THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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.

Of Which

S&ME, Inc., is.....Respondent.

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING

Respondent S&ME, Inc. submits its return to the Appellants' Petition for Rehearing.

Argument

I. Appellants Improperly Argue that the Court's August 19, 2015 Decision Lacks Legal Analysis

Appellants incorrectly argue that this Court's August 19, 2015 decision is devoid of legal analysis or explanation. Contrary to Appellants' assertion, the decision complies fully with the South Carolina Appellate Court Rules and provides all required analysis and

explanation. Rule 220(b) provides that this Court must address in writing and provide an explanation for "every point distinctly stated in the case which is necessary to the decision of the appeal." S.C. R. App. P. 220(b). The South Carolina Supreme Court has specifically held that the following format is sufficient and that this Court may use this and similar formats:

> Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground at trial and another on appeal); Issue 2: S.C. Code Ann. §19-5-510 (1985); Kershaw County DSS v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); Peagler v. Atlanta Coast Line Railway Co., 234 S.C. 140, 107 S.E.2d 15 (1959).

In re Memorandum Decisions by Court of Appeals, 322 S.C. 54, 54-55, 471 S.E.2d 456, 457 (1993). The Court in this case used the format described in In re Memorandum Decisions by Court of Appeals and, thus, the decision is sufficient and Appellants are not entitled to a rehearing.

II. Appellants Improperly Argue that the Court Set Forth No Basis for Affirming the Denial of the Motion to Amend

Appellants also erroneously argue that this Court's August 19, 2015 decision sets forth no basis for affirming the denial of the motion to amend. This Court clearly affirmed the trial court's decision to deny the motion to amend and clearly provided its basis for doing so as follows:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: 1. As to whether the circuit court erred in denying the McCarthy's motion to amend: Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (finding the circuit court properly denied party's motion to add a cause of action to its complaint because amendment did not occur until three years after filing of complaint and undertaking of extensive discovery, particularly when there were no significant factual developments that warranted the untimely amendment); Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) rev'd on other grounds, 401 S.C. 1, 736 S.E.2d 242 (2012) ("Although

> leave to amend should generally be 'freely given,' this court has held that it may be denied where the proposed amendment would be futile."); Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) ("The prejudice that Rule 15[, SCRCP] envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." (citing Tanner v. Florence Cnty. Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999))); Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) ("Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action."); Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986) (finding prejudice can result when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts not already considered by opposition).

This Court properly provided the legal authorities and basis for its decision to affirm the trial court's denial of the motion to amend in the form approved by the South Carolina Supreme Court and Appellants are not entitled to a rehearing.

III. Appellants Improperly Argue that the Court Failed to Address Appellants' Third Issue on Appeal

Appellants argue that they are entitled to a rehearing because this Court's August 19, 2015 decision does not address findings of fact made by the trial court. Specifically, Appellants take issue with the following findings of fact made by the trial court:

> 6. On June 22, 2005, S&ME's geotechnical engineers Walker Birdsong and Michael Revis sent a proposal to Don Nickell, Vice President of Planning Engineering and Development for The Cliffs Communities, Inc. to perform a geotechnical evaluation of three unidentified lots. (Pls.' Mem. Opp. Ex. F).
>
> 7. Birdsong and Nickell subsequently agreed that S&ME's geotechnical evaluation services would be limited to evaluation of Lot 31 at the Cliffs at Keowee Falls South. (Birdsong Aff. ¶ 2). Thus, S&ME never investigated geotechnical conditions at Lot 32. (Birdsong Aff. ¶ 3).
>
> 8. On June 27, 2005, Don Nickell executed an Agreement for Services for S&ME's services to be performed at Lot 31. (Pls. Mot. Opp. Ex. H.) The Agreement for Services contains the following terms:

> 7. **Reports:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects....
>
> Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization....
>
> 9. **Confidentiality:** Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services to Client's authorized Representative(s) and to persons designated by the authorized representative to receive such information.

(Appellants' Brf. at 11-12; R. pp. 8-9). Appellants are simply asking this Court to reconsider prior arguments and Appellants' Petition for Rehearing should be denied. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) ("The purpose of a petition for rehearing [is not] to have the case tried in the appellate court a second time."); Arnold v. Carolina Power & Light Co., 168 S.C. 163, 173, 167 S.E. 234, 238 (1933) ("Many" petitions for rehearing "are filed just for delay" and "[u]sually [the appellate court] dismiss[es]" them "for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of.") Further, "to prevail on a petition for rehearing, appellants must

demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, ___ (2001).

Appellants' Petition for Rehearing asserts in conclusory manner that this Court did not address the findings of fact made by the trial court. However, Appellants fail to present any evidence that this Court overlooked or misapprehended their arguments regarding the factual findings in making its decision. This Court affirmed the trial court's entry of summary judgment for Respondent S&ME and Appellants are not entitled to have their "case tried in the appellate court a second time."

IV. Appellants Improperly Argue that the Court Failed to Address the Fourth, Fifth, Sixth, Seventh, and Eighth Issues on Appeal

Appellants incorrectly assert that this Court failed to address Appellants' fourth and fifth issues on appeal:

> IV. Pursuant to South Carolina Code Ann. § 40-22-20(14), South Carolina Code of Regulations § 49-301 and the relevant industry standards, the Court erred in failing to find that Respondent owed a duty of care to Appellants.
>
> V. By failing to view the evidence and failing to draw the inferences therefrom in a light most favorable to Appellants, the Court erred in granting Respondent's Motion for Summary Judgment: A) Viewing the evidence and inferences therefrom in a light most favorable to Appellants, Respondent owed a duty of care to Appellants; B) Viewing the evidence and inferences therefrom in a light most favorable to Appellants, a reasonable inference can be made that Respondent's negligence was the proximate cause of Appellants' damages.

(Appellants' Brf. at 1). Contrary to Appellants' belief, paragraph 2 of this Court's August 19, 2015 decision clearly addresses whether Respondent S&ME owed a legal duty to Appellants. In affirming the trial court's decision, this Court cited the following:

- "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the Plaintiff. Without a duty, there is no actionable negligence." Oblachinski v. Reynolds, 391 S.C. 557, 561, 706 S.E.2d 844, 845-46 (2011).

- "[T]he exception announced in Kennedy [v. Columbia Lumber & Mfg. Co.], 299 S.C. 335, 284 S.E.2d 730 (1989)] is a very narrow one, applicable only in the residential real estate construction context." Sapp v. Ford Motor Co., 386 S.C. 143, 150, 687 S.E.2d 47, 51 (2009).

- "An affirmative legal duty [of care] . . . may be created by statute, contract relationship, status, property interest, or some other special circumstance." Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991).

- "[A] licensing statute will not ordinarily provide a basis for a negligence per se action." Hurst v. Sandy, 329 S.C. 471, 480, 494 S.E.2d 847, 851 (Ct. App. 1997).

The authority cited by this Court clearly addressed each of Appellants' arguments that Respondent S&ME owed them a duty created by statute or otherwise. Appellants simply seek reconsideration because they dislike the Court's decision, not because the Court failed to address their arguments.

Likewise, Appellants incorrectly assert that this Court failed to address Appellants' sixth, seventh, and eighth issues on appeal, which are:

> VI. Pursuant to the Court's extension of the Kennedy holding, the Court err [sic] in finding that Appellants' claims against Respondent were barred by the economic loss rule.
>
> VII. The Court erred in finding that Appellants' were not entitled to recover the purchase price of Appellants' lot.
>
> VIII. The Court erred in finding that Appellants' were not entitled to an award of punitive damages against Respondent.

(Appellants' Brf. at 1). Contrary to Appellants' assertion, this Court unambiguously addressed punitive damages:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: 3. As to whether the circuit court erred in finding the McCarthy's were not entitled to an award of punitive damages against respondent: Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996) (explaining that punitive damages may only be awarded where the plaintiff proves by clear

and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights); Cook v. Atl. Coast Line R.R. Co., 183 S.C. 279, 190 S.E. 923, 925 (1937) (finding that there must be an award of actual or nominal damages for a verdict of punitive damages to be supported).

As discussed above, this Court need only address issues necessary to the decision on appeal. Having found that the trial court correctly concluded that no duty existed, there is no need to address damages. Accordingly, Appellants' Petition for Rehearing should be denied.

Conclusion

In conclusion, there are no grounds for a rehearing on the Court's August 19, 2015 decision, which does not overlook any material fact and fully comports with South Carolina law.

September 14, 2015
Spartanburg, South Carolina

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, South Carolina
29302
(864) 327-5000

Attorneys for Respondent
S&ME, Inc.

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APPEAL FROM GREENVILLE COUNTY
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Clifton Newman, Circuit Court Judge

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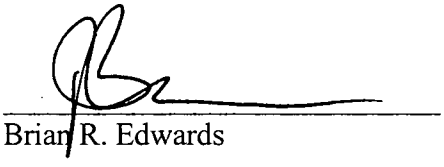
Of Which

S&ME, Inc., is.....Respondent.

PROOF OF SERVICE

The undersigned, Brian R. Edwards, certifies that he is an employee of Gibbes Burton, LLC and on the 14th day of September 2015, he served a copy of the Respondent's Return to Appellants' Petition for Rehearing by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed as follows:

Thomas E. Dudley, III
Townes Boyd Johnson, III
Kenison, Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, SC 29601



September 14, 2015

Brian R. Edwards

Stephanie H. Burton
sburton@gibbesburton.com

GIBBES BURTON gb LLC Attorneys & Counselors

RECEIVED
SEP 16 2015
SC Court of Appeals

September 14, 2015

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Kevin McCarthy and Courtney E. McCarthy v. Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC d/b/a The Cliff at Keowee Falls South, Cliffs Real Estate, Inc., The Cliffs Golf and Country Club, Inc., and S&ME, Inc.
Appellate Case No.: 2013-001843

Dear Ms. Kitchings:

We are enclosing for filing the original and six copies of the following:

1. Respondent's Return to Appellants' Petition for Rehearing; and

2. Our Certificate of Service.

We would appreciate you filing these papers and returning clocked copies to us in the enclosed envelope.

With kind regards,

Yours very truly,

GIBBES BURTON, LLC

Stephanie H. Burton

SHB/bre
Enclosures

308 East Saint John Street
Spartanburg, South Carolina 29302
Telephone 864.327.5000 • Facsimile 864.342.6884
www.gibbesburton.com

GIBBES BURTON, LLC
308 E. ST. JOHN STREET
SPARTANBURG, SC 29302

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Clerk of South Carolina Court Appeals
P.O. Box 11629
Columbia, SC 29211