THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge



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Case No. 2013-CP-28-0250

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Clifford D. Holley and Sharon Holley, Appellants,

v.

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

Of whom Charles E. Oman and and Janis M. Niemi are the Respondents.

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# INITIAL BRIEF OF APPELLANTS

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### CASES

STATUTES



COURT RULES



OTHER AUTHORITIES

## STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING RESPONDENTS' BURIAL OF ORGANIC DEBRIS ON THEIR PROPERTY WAS NOT A MATERIAL FACT IN THE SALE OF THE PROPERTY.

II. WHETHER A VENDOR OF PARTIALLY IMPROVED LAND HAS A DUTY TO DISCLOSE KNOWN LATENT DEFECTS AFFECTING THE SUITABILITY OF THE LAND FOR FURTHER RESIDENTIAL IMPROVEMENTS.

III. WHETHER A VENDOR'S LIABILITY FOR FAILURE TO DISCLOSE LAND DEFECTS EXTENDS TO A SUBVENDEE.

IV. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT APPELLANTS' DAMAGES WERE NOT CAUSED BY RESPODENTS' FAILURE TO DISCLOSE BURIED DEBRIS.

V. WHETHER A RESIDENTIAL LOT OWNER WHO CONSTRUCTS HOME FOUNDATION FOOTERS ON THE LOT AND THEN SELLS IT TO A BUILDER TO COMPLETE CONSTRUCTION OF A SPECULATIVE HOME OWES A DUTY OF CARE TO A SUBSEQUENT OWNER OF THE FULLY CONSTRUCTED HOME.

## STATEMENT OF THE CASE

This action was commenced on March 19, 2013, with the filing of a summons and complaint naming as defendants the Respondents to this appeal, Charles E. Oman and Janis M. Niemi. (Summons). The complaint was amended once on May 22, 2013, and then again on January 28, 2014 (2nd Am. Compl.).

The Appellants, Clifford and Sharon Holley, asserted a negligence cause of action against Oman and Niemi, alleging that they had acted negligently in burying organic debris on a lot intended for residential construction, conveying the partially improved lot to a builder, and failing to disclose the existence of the concealed debris pursuant to that sale. (2nd Am. Compl. ¶ 35). The Respondents answered asserting various defenses, including a denial of any duty of care

towards the Holleys as subvendees. (Ans. 2nd Am. Compl. ¶ 43)

On January 20, 2015, Respondents' motion for summary judgment came before the circuit court. The Honorable G. Thomas Cooper, Jr. entered an Order Granting Defendants Oman and Niemi's Motion for Summary Judgment ("the order") on February 23, 2015. (Order). Appellants' Notice of Appeal was served on March 23, 2015, and then timely filed, commencing this appeal.

## FACTS

In October 2006, Oman and Niemi purchased a property with a modular home situated on 1.93 acres in Kershaw County, at Lake Wateree. (Oman Aff. ¶ 1). After purchasing the property. Oman and Niemi divided the property to make two lots: one was 1.07 acres on which the modular home was located; and the other parcel was 0.86 acres. (Oman Aff. ¶ 4; Def. Ex. 1). On March 2, 2007, Respondents obtained a building permit to move the modular home from the original site onto the site of the smaller lot ("the lot"). (Def. Ex. 2; Reynolds Depo. p.8, ln. 12-15; Oman Aff. ¶ 7). According to Oman, Respondents planned to sell the larger lot and keep the smaller lot with the modular home on it for themselves to use it as their house. (Oman Aff. ¶ 5). In January or February of 2007, Oman hired a company, Bluewater Development, to clear the lot to prepare it for the footings for a home. (Oman Aff. ¶ 5).

Bluewater employee Altman testified that Oman directed Bluewater to move the tree debris which had been cleared off the property into a particular location on the lot and bury it. (Altman Depo. p.32, ln. 2-7). Altman also testified that Oman supervised the debris burial process. (Altman Depo. p.32, ln. 8-12).

Following the burial of the debris, Oman hired a contractor to pour the footings for the foundation for where a home would be located. (Oman Aff. ¶ 8). On July 10, 2007, the Kershaw County building official approved the footings. (Def. Ex. 4; Reynolds Depo. p.8, ln. 21 through p.9, ln. 17). On the smaller lot, Mr. Oman built a retaining wall at the County building official's recommendation. (Oman Aff. ¶ 9). The retaining wall was approximately 8 feet from the footers. (Gibson Depo. p.42, ln. 6-10).

Prior to moving forward with the rest of the subdivision and construction project, the Respondents instead put the partially improved property up for sale. (Oman Aff. ¶ 9, 10). On October 24, 2007, Respondents entered into a "Land, Lots and Acreage Contract of Sale" with Dan-Sa, Inc., which agreed to purchase the smaller lot. (Def. Ex. 5). Oman and Niemi provided Dan-Sa a set of plans for a house which could be built on the existing footers. (Oman Aff. ¶ 11). The drawings included plans for a porch to be constructed on the left side of the house facing the lake. (Oman Aff. ¶ 11; Bradshaw Depo. p.5, ln. 9 – 12). Oman described the plans as draftsman's drawings. (Oman Aff. ¶ 11). The owner of Dan-Sa testified that the drawings looked like architectural plans. (Gibson Depo. p.14, ln. 12). Pursuant to the sales contract, the Respondents also provided Dan-Sa with a building permit and septic permit for the home, (Gibson Depo. p.19, ln. 19 through p.20, ln. 19, and p.26, ln. 23; Def. Ex. 4; Gibson Depo. Pl. Ex. 1 and 2), as well as a survey of the property. (Gibson Depo. p.35, ln. 4-11; Gibson Depo. Pl. Ex. 8 p.3).

Prior to the sale of the improved lot, Oman had multiple conversations with Danny Gibson, the president and owner of Dan-Sa and an experienced homebuilder. (Gibson Depo. p.7, ln. 12-25; p.77, ln. 8-10). Oman represented to Gibson that he worked in the construction industry. (Gibson Depo. p.14, ln. 14-18). Oman and Niemi did not inform Gibson that organic debris had been buried on the lot, and Gibson did not see any indication that organic debris had been buried. (Gibson Depo. p.73, ln. 23 through p.74, ln. 3).

At the time Dan-Sa purchased the lot, Gibson was aware that the property had a driveway, septic tank, footers and retaining wall. (Gibson Depo. p.12, ln. 7-14). He testified that he looked at the footers before buying the property and described them as being large and dug with a "two foot bucket." (Gibson Depo. p.13, ln. 4-11). Gibson also testified that there was no foundation at the time of his purchase of the lot. (Gibson Depo. p.41, ln. 14-17). On December 21, 2007, Oman and Niemi transferred the property to Dan-Sa. (Def. Ex. 6).

Gibson intended for Dan-Sa to build a "spec" home on the lot. (Depo. of Gibson, p.21). Kershaw County required Gibson to bring in the building permit provided by the Respondents and exchange it for one reissued in Dan-Sa's name, (Depo. of Gibson, p.20, ln. 15 – 19, p.45, ln. 20 – 25), which he received on January 3, 2008. (Exhibit 7, Building Permit: Depo. of Gibson. p.20, ln. 6-19).

After Kershaw County reissued the building permit, Dan-Sa constructed the home in approximately five to six months. (Gibson Depo. p.21, ln. 7-8). Gibson used the plans provided by the Respondents, but made some modifications to the layout of the home. (Gibson Depo. p.16, ln. 14-17; p.30, ln.

22 through p.31, ln. 6). The home was built on the existing footers. (Gibson Depo. p.41, ln. 18-20). Gibson testified that the porch on the left side of the home was supported by multiple 6-inch by 6-inch beams anchored in concrete footings behind the retaining wall, approximately two feet in the ground. (Gibson Depo. p.57, ln. 12-24; p.61, ln. 4-12). Additional support for the porch was provided by posts set on top of the concrete block retaining wall. (Rabon Depo. p.39, ln. 16-18). Gibson testified that during his work he did not have any reason to dig deep enough to encounter the buried debris. (Gibson Depo. p.69, ln.8-23). A certificate of occupancy was issued on June 20, 2008. (Gibson Depo. p.38, ln. 8-12).

Four months after finishing the construction, Dan-Sa executed a deed in lieu of foreclosure to Blue Ridge Savings Bank. (Def. Ex. 8). On June 23, 2010, almost two years after acquiring the property, Blue Ridge Savings Bank sold the property to Gina Pike. (Def. Ex. 9, 10). Gina Pike owned the house for one year. On June 29, 2011, Pike contracted with the Appellants to sell the property. (Def. Ex. 11). Pike conveyed the property to the Holleys on July 8, 2011. (Def. Ex. 12). Before purchasing the property from Pike, the Holleys had the home inspected and found no structural defects. (Holley Depo. p.22, ln. 8-14; p.24, ln. 15-17).

Soon after purchasing the house from Pike, the Holleys decided to build a pool to the left of the home beyond the porch and retaining wall. (Def. Ex. 3). The Holleys contracted with a company named Alaglass to build the pool. (Def. Ex. 13). Cliff Holley testified that Kershaw County would have let them install the pool at the existing grade, but that they opted to install fill dirt and another retaining wall in order to raise the elevation of the pool. (Holley Depo. p.28, ln. 11-23). The

Holleys had the property surveyed three times to be certain they were not constructing in the flood plain and verified that they were approximately 30 feet away from the line. (Holley Depo. p.57, ln. 2-6; p.58, ln. 11-20). In August 2011, the Holleys' contractors started working on installation of the pool. (Def. Ex. 3).

When the Appellants' contractor, Alaglass, started work on the pool, workers found debris – timber, limbs, and other organic materials -- buried underground. (Rabon Depo. p.23, ln. 6-14; Gibson Depo. Def. Ex. 2, 7, 10). One contractor involved with the debris excavation testified that the debris field extended from the area where the pool was being installed to underneath the porch and its footers, and that debris was even pulled out "from underneath the house." (Rabon Depo. p.23, ln. 14-17; p.107, ln. 8-11). The debris was buried so deep that the backhoe on site to dig the pool area could not reach the bottom of the pit. (Rabon Depo. p.23, ln. 12-14). Another contractor testified that he saw debris excavated up to one and a half feet from the retaining wall that sits right in front of the beams supporting the porch. (Morrison Depo. p.14, ln. 7-16). Based on this proximity to the retaining wall, it is clear that the debris was buried well within the building setback line indicated on the foundation survey plat commissioned by Dan-Sa. (Gibson Depo. Pl. Ex. 8 p.5; Gibson Depo. p.28, ln. 3-18; p.34, ln. 25 through p.35, ln. 3).

During the process of debris excavation, damage was sustained to the retaining wall, porch, and roof. (Rabon Depo. p.23, ln. 6-23; Morrison Depo., p.15, ln. 8-13).

Neil Baer, P.E., a structural engineer retained as an expert witness for the Appellants, opined that

> Oman and Niemi violated applicable construction and other standards when they buried the organic material on the lot both adjacent to and underneath where the foundation was to be poured. Organic material will decay over time. Therefore, when a foundation is poured or a structure is built over the organic material, there will be damage to the structure caused by the settlement.

(Baer Aff. ¶ 5). Danny Gibson of Dan-Sa, who built the home, agreed that buried debris should be disclosed precisely to avoid the types of problems that have arisen with regard to the Holley property. (Gibson Depo. p.80, ln. 8-22; p.81, ln. 2-14). Gibson, who built five other homes on Lake Wateree in 2007 and 2008, also testified that he had never experienced another situation involving buried timbers on a lot in the area. (Gibson Depo. p.10, ln. 16-23; p.59, ln. 21-25). Another contractor with experience working around Lake Wateree testified that "[a]ll debris is supposed to be hauled off and disposed of" and is not supposed to be buried. (Rabon Depo. p.35, ln. 22-24).

Neil Baer further explained that the concealed debris on the Holley property was a problem even before damage began to manifest in the structure above it during excavation:

> The extent of the damage, and when it manifests itself, is a function of time and other factors. However, the burial of organic material in and of itself created an immediate unstable condition and defect to the property that was concealed by the burial and had to be remediated. This is true even if an area is not "buildable" because it will still sink or settle.

(Baer Aff. ¶ 5). Baer concluded that

> Oman and Niemi violated applicable construction and other standards by failing to disclose to anyone that they had the organic material buried on the property in 2007. The purchaser of the property, as well as subsequent purchasers of the property, had no way of knowing that the organic material had been buried because it was concealed.

(Baer Aff. ¶ 6).

## ARGUMENT

The circuit court erred in granting summary judgment on the basis that the Respondents owed no duty of care to the Appellants as subsequent owners of the property. "On review from a grant of summary judgment, the Court applies the same standard applied by the circuit court." Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). Summary judgment is only appropriate where "there is no genuine issue as to any material fact[.]" Rule 56(c), SCRCP. This "drastic remedy . . . should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." BPS, Inc. v. Worthy, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). "[T]he appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id.

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008).

Once the moving party meets this initial burden, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

**I. The circuit court erred in holding Respondents' burial of organic debris on their property was not a material fact in the sale of the property.**

The circuit court erred in holding as a matter of law that the presence of concealed, buried organic debris was not a material fact in the Respondents' sale of the property to Dan-Sa. The S.C. Supreme Court has recognized that the existence of buried organic debris causing concealed, unstable conditions is a material fact in a sale of land. Lawson v. Citizens & S. Nat. Bank of S. C., 255 S.C. 517, 520-21, 180 S.E.2d 206, 208 (1971).

A fact is material to a transaction if its disclosure "might have put a different light on the transaction." Culbreath v. Investors Syndicate, 203 S.C. 213, 26 S.E.2d 809, 812 (1943). In other words, a fact is material if it induces a party to act. Sub Station II of Tennessee, Inc. v. Oliver, 307 S.C. 166, 169, 414 S.E.2d 141, 142 (1992); Finley v. Dalton, 251 S.C. 586, 591, 164 S.E.2d 763, 766 (1968); Lebby v. Ahrens, 26 S.C. 275, 2 S.E. 387, 389 (1887). See also Restatement (Second) of Torts § 538(2)(a) (1977) ("The matter is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.").

The materiality of a fact is a question for the jury. Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc., 338 S.C. 343, 348-49, 526 S.E.2d 253, 255 (Ct.

App. 2000) aff'd as modified, 349 S.C. 356, 563 S.E.2d 331 (2002). See also Culbreath, 203 S.C. 213, 26 S.E.2d at 812 (fact "may reasonably have been found by the jury to have been both false and material."); Restatement (Second) of Torts § 538, cmt. e (1977).

The circuit court erred in restricting its materiality analysis to consideration of concealed debris being "outside the perimeter of the footings." (Order p.12). At least one witness testified that tree debris was pulled out not only from under the porch and porch footings but "from underneath the house" as well. (Rabon Depo. p.23, ln. 14-17; p.107, ln. 8-11). It is undisputed that the stability of the land under the area that would become the foundation of the home was a material fact in Respondents' sale of the property. (Memo. In Support p. 13). As set forth in the Affidavit of Neil Baer, "when a foundation is poured or a structure is built over organic material, there will be damage to the structure caused by settlement." (Baer Aff. ¶ 5). The circuit court should have left it to the jury to weigh the evidence and make a determination as to whether the debris was in a location of material interest to a reasonable buyer.

Furthermore, the circuit court incorrectly characterized the possibility of building a house on the existing footers as being, singularly, "*the* material fact" in the conveyance to Dan-Sa. (Order p.12) (emphasis added). Regardless of whether a jury would ultimately find that the buried debris field extended under the foundation of the home, the uncontroverted evidence shows that that it extended at least as far as the retaining wall and porch footers (Morrison Depo. p.14, ln. 7-16), and that this was only approximately eight feet from the

foundation of the home (Gibson Depo. p.42, ln. 6-10). The construction of a porch in this specific location was anticipated in the construction drawings the Respondents transferred to Dan-Sa pursuant to the sales contract. (Oman Aff. ¶ 11). Even if the transferred plans had not included a porch in this area, the possibility that Dan-Sa would decide to add a porch or other similar structure in this area closely proximate to the existing footers, on the side of the house facing the lake, was eminently foreseeable. The owner of Dan-Sa agreed that buried tree debris should always be disclosed in order to avoid the type of situation at issue in this litigation. (Gibson Depo. p.80, ln. 8-22; p.81, ln. 2-14).

Furthermore, the fact that the Respondents' needed to install a retaining wall to accommodate the grade of the lot makes it clear that it was far from unreasonable to expect that a subsequent owner might install another retaining wall and fill dirt in order to construct a pool or other fixture. The contractor who buried the debris at the direction of Oman testified that, based on Oman's decision to subdivide the larger and smaller lots, the decision on where to bury the debris was "absolutely a poor choice" and limited the use of the land. (Altman Depo. p.62, ln. 24 through p.63, ln. 11). Accordingly, the burial of debris on the property, even debris several feet away from the footers or beyond, was a fact that a jury could find a reasonable buyer would consider material.

The circuit court incorrectly characterized the conveyance to Dan-Sa as having just one material fact, the possibility of building a house on the existing footers. (Order p. 12). Accordingly, it was error to hold that, as a matter of law, the existence of the buried debris was immaterial.

## II. A vendor of partially improved land has a duty to disclose known latent defects affecting the suitability of the land for further residential improvements.

The circuit court also erred in holding that the Respondents had no duty to disclose the burial of the debris pursuant to the sale of the property to Dan-Sa. "The determination of whether a party has a duty to exercise reasonable care for the benefit of another is a question of law for the court." Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 114, 512 S.E.2d 510, 519 (Ct. App. 1998). Both "[t]he existence and scope of the duty are questions of law." Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997).

"[A] duty is imposed upon the seller of land to disclose the existence of unstable conditions which are artifically *[sic]* created and concealed." Pruitt v. Morrow, 288 S.C. 298, 300, 342 S.E.2d 400, 401 (1986) (citing Lawson v. Citizens & Southern National Bank of S.C., 255 S.C. 517, 180 S.E.2d 206 (1971)). "Where material facts are accessible to the vendor only, and he knowns them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts and make them known to the purchaser." Lawson at 485, 193 S.E.2d at 128 (citing Brooks v. Ervin Construction Co., 253 N.C. 214, 116 S.E.2d 454 (1960)).

"It is a practically universal rule that under circumstances which make it the duty of the seller to apprise the buyer of the defects in the subject matter of the sale known to the seller but not to the buyer, Suppressio veri is as much fraud as Suggestio falsi." Lawson at 485, 193 S.E.2d at 128 (citing Brooks

Equipment & Mfg. Co. v. Taylor, 230 N.C. 680, 55 S.E.2d 311 (1949)). "[T]he doctrine of *caveat emptor* is . . . inapplicable in actions based upon negligent or reckless non-disclosure of land defects." Pruitt at 301, 342 S.E.2d at 401 (1986). The negligence of a misrepresentation "may consist of failure to make proper inspection or inquiry." Restatement (Second) of Torts § 311, cmt. d (1965).

In this case, it is undisputed that Respondents buried tree materials on their property and then sold the property to Dan-Sa without disclosure of the concealed organic debris. (Altman Depo. p.32, ln. 2-12; Gibson Depo. p.73, ln. 23 through p.74, ln.3). As discussed above, the evidence at the very least presents a jury question as to whether the debris was buried in a location that would be considered material to a prospective buyer. Accordingly, the circuit court erred in holding as a matter of law that Respondents had no duty to disclose the buried materials to their vendee.

### III. A vendor's liability for tortious failure to disclose land defects extends to a subvendee.

The circuit court also erred in holding that South Carolina law insulates a negligently nondisclosing vendor of land from liability simply because the land is later transferred from the vendee to a subvendee. (Order p.7). "A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party." Dorrell v. S. Carolina Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004). See also Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970) (subcontractor liable to property owner for negligent performance of work).

"The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care." Dorrell at 318, 605 S.E.2d at 15. "This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs." Id. In determining liability to a third party, "[t]he key inquiry is foreseeability, not privity." Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980).

**a. South Carolina concealed debris jurisprudence does not insulate a negligent vendor from liability to a subvendee.**

In the case of Pruitt v. Morrow, 288 S.C. 298, 301, 342 S.E.2d 400, 401 (1986), the defendant developer buried a pit of tree stumps on a subdivided lot and then sold the lot, without disclosure of the buried debris, to a homebuilder. The homebuilder constructed a "spec" house on the lot and then conveyed it to a subvendee, Pruitt. Following this sale, the home began to settle and Pruitt obtained a verdict against the corporate successor of the original developer-vendor based on a claim for negligent nondisclosure. On appeal, the Supreme Court held that "the doctrine of *caveat emptor* is . . . inapplicable in actions based upon negligent or reckless non-disclosure of land defects[,]" Id. at 301, 342 S.E.2d at 401, and that the developer-vendor therefore had a duty to disclose the buried debris when he sold the lot to the homebuilder.

While the Pruitt opinion does not explicitly discuss the distinction between a vendee and a subvendee, in context the decision nonetheless stands for the proposition that a nondisclosing vendor's liability extends to protect a subvendee. The conceptual focus of the opinion, the doctrine of *caveat emptor* ("let the buyer beware"), is a defense denying the existence of liability to an injured party. In

holding that *caveat emptor* does not protect a vendor from a subvendee's negligent nondisclosure cause of action, the court also implicitly affirmed that a vendor's liability does in fact extend to innocent subvendees. Furthermore, the fact that the Pruitt opinion does not specifically discuss a distinction as obvious as that between a vendee and subvendee indicates that the court considered it a distinction without a difference. *See* Id. at 301, 342 S.E.2d at 401 ("the remaining issues present no errors of law"). The circuit court erred in broadly dismissing Pruitt as "inapposite to the instant case." (Order p.8).

Furthermore, contrary to the analysis in the order of the circuit court (Order, p. 10), the opinion in Lawson v. Citizens & S. Nat. Bank of S. C., ("Lawson I") 255 S.C. 517, 180 S.E.2d 206 (1971), did not address the issue of the vendee – subvendee distinction. In that case, the vendor was a developer who allegedly filled a deep gully, situated over a large portion of a lot, with tree stumps and rubble and concealed it by capping it with clay. The developer then sold the lot to a vendee, Mr. Lawson, without disclosing the buried debris. Mr. Lawson constructed a home on the lot and, pursuant to a subsequent divorce, conveyed the property to his wife. After the home began to settle, Mr. and Mrs. Lawson joined as co-plaintiffs in a negligence lawsuit against the vendor.

The key holding in Lawson I was that the plaintiffs' complaint was not subject to demurrer on the grounds that it combined allegations of both negligence and fraudulent nondisclosure. Id. at 521, 180 S.E.2d at 209. However, the court also noted that there were no grounds for demurrer on the basis of inclusion of Mrs. Lawson, as subvendee, as a party. Specifically, the

court stated that "[t]he cause of action . . . ripened in Mr. Lawson upon completion of the dwelling, and defendant's liability was unaffected by [Mr. Lawson's] subsequent conveyance of the premises. . . . We need not inquire whether Mrs. Lawson is a proper party because defect of parties, not multiplicity, is ground for demurrer." Id. at 522, 180 S.E.2d at 209. In other words, the court explicitly declined to analyze the vendee – subvendee distinction because it had no relevance to the issues on appeal.

In the subsequent opinion of Lawson v. Citizens & S. Nat. Bank of S. C., ("Lawson II") 259 S.C. 477, 193 S.E.2d 124 (1972), the court affirmed denial of a motion for judgment n.o.v. following a jury verdict in favor of the Lawsons. In holding that the evidence was sufficient to support the jury's verdict, the court cited the rule that "[n]on-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Id. at 481-82, 193 S.E.2d at 126. The court affirmed in favor of both of the plaintiffs, regardless of the fact that Mrs. Lawson, a subvendee, was not a "party to the transaction." As in the Pruitt case, Lawson II does not explicitly discuss the relevance of the vendee – subvendee distinction. However, the clear implication of the holding is that while a nondisclosing vendor may not be liable in the absence of a duty to the original vendee, the vendor's liability is not limited to that vendee but instead extends to foreseeably injured subvendees. Just like the subvendee Mrs. Lawson, the Appellants herein were foreseeably damaged because of the failure of "the party having knowledge of the facts to make them known to the other party to the transaction." Id.

Additionally, the circuit court order incorrectly characterized the holding of the case of LoPresti v. Burry, 364 S.C. 271, 272, 612 S.E.2d 730, 731 (Ct. App. 2005). LoPresti stands for the simple proposition that a vendor is not liable for failure to disclose a matter of public record. Id. at 278, 612 S.E.2d at 733-34. Specifically, the Court of Appeals considered whether a vendor was liable for nondisclosure of a properly recorded flood easement on a lakefront lot. Subvendees asserted the claim against the vendor (the original developer) on the basis that he had filed a subdivision survey plat which did not show the easement. The court held that the subvendee plaintiffs could have discovered the easement through reasonable inquiry into the chain of title and, therefore, did not have a cause of action for nondisclosure. Id.

Contrary to the discussion in the order challenged in this appeal (Order, p.11), the court in LoPresti did not hold that a vendor can never be liable to a subvendee for negligent nondisclosure in the absence of a fiduciary or other "special relationship." The Court did note that even a matter of public record may require disclosure when the parties have a fiduciary or other similar relationship, but found this unavailing to the plaintiffs because, as with most land transactions, no such special relationship had been formed. Id. at 278, 612 S.E.2d at 734, fn.15. The opinion is entirely silent on the question of whether a vendor's liability extends to a subvendee. Accordingly, LoPresti is not on point with regard to the case on appeal, because the buried organic debris on the Respondents' property was not a matter of public record or otherwise subject to constructive notice.

In summary, South Carolina case law simply does not support the proposition that a tortiously nondisclosing vendor is insulated from liability based on a subsequent sale from the vendee to a subvendee. Such a rule would directly contradict the fundamental principle that "[t]he tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care . . . . to avoid damage or injury to foreseeable plaintiffs." Dorrell, 361 SC at 318, 605 S.E.2d at 15.

**b. The Restatement (Second) of Torts recognizes that a nondisclosing vendor is liable to an innocent subvendee.**

Furthermore, the relevant provisions of the Restatement (Second) of Torts ("the Restatement"), a treatise frequently cited by South Carolina courts in nondisclosure cases, explicitly recognize the liability of a nondisclosing vendor to subvendees.

In its summary judgment order, the circuit court cites to Section 353 of the Restatement. (Order p. 13). This section expressly states that tortiously nondisclosing vendors are subject to liability to subvendees:

> A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition . . . .

Restatement (Second) of Torts § 353 (1965) (emphasis added). The comments reiterate that this liability extends to "not only those who are there by the consent of the vendee as his licensees but any person to whom he subsequently sells or leases the land and those who enter with the consent of such subvendee or lessee." § 353, cmt. a (1965) (emphasis added).

While the provisions of Section 353 may be more directly applicable to conditions dangerous to human health and safety, South Carolina courts have cited to its general principles in cases involving nondisclosure of conditions affecting suitability of land for residential construction. *See* Pruitt, 288 S.C. at 301, 342 S.E.2d at 401 (§ 353 "rejects, by clear implication, *caveat emptor* in non-disclosure of land defect cases"); LoPresti, 364 S.C. at 278, 612 S.E.2d at 734 (§ 353 does not protect vendees who know or have reason to know of an undisclosed condition). There is no reason to suggest that this authority is any less persuasive on the general principle of liability to innocent subvendees. Regardless, the record does support an inference that the undisclosed property defect could have made the property dangerous to persons, such as through an eventual collapse of the deck or some other structure. (Gibson Depo. p.61, line 24 through p.62, line 13; Baer Aff. ¶ 5). The circuit court cites no basis for its assertion that "there is no dispute" on this issue. (Order p. 14).

Furthermore, Section 311 of the Restatement, which is directly applicable to property defect cases such as this, also recognizes a negligent vendor's liability to foreseeably injured third-parties such as subvendees:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.

Restatement (Second) of Torts § 311(1) (1965) (emphasis added). See also § 311, cmt. c (stating that the section applies to "physical harm to the property of the one affected"); § 7 (defining "physical harm" to include "physical impairment . . . [of] land or chattels").

The comments applicable to Section 311 reiterate that "[a] misrepresentation may be negligent not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation." § 310, cmt. c. *See also* § 311, cmt. f (incorporating by reference comments c and d to § 310). Likewise, liability "is not confined to those persons whose conduct the misrepresentation is intended to influence, or to harm received in the particular transaction which the misrepresentation was intended to induce." § 310, cmt. d.

To illustrate these principles, the comments give the example that "a seller of an automobile who paints over a defective wheel or axle and so conceals its dangerously defective character is liable not only to his immediate buyer who is harmed by the collapse of the wheel or axle, but also to any person to whom the immediate buyer by sale, lease, or license transfers the use of the car, and to other travelers . . . whose cars are damaged." § 310, cmt. c (emphasis added); *See* § 311, cmt. f.

The Court of Appeals should reverse the circuit court and, along with Sections 311 and 353 of the Restatement (Second) of Torts, confirm that a vendor who negligently fails to disclose a land defect is not insulated from liability

to an innocent subsequent purchaser. On that basis, the Court should also rule that the Respondents' duty of care extended to Appellants as foreseeable subsequent purchasers of the subject property. This holding would be consistent with South Carolina case law analyzing vendor liability, consistent with general tort law foreseeability principles, and conducive to fair results as between negligent vendors and innocent subsequent buyers.

## IV. The circuit court erred in holding that Appellants' damages were not caused by Respondents' failure to disclose buried debris.

The circuit court also erred in holding, in effect, that as a matter of law there was no causal relationship between the Appellants' damages and the Respondents' failure to disclose the buried debris to their vendee, Dan-Sa. Specifically, the court noted that even if the Respondents had disclosed the debris to Dan-Sa, this information would never have reached the Appellants because of the intervening series of conveyances in which no disclosures were required. (Order p. 15). This was error because the relevant chain of causation relates not to the series of conveyances but, instead, to Dan-Sa's reliance on the Respondents' silence about the concealed debris when it moved forward with constructing and selling the home eventually purchased by the Appellants.

"Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." Player v. Thompson, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Cody P. v. Bank of Am., N.A., 395 S.C. 611, 621, 720 S.E.2d 473, 479

(Ct. App. 2011) (quoting Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct.App.1986)). "If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." Cody P. at 621-22.

"The touchstone of proximate cause in South Carolina is foreseeability." Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Foreseeability is determined by looking to the natural and probable consequences of the act complained of." Id. "In order for conduct to amount to negligence for which compensation can be collected, the actor must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that his conduct would likely cause injury to another." Vinson v. Hartley, 324 S.C. 389, 400-01, 477 S.E.2d 715, 721 (Ct. App. 1996).

A reasonable jury could certainly find that, but for the Respondents' failure to disclose the buried debris to Dan-Sa, Dan-Sa would not have built the home and porch without removing the debris or otherwise correcting for the instability of the land. Dan-Sa's owner testified that buried debris should be disclosed in order to avoid the type of problem that the Appellants have encountered. (Gibson Depo. p.80, ln. 8-22; p.81, ln. 2-14). If portions of the structure had not been built over unstable soil, then the Appellants would not have sustained the resulting damages. The damage would have occurred regardless of whether Dan-Sa placed some of the beams supporting the porch on top of the retaining wall because the tree debris also extended under the other porch footers. (Rabon

Depo. p.23, ln. 14-17; p.107, ln. 8-11). Regardless, the retaining wall only failed because of the necessity to remediate the concealed debris. (Baer Aff. ¶ 5).

Likewise, a reasonable jury could find that the Appellants' damages were a foreseeable, proximate result of the Respondents' failure to disclose the concealed debris to a vendor they knew intended to complete construction of the home and sell it. The Appellants were members of a foreseeable class of subsequent purchasers without any way of knowing about the concealed land defect. Foreseeability would be particularly easy for a jury to find based on evidence in the record that the Respondent Oman worked in the construction industry. (Gibson Depo. p.14, ln. 14-18). Additionally, it is a question of fact for the jury as to whether the possibility of Dan-Sa placing additional support beams for the porch on top of the retaining wall should have been foreseeable to Respondents and what effect, if any, this has on the proportion of the Respondents' liability. *See* S.C. Code Ann. § 15-38-15; Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984).

Furthermore, there is no basis in the record for the circuit court's finding that, as a matter of law, Dan-Sa had the opportunity to discover the buried debris when it dug footers for the porch to a depth of two feet. (Order p. 14-15). The owner of Dan-Sa testified that during his work on the home he never had any reason to dig deep enough to encounter the debris. (Gibson Depo. p.69, ln. 8-23). The circuit court did not cite, and the record does not contain, any evidence to contradict this. Accordingly, there was no factual basis for this finding.

## V. A residential lot owner who constructs home foundation footers on the lot and then sells it to a builder to complete construction of a speculative home owes a duty of care to a subsequent owner of the fully constructed home.

Finally, the circuit court erred in holding that the Respondents did not owe a duty to the Appellants, as foreseeable subsequent purchasers of the home, to exercise due care in subdividing and clearing the property and furthering the process of constructing a home they knew would be put into the stream of commerce.

The record clearly demonstrates that Respondents acted as their own general contractors in subdividing and preparing the site for construction of a home in a specific location on the lot, directing and supervising the burial of tree debris and then contracting for the construction of foundation footers. (see discussion on pp. 2–4 hereinabove). The Kershaw County building inspector testified that by pulling the building permit the Respondents assumed responsibility for their subcontractors working on the lot. (Reynolds Depo. p.27, ln.1-2, 20-22). Likewise, a permit disclosure form signed by Respondent Niemi recognized that, in accordance with an applicable statutory provision, S.C. Code Ann. § 40-59-260(C) (1976, as amended), "[i]f you sell or rent a building you have built yourself within two years after the construction is complete, the law will presume that you built it for sale." (Reynolds Depo. Def. Ex. 1 p.4).

Notwithstanding Oman's assertion that the Respondents intended to move a modular home onto the lot and use it as a residence, the building permit issued to them indicates that by no later than July of 2007 they had changed their minds and decided to construct a "stick built" home. (Def. Ex. 4), and obtained plans to

do so. (Oman Aff. ¶ 11). This corresponds with the same time that the footers were installed and approved by the County (Def. Ex. 4), creating an inference of fact that at the time footers were installed the Respondents had already decided not to use the lot for residence in the modular home.

Significantly, pursuant to and as consideration for the sale of the partially improved property to Dan-Sa, the Respondents also provided Dan-Sa the building permit and plans for a home to be built on the footings they had installed. (Def. Ex. 5 p.1). It is undisputed that "[t]he location of the house was clearly established by the footings poured on the lot prior to the lot being sold to Dan-Sa." (Memo. in Support p. 13; Order p.12). Prior to the transfer of the improved lot, construction plans, and building permit, Oman represented to the owner of Dan-Sa that he was in the construction industry. (Gibson Depo. p.14, ln. 14-18).

The facts of this case are very different from those in Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008) ("Breedlove"). In that case, the S.C. Supreme Court held that a homeowner who acted as general contractor in constructing his own house and then lived in the house for several years did not owe a duty of care to subsequent purchasers to use proper workmanship. Id. at 424, 661 S.E.2d at 72. The record in the case "showed that the Breedloves intended to stay in that home for the remainder of their lives." Id. at 419, 661 S.E.2d at 69. The court reasoned that "the crucial undisputed fact is that Breedlove, when he constructed the residence, did not build or plan to build the home for anyone but his family. He simply did not owe a duty to any future purchaser when no such sale was reasonably expected." Id.

Continuing its negligence analysis, the Breedlove court explained that

> The key inquiry is foreseeability . . . . In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder's efforts. The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

Id. *at* 424-25, 661 S.E.2d at 72 (emphasis added) (quoting Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980)).

The court concluded that the defendant had no duty "[b]ecause it was not reasonably foreseeable that Breedlove's home would be exposed to a known or speculative 'class of purchasers'." Id. at 425, 661 S.E.2d at 72. "In other words, while possible that Breedlove's home would eventually be purchased or occupied by another owner, this remote possibility, under the facts of this case, was not reasonably foreseeable so as to create a duty on behalf of Breedlove." Id. at 425, 661 S.E.2d at 73.

In contrast to the situation in *Breedlove*, it is beyond dispute that a builder constructing a home for speculative sale owes a duty of care to subsequent purchasers. Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (second owners of house built on unstable soil could bring a negligence claim against the builder). The unusual facts of the case on appeal are significantly closer to Terlinde than to Breedlove. The key distinction is that, unlike the Breedlove defendants, the Respondents did not convey a fully constructed home

in which they had originally intended to reside indefinitely; instead, pursuant to the contract of sale, the Respondents conveyed a partially improved lot along with a building permit and plans to construct a home in a specific location on existing footers. A material part of what the Respondents transferred to Dan-Sa was the capability to continue the specific construction process the Respondents had started. At the time they did so, the Respondents clearly had no intention of living in the completed home themselves.

Accordingly, the Respondents undertook, in exchange for a significant sales contract price, to enable and contribute to the construction of a speculative home on the lot for sale to a foreseeable class of future purchasers. In doing so, the Respondents assumed a duty to act with due care. *See* Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006). This duty extended to future purchasers such as the Appellants. Terlinde, supra.

At the time Respondents undertook to provide Dan-Sa with plans and a building permit for continuing construction of the home on the existing footers, it was not too late to take measures to avoid the damages the home would eventually sustain. Since only the retaining wall and footers were in place at that point, the buried debris could have been removed prior to further construction. A party's duty of care includes acknowledging and correcting its own reasonably known errors. By way of analogy, a road bed preparation contractor has a duty not only to perform its work with due care, but also to exercise due care to acknowledge deficiencies in the work before another contractor starts paving.

This duty of care extends to foreseeably injured third parties. *See, e.g.*, Dorrell v. S. Carolina Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004).

Furthermore, the circuit court erred in holding that the duty of care described in Terlinde is only applicable to the party that puts the "finished product" of a complete home into the stream of commerce. (Order p. 17). A party undertaking to participate in a construction project has a duty of care regardless of whether it is the general contractor responsible for the entire structure at the time it is completed. *E.g.*, Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970) (roofing subcontractor owed property owner duty of care in performing work). The incorrect rule applied by the circuit court would be equally availing to a developer who negligently prepared a site and footers for a residential subdivision over concealed organic debris and then conveyed the entire partially improved project to another developer for completing construction of the homes. There is no basis in South Carolina law for such an inequitable outcome.

Requiring that a party must have been responsible for the "finished product" of a completed home in order to have tort liability would, in effect, reinsert a privity requirement into the law of residential construction negligence, because the party responsible for the overall construction of the home will almost always be a general contractor in privity of contract with the homeowner. To the contrary, the entire point of Terlinde is that privity is *not* a requirement for a residential construction negligence claim. 275 S.C. at 399, 271 S.E.2d at 770.

Accordingly, the circuit court erred in holding as a matter of law that the Respondents had no duty to exercise care in subdividing and clearing the property and acting in furtherance of construction of the home.

## CONCLUSION

For the foregoing reasons, the Appellants respectfully submit that the Court should reverse the circuit court's grant of summary judgment and remand the case for a trial on the numerous questions of fact presented in the record.

Respectfully submitted,

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June 22, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2013-CP-28-0250



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Clifford D. Holley and Sharon Holley, Appellants,

v.

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

Of whom Charles E. Oman and and Janis M. Niemi are the Respondents.

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PROOF OF SERVICE

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I certify that I have served the *Initial Brief of Appellants* and *Designation of Matter to be included in the Record on Appeal* on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 22, 2015, addressed to their attorney of record, Catharine Garbee Griffin, Post Office Box 8057, Columbia, South Carolina 29202.

June 22, 2015

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June 22, 2015



Via hand delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Clifford D. Holley and Sharon Holley v. Dan-Sa, Inc., et al.*
Appellate Case No. 2015-000652

Dear Ms. Kitchings:

Please find enclosed for filing the following documents in the above referenced matter:

1.) Initial Brief of Appellants;

2.) Designation of Matter to Be Included in the Record on Appeal; and

3.) Affidavit of Service.

Thank you for your attention to this matter. I have served copies of the above referenced documents on counsel for Respondents by copy of this letter.

Sincerely,

William C. Dillard

William C. Dillard, Jr.

WCD/sra
cc: Catharine Garbee Griffin, Esq.
Stephen "Chip" Burn, Esq. (via email)
*sradocs/ser/14082A/kitchings 150622*