

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Clifton Newman, Circuit Court Judge

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

Kevin McCarthy and Courtney R. McCarthy, Appellants,

v.

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

Of whom S&ME, Inc. is the Respondent.

**RECORD ON APPEAL
VOLUME III OF III**

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INDEX

VOLUME I

ORDERS:

Scheduling Order of the Honorable Clifton Newman dated July 9, 2012.....	1
Order of the Honorable Clifton Newman Denying Appellants' Motion to Amend dated July 9, 2013.....	3
Order of the Honorable Clifton Newman Granting Respondent's Motion for Summary Judgment dated July 15, 2013.....	7
Order of the Honorable Clifton Newman Denying Appellants' Motion to Alter or Amend dated November 25, 2013.....	27

PLEADINGS:

Complaint of Appellants with Exhibits dated September 23, 2011.....	28
Answer of Respondent dated November 7, 2011.....	177
Answer of Cliffs Defendants dated November 10, 2011.....	187
Respondent's Motion for Summary Judgment dated January 15, 2012.....	196
Affidavit of Walter Birdsong with Exhibits dated January 14, 2013.....	198
Appellants' Motion to Amend Complaint dated March 20, 2013.....	208
Respondent's Memorandum in Support of Summary Judgment with Exhibits dated April 29, 2013.....	239

VOLUME II

Appellants' Memorandum in Opposition to Respondent's Motion for Summary Judgment with Exhibits dated May 1, 2013.....	429
Appellants' Memorandum in Support of Motion to Amend dated May 2, 2013.....	762

Respondent's Motion to Strike Portions of Appellants' Memorandum in Opposition to Respondent's Motion for Summary Judgment dated May 3, 2013.....	766
Respondent's Supplemental Brief dated May 24, 2013.....	773
Appellants' Supplemental Memorandum Concerning Economic Loss Rule dated June 10, 2013.....	789
Appellants' Motion to Alter or Amend dated August 2, 2013.....	797

VOLUME III

TRANSCRIPTS:

Transcript of Hearing held on May 3, 2012 (Motion to Amend).....	811
Transcript of Hearing held on May 3, 2012 (Summary Judgment).....	853
Deposition excerpts of Kevin McCarthy with Exhibit.....	923
Deposition excerpts of Courtney McCarthy.....	953
Deposition excerpts of Carroll Crowther.....	956

OTHERS:

Deed filed in Oconee County on December 18, 2002.....	960
Notice of Appeal dated August 22, 2013.....	973
Notice of Appeal dated December 9, 2013.....	975
Motion to Consolidated Appeals dated December 9, 2013.....	977
Letter of Court of Appeals dated December 18, 2013.....	979
Certificate of Counsel	980

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	TRANSCRIPT OF RECORD
	)	
Kevin McCarthy, et al,	)	
	)	
Plaintiff,	)	Case No(s) : 2011CP2305300
	)	
-VS-	)	
	)	
The Cliffs Communities, Inc.,	)	
et al.	)	
	)	
Defendant.	)	

May 03, 2012
Greenville, South Carolina

B E F O R E:

THE HONORABLE CLIFTON NEWMAN, Judge.

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I N D E X

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Motions	4
Certificate of Reporter	42

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

THE COURT: Who is next?

MS. McMILLAN: Your Honor, do you want to proceed with the summary judgement motion of McCarthy is what I would propose to go next.

THE COURT: All right. Mr. Dudley, you are -- were you thinking that you should be next?

MR. DUDLEY: Well, I thought the motion to amend. That's not going to undo their motion for summary judgement. It may change. But I'll be happy to argue my motion to amend.

THE COURT: In my mind, the way I thought of all this is to put on the record what has been settled, deal with the motion to intervene, deal with the motion to amend and then with the summary judgement motions.

MR. DUDLEY: Your Honor, if I could --

THE COURT: Yes, sir.

MR. DUDLEY: This nice little notebook up here is a compilation of all of our motions and memorandums and exhibits. Your Honor, with regards to my motion to amend. Rule 15 is very -- should be -- we have to appeal -- request from Court should be freely given and shouldn't result in a prejudice against the other side. I think with

1 regards to all of those, the nature of the motion
2 to amend and the substance that we are bringing,
3 uh, neither prejudices the other side and we think
4 it makes sense because it kind of cleans up what
5 we've done during discovery.

6 There's some major things that we learned
7 during discovery early on. There is a significant
8 one that resulted in the cause of action against
9 the Cliffs for negligence that we learned for the
10 first time in December of 2012. So the two big
11 things that we learned during discovery that are
12 now -- we concluded in our facts section of our
13 complaint, the amended complaint that we would
14 propose and then also the causes of action against
15 the -- the additional causes of action against S&ME
16 was the discovery during -- was the discovery
17 during discovery -- I guess that's right -- of the
18 Alpha Environmental report that preceded my clients
19 buying the property that S&ME had and the Cliffs
20 had. So we think those are matters that were first
21 discovered during the discovery phase of this case.
22 And also --

23 **THE COURT:** Can you, uh, -- before you
24 continue with that, tell me what it is that you're
25 wanting to amend and what new claim you are wanting

1 to assert.

2 MR. DUDLEY: Yes, sir. There's really -- I've
3 kind of gone back. There is a negligence claim --
4 the ba--- a negligence against the Cliffs. The
5 basis of that is December of 2012, S&ME made a
6 designation of their expert, Dr. Borden. In that
7 designation in December said that it is his
8 opinion, Dr. Borden's opinion, that the
9 inclinometer data on Lots 30, 31 and 32 were
10 showing movement because there had been a waterline
11 break in the cul-de-sac in 2009 and the escape of a
12 lot of water, uh, was causing the inclinometer data
13 that was showing up in my client's lot and the
14 Harrells' lot. That came for the first time as an
15 opinion by an expert in December 2012 and the first
16 time that theory was put out there.

17 Based on that -- now, we don't agree with it.
18 Our expert does not agree that the cause of the
19 inclinometer data has anything to do with this
20 waterline break. But assuming a jury were to find
21 that that's the basis, we think that we have a
22 damages claim against the Cliffs because the Cliffs
23 are the ones that put the waterline in. They put
24 that waterline in negligently and that is cause
25 against -- which we don't believe. If that's the

1 cause of the water that's now causing the
2 inclinometer data and the movement on our lots,
3 then we have a negligence claim for property damage
4 against the Cliffs. So that came up the first time
5 in December. That's why -- that's the first thing
6 is just a cause against the Cliffs for negligence
7 based on the waterline break assuming that the
8 expert of S&ME, his opinion is correct.

9 The only other one has to do with the
10 negligence misrepresentation claim against S&ME
11 coming out of the disclosure during discovery --
12 that's a better way to say it -- of the Alpha
13 Environmental report and the deposition testimony
14 of Walker Birdsong in December of 2012 -- or was he
15 November? November, late November of 2012 -- uh,
16 that he, in fact, when he did his proposal which
17 was something else we learned for the first -- that
18 we got the first time during discovery, a proposal
19 to go look at that three lots prior to my client or
20 actually two days after my client entered a
21 contract to buy Lot 32. Mr. Birdsong, in his
22 deposition that we learned for the first time in
23 2012, that he actually had a copy of the Alpha
24 report and reviewed the Alpha report, was told
25 about the Alpha report in the buyback of Lot 31 in

1 2005 when he -- before he went out and did this
2 proposal in June of 2005.

3 And so the discovery of that information in
4 November -- late November and early to 2012 is the
5 genesis of us making a motion to amend to assert
6 those two newt causes of action. We don't need to
7 take those depositions again. It's all from the
8 deposition testimony. For that reason, we ask the
9 court to allow us to amend the pleadings.

10 **THE COURT:** All right. Ms. McMillan.

11 **MS. McMILLAN:** May it please the Court, Your
12 Honor. I'm going to hand up at this time our
13 memorandum and documents to support our summary
14 judgement motion which also affects this motion to
15 amend, as well as a brief motion opposing the
16 motion to amend. I meant a brief memo. Excuse me,
17 Your Honor..

18 Your Honor, we contend -- the Cliffs, KFIG and
19 Cliffs Real Estate Inc. and Cliffs Golf and Country
20 Club oppose this motion to amend for two specific
21 reasons. Number one, it's not timely. To say that
22 they just learned in December 2012 that there was
23 an issue about the waterline break and they point
24 fingers now at possibly the Cliffs of installing
25 the waterline break, that's just -- maybe that's

1 the first time the experts say that by Ms. Burton's
2 client, but that issue has been at the -- that's --
3 the waterline break, whether it caused the movement
4 of the slope or whether the movement of the slope
5 caused the waterline to break has been the chicken-
6 and-egg question ever since both of these cases
7 have been filed. That has been the most
8 significant issue that the waterline -- Your Honor,
9 if I may I approach.

10 I don't know who put this exhibit up here.
11 Let me just bring it up a little bit. Let me get
12 my bearings straight on where we are. I guess this
13 is -- the highlighted? Oh, right there. These
14 lots. This is, I guess, Keowee Falls South which
15 is a big issue here that was owned by Keowee Falls
16 Investment Group LLC. Very important fact in this
17 case with regard to all of our motions, Your Honor.
18 But these three lots, the Harrells' lot and the
19 McCarthys' lot. 32 is here and 31 is here. There
20 is a cul-de-sac up above these lots.

21 In November, I think it was, of 2009, in the
22 cul-de-sac area, a waterline burst. And it's
23 estimated that about 100,000 gallons of water were
24 released from the waterline separation. We are not
25 trying decide that issue of fact about that right

1 now. I'm saying there is testimony that that
2 waterline break occurred and dispersed 100,000
3 gallons of water.

4 Ms. Burton's expert testified that he believes
5 the waterline separation could have caused some of
6 the damage you see in some of the inclinometers.
7 The plaintiffs, the Harrells', filed their suit
8 first. They alleged that the slope failure was
9 occurring which caused the waterline to separate.
10 And they filed their lawsuit on that basis.

11 It is undisputed in the record that Mr.
12 McCarthy testified he did not know anything about
13 this issue until Mr. Harrell approached him and
14 told him about it and told him what was happening
15 and that he had an expert that the lot was, uh, the
16 slope failure was occurring and it probably
17 affected Mr. McCarthy's lot. I believe that at the
18 same time, Mr. McCarthy was advised about the
19 waterline break. That has been the core issue that
20 precipitated both of these actions.

21 The fact that Ms. Burton's expert stated
22 specifically in December 2012 that he thought that
23 that waterline break could have caused some of the
24 movement that has been seen in the inclinometers
25 does not mean that's the first time that the

1 McCarthys were aware that, hey, maybe it's the
2 waterline separation that has caused the movement.
3 That has been at the center of both of these cases.

4 We would argue that that is not a reason to
5 allow an amendment to occur at this time when
6 that's been one of the central focus issues in
7 every deposition that has been taken almost about
8 which happens first. So our position is it's not
9 timely. The second --

10 **THE COURT:** Does the scheduling order address
11 the last date for amending?

12 **MS. McMILLAN:** At first, I thought it did,
13 Your Honor. And I don't think it had a specific
14 provision in there.

15 **MS. BURTON:** It addresses all motions.

16 **MS. McMILLAN:** Well, it did say all motions to
17 be filed by January 15th. This motion was not
18 filed until March. I don't remember the exact
19 date, but it was filed in March. So it did miss
20 the deadline for all motions, Your Honor, even
21 though it wasn't specifically about amending
22 pleadings, but all motions were to be
23 filed by January 15th.

24 The second position that we have is the
25 negligence claim would be futile. This goes to my

1 main argument in my motion for summary judgement
2 with regard to both the Cliffs Communities Inc. and
3 KFIG. I call it KFIG. It's Keowee Falls Investment
4 Group. This chart that Ms. Burton handed up is
5 very helpful on this situation.

6 The Cliffs Communities Inc., the named
7 defendants by Mr. McCarthy is a member, is the sole
8 member of KFIG, the LLC. There is undisputed
9 evidence that KFIG owned the property that was sold
10 to the McCarthys. The purchase contract, which is
11 one of our exhibits in our memo shows that KFIG was
12 the seller to the McCarthys.

13 The deposition testimony of Mr. McCarthy is
14 that he talked to a realtor named Jay Scott who
15 sold him the lot. Jay Scott was not an employee of
16 KFIG or Cliffs Communities Inc. Our contention is
17 and the basis for our motion for summary judgement
18 is that the Cliffs Communities Inc. is entitled to
19 summary judgement on all of the claims because it
20 was not a party to the contract between KFIG and
21 Mr. McCarthy. It didn't make any representations
22 whatsoever, had no involvement with the sale of the
23 lot to Mr. McCarthy.

24 Mr. McCarthy testified that he wasn't quite
25 sure how many times he had have come and seen the

1 lot. The only person he talked to about purchasing
2 that lot was Jay Scott, an independent contractor
3 who was a real estate agent for Cliffs Real Estate
4 Inc. So my main point here is that Cliffs
5 Communities Inc. cannot be sued in negligence, Your
6 Honor, because they had no involvement with the
7 sale of the lot to Mr. McCarthy.

8 With regard to KFIG, they signed the contract,
9 the purchase agreement between KFIG and Mr.
10 McCarthy. They trans -- the deed is from KFIG to
11 Mr. McCarthy. My argument there is, Your Honor,
12 and the basis for my motion for summary judgement
13 is under economic loss rule, the duties that arose
14 between Mr. McCarthy and KFIG arose out of that
15 contract, the purchase contract. Under well-
16 settled law in South Carolina, the economic loss
17 rule bars court claims when the duties between the
18 parties arise out of the contract.

19 My argument with regard to motion to amend is
20 you can't come back now and assert this negligence
21 claim because, A, you can't assert against the
22 Cliff's Communities Inc. because there's no
23 evidence to show that he had any involvement with
24 the sale of this lot to Mr. McCarthy. And, B, you
25 can't bring it against KFIG because the duties

1 arose out of the contract. A negligence claim
2 would be barred by the economic loss rule. That's
3 my position with regard to the motion to amend,
4 Your Honor.

5 **THE COURT:** All right. Ms. Burton.

6 **MS. BURTON:** Your Honor, I also have a
7 memorandum and some cases to hand up to the court.

8 **THE COURT:** Yes, ma'am.

9 **MS. BURTON:** Thank you, Your Honor. In the
10 original complaint filed by Mr. and Mrs. McCarthy,
11 there is only one cause of action alleged against
12 my client, S&ME, and that's a cause of action for
13 negligence. In the proposed amended complaint, the
14 McCarthys proposed to add a cause of action for
15 negligent misrepresentation.

16 Their negligent misrepresentation claim is
17 based upon -- and I handed up that little outline
18 to the court before -- it is based upon a July 2005
19 report prepared by S&ME. That is also the report
20 that the plaintiffs allege contains improper
21 geotechnical engineering recommendations in their
22 negligence cause of action. So there are no new
23 facts related to the discovery that my client
24 prepared a 2005 report that has come up in
25 discovery in this case.

1 But I would first point out to the Court that
2 in South Carolina, the cases say that an amendment
3 should not be permitted if the amendment is futile.
4 With respect to this negligent misrepresentation
5 claim, there are two reasons that the court should
6 not grant the motion to amend.

7 The first of those relates to the packet of
8 cases I handed up to the court. Frankly, my
9 attention was drawn to this issue when I read the
10 memorandum in opposition to the motion for summary
11 judgement that was filed by the McCarthys. In that
12 memorandum on page 2, the McCarthys stated that the
13 plaintiffs discovered this -- and that, being, this
14 alleged slope failure -- when the owner of Lot 31,
15 Jack Harrell, who has also filed suit against all
16 defendants contacted Kevin McCarthy in April 2011
17 and notified him of the problem.

18 And I would suggest to the Court that, uh,
19 several things. In this case, there is no evidence
20 that the 2005 report prepared by S&ME was ever
21 provided to Mr. or Mrs. McCarthy. In fact, in
22 their brief, they say it was Mr. Harrell in 2011
23 who provided them with the report. There has to be
24 some representation to support a negligent
25 misrepresentation claim. The representation that

1 is relied upon is statements made in the 2005
2 report which they admittedly, in their papers and
3 in Mr. McCarthy's deposition, said they did not get
4 for six years after they brought the land. The
5 damages being claimed by McCarthys in the lawsuit
6 are the cost of the property.

7 I would suggest to the Court, number one,
8 there was no representation made by S&ME in 2005
9 to the plaintiffs. That can't be possible since
10 they said they never saw the report for six years.
11 There obviously has to be a misrepresentation made.

12 Number two, the McCarthys would have to allege
13 and prove that they relied on some representation
14 made by S&ME in 2005 to sustain a claim for
15 negligent misrepresentation.

16 **THE COURT:** Would the reliance have to be in
17 the, uh, purchase of the property?

18 **MS. BURTON:** Yes, sir, it would because the
19 damages being claimed are the purchase price of the
20 property. So you can not rely on something that
21 you don't see for six years in purchasing the
22 property in 2005. It's a legal impossibility.

23 The, uh, claims -- if the court allowed the
24 amendment, all that's going to happen is we're
25 going to be back before Your Honor on a motion for

1 summary judgement with respect to this negligent
2 misrepresentation claim because the plaintiffs
3 can't prove that my client -- this is Mr. Birdsong
4 who, uh, was involved in some of the reports that
5 was prepared with S&ME. The plaintiffs can't
6 prove, there is no evidence, nor can they plead it,
7 that S&ME ever made a representation directly to
8 them because S&ME didn't know in 2005 the McCarthys
9 even existed on this earth. They didn't own the
10 land at the time the report was prepared. So there
11 can't be a representation. The report was given to
12 the Cliffs.

13 The ethical rules for engineer says an
14 engineer can't give their report willy-nilly to
15 anybody but their customer. So the report, by all
16 the evidence, was not provided to the McCarthys.
17 By all the evidence, including the admissions made
18 in their papers, the plaintiffs never learned about
19 the report for six years. I would suggest to the
20 court that the plaintiffs cannot prove the
21 essential elements of a negligent misrepresentation
22 claim, that being a false representation made to
23 the plaintiffs and justifiable reliance by the
24 plaintiffs and that the plaintiffs suffered a
25 pecuniary loss as a direct and proximate result of

1 their reliance.

2 Given the facts in this case and the pleading
3 if the court looks at the negligent
4 misrepresentation claim, the facts just show that
5 that claim is a legal impossibility and thus it is
6 futile and the court should deny the motion to
7 amend. In addition, I would, uh, argue that the
8 proposed amendment is quite late. We've been
9 involved in this lawsuit for 18 months, I guess.

10 The court held a status conference. I believe
11 it was in June of 2012. At which time, we had a
12 lengthy discussion with Your Honor about proposed
13 deadlines and the defendants wanted the deadlines
14 to be longer and the plaintiffs wanted the deadline
15 to be shorter. Ultimately, the court issued some,
16 frankly, midpoint deadlines between everybody's
17 respective positions and issued a scheduling order
18 which was drafted by the McCarthys' counsel that
19 said that all motions except those relating to
20 admissibility of evidence and those to compel
21 discovery should be filed no later than January 15,
22 2013.

23 And the motion -- I can't recall exactly when
24 it was filed, but I know it was subsequent to that
25 date. And discovery is over in the matter. We're

1 talking adding a number of additional claims and
2 reopening discovery in this case to take discovery
3 with respect to those claims. I would contend that
4 that is not timely and that it would prejudice the
5 defendants.

6 **THE COURT:** All right. Before going back to
7 you, Mr. Dudley, I'm going to hear Ms. McMillan
8 regarding -- your argument regarding the economic
9 loss rule and how it applies to this new one. Talk
10 a little more about that.

11 **MS. McMILLAN:** Yes, Your Honor. And I
12 apologize. I gave you the Harrell memo as opposed
13 to the McCarthy memo which basically has some of
14 the same arguments in it.

15 **THE COURT:** You know, this whole, uh, economic
16 loss rule is, uh, often puzzling to me, so I want
17 you to explain economic loss rule to me and how it
18 applies to this case.

19 **MS. McMILLAN:** It's very puzzling for me too.
20 It's a very hard issue, I think. My argument is
21 it's very important to separate who the parties are
22 that are involved in the case. The argument about
23 the economic loss rule is that any claims against
24 KFIG, the entity that contracted with Mr. McCarthy,
25 uh, that the cause of action that they would have

1 against KFIG for problems that they think is with
2 the lot or what they didn't get or they loss the
3 benefit of their bargain that, I guess, would be
4 related to that contract. The duties between the
5 parties arose from that contract. The law in South
6 Carolina is that if your claims arise out of the
7 contract, then you can't bring the tort claims.

8 There is that line of cases, the Griffin
9 Plumbing case, the Kennedy Lumber case and I know
10 there's been an exception carved out for
11 residential homes with regard to a house that's
12 been built. But at the time the McCarthys bought
13 this a lot, there was no home on it. It was not
14 like a home -- it's not a house being sold. It's a
15 piece of property being sold. Indeed, the
16 McCarthys have never built a house on it. So my
17 argument is that any claims against Keowee Falls
18 Investment Group LLC would have to be for breach of
19 contract or a contract related-type claim.

20 The economic loss rule would prevent that
21 claim. I know Mr. Dudley has said that negligent
22 misrepresentation, uh, he does not believe fraud is
23 barred by the economic loss rule. I've been
24 searching for cases on that, Your Honor. I know
25 there is the Bishop Logging case which held that --

1 this is Bishop Logging versus John Deere Industrial
2 Equipment Company where John Deere sold a piece of
3 equipment to Bishop Logging. It did not perform as
4 they anticipated it would. They said they relied
5 on representation of John Deere of what that piece
6 of equipment would be doing and how it would be
7 appropriate for them.

8 The court ruled that their negligent
9 misrepresentation claim in that case should be
10 thrown out because of the economic loss rule that
11 the duties arose between the parties by contract.
12 So the tort claim was not allowed. It specifically
13 disallowed a negligent misrepresentation claim in
14 that case. That's been what I've been able to find
15 in South Carolina regarding --

16 **THE COURT:** What damages was they seeking
17 under this negligence theory? If he were allowed
18 to add in negligence, what --

19 **MS. McMILLAN:** I guess he would have had a
20 chance to sue for punitive damages, Your Honor, in
21 the negligence claim. That would be in addition to
22 or different from what he would have sued for in
23 the breach of contract claim.

24 **THE COURT:** So he is seeking to change the
25 whole direction of litigation from a breach of

1 contract cause of action resulting in damages?

2 MS. McMILLAN: Well, he already has a
3 negligent misrepresentation claim. He already has
4 a fraud claim. And he's got several violation of
5 statute claims. He has got other causes of action
6 in his complaint already. Quite frankly, Your
7 Honor, I think the negligence claim has to relate
8 to insurance coverage to be quite honest. That's
9 why that's being sought at this time.

10 But my argument still stands that the
11 negligence claim can not be brought against KFIG
12 because -- as to a negligence claim. It's clear
13 that the economic loss rule would bar that claim.
14 The negligence claim can't be brought against the
15 Cliff Communities Inc. because there is absolutely
16 no evidence in the record that the Cliffs
17 Communities Inc. had any -- made any
18 representations to Mr. McCarthy regarding this lot.

19 Mr. McCarthy dealt with Jay Scott, a real
20 estate agent who is an independent contractor and
21 sold properties. Cliffs Real Estate Inc. paid him
22 commissions for the sales that he did. The Cliffs
23 Communities Inc. is a totally separate entity from
24 the Cliffs Real Estate Inc. It was a member of
25 KFIG, but it was not the party that showed anything

1 to Mr. McCarthy that made any representations to
2 Mr. McCarthy and his contract to buy the land was
3 with KFIG. They were the owner of all of that
4 Keowee Falls development. KFIG was the developer
5 of that property, and they sold it to Mr. McCarthy.

6 That's my argument, Your Honor, about the
7 economic loss rule with regard to the negligence
8 claim and why we think it's not appropriate to
9 bring the claim against Cliffs Communities Inc.
10 either.

11 **THE COURT:** All right. Yes, sir, Mr. Dudley.

12 **MR. DUDLEY:** Your Honor, I'm going to make
13 this statement cause I think we're going to get
14 into the meat of the underlying motions that are
15 here. But I feel like since they brought it up, I
16 got to bring it up. Essentially what the
17 defendants would have this court do is if you play
18 a corporate shell game and if you make
19 representations to an entity that isn't the one
20 that writes to contract, that somehow you can get
21 away with the material omissions of fact and fraud.

22 The important thing is if Your Honor looks at
23 the timing of this -- and Your Honor, also I need
24 to make a point out to is that to the extent the
25 defendants want to try to distinguish our claims,

1 not just our claims, but the McCarthys' claims,
2 that something's different than the cases of
3 Kennedy Lumber, Beachwalk Villas and all those
4 cases that talk about our courts have carved out
5 and are going to protect home buyers simply
6 because, I guess, in this instance, we're buying
7 real estate, expensive real estate, but there is
8 nothing in the case law that says the case law that
9 protects home owners only applies to the buildings
10 and not the property and the case law only applies
11 to small lots not expensive lots on a lake. It
12 doesn't exist.

13 So what we have here, I think it not only
14 applies to the duty that's going to be the
15 underlying issue, is this economic loss rule. And
16 what we've have seen and what the court has seen is
17 that Kennedy -- well, start with Griffin, which is
18 a commercial case that talks about, uh, the duties.
19 And it talks about economic loss rule. And it
20 talks about if it's outside of the contract and
21 then breaches a violation, eroding of economic loss
22 rule is a defense.

23 In Kennedy, which is a perfect case, talks
24 about not only the protection of homeowners, and it
25 says the courts are going to protect homeowners.

1 What is more important, it's not just -- in
2 Beachwalk Villas which is architects, that said
3 we're going to extend Kennedy to architects. And
4 it's not a quantum leap that a court would also
5 agree that if an architect could have a duty and is
6 outside economic loss for a homeowner that an
7 engineer that says whether you can even build a
8 house on your lot is not quantum leap to include
9 them into that group. Again, it's protecting
10 homeowners.

11 The issue back is this, is that the Cliffs are
12 a developer. The only thing you can build on that
13 development is residential real estate. You can't
14 build anything else. It's not like Farmer Joe
15 selling it to somebody and then the duties and all
16 and adjacent landowners. We're talking about
17 residential construction. That's all these guys
18 could do. That's all the McCarthys could do.
19 That's all we could do. They fit right under our
20 court's spelling out the duties and the eroding of
21 the economic loss rule as a defense to the claims
22 when there's code violations and/or what's very
23 important when it comes to S&ME is violations of
24 industry standards.

25 Here is what I want to kind of drop back into

1 first. Let's talk about the timing of these
2 issues. Ms. McMillan is right. What prompted me
3 to make this motion to amend was mediation.
4 Mediation and a claim there having to do with
5 insurance. The reality is that in Decem -- up
6 until that point, an allegation as to the waterline
7 had nothing to do with the McCarthys. Again, my
8 clients first learned there was a problem by my
9 client -- from the Harrells in April of 2011. They
10 didn't even know the --

11 **THE COURT:** On the question of futility, as
12 Ms. Burton argued, how can you have a claim for
13 negligent misrepresentation when there was no
14 representation?

15 **MR. DUDLEY:** Because it goes back to that
16 shell game thing, Your Honor. If you look at the
17 case that I cite --

18 **THE COURT:** As it relates to Ms. Burton, how
19 -- they are in the shell game too?

20 **MR. DUDLEY:** They are in the shell game too,
21 and I'm going to get to that.

22 **THE COURT:** All right.

23 **MR. DUDLEY:** The issue is case I cited in my
24 brief says the nondisclosure of material fact which
25 is duty bound to disclose is equivalent to a false

1 misrepresentation. I think that, Your Honor, you
2 know that. An omission of a material fact is a
3 misrepresentation. If you are duty bound to make
4 disclosure and you don't, your silence is a
5 misrepresentation.

6 That's exactly what -- the issue here. If you
7 look at the timeline that Ms. Burton put together.
8 We're not a remote claimant. That's what S&ME
9 wants to say that somehow we're just a remote
10 claimant, we're down the chain. And the important
11 part of the shell game too is that KFIG signed the
12 deed. Actually, KFIG didn't sign a deed. Cliffs
13 Communities signed the deed as the sole member of
14 KFIG. KFIG is on the deed and KFIG is on the
15 contract. That's it.

16 The Cliffs Communities are the only actors
17 from 2005 to 2011. They are the only actors. KFIG
18 took zero steps to do anything. Everything that's
19 involved in the misrepresentations and the work
20 that was done on these lots was 100 percent by the
21 Cliffs Communities.

22 Here is where I'm talking about the important
23 part. In May 2005, the owner of Lot 31, the
24 Rockwells, hire Alpha Environmental Services based
25 on their builder surveyor saying something ain't

1 right out there. Alpha Environmental Services, a
2 professional geologist, looks at that lot, issues a
3 report and says there is slope failure, there is
4 evidence of that and it extends to the lots north
5 and south. That's Lot 32. We're to the south of
6 Lot 31. We're right next door. It says -- not
7 just says you ought not build on it. It says we
8 strongly urge that no residential construction be
9 built on that lot and perhaps the lots north and
10 south.

11 So in May of 2005, the Cliffs were aware that
12 there was a problem with that lot. They were so
13 aware of that problem that they traded that lot
14 out. They lost a million-dollar sale by taking the
15 Rockwells and giving them a different lot. So in
16 the spring of 2005, Cliffs didn't even own Lot 31.

17 Now, within weeks, not even -- well, let's
18 just talk within days. Within days of the Alpha
19 Environmental report, my clients sign a contract.
20 In fact, the Alpha report happened on June the 2nd.
21 My client entered a contract on June the 20th.
22 June 20th. At the time my clients bought the lot,
23 signed the contract, we had closing in August, the
24 only report dealing with those three lots was the
25 Alpha report. That's all the Cliffs had.

1 Two days after -- two days after my client
2 signed a million-dollar contract on that lot, they
3 get a proposal from S&ME. And guess what? S&ME
4 has the Alpha report. Guess what doesn't get
5 disclosed is their report, uh, is the Alpha report.
6 And guess what doesn't get disclosed in discovery
7 in this lawsuit? The Alpha report. But we do
8 learn for the first time in November 2012 that Mr.
9 Birdsong had the Alpha report and reviewed it and
10 even said I did my proposal in June which was of
11 three lots, not one lot, but the three lots the
12 Alpha Environmental report implicated. He did a
13 proposal of three lots to the Cliffs, the Cliffs
14 Communities, not KFIG, to the Cliffs Communities in
15 2005.

16 There is a part of the Cliffs going out and
17 saying we've got to get a second opinion on these
18 three lots. But they took my clients' retainer and
19 they were pushing to close in August. What happens
20 is between the proposal for three lots and then the
21 ultimate report that S&ME did was only one lot. It
22 was Lot 31.

23 The only time S&ME doesn't fully describe the
24 geological conditions -- because they were involved
25 past 2005. The only time they don't fully describe

1 the geological conditions that they observed for
2 that whole cul-de-sac is June -- June -- July of
3 2005 when they only implicate Lot 31.

4 Mr. Nichols of the Cliffs Communities is the
5 one -- he can't recall why the proposal went from
6 three to one. But Your Honor, the inference is and
7 what we know now is that in June of 2005 they had
8 an opportunity to sell Lot 32 for a million dollars
9 to the McCarthys and not tell them about the Alpha
10 report and not tell them that they are getting a
11 second opinion about whether or not he can build a
12 house on this million-dollar lot.

13 What happens then is that in the duties that
14 cited in my brief from the statutes governing
15 engineers, from the regulations governing
16 engineers, that engineers have an obligation to
17 disclose all relevant data. We also cited the
18 deposition testimony of engineers, professional
19 geologists that all talk about an industry standard
20 that you fully identify the geological conditions
21 even if they extend past property lines.

22 I'll tell you what is most important is their
23 damages expert, Doug Chappell of Wurster
24 Engineering talks about we got to account for
25 adjacent landowners. In fact, Dr. Borden, S&ME's

1 expert, his deposition expert testimony excerpt on
2 Exhibit FF talks about engineers having an
3 obligation to notify adjacent landowners if they
4 find safety property issues on an adjacent
5 landowner even if they are not in contract with
6 them.

7 So the idea goes back to 2005. S&ME had an
8 obligation to speak. They had an obligation -- and
9 I'll cite it too. In the regulations, it says if
10 an engineer is told it's overruled by its client,
11 then they have an obligation to tell their client.
12 In June 2000 -- July 2005, S&ME was under an
13 obligation professionally and by industry standards
14 to note that the condition that they had observed
15 in their proposal, and they all talk about the
16 three lots, they had an obligation to disclose
17 that. They had an obligation, even if they
18 disagreed with it, they had an obligation to do it.

19 Now, the ultimate issue is we have an
20 engineer, we have a professional geologist that
21 says there is a problem, we have Bill Mathews of
22 that's brought out there by the Cliffs Communities
23 in 2010 to do a inclinometer data that says there's
24 a problem. Of course, our expert says there is a
25 problem. Even Mr. Price's client has hired an

1 expert that says that there is a problem with those
2 lots. The biggest thing is S&ME that misdiagnosed
3 the problem. And had S&ME properly done its job in
4 2005, we wouldn't be here because the Cliffs
5 wouldn't have sold \$4.5 million worth of property
6 that's suitable for a picnic table.

7 So when we talk about the material -- the
8 omission of material fact being a
9 misrepresentation, S&ME had a duty. And they
10 should have done it, and they didn't do it. The
11 fact that my clients don't discover that until June
12 -- in April 2011 is because they didn't do their
13 job. The fact that you lie and you hide something
14 doesn't mean it's not wrong and the other side
15 doesn't rely on it. Had they done their job, my
16 client would have relied -- would have not
17 purchased that lot. That's the whole issue here.

18 You don't get to say if I'm successful at
19 hiding something from you, uh, that somehow you are
20 not affected by that. We're in the meat of this
21 thing when my clients bought this lot. This is
22 right as they -- when they signed the contract, the
23 Cliffs only had the Alpha Environmental report. By
24 the time they -- they had not closed. There was
25 still an opportunity for them to get it. And S&ME

1 failed in not disclosing that. And the Cliffs did
2 too.

3 It's very interesting here that they want to
4 -- again, this is corporate shell game. Well, KFIG
5 is the one that did it. The Cliffs communities did
6 everything. The Cliffs Communities were the ones
7 that traded out the lot next door. Again, a
8 material issue of fact, but they want to hide by
9 that. I'm getting wrapped up into all this other
10 stuff.

11 The bottom line is, Your Honor, is that in
12 December, the first time someone put a pen to paper
13 and said we have an expert that says the reason
14 your lot is moving is a waterline break in 2010,
15 that's nowhere else. That's where it is. There is
16 an expert that said it. The first time we knew
17 that S&ME had the Alpha Environmental report was at
18 Mr. Birdsong's deposition in November the 26th of
19 2012 because they didn't produce it during
20 discovery. That's the basis of my amendment.

21 We don't have to go and do anything. Those
22 are causes of action that are based on what we
23 found in discovery. We don't need to take any more
24 depositions. I'm getting riled up. I'll calm down
25 and answer any questions you have.

1 **THE COURT:** All right. I'll hear the response
2 that Ms. McMillan or Ms. Burton may have.

3 **MS. BURTON:** Your Honor, I heard Mr. Dudley's
4 opposition to our motion for summary judgement. I
5 feel a little, uh, unsure about how you want to
6 proceed. Most of what we heard, number one, is not
7 in the record in the McCarthy case. That is the
8 basis for my motion to strike. All of this stuff
9 about Mr. Birdsong's deposition, he wasn't deposed
10 in the McCarthy case. All of the documents he's
11 referring to aren't evidence in the McCarthy case.
12 That, frankly, is an issue related to the motion
13 for summary judgement. All this stuff about
14 economic loss rule doesn't have anything to do with
15 the motion to amend.

16 So I'm glad to proceed however the court wants
17 to. But just -- with respect just to the motion to
18 amend, the plaintiff has got to be able at this
19 late, late, late stage be adding a claim that isn't
20 futile. That's what the cases say. That's the
21 issue that the court has to consider. The court
22 has to consider is there any evidence in the record
23 in the McCarthy case, not in some other case, in
24 the McCarthy case that the McCarthys got a
25 representation from S&ME before they purchased

1 their lot. That's a pretty simple question. The
2 answer from the evidence in the McCarthy case is
3 no.

4 Mr. McCarthy testified in his deposition,
5 which we took in the case, that he did not know
6 anything about S&ME. He'd never heard of the
7 company until he looked at a website after Mr.
8 Harrell called him in April of 2011.

9 **THE COURT:** What about Mr., uh, Mr. Dudley's
10 contention that pursuant to Land Best Associates v.
11 Owens, nondisclosure of a material fact which one
12 is duty-bound to disclose is equivalent to a false
13 misrepresentation? I guess he's contending that
14 that nondisclosure relates to something to that
15 effect.

16 **MS. BURTON:** Here's the problem with that
17 argument. That argument would make sense if you
18 were making the argument and you were the person
19 who had hired S&ME to conduct a geotechnical
20 investigation and your argument was that they
21 found, let's say, rock and they didn't disclose it
22 to you, their customer, maybe you can make that
23 argument. But the argument he is making which is
24 in violation of the rules for engineers is that Mr.
25 Birdsong, if he goes out and discovers rock on my

1 property, that he has an obligation to go tell Ms.
2 McMillan that there might be rock on her property.
3 That is not what the cases say.

4 In fact, it would be improper for Mr. Birdsong
5 to make a disclosure in his report to Ms. McMillan.
6 That is ethically improper for a geotechnical
7 engineer, yet that is essentially what Ms. Dudley
8 is telling you is that if Mr. Birdsong goes out and
9 finds rock on my property that somehow he has an
10 obligation of disclosure not only to me who hired
11 him, but to Ms. McMillan and to Mr. Stern and to
12 Mr. Dudley and to Mr. Price and to everybody else
13 in the neighborhood. That certainly would be quite
14 an extension of the law if the court were to adopt
15 such finding.

16 There's simply no law -- and this kind of gets
17 into the motion again, the motion for summary
18 judgement, Your Honor. This -- there is no law in
19 South Carolina that says an engineer who works on a
20 specific piece of land or on a building has an
21 obligation or any kind of duty to an adjacent,
22 existing adjacent landowner. And it would be a
23 further step to say that an engineer has some kind
24 of obligation, not only to an existing adjacent
25 landowner, but to all the future potential

1 purchasers of that land. But that's the extension
2 of the law that they're arguing.

3 THE COURT: Which McCarthy would be a future
4 purchase?

5 MS. BURTON: Sure. Because if you look back
6 at my chronology, and Mr. Dudley referred to it,
7 the McCarthys had signed a contract to purchase.
8 They had a contract to purchase but they didn't
9 close until August 5th, 2005. At the time this
10 report that they're saying has this great rendition
11 and that Mr. Birdsong and his folks should have
12 discovered a slope failure, the report was prepared
13 before they closed. All they are is a future
14 potential purchaser of Lot 32 who S&ME, how would
15 they possibly know existed? It's not like they
16 have any kind of property interest. They don't
17 have an insurable property interest. The cases
18 certainly say that. They have no property interest
19 at that time.

20 So the argument is being made that somehow an
21 engineer has a duty to a adjacent landowner which
22 is not the law and to all potential purchasers of
23 an adjacent landowner and presumably extends to --
24 if Mr. McCarthy sells a lot to me for 10 bucks
25 today, apparently that would extend to me now

1 because I am a potential purchaser of Lot 32. I
2 would suggest to the court that would be a great
3 extension of the law if the court were to adopt
4 that.

5 We cited a number of cases in connection with
6 our motion for summary judgement on this duty
7 issue. In fact, a number of South Carolina, albeit
8 district court cases and unpublished cases in which
9 the court directly addressed this issue but only
10 with respect to current owners. Because nobody --
11 I've never seen a case where somebody said an
12 engineer owed a duty to future owners of adjacent
13 property. That's the argument that is being
14 espoused to the court on the misrepresentation
15 claim.

16 Again, you have to have some representation by
17 S&ME to the McCarthys and some obligation to make a
18 representation to them. More importantly, you have
19 to have justifiable reliance. You have to say I
20 changed my position because of something that you
21 told me. There is no evidence of that in the case.
22 And to permit the amendment now after we have been
23 involved in the lawsuit and the discovery that we
24 have done in the McCarthy case, to permit that now
25 would just be allowing a futile amendment. And

1 obviously we'll be back before the court on yet
2 another motion for summary judgement. I would
3 respectfully suggest the motion to amend should be
4 denied for that reason.

5 **THE COURT:** Ms. McMillan.

6 **MS. McMILLAN:** Thank you, Your Honor.
7 Basically with regard to the allegation that this
8 is a corporate shell game, there is nothing wrong
9 with a LLC having a corporation as its member.
10 That's what's happened here. The Cliffs
11 Communities Inc. is the sole member of KFIG. There
12 is no trying to hide that. But I would ask that
13 you just look at the principles of law though. The
14 contract was with KFIG, not Cliffs Communities Inc.
15 And there's still --

16 **THE COURT:** Is there anything in the lawsuit
17 about disregarding the corporate structure ---

18 **MS. McMILLAN:** Not in the pleadings that were
19 filed, Your Honor.

20 **THE COURT:** --- and piercing the veil of
21 corporate protection?

22 **MS. McMILLAN:** I think Mr. Dudley made a
23 reference of that in his memo in opposition to my
24 motion. But there has been no trying to pierce the
25 corporate veil or the LLC. There's been no

1 allegations of that in any of the pleadings.

2 **THE COURT:** Anything else on this issue?

3 **MR. DUDLEY:** One -- one -- two things. One,
4 the whole issue of piercing and all that other
5 stuff, we didn't know any of this stuff until we
6 filed suit and got their discovery and realized
7 KFIG did nothing.

8 The other thing is -- I go back to this thing.
9 Ms. Burton is going to harp this point but about no
10 case law. You got to look at the regulations.
11 Their own expert -- and I cited the other engineers
12 talking about the duty to adjacent landowners.
13 Again, Dr. Borden, North Carolina State professor
14 at Exhibit FF, so -- this is his testimony -- so if
15 we see an issue that we believe endangers life,
16 safety or property, even if we're not contractually
17 involved with the individual, we have a
18 professional duty to bring that to someone's
19 attention.

20 I don't know. That whole idea -- and the
21 whole idea is that Beachwalk Villas and Kennedy,
22 they all talk about foreseeability, future
23 homeowners and that does extend to that. In the
24 Georgetown Steel case that we cited also, which is
25 unpublished, but that the Fourth Circuit Court of

1 Appeals talks about, it's not privity, it's
2 foreseeability. We're next door.

3 When he went out there and proposed to do the
4 work, he thought he was going to conclude our lot
5 and then he didn't because he knew it and they had
6 a contract. Now, I'm going to sit down and be
7 quiet. And discovery is done. We don't need to do
8 any more discovery.

9 **THE COURT:** Well, considering that the, uh, --
10 some of the arguments involved in this issue spills
11 over into the arguments involving the, uh, summary
12 judgement matters, I will take this issue, these
13 issues involving an amendment under advisement and
14 then hear the summary judgement so that you won't
15 be restricted in parsing the arguments and give a
16 full argument on all of them including summary
17 judgement so I can get a better context. So I will
18 take the amendment under advisement.

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Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Jack Harrell, et al,	)	Case No(s) : 2011CP2305300
	)	
Plaintiff,	)	
	)	
-VS-	)	
	)	
The Cliffs Communities, Inc.,	)	
et al.	)	
	)	
Defendant.	)	
	)	
Kevin McCarthy, et al,	)	Case No(s) : 2011CP2306376
	)	
Plaintiff,	)	
	)	
-VS-	)	
	)	
The Cliffs Communities, Inc.,	)	TRANSCRIPT OF RECORD
et al.	)	(McCarthy Motion for
	)	Summary Judgement)
Defendant.	)	

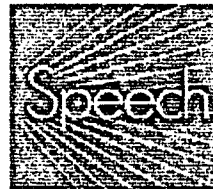
May 03, 2012
Greenville, South Carolina

B E F O R E:

THE HONORABLE CLIFTON NEWMAN, Judge.

Teresa B. Johnson
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I N D E X

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Motion	4
Certificate of Reporter	70

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u> <u>EV</u>
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PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, a short recess is taken.)

THE COURT: Okay. Very good. Please be seated. Okay. We've talked about motions to strike, summary judgements. What is next?

MS. McMILLAN: Your Honor, I guess I can proceed with the motion for summary judgement in the McCarthy case ---

THE COURT: Okay.

MS. McMILLAN: --- which has already partially been argued in the motion to amend.

THE COURT: In the McCarthy case, you said?

MS. McMILLAN: Yes, sir. Your Honor.

THE COURT: Okay.

MS. McMILLAN: In the McCarthy case, the causes of action asserted in the McCarthy case, I think I have listed them in my memorandum. But there is a breach of contract claim against all of the defendants, a claim of fraud, negligent misrepresentation, constructive fraud, violation of the Interstate Land Sales Disclosure Act and violation of the South Carolina Unfair Trade Practices Act.

Again, I've filed a motion for summary judgement for the Cliffs Communities, Inc. on the

1 basis that it was not the entity that had a
2 relationship with Mr. McCarthy and Mrs. McCarthy.
3 Essentially, for the breach of contract claim, in
4 order to have a breach of contract claim, Your
5 Honor, you have to have a claim contract with that
6 person. The contract in this case was entered into
7 by KFIG with McCarthy. So I alleged that the
8 breach of contract claim, Your Honor, our position
9 is that there is no contract with Cliffs
10 Communities, Inc. and that should be dismissed as
11 to them.

12 The next claim is the claim of fraud and
13 negligent misrepresentation and constructive fraud.
14 All of which hinge on the fact that a false
15 representation is made. There is no evidence in
16 this case to show that the Cliffs Communities, Inc.
17 in any way made representation of any nature to Mr.
18 McCarthy.

19 In his deposition testimony, he testified that
20 he only came -- that he was traveling down I-85.
21 He lived in Atlanta at one point in time. His
22 fiancée at the time, Mrs. McCarthy, was in
23 Charlotte. They were trying to find a place that
24 would be equal distance between Atlanta and
25 Charlotte that they could enjoy a property on the

1 lake.

2 He saw advertisements for the Cliffs
3 Communities' properties. That is how he first
4 learned anything about it. He thought it would be
5 convenient for both of them to buy a house or a lot
6 there.

7 So he contacts a realtor, which is Jay Scott.
8 As I've testified before, we have -- in the record
9 is a contract with Cliffs Real Estate, Inc. that he
10 is an independent contractor. He is solely
11 responsible for the property he sells. Cliffs Real
12 Estate, Inc. doesn't direct his work. He's an
13 independent contractor. He gets paid commission by
14 Cliffs Real Estate, Inc. for any property that he
15 sells in that area.

16 They meet with Mr. McCarthy. I think Mr.
17 McCarthy meets with Jay Scott and looked at the
18 property. They never went to that -- he never
19 walked the property more than once before buying
20 it. He looked at two lake front lots in Jasmine
21 Cove and he looked at spec houses that had been
22 built on the lake in other area.

23 After going two or three times at the most, he
24 decided to purchase Lot 32. The contract was
25 signed with KFIG. The purchase agreement. And

1 then KFIG transferred the property. There is no
2 evidence in the record -- and I think he testified
3 he never talked to anybody at Cliffs Communities,
4 Inc. before he signed the purchase agreement and
5 closed on the property.

6 So the argument is that all three of these
7 claims failed, the fraud, negligent
8 misrepresentation and constructive fraud, they all
9 fail as to Cliffs Communities, Inc. There's never
10 been a representation made by Cliffs Communities,
11 Inc. whatsoever to the McCarthys.

12 The next claim is the violation of Interstate
13 Land Sales Full Disclosure Act which is a federal
14 statute that deals with developers that develop raw
15 land and put it in commerce through the interstate
16 mails. Again, the developer in this case was
17 Keowee Falls Investment Group LLC. They signed the
18 HUD report which is the subject of controversy
19 under
20 that statute.

21 The Cliffs Communities, Inc. did not sign that
22 report. That was by KFIG. KFIG is the entity that
23 gave it to -- well, it was attached to the purchase
24 agreement. Again, Cliffs Communities, Inc. can not
25 be subject to the statute because it was not the

1 developer as defined by that statute and is not
2 subject to it.

3 The final Cause of Action is the South
4 Carolina Unfair Trade Practices Act claim that
5 requires a showing that a deceptive act was used.
6 Again, Cliffs Communities, Inc. did not provide any
7 statements or make any deceptive acts, evidence of
8 deceptive acts by Cliffs Communities, Inc. That's
9 why we believe that all of the causes of action
10 against Cliffs Communities, Inc. fail.

11 We also filed a motion for summary judgement
12 on the economic loss rule with regard to KFIG
13 saying that that was the entity that entered into a
14 contract with the McCarthys. Because of economic
15 loss rule, the tort claims should be barred.

16 I cited the cases in here in Kennedy versus
17 Columbia Lumber. There is an exception, Your
18 Honor, to the economic loss rule, as I stated
19 before, when it involves when a builder builds a
20 home and puts that home out into the stream of
21 constant commerce, the courts -- South Carolina
22 courts says there is an exception to the economic
23 loss rule. But they've been very specific that
24 that exception applies to a builder who puts a
25 home, a built home out in the stream of commerce.

1 In this case, Your Honor, this was not a home
2 that was built and that was sold to the McCarthys.
3 It was a piece of land. And they had a HUD report
4 that went with that land. So the plaintiffs are
5 already suing over breach of contract. They are
6 already suing for violation of this federal
7 statute. Then they are bringing in other tort
8 claims. Your Honor, the duty arose out of what was
9 in that contract.

10 This was expensive real estate. I agree with
11 that. It's an over a million-dollar piece of
12 property. For a vacation home, Your Honor. It was
13 not a house built on this property. I would argue
14 that exception that the South Carolina Supreme
15 Court had ruled out for home builders and in the
16 home building context does not apply in this
17 situation. Under the law of the economic loss
18 rule, the claim should be brought for a breach of
19 contract claim only, Your Honor.

20 With regards to the breach of contract claim
21 against KFIG -- and I'm not going to rehash the
22 argument unless you want to ask me more about that.
23 But we would also argue that the contract has an
24 as-is clause in it. We would argue that that as-is
25 clause would prevent the claims as well because

1 they signed it.

2 When you sign a contract, I believe the law in
3 South Carolina is that if you are deemed to have
4 fully read the contract and understood it. We
5 believe then that because there is this as-is
6 clause which says you can't make any representation
7 -- any misrepresentations made by salesmen are not
8 going to contradict or conflict with what else is
9 set forth in this agreement. That's Section 9.3
10 and 9.5. 9.3 of the purchase agreement is the
11 as-is clause. I believe 9.5 is the clause which
12 states that representations made by a salesman
13 can't conflict with what is in the contract. We
14 would argue that the breach of contract claim fails
15 because of the as-is close.

16 With regard to the Unfair Trade Practices Act
17 claim, Your Honor, we would also argue that it
18 fails because it does not apply when it solely
19 relates to a transaction between two parties in a
20 contract. I cited case law to that effect, Your
21 Honor. If it is just that breach of contract
22 claim, you can't assert a claim under the unfair --
23 South Carolina Unfair Trade Practices Act. That's
24 the basis for having that claim dismissed as well.
25 I believe I've set all of this out in my

1 memorandum, Your Honor.

2 THE COURT: All right.

3 MS. McMILLAN: I also adopted the same claim
4 about, uh, to cover the damages they seek because
5 the repair is feasible as has been proposed in this
6 case. I'm going to let Ms. Burton address that
7 because that's been an issue that she has hired an
8 expert on. And I'll let her address that issue.

9 THE COURT: Okay. All right. Mrs. Burton?

10 MS. BURTON: Thank you, Your Honor. I do
11 have, uh, a motion to strike portions of the
12 McCarthy opposition to S&ME's motion for summary
13 judgement.

14 THE COURT: Okay.

15 MS. BURTON: Your Honor, because in -- part
16 of the reason I handed up the list of depositions
17 to the Court related both to the McCollum motion to
18 intervene but it also relates to the McCarthy
19 opposition. Quite a bit of the information in the
20 opposition papers filed on behalf of the McCarthys
21 is not in the record in the case. It is
22 information, frankly, taken from the Harrell case
23 when the cases were not consolidated and is simply
24 not evidence in the record.

25 There's also things that just aren't evidence

1 anywhere. For instance, printing out pictures off
2 the Internet and the like, obviously those things
3 are inadmissible. I did want to hand that up to
4 the court because I think, in large part, the
5 McCarthys' attempt to rely on evidence that would
6 not be properly considered by the court because it
7 is not proper evidence to be considered by the
8 court.

9 The diagram that I handed up some time ago --
10 it seems like a long time ago now -- does outline
11 the parties in the McCarthy action and the
12 relationships. I think that is an important issue.
13 Because as the court can see, the evidence in the
14 case so far, there is three entities at the top,
15 Cliffs Real Estate, a named defendant, Cliffs
16 Communities, Inc., a named defendant, and the
17 Cliffs Golf and Country Club, Inc., a named
18 defendant. The reason I included dotted lines
19 between those is
20 because there is no evidence in the case what, if
21 any, relationship there is between those entities.

22 There is evidence in the case that the
23 defendant called Keowee Falls Investment Group,
24 that the sole member of that LLC is the Cliffs
25 Communities, Inc. which is why I placed that down

1 below the Cliffs Communities, Inc. because we do
2 have some evidence about their relationship.

3 We also have evidence in the record -- yes,
4 sir. (Pause).

5 **THE COURT:** From the diagram, I'm trying to
6 get the one that was for Harrells' case.

7 **MS. BURTON:** This one is for McCarthy. I'm
8 sorry, Your Honor.

9 **THE COURT:** McCarthy. Okay.

10 **MS. BURTON:** It's got the three entities at
11 the top. I can hand up another one. I can steal
12 Ms. McMillan's. Did I hand up the wrong one? I'm
13 sorry. I won't steal Ms. McMillan's copy. I
14 apologize, Your Honor.

15 **THE COURT:** Okay. Thank you.

16 **MS. BURTON:** Your Honor, as I was saying,
17 there are four -- there are five total defendants
18 in the McCarthy matter. I tried to depict them all
19 on this diagram. The three entities at the top, we
20 don't know what the relationship is based on the
21 evidence in the case. We do know that the Cliffs
22 Communities, Inc. is a member of the LLC called
23 Keowee Falls Investment Group. We also know that
24 contract between the McCarthys is with Keowee Falls
25 Investment Group. We know by recorded deed that

1 Keowee Falls Investment Group owned the land that
2 is the subject of the lawsuit. It transferred the
3 land by deed to the plaintiffs.

4 My client, S&ME, who is only one legal entity
5 -- we don't have any other entities -- entered into
6 a contract with a company called the Cliffs
7 Communities, Inc. and did not enter into any
8 agreement with Keowee Falls Investment Group, which
9 I think is relevant when the court has to consider
10 issues related to duty.

11 In addition -- and we've talked about this
12 before -- the facts with McCarthy, at least with
13 respect to S&ME, are fairly narrow. The McCarthys
14 testified that they signed a contract to purchase
15 Lot 32 as a vacation property from a company called
16 Keowee Falls Investment Group. That document is an
17 exhibit. It was identified by Mr. McCarthy. The
18 seller is Keowee Falls Investment Group. The
19 purchaser is Kevin McCarthy and Courtney Roundtree,
20 who was now Courtney McCarthy.

21 S&ME prepared a report thereafter for the
22 Cliffs Communities, Inc., a separate legal entity.
23 At the time the report was prepared, the McCarthys
24 had no property interest in Lot 32. The McCarthys
25 closed on the lot purchase on August 5th of 2005.

1 And by the testimony, Mr. McCarthy learned of
2 issues on the lot from Mr. Harrell when he placed a
3 telephone call to him six years later in April of
4 2011.

5 The question that the McCarthy matter presents
6 to Your Honor is whether an engineer owes a duty,
7 not only to an adjoining property owner, but to an
8 adjoining future property owner because that is the
9 situation we have here. We don't have any services
10 rendered by S&ME on Lot 32. Their services were
11 rendered on the Harrell lot in 2005 on Lot 31. So
12 the question becomes whether if I go out and
13 prepare a report on Lot 31, I have some legal duty
14 to an adjacent landowner and to a future potential
15 adjacent landowner. I would respectfully submit to
16 the court that that is not the law in South
17 Carolina. In South Carolina --

18 **THE COURT:** Does it matter that the
19 contracts were entered into closing pending while
20 these, uh, things are going on sort of
21 simultaneously, the McCarthys entering into a
22 contract and Cliffs communities retaining S&ME?

23 **MS. BURTON:** No, sir.

24 **THE COURT:** That doesn't matter? Doesn't
25 merit any distinction?

1 **MS. BURTON:** No, sir. I don't believe that
2 it does. If the court looks at the cases that we
3 cited, even if they were an existing property owner
4 of Lot 32, S&ME does not owe any legal duty to them
5 if they do an investigation on Lot 31. I would
6 point the Court's attention in that regard --

7 **THE COURT:** They are -- Okay. I got you.
8 They are retained on Lot ---

9 **MS. BURTON:** 31.

10 **THE COURT:** --- 31 and the McCarthys
11 contract was on Lot ---

12 **MS. BURTON:** 32.

13 **THE COURT:** --- 32. Okay.

14 **MS. BURTON:** Yes, sir. They are next-door
15 neighbors.

16 **THE COURT:** Next-door neighbors.

17 **MS. BURTON:** Yes, sir. And I think if Your
18 Honor looks at the cases that we cited and
19 particularly I would point the Court's attention to
20 the decision from the District Court in Long which
21 is a decision by Judge Mary Louis. In that case, a
22 pretty similar argument --

23 **THE COURT:** Judge Mary Louis? It must be a
24 recent case.

25 **MS. BURTON:** Yes, sir. It is.

1 **THE COURT:** Is that one you handed up?

2 **MS. BURTON:** It is in the materials we
3 handed up to the -- hope we submitted to the court.
4 Yes, sir. I can hand it up. I can find it and
5 hand it up. Would that be helpful?

6 **THE COURT:** It could have been one I
7 deleted.

8 **MS. BURTON:** Okay. If it's okay with the
9 court, I will dig through my giant notebook and
10 hand that one up after we argue.

11 **THE COURT:** Yeah.

12 **MS. BURTON:** I can tell you about that case.
13 In that case, the allegations were made by a
14 homeowner next to a O'Reilly's Auto store that cite
15 the civil engineer's design was defective. Because
16 the design was defective, too much storm water was
17 leaving the O'Reilly's property and running onto
18 their property.

19 You have an engineer working on the O'Reilly's
20 property and adjoining landowner, Mr. Long. And
21 Judge Lewis, in her opinion, concluded that there
22 is no duty owed by the civil engineer to an
23 adjoining landowner. That was existing adjoining
24 landowner, Mr. Long.

25 Also point the court's attention to the case

1 -- and again, I will dig it out in just a minute.
 2 It's a case law involving Mac Tech which is a --
 3 it's now got a new name -- but it is a large
 4 geotechnical engineering firm. A competitor of
 5 S&ME.

6 There is a case involving Ross Dress for Less.
 7 It is a York case, but it was in district court.
 8 In that case, Ross had purchased some land that had
 9 been developed by Transpoint. Transpoint had hired
 10 construction company. Mac Tech worked for the
 11 construction company and done geotechnical
 12 engineering. The allegation by Ross was that there
 13 was trees and stuff buried in the land and it was
 14 causing problems to the structure.

15 In that case -- and I believe that was Judge
 16 Curry -- ruled that there was no legal duty owed by
 17 Mac Tech to Ross. Now, that's on the same piece of
 18 property. They were a purchaser of the land. But
 19 in that case, the court recognized there was no
 20 duty.

21 **THE COURT:** As we are talking on the issue
 22 of duty to disclose, has plaintiffs cited any
 23 authority to the contrary?

24 **MS. BURTON:** This is negligence duty as
 25 opposed -- I just want to make sure it is not a

1 duty to disclose. As I understand the allegations
2 made by the McCarthys, it is that Mr. Birdsong and
3 his coworkers at S&ME deviated from the standard of
4 care because they did not diagnose what they
5 contend is a deep-seated slope failure. It's a
6 negligence. You should have diagnosed it. You
7 didn't diagnose it. And it's some existing feature
8 of the land that was there. It's not -- the
9 negligence claim relates necessarily to a
10 representation.

11 **THE COURT:** He's saying that because the
12 economic loss rule doesn't apply, it does not
13 matter whether it's negligence or contract. The
14 duty to disclose, if it's breach, it amounts to
15 negligence in the context of this action involving
16 residential realty whether it is built on or not
17 built on. That's sort of a general gist of what I
18 thought the plaintiffs were arguing.

19 **MS. BURTON:** I think that's the argument --
20 the plaintiff is arguing with respect to amending
21 to add a negligent misrepresentation claim. The
22 Plaintiffs' argument just on the plain old
23 professional negligence claim is essentially that
24 S&ME should have diagnosed a deep-seated slope
25 failure and they didn't and they were negligent

1 because they didn't discover it.

2 **THE COURT:** Should have diagnosed it and
3 disclosed it for the benefit of the McCarthys.

4 **MS. BURTON:** Should reported to Cliffs
5 Communities in their report that there was a
6 deep-seated slope failure on the property. That's
7 the argument as I understand it.

8 **THE COURT:** And, uh, while we are focusing
9 on this, since we have so much to focus on, have
10 they cited anything that's contrary to the citation
11 that you have involving the case Judge Lewis has
12 and issued an opinion on and the one Judge Curry
13 issued, the Ross Dress for Less case? In the
14 material they submitted, is there something else I
15 should be looking at to the contrary or is all the
16 authority in your favor?

17 **MS. BURTON:** They cite two -- I do not
18 believe in South Carolina but for the two cases
19 that I cited to the Court, I believe there's any
20 case that talks about engineer duties to adjacent
21 landowners, engineer duties to future landowners.
22 That's just -- the cases are rather limited, as
23 the court knows, in the construction area.

24 As I understand -- Mr. Dudley could certainly
25 speak up -- he the cites to the old litany of

1 cases, Tommy L. Griffin, Kennedy Lumber Company,
2 McCollum, that line of cases that intermix the
3 notion of duty and economic loss rule. Sometimes
4 one is not clear which one the court is talking
5 about. But I didn't see in Mr. Dudley's paper any
6 case that was not in that general line of Kennedy
7 Lumber and those sorts of cases.

8 I am not aware of some other case. Certainly,
9 I would love to find such a case. I did find a
10 number of out-of-state cases which I cite in my
11 paper that relate to arguments that a surveyor owed
12 a duty to an adjacent property owner when they get
13 a boundary wrong and those kind of cases. But I
14 would suggest to the court, if this court were to
15 find that an engineer owed a duty, number one, to
16 an adjoining landowner or, number two, to a future
17 perspective adjoining landowner, that would be an
18 extension of South Carolina law that we do not
19 have.

20 I suggest there's a whole lot of engineers who
21 aren't going to want to do work on any kind of
22 property anymore because then they owe duties every
23 time they go out to everybody around the land that
24 they are being asked to look at. That would be an
25 extension that would be untenable, frankly, in the

1 industry.

2 In the McCollum case, which is a 2007 Supreme
3 Court case, this is one of the Home Gold cases.
4 The Court goes through in some extensive detail in
5 that case to say when does a duty -- when does a
6 duty arise under South Carolina law. They go
7 through this laborious exercise of going through
8 and saying can it arise under the statute, can it
9 arise under a contract. And as I understand the
10 McCarthys' argument, number one, I heard that they
11 argued that there is some foreseeability standard.
12 The cases flat say foreseeability alone is not
13 enough. Foreseeability injury does not establish a
14 duty of care on anybody's behalf. I think the
15 McCarthys are arguing that somehow -- and they
16 argue on their paper that somehow -- because they
17 have a contract with KFIG, that somehow, my client,
18 S&ME, has a special relationship with them.

19 As the court knows in the Tommy L. Griffin
20 case particularly and in the subsequent cases, that
21 those words "special relationship" are frequently
22 used as to what may create a duty. There is no
23 relationship here. They didn't know the McCarthys
24 existed. There is no way the McCarthys can prove
25 they had any contact with S&ME. In fact, McCarthy

1 testified to the contrary. I would respectfully
2 suggest that there is no evidence. If one looks at
3 the McCollum case and goes through the analysis of
4 when you can owe a duty if you were a volunteer or
5 something like that that none of those cases apply
6 in this lawsuit. There is simply no legal duty
7 owed by S&ME to the McCarthys which is a question
8 for the court to decide whether in these
9 circumstances that a legal duty can be owned by an
10 engineer.

11 In addition -- although we haven't talked
12 about this yet, the plaintiffs don't have any
13 evidence of proximate cause. We talked earlier
14 about the issue that, of course, the McCarthys
15 never saw the report from S&ME. The additional
16 issue is it's a little bit different than your
17 standard architects and engineers case where
18 somebody designs anchor bolts and the column isn't
19 accurately supported and it falls over. That is
20 not the same circumstance that we have here.

21 In this case, the plaintiff contends that
22 there is a geologic condition of the earth that
23 exists on the property. And it is absolutely clear
24 that S&ME did not create a geologic condition of
25 the earth on the property. The evidence is also

1 that a repair to the property is feasible.

2 Interestingly, I've never had a case to be
3 perfectly honest with you, Your Honor, where the
4 plaintiffs didn't get any repair estimate to repair
5 the property. They're just seeking "give me the
6 whole purchase price back" as opposed to, uh,
7 trying to see if a repair is feasible.

8 We retained Doug Chappell of Wurster
9 Engineering to prepare a repair estimate for the
10 property. He has been deposed and he gave this
11 estimate and discussed in some detail the way the
12 land can be repaired. And certainly, it's not an
13 inexpensive repair but the evidence is that a
14 repair is feasible.

15 The plaintiffs retained a gentleman named
16 Carroll L. Crowther as their expert witness. Mr.
17 Crowther, in his testimony in the case, indicated
18 that he has not engineered any kind of repair and
19 that there are certain things that one would have
20 to do to get sufficient data to engineer a repair
21 but that he has not undertaken those items and that
22 he has not been asked to determine whether a repair
23 is feasible although he testified in his deposition
24 that there certainly could be a repair. Whether it
25 would be economically realistic or not, I can't

1 make any opinions on that. So I asked him, so it's
2 feasible, it just might be really pricy. And he
3 responded to me yes.

4 Then he discussed with me in his deposition
5 options. You can flatten the inclination of the
6 land, make the slope less steep, as a possibility.
7 He also indicated that soil nailing or tiebacks or
8 some sort of deep anchor might be an effective
9 repair. He indicated that it could be repaired but
10 he did not know what the economics of the repair
11 would be. He has not reviewed the details of the
12 repair prepared by Mr. Chappell.

13 In addition, Dr. Borden who is a Professor of
14 Geotechnical Engineering at NC State -- you've
15 heard his name mentioned so I wanted to tell you
16 who he was -- has testified that repair is
17 feasible, that slopes that are in the failure mode,
18 assuming this one was, which he does not believe it
19 is, could be repaired and that is not uncommon to
20 repair a slope. So the evidence as of this moment
21 is that a repair is feasible although it may be
22 expensive. Certainly, Mr. Chappell's estimate is
23 not inexpensive.

24 So with respect to proximate cause -- I'm
25 sorry that was a long argument. With respect to

1 proximate cause, there is no evidence in this case.
2 Let's assume that Mr. Birdsong had gone out in 2005
3 and said -- written in the report to Cliffs
4 Communities there is a possible slope failure on
5 this property, a repair was feasible in 2005.
6 Repair is feasible in 2013. S&ME has not caused
7 any condition on the land that has proximately
8 caused that repair, that feasible repair to have to
9 be undertaken. Therefore, there are no damages that
10 proximately caused S&ME's alleged error in not
11 discovering this slope failure.

12 Briefly, we had some discussion. I know Ms.
13 McMillan is more expert than me on the economic
14 loss rule. But I would respectfully disagree with
15 Mr. Dudley's discussion about Kennedy and how
16 Kennedy applies to this case. Uh, the court has
17 drawn a distinction --

18 THE COURT: Just a moment.

19 MS. BURTON: Sure.

20 (WHEREUPON, there is a pause.)

21 THE COURT: Okay.

22 MS. BURTON: The court has drawn a clear
23 distinction about Kennedy. In recent cases when
24 they talk about Kennedy, they say Kennedy is
25 limited to the residential homebuilder context.

1 They actually describe in Kennedy how the
2 residential homebuilder puts a home in the stream
3 of commerce and how that has special
4 considerations. And actually -- and I apologize
5 for not bringing it because I honestly didn't think
6 that issue was going to come up.

7 But I believe the opinion is March 13, 2013.
8 The Supreme Court issued a decision, and I believe
9 the plaintiff's name is Gladden, which was a case
10 against a home inspector. The primary issue in the
11 case had to do with whether a limitation of
12 liability in the home inspector's contract applied.
13 But in the case, they made the argument that you
14 can't have such a limitation on liability because
15 it's void against public policy, which was rejected
16 by the Supreme Court. But they again distinguish
17 Kennedy and said, look, Kennedy relates to
18 residential homebuilders because they put a home
19 into the stream of commerce.

20 I would suggest this discussion about Kennedy
21 certainly doesn't apply to any party in this case.
22 Nobody is a residential homebuilder. Nobody has
23 put a house in the stream of commerce. Those cases
24 are simply inapplicable to the case at hand.

25 In this case, Your Honor, the McCarthys have

1 pled a punitive damage claim against my client
2 S&ME. They don't have any evidence to support the
3 claim that S&ME was willful or wanton or reckless
4 or anything like that. They don't have any
5 evidence about -- really about what S&ME did at
6 all. They did not depose the folks at S&ME that
7 did the work. The best they got is that S&ME
8 should have discovered a deep-seated slope failure
9 on the property.

10 We had some discussion today about Alpha
11 Engineering [sic]. I was interested in that
12 because the McCarthys took deposition testimony
13 from Roger Moore of Alpha Engineering [sic]. That
14 report is in the materials in the record of the
15 case. They took a videotaped deposition of the
16 fellow to present at trial because he does not live
17 in South Carolina.

18 We've heard about Alpha. What's interesting
19 about Alpha Environmental Services is while they
20 wrote a report in 2005, the gentleman from Alpha
21 said he believed that there had been a slope
22 failure when the lake was impounding at Keowee and
23 the land moved. But he did not report that there
24 was an existing the slope failure on the land when
25 he did his report in 2005. He also testified he

1 didn't give his report to anybody.

2 I would respectfully suggest that in the
3 McCarthy case, they've elicited testimony from
4 somebody else who went out to the land in 2005 and
5 who said there is ongoing slope failure on this
6 property which happened back when Lake Keowee was
7 impounding which obviously was some number of years
8 ago. There is simply no evidence that Mr. Birdsong
9 and his folks engaged in any conduct that would
10 warrant punitive damages in this case.

11 The plaintiffs asserted a claim for attorney's
12 fees. Not sure what the basis for that claim is.
13 But clearly it's not recoverable under a theory of
14 negligence.

15 MR. STERN: We agree with that as to the
16 Harrells.

17 MR. DUDLEY: Attorneys fees?

18 THE COURT: You are withdrawing those
19 claims? Is that what you're saying?

20 MR. STERN: Yes, sir.

21 MR. DUDLEY: Yes, sir.

22 THE COURT: All right.

23 MS. BURTON: In the, uh, McCarthy case, Your
24 Honor, the damages that the McCarthys seek are
25 two-fold. Neither of which are recoverable.

1 First, the McCarthy seeks reimbursement from S&ME
2 among others for the purchase price of the land. I
3 would submit to the court that is not a proper
4 measure of damages in the case. We cited a number
5 of cases in our brief related to that. But
6 basically under the economic waste rule, if a
7 repair is feasible, you can't get your entire
8 purchase price back. You don't tear down a house
9 that can be fixed and you don't get your entire
10 purchase price back for land where a repair is
11 feasible.

12 The only evidence submitted in the case by us
13 is that a repair is feasible. There is no opinion
14 that the repair that we have proposed is not, in
15 fact, a feasible repair. Plaintiff's expert
16 certainly did not testify that he had done any
17 study at all to determine whether it was or wasn't
18 feasible. In fact, he thinks a repair is feasible.
19 He just doesn't know how much it's going to cost.

20 Secondly, the McCarthys have an interesting
21 mathematical calculation where they ask for lost of
22 investment opportunity. Basically, as I understood
23 Mr. and Ms. McCarthy's testimony, they've taken the
24 money that they paid for the lot, which was over a
25 million dollars and they've done some math saying

1 if I had invested it in S&P, how much would it have
2 earned. That measure of damages is not recoverable
3 in this case. It's unduly speculative, if
4 anything.

5 And in fact, they testified that they were
6 going around looking for vacation property in
7 between Atlanta, Georgia and Charlotte, North
8 Carolina. And they looked at a number of pieces of
9 property. And they ultimately purchased Lot 32.
10 There is simply no evidence that they were going to
11 take \$1 million -- and at that time, they borrowed
12 the money -- take \$1 million borrowed money from a
13 bank and invested the S&P 500. That is just not a
14 proper measure of damages in the case. S&ME is
15 entitled to summary judgement accordingly.

16 **THE COURT:** All right.

17 **MR. DUDLEY:** Well, let's start with the
18 Cliffs. Want me to respond to the Cliffs first,
19 sir?

20 **THE COURT:** Yes.

21 **MR. DUDLEY:** All right. The first issue
22 here is we have a breach of contract against KFIG.
23 I guess we got to look at the totality of the
24 issues. We have breach of contract against KFIG
25 and we also have a breach of contract -- we added

1 in Cliffs Communities, the Real Estate and the Golf
2 and Country Club.

3 Now, there's no question we had a contract
4 with KFIG. In the contract itself, Your Honor, is
5 where the Golf and Country comes back. It's a
6 \$50,000 membership that gets paid at closing. It's
7 in the contract. Golf and Country Club is in the
8 contract. The real estate commission was over
9 \$105,000. What we were seeking is rescision. The
10 way we get rescision is the Country Club, the real
11 estate commission, all of that went under the
12 Cliffs Communities. That's how you get that. The
13 rescision is you've got to have those parties that
14 got the money in the contract. Those are the ones
15 that we -- to give effect to the remedy of
16 rescision, that's the people that we need to be a
17 part of it.

18 Now, the other part about it is -- that takes
19 care of the Country Club, which is in the contract
20 and the real estate commission. That's on the HUD
21 statement. That shows that that's how much money
22 they've got.

23 The Cliffs Communities -- again, we didn't
24 have to allege a piercing of the corporate veil, et
25 cetera, any of that stuff now. That's really after

1 judgement. But what we do know after having looked
2 at the documents that we did have is that the issue
3 was raised in 2005. We're dealing with the Cliffs
4 Communities Real Estate agent, Mr. Jay Scott. We
5 didn't know he was an independent agent. What we
6 do know is that he signed something that says we
7 weren't given anything in opposition to the HUD
8 that he gave us.

9 So that whole idea of the Cliffs Real Estate,
10 Cliffs Communities, that's where they went. They
11 didn't go to an outside real estate agents. They
12 went to the Cliffs itself. That's the agent that
13 they had. The fact that he was independent doesn't
14 -- that's not anything that we knew. The bottom
15 line is that the Court looks at in the documents
16 that we've generated in the brief and the attached
17 exhibits is that the only thing KFIG did was sign a
18 contract, actually that Cliffs Communities signed
19 the contract for it and had its name preprinted on
20 a form at HUD. KFIG did nothing else.

21 As I said earlier today, that is the real
22 issue here is why in the world that it's convenient
23 -- to look at the chart that Ms. Burton put out,
24 why in the world -- and it goes to the shell game
25 -- why in the world would the Cliffs Communities

1 hire an engineer on lots they didn't even own? Why
2 would it care and do that?

3 Well, the thing is, at the time, the Cliffs
4 Communities, Cliffs Communities, a sole member of
5 KFIG, Cliffs Communities own Lots 30 and 32, my
6 client's lot. When they entered into the contract
7 -- and I'm getting ahead of myself on S&ME. When
8 the Cliffs Communities goes and investigate this,
9 which is not their deal at all, -- it's KFIG
10 according to Ms. McMillan -- uh, the Cliffs
11 Communities hires the engineer. The Cliffs
12 Communities is the one that interacts with the
13 Rockwells and buys out and trades a million-dollar
14 lot on a piece of property that they don't own.

15 Even after that, we have -- Mr. Stern will
16 show in all the times after that, there were issues
17 with the cul-de-sac and the waterline and all that
18 work, it was the Cliffs Communities that did all
19 the -- spent all of the money, hired all of the
20 people to deal with the issues on Jasmine Point.
21 It wasn't KFIG. If there was ever something to
22 show a material issue of fact as to one company
23 acting as instrumentality of the other, it's this
24 one because you don't have KFIG doing anything to
25 protect itself. You don't have KFIG doing anything

1 to -- again, it's one of two things. Either KFIG
2 was a mere instrumentality or KFIG was an artifice
3 or it's act of fraud on people. What you have is
4 KFIG does nothing.

5 The Cliffs Communities hire the engineer. So
6 I guess now the Cliffs Communities doesn't owe a
7 duty to the plaintiff because they are not the
8 owner of the property and that allows S&ME to be
9 outside of that chain of privity too. So it's
10 either an artifice or it's act of fraud or it's
11 instrumentality. There is a material issue of fact
12 to keep the Cliffs Communities in.

13 We know -- it's interesting that Ms. McMillan
14 would cite the as-is clause of this contract
15 knowing full well that their client has a federal
16 obligation under HUD to issue these HUD reports and
17 give to every prospective purchaser. In that HUD
18 report, there are specific representations. The
19 interesting thing, attached to the contract -- I'm
20 sorry -- incorporated into the contract is the HUD.
21 On page 8 of the contract is the HUD. So on the
22 one hand, you're going to make a specific
23 representation required by federal government and
24 say it's as-is. That is inconsistent.

25 In fact, there is an attachment to --

1 attachment to the contract that says the real
2 estate agent confirms that he made no
3 representations inconsistent to the HUD. If that
4 were the case, you wouldn't need that if it were
5 sold as-is. There would be no inconsistent
6 representations as to the HUD.

7 Again, the important part is in the HUD, the
8 Cliffs made a representation to all prospective
9 purchasers in that subdivision. Not only the
10 status of infrastructure and all of this money that
11 we're going to spend for your lot, but there's two
12 specific provisions in there that are very
13 important. One of which when we talk about -- and
14 we get to this whole thing about residential
15 construction and whether or not this case and the
16 Harrell case fit into the Kennedy case and the
17 progeny -- is because this is residential
18 construction. There is nothing else you can do
19 here. The fact that they didn't build a house yet
20 does not take it out of Kennedy. The fact that
21 Beachwalk Villas extended it to an architect that
22 this is all a part of Kennedy. This is real estate
23 residential construction. This is not commercial
24 construction and it's protected.

25 So in that HUD report, it says if you can't

1 get a septic permit, we will buy your lot back. It
2 says it right there. There's also a provision in
3 there that talks about topography. It says there's
4 no expansive or loose soils that would require
5 special construction techniques. This is not,
6 again, raw land. As the defendants would say,
7 well, they just bought a piece of land. They
8 didn't buy a piece of land. They bought a piece of
9 land with a very thick representations -- the
10 infrastructure and specific representations. You
11 can use this for a residence. And if you can't, we
12 will buy the lot back. That's as to the septic
13 tank.

14 They also -- as to the topography of the land,
15 they make specific representations of even how.
16 You're not going to have to spend a lot of money on
17 the foundation. They make that representation.
18 They can't take it back in an as-is. And it's
19 inconsistent. Their document is being construed
20 against them.

21 The interstate land sales, again, the
22 instrumentality issue, that is why the Cliffs
23 Communities, Inc. are a part of that. You can't do
24 one thing and take it away. That's inconsistent.
25 We have got evidence here. Again, if it's

1 instrumentality or artifice to commit fraud is that
2 the Cliffs Communities is the one that negotiates.

3 They did the, uh, Alpha Environmental report.
4 They are the ones that says -- I've got to say
5 this. Ms. Burton sat there and said that Mr.
6 Moore, the professional geologist said that there
7 had been a slope failure when the lake was
8 impounded but there wasn't one now. That's not
9 what the report says at all. It says they strongly
10 recommend against using it for residential
11 purposes. There's a strong possibility it can
12 continue to move. Read the report. It says that.
13 He doesn't say it happened 40 years ago. He says
14 we strongly recommend against it.

15 So we go back to this thing. If you have the
16 Cliffs Communities, if they are not, there will be
17 no reason for them to go and hire the engineer.
18 The reason they hire the engineer is because they
19 are the ones that operate and deal with all of
20 this. The fact that you got KFIG as a separate LLC
21 is just an instrumentality issue.

22 And again, you want to talk about the privity
23 issue, it's a license to lie. That's exactly what,
24 you know, I kind of wrote down in the as-is clause.
25 If you have an as-is clause, but you got a HUD that

1 says -- and the HUD's incorporated in your
2 contract, then really the as-is clause is a license
3 to lie. We know that that's just not the law.
4 That's not what the requirements are.

5 This repair is feasible. I guess it's okay
6 for the defendants to say that. They want \$700,000
7 to repair a one million-dollar lot before you build
8 anything on it and there is no warranty. So I
9 don't know what feasible means. But what they are
10 saying is that the repair is \$700,000 with no
11 warranty. What they haven't produced is anything
12 that says anybody would buy it or it could be used.

13 A very important part of that too, the
14 gentleman from Wurster Engineering, Doug Chappell,
15 that testified about the repair brought no
16 documentations whatsoever to support his \$700,000
17 repair or 600,000 or \$30,000 repair for the
18 Harrells. That's a huge gaping issue in their
19 position that the repair is feasible.

20 That really is a material issue of fact
21 because the Cliffs knew. A professional geologist
22 recommended against a building on a lot. They were
23 moved so much by it they bought the lot back. They
24 lost a million-dollar sale. They didn't tell the
25 McCarthys. That's a material omission. They had a

1 duty and obligation.

2 They were getting ready to get \$1 million for
3 the McCarthys. And to say that somehow it's the
4 Cliffs Communities did that and not KFIG is
5 ridiculous. That's a material issue of fact. That
6 supports the fraud, negligent misrepresentation and
7 constructive fraud is that they knew there was a
8 problem. They didn't just know. They traded a
9 lot, a million-dollar lot because there was a
10 problem.

11 Here is a very important part. It not only
12 implicates the Cliffs, it implicates S&ME. Ms.
13 Burton sat up there and said he was only engaged to
14 look at Lot 31. That's not true. He proposed to
15 do all three lots. In fact, the contract that was
16 signed between the Cliffs Communities and S&ME was
17 to do three lots. He was contractually obligated.

18 The fact that they may have modified it later
19 to only do one, which was awfully convenient, so
20 they didn't have to disclose Lot 30 or 32 and the
21 million-dollar lot of the McCarthys could go
22 through, that's an after-the-fact. He was contract
23 -- he had contractually obligated S&ME to look at
24 the three lots. Mr. Nichol of the Cliffs says he
25 doesn't remember how it went from 3 to 1. Very

1 important part.

2 Now we go, Your Honor -- I think that was
3 everything with the Cliffs. They knew there was a
4 problem. My clients aren't a foreseeable plaintiff
5 in the future. They're in it. They are right in
6 when all of this stuff was happening. In fact,
7 when my client signed the contract, S&ME hadn't
8 even done its research yet. And again, the prox --
9 well, I'll get to S&ME later.

10 The motion to strike. I am floored by this.
11 Your Honor, we were here in front of Your Honor
12 about my motion to consolidate. One of the things
13 -- we had a big discussion about whether we could
14 use each other's depositions and we talked about --
15 we looked through the rules, Mr. Barton, Ms.
16 McMillan, myself, and Ms. Wright were there. We
17 looked through the rules. There's nothing in there
18 that said you couldn't use the depositions. In
19 fact, Rule 804(b)(1), the Rules of Evidence says
20 you can use. Your Honor brought that out that we
21 could use testimony under oath in another matter as
22 long as the party that solicited that testimony --
23 in this case, the Harrells -- let us use it. Well,
24 the Harrells are letting us use it.

25 All that motion to strike is contrary to what

1 we discussed back at that motion to consolidate.
2 It's contrary -- Your Honor said earlier these
3 cases were consolidated for discovery. The motion
4 to strike is simply done to keep out information
5 that it knows is damaging to its case.

6 Again, this issue of adjoining property owner
7 -- and I can go through the case law. Your Honor
8 even asked what case law is there to counter that.
9 First, I would ask the court to look at the cases
10 that Defendant S&ME cited on the adjoining property
11 owner issue. The first one was a Texas case.
12 Actually, let me drop back. Every one of them,
13 except the Long case which is unpublished and I'll
14 get to that, every one of those cases that they
15 cited commercial construction. Kennedy talks about
16 carving out a distinction. The South Carolina
17 cases, Griffin, McCollum talk about special
18 relation. They are commercial cases. The
19 Georgetown, some of these others, they clearly --
20 the courts look at commercial construction
21 differently than residential. In fact, our
22 legislature looks residential construction
23 different from commercial construction.

24 I cited in my brief a general contractor can
25 use unlicensed subcontractors. Commercial general

1 contractors, because sophisticated parties can look
2 out for themselves. Yet, our legislature says if
3 you do more than 200 -- if you do only more than
4 \$200 worth of work on a residence, you have to have
5 a specialty license. In fact, a residential
6 builder has to use specialty licenses. There is no
7 question that our courts and our legislature said
8 we are going to deal residential construction
9 completely different than commercial. That's the
10 first distinguishing part on the case cited by S&ME
11 on a adjoining landowner.

12 The second very important part is that the
13 Texas case -- the Texas and Indiana case that kind
14 of look like those are right on point. Those two
15 cases, there is a complete requirement of privity.
16 In fact, there's a privity bar in both of those
17 states that does not exist in South Carolina.
18 Those cases are completely inapplicable because the
19 case in those jurisdictions are not similar to
20 South Carolina.

21 The District Court case, the Long case that
22 she handed up was at a motion to dismiss phase.
23 That's where that was decided at a motion to
24 dismiss. And it's a pleading issue. We are not
25 talking about summary judgement. It was not

1 talking about trial. And the Long case was --
2 remember it was O'Reilly's. It was commercial, uh,
3 commercial, uh, construction. Now, it affected a
4 property owner that happened to be an adjacent
5 property owner, but it was commercial construction.
6 And it also had to do with a motion to dismiss
7 phase, not where we are now.

8 The Ross Dress for Less case, another great
9 example. What it talks about in Ross Dress for
10 Less is it carves out and it recognizes that
11 residential construction is dealt with differently.
12 Commercial -- Ross Dress for Less was a big plant
13 facility in Spartanburg. It was dealt -- it was
14 commercial construction. It was dealt with that
15 way.

16 Now, I mentioned the point earlier that the
17 issue of adjoining landowners -- Ms. Burton
18 mentioned adjoining landowners and they were only
19 engaged to look at Lot 31. I would ask the Court to
20 look at the proposal and the contract that they
21 entered into in June of 2005, two days after my
22 people signed their contract. It was for three
23 lots. Guess who owned one -- uh, two of the three
24 lots? KFIG. The Cliffs Communities are the ones
25 that are engaging S&ME to look at these three lots.

1 One of which it doesn't own; the Rothwells own.
 2 That one case is the one that the Cliffs
 3 Communities is negotiating traded out lots for.

4 So when we talk about adjacent property
 5 owners, at the time S&ME did their work, the
 6 adjacent property owner was their client was Cliffs
 7 Communities who hired them or their company. So
 8 with regards to that adjoining landowner, he was
 9 engaged to look at all three. He only looked at
 10 one.

11 Mr. Crowther, when we talk about the duty to
 12 disclose in his report and in his affidavit filed
 13 as a part of our complaint, it's not just that he
 14 screwed it. He missed it. He blew the diagnosis
 15 that four other engineers and geologists that said
 16 there was a slope failure. He talks about -- Mr.
 17 Crowther talks about the obligation to do the
 18 testing and the obligation to describe and it goes
 19 into -- and warn the adjoining landowners.

20 The biggest point on this duty issue, this
 21 never happens -- an expert witness for the other
 22 side is never going to give you this kind of gem.
 23 What I've also done in the duty issues is I've gone
 24 through the statutes, gone through the regulations,
 25 gone through the code of ethics, the obligations to

1 fully disclose all relevant information. If your
2 client tells you to do something contrary, you got
3 to point it out to them. There is all that
4 discussion.

5 But I've got Mr. Chappell, their liability
6 expert, agree that you got to look out for the
7 adjacent landowners. The best one, and I've
8 already cited it, is their liability expert agreed
9 that engineers can not put on professional blinders
10 -- and Mr. Crowther also. I cited that testimony
11 too. Dr. Borden said we've got an obligation that
12 if we see something going on on an adjoining land
13 owner, if we aren't even contractually obligated to
14 them, we got to say something. And they didn't do
15 it.

16 So the duty issue, this court
17 ought to rely on Dr. Borden's testimony. What
18 we're talking about here is the duty. That's not
19 case law. That's their expert. And that is
20 someone that is bound by the rules.

21 Beachwalk Villas is another one. If the
22 courts can say an architect, you're going to be
23 liable -- well, if the courts can start by saying
24 if the builder puts it into the stream of commerce,
25 you can be liable to future property owners and

1 then the courts expand Kennedy and says, architect,
2 if you build a condo, you're not only liable to the
3 homeowners association, you are liable to
4 subsequent purchasers of that condo complex which
5 is Beachwalk Villas, -- that's residential
6 construction -- then it's not a far cry.

7 It makes sense that a developer like the
8 Cliffs obviously is putting lots in the stream of
9 commerce for residential construction and an
10 engineer that opines as to the buildability or the
11 structural integrity to actually hold the structure
12 on the lot, that's an easy, easy step. That's
13 looking backwards instead of forwards. That's
14 saying before you can build your house, here is
15 what you're going to have to do to build it on.

16 The Georgetown Steel case which is an
17 unpublished opinion, but it's a Fourth Circuit
18 decision, one of the neat things they go through is
19 they talk about it. We've looked at South
20 Carolina. South Carolina is in the forefront of
21 expanding the rights for homeowners and expanding
22 and eroding this economic loss rule. It really
23 doesn't make sense. They talk about it.

24 The key is foreseeability, not privity. We
25 are not a remote purchaser out somewhere in the

1 future. We were right there in the thick of it.
2 All of this stuff was going on. My client could
3 have made decisions if they had acted properly.
4 And they didn't.

5 The Booz Allen case, Ms. Burton cites that as
6 saying that that kind of stops the foreseeability.
7 It doesn't. The court said, all right, the unions
8 and people that might remotely be affected by this
9 report, the South Carolina Ports Authority who was
10 a third party, you are not distinct and you do have
11 a cause of action. I would submit, Your Honor,
12 that the South Carolina Ports Authority is like the
13 adjacent property owner. In that instance, our
14 court said, You are. There is a duty in that
15 respect. But I would agree that the unions and
16 stuff like that, the distinction was how distantly
17 you are from the transaction.

18 I think that's really -- the proximate cause
19 issue is this too. It all boils -- it's really
20 two-fold. S&ME does their job. And they correctly
21 identified the condition that the professional
22 geologist saw that BLE. Which is interesting.
23 You've got inclinometer data that says -- the only
24 person that says deep-seated slope failure is
25 ongoing at that property are the professional

1 geologists with Alpha. They don't have a dog in
2 this fight. They are not hired guns by anybody.
3 Both of those people say don't build on it. One
4 says don't build on it. The other one says there's
5 a deep-seated slope failure that is continuing on
6 this property. They don't have a dog in this
7 fight.

8 Yet, had S&ME done their job as Mr. Crowther
9 opined in his affidavit, the Cliffs would not have
10 sold Lot 30, 31 or 32. They would not have been
11 able to. Had they correctly diagnosed that issue
12 and had they not allowed its client to put on
13 professional blinders, then that's -- those lots
14 would not have been sold. And had S&ME does its
15 job in the disclosure in its report and it
16 implicated Lots 32, then again, that's going to be
17 that there's a report that implicates my lot. My
18 client sees something like that, they still got an
19 opportunity to get out of it. They haven't closed
20 on that lot. We're not somebody in the future.
21 We're somebody right there. We're not somebody
22 that's three or four houses down. We are in the
23 contract. We are the lot that they agreed to do
24 work on. That's proximate cause.

25 **THE COURT:** As a matter of public policy or

1 just the policy consideration responding to, uh,
2 Ms. Burton's comment that if liability was
3 extended in the manner in which you are arguing in
4 this case to S&ME that it would just, uh, -- how
5 could they ever be insured? How could -- how would
6 they ever accept any work if there's no limitation
7 to liability?

8 **MR. DUDLEY:** There's two parts to that, Your
9 Honor. The first is do it right. Practice
10 competent engineering, and you don't have to worry
11 about it. That's the most fundamental issue. The
12 second issue is if the regulations that govern
13 engineering --

14 **THE COURT:** Of course, they are not
15 conceding that they didn't do it right.

16 **MR. DUDLEY:** Well, you're right. That's the
17 first way you address the issue. If you practice
18 engineering competently, you don't have to worry
19 about it. The second part about it is they've
20 always been governed by this. Their code of ethics
21 and their standards, they say that. The one thing
22 they all say is that, well, you --

23 **THE COURT:** That's sort of like if you have
24 someone sitting in the courtroom listening to you
25 argue this case and take your advice based on what

1 they are hearing you argue and say you -- and you
2 say, well, they aren't my clients -- come on.

3 **MR. DUDLEY:** I think the distinction is I
4 think the Booz Allen cases are really good when it
5 comes this. It's kind of analogous here. The
6 court looks at it and says, all right, Ports
7 Authority, they are implicated in this negative
8 report. There are at least -- there's false
9 information. That's foreseeable, but we don't
10 think the labor unions that are affected by the
11 reduction in traffic at the Ports Authority.
12 That's too distinct and that's too remote. I'm
13 going to disagree with that. There has to be some
14 type of -- there has to be a nexus. There has to
15 be some outer limits. I totally get that.

16 **THE COURT:** As far as outer limits go, I
17 mean, your -- you didn't pay them any money. You
18 didn't own the lot at the time. Of course, there's
19 some question as to whether the work was done --
20 well, the opinion was issued on the adjoining lot.

21 **MR. DUDLEY:** Yes, sir.

22 **THE COURT:** Of course, then we have you and
23 we have Mr. Price who is also downstream.

24 **MR. DUDLEY:** Well, I think the biggest --
25 here, sir, the fact that we didn't pay them is what

1 -- the biggest issue we've got right here is who
2 was their client. Who did they owe that duty to at
3 the time was the Cliffs. That kind of -- you're
4 paying us to do these three lots, that's who I owe
5 that to. So that first line of getting it right --
6 we talked about getting it right is to the Cliffs,
7 who we have a contract with. We're buying that.
8 All right. So that's where I think there's a
9 connection there if we want to talk about a special
10 relationship.

11 The other thing we talk about, again, I would
12 ask Your Honor to look at the excerpts from the
13 deposition testimonies of Roger Moore, the
14 professional geologist, Bill Matthews, uh, Doug
15 Chappell and Dr. Borden. They all talk about, as
16 engineers, we recognize we've got an obligation.
17 One of the biggest, there's two component parts,
18 Dr. Borden threw me a great one in that quote
19 because he's a professional engineer and he's
20 recognizing that's his obligation. That's -- they
21 all recognize there's a code of conduct and there's
22 the requirements that they had. The other one
23 thing that --

24 **THE COURT:** Was he referring to situations
25 like if there was a mudslide down at the foot of

1 the mountain and the engineer knows the hazard is
2 there, he has a duty to, out of safety concerns, to
3 sound the alarm? Was he referring to that or was
4 he -- or was it much greater than that?

5 MR. DUDLEY: Well, I think the issue that he
6 says -- he says safety or property. I'm not just
7 saying if there's a safety concern. He mentions
8 property. Here's the one thing too. We finished
9 up his deposition this morning. One of the things
10 we looked at this morning was, uh, -- is that these
11 types of slope failures can go slowly for a while
12 and then have a catastrophic loss. I mean, that's
13 a quote from one of these.

14 He agreed that that was just -- and I'm
15 paraphrasing, obviously. But that's the problem
16 with these slope failures. It's not like -- well,
17 it's just moving a tenth of an inch every 90 days
18 and it's going to continue that way. Well, in 10
19 years, that's going to have a ridiculous effect on
20 a house. The issue is that if these slope failures
21 happen suddenly, then you can add personal injury.
22 That's a property issue.

23 It all boils down to this. Have they properly
24 diagnosed it and seen what other engineers saw at
25 that time and opined about, then they would have

1 had an obligation to disclose to that to their
2 client, the Cliffs. And even if they didn't, even
3 if they didn't know who that adjacent landowner is,
4 they had an obligation to disclose that to someone.

5 THE COURT: The Cliffs would have a cause
6 of action against S&ME based on what you just said?

7 MR. DUDLEY: I absolutely think so, yes.
8 Yes, sir.

9 THE COURT: But not only the Cliffs, but
10 also the McCarthys even though they knew nothing
11 about the McCarthys.

12 MR. DUDLEY: S&ME knew nothing about the
13 McCarthys?

14 THE COURT: Yes.

15 MR. DUDLEY: That's right. But the issue
16 here goes back to this is that it's a two-fold
17 issue. It's a diagnose issue and it is a disclose
18 issue. Even if they agree they missed it and they
19 blew it, there's a disclosure issue that, again,
20 all of them talked about. You got to completely
21 define this thing. You've got to spell this thing
22 out.

23 Again, we're not remote. We're in the thick
24 of it. We have the ability to make a decision
25 right then and there. That's what I think is most

1 striking is the inference can be drawn. They go
2 out. They make a proposal to do for three. They
3 allow their clients to put professional blinders on
4 and only do one. It's real clear. We don't have
5 to talk about foreseeability -- because the Cliffs
6 had a billion-dollar sale that was taking place --
7 if you go and you make your report only about Lot
8 31, that somehow you are a longstanding client.
9 So, they've been working together for 15 years.
10 S&ME and the Cliffs had a longstanding
11 relationship.

12 **THE COURT:** All of this is revealed how
13 many years after the fact?

14 **MR. DUDLEY:** Which one?

15 **THE COURT:** This disclosure that you are
16 saying should have been made?

17 **MR. DUDLEY:** We found it out in -- well, we
18 started -- we found it out -- we found that there
19 was a problem with the next-door neighbor. The
20 Harrells called Mr. McCarthy and said there was a
21 problem.

22 **THE COURT:** So like six years later?

23 **MR. DUDLEY:** Yes, sir. But it's kind of
24 like the discovery -- it's no different than the
25 discovery rule. If you don't know you've been lied

1 to, somehow does that make the lie okay? Of course
2 not if someone has materially omitted information
3 from you and you don't know it because it's not
4 given to you. That's the whole idea why a material
5 omission is a misrepresentation because the other
6 side is not going to know. That's the real
7 important part.

8 The stuff doesn't really -- the whole idea of
9 this stuff doesn't really manifest until the
10 Harrells built their lot and they start noticing
11 cracks in their slabs and movement in the house.
12 That's when it starts -- that's when the whole
13 someone starts drilling down and figuring out we
14 need to look at this a little bit more deeply. In
15 fact, it really starts with the neighbors that has
16 Lot 29. They hired BLE to come out and look at it.

17 The builder for the Harrells, they say, hey,
18 you need to come look at ours too. So finally, you
19 get some third party that's independent, gets hired
20 by the Cliffs Communities. They put inclinometers
21 out there and find there's a deep-seated slope
22 failure. He says it to this day. That's his term.
23 Deep-seated slope failure is going on on these
24 three lots. I mean, that -- he's not paid by my
25 clients, he's not paid by the defendants. He's

1 saying it's going on. It all ties back to what
2 everyone knew, what was apparent at the time in
3 2005. The fact that they lied to us then and we
4 didn't discover it until '11 doesn't make their lie
5 any less of a lie.

6 **THE COURT:** All right. If you can wrap it
7 up.

8 **MR. DUDLEY:** The damage. The speculative
9 damages. Here's what I think is right. I think
10 that's what prejudgement interest would account
11 for. I would agree with that. If there were a
12 claim, it would be prejudgement interest accounts
13 for that, not the, uh, -- have them put their money
14 in S&P 500. I don't disagree with that.

15 **THE COURT:** All right.

16 **MS. McMILLAN:** Your Honor, briefly about the
17 allegations against Cliffs Communities, Inc. It's
18 clear and well-settled law that a corporation or
19 corporate entity can only add to its agents. KFIG
20 and Cliffs Communities, Inc. was acting, uh,
21 carrying stuff, I mean, carrying out issues for
22 KFIG. You still have a right to have a distinction
23 in corporate entities.

24 **THE COURT:** I'm just wondering. Looking at
25 the contract, doesn't it contain some promises by,

1 uh, Cliffs Communities, Cliffs Real Estate? Aren't
2 they all referenced in the contract?

3 **MS. McMILLAN:** I see where the Golf and
4 Country Club, Inc. is referenced in there, Your
5 Honor, but I don't, uh, -- the Cliffs Communities
6 --

7 **THE COURT:** It's not just a simple real
8 estate sales contract. It's a, uh, --

9 **MS. McMILLAN:** It talks about how the
10 contract with the country club is a separate
11 contract, I thought, Your Honor.

12 **MR. DUDLEY:** Paragraph 9.

13 **MS. McMILLAN:** In paragraph 5. Uh,
14 paragraph 9, is that what you said? I thought
15 there was a provision in here that says there was a
16 separate contract for the club membership.
17 Paragraph 5.

18 **MR. DUDLEY:** The face of the agreement says
19 Cliffs Communities Real Estate Sale and Purchase
20 Agreement. That's what the document is implying.

21 **MS. McMILLAN:** Which is still not the Cliffs
22 Communities, Inc.

23 **THE COURT:** What is that?

24 **MS. McMILLAN:** The title, Your Honor?

25 **THE COURT:** Real Estate Cliffs Communities.

1 **MS. McMILLAN:** It says the Cliffs
2 Communities Real Estate Purchase Agreement. It
3 does say that at the top, Your Honor.

4 **THE COURT:** Who are they? Who is that?
5 Which plaintiff? Which defendant?

6 **MS. McMILLAN:** Technically, it's not any
7 defendant because it's not Cliffs Communities,
8 Inc., Your Honor.

9 **THE COURT:** Okay.

10 **MS. McMILLAN:** That was all I was going to
11 address, Your Honor.

12 **THE COURT:** Okay.

13 **MS. BURTON:** Your Honor, I'm going to hand
14 up the case you deleted, the Mark Long and the Ross
15 Dress for Less opinions from the district court.

16 **THE COURT:** Judge Lewis is on page -- in
17 your memo, like page 64.

18 **MS. BURTON:** Yes, sir. I think Mr. Dudley
19 accurately pointed out that was a motion to
20 dismiss. She ruled as a matter of law on a motion
21 to dismiss that when a civil engineer that rendered
22 services on the O'Reilly's property, it and he,
23 because there were two defendants, the engineer and
24 the company, did not owe a duty of care to the
25 adjacent landowner. I believe that's, uh, the last

1 portion of the court's opinion.

2 **THE COURT:** Looks like she relied upon one
3 of my cases.

4 **MS. McMILLAN:** Yes, sir. There were also a
5 bunch of water --

6 **THE COURT:** One I did in Lexington years
7 ago.

8 **MS. McMILLAN:** Yes, sir. And the only other
9 thing is -- I will hand up -- it's already part of
10 the papers that we filed with the court, the
11 portions of Roger Moore's deposition, this fella
12 from Alpha Environmental Services, where he
13 testifies in his videotaped deposition that when he
14 went to put his big toe on Lot 31 -- and that's the
15 only lot he worked on with respect to Alpha's
16 report. When he went out there, he did not
17 diagnose an ongoing deep-seated slope failure. He
18 did not advise his client that there was a
19 deep-seated slope failure either.

20 **THE COURT:** Okay.

21 **MR. DUDLEY:** I've got a two-second response
22 to that. You can call it a deep-seated slope
23 failure, a shift failure. You could call it slope
24 movement. You can call that an active slope
25 failure. The bottom line is it was moving. He

1 said there's a strong possibility of continuing to
2 move and don't build on it. If you call it a duck
3 -- you know, I guess you can call it whatever you
4 want. If it's a duck, it's a duck.

5 **THE COURT:** What did your folks rely on in
6 deciding to build? Well, they haven't built on it.

7 **MR. DUDLEY:** They haven't built on it. They
8 got married. Well, he got moved up. By the way,
9 that's Kevin McCarthy that's right here. When
10 Kevin -- Kevin got a job up in Charlotte. The
11 whole idea -- he testified the whole idea of doing
12 something there wasn't -- it was no longer
13 necessary. They were -- one was in Charlotte. He
14 was in Atlanta. He got a job up there. The
15 impetus for doing that kind of went away.

16 The whole issue is that you've got -- one of
17 the things he talked about -- I saw that in --
18 maybe it was in Beth's brief -- that he didn't --
19 he didn't really look at the HUD. I sent the
20 supplemental that -- there's three or four pages.
21 He's identifying his handwritten notes on the HUD.
22 He got deep into that. He was talking about the
23 developer, the Cliffs hadn't got any of the
24 infrastructure, a lot of the infrastructure
25 deadlines. So there was a HUD.

1 **THE COURT:** Considering that he never built
2 on it, does that change his status from the
3 protection the Court gives to residential
4 construction? Does it shift from that to negative
5 treatment the Court might give to investors?

6 **MR. DUDLEY:** Here's the thing. Here's --
7 no, I don't think it does and here is why. If this
8 was raw land and you could do whatever you want to
9 it, and I think it was just I was going to put a
10 house on it, that's a distinction. When you have
11 real estate development that has covenants and
12 restrictions and all you can do is build a house on
13 it, then that fits squarely in all the little
14 things that touch on building on a house. There's
15 no reason why it wouldn't. I would agree if it was
16 just raw land and he thought about building a house
17 on it.

18 **THE COURT:** The reason I am asking is since
19 the principles and policies of the Kennedy Lumber
20 case just based on the facts of that case and the
21 -- of course, you have extended it to -- your
22 analysis to Beachwalk Cliffs, Georgetown Steel and
23 others, it sort of goes back to the question of how
24 far this policy should go in attempting to extend
25 liability.

1 **MR. DUDLEY:** Yes, sir. I think if the whole
2 idea is that the reason that S&ME was bought out
3 there was to address an issue of buildability of
4 that lot. It wasn't is there a spring on it or
5 let's see if there is rock on it. It was
6 specifically addressed can we sell this lot, 'we
7 just bought one, can a house built on it. In fact,
8 his analysis was we'd have to spend about \$50,000
9 before you begin your foundation.

10 The S&ME report that he actually did wasn't
11 whether or not there was a slope failure. The S&ME
12 report that he did was can you build a house on it.
13 That's not a quantum leap, I would propose.

14 **THE COURT:** Okay.

15 **MS. McMILLAN:** Your Honor, I've got one
16 thing if I could. If you are inclined to find that
17 the Cliffs Communities, Inc. is a part of -- is, in
18 essence, part of the contract here, then the
19 argument for the economic loss rule would apply to
20 Cliffs Communities, Inc., as well as KFIG. I just
21 want to raise that point.

22 **THE COURT:** Okay. All right. Well, I think
23 we're going to take a break at this moment. My
24 thinking on this is to, uh, -- is to have proposed
25 orders submitted, of course, in relation -- well,

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

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

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

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

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

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

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

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

1 **THE COURT:** October 10th letter. Exhibit N.

2 **MR. DUDLEY:** Actually, it's just to transfer
3 the deed. It says deed. That's from the law
4 firm --

5 **MS. McMILLAN:** That could even be the law
6 firm's -- yeah.

7 **MR. DUDLEY:** That was the deed. Yes, sir.
8 The exhibit is just the deed. It's a public
9 record.

10 **THE COURT:** Of course, that letter from the
11 law firm in Atlanta would not be -- would not be
12 any type of admission by a party opponent nor sworn
13 testimony. So that particular one would be -- I
14 grant the motion as to that one.

15 **MR. DUDLEY:** What about the -- all that
16 exhibit is is the deed. The deed is a public
17 record.

18 **THE COURT:** The deed is fine obviously.
19 It's a public record. The cover letter is not.

20 **MR. DUDLEY:** Yes, sir. That's not --

21 **THE COURT:** Okay.

22 **MR. DUDLEY:** Doesn't even need to be a part
23 of it. I can take that out.

24 **THE COURT:** Okay. So that's my thought on
25 that. I'm granting -- I'm denying the motion to

1 strike for the reasons I stated. And, uh, the
2 motion for summary judgement and the motion to
3 amend, I would like to get proposed orders on those
4 from the, uh, moving parties from the defense.
5 And, uh, when you -- how much time you need to
6 submit those?

7 MS. McMILLAN: A week to 10 days, Your
8 Honor. I'm going to be out of town actually
9 starting Sunday through Thursday.

10 THE COURT: Ten days. Ten days is fine.

11 MS. McMILLAN: Thank you.

12 THE COURT: Submit them with copies to, uh,
13 the defense, to Mr. Dudley. Mr. Dudley, then you
14 would have 10 days to -- we'll shorten your time.
15 Seven days to respond by, uh, pointing out whatever
16 you want to point out in response to those motions.
17 So your response to their proposed orders.

18 MR. DUDLEY: Yes, sir. Are you ruling or
19 this is --

20 THE COURT: No, I'm not ruling.

21 MR. DUDLEY: Okay. I got you.

22 THE COURT: I'm -- as you all prepare -- as
23 you all are preparing your proposed orders, it
24 gives me an opportunity to review everything that
25 has been presented today and this past week.

1 MR. DUDLEY: Thank you, sir.

2 THE COURT: Then all of that will be taken
3 into consideration. It's not a ruling at all.

4 MR. DUDLEY: Thank you, sir.

5 THE COURT: If I deny the motions, then I
6 don't need a proposed order. I'm denying the
7 summary judgement as a Form 4.

8 MR. DUDLEY: Yes, sir.

9 THE COURT: But granting it entails
10 specific findings and conclusions. There will be
11 many subparts to the proposed orders.

12 MR. DUDLEY: Yes, sir.

13 THE COURT: Now, uh, the motion to strike
14 has been filed or is that an oral motion?

15 MS. BURTON: I have it to file in my
16 briefcase.

17 THE COURT: To file?

18 MS. BURTON: Yes, sir.

19 THE COURT: Okay.

20 MS. BURTON: I have my check and everything.
21 I just haven't gotten down to the clerk's office.

22 THE COURT: All right. We'll probably do a
23 Form 4. We'll probably do a Form 4 denying it
24 after it has been filed.

25 MS. McMILLAN: That's fine, Your Honor.

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(WHEREUPON, McCarthy's motion for summary judgement
is concluded.)

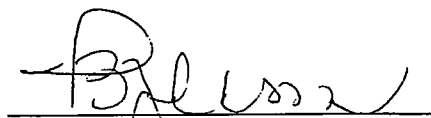
CERTIFICATE

70

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 3rd day of January, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

A handwritten signature in cursive script, appearing to read 'T. B. Johnson', is written over a horizontal line.

Teresa B. Johnson

Circuit Court Reporter

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

2 COUNTY OF GREENVILLE CA No.: 2011-CP-23-6376

3
4 Kevin McCarthy and Courtney E. McCarthy,

5 Plaintiffs,

6 vs.

7 Keowee Falls Investment Group, LLC,
8 The Cliffs Communities, LLC, d/b/a
9 The Cliffs at Keowee Falls South,
10 Cliffs Real Estate, Inc.,
11 The Cliffs Golf and Country Club, Inc.,
12 and S&ME, Inc.,

13 Defendants.

14
15 DEPOSITION OF KEVIN MCCARTHY
16
17

18 Pursuant to notice of deposition or subpoena
19 or agreement in the above-entitled case, a deposition
20 was taken on the 29th day of November 2012,
21 commencing at approximately 9:00 a.m., attended by
22 counsel as follows:
23
24
25

1 A. I do.

2 Q. What in?

3 A. An MBA.

4 Q. Where did you get that?

5 A. Duke.

6 Q. Fuqua school?

7 A. Correct.

8 Q. When did you get the MBA?

9 A. It was a, it was while I was working an executive
10 program, it's an MBA, two years, I graduated in '97.

11 Q. So while you were at Wachovia --

12 A. Um-hmm.

13 Q. -- I take it.

14 When did you graduate from UVA?

15 A. '92.

16 Q. Tell me when you first became interested in acquiring
17 property around Lake Keowee?

18 A. I don't know for certain, but if I recall correctly
19 the dates, then I would say that if we bought our lot
20 in, closed on it, I think it was August of '05, then
21 I was probably interested in looking around Keowee
22 and The Cliffs six, nine months prior to that. I'm
23 guessing.

24 Q. Was the lot that you purchased at Jasmine Cove, the
25 first, second home or second vacation type property

1 you had purchased?

2 A. Yes, it was the first piece of raw land I purchased.
3 And it was my wife's first ever real estate purchase.

4 Q. When did you and Mrs. McCarthy get married?

5 A. April of '06.

6 (Defendant's Exhibit 1 marked for
7 identification, Kevin McCarthy
8 deposition, 11/29/12, RAM.)

9 BY MS. BURTON:

10 Q. Let me hand you a document I've marked as Exhibit
11 number 1 to your deposition. And I'll tell you, Mr.
12 McCarthy, this is a document that was produced by The
13 Cliffs in this lawsuit, and I don't know whether
14 you've ever seen the document before.

15 Have you seen this document?

16 A. I don't know.

17 I need to ask Tom whether or not this was part
18 of the documents that he shared with me as a part of
19 this proceeding. And so I don't know, this document
20 does not look familiar to me at all.

21 Q. Okay, that's fine.

22 And I don't know exactly what the document is,
23 Mr. McCarthy, but it appears The Cliffs, with respect
24 to their sales and marketing department keeps ongoing
25 notes about contacts with potential purchasers and

1 Q. Okay.

2 A. So I think what this has is accurate and consistent
3 with what I said earlier, which is six months.

4 Q. So you'd played at The Cliffs at Glassy, I take it,
5 and The Vineyards course in the past?

6 A. I played courses, yes, The Cliffs and The Vineyards
7 courses.

8 Q. And that could have gone back perhaps as far as '99,
9 playing on the courses?

10 A. Sure. Could have.

11 Q. And that's perhaps how they got your name?

12 A. Yeah.

13 Q. Tell me about your initial contact with anybody about
14 looking at a lot or looking at a home associated with
15 any Cliffs property?

16 A. As I said, I don't, from what I recall, we knew, or
17 we thought we wanted to buy a house on a lake.

18 And so we, I was living in Atlanta at the time,
19 my wife was living in Charlotte, we traveled up and
20 down 85 pretty frequently to see one another.

21 And The Cliffs struck us as a place that was
22 equidistant between Atlanta and Charlotte. And you
23 couldn't drive 85, and you still can't, without
24 seeing advertisements or in golf magazines for The
25 Cliffs.

1 sure, I would imagine we went in there and said, we'd
2 like to look to lakefront properties, what do you
3 have.

4 We got in the car, we toured around.

5 My wife and I, we talked about this, and the
6 best of my knowledge, we only looked at two lakefront
7 lots, because in the release there, what I can
8 remember, that, you know, Jay Scott was not any
9 different than any other salesman that you would deal
10 with, it was pretty high pressure.

11 He was telling us how, you know, you better get
12 it while it's hot, because these things are going
13 fast. And in the current release there was a limited
14 amount of developer remaining lakefront lots.

15 And so we drove around, and we looked at what
16 ultimately was the lot we purchased. And the only
17 other one that I can recall we looked at was the one
18 right next door to us, lot number 33.

19 And in addition to that, he drove us over to a
20 small spec subdivision, which overlooks the falls
21 that Keowee Falls is named after, in a little cove.

22 And there were probably, I don't know, six or
23 eight homes that were built on spec by a firm called
24 Community Concepts, which is one of The Cliffs
25 signature builders. And we looked at those.

1 Do you have any idea when you made that visit?

2 A. Not specifically. But reviewing the time line that
3 we put together with Tom, and the materials that we
4 had in our files and that we gave over to Tom, I
5 imagine that was sometime before June of '05.

6 Q. Okay. And I was looking at this sheet to see if this
7 gives us any illumination on that.

8 A. Yeah.

9 Q. There's a reference, turn to that last page, are you
10 still on that, of Exhibit number 1?

11 A. Yeah.

12 Q. At the entry on that page that appears to be dated
13 June 1, 2005?

14 A. Um-hmm.

15 Q. And the entry says, R. Wiles, it says:

16 "Follow up from Doug Wall. I spoke to Kevin
17 McCarthy last week regarding FC number 26. He seemed
18 to be still in the game, and was leaving for vacation
19 over the weekend, to return yesterday. In that
20 conversation we set up a tentative meeting with him
21 and Courtney for Saturday at our Greenville office to
22 discuss floor plans. I called him today to confirm
23 and have not heard back as of yet."

24 Do you know, and there's more references, I'll
25 tell you, to this FC 26. Do you have any idea what

1 The next entry right above that, is entered by
2 R. Wiles, it looks like: "Phone in conversation.
3 Coming this weekend to do Falls Creek contract.
4 Booked Discovery Home for tomorrow night."

5 Does that ring any bells with you, that you were
6 coming in to do something about a Falls Creek
7 property?

8 A. Not, no, not to do a, not to do a contract on a Falls
9 Creek property, no. That doesn't ring a bell.

10 Q. Did you talk with anybody whose last name is Wiles?

11 A. That does not ring a bell with me.

12 Q. Do you remember talking to anybody you thought was
13 associated with The Cliffs or any Cliffs entity,
14 other than Mr. Scott, before you signed a contract to
15 purchase a lot?

16 A. No, I don't remember, if you're asking me if I
17 remember the name of anybody or anybody in particular
18 that we talked to other than Jay Scott?

19 Q. Right.

20 A. No.

21 Q. So Scott was your main contact?

22 A. Yes.

23 Q. Tell me, I know you told me that y'all came and you
24 looked at two lots and some of the houses. How many
25 times did you go to any of The Cliffs properties

1 A. Yeah, no, there was some discussion of that, but I
2 don't remember whether we actually went out on a boat
3 or not.

4 Q. Okay. When you were out on Lot 32 with Mr. Scott,
5 did you have any kind of plat or diagram or anything
6 that showed the shape, size, contours, anything about
7 it?

8 A. I don't remember that. While we were out on the lot,
9 I don't remember that.

10 Q. Okay. Prior to closing on the lot, did you ever see
11 a plat or map or drawing?

12 A. I would imagine I did, because we got a loan on it,
13 and so they would have to do a survey that would
14 include that, I would think.

15 I recall seeing in the documentation a plat or a
16 diagram, I do recall that.

17 Q. Did you see one before you signed a contract to
18 purchase the lot?

19 A. I would imagine I did, but I'm not sure.

20 Q. I don't know.

21 A. I don't remember either, it was six years ago. I
22 have trouble remembering six weeks ago.

23 Q. Do you think that you went and walked on Lot 32 on
24 more than one occasion before you signed a contract
25 to purchase the lot?

1 A. I don't remember.

2 Q. Did you talk with anybody other than Mr. Scott about
3 Lot 32, before you signed a contract to purchase the
4 lot?

5 A. Anybody other than Mr. Scott at The Cliffs or?

6 Q. Anybody, well, other than your wife who I'm sure you
7 talked with about whether to purchase the property.

8 Anybody else. Did you talk with anybody else
9 about the lot before you signed a contract to
10 purchase it?

11 A. I'm sure I did. My friends, people who we would talk
12 to that, so I'm sure I did. I don't know who it was.

13 I didn't talk to anybody, I can't recall
14 specifically who I talked to about that, but nobody
15 that I can remember associated with The Cliffs
16 specifically.

17 I mean I called up to talk to Jay Scott, who as
18 you pointed out, was our key person that we dealt
19 with, and so I'm sure I talked to the receptionist,
20 I'm sure I talked to his assistant when he wasn't
21 there. But I can't remember who they were or what
22 their names were.

23 Q. Do you recall having any substantive conversation
24 about Lot 32 with anyone other than Mr. Scott before
25 you signed a contract to purchase the lot?

1 architects, or anything like that about building a
2 house out there?

3 A. Yes.

4 Q. Tell me when you first started that?

5 A. I don't know specifically when we first started that.

6 But we, I did talk to at least one architect, I
7 can't remember his name.

8 And I'm sure I, I was looking at house plans in
9 magazines or, for example, The Cliffs, the Community
10 Concepts, the Falls Creek homes that we were talking
11 about earlier, as a part of that, and I mentioned
12 that Community Concepts was somebody that would, not
13 only sell you one of the spec homes they built, but
14 they'd build a house for you on your lot.

15 Q. Sure.

16 A. We got a number of plans from them as a part of our
17 investigation into that builder and those properties.
18 And so I was playing around and noodling around.

19 As I said, I talked to at least one architect,
20 whom I can't remember his name.

21 And then what happened, sort of in our
22 chronology, is that, as I mentioned earlier, in
23 November of 2006, I moved back to Charlotte.

24 Q. Okay.

25 A. And in April of '06 my wife and I got married.

1 Q. Okay.

2 A. In November of '06, I moved back to Charlotte.

3 I was probably talking to the people at Wachovia
4 in mid to late summer about returning to Charlotte
5 and returning to work for Wachovia.

6 Q. Good idea, you'd just gotten married.

7 A. She might tell you under oath that she'd be happier
8 if I stayed down in Atlanta, but I'll wait and let
9 her tell you that.

10 And so as I also mentioned earlier, one of our
11 motivations, on top of the fact that The Cliffs
12 seemed like a great place and had all the amenities
13 and everything that we wanted in a second home, it
14 was equidistant between Atlanta and Charlotte..

15 Q. Right.

16 A. And that was, that was consideration in our deciding
17 to purchase there.

18 And candidly, we did not know, we knew we
19 weren't going to stay apart, but we didn't know
20 whether we'd live in Atlanta or Charlotte.

21 Had we moved and lived in Atlanta, The Cliffs
22 might have been a stronger possibility for us to keep
23 and maintain a home, because in Atlanta you're five
24 hours from the coast in any direction, and The Cliffs
25 is only two hours, 15 minutes.

1 In Charlotte, though, you have lots of different
2 options. You can be at the beach in two-and-a-half
3 hours, and you can be at the western North Carolina
4 mountains in an hour 45 minutes.

5 So when it became clear I was moving to
6 Charlotte, the idea of building on the lot took a
7 backseat. I wouldn't say we ruled it out, but it
8 took a backseat.

9 And me settling into a new job, my wife and I
10 getting settled as a married couple in Charlotte, all
11 of that sort of took priority. So the momentum, if
12 you will, around building on the property at Keowee
13 slowed down.

14 Q. Okay. Did you go, and I don't know, in some of the
15 notes, we can look at them, they talk about, my
16 impression is that, if one owned a lot at The Cliffs
17 or wanted to go play golf, that you could call out
18 there and maybe rent or stay in some kind of condo or
19 something like that?

20 A. Yeah. That's right.

21 Q. Did you do that some after you closed, go and play
22 golf up there?

23 A. Well, a couple of comments.

24 One is that the golf course in the development
25 that I was in, was not done.

1 A. And then we paid it off, paid off the balance of 750
2 in August of 2010.

3 Q. Was that an interest-only loan, were you just paying
4 interest all along? Because you mentioned two
5 principal payments?

6 A. Yeah, I think so. I think it was a, it was, it was
7 some, I would imagine it was some form of ARM that we
8 were paying interest only on.

9 Q. And we'll be able to tell that from the binder?

10 A. We can get that information.

11 Q. Thank you.

12 (Defendant's Exhibit 15 marked for
13 identification, Kevin McCarthy
14 deposition, 11/29/12, RAM.)

15 BY MS. BURTON:

16 Q. Let me hand you a document I've marked as Exhibit
17 number 15, that I will represent to you came from Ms.
18 McMillan's office.

19 And it says that it is a Cliff Communities Real
20 Estate Inc. Exclusive Right to Sell Agreement, Home
21 Sites. And if you look at the last page, can you
22 tell me whether you signed this document?

23 A. Yes.

24 Q. In July of 2008 did you and your wife list the
25 property for sale, using The Cliffs as the broker?

1 may have a different one, but my impression was that
2 Libby was more communicative with us, in terms of her
3 efforts. And I think the property was featured on
4 their website.

5 And there was certain marketing activities that,
6 at least to me appeared to be more visible than those
7 with the Cliffs. And she was better at communicating
8 with us what was going on.

9 But there were no, the results were the same.

10 Q. No bites?

11 A. I won't say no bites; there might have been some
12 bites or some interest. And might have just been a
13 function that she was more communicative where she'd
14 say, I've got somebody coming, they're going to look.

15 And so we were made aware of people through her
16 --

17 Q. Sure.

18 A. -- that were, had expressed some degree of interest
19 in the property. But none of that resulted in an
20 offer.

21 Q. When did you withdraw the property from the market?

22 A. I can't recall. I'd have to follow up with that.

23 Q. Would it have been after the expiration of the Winter
24 contract?

25 A. Yes.

1 provided through your counsel to us.

2 A. Okay.

3 Q. There are attachments, I will tell you, to the
4 original report, but there are none in what you
5 provided to us.

6 A. Okay.

7 Q. Do you know whether you have ever gotten a copy from
8 Mr. Harrell or his counsel with the entire report?

9 A. I seem to recall, and again I don't know whether I
10 should say this or not because this is what I recall
11 through my discussions of the case with Tom.

12 Q. Okay, I don't, and he can tell you also, but I don't
13 want to know anything you've talked about with your
14 lawyer.

15 If you've got something from Mr. Harrell, or he
16 talked to you, you can tell me you got it in the
17 lawsuit process, I'm okay with that. I just don't
18 want to know what your lawyer told you.

19 A. I don't, I don't recall specifically seeing
20 attachments. I do recall having conversations, as a
21 part of this process, that we were aware that there
22 were attachments that existed. And it could have
23 been with Jack, it could have been with Tom, and that
24 we've requested those attachments.

25 Q. Okay.

1 realizing this would be a great piece of property to
2 develop for a resort community.

3 So, no, I don't know what it was used for, if I
4 assumed it was used for anything.

5 Q. Did you know that Crescent Resources used to own that
6 land, which I think is an affiliate of Duke Energy?

7 A. It is.

8 Q. Did you know that?

9 A. I knew that only by virtue of the permitting process
10 for the dock. I think it needed to be approved by
11 Crescent.

12 Q. Is there a dock on your property?

13 A. No.

14 Q. You just knew that if you wanted a dock, Crescent was
15 going to have to have some involvement?

16 A. Actually been through and got it permitted.

17 Q. Okay. When did you do that?

18 A. I can't remember.

19 It would have been kind of shortly after we
20 bought it, not recently. And the permits for the
21 docks only last a finite period of time.

22 And it lapsed and we didn't, you know, we had,
23 this was all part of, hey, we're going to build, we
24 need to get a dock permit, let's do that. And we did
25 that.

1 And then for reasons that I've described
2 already, we didn't go forward and build.

3 Q. Okay. So you found out about Crescent somehow
4 through that permitting process?

5 A. Or maybe through the background on The Cliffs
6 Communities, so I know it's a power generation lake.

7 Q. Has anybody said anything to you about roads, old
8 roads being on your land?

9 A. No.

10 Q. Has the shoreline on your property been stabilized --

11 A. Yes.

12 Q. -- with riprap?

13 A. We did it.

14 Q. I notice, I actually looked at it from Bing, or one
15 of those map things, and I noticed there were stones
16 along the edge of your property.

17 Tell me when you did that shoreline
18 stabilization work?

19 A. I think it's in our Complaint. But to the best of my
20 knowledge, and now I will look at something on our
21 sheet here, it looks like it was completed or we paid
22 for it in the early part of 2010.

23 Q. Who did the work for you?

24 A. Breazeale Shoreline.

25 Q. How did you find those guys?

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

2 COUNTY OF GREENVILLE CA NO.: 2011-CP-23-6376

3

4 KEVIN MCCARTHY AND COURTNEY E. MCCARTHY,

5 PLAINTIFFS,

6 VS.

7 KEOWEE FALLS INVESTMENT GROUP, LLC,
8 THE CLIFFS COMMUNITIES, LLC, D/B/A
9 THE CLIFFS AT KEOWEE FALLS SOUTH,
10 CLIFFS REAL ESTATE, INC.,
11 THE CLIFFS GOLF AND COUNTRY CLUB, INC.,
12 AND S&ME, INC.,

13 DEFENDANTS.

14

15

16

17

18 DEPOSITION OF KEVIN MCCARTHY

19

20

21

22

23 DEFENDANT'S EXHIBITS 1 - 19

24 NOVEMBER 29, 2012

25

26

27

28

DEPOSITIONS AND..., INC.,
864-235-3518

Property Owner Record for
Mr. and Mrs. Kevin McCarthy

Page 1
8:48

Salesperson	Sales Asst	Entered	1st Contact Type	Bldr	Lead Source	Referred by
jmarks		10/12/99	Internet Respons	☒	TV/CNN Headline	
Next Contact	Rank	# BRs	Price Range	Intended Use		
12/20/2011	P					

Seeking	☒ Primary Res	☒ Sec/Seas Res	☒ Resale Home	☒ Builder Program	☒ Maint-Free Livin
	☒ Homesite	☒ Condo	☒ Opt-In	☒ Non Mailer	☒ Has e-Mail
Views	☒ Golf Course	☒ Golf View	☒ Interior Lot	☒ View	☒ Lakefront
	☒ Wooded Lot	☒ Lake View	☒ Dock	☒ Lakefront No Doc	☒ Seasonal

Head of Household					
Title	First Name	Last Name	Suffix	Occupation	Age Range
Mr.	Kevin	McCarthy			36 to 45
☐ Mountain	☐ High Carolina	☐ Keowee	☐ Walnut Cove	☐ Resort	
☐ Other?	Other detail:				

Spouse					
Title	First Name	Last Name	Suffix	Occupation	Age Range
Mrs.	Courtney	McCarthy			
☐ Mountain	☐ High Carolina	☐ Keowee	☐ Walnut Cove	☐ Resort	
☐ Other?	Other detail:				

Other Detail					
Inq Date: 10/11/1999; Entered by: MD;					
E-mail Addresses			Phone Numbers		
Type	E-mail Address	Primary	Type	Phone Number	Best Remarks
	Kevin's Pers kmccarthy@bellsouth.net	☒			
	cmccarthy@bellsouth.net	☐	Business	(704) 819-8749	☐ Courtney's
		☐	Cellular	(404) 664-9592	☐
		☐	Cellular	(704) 526-5353	☐ Kevin
		☐	Home	(704) 367-3408	☒

Primary Address			
Line 1:	2518 Forest Drive		
Line 2:			
City:	Charlotte	ST:	NC Zip: 28211
Country:			

Secondary Address			
Line 1:	604 A Timm Valley Road		
Line 2:			
City:	Atlanta	ST:	GA Zip: 30305
Country:			

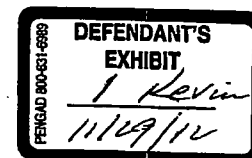
Mail Code: CKS Cert; KSCR 9/05;

Children

Appointments				
Date	Time	Type	Kept?	Result comments
5/20/2005	8:00 PM	DISCOVER	☒	

Contact History					
Date	Start	End	Made By	Type	Result
9/21/11	11:28	0:00	jmarks	Mail Out	Personal Note
					Rank Next Detail
					P 12/20/11 Sent SampleLetter1.doc

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MGC -00001

Property Owner Record for
Mr. and Mrs. Kevin McCarthy

Page 2
8:48

9/21/11 11:30 0:00 jmarks Mail Out Personal Note P 12/20/11 Good morning from The Cliffs-

This afternoon The Cliffs and ClubCo are holding a town-hall meeting in Greenville for all Cliffs Members to attend. The forum includes the current financial position of The Cliffs, ClubCo as well as proposed changes to the membership initiation fees and monthly dues that will allow the clubs and ClubCo to be self sustaining going forward.

If you are unable to attend the meeting, you can [CLICK HERE](#) to register and participate in the meeting on-line. Or, you can call me on my cell anytime and I'll be happy to discuss the meeting with you.

As for the current pace of sales, we have closed three homes in the last 45 days (\$900K, \$1.6M and \$4.1M). Recent lot sales have been lake front from the \$300's-\$800's. Currently The Cliffs Real Estate Office at Lake Keowee has accounted for the vast majority of sales compared to other real estate companies and has totaled over \$19M in closed transactions this year. The majority of those sales have been resale homes and home-sites.

Let me know how I can be of service.; Sent SampleLetter1.doc

6/7/11 17:09 0:00 jmarks Mail Out Personal Note P 9/5/11 Good afternoon from The Cliffs!

I thought you would enjoy a short update on recent real estate sales at The Cliffs. As a company we are approximately \$7M ahead of budget for the year (\$27.4M budgeted versus \$34.6M in actual sales.) About 40% of those sales have been developer owned properties and 60% have been resale properties. Also it was brought to our attention that over the last four years, The Cliffs sales teams have sold 86% of all home-sites and 61% of all homes purchased in Cliffs neighborhoods while other sales organizations have sold the balance (14% and 39% respectively.)

Finally, lake season has officially arrived! If you have not taken a boat cruise to the Lake House for dinner, enjoyed the Springs Beach Club or played one of the courses recently, they are all better than advertised.

Always let me know if I can help with anything and how The Cliffs can continue to serve you.

Thanks,
Jake; Sent SampleLetter1.doc

Property Owner Record for
Mr. and Mrs. Kevin McCarthy

Page 3

8:48

Date	Time	Duration	Initials	Action	Category	Subject
5/11/11	15:55	0:00	jmarks	Mail Out	Personal Note	P 8/9/11 Attached is a quick update from The Cliffs.

Also worth mentioning is that in the last 10 days we have had over \$6,000,000 in real estate purchased in our Lake Keowee properties alone! We have been extremely busy over the past few weeks and expect several more families to join us too.

Additional good news is that a new mortgage brokerage, AffinW Capital, just opened up shop in the Keowee Towne Market Place. They have already proven to be a huge asset to our customers with their initial purchase and property owners who are ready to build!

Several incredible lake front opportunities exist right now. Lake front lots start in the \$300's, lake front town-homes from \$800K and lakefront single family homes from \$1.1M.

Let me know if I can help with anything!

Thanks; Sent SampleLetter1.doc

Date	Time	Duration	Initials	Action	Category	Subject
3/21/11	17:04	0:00	jmarks	Mail Out	Personal Note	P 4/28/11 JHM Good morning from The Cliffs! I thought you would appreciate a quick real estate update for 2011 YTD. Our tours are up from this time last year and consumer confidence seems to be improving with our customers...there are some great deals to be had and buyers are seizing those opportunities. Currently we have had 16 families purchase at The Cliffs and several more are pending this week. This weekend we have 9 scheduled appointments at Lake Keowee alone! Also, as of last week The Cliffs has joined the MLS. We look forward to the additional exposure, listings and sales that this will bring to The Cliffs. Presently there are 32 homes under construction at our Keowee properties and more than a dozen are in the review process. For many reasons more and more members have decided to move forward with the construction of their home now. Other members have recently approached me about purchasing an existing home instead of building. Single family homes currently start in the \$500's. If I can answer any questions you have or be of assistance in any way, please let me know how I can help.

Thanks

Jake; Sent SampleLetter1.doc

Date	Time	Duration	Initials	Action	Category	Subject
3/1/11	16:59	0:00	jmarks	Mail Out	Personal Note	P 3/22/11 JHM 1st QTR 2011 PO newsletter.; Sent SampleLetter1.doc

Property Owner Record for
Mr. and Mrs. Kevin McCarthy

Page 4
8:48

12/13/10 10:55 0:00 jmarks Mail Out Sent Letter/Info P 2/28/11 Greetings from The Cliffs!

I took a little field trip into Jocassee Gorge a couple weeks ago and thought I'd pass along a picture. If you don't know, Keowee Vineyards backs up to Jocassee Gorge which is a 48,000 acre state park that surrounds Lake Jocassee. It was a 10 mile, 30 minute drive on a gravel road and four wheel drive was needed but well worth the time. Hard to believe this is right in our back yard.

"Jumping of Rock" overlooks Lake Jocassee as well as Georgia and North Carolina mountains. From this overlook it is 800 feet straight down granite cliffs to Lake Jocassee. It is also home to one of the few known pair of Peregrine Falcons in South Carolina. There are also dozens of other overlooks, waterfalls and hiking trails to explore in the Gorge.

If you ever have any questions or if there is anything I can do for you please let me know how I can help.

Have a Happy Holiday Season!

Thanks,

Jake; Sent SampleLetter1.doc

12/10/10 13:46 0:00 jfowler Mail Out X-Mas Card P 2/28/11 Jake and I would like to pass along Holiday Greetings to your family! We've had a successful 2010 here and look forward to an even better 2011 as The Cliffs Communities continues to move forward with construction of amenities. We look forward to helping you and your family in any way we can here at The Cliffs.; Sent SampleLetter1.doc

11/8/10 10:07 0:00 jfowler Mail Out Sent Letter/Info P 2/28/11 Good afternoon from The Cliffs!

You have most likely seen the below update regarding the Keowee Falls Tennis Courts but I have also attached a few pictures of High Carolina Golf Course construction too. We are also eagerly awaiting construction of the Keowee Springs Spa, Wellness Center and Dining facilities this winter as well as additional construction of the Keowee Falls Wellness facilities.

Let me know if I can ever help with anything or if you have any friends who may take an interest in The Cliffs Communities too.

Thanks,

Jake; Sent SampleLetter1.doc

8/11/10 12:21 jfowler Phone Out Answering Machine P 11/9/10 following up on behalf of the welcoming committee for referrals

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MGC -00004

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 5
8:48

8/5/10	13:15	0:00	jfowler	Mail Out	Sent Letter/Info	P	8/10/10	Good morning from Lake Keowee! I just wanted to pass along a few pictures to keep you up to date with the current amenity construction at The Cliffs. I have attached several pictures of ongoing construction at the Keowee Falls Wellness Center and the opening day of the Keowee Springs Beach Club. Also, construction resumed this week on Gary Player's golf course at Mountain Park.; Sent SampleLetter1.doc
5/26/10	15:53	0:00	jmarks	Mail Out	Sent Letter/Info	P	8/10/10	sent beach club update to all Property Owners; Sent SampleLetter1.doc
5/12/10	13:31		jmarks	Phone Out	Answering Machine	P	8/10/10	JHM- LM about sales and development updates....40 homes under construction etc.
5/12/10	13:35		jmarks	Phone Out	Conversation	P	8/10/10	JHM- TT someone at one of the 404 #'s. They left GA a few years ago and live in NC/Charlotte now.
5/3/10	12:14	0:00	jmarks	Mail Out	Sent Letter/Info	P	5/17/10	Beach Club Update-Greetings from The Cliffs! The weather has been beautiful this spring and more families are starting to ski, tube and swim in the pristine waters of Lake Keowee every weekend. Soon we will have another water related attraction to enjoy....the Beach Club at Keowee Springs is well under construction and scheduled to open the weekend of July 4th. During the last few months, we have had over 40 new families purchase property at The Cliffs and take advantage of the unprecedented and limited purchase incentives being offered. We have seen a significant rise in tours and have scheduled over 250 real estate appointments and tours over the last 45 days! If you ever have any questions or need help with anything please do not hesitate to let me know. Also, if you have any friends who are interested or even just curious about The Cliffs, please let me know. I would love the opportunity to help them learn more about The Cliffs. *The Beach Club site plan is attached. Thanks, Jake; Sent SampleLetter1.doc
2/18/10	11:00	0:00	mdionne	Mail Out	E-Blast	P	5/17/10	MJD; Sent Resale Eblast Lake Feb 2010.doc
2/16/10	16:38	0:00	ahartzell	Mail Out	Sent Letter/Info	P	5/17/10	PO Friend Invite with Special Disc. Rate-eblast & personal note reiterating Jake personal PO referral program.; Sent SampleLetter1.doc
2/4/10	11:54	0:00	jmarks	Mail Out	Sent Letter/Info	P	2/15/10	JHM- PO email update- CKS beach club under construction.; Sent SampleLetter1.doc
1/28/10	13:31	0:00	mdionne	Mail Out	Sent Letter/Info	P	2/15/10	MJD; Sent Resale Eblast 147 Button Bush Trail.doc
12/17/09	11:00	0:00	ahartzell	Mail Out	X-Mas Card	P	2/15/10	Christmas cards to all A, A1 & Ps; Sent SampleLetter1.doc
11/23/09	15:02	0:00	jmarks	Mail Out	Sent Letter/Info	P	2/15/10	Update email to all property owners with ytd stats and best buys for referrals interested in Cliffs. Best buys- CKS 1-114 at \$450K with incentives & WF resale lot at \$650K; Sent SampleLetter1.doc
11/5/09	14:37	0:00	mdionne	Mail Out	Sent Letter/Info	P	11/19/09	MJD E-Blast; Sent Resale Eblast 11-09.doc
8/21/09	16:02	0:00	ahartzell	Mail Out	Sent Letter/Info	P	11/19/09	CKS Equity Residence Club Personalized Email-JHM; Sent SampleLetter1.doc
7/28/09	15:15		jmarks	Phone Out	Left msg	P	10/26/09	JHM- LM Intro and updates.

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 6
8:48

7/28/09 15:21 jmarks E-mail Out Personal Note P 10/26/09 Good afternoon Kevin and Courtney!

I gave you a call at home this afternoon to find out if there is anything I can do for you or if you needed any updates from The Cliffs but I must have missed you. If there is ever anything you need please give me a call.

I also wanted to bring something to your attention. Recently, several property owners have proposed that they "trade-up" their property either into another Cliffs property with a better view or into an existing Cliffs owned home. If that is something that you may have questions about we can look into the options.

Best regards,
Jake

7/14/09	16:25	0:00	ahartzell	Mail Out	Sent Letter/Info	P	7/20/09	Jake will call when he returns from vacation; Sent SampleLetter1.doc
7/7/09	15:33	0:00	mdlonne	Mail Out	Sent Letter/Info	P	7/7/09	MJD reassigned to lake team was DO or SMB per JFK; Sent Reassignment.doc
6/9/09	10:53		dowensby	Change Date	Move Contact Date	P	9/7/09	Move out
4/27/09	15:02	0:00	dowensby	Mail Out	Sent Letter/Info	P	6/9/09	It's a GREAT time to visit! I'd love to show you this amazing new facility and why the Cliffs is such an incredible place to call home.

Our spring and summer schedules are booking up quickly, so let's schedule your tour, soon. Through the end of May, I can offer a 3-day, 2-night package for a total of \$229.00 that includes \$100.00 dub credit to use any way you'd like. What better way to test drive your life at the Cliffs?

Let's chat, soon!

Debra; Sent SampleLetter1.doc

4/2/09	12:09	0:00	mdlonne	Mail Out	Sent Letter/Info	P	6/9/09	MJD; Sent Property Owner March 09 Eblast.doc
3/11/09	17:58		hibruce	Change Date	Move Contact Date	P	6/9/09	Move Out

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 7

8:48

3/4/09 13:43 kcastleman E-mail In Info Request P 3/6/09 Kate,

Hope this message finds you well. My husband (Kevin McCarthy) and I had our waterfront lot at Keowee Falls South listed with you last fall, but the listing agreement lapsed around the end of the year. Given the time of year and lack of showings at that time, we thought it made sense to let the listing lapse. However, as we approach the spring season I wanted to check in with you and get a feel for whether or not it makes sense to re-list it. I tried to reach you on your office line, but wasn't able to -- you may be out of the office so I thought it would be more efficient to send you an email with some questions that it would be helpful for you to address. Specifically, I would like to get an update on the real estate trends you are seeing generally across the Cliffs Keowee portfolio and specifically within the Falls development, understand the state of completion of the Falls development, see the current listing for waterfront lots and also get sales comps for waterfront lots over the past year. Last, we recently received a mailer stating that the resale commission structure would be changing, so if you can provide color on that as well it would be helpful.

If you have time, perhaps we could schedule a time to speak later this week. Thanks and I look forward to speaking with you soon.

Courtney McCarthy

1/29/09	17:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	3/6/09	MJD Jan E-Blast; Sent Property Owner Jan 09. Eblast.doc
1/21/09	15:01	0:00	hbruce	Mail Out	Sent Letter/Info	P	3/6/09	Sent January Newsletter; Sent SampleLetter1.doc
12/22/08	11:08		hbruce	E-mail Out	Personal Note	P	3/6/09	Happy Holidays ecard
12/15/08	16:10		hbruce	E-mail Out	Sent Info	P	3/6/09	Gingerbread House PR
11/25/08	11:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	3/6/09	MJD Nov E-Blast; Sent Property Owner Nov 08 Eblast.doc
11/18/08	12:55		kcastleman	Phone Out	Answering Machine	P	3/6/09	Left message about properties expiration.
11/6/08	11:06		dowensby	Phone Out	Answering Machine	P	3/6/09	Left message.
11/3/08	15:09		kcastleman	Phone Out	Answering Machine	P	11/6/08	Left message about property's upcoming expiration. Also wanted them to know I was able to wak property this morning and take Fall photos. Will pass those along in email.
11/3/08	15:14		kcastleman	E-mail Out	Sent Info	P	11/6/08	Sent Fall photos of their homesite
10/31/08	13:39	0:00	mdionne	Mail Out	Sent Letter/Info	P	11/6/08	MJD Oct E-Blast; Sent Lake Property Owner Oct 08 Eblast.doc
10/25/08	10:46		Kcastleman	E-mail Out	Sent Info	P	11/6/08	Sent expiration email.
10/14/08	17:13		hbruce	E-mail Out	Sent Info	P	11/6/08	GPI on Golf Channel
10/13/08	14:15		hbruce	Supplement	Remark/Note	P	11/6/08	reorganizing POs for Debra to call
10/3/08	12:24	0:00	mdionne	Mail Out	Sent Letter/Info	P	11/6/08	MJD; Sent Lake Property Owner Sept 08 Eblast.doc
10/2/08	14:07		kcastleman	Phone In	Conversation	P	10/29/08	Spoke about the market, buyers, activity, competition to her homesite, possible price reduction, 2008 resale sold homesites, renting a pmg home.
9/19/08	12:33		kcastleman	Phone Out	Answering Machine	P	10/29/08	Left message to touch base with POs
8/5/08	16:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	10/29/08	MJD; Sent HC Announcement E-Blast.doc
7/25/08	14:15		tteramano	E-mail Out	Personal Note	P	10/29/08	deadline for PO priority at High Carolina is August 1st
7/24/08	14:59		cjackman	Mail Out	Sent Letter/Info	P	10/12/08	Sent Listing Agreement for KFS JC 32; Sent Executed Listing Agreement.doc.

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MGC -00007

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 8
8:48

7/17/08	15:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	10/12/08	MJD E-Blast; Sent CKS Property Owner July 08 Eblast.doc
7/14/08	14:46		terramano	Mail Out	Personal Note	P	10/12/08	mailed personal note introducing debra
7/10/08	13:13	0:00	mdionne	Mail Out	Sent Letter/Info	P	12/3/08	MJD reassigned was JAY; Sent Reassignment.doc
7/3/08	14:10	0:00	mdionne	Mail Out	Sent Letter/Info	P	7/10/08	MJD; Sent HC Property Owner Letter-Reservation.doc
6/13/08	15:48	0:00	mdionne	Mail Out	Sent Letter/Info	P	12/3/08	Eblast June 08; Sent Lake Property Owner June 08 Eblast.doc
6/11/08	15:28	0:00	mdionne	Mail Out	Sent Letter/Info	P	12/3/08	MJD; Sent Seasons Issue 1.doc
5/2/08	16:30	0:00	mdionne	Mail Out	Sent Letter/Info	P	12/3/08	MJD; Sent May 08 Eblast.doc
4/11/08	17:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	12/3/08	MJD; Sent CKS Property Owner April 08 Eblast.doc
3/5/08	15:25		rwiles	E-mail Out	Personal Note	P	12/3/08	The Cliffs: CONDOS and HOMES
3/4/08	16:47		kcastleman	Phone Out	Answering Machine	P	3/5/08	Left message for PO. We are playing phone tag. Still wanted to speak to PO in regards to his property JC32.
3/4/08	18:25		kcastleman	Phone In	Conversation	P	3/5/08	Spoke to PO about listing his property. He wants it to move quickly but is not desperate to sell. He would like to think about it a little bit but in the mean time I will be sending information on getting the lot underbrushed and getting a dock permit.
2/25/08	17:00	0:00	mdionne	Mail Out	Sent Letter/Info	P	3/5/08	MJD; Sent PO Feb Eblast.doc
2/13/08	10:45	0:00	rwiles	Mail Out	Sent Letter/Info	P	3/5/08	2008 GOLF Magazine Dream House at The Cliffs; Sent No Letter For Mail Merge Only.doc
2/6/08	17:36	0:00	rwiles	Mail Out	Sent Letter/Info	P	3/5/08	The Cliffs-Condos and Homes Springs Release email for POs; Sent No Letter For Mail Merge Only.doc
12/6/07	13:20	0:00	rwiles	Mail Out	Sent Letter/Info	P	3/5/08	Christmas card; Sent No Letter For Mail Merge Only.doc
11/21/07	16:18	0:00	rwiles	Mail Out	Sent Letter/Info	P	1/20/08	CNBC International Property Awards; Sent No Letter For Mail Merge Only.doc
10/19/07	11:42		jscott	Phone Out	Answering Machine	P	1/20/08	TW. Referrals?
8/15/07	18:43	0:00	rwiles	Mail Out	TW Announce	P	9/13/07	Considering what Tiger did for Nike...Congratulations on now owning an even more valuable membership; Sent No Letter For Mail Merge Only.doc
6/18/07	19:04	0:00	rwiles	Mail Out	MP Geh I	P	9/13/07	Now accepting reservations!! Contact me to learn more!; Sent No Letter For Mail Merge Only.doc
6/15/07	12:55		rwiles	Phone Out	Conversation	P	9/13/07	Talked w/ Courtney Roundtree. She is married to Kevin McCarthy so I can add her to his record. Told her about CMP release and she gave updated address.
5/2/07	16:14	0:00	mdionne	Mail Out	Sent Letter/Info	P	7/3/07	MJD; Sent MP Release Matter.doc
4/13/07	14:06	0:00	mdionne	Mail Out	Sent Letter/Info	P	7/3/07	MJD; Sent KFS Golf Course Grand Opening Property Owners Letter.doc
4/4/07	16:02		rwiles	E-mail Out	Personal Note	P	7/3/07	E-Card Souls Never Wrinkle Wishing you another year of happiness and prosperity. Happy Birthday! Jay Scott & Rachael Wiles The Cliffs on Lovely Lake Keowee
3/9/07	6:25	0:00	mdionne	Mail Out	Sent Letter/Info	P	4/3/07	MJD; Sent 2007 BMW Property Owner Letter.doc
3/5/07	16:02	0:00	mdionne	Mail Out	Sent Letter/Info	P	4/3/07	MJD; Sent Member Referral Package.doc
1/24/07	17:16	0:00	mdionne	Mail Out	Sent Letter/Info	P	4/3/07	MJD; Sent Celebrity Auction Letter.doc
1/19/07	14:01	0:00	mdionne	Mail Out	Sent Letter/Info	P	4/3/07	MJD; Sent GA Offsite 2-13-07.doc

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 9

8:48

1/19/07	17:39	0:00	rwiles	Mail Out	Sent Letter/Info	P	4/3/07	(Porch Dog Photo) As always, I aim to keep you informed of important events and new media here at The Cliffs. The following is a video message relaying the latest on our upcoming release here at Lake Keowee! http://www.thedcliffs.tv/keowee.html WE ARE STILL ACCEPTING RESERVATIONS!! If you have not yet faxed yours or have questions about the reservation process, get in touch with me ASAP!! Pricing, site plans, FAQs, etc. will be available to all reservation holders very soon, so stay tuned... Happy New Year! Sent No Letter For Mail Merge Only.doc
12/20/06	13:31	0:00	mdionne	Mail Out	Sent Letter/Info	P	4/3/07	MJD; Sent 07 Calander and Letter.doc
12/7/06	16:54	0:00	rwiles	Mail Out	Sent Letter/Info	P	4/3/07	Christmas card "Through These Doors"; Sent No Letter For Mail Merge Only.doc
12/1/06	14:19	0:00	rwiles	Mail Out	Sent Letter/Info	P	4/3/07	Sent KFS 2007 May Release Reservation Form email; Sent No Letter For Mail Merge Only.doc
11/17/06	18:00	0:00	rwiles	Mail Out	Sent Letter/Info	P	4/3/07	Happy Thanksgiving!! Email letting POs know about May release; Sent No Letter For Mail Merge Only.doc
10/12/06	11:50	0:00	rwiles	Mail Out	Sent Letter/Info	P	4/3/07	(Glassy Club Pano) Please view the following link for a very special video message... http://thedcliffs.tv/jaytor.html ; Sent No Letter For Mail Merge Only.doc
10/5/06	16:26		rwiles	E-mail Out	Personal Note	P	4/3/07	
10/5/06	16:18	0:00	rwiles	Mail Out	Sent Letter/Info	P	10/1/06	A Personal Invitation from Gary Player; Sent No Letter For Mail Merge Only.doc
9/25/06	15:17	0:00	rwiles	Mail Out	Sent Letter/Info	P	10/1/06	Emailled update on time change. The Gary Player segment on FOX has been moved up to 7:38 AM Eastern!; Sent No Letter For Mail Merge Only.doc
9/21/06	10:41	0:00	rwiles	Mail Out	Sent Letter/Info	P	10/1/06	Gary Player on Fox & Friends September 26 at 8:38AM (Eastern); Sent No Letter For Mail Merge Only.doc
8/23/06	17:34	0:00	rwiles	Mail Out	Sent Letter/Info	P	10/1/06	Email Blast: USA CYCLING PRO CHAMPIONSHIPS AT THE CLIFFS; Sent No Letter For Mail Merge Only.doc
8/15/06	13:55	0:00	rwiles	Mail Out	Sent Letter/Info	P	10/1/06	WALNUT COVE E-NEWSLETTER Amenities Update; Sent No Letter For Mail Merge Only.doc
7/3/06	13:19		jscott	Phone In	Left msg	P	10/1/06	wants plat of lot for builder will be by at 2pm to pick up.
6/27/06	10:20		rwiles	Phone Out	Conversation	P	9/25/06	Is going to be in town this weekend and needs 2 BR unit and sounds like he wants a tee time. It was loud b/c he was in airport about to board a plane. Asked me to email the names/numbers for Loretta and pro shop b/c he wouldn't be able to talk.
6/27/06	10:23		rwiles	E-mail Out	Sent Info	P	9/25/06	For accommodations, call Loretta Wilkins or Sandra Crain at 866-725-4337
								For tee times, call the pro shop at 864-868-4444
6/27/06	14:36	0:00	rwiles	Mail Out	Sent Letter/Info	P	9/25/06	Introducing The Residences at The Keowee Springs Lodge and Spa; Sent No Letter For Mail Merge Only.doc
5/23/06	11:26		rwiles	Phone Out	Conversation	P	8/21/06	He is travelling, so I caught him on cell phone to let him know HR 21 is available. He said he wanted to try to get over here to look at it. Will call me next week and thanked me for the call.
5/19/06	9:33		rwiles	Phone In	Conversation	P	8/17/06	He asked if I had a larger map to send. I said unfortunately the lot was taken off the market yesterday. He still wanted me to send larger map so that he could see where it was in relation to everything else. They still plan to attend Saturday. He also asked about renting a boat and accommodations. I gave Loretta Wilkins # and marina #.
5/19/06	9:35		rwiles	E-mail Out	Sent Info	P	8/17/06	Link for Map & Plats for KFS

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MGC -00009

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 10

8:48

5/19/06	9:53	rwiles	Phone Out	Answering Machine	P	8/17/06	Let him know LP 81, AR 21 and LP 44 are now back on the market.
5/18/06	11:36	rwiles	Phone In	Conversation	P	8/16/06	Got invitation to KFS release and plans to attend. He may be interested in buying something. I handed phone to JAY so he could explain what is available. Told him about HR 21 and recommended he get here earlier rather than later Saturday.
5/18/06	11:45	rwiles	E-mail Out	Personal Note	P	8/16/06	Plat of HR 21
4/4/06	10:45	rwiles	E-mail Out	Personal Note	P	6/26/06	Good Wine e-card for Kevin's 41st b-day
4/4/06	17:55	rwiles	E-mail In	Email Reply	P	7/3/06	Thanks for the card and for thinking of me. It was much appreciated. Kevin
3/8/06	14:38 0:00	rwiles	Mail Out	Sent Letter/Info	P	6/4/06	The Cliffs-Capital City Club Offsite Cancelled; Sent No Letter For Mail Merge Only.doc
3/7/06	13:52 0:00	rwiles	Mail Out	Sent Letter/Info	P	6/4/06	Save the Date BMW Charity Pro-Am at The Cliffs; Sent No Letter For Mail Merge Only.doc
3/6/06	15:02	rwiles	E-mail Out	Personal Note	P	6/4/06	Emailled March Pinnacle Care bulletin, and reminded him he has free membership if he turns in the form.
3/1/06	13:52 0:00	rwiles	Mail Out	Sent Letter/Info	P	5/15/06	Emailled ATL2 offsite Reminder; Sent No Letter For Mail Merge Only.doc
2/22/06	11:12 0:00	mdionne	Mail Out	Sent Letter/Info	P	5/15/06	MJD; Sent WC Atlanta Invitation.doc
2/16/06	11:15 0:00	rwiles	Mail Out	Sent Letter/Info	P	5/15/06	BMW Charity Pro-Am News! Greenville News article about Cstner; Sent No Letter For Mail Merge Only.doc
2/14/06	17:56	rwiles	E-mail Out	Personal Note	P	5/15/06	ATL offsite reminder
2/1/06	13:44	rwiles	Phone Out	Conversation	P	2/2/06	Discussed KFS Release, touched on dates. He wants me to send reservation.
2/1/06	13:45	rwiles	E-mail Out	Sent Info	P	2/2/06	KFS reservation and instructions
1/31/06	8:20 0:00	mdionne	Mail Out	Sent Letter/Info	P	4/5/06	MJD; Sent High Museum Invitation.doc
1/31/06	8:33 0:00	mdionne	Mail Out	Sent Letter/Info	P	4/5/06	MJD; Sent Country Club of the South Invitation.doc
1/20/06	10:00 10:01	rwiles	Mail Out	Sent Letter/Info	P	4/5/06	New Brochure/DVD fishing for PORs; Sent No Letter For Mail Merge Only.doc
1/19/06	10:46 0:00	rwiles	Mail Out	Sent Letter/Info	P	4/5/06	Included referral brochures, BMW info, JS email, Offsite calendar of events; Sent 2006 PO letter.doc
1/6/06	16:35 0:00	mdionne	Mail Out	Sent Letter/Info	P	4/5/06	MJD; Sent CKF DM.doc
1/5/06	16:06	rwiles	E-mail Out	Personal Note	P	4/5/06	The Cliffs in the TOP 10
12/12/05	11:36 0:00	rwiles	Mail Out	Sent Letter/Info	P	12/13/05	Christmas Card 2005; Sent No Letter For Mail Merge Only.doc
9/14/05	15:40	rwiles	E-mail Out	Personal Note	P	12/13/05	Hi Mr. McCarthy, I'm not sure if Jay made you aware of all the Pinnacle Care benefits that go along with your Membership. Rachel Killeen has been trying to reach you to answer any questions and keep you informed of all this program has to offer. Feel free to contact her at any time regarding Pinnacle Care, and I know she's eager to help! Rachel Killeen Direct 443.874.5940 Cell 443.791.9700 www.PinnacleCare.com
9/13/05	17:22	rwiles	E-mail Out	Personal Note	P	12/12/05	The Cliffs at Maggiano's
8/29/05	12:08 0:00	mdionne	Mail Out	Sent Letter/Info	P	11/17/05	MJD; Sent 9-14-05 Atlanta Offsite Invitation.doc

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 11
8:48

8/19/05	14:57	rwiles	E-mail In	Personal Note	P	11/17/05 Rachel, Sorry that I have not gotten back to you sooner (I just tried to call you and the phone kept ringing). Unfortunately, Courtney and I are not going to be able to schedule a time to visit the Springs, and given the inability to "trade-up" from our current property a visit does not make sense (we cannot afford two properties). Thanks for keeping us informed about the project and we wish you and Jay the best of luck with it. We are looking forward to building our house at Keowee Falls South. Regards, Kevin
8/18/05	11:36	rwiles	Phone Out	Left msg	P	11/16/05 Left same message as before. Are he and Courtney going to tour 28th or 26th, or different day altogether.
8/18/05	13:45	jscott	Phone Out	Left msg	P	11/16/05 just list all w/ \$900 or less hope you get one.
8/15/05	15:30	rwiles	Phone Out	Left msg	P	11/13/05 Touring 26th or 28th?
8/11/05	11:05	rwiles	Phone In	Conversation	P	11/9/05 Tried to get me to spill beans on Canyon Ranch, but I said I didn't know anything. He heard we tried to get Canyon Ranch to do WC, but they wouldn't. I said I didn't know anything about that. He asked about the turkey head lots that aren't for sale. Still would like for Jay to call him.
8/11/05	14:27	jscott	Phone Out	Conversation	P	11/9/05 answered questions will try to come to look at Springs end of August
8/11/05	17:00 0:00	rwiles	Mail Out	Sent Letter/Info	P	11/9/05 Sent Keowee Springs LOI Phase III first page.doc
8/10/05	12:45	rwiles	Mail Out	Sent Letter/Info	P	11/8/05 Sent flowers congratulating them on closing.
8/9/05	13:21	rwiles	Phone Out	Answering Machine	P	8/16/05 LM saying we need to set tour date if you're going forward w/ reservation. Congrats on closing!
8/9/05	16:22	rwiles	Phone In	Conversation	P	11/7/05 Want me to hold 26th and 28th to come view lots. Need Jay to call and explain why POs will not move up in priority. They don't think top 100 seems very high priority.
8/8/05	9:26	shyder	Mail Out	Sent Letter/Info	U	8/9/05 Sent Close Letter.doc.
8/8/05	9:31	shyder	Supplement	Remark/Note	P	8/9/05
8/5/05	14:56	rwiles	E-mail Out	Personal Note	U	8/6/05 The Cliffs-Springs Map and Pricing
8/4/05	12:26	rwiles	Mail Out - Sta	CKS Broch w/o res	U	8/5/05
7/26/05	11:24	rwiles	Phone Out	Conversation	U	7/27/05 Spoke with him about closing and Springs. I got email address from him and told him I needed bank prequal and set tour date. He would like me to send plat as soon as something can be emailed or faxed. He would like to shoot for closing Aug. 4 or 5, I transferred him to Sandra to discuss. He would like Jay to call.
7/26/05	11:32	rwiles	E-mail Out	Personal Note	U	7/27/05 Pre-Pkg email
7/26/05	16:01	jscott	Phone Out	Left msg	U	7/27/05 returned call and we walked lots with JBA and prices should be within the wk
7/22/05	10:24	ppresley	Mail Out	Sent Letter/Info	U	7/23/05 Phyl sent POR than you for referral of Ms Courtney Roundtree; Sent POR Thank You.doc
7/6/05	14:22	rhodes	Mail Out - Sta	Sent Letter/Info	U	7/7/05 Sent Intro Letter.doc.
6/29/05	11:13	rwiles	Mail Out - Sta	Sent Letter/Info	U	6/30/05 Polo shirts
6/27/05	15:37	shyder	Mail Out - Sta	Sent Letter/Info	U	6/28/05 Sent Worksheet.doc.
6/21/05	9:35	jscott	Phone Out	Conversation	U	6/22/05 Decided to buy Jc-32 (Bonuslot) rather than Jc-21. Called Doug Wall to let him know Fc-26 will cancell.
6/21/05	13:27	rwiles	Fax In	Rec'd Info	U	6/22/05 Contract
6/21/05	14:23	rwiles	Phone Out	Left msg	U	6/22/05 Need Finance addendum from Kevin.
6/17/05	17:03	rwiles	Phone In	Conversation	A1	7/1/05 Coming this weekend to do Falls Creek contract. Booked Discovery Home for tomorrow night.
6/2/05	11:07	jscott	Phone Out	Conversation	A1	6/10/05 great conversation looks like a goFC-26 he will be in NY 6/9. I call Doug Wall gave update Doug will e-mail a confirmation to Kevin for sat meetw/arch

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MGC -00011

**Property Owner Record for
Mr. and Mrs. Kevin McCarthy**

Page 12
8:48

6/1/05	14:47	rwiles	E-mail In	Personal Note	A1	6/15/05	Follow up from Doug Wall...I spoke to Kevin McCarthy last week regarding FC #26. He seemed to be still in the game and was leaving for vacation over the weekend to return yesterday. In that conversation, we set up a tentative meeting with him and Courtney for Saturday at our Greenville office to discuss floor plans. I called him today to confirm and have not heard back as of yet. If I don't hear back from him by Friday, I will have to release the hold on the lot. I will call him on Friday and inform him. I will follow up with you when I know more.
5/26/05	10:35	rwiles	Phone Out	Conversation	A1	6/9/05	Doug spoke to Kevin this morning and they are trying to have a conference call this afternoon with architect to answer some design questions he and Courtney have.
5/23/05	10:01	aminton	Update	TE to another Exec	TE	5/24/05	TE to JAY
5/23/05	13:25	Glatson	Update	Transferred	N	5/24/05	GAL transferred to JAY was AM
5/23/05	15:09	rwiles	Phone Out	Conversation	A1	6/6/05	Doug Wall emailed floor plans, and they are scheduled to have a conference call on Thursday. Flances is Courtney Roundtree. She also did a cert for the Springs.
5/21/05	10:00	JAY	Appointment	Tour - Keowee Falls	A	5/30/05	HED
5/20/05	14:26	aminton	Phone In	Conversation	N	5/21/05	Info call entered by AM
5/20/05	14:35	aminton	Phone In	Booked Tour	A	5/30/05	have been actively looking for property for past 6 months, have been looking at beach and Cashiers and said he thought he would revisit us. Has been in system since 1999, did say played Glassy and Vineyards course. Looking for homesite, new home or resale, preference would be home or resale because want something sooner that later. Home + lot price range is 750-1.6M
9/8/04	14:53	14:54 mdionne	Mail Out - Sta	Sent Letter/Info	T	2/4/02	MJD; Sent Fall Release 2004.doc

Properties Owned

Property

KFS - Jasmine Cove - 032

Community

KFS

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF GREENVILLE CA No.: 2011-CP-23-6376
3

4 Kevin McCarthy and Courtney E. McCarthy,
5 Plaintiffs,

6 vs.

7 Keowee Falls Investment Group, LLC,
8 The Cliffs Communities, LLC, d/b/a
9 The Cliffs at Keowee Falls South,
10 Cliffs Real Estate, Inc.,
11 The Cliffs Golf and Country Club, Inc.,
12 and S&ME, Inc.,

13 Defendants.
14
15
16

17 DEPOSITION OF COURTNEY MCCARTHY
18
19
20
21
22
23
24
25

Pursuant to notice of deposition or subpoena
or agreement in the above-entitled case, a deposition
was taken on the 29th day of November 2012,
commencing at approximately 2:00 p.m., attended by
counsel as follows:

1 where they had their marketing materials. And I
2 believe we met with him there, and had a brief
3 overview of the development and the broader Keowee
4 umbrella.

5 And went out and toured, started touring
6 properties with him, or at least driving around the
7 community and looking at the different areas, with
8 the primary criteria that we were interested in being
9 in a lakefront property.

10 Q. And I gather he took you around and looked at
11 potential lakefront houses and parcels?

12 A. We focused almost all of our time, really all of it
13 that I recall, in the areas Kevin referenced, which
14 are really more or less adjacent to each other.

15 One was a street of homes that this Community
16 Concepts company built; and the other was the street
17 that we ended up purchasing on in Jasmine Cove, where
18 there were lots, empty lots for homes to be built on
19 in the future.

20 Q. About how many houses did you look at?

21 A. My recollection is that we looked at two lots, the
22 lot that we purchased, number 32, the one next to it,
23 which I believe is 33, which was facing from the
24 water the lot to the left.

25 And then Community Concepts, my recollection is,

1 they had some homes that had been built and were
2 unoccupied, and I believe we looked at at least one
3 of those. And then they may have had a lot that
4 needed to be built under the Community Concepts sort
5 of spec floor plans, but that you could have some
6 input to.

7 So the two lots, including the one that we
8 ultimately purchased, and one or two Community
9 Concepts properties. And that's really it that I
10 recall.

11 Q. Were all the Community Concepts properties all
12 located adjacent to one another, at least in the same
13 area?

14 A. The ones that we saw were.

15 Q. And one of those you think maybe was an undeveloped
16 lot, but they owned it and they were going to do it?

17 A. Um-hmm, and had particular building restrictions on,
18 and, you know, as I recall there was maybe latitude,
19 two different choices in their sort of spec floor
20 plans.

21 But the idea is, they own the property, they
22 would build it; but you could maybe have a little bit
23 of input to it.

24 Q. On how many occasions did you go look around Lake
25 Keowee before signing a contract to purchase Lot 32?

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE CASE NO. 2011-CP-23-6376

KEVIN MCCARTHY and COURTNEY E. MCCARTHY,
Plaintiffs,

vs.

KEOWEE FALLS INVESTMENT GROUP, LLC,
THE CLIFFS COMMUNITIES, LLC,
d/b/a THE CLIFFS AT KEOWEE FALLS SOUTH,
CLIFFS REAL ESTATE, INC.,
THE CLIFFS GOLF and COUNTRY CLUB, INC.,
and S&ME, INC.,
Defendants.

COPY

DEPOSITION OF CARROLL CROWTHER, PE

DATE TAKEN: Friday, January 18, 2013
TIME BEGAN: 9:58 a.m.
TIME ENDED: 12:36 p.m.
LOCATION: McAngus, Goudelock & Courie, LLC
75 Beattie Place, Suite 300
Greenville, South Carolina 29601

REPORTED BY: TARI B. KRAMER, RMR, CRR
GALLAGHER COURT REPORTING
864-234-5744

1 borings out there.

2 EXAMINATION RESUMED BY MS. BURTON:

3 Q. could one take the borings that have been done
4 on the lots and do a profile of the weak area?

5 A. If the borings went deep enough to do that, you
6 could -- you ought to be able to connect the
7 dots on those soil strata, that show up in the
8 inclinometer failure zones.

9 Q. So one could -- you can do a topo and come up
10 with the profile of the land we see; right?

11 A. Yes.

12 Q. And one could, if you so desire, do a profile of
13 this weak zone underneath the surface of the
14 land.

15 A. Yes.

16 Q. And they may or may not mirror one another.

17 A. They probably would not.

18 Q. Okay. So the topo that we see, looking, may not
19 be the topography of the weak zone.

20 A. Right.

21 Q. Have you done any analysis to determine what the
22 topography of the weak zone is?

23 A. No.

24 Q. Can that be done?

25 A. Yes.

1 Q. Why haven't you done it?

2 A. I haven't been asked to. Because that would be
3 necessary to trying to evaluate if there is a
4 possible remediation. All I'm telling you is,
5 from the surface, it's obvious that the slope is
6 failing.

7 Q. And if one was going to determine -- if somebody
8 asked you, Mr. Crowther, I want you to determine
9 whether there's a possible remediation. What
10 work would you have to do to accomplish that
11 task?

12 A. I'd have to, number one, determine where the
13 slide is occurring, what's the mass of soil that
14 we've got to try to stabilize.

15 Q. How do you determine that, other than try and do
16 the profile you and I just talked about?

17 A. That would be the initial thing you'd want to
18 do.

19 Q. Okay. So you'd look at the inclinometers and
20 try and figure out where that weak zone is --

21 A. Yes.

22 Q. -- and then profile it, for lack of a better
23 word. That would be number one. Number two,
24 what would you do?

25 A. That would be the starting point. And then

1 determine what the forces are that have caused
2 that to fail. And what kind of force you would
3 have to install or what kind of strength you'd
4 have to add to that mass to keep it from moving.

5 Q. How do you determine the forces that caused it
6 to fail?

7 A. That would be the slope stability analyses that
8 Dr. Borden spoke so much about the other day.
9 That is the determination of the forces that are
10 causing the movement. And you find the forces
11 that are resisting the movement. And then what
12 do you need to add to the site to make it
13 stable.

14 Q. So one would do a global stability analysis,
15 because you're trying to determine how strong
16 the material needs to be to hold back gravity
17 and the weight of material above?

18 A. That's the purpose of the stability analyses.

19 Q. Okay. And I know that's a simplistic version,
20 because I am not an engineer. Okay. And you
21 mentioned Dr. Borden and the stability analysis.
22 Have you studied the stability analyses that
23 have been done?

24 A. He's done them only on Lot 31, so I have not
25 studied anything he's done on Lot 32.

OCONEE COUNTY
STATE TAX 57,200.00
COUNTY TAX 24,200.00
EXEMPT

BOOK 1256 PAGE 257

FILED FOR RECORD
OCONEE COUNTY, S.C.
REGISTER OF DEEDS

Prepared by: Parker, Poe, Adams & Bernstein LLP
Three Wachovia Center
401 South Tryon St.
Suite 3000
Charlotte, NC 28202
2002 DEC 18 P 4: 51 Tract Nos. S-7083 and 7139.01
Return to: Crescent Resources, LLC
Attn: S. Higginson
PO Box 1003
Charlotte, NC 28201-1003
EXCISE TAX - \$81,400.00

Ref: Olson
1900

019946

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE) SPECIAL WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS that

CRESCENT RESOURCES, LLC, a Georgia limited liability company (successor by merger and conversion to Crescent Resources, Inc., whose name was changed from Crescent Land and Timber Corp. by Articles of Amendment filed in the office of the South Carolina Secretary of State), whose address is P.O. Box 1003, Charlotte, NC 28201-1003, hereinafter called "Grantor," in consideration of the sum of Twenty-Two Million and No/100 Dollars (\$22,000,000.00), to it in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto KEOWEE FALLS INVESTMENT GROUP, LLC, a South Carolina limited liability company, whose address is 301 Beaverdam Road, Travelers Rest, SC 29690, hereinafter called "Grantee," all that certain tract of land described in Exhibit A attached hereto ("Property").

The Property is conveyed subject to the easements, conditions and restrictions set forth on Exhibit A attached hereto and incorporated herein by reference.

The conveyance is made subject to the covenants and restrictions set forth in Exhibit B attached hereto and incorporated herein by reference.

TOGETHER WITH all and singular the rights, members, hereditaments and appurtenances to the Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the Property, unto the said Grantee and Grantee's heirs, successors and assigns forever, except:

- (1) flood easements in favor of Duke Energy Corporation (formerly known as Duke Power Company) and riparian rights of others, including, but not limited to, the flood easement to flood to the 810 foot contour line and all other reservations, restrictions and conditions contained in that deed recorded in Deed Book 635, Page 298; in Deed Book 633, Page 154, and in Deed Book 652, Page 58;
- (2) transmission line and retail electric line rights-of-way, if any, reserved by or granted to Duke Energy Corporation (formerly known as Duke Power Company), including, but not limited to, the four hundred forty-five (445) foot wide transmission line right-of-way shown on the Plat as "Duke Energy Corp. 445' R/W";

CLT 661347v1

THIS PROPERTY DESIGNATED AS
MAP 099 SUB 00 BLK 02 PARC 002
099-00-01-001
ON OCONEE COUNTY TAX MAPS
R. H. Williams
OCONEE COUNTY ASSESSOR

Recorded this 19 day of Dec
Book 12 Page 257, 979
Fee
R. H. Williams
Auditors Oconee County, S.C.

BOOK 1256 PAGE 258

- (3) ad valorem taxes for the year 2003 and subsequent years;
- (4) "rollback" or other deferred ad valorem property taxes;
- (5) matters affecting title to the Property as shown on the Plat or which would be shown on a current and accurate survey of the Property (including any encroachments);
- (6) easements, covenants, restrictions and conditions of record, and rights-of-way of public and private streets and roads;
- (7) easements, restrictions and rights-of-way as may be apparent from an inspection of the Property;
- (8) zoning, subdivision, land use and other laws, regulations or ordinances applicable to the Property; and
- (9) the reservations and restrictions set forth herein.

The Grantor covenants to warrant specially the title to the Property against the lawful claims of any person claiming from, through or under it.

[SIGNATURE PAGE FOLLOWS]

CLT 661347v1

BOOK 1256 PAGE 259

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed this 14th day of December, 2002.

Signed, Sealed and Delivered in the Presence of:

CRESCENT RESOURCES, LLC,
a Georgia limited liability company

Ann E. Long
Print Name: _____
Witness #1

By: James M. Short, Jr.
James M. Short, Jr.
Senior Vice President

Susan Higginson
Print Name: Susan Higginson
Witness #2

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Personally appeared before me the undersigned witness who being duly sworn deposes and says that he/she saw the within named James M. Short, Jr., Senior Vice President of CRESCENT RESOURCES, LLC, a Georgia limited liability company, sign, and as its act and deed deliver the foregoing instrument for the uses and purposes therein mentioned, and that he/she, together with Susan Higginson (witness #2), the other witness subscribed above, witnessed the execution thereof.

Ann E. Long
(Witness #1 sign here)

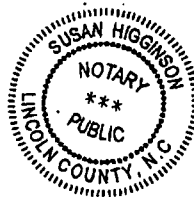
Sworn to and subscribed before
me this the 14th day of
December, 2002.

Susan Higginson
Notary Public

Notary Public for North Carolina

My Commission Expires: 3/27/2006

[NOTARIAL STAMP-SEAL]



CLT 661347v1

BOOK 1256 PAGE 260

FILED FOR RECORD
OCONEE COUNTY, S.C.
REGISTER OF DEEDS**EXHIBIT A**

All references to recording information shall refer to documents that were recorded in the Office of the Clerk of Court for the county in which the Property is located.

TRACT I (S-TRACT 7083):

All that certain tract of land located in Keowee Township, Oconee County, South Carolina, containing 1,073.38 acres as shown on plat recorded in Plat Slide A-914, Pages 1-8 ("Plat 1"); AND BEING all or a portion of the land conveyed to Crescent Land & Timber Corp. (presently known as Crescent Resources, LLC) by deed from Bessie Porter and Roy Porter (K-981) recorded in Deed Book 11-E, Page 164; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from F. C. Parker (K-20) recorded in Deed Book 9-F, Page 37; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Roy S. Dalton (K-31) recorded in Deed Book 9-F, Page 41; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from G. W. Ferguson, Executor, (K-18) recorded in Deed Book 9-G, Page 142; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Lucia K. Acker, et al. (K-139) recorded in Deed Book 9-K, Page 202; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Virginia Adams (K-137) recorded in Deed Book 9-L, Page 154; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Ray Bryant (K-141) recorded in Deed Book 9-M, Page 97; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Oscar Wigington (K-160) recorded in Deed Book 9-N, Page 135; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Daniel T. Porter (K-153) recorded in Deed Book 9-N, Page 154; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from N. P. Madden and V. E. Madden (K-188) recorded in Deed Book 9-O, Page 167; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Edna W. Barton, et al. (K-310) recorded in Deed Book 9-Q, Page 26; and by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from G. W. Ferguson (K-619) recorded in Deed Book 10-A, Page 137.

TRACT II (S-TRACT 7139.01):

All that certain tract of land located in Keowee Township, Oconee County, South Carolina, containing 1,093.57 acres as shown on plat recorded in Plat Slide A-913, Pages 1-8 ("Plat 2"); AND BEING all or a portion of the land conveyed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) by deed from Seymour S. Dozier (K-70) recorded in Deed Book 9-I, Page 145; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Lucia K. Acker, et al. (K-139) recorded in Deed Book 9-K, Page 202; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Oscar Wigington (K-160-36) recorded in Deed Book 9-N, Page 135; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Josie S. Cantrell, et al. (K-294) recorded in Deed Book 9-O, Page 171; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from D. L. Rima and E. H. Rima (K-282) recorded in Deed Book 9-P, Page 4; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Nona C. Head (K-328) recorded in Deed Book 9-P, Page 146; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from Lucia K. Acker, et al. (K-142) recorded in Deed book 9-R, Page 96; by deed to Crescent Land & Timber Corp. (presently known as Crescent Resources, LLC) from T. Frank Murphree, et al. (K-814) recorded in Deed Book 10-K, Page 235; by deed to Crescent Land & Timber Corp.

CLT 661347v1

Page 4 of 12

(presently known as Crescent Resources, LLC) from T. Frank Murphree (K-799) recorded in Deed Book 10-K, Page 241; by deed to South Carolina Land & Timber Corp. (presently known as Crescent Resources, LLC) from D. B. Beatty (K-330) recorded in Deed Book 10-U, Page 210; by deed to Crescent Land & Timber Corp. (presently known as Crescent Resources, LLC) from Lou Verta Pervis (K-927) recorded in Deed Book 10-V, Page 20; and by deed to Crescent Resources, Inc. (presently known as Crescent Resources, LLC) from Ingram Enterprises (K-443) recorded in Deed Book 600, Page 67.

Tract I and Tract II are herein collectively referred to as the "Property" and Plat 1 and Plat 2 are herein collectively referred to as the "Plat."

The Property is conveyed subject to non-exclusive access road easements which are hereby reserved by Grantor, for the benefit of Grantor, its successors and assigns (and for the owners of all current or future lots or parcels served by the following described roads), over and across the existing access roads shown on the Plat as (i) "SHADY LANE," (ii) "RATTLESNAKE RIDGE RD," (iii) "FALL CREEK CHURCH RD," (iv) "INDIAN TRAIL," (v) "LANDING ROAD," and (vi) the access road running along the western boundary of Tract II in a north to south direction between Rattlesnake Ridge Road and Shallow Ford Rd., all for the purposes of vehicular and pedestrian ingress, egress, and regress over said roads until such time (if ever) as public roadways are constructed which provide direct access to each of the lots or parcels benefited by the easements reserved herein.

Notwithstanding anything contained herein to the contrary, by its acceptance of this Deed, Grantee acknowledges and confirms its grant of an Option to Purchase Club Memberships ("Option") as set forth in the Contract for Exchange of Property and Assignment Agreement between Grantor and Grantee dated August 20, 2002 in connection with the Property. The terms of such Option are as follows:

Grantee intends to cause a private golf and recreational club ("Club") to be constructed upon a portion of the Property. Grantee shall cause any club developed upon, or in connection with the Property to reserve in its operative documents ("Club Documents"), the following memberships which may (but need not) be purchased by Grantor and/or any assignee of Grantor: a minimum of 20 fully-privileged memberships ("Reserved Memberships") which may be purchased by Grantor or its assigns. Grantee shall cause Grantor to receive notice upon the initial sale of Club memberships and the Reserved Memberships may be purchased by Grantor or its assigns at anytime thereafter prior to the earlier of: (i) the end of the fifth (5th) year following the sale of the first membership in the Club; or (ii) twenty-five (25) years following the date of this Deed. Each of the aforesaid memberships shall be sold to Grantor or its assigns for the lowest then-current offered price. All documents establishing the Club and/or its membership categories, including without limitation any membership agreements, bylaws, articles of incorporation, rules and regulation, and offering plans, shall apply uniformly to the memberships purchased by Grantor or its assigns and the memberships offered any other member, shall be consistent with the terms of this option and commercially reasonable and shall be provided to Grantor prior to their dissemination to any prospective Club members. This Option shall run with the title to the Property and shall be binding upon Grantee and its successors and assigns.

BOOK 1256 PAGE 262

FILED FOR RECORD
OCONEE COUNTY, S.C.
REGISTER OF DEEDS

2002 DEC 18 P 4:57

EXHIBIT B

GENERAL DEED RESTRICTIONS

THE PROPERTY SHALL BE CONVEYED SUBJECT TO THE FOLLOWING RESTRICTIONS, WHICH SHALL ENCUMBER THE PROPERTY AND SHALL RUN WITH TITLE TO THE PROPERTY.

1. **Definition of "Property".** As used herein, the word "Property" shall mean all of the property conveyed by Grantor to Grantee pursuant to this deed; provided that if the conveyed property consists of more than one subdivided parcel of land, or if the property conveyed is ever subdivided into more than one parcel, then the defined term "Property" shall mean each parcel of land containing all or a portion of the property conveyed hereby and the restrictions set forth herein shall apply to each such subdivided parcel.

2. **Single Family Use.** The Property shall be used only for detached, single-family residence purposes, and/or up to a maximum of one hundred fifty (150) townhomes (which may be attached), together with the accessory buildings and structures permitted pursuant to Section 6 below. No more than one single-family residential dwelling may be constructed on the Property. No condominium, duplex, apartment or other multi-family residential uses are permitted on the Property; provided, however, that townhomes (which may be attached) may be constructed on the Property in accordance with Section 2 hereof and the first sentence of this Section 2. Further, no camper, trailer, motor home, boat (including, without limitation, any boat docked adjacent to the Property), recreational vehicle, or similar habitable or transportable unit or structure shall be allowed to remain on or adjacent to the Property as a place of residence. The single-family residence restrictions set forth above shall not prohibit the construction of pools, tennis courts, walking trails, spas or other recreational facilities or amenities such as are commonly constructed and maintained for the benefit of lot owners within planned unit developments ("Wellness Facilities"); provided that such Wellness Facilities may not be located within any Buffer Area (defined below).

3. **Restricted Activities.** The following activities are prohibited on the Property:

- a. Raising, breeding, or keeping of animals, livestock or poultry of any kind, except that dogs, cats, or other usual and common household pets (which are registered, licensed and inoculated as required by law) may be permitted on the Property;
- b. Any activity which violates local, state, or federal laws or regulations;
- c. Institutional uses, including but not limited to group homes, day care centers, churches, temples or shrines, rest homes, schools, medical care facilities, lodges, inns, beds and breakfasts; except that a medical care facility may be constructed and operated on the Property, provided that such medical care facility contains no more than ten thousand (10,000) square feet, does not provide surgical services, is not constructed within four hundred (400) feet of the Contour Line of the Lake (as defined in Section 8 hereof), and is solely for the benefit of the members of such medical care facility (which members shall include, without limitation, residents of existing or future communities developed

CLT 661347v1

Page 6 of 12

by Grantor, or the successors or assigns of Grantor, in the vicinity of the Property, but shall not include the public generally); and

- d. Any business or trade (other than the medical care facility permitted under Section 3(c) hereof), except that an owner or occupant residing on the Property may conduct business activities within a dwelling on the Property so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound, or smell from outside the dwelling unit; (ii) the business activity conforms to all zoning requirements for the Property; (iii) the business activity does not involve regular visitation of the Property by clients, customers, suppliers, or other business invitees; (iv) the business activity does not involve any service or delivery business in which more than one vehicle used in such business would be parked overnight on the Property, or for which any parts, equipment supplies, raw materials, components or tools are stored on the Property and (v) the business activity is consistent with the residential character of the Property and does not constitute an unreasonable disturbance to adjoining land owners or others, a nuisance, or a hazardous or offensive use. The foregoing shall not preclude occasional garage sales, moving sales, rummage sales, or similar activities provided that such activities are not held on the Property more than once in any six-month period. The terms "business" and "trade," as used in this provision, shall be construed to have their ordinary, generally accepted meanings and shall include, without limitation, any occupation, work, or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (i) such activity is engaged in full or part-time, (ii) such activity is intended to or does generate a profit, or (iii) a license is required. The leasing of the Property for single-family residential use shall not be considered a business or trade within the meaning of this subsection.

4. Prohibited Conditions. None of the following structures or improvements may be located upon the Property:

- a. Structures, equipment or other items which are visible from any road or adjacent property which have become rusty, dilapidated, or otherwise fallen into disrepair;
- b. Towers, antennas, or other apparatus for the transmission or reception of television, radio, satellite, or other signals of any kind which are located outside of the dwelling on the Property other than (i) a customary antenna, which shall not extend more than ten (10) feet above the top roof ridge of the dwelling; and (ii) a satellite disc or dish no larger than eighteen inches (18") in diameter;
- c. Any freestanding transmission or receiving towers or any non-standard television antennas; and
- d. Chain-link fences.

5. Quality Craftsmanship/Dwelling Size. All buildings and outbuildings erected upon the Property shall be built on site of new materials of good grade, quality and appearance, and shall be constructed in a good, workmanlike manner, conforming to all applicable building codes. Further, all dwellings must meet the following construction requirements:

- a. One story dwellings shall not contain less than 2,000 square feet of Heated Living Area (defined below);
- b. One and a half story dwellings shall not contain less than 2,200 square feet of Heated Living Area;
- c. Two (or more) story dwellings shall not be less than 2,400 square feet of Heated Living Area;
- d. No dwelling may exceed two and a half stories and no dwellings may be constructed on top of other dwellings;
- e. All dwellings and accessory structures shall be completely supported with solid brick, brick or stone covered block, or stucco covered foundation;
- f. Roofs shall have not less than a 6 inch pitch, and not less than 12 inch overhang, and shall be covered with asphalt or fiberglass shingles, terra cotta tile, real or man-made slate, copper sheathing or wood shingles or pre-painted metal roofing;
- g. The exterior surfaces of all dwellings and accessory structures shall be covered only with brick, stone, hard stucco (synthetic stucco is not permitted), wood, or siding consisting of wood, composite or vinyl material; provided, that any horizontal siding must be completely supported to maintain a straight and even outer surface and must be fully and properly finished; and
- h. Exteriors of all dwellings and accessory structures must be completed within one year after the commencement of construction, and a certificate of occupancy issued within two years after commencement of construction.

As used herein, "Heated Living Area" excludes basement areas (defined as any level in which at least one perimeter wall is below, or partially below, grade), unless such basement areas have two or more perimeter walls above surrounding grade, and such basement areas are fully heated and air-conditioned and constructed to a quality equal to the above grade levels of the dwelling. In addition, Heated Living Area excludes vaulted ceilings areas, attics, unheated porches, attached or detached garages, porte-cocheres and unheated storage areas, decks and patios. The term "story" shall mean a finished horizontal division of Heated Living Area extending from the floor of such division to the ceiling above it. The term "half story" shall mean a story which contains fifty percent (50%) or less Heated Living Area than the story in the house containing the most Heated Living Area.

6. **Permitted Accessory Structures.** No buildings, structures or improvements of any kind may be located on the Property other than the residences permitted under Section 2 hereof, the medical care facility permitted under Section 3(c) hereof and the following permitted accessory structures:

- a. Storage and shop outbuildings, including detached garages, workshops, storage and utility buildings, greenhouses and similar buildings, not exceeding fourteen (14) feet in height. The total square footage contained within all such outbuildings combined shall not exceed two thousand (2000) square feet. All outbuildings shall be permanently affixed to the Property and shall be covered with the approved exterior materials

described in Section 5(g) above. Further, no outbuildings shall be located wholly or partially within any Buffer Area (as defined below).

- b. Recreational structures, including decking, gazebos, covered patios, playhouses, barbecue pits and similar structures. The total square footage contained within such structures when combined shall not exceed one thousand (1000) square feet in area. Further, no such structure shall be located wholly or partially within any Buffer Area (as defined below).
- c. To the extent permitted at the time of construction and installation by Duke Energy Corporation (or its successor, with respect to ownership and/or management authority over the Lake, if applicable) (hereinafter, "Duke Energy") and all applicable governmental authorities, waterfront structures, including fixed piers, boat slips or floats, covered docks, boat ramps, decking and sitting areas attached to piers, walkways and other similar structures. Grantee acknowledges by acceptance of this deed that policies, laws and regulations regarding its ability to construct or install such structures may change from time to time before or after Grantee's acquisition of the Property and Grantor makes no representation or warranty as to Grantee's ability to construct or install such structures either now or in the future. Such structures may be located wholly or partially within the Buffer Area provided no more than a total of two hundred (200) square feet of such structures shall be located within the Buffer Area.

7. Site Development Requirements. The Property shall be subject to the following specific development requirements.

- a. No portion (or portions) of the Property greater than two thousand (2000) square feet shall be: (i) denuded of ground cover or topsoil, (ii) graded, (iii) excavated or (iv) covered with earth or other natural or man-made fill material, unless all required building, grading and erosion control permits have been issued by the applicable municipal authorities.
- b. All denuded, graded, excavated or filled areas shall be stabilized and replanted on or before: (i) the thirtieth (30th) day following the initial denuding, grading, excavation, or filling (unless footings and foundations are being installed upon the disturbed area and construction is being diligently and continuously pursued upon such area); or (ii) such time as construction is completed or interrupted for a period of thirty (30) continuous days. In addition to, or in the absence of local or state government regulations on such land disturbance, none of the activities described in (i) through (iv) in Section 7(a) above shall be allowed to commence without compliance with the following requirements:
 - i. The surveying and flagging of the Buffer Area (defined below) and any portion of the Buffer Area that may be disturbed as a result of any activities permitted hereunder;
 - ii. The flagging of all trees in the Buffer Area that equal or exceed six (6) inches in diameter, as measured four and one-half feet (4.5') from the base of each tree. The trees, Buffer Area (defined below) and disturbed areas referenced in Sections 7(a) and (b) shall be clearly and distinctly flagged, staked, or otherwise

designated in order to prevent the unintentional violation of these restrictions by parties performing work upon the Property; and

- iii. The proper installation (in accordance with manufacturer's instructions) of construction silt fencing on the lower perimeters of all areas within the Property to be disturbed, and any other areas which may be impacted by silt runoff from any disturbed areas located on the Property.

8. **Buffer Area Restrictions.** As used herein, the term "Buffer Area" shall mean any portion of the Property that is located within fifty feet (50') of any common boundary (the "Contour Line") of the Property and Lake Keowee (the "Lake"). No portion of the Buffer Area may be disturbed in any way, including any disturbance or removal of topsoil, trees and other natural growth. The Contour Line of the Lake shall not change as a result of erosion or stabilization measures occurring following the conveyance of this Property to Grantee. Notwithstanding the second sentence in this Section 8, the following activities are permitted within the Buffer Area:

- a. Trees which are less than six (6) inches in diameter, as measured four and one-half feet (4.5') from the base of each tree may be removed. Any tree removal shall be performed using hand held gas or electric chain saws and/or manual handsaws. No other mechanical equipment or vehicles may be used in removing any trees. Additionally, trees having a greater diameter than that set forth above that have become diseased or damaged through natural processes may be removed in the same manner.
- b. An access corridor may be created within the Buffer Area for the purpose of providing lake access to install shoreline stabilization or to install and use water access structures (such as docks or boat ramps) that have been approved in advance by Duke Energy and otherwise comply with Section 6(c) above. The access corridor may not exceed fifteen (15) feet in width. Trees with diameters equaling or exceeding six (6) inches, as measured four and one-half feet (4.5') from base, may be removed within the access corridor and grading or ground disturbance (which otherwise complies with the restrictions set forth herein) may be performed if reasonably necessary to provide access to the Lake for the purposes described above in this Section 8(b).
- c. Underbrush (defined as nuisance shrubs, vines and similar plant growth beneath the tree canopy, and generally growing less than six feet (6') in height) may be removed.
- d. Pruning and trimming of trees is permitted, provided that pruning is limited to tree branches beginning with the lowest to the ground and extending up the tree trunk no more than one-half of the total height of the tree. Trimming may also be performed on any limbs or branches that are diseased or naturally damaged.
- e. The use of rip-rap, bulkheading or other shoreline stabilization methods or materials may be initiated with the prior written approval by Duke Energy and any shoreline stabilization shall be performed in compliance with Duke Energy's Shoreline Management Guidelines which are in effect at the time such stabilization occurs. Generally, Duke Energy allows structural stabilization to extend only to a height five feet above the Contour Line of the Lake. If Duke Energy authorizes Grantee to perform certain shoreline stabilization, then at all points where shoreline stabilization occurs, the inner boundary line of the Buffer Area (i.e. the boundary line opposite the Contour Line

of the Lake) shall be adjusted inward (i.e. away from the Contour Line of the Lake) by the same distance that the stabilization structures or improvements extend from the Contour Line of the Lake into the Property, provided however, that in no event shall the width of the undisturbed Buffer Area be reduced to less than fifty (50) feet between any portion of the interior edge of the stabilization structures or improvements and any residence or other structure or improvement located on the Property (other than docks, boat ramps, or other water access structures which have been approved in writing by Duke Energy).

9. **Townhomes.** Although townhome dwellings may be attached, each dwelling will be located upon its own subdivided lot and shall comply with all applicable laws and ordinances, including zoning and subdivision ordinances. No townhome may be constructed closer than seventy-five feet (75') to the Contour Line (i.e. measured horizontally from such line as shown on the Plat, regardless of the topography of the Property). There shall be no more than one hundred (100) "water-front" townhomes. As used herein, the term "water-front" townhome shall include any townhome, any portion of which is located within one-hundred twenty-five feet (125') of the Contour Line, measured horizontally from such line as shown on the Plat.

10. **No Claims.** No owner of the Property or of any Benefited Property (defined below) shall have any claim or cause of action against Grantor or its affiliates arising out of the exercise, or non-exercise, or enforcement, or failure to enforce, or the amendment, release or grant of variance with respect to any covenant, condition, restriction, easement or other right reserved hereunder or referred to herein.

11. **No Delay.** No delay or failure on the part of Grantor to invoke an available remedy with respect to a violation of any restriction contained herein shall be held to be a waiver by Grantor of any right available to it upon the recurrence or continuance of said violation or the occurrence of a different violation.

12. **Rights of Enforcement.** The covenants, conditions and restrictions set forth herein shall run with the title to the Property and shall benefit Grantor and all property (the "Benefited Property") owned on the date hereof by Grantor or its subsidiaries located within one thousand feet of any portion of the Property (other than any property located within the FERC boundaries of the Lake. If the Property owner, its heirs, successors, tenants, or assigns shall violate or attempt to violate any of the covenants, conditions or restrictions contained herein, Grantor and any subsequent owner of any portion of the Benefited Property may enforce the covenants, conditions and restrictions set forth herein by any remedy available at law or in equity, either to prevent or remediate such violation, or recover damages for such violation, or both; provided that, with the exception of Grantor, no Benefited Property owner shall have the right to enter the Property in order to monitor or enforce compliance without court order. The party bringing such action shall be entitled to recover its reasonable attorney's fees and expenses incurred in such proceedings from the person or entity violating or attempting to violate the same. Nothing herein shall be held to impose any restriction on any other land owned by Grantor, its subsidiaries or affiliates.

13. **Modification, Amendment, Variances.** Grantor hereby reserves the right for itself and its successors or assigns, to amend or modify, release, or grant variances with respect to the covenants, conditions, easements and restrictions set forth herein. As used in this Section 13, the term "successors or assigns" shall be limited to Grantor's successors or assigns by merger or consolidation or by written assignment.

BOOK 1256 PAGE 268

14. **Reserved Easement.** Grantor hereby reserves unto itself and any successors in title, (i) a ten (10) foot wide easement extending into the Property from and along all side Property lines for the installation and maintenance of utility lines, drainage ditches or facilities, or any other related improvements that may be required by Grantor or its successors or assigns; and (ii) a fifteen (15) foot wide easement extending into the Property from and along any public or private road rights of way for the installation and maintenance of utility lines, drainage ditches or facilities, or any other related improvements that may be required by Grantor or its successors or assigns.

15. **Minimum Lot Size.** The Property may not be subdivided in a manner that will result in any lot or parcel being created which is less than 25,000 square feet.

16. **No Modular or Mobile Homes.** No mobile, manufactured or modular home or structure having the characteristics or appearance of a mobile, modular or manufactured home, including, without limitation, any mobile, modular or manufactured home as defined by the building codes or other applicable laws of the state in which the Property is located, shall be located upon the Property.

BOOK 1256 PAGE 269

STATE OF NORTH CAROLINA

AFFIDAVIT

COUNTY OF MECKLENBURG

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located in Oconee County, Tax Identification Numbers 099-00-02-002, 077-00-01-001 and P/O 056-00-03-022 was transferred by Crescent Resources, LLC to Keowee Falls Investment Group, LLC on December ____, 2002.

The transaction was (Check one):

 X an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$22,000,000.00.

 not an arm's length real property transaction and the fair market value of the property is \$ _____.

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. seq. because the deed is (See back of affidavit.):

As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Seller.

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

CRESCENT RESOURCES, LLC

By: James M. Short, Jr.
JAMES M. SHORT, JR.
SENIOR VICE PRESIDENT
Purchaser, Legal Representative of the Purchaser, or Other
Responsible Person Connected with the Transaction

SWORN to before me this 16th
day of December, 2002.

Susan Higginson
SUSAN HIGGINSON
NOTARY PUBLIC FOR NORTH CAROLINA
MY COMMISSION EXPIRES: March 27, 2006

FILED FOR RECORD
OCCONE COUNTY, S.C.
REGISTERED DEEDS
16 DEC 18 PM 4:51

*The fee is based on the real property's value. Value means the realty's fair market value. In arm's length real property transactions, this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgages assumed or placed on the realty as a result of the transaction). However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement, or realty before the transfer and remaining on it after the transfer.

CLT 653915v1

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No.: 2011-CP-23-6376

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,

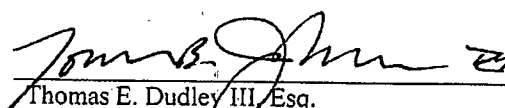
Of whom

S&ME, ... Respondent.

NOTICE OF APPEAL

The Appellants appeal from the Order of the Honorable Clifton Newman dated July 22, 2013, which denied Appellants Motion to Amend. Appellants received written notice of the order on July 25, 2013.

August 22, 2013



Thomas E. Dudley III, Esq.

Townes B. Johnson III, Esq.

KENISON, DUDLEY & CRAWFORD, LLC

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Elizabeth H. McMillan, Esq.

McAngus Goudelock & Courie, LLC

P.O. Box 2980

Greenville, SC 29602

Attorney for Defendants 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.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No.: 2011-CP-23-6376

DEC 12 2013

DEC 12 2013

COURT OF APPEALS

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

v.

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

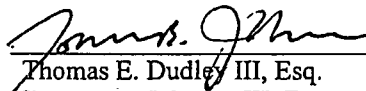
Of whom

S&ME, Inc. is Respondent.

NOTICE OF APPEAL

The Appellants appeal from the Order of the Honorable Clifton Newman entered on
December 3, 2013, which denied Appellants' Motion to Alter or Amend. Appellants received
written notice of this Order on December 4, 2013.

December 9, 2013

 _____

Thomas E. Dudley III, Esq.

Townes B. Johnson III, Esq.

KENISON, DUDLEY & CRAWFORD, LLC

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P.O. Box 2980
Greenville, SC 29602
Attorney for Defendants 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.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No.: 2011-CP-23-6376

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,

Of whom

S&ME, ... Respondent.

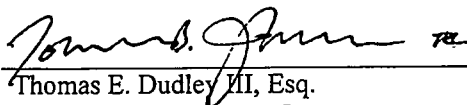
MOTION TO CONSOLIDATE

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned attorney, counsel for Appellants, files this motion to consolidate the Notice of Appeal filed at the same time as this motion and Appellate Case No. 2013-001843.

On or about August 22, 2013 Plaintiffs / Appellants Kevin McCarthy and Courtney E. McCarthy ("Appellants") filed a Notice of Appeal regarding the Honorable Clifton Newman's July 22, 2013 Order denying Appellants' Motion to Amend its complaint and assert additional causes of action against Defendant S&ME ("Respondent"). This Court assigned that case Appellate Case No. 2013-001843.

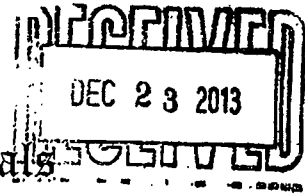
RECEIVED
AUG 29 2014
SC Court of Appeals

On or about December 3, 2013, the Honorable Clifton Newman issued an Order denying Appellants' Motion to Alter or Amend the Court's July 22, 2013 Order granting Respondent's Motion for Summary Judgment. Appellant, by and through the Notice of Appeal filed herewith, is now seeking an appeal of this December 3rd Order and would respectfully ask that Appellants' appeal of the December 3rd Order be consolidated with Appellate Case No. 2013-001843.



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Townes B. Johnson III, Esq.
KENISON, DUDLEY & CRAWFORD, LLC
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Other Counsel of Record:
Stephanie H. Burton, Esq.
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
Attorney for Defendant S&ME, Inc.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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DEPUTY CLERK

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December 18, 2013

Mr. Thomas Elihue Dudley, III
704 E. McBee Ave.
Greenville SC 29601

Mr. Townes Boyd Johnson, III
704 E. McBee Ave.
Greenville SC 29601

Re: Kevin McCarthy v. The Cliffs Communities
Appellate Case No. 2013-001843

Dear Counsel:

This Court has received multiple notices of appeal in this matter. These appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules (SCACR), and we anticipate receiving one record on appeal. The times for perfecting this appeal will run from the service of the last notice of appeal.

Very truly yours,

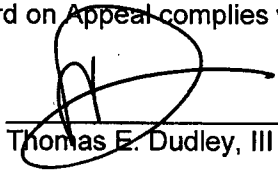
A handwritten signature in black ink, appearing to read "Jenny Abbott Kitchings". The signature is stylized and includes a large, sweeping flourish at the end.

CLERK

cc: Stephanie Holmes Burton, Esquire

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal complies with Rule 210, SCACR.



Thomas E. Dudley, III

August 19, 2014

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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

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

v.

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

Of Whom

S&ME, Inc. is Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Record on Appeal in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 27th day of August, 2014, addressed as follows:

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
Attorney for Respondent



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Attorneys for Appellants