to his ex-wife, the court decided it did not need to determine whether Mrs. Lawson was a proper party because the cause of action “ripened in Mr. Lawson upon completion of the dwelling.” Id. at 522, 180 S.E.2d at 209. The court specified it did not need to inquire whether Mrs. Lawson was a proper party because “defect of parties, not multiplicity, is ground for demurrer,” i.e. a proper party, Mr. Lawson, had a cause of action against the developer, and it did not matter that Mrs. Lawson did not. Id.

Furthermore, Lawson II acknowledged the South Carolina law regarding the limitation of the duty to disclose as between the parties to the transaction by citing to Holly Hill Lumber Co. Explicitly, in Lawson II, the court addresses the duty to disclose arising from the transaction between Mr. Lawson and developer, and the developer’s duty to disclose in the context of that transaction. Lawson II, 259 S.C. at 480-81, 193 S.E.2d at 126.

Furthermore, in support of its holding, the Pruitt court also noted that section 353 of the Restatement (Second) of Torts “reject[ed], by clear implication, *caveat emptor* in non-disclosure of land defect cases.” Pruitt, 288 S.C. at 301, 342 S.E.2d at 401. In LoPresti v. Burry, 364 S.C. 271, 612 S.E.2d 730 (Ct. App. 2005), the court states, in a footnote, that section 353 ‘suggest[s] a

seller of real property may be liable for negligent nondisclosure of defects in the land” but points out the condition precedent before liability can be imposed that “the vendee does not know or have reason to know of the condition or the risk involved.” (emphasis added). In LoPresti, a subsequent purchaser brought a claim for negligent and reckless nondisclosure of land defects against the seller, together with claims for fraud and fraudulent concealment, in an action arising from their purchase of a home encumbered by a flood easement. The seller recorded a plat without the floodplain line, although the flood easement had been previously recorded. The appellate court affirmed the trial court’s grant of summary judgment to the seller on all causes of action and specifically considered as dispositive the absence of any special relationship between the subsequent purchaser and the seller that would require disclosure of a matter of public record, along with the constructive notice of the easement. Likewise, this court fails to find a special relationship between the seller and subsequent purchasers; therefore, summary judgment should be granted in favor of the sellers.

This court also considered the case law from other jurisdictions that limit the duty to disclose land defects to situations where the relationship between the parties is that of seller-purchaser. See Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 100-101 (D. Mass. 1990) (specifying that the exception to the general rule<sup>1</sup> of nonliability for vendors in the circumstances of any hidden defects that the vendor knows or should know would create an unreasonable risk of harm does not apply in this case where the relationship between the plaintiff and the defendant was not one of vendor and vendee); Christy v. Glass, 415 Mich. 684, 696, 329 N.W.2d 748, 753 (1982) (the vendor of land with water problems had no duties of disclosure to the subvendees and its only liability for a failure to disclose would have been only to its vendee).

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<sup>1</sup> This “exception to the general rule” is the one referred to in section 353 of the Restatement. See Wellesley Hills Realty Trust, 747 F. Supp. at 100; Christy, 415 Mich. at 695 n. 7, 329 N.W.2d at 752 n.7.



See also DeAravjo v. Walker, 589 So. 2d 1292, 1294 (Ala. 1991) (affirming summary judgment granted to the vendor of land when the plaintiffs did not offer anything to indicate they were in privity with the vendor).

Moreover, this court finds that the defendants had no duty to disclose debris buried on any portion of the lot that was outside the perimeter of the footings. A fundamental difference exists between the situations in Pruitt and Lawson and the situation in the present case. In both Pruitt and Lawson, the developer/seller of land failed to disclose debris buried on the lots in situations where the residential homes could be built anywhere on those lots. Additionally, Lawson II indicates that the purchaser of the lot placed the location of the house in such a manner as to avoid a gully or ditch that was visible on the lot. Lawson II, 259 S.C. at 484, 193 S.E.2d at 128. The Pruitt court does not specify what a cause of action in negligent or reckless non-disclosure of land defects must rely on, but cites to Lawson I and II. The land purchaser's cause of action in Lawson II relied on the seller's knowledge that the land was unstable and unsuited for the intended purpose of building a residential house on it, which was a *material fact* in the transaction between Lawson and the developer. From the Pruitt court's reliance on Lawson, this court infers that materiality of the non-disclosure applies even when the non-disclosure is negligent or reckless, as opposed to fraudulent.

Here, the material fact in the transaction between Defendants and Dan-Sa, the builder, was the possibility of building a house on the footings poured on the property. The location of the house was clearly established by the footings poured on the lot prior to the lot being sold to Dan-Sa. The house built on the footings did not show any defects or signs that it was built on unsuitable footings. The remaining part of the lot was, to Defendant's knowledge, not buildable, due to the topography of the land and the 100-year floodplain which shows a large portion of the

remaining lot was not above the 100-year floodplain. Dan-Sa's owner actually agreed that a builder would know not to build in an area not above area the 100-year floodplain and it was general knowledge for builders that it could not be built upon. Therefore, building anything on the part of the property known as unbuildable was not a material part of the transaction between Dan-Sa and Oman and Niemi to give rise to a duty to disclose. Consequently, Oman and Niemi cannot be liable as a matter of law for failure to disclose.

Furthermore, Section 353 of the Restatement (Second) of Torts, to which the Pruitt court referred, and the comments thereof, clearly establish that this section is not applicable under the facts of this case. Pursuant to section 353, the vendor of land is subject to liability for physical harm when the vendor fails to disclose to his vendee a condition "which involves unreasonable risk to persons on the land" IF

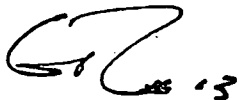
- (a) the vendee does not know or have reason to know of the condition or the risk involved, and
- (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

Restatement (Second) of Torts § 353 (1965) (emphasis added).

Comment (e) to this section, specifies that a condition necessary to subject the vendor to liability is that he realized or should realize the risk involved. Specifically,

[i]f the defect which he fails to disclose is one which does not make the land dangerous to persons upon it unless it is used for a purpose to which the vendor has reason to believe that it will not be applied, a reasonable man, though knowing of the condition, would not believe that it was likely to cause any harm to such persons.

Plaintiffs' complaint indicates the discovery of the debris was a result of their contractor's work to install a pool. This pool was to be placed on the portion of the lot to the left



of the house that had been built by Dan-Sa on the footings poured by Defendants. There is no dispute that the burial of the organic debris did not make the land dangerous to persons. Defendants had not reason to believe that the buried debris would make the land unsuitable for building a pool in that area when, to their knowledge, that area was not buildable to begin with and had no information that the subsequent purchaser, six years later, would decide to build a six foot retaining wall to accommodate a pool.

Also, the draftsman's drawings provided by Defendants to Dan-Sa were for a house that could be built on the existing footings, but did not include porches that would be supported on any part by the retaining wall. The drawings actually indicated the porches were to be supported by posts, each of them placed on its own footings. Dan-Sa supported the second floor roof of the porch with a post placed on the retaining wall which violated the standard of care for a builder. Thus, Defendants did not realize and could not have realized that Dan-Sa would decide to use a part of the retaining wall to support the porch and these Defendants cannot be liable to Dan-Sa for failure to disclose to him that the retaining wall was unsuited for such a use. Additionally, Defendants could not have realized that removing the debris to accomplish the construction of a pool on the left side of the retaining wall would create a risk to the porch which was improperly constructed by a subsequent purchaser/builder.

This court finds that Oman and Niemi did not owe a duty even to Dan-Sa, their purchaser with whom they were in privity, to disclose that debris was buried on the lot in an area considered not buildable, which was to the left of the home site marked by the poured footings because such a disclosure was not material to the transaction.

Even if Oman and Niemi would have had a duty to disclose the existence of the debris to Dan-Sa, pursuant to section 353 of the Restatement (Second) of Torts, knowledge of a land

defect on the part of the vendee or an opportunity to discover it and to remedy the situation relieves the vendor of any duty or liability. Dan-Sa had the opportunity to discover that some buried debris ran under the retaining wall when it dug footers for some of the posts to a depth of two feet to support the porch on the left side of the house.

Furthermore,<sup>6</sup> Dan-Sa conveyed the property to Blue Ridge Savings Bank in lieu of foreclosure. At the time Dan-Sa gave a deed in lieu of foreclosure, it did not make any disclosures to the bank nor was it required to make any disclosures. For that reason, when the bank conveyed the property two years after acquiring it, the bank conveyed the property "AS-IS" to Gina Pike under a contract specifically stating that no Residential Property Condition Disclosure Statement was to be provided. The South Carolina Residential South Carolina Residential Property Condition Disclosure Act specifically exempts disclosure under these circumstances where the bank takes title from a mortgagor whose indebtedness was in default. See, S.C. Code Ann. § 27-50-30 (2). Therefore, any disclosure, if it had been required, and although not made, would never have been conveyed to the Holleys. This court, therefore, dismisses the plaintiffs' action for failure to disclose.

**II. DEFENDANTS OWED NO DUTY TO PLAINTIFFS IN MAINTAINING THE LOT THEY OWNED IN A PARTICULAR MANNER OR IN CLEARING THE LAND AND IN BUILDING THE RETAINING WALL**

The plaintiffs also contend that the defendants are liable as residential home builders and also to maintain the property. In a negligence action, [t]he court must determine, as a matter of law, whether the law recognizes a particular duty." Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." Bishop v. S. Carolina Dep't

of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

Plaintiffs allege that Oman and Niemi had a duty "to act reasonably and with care in maintaining the property" while they cleared the land. However, this court finds no South Carolina cases which impose a duty on a landowner to maintain their property in a certain way while owning the property. Such a duty would be unreasonable, as expressed persuasively by a court from another jurisdiction:

. . . no legal authority . . . would support the imposition of a duty on an owner of land to maintain his or her property in a certain condition or to refrain from any activity affecting the property which would extend to future owners of the land. The imposition of such a duty would be unreasonable because such future owners may not be known or even contemplated at the time the landowner creates or maintains a condition on his or her property. Moreover, such a duty would unreasonably interfere with a landowner's right of ownership; the right to do with his or her property as desired without liability so long as he or she does not interfere with the interests of others.

Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 100 (D. Mass. 1990).

In Wellesley, Mobil Oil Corporation sold a property on which it previously operated a gasoline station to Harold Alexander. A few months thereafter, Alexander sold the property to Wellesley Hills Realty Trust (Trust). One of the Trust's many causes of action asserted that "Mobil had a duty to ensure that there were no releases of oil or hazardous materials at the site" and that Mobil was liable in negligence because it breached this duty and caused damage to the Trust's property. The court concluded as a matter of law that Mobil did not owe a duty to the Trust to ensure that there were no releases of oil or hazardous material on the property while Mobile owned and possessed the property. See also Jones v. Texaco, Inc., 945 F. Supp. 1037, 1047 (S.D. Tex. 1996) (citing to Wellesley Hills Realty Trust and to cases from other jurisdiction in which the courts declined to impose liability under a negligence theory upon a prior

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landowner in favor of remote, subsequent purchasers, in situations of contamination with oil or other chemicals).

Similarly, this court finds that Oman and Niemi owed no duty to subsequent purchasers to maintain the property in a certain condition or refrain from any activity affecting the property, like the clearing of their land and disposal of the debris on their property, while they owned the property. Furthermore, the buried debris does not involve hazardous material per se that contaminated the property, but debris that was organic material that would decompose in time.

This court also concludes that an action in negligence by Plaintiffs' against Oman and Niemi arising from the building of the retaining wall and pouring the footings, although one not asserted in the complaint, but argued by the plaintiffs at the hearing, must fail due to Plaintiffs' failure to establish the existence of an essential element of the party's case. See Harris, 315 S.C. at 346, 433 S.E.2d at 906.

In Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980), the Supreme Court held that a residential builder of a home built as speculative owes a duty of care in constructing it to the members of the class for which it was constructed, so as to render him accountable for negligent workmanship, even in absence of privity. This court finds that the duty of care in Terlinde is applicable to the entire home, the finished product, placed into the stream of commerce. Therefore, this court concludes that the Terlinde duty cannot be extended to the footings or, even more so, to the retaining wall, which is not even a part of a residential building. As stated above, the house was built on the poured footings by Dan-Sa, a South Carolina licensed residential builder, who was building it for speculative sale. Under these circumstances, the duty of care in building the residence should be imputed to Dan-Sa, who built the finished product, and not the sellers of the property.



Defendants intended to move the modular home on the lot at 2834 Lake Road to use as their residence. For this purpose, they applied for and obtained a building permit. If their plan would have proceeded, Oman and Niemi would have been in a similar situation as the one described in Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008). Breedlove planned to build a residence for his family on a vacant lot he owned in Hilton Head and he did not have any agreement or intention to sell the residence. Breedlove built the house acting as his own general contractor. The family lived in the residence for a while, but unforeseen circumstances made it necessary for them to sell it. Several years later, the purchaser filed suit against Breedlove on several causes of action, including negligence in constructing the home. The supreme court affirmed the grant of summary judgment to Breedlove. In regard to the negligence argument, the supreme court noted “[t]he circuit court held that the undertaking or agreement to construct a dwelling for another is what creates the duty to exercise and use due care in the construction of that dwelling.” Id. at 424, 661 S.E.2d at 72. In light of the decision in Smith, this court concludes that it would be unreasonable to impose a residential builders’ duty of workmanship on Oman and Niemi when the entirety of their work consisted of pouring footings and building a retaining wall while the construction of a home for another was done by Dan-Sa.

Additionally, the Terlinde court’s imposition of liability in tort in the absence of privity between the tortfeasor and the third party was limited to protecting an innocent purchaser in the context of defective construction. Therefore, there could not be any liability imposed on Oman and Niemi because there is no competent evidence that the house constructed on the footings by Dan-Sa was defective. According to Dan-Sa’s owner, Danny Gibson, who built the house, “if [the plaintiffs] had never dug that pool, the house would still be there like in 40 years from now.” His statements are supported by the allegations in the complaint, where it is explained that the




discovery of buried debris was the result of Plaintiffs' contractor's work to install a pool, and not by finding any defects in the house.

Because the Plaintiffs also failed to show they owed any additional duties to the subsequent purchasers for failing to maintain or the construction of the footers and retaining wall, this court grants summary judgment to the Defendants, Oman and Niemi, on all of the remaining allegations in the complaint.

**ORDER**

For the reasons set forth above, it is ORDERED that Oman and Niemi's Motion for Summary Judgment is granted and the case against these defendants is dismissed with prejudice.

**AND IT IS SO ORDERED.**

  
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G. Thomas Cooper, Jr.  
Judge, Fifth Judicial Circuit

Camden, South Carolina

2-22, 2015