

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman

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 Respondent.

APPELLANTS' PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, the Appellants Kevin McCarthy and Courtney R. McCarthy, hereby petition for a rehearing of their appeal, which was decided via unpublished opinion no. 2015-UP-436, filed on August 19, 2015. The Appellants hereby respectfully submit that the following points were overlooked or misapprehended by the Court, and respectfully request a rehearing:

1. THE OPINION ONLY ADDRESSES THREE (3) ISSUES WHEN APPELLANTS ARGUED EIGHT (8) STATEMENTS OF ISSUES ON APPEAL.

The Opinion only addresses three (3) issues on appeal and completely ignores five (5) issues on appeal. For this reason, Appellants request the Court schedule a rehearing so that these issues are addressed in an opinion.

2. THE OPINION IS DEVOID OF ANY LEGAL ANALYSIS OR EXPLANATION AS TO THE RULING OF THE COURT FOR THE THREE ISSUES IT DOES ADDRESS.

Rule 220(b) of the SCRAP requires the Opinion address all points distinctly stated in the case and give the reason for the Court's decision, in order for the issues to be preserved for appeal.

The Opinion does not address all issues raised by Appellants and it does not articulate the reasoning upon which the decision was made for the issues it does purport to address, leaving Appellants with no understanding to determine if further appeal is necessary or advisable.

3. THE OPINION SETS FORTH NO BASIS FOR AFFIRMING THE DENIAL OF THE MOTION TO AMEND.

As to Appellants' two issues related to the denial of their motion to amend, the Opinion does not reference any statement or evidence of prejudice by Respondent warranting denial of the motion. Therefore, Appellants request a rehearing so the

Opinion can address this absence of prejudice to Respondent. The same argument applies to Appellants' second issue on appeal regarding the denial of the motion to amend.

4. THE OPINION FAILED TO ADDRESS APPELLANTS' THIRD ISSUE ON APPEAL.

The trial court made findings of fact in its order, when it was clear those matters were in dispute. The Opinion does not address this issue and the Court should schedule a rehearing so that issue can be address.

5. THE OPINION FAILED TO ADDRESS APPELLANTS' FOURTH AND FIFTH ISSUES ON APPEAL RELATING TO THE TRIAL COURT'S ERROR IN RULING NO DUTY EXISTED.

The Opinion failed to address the application of S.C. § 40-22-20(14) and S.C. Regulation 49-301 and 303 and the relevant industry standards as noted by the testimony of several engineers involved in the case. This testimony, along with the statues and regulations, establishes the duty Respondent owed Appellants that Respondent breached. The Opinion affords no explanation as to why the statute, regulation, and testimony does not apply.

Appellants, at the summary judgment hearing and in their appeal, spelled out in detail the deposition testimony of five professional engineers and one professional geologist, each of which provided testimony acknowledging the duty an engineer owes to persons like Appellants in the performance of their investigations. First, to fully describe the condition encountered (which Respondent did in its proposal to The Cliffs but did not in its report to The Cliffs). Further, each engineer and geologist acknowledged that fully describing what they observed was their obligation. They also agreed geological conditions did not stop at property lines, which makes fully describing this so important.

The importance here was that Respondent did this in its proposal, but described only up to the property line in its report and failed to acknowledge the condition continued into Appellants' lot. Here the signs of slope failure Respondent observed were noted in its proposal to The Cliffs. Specifically, Respondent's observations were noted as extending into Appellants' lot, as the proposal was to investigate three lots, not one. Respondent signed a contract to investigate all three lots. But then Respondent allowed its report to The Cliffs to mysteriously remain silent as to those conditions extending into Appellants' lot in violation of statute, regulation and industry standard. That is important because the evidence established that Respondent knew the conditions existed on Appellants' lot because it proposed to investigate and signed a contract with The Cliffs to investigate three lots, which included Appellants' lot. Limiting the investigation and report to Lot 31 was important to The Cliffs because Respondent issued its report at the exact time Appellants were contracting with Respondent's customer (The Cliffs) to buy the adjacent and implicated Lot 32 for over \$1 million. Respondent's silence in this report allowed The Cliffs to sell the lot to Appellants without disclosing Respondent's observations about the conditions and recommendations Respondent made about the condition that also existed on Lot 32. Had Respondent included that the condition observed also extended into Appellants' lot, it would have fulfilled its duty to fully describe the condition it observed and, more importantly, would not have allowed its client to overrule its judgment which is required of engineers (SC R. 49-301 and 303). Respondent allowed its client to overrule its judgment of an investigation of all three lots, causing damage to Appellants.

The Opinion ignores all of the testimony of those professionals who engage in the practice of engineering in South Carolina with regard to their duty. Who better to know the duties and who they owed them to than the practitioner themselves? All of the engineers agreed that geological conditions do not stop at property lines, which is why they are required to fully describe the conditions they observe. This is critical in the analysis. Respondent's own expert, the renowned N.C. State Professor Borden, specifically answered the question that if an engineer observes a geological condition extending into an adjacent land owner, that engineer has an affirmative duty to speak out. These professionals understand this obligation exists (and it is confirmed by the unique statute and regulations governing an engineer's professional practice). Yet, the Appellate Court does not address this issue on appeal at all. Appellants' expert clearly testified that when Respondent saw a condition that extended into Appellants' lot, Respondent was required to disclose that in their report to The Cliffs and not ignore it, but Respondent did not do this.

Even Respondent's own expert put to rest the question whether professional engineers owed a duty to adjacent land owners when he testified if an engineer sees a condition, "we believe endangers life, safety or property, even if we are not contractually involved with an individual, we do have a professional duty to bring that to someone's attention." (R. 761). Respondent's expert recognized the duty exists.

What better method of determining the duties owed in a profession but from the ones involved in practicing in that profession. And Dr. Borden was not the only one clear in this understanding. The S.C. Regulations adopt this approach to prohibit clients from putting blinders on engineers and then allowing engineers to passively escape liability.

They have an affirmative duty to speak. “If the judgment of the engineer or surveyor is overruled under circumstances where the safety, health, and welfare of the public are endangered, he shall inform his employer of the possible consequences and notify other proper authority of the situation, as may be appropriate.” S.C. Code of Regulations R. 49-301(b). There are clearly material facts at issue as to whether Respondent breached its obligation that directly impacted Appellants.

Respondent’s duty is particularly acute in this case, which arises in the residential construction context. Respondent was hired by the Developer to opine about the buildability of the lots Developer was selling, which could only be used for residential construction. Our Legislature, but more importantly this Court, recognizes the realm of residential construction is judged with a different standard to protect homeowners like Appellants¹.

Because Respondent was hired to opine as to the buildability of the lots that can only be used for residential construction, this Court should apply the same standard as Kennedy v. Columbia Lumber & Mfg. Co. and Beachwalk Villas Condominium Assoc., Inc. v. Martin in finding a special relationship existed as noted in Tommy Griffin. Importantly, whether the special relationship existed “depends on the facts and circumstances of each case.” Tommy Griffin, 463 S.E.2d at 89.

In accordance with Tommy L. Griffin Plumbing and Heating Co., Cullum Mechanical Construction, Inc., Beachwalk Villas Condominium Assoc., Inc., Kennedy, Booz-Allen & Hamilton, Inc., Georgetown Steel Corp., Terlinde, Sapp, and Ross Dress

¹ While Appellants have yet to build a house, that was all they could do with the lot since it was restricted residential. It was also their intent to build on it when they bought it.

For Less, Inc., a special relationship between Appellants and Respondent clearly exists under these facts and circumstances and Respondent owed Appellants a duty to accurately diagnose the slope failure, a duty to fully describe the conditions in which it observed on Appellants' lot, and a duty to disclose all relevant information in its report in regard to Appellants' lot. Tommy L. Griffin Plumbing and Heating Co., 463 S.E.2d 85; Cullum Mechanical Construction, Inc., 544 S.E.2d 838, 842; Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989); State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986); Georgetown Steel Corp v. Law Engineering Testing Co., 7 F.3rd 223 (4th Cir. 1993); Terlinde, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980); Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Sapp v. Ford Motor Co., 687 S.E.2d 47, 386 S.C. 143 (S.C. 2009); Ross Dress For Less, Inc. v. Lauth Construction Group, LLC (unreported) 2012 WL 2572042 (D.S.C 2012).

This, at a minimum, created a material issue of fact such that summary judgment should have been denied, and yet, the Opinion ignores this argument too.

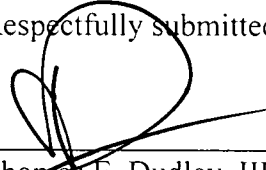
The remaining issues on appeal, except the punitive damage issue, were also ignored by the Court and should at a minimum be addressed and legal analysis applied.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court grant a rehearing.

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Respectfully submitted,



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September 1st, 2015

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

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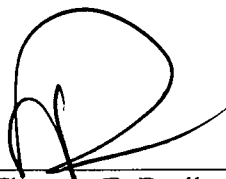
Of Whom

S&ME, Inc. is Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellants' Petition for Rehearing 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 1st day of September, 2015, addressed as follows:

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September 1, 2015

Via Overnight Delivery

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Kevin McCarthy, et al. vs. S&ME, Inc., et al.
Appellate Case No.: 2013-001843

To Whom It May Concern:

Please find enclosed an original and six (6) copies of Appellants' Petition for Rehearing with Proof of Service in the above referenced matter, as well as our check in the sum of \$25.00 as and for the filing fee.

By copy of this letter, we are serving same upon counsel for Respondent. Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



Helen Cotrone
Legal Assistant

Enclosures

cc: Stephanie H. Burton
Kevin & Courtney R. McCarthy
(Both via 1st Class Mail)

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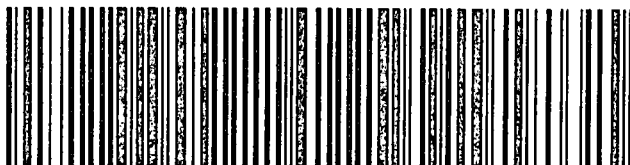
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