THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-28-0250

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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ARGUMENT

I. The foreign jurisdiction cases cited by Respondents are distinguishable from the case on appeal.

The Respondents cite in their brief to several cases from other jurisdictions in support of the proposition that vendors are immune from liability to subvendees for negligent nondisclosure of concealed land defects. Each of these cases is distinguishable from the case at hand based on the facts and applicable South Carolina law.

In Christy v. Glass, 415 Mich. 684, 329 N.W.2d 748 (1982), the court held that a vendor of land was not liable to residential subvendees based on his failure to disclose land defects to the original vendee. However, the court reached this result based on the important fact that the vendee knew about the defect before transferring the property to the plaintiff-subvendees. Id. at 696, 329 N.W.2d at 753. As the court explained,

> [h]ere Glass' vendee, Prestige, knew of the water problems. Plaintiffs' relief as subvendees, if any, is therefore limited to Prestige - they have no recourse against Glass since his vendee knew of the water problems, and it was Prestige who had the duty to inform the plaintiffs of the problems.

Id. This holding is based on facts clearly distinguishable from those in the case at hand, in which the original vendee, Dan-Sa, did not have knowledge of the buried debris.

While the court in Christy also went on to make general statements regarding vendors having no duty to subvendees, these statements went beyond the actual holding of the case and were therefore dicta. Furthermore, the court also made it clear that its analysis was based on the fact that under Michigan

law, subject to certain exceptions, "[c]aveat emptor prevails in land sales." Id. at 694, 329 N.W.2d at 752. Under South Carolina law, on the other hand, "the doctrine of *caveat emptor* is . . . inapplicable in actions based upon negligent or reckless non-disclosure of land defects." Pruitt v. Morrow, 288 S.C. 298, 301, 342 S.E.2d 400, 401 (1986).

The opinion in Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990), involving a subvendee's claim against the original vendor for nondisclosure of environmental contamination, is distinguishable for similar reasons. While the court did note that there was no vendor-vendee relationship between the parties, it held that "[m]ost importantly, any attempt by WHRT to state a claim [for undisclosed hidden defects] would ultimately fail because the undisputed facts are that an environmental assessment was conducted prior to the sale and that WHRT therefore knew of the contaminated condition of the property when the sale was consummated." Id. at 101. In the case at hand, the Appellants had no idea about the buried debris on their property until well after they purchased it.

The case of DeAravjo v. Walker, 589 So. 2d 1292 (Ala. 1991), is also distinguishable. In that case, the plaintiff-subvendees asserted claims for fraud and breach of implied covenant of fitness against the original vendor, who had sold the property with storm water drainage fixtures and other basic infrastructure to a homebuilder-vendee without disclosing the propensity of the otherwise unimproved lot to flood. Id. at 1293. The court noted that, unlike in the case on appeal here, there was no evidence in the record that the defendant-vendor

knew about the defective condition of the land. Id. The court held that the vendor had no liability to the subvendee because, under Alabama law, "the doctrine of caveat emptor applies with regard to the purchase of unimproved land." Id. The S.C. Supreme Court, on the other hand, has specifically rejected the argument that caveat emptor survives as a defense to a nondisclosure case where the land is undeveloped. Pruitt at 300, 342 S.E.2d at 401. While the DeAravjo opinion does also make brief reference to the lack of privity between the vendee and subvendee, the opinion does not make clear whether the court considered this relevant to the fraud claim or the implied covenant claim. DeAravjo at 1294. Accordingly, that language in the opinion is not instructive in the case at hand.

II. Vendors are liable for nondisclosure of concealed land defects even where there is no hazard to human safety.

Contrary to the assertion in the Respondents' Brief to the contrary, (Resp. Br. p. 19), Appellants' counsel argued at the summary judgment hearing, in response to the circuit court's question regarding why a non-hazardous land defect would require disclosure, that under Pruitt v. Morrow, 288 S.C. 298, 342 S.E.2d 400 (1986), all material concealed land defects must be disclosed to a vendee. (Tr. p. 28, ln. 18 through p. 29, ln. 2, p. 30, ln. 16 through p. 31, ln. 8).

As provided in the discussion of relevant authorities in the Appellants' Brief (App. Br. p. 12-13, 19-20), South Carolina law recognizes liability for nondisclosure of land defects without regard to whether a defect involves a hazard to human safety. *See* Pruitt at 300, 342 S.E.2d at 401; Lawson v. Citizens & S. Nat. Bank of S. C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972); Restatement (Second) of Torts § 311, 353 (1965). The S.C. Supreme Court has

specifically cited to the Restatement provision relied upon by the Respondents', Section 353, without restricting liability to hazardous conditions. Pruitt at 301, 342 S.E.2d at 401.

III. Appellants' arguments are preserved for appeal.

The Appellants' arguments were all properly preserved for appeal. The assertions in the Respondents' Brief to the contrary are incorrect. The S.C. Supreme Court has acknowledged "the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (holding reference at the trial court level to federal policy in favor of arbitration was insufficient to preserve the specific issue of preemption by the Federal Arbitration Act). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S. Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

"[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron at 466, 719 S.E.2d at 642. Similarly, an issue is not abandoned simply because a party "did not phrase its objection in the exact terms used in the issues on appeal", so long as the party "provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue." First Carolina Corp. at 302, 641 S.E.2d at 907.

As discussed in turn below, the purported issue preservation deficiencies argued in the Respondents' Brief certainly do not rise to the level of a party "keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

a. Restatement (Second) of Torts § 311 is additional persuasive authority relevant to a preserved issue.

First, the Respondents were not required to refer specifically to Restatement (Second) of Torts Section 311 in order to cite to this authority on appeal. (See Resp. Br. 12-13). At the summary judgment hearing, counsel for Appellants argued that the duty to disclose concealed land defects to a purchaser also extends to protect subsequent purchasers, (Tr. p. 30, ln. 23 through p. 31, ln. 8), but the circuit court ruled otherwise. (Order p. 7). On appeal, Appellants have merely cited to Section 311 as additional persuasive authority for the same proposition (App. Br. pp. 19-20). South Carolina's issue preservation rules do not preclude a party from referencing, nor the Court of Appeals from considering, additional authority relevant to a preserved issue.

b. Appellants properly preserved the argument that the buried debris extended under the home foundation.

Second, the issue of whether the field of buried debris extended under the home itself is preserved for appeal. (See Resp. Br. p. 16). In their pleadings, the Appellants alleged that "[t]he debris ran across the property and proceeded under the home and porch." (2nd Am. Compl. ¶ 16). Likewise, at the summary

judgment hearing the Appellants submitted evidence that the debris extended under the home, (Rabon Depo. p.23, ln. 14-17; p.107, ln. 8-11; see App. Br. p. 10), submitted an expert affidavit analyzing the significance of the extension of the debris under the home foundation, (Baer Aff. ¶ 4(m), 5; see App. Br. p. 10), and argued that the home foundation footings were poured over the area where the debris had been buried. (Tr. p. 23, ln. 14-17, 24 through p. 24, ln. 3) ("[E]ven though [the contractors] were also specifically directed by Mr. Oman as to where the footings were going to be poured, Mr. Oman did not tell them that the debris was there."). Counsel for Appellants clearly argued to the circuit court that "[t]he material was largely adjacent to the house, but it actually extended underneath a retaining wall and also underneath where the foundation was." (Tr. p. 4, ln. 9-11). Accordingly, this issue is preserved for appellate review.

c. Appellants properly preserved the argument that the nondisclosed property defect presents a safety hazard.

Third, the issue of whether the buried debris presented a potential hazard for human safety, while not a required element of the Appellants' claims, is also preserved for appeal. (See Resp. Br. p. 20-21). While it is true that counsel for Appellants did not specifically use the phrase "safety hazard" at the summary judgment hearing, such specific wording is not required for issue preservation. First Carolina Corp. 372 S.C. at 302, 641 S.E.2d at 907. Appellants' counsel argued to the trial court that as a result of the buried debris the home foundation had to be reinforced "so it wouldn't topple over," (Tr. p. 31, ln. 23 through p. 32, ln. 1), and that according to Appellants' expert witness the buried debris under the foundation of the elevated porch "will decay over time and cause a big hole

over time." (Tr. p. 25, ln. 15-17). These arguments presented the circuit court with issues of fact regarding the safety of a residential structure, and the safety hazard issue is accordingly preserved for appeal.

d. Appellants properly preserved the argument that Respondents proximately caused the claimed damages.

Fourth, Appellants' argument that the Respondents' nondisclosure of concealed land defects was the proximate cause of the claimed damages is also preserved for appeal. (See Resp. Br. p. 21-22). The Appellants' alleged in their pleadings that the Respondents' negligent nondisclosure was the proximate cause of their damages. (2nd Am. Compl. ¶ 35, 36). At the hearing, with the benefit of evidence obtained during discovery, Appellant's counsel argued that "the spec home builder had no idea [the debris] was there, and then the spec home builder built the house," (Tr. p. 25, ln. 5-6), that the subsequent intermediate purchasers did not know about the debris, (Tr. p. 25, ln. 7-11), that the Appellants' damages were caused by the fact that the home and porch were built prior to removal of the debris, (Tr. p. 4, ln. 12-16; p. 25, ln. 12-17; p. 31, ln. 23 through p. 32, ln. 1), and that that the Respondents' duty to disclose extended to protect subsequent purchasers. (Tr. p. 31, ln. 5-8). Respondents' issue preservation argument seems to rely on an implicit presumption that their vendee, Dan-Sa, would have built the home and porch over buried debris even it had knowledge of the debris. There is no legal basis for this presumption, and the record in fact contains evidence that Dan-Sa would not have knowingly built on top of the debris. (Gibson Depo. p.80, ln. 8-22; p.81, ln. 2-14). Accordingly, Appellants' arguments regarding causation are preserved for appeal.

e. The building permit disclosure form was part of the building permit which was specifically argued as a source of Respondents' duty.

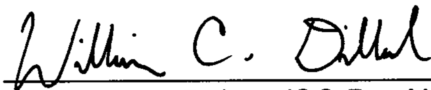
Fifth, the Appellants' reference to a building permit disclosure form putting Respondents' on notice of their potential liability to subsequent purchasers is not barred on issue preservation grounds. At the summary judgment hearing, Appellants' counsel argued that Respondents' duty to exercise reasonable care derived in part from pulling the building permit. (Tr. p. 25, ln. 23 through p. 26, ln. 7). The disclosure form referred to in Appellants' Brief (p. 24) was attached to the building permit and signed by the Respondents in order to obtain the permit, (Reynolds Depo. Def. Ex. 1 p.4), and was accordingly part of the issue argued to and adversely ruled upon by the circuit court. (Order p. 18). *See* Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (argument that defendant owed duty based on former attorney-client relationship was preserved where the circuit court ruling stated generally that defendant "owed no duty or obligation").

Additionally, while the Code section referred to in the disclosure form, S.C. Code Ann. § 40-59-260(C) (1976, as amended), is not indispensable to determination of the issues on appeal, it is worth noting that, contrary to the assertion in the Repondents' Brief (p. 25), the statute's presumption of an intention to sell a newly constructed home applies to "[any] action brought under" Title 40, Chapter 59 of the Code, which includes private actions for residential construction defects. *See* § 40-59-820 (1976, as amended).

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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PROOF OF SERVICE

I certify that I have served the *Initial Reply Brief of Appellants* and *Amended 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 August 31, 2015, addressed to their attorney of record, Catharine Garbee Griffin, Post Office Box 8057, Columbia, South Carolina 29202.

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