

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2015-000589

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SC Court of Appeals

Jack R. Harrell, Jr. and Tina W. Harrell Appellants,

v.

Keowee Falls Investment Group, LLC, The Cliffs Communities,
LLC and S&ME, Inc. , Defendants

Of whom Keowee Falls Investment Group is the.....Respondent.

INITIAL BRIEF OF APPELLANT

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Statements of Issues on Appeal

- I. Did the trial court err in granting Keowee Falls Investment Group (“KFIG”) directed verdict on Harrells’ breach of contract and implied covenant of good faith and fair dealing causes of action?

Statement of the Case

On August 8, 2011, Jack and Tina Harrell (“Harrell”) filed their Complaint (R. ___, Complaint) concerning damage done to their home and lot from active slope failure. Harrell alleged breach of contract, implied covenant of good faith and fair dealing, negligence, negligence *per se* and negligent misrepresentation against Keowee Falls Investment Group (“KFIG”), and The Cliffs Communities, LLC. Harrell alleged negligence and negligent misrepresentation against S&ME, Inc. On September 23, 2011, KFIG and The Cliffs Communities answered and requested a jury trial.

The case was tried before the Honorable Clifton Newman in a two-week trial on February 3-14, 2014.¹ KFIG and The Cliffs Communities moved for directed verdict for all causes of action. The trial court dismissed The Cliffs Communities (R. ___, Tr. p. 875: 5-6) and dismissed all causes of action against KFIG except negligent misrepresentation. (R. ___, Tr. p. 901: 6-8). On February 14, 2014, the jury returned a verdict in favor of KFIG. On February 24, 2014, Harrell submitted his motion for a new trial pursuant to Rules 50 and 59, SCRC. (R. ___, Harrell Motion for New Trial). The trial court denied the motion in its Order dated February 10, 2015. (R. ___ Order of the Honorable Clifton Newman dated February 10, 2015. This appeal follows.

¹ There was a two-day delay during the trial due to inclement weather.

Statement of Facts

In July 2008, Jack and Tina Harrell signed a contract to purchase Lot 31, Jasmine Cove in the Cliffs at Keowee Falls South, a development on Lake Keowee in Oconee County. (R. ____, Plaintiffs' Ex. 1, Harrell Contract). Cliffs Communities, LLC ("The Cliffs"), a subsidiary of Respondent Keowee Falls Investment Group ("KFIG"), developed Keowee Falls South. The Harrells, who reside in Lakeland, Florida, purchased the lot with the intent to build a vacation home. (R. ____, Tr., pgs. 136:9 – 137: 2, Testimony of Jack Harrell). They contracted with Resort Custom Homes to build their home. In December of 2009, employees of Resort Custom Homes observed and reported damage to the home consisting of a crack in the concrete basement slab, separation of the outside patio slab from the foundation, and a support column for the deck above the patio that was visibly out of plumb. Resort Custom Homes met with representatives from Defendant S&ME, Inc. ("S&ME"), The Cliffs, and other subcontractors to discuss the problem. Based on recommendations in the S&ME February 12, 2010 report (R. ____ Plaintiffs' Trial Ex. 29), a concrete bond beam and helical piers were installed to fix the problem and the house was subsequently completed.

What was not known at the time of the discovery of the damage, except by KFIG, was that this property should never have been sold because Lot 31 is subject to an active slope failure. The Harrells also did not know that KFIG previously sold this same lot in February 2005, a sale subsequently rescinded when the buyer's engineering firm, Alpha Environmental Sciences, Inc. ("Alpha Environmental") concluded, "we strongly recommend that the building lot not be utilized for residential construction. A strong

potential exists that further movement may occur along the original slope failure plane.” (R. ___ Plaintiffs’ Trial Ex. 12, Alpha Environmental Report.) Unfortunately, KFIG ignored these warnings, put profits over principle, and three years later, resold the lot to the Harrells at a higher price. Instead of the dream home they envisioned, the Harrells were left with a “moving” property which could not even be listed with a broker, much less sold. (R. ___, Tr. pgs 858: 18 – 859: 3, testimony of Justin Winter). Further, Richard Kapp, P.E., testified that in his professional opinion the house should no longer be lived in until such time as it is stabilized. (R. ___, Tr. p. 655: 15-25, Testimony of Richard Kapp).

When Ross Kester, a salesman for KFIG/Cliffs, showed Jack and Tina Harrell Lot 31, Jasmine Cove, the Harrells liked the lot because it was a shorefront lot facing an island that would remain undeveloped. (R. ___, Tr. p. 139: 7-12, Testimony of Jack Harrell) Even more attractive was the fact that the lot was relatively flat compared to other Cliffs lots, which would enable the Harrells to have a backyard for future grandchildren. (R. ___, Tr. p. 139: 13-17, Testimony of Jack Harrell). Jack Harrell noticed that the vegetation on Lot 31 was different than what he had seen on other lots. Harrell noticed that the other lots had native vegetation, but Lot 31 had erosion control grass. Harrell also noticed a walkway to the lake and riprap at the shorefront. (R. ___, Tr. pgs. 139:18- 140: 2, Testimony of Jack Harrell). Mr. Harrell asked Ross Kester about the difference in vegetation and Mr. Kester told him The Cliffs had done work on the lot. Mr. Harrell testified at trial that he literally turned to walk away when Mr. Kester informed him that The Cliffs’ engineer did test borings, which did not meet standards. According to Kester, The Cliffs then came in and made the lot suitable for residential

construction. (R. ___, Tr. 140: 3- 141: 2 Testimony of Jack Harrell). Reassured by Mr. Kester's representations, Mr. Harrell agreed to purchase Lot 31 for the price of \$1.6 M. (R. ___, Tr. pgs. 141:11 – 142: 3, Testimony of Jack Harrell).

The Harrells received from KFIG/Cliffs three important documents concerning the property. (R. ___ Tr. p. 142: 16-22, Testimony of Jack Harrell). One document was the HUD report prepared by KFIG/Cliffs. (R. ___, Plaintiffs' Ex. 2, HUD Report.) The HUD report warned of certain lots that required 'special construction techniques', but Lot 31, Jasmine Cove was not listed as one of the lots. (R. ___, Plaintiffs' Ex. 2, HUD Report, page 24). The second document was the July 2005 report prepared by S&ME for The Cliffs in which S&ME stated the lot was suitable to build upon if the lot were prepared with undercut and fill or if rammed aggregate piers were used. (R. __ Plaintiffs' Ex. 4, Jul. 18, 2005 S&ME Report.) The third document was the June 3, 2008 report prepared by S&ME setting forth how it observed KFIG/ Cliffs workers install a building pad on Lot 31. (R. ___ Plaintiffs' Ex. 5, S&ME Jun. 3, 2008 Report.) The June 3, 2008 report does not warn that any buildings erected on Lot 31 must be built only on the building pad.

Because KFIG/Cliffs was the seller, the Harrells believed that they were the first purchasers of Lot 31. That was not the case. Three years prior to the Harrell purchase, Richard Rockwell purchased Lot 31. Mr. Rockwell hired Paragon Builders to build his home on the lot and Paragon contacted Alpha Environmental to investigate the lot. (R. ___, Plaintiffs' Ex. 10, May 11, 2005 letter from Alpha Environmental to Larry Hutchinson).

On June 2, 2005, Alpha Environmental submitted its report to Paragon Builders in which it stated, "we strongly recommend that the building lot not be utilized for residential construction," and went on to say, "A strong potential exists that further movement may occur along the original slope failure plane." (R. ___, Plaintiffs' Trial Ex. 12, Alpha Environmental Report) Alpha also noted in its report that the conditions present on Lot 31 were also present on the lots 30 and 32. On or about June 6, 2005, Don Nickell, vice-president with The Cliffs, received copies of the Alpha Environmental report. (R. ___, Tr. p. 943: 15-18, Testimony of Don Nickell). KFIG/Cliffs never disclosed the Alpha Environmental report to the Harrells. (R. ___ Tr. pgs. 186:20-187: 2, Testimony of Jack Harrell).

KFIG/Cliffs contracted with S&ME for the report dated July 18, 2005 in which S&ME's engineer Michael Revis opined that Lot 31 could be used for residential building if rammed aggregate piers were used or under cut and replacement was performed. (R. ___ Plaintiffs' trial exhibit 4, S&ME July 18, 2005 report). In June 2008, KFIG/Cliffs installed a building pad on Lot 31 in which S&ME performed soil tests. (R. ___ Plaintiffs' trial ex. 5, S&ME June 2008 report). KFIG/Cliffs installed the building pad prior to the Harrells' purchase.

Unaware of the actual conditions of Lot 31, the Harrells contracted with Resort Custom Homes to design and build their home. Jack Harrell passed on to Resort Custom Homes the S&ME Engineering reports he received when he signed the purchase contract. (R. ___ Tr. p. 150: 20-25 and R. ___ Tr. pgs. 151: 21 – p. 152: 10, Testimony of Jack Harrell). Resort Custom Homes consulted with S&ME to see if the home could be partially built off the pad and S&ME provided a report with recommendations of how

that could be accomplished. (R. ____, Plaintiffs' trial ex. 25, S&ME recommendations to Resort Custom Homes).

In the fall of 2009, Resort Custom Homes placed the foundation walls and concrete slabs for the Harrell home. Throughout the fall of 2009 the slab appeared to be performing satisfactorily, however, in December 2009 separation cracks appeared in the slabs. In the same timeframe in which the slab cracks were discovered, a water main burst in the cul-de-sac in which the Harrell home is located. A crack developed in the cul-de-sac and extended down the drive of Lot 29, two lots over from the Harrell lot. The owners of Lot 29 contracted with Bunnell-Lammons Engineering ("BLE") to investigate the damage and BLE opined that scarp across lots 29-31 showed the existence of active slope failure and that further tests coordinated with the developer needed to be performed. (R. ____, Plaintiffs' trial ex. 15, BLE report of March 1, 2010). Resort Custom Homes met with representatives of KFIG/Cliffs and S&ME to discuss the cause of the cracks and how the house could be stabilized. The result was that helical piers and a concrete beam were installed in order to stabilize the house. (R. ____ Tr. p. 159: 13-19, Testimony of Jack Harrell).

In August 2010, Lucas Anthony, President of KFIG, called Jack Harrell and stated that while his engineers told him there was no movement in the lot, he wanted to make sure and Anthony asked Harrell for permission to install two slope inclinometers on Lot 31. (R. ____ Tr. p. 160:24-162:6, Testimony of Jack Harrell). BLE, now working for KFIG/Cliffs, installed a total of six slope inclinometers. Two were installed on Lot 31 and two each on the lots on either side. BLE reports for September and October 2010 showed movement still occurring on all of the lots. (R. ____, Plaintiffs' Exhibits 19 and

20, BLE reports of September and October 2010). William Mathews, engineer with BLE, testified at trial that there is slope failure at Lot 31. (R. ___p. 350: 16-19, testimony of William Mathews).

In spring 2010, Matt Vogt with Resort Custom Homes met with representatives of Wurster Engineering to see if a repair could be made to Lot 31. Representatives from Wurster informed Vogt that it would need \$30-40 thousand dollars just to see if a repair could be made. Vogt forwarded an email from Wurster to KFIG/Cliffs because he thought KFIG/Cliffs was still interested in making things right as Lucas Anthony had said. (R. ___, Tr. 594: 5 – 595: 19, testimony of Matt Vogt). Neither Vogt or the Harrells received any indication that KFIG/Cliffs was interested in pursuing the Wurster proposal.

On January 10, 2011, counsel for the Harrells presented a demand letter to Lucas Anthony of KFIG, demanding reimbursement for damages the Harrells have incurred as a result of the active slope failure. (R. ___Plaintiffs' trial ex. 7.) KFIG/Cliffs's liability carrier in May 2011 denied the claim. The Harrells were left with no alternative but to file suit.

Standard of Review

On review of an order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. A jury issue exists where the evidence is susceptible of more than one reasonable inference. *Botchie v. O'Dowd*, 318 S.C. 130, 456 S.E.2d 403 (1995). In reviewing a directed verdict, the appellate court must determine whether a verdict for the party opposing the motion would have been reasonably possible under the facts. The issue must be submitted to a jury whenever there is material evidence tending

to establish the issue in the mind of a reasonable juror. However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).

Argument

I. The trial court erred in granting Keowee Falls Investment Group (“KFIG”) directed verdict on Harrell’s breach of contract and implied covenant of good faith and fair dealing causes of action.

The trial court erred in granting KFIG’s directed verdict motion, finding that the “as-is” clause in the contract barred Harrell from any recovery. However, the “as-is” clause can be interpreted two ways. One way is that “as-is” means just that, as-is. The other way is that “as-is” in this contract means “as-is” incorporates the engineering reports and the HUD report to show that Lot 31 is suitable for building. These two interpretations show the contract is ambiguous. A contract is ambiguous when the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) *citing* 17A Am.Jur.2d Contracts § 338, at 345 (1991). Because the contract is ambiguous, the evidence should have been admitted to show intent of the parties. *Id.* Determination of the parties’ intent then becomes a question of fact for the jury. *Id.* A jury issue exists where the evidence is susceptible of more than one reasonable inference. *Botchie v. O’Dowd*, 318 S.C. 130, 132, 456 S.E.2d 403, 405 (1995).

A. Engineering statements were made part of the contract.

When Harrell signed the contract to purchase Lot 31, he received two engineering statements from Ross Kester, salesman for KFIG/Cliffs. (R. ___, Tr. p. 141: 16-22, Jack Harrell Testimony). Harrell identified the reports as the July 2005 report and the June 2008 report both prepared by S&ME. (R. ___, Tr. 149: 12-20 and R. ___ Tr. 151: 4-9, Jack Harrell Testimony). The contract refers to “engineering statement” on page 8 and underneath the reference Harrell placed his initials to show he had received the documents. (R. ___, Plaintiffs’ Ex. 1, Contract, page 8). KFIG pointed out that the contract only referenced “engineering statement”, but in its Answer it admitted in Answer paragraph 8 that the S&ME engineering reports had been attached to the contract. (R. ___, Answer of KFIG, paragraph 8). Further, Section 9.6(d) of the contract references “checked documents or instruments listed on Purchaser’s signature page below.”

To incorporate the terms of extrinsic material, a contract need not use “magic words.” *Stevens Aviation, Inc. v. DynCorp International LLC*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct. App. 2011) citing *Northrup Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1346 (Fed. Cir. 2008). However, the contract must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g. as background law or negotiating history). *Id.*

In the case of the Harrell contract with KFIG, KFIG itself knew exactly what engineering statements were referenced in the contract as seen by paragraph 8 of its Answer. Further, the contract in Section 9.6(d) references the engineering reports and on page 8 just above the signature area, Harrell had to place his initials to show he had

received the engineering reports. Clearly, the reports are considered a part of the contract, so much so that every effort is made to make sure the purchaser receives the reports. This is far from an acknowledgment of the document in the contract as contemplated in *Stevens*. The evidence on the record in the form of the contract language, KFIG's Answer, the S&ME reports and Jack Harrell's testimony show that the engineering reports were incorporated into the contract and were not merely acknowledged as a reference. If the engineering documents were merely referenced in the contract, there would have been no need for Harrell to initial the contract indicating he had received them.

B. HUD report also is incorporated into the contract.

The HUD report (R. ____, Plaintiffs' Trial Exhibit 2) is also incorporated into the contract. This is clearly stated in Section 3.1 on page 2. The HUD report is also referenced on page 8 of the contract in the same section in which the engineering reports are referenced. This is important because the HUD report sets forth in detail information on the conditions of the lots in Keowee Falls South and restrictions pertaining to the lots. The fact that the incorporated HUD report is among the documents provided to Harrell indicates that KFIG intended for both the HUD report and the S&ME engineering reports to be part of the contract.

C. "As-is" in the contract means that the lot is suitable for a residential structure, based on the engineering reports and the HUD report.

Section 9.3 of the contract states, "Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in AS-IS condition". KFIG argues that "as-is" means just as Lot 31 is found and that Harrell knew or should have known he was taking

a risk when he purchased the lot. KFIG wants it both ways and argues that “as-is” means Harrell took a risk in purchasing the lot as it is found, but also argues that the HUD report and the S&ME engineering reports served to put Harrell on notice that he needed to investigate further. KFIG’s own split argument shows the ambiguity in the contract. Due to the ambiguity, the jury should have deliberated on KFIG’s intent in including the documents in the contract and whether it was the parties’ intent that Harrell was on notice of problems with the lot or that in including the engineering reports and the HUD report, KFIG represented that all problems with the lot were resolved and “as-is” means the lot is suitable for a residential structure.

The S&ME engineering reports of 2005 and 2008, (R. ____, Plaintiffs’ Trial Exhibit 4 and R. ____, Plaintiffs’ Trial Exhibit 5), do not put any purchaser on notice of problems with the lot, but rather that the lot is suitable for a residential structure. The 2005 report states that a structure can be built on the lot if rammed aggregate piers are used or the technique of undercut and replacement is used. Interestingly, the report does not contain language that warns of any danger if these modifications are not used. The S&ME 2008 report states that S&ME observed KFIG/Cliffs personnel install a building pad and that S&ME performed soil tests on the building pad. Again, there is no warning that the purchaser must build only on the building pad. The fact that KFIG/Cliffs saw fit to install a building pad a month before the Harrells purchased the lot indicates KFIG had doubts about the lot being purchased “as-is” and sought to fix the lot. Both engineering reports serve to reassure the purchaser that the lot is fine. As Jack Harrell noted in his trial testimony, there is nothing in the S&ME engineering reports to indicate Lot 31 was unsuitable for building. (R. ____, Tr. p. 150: 1-14, Jack Harrell Testimony).

The HUD report also provides no warnings concerning Lot 31 or the Jasmine Cove area. On page 24 of the HUD report, KFIG listed lots in the High Ridge section and Keowee Towne section that might require “special construction techniques”, but there is no mention of the Jasmine Cove area. A purchaser could logically conclude that if his lot was not listed in this section, then his lot did not require any “special construction techniques”.

Page 24 of the HUD does contain a warning of how some lots in the mountainous subdivisions have a slope of 20% or more. Jack Harrell testified that he was not sure if the warning applied to his lot. (R. ___, Tr. p. 148: 1-10, Jack Harrell Testimony). Indeed, seeing as Lot 31 is lakefront property and the warning refers to mountainous subdivisions, there is nothing in the warning to put Harrell on notice.

Given that there is nothing in the contract documents including the engineering reports or the HUD report to put Harrell on notice of problems with Lot 31 and given that the overall tone of the contract documents is to reassure Harrell that Lot 31 was fixed, a logical interpretation is that the “as-is” clause means Lot 31 is suitable for a residential structure. Both the law and the facts of the case show that the contract is ambiguous and therefore should have gone to the jury. *Hawkins*, p. 592, 878.

D. Lot 31 is not suitable for a residential structure.

Despite KFIG’s representations in its engineering reports and the HUD report, the fact remains that Lot 31 is NOT suitable for a residential structure. Unbeknownst to Harrell at the time of purchase in 2008, Lot 31 had been found in 2005 to be unsuitable for a residential structure. Alpha Environmental prepared a report for the first purchaser of Lot 31 stating so. (R. ___ Plaintiffs’ Trial Ex. 12, Alpha Environmental report). Roger

Moore, the author of the Alpha Environmental Report, testified at trial that he had not changed his opinion since he wrote the report. (R. ___ Tr. p. 301: 1-7, Roger Moore Testimony).

After a water main broke in December 2009 in the cul-de-sac where the Harrell home is located, the escaping water severely damage the driveway located on Lot 29, two lots over from the Harrell lot. The owner of Lot 29 hired Bunnell-Lammons Engineering (“BLE”) to ascertain the cause of the damage. BLE issued a report stating the existence of differential movement across Lots 29-32. (R. ___ Plaintiffs’ Trial Ex. 15, BLE March 1, 2010 report). At the request of KFIG/Cliffs, BLE installed six slope inclinometers, two each on Lots 30, 31, and 32. Readings taken in September and October 2010 showed that there was still movement indicative of slope failure on all three lots including the Harrell lot. (R. ___, Plaintiffs’ Trial Ex. 19 and R. ___, Plaintiffs’ Trial Ex. 20, BLE reports). In June 2011, Harrell hired Carroll Crowther of Whitaker Laboratory, Inc. to investigate Lot 31 and report on his findings. Mr. Crowther also found the presence of slope failure on Lot 31. (R. ___, Plaintiffs’ Trial Ex. 36, June 21, 2010 report of Carroll Crowther). Finally, Richard Kapp, P.E., testified that in his professional opinion the house should no longer be lived in until such time as it is stabilized. (R. ___, Tr. p. 655: 15-25, Testimony of Richard Kapp). The Harrells have not inhabited the house since 2013. All of these facts on the record provide evidence that KFIG breached its contract with the Harrells by representing Lot 31 was suitable for a residence when it was not and KFIG knew it was not.

E. Harrell did rely on the contract documents and did investigate the conditions of Lot 31.

KFIG argued during directed verdict motions that Harrell did not rely on the contract documents and he did not investigate the conditions of Lot 31. Harrell admitted in his testimony that he did not read the documents. However, he also testified that he had done a great deal of business with KFIG/Cliffs and that he knew the Cliffs to be credible and he assumed when they were selling something, they were just as credible. (R. ____, Tr. pgs. 140:23- 141:2, Testimony of Jack Harrell). More importantly, while Harrell did not read the contract documents, he made sure to provide them to his builder Matt Vogt of Resort Custom Homes. (R. ____, Tr. p. 150: 20-25, Testimony of Jack Harrell). Harrell also asked for an extension of the 30-day period in which he was required to close so he could meet with a builder. (R. ____, Tr. pgs. 142:21 – 143: 21, Jack Harrell testimony).

KFIG would have Harrell conduct his own geotechnical investigation, arguing that Harrell should not have trusted the contract documents because he was on notice of problems with Lot 31. This is a disingenuous argument, to say the least. First, KFIG incorporates documents into the contract purporting to show Lot 31 is fixed and up to its engineering standards, then it takes the position of “don’t pay any attention to our reports because we are really lying about the condition of Lot 31!” For the sake of argument and assuming Harrell was on notice of problems with Lot 31, what was he supposed to do to investigate that he had not already done? He had no knowledge of the Alpha report in 2008 when he signed the contract because KFIG did not give him a copy even though KFIG was in possession of the Alpha report. He did consult with a builder and he did ask for more time before closing so he could do so. KFIG would have it that Harrell should

have conducted his own geotechnical investigation and do the same work its engineers with S&ME did, but there is nothing in law to support that position.

In the case of *Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005) concerning representations made during a land purchase deal, the South Carolina Supreme Court noted that a right to rely must be determined in light of representee's duty to use reasonable prudence and diligence under the circumstances. *Id.* at 639. The Court also noted in this case misrepresentations made by Seller's agents may have induced the Buyers to refrain from discovering the true facts. *Id.* at 639. In the Harrell case, given that Jack Harrell trusted KFIG from previous business dealings and given that he had to close in a short period of time, expecting Harrell to conduct his own geotechnical investigation is unreasonable. Harrell did use reasonable prudence under the circumstances.

F. Appellants' breach of contract and implied covenant of good faith and fair dealing cause of action should have gone to the jury.

The standard for denying a directed verdict motion is that the trial court is required to review the evidence and the inferences that can reasonably be drawn therefrom in a light most favorable to the party opposing the motions. *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 316, 325 (Ct. App. 2011). The trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt. *Id.* In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. *Id.* This court will reverse only when there is no evidence to support the trial court's ruling or when the ruling is controlled by an error of law. *Id.*

In granting KFIG's directed verdict motion the trial court erred in that it failed to find that the contract was ambiguous and therefore should have gone to the jury to determine the parties' intentions. *Hawkins*, p. 592, 878. The fact that there is two possible interpretations of "as-is" concerning the contract shows that the contract is ambiguous. There is plenty of evidence on the record to show that KFIG incorporated the engineering reports and the HUD report in the contract, thus putting KFIG's inference that the "as-is" clause precluded any relief for Harrell in doubt. For example, KFIG admitted in its own Answer that the S&ME reports were attached to the contract and Jack Harrell at trial identified the S&ME reports as the documents he received when he signed the contract.

There is also plenty of evidence on record to show that KFIG knew Lot 31 was not suitable for a residential structure, yet it went ahead and put it on the market. Roger Moore of Alpha Environmental testified he had prepared a report in 2007 recommending that no structure be built on the lot. Don Nickell, vice-president of The Cliffs Communities, Inc., testified he had received a copy of the Alpha report in 2005. Jack Harrell testified that KFIG did not give him a copy of the Alpha report when he signed the contract. This evidence should have been part of the jury's deliberations.

Because the breach of contract action should have gone to the jury, the implied covenant of good faith and fair dealing cause of action should also have gone to the jury. *See Rotec Services v. Encompass Services*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004)(holding implied covenant of good faith and fair dealing actions are not separate actions, but part of a breach of contract action). The jury should have been allowed to

deliberate whether KFIG's breach of contract was also a breach of the implied covenant of good faith and fair dealing.

Conclusion

Based on the fact that the contract is ambiguous, thus providing more than one inference concerning KFIG's alleged breach, the trial court's ruling on KFIG's directed verdict motion should be reversed and the breach of contract action and the implied covenant of good faith and fair dealing action should be remanded to the trial court. Respectfully submitted.

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Clifton Newman, Circuit Court Judge

Case No. 2011-CP-23-5300

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Of whom Keowee Falls Investment Group is the.....Respondent.

PROOF OF SERVICE

I certify that I have served the **Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal** on counsel for the Respondent and for The Cliffs Communities, LLC Elizabeth M. McMillan, at her address of P.O. Box 2980, Greenville, SC 29602, by depositing it into the U.S. Mail, first class postage prepaid on September 14, 2015.



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P.O. Box 11629
Columbia, SC 29211

RE: Jack R. Harrell, Jr. and Tina W. Harrell, Appellants v. Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC and S&ME, Inc. *of whom* Keowee Falls Investment Group is the Respondent.
Appellate Case No. 2015-000589

Dear Ms. Kitchings:

Please find enclosed for filing the following:

1. Appellants' Initial Brief
2. Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service; and
4. A self-addressed, stamped envelope.

Please return the clocked-in copy to me by way of the self-addressed, stamped envelope. By copy of this correspondence I have served counsel for the Respondent.

Very truly yours,

V. ELIZABETH WRIGHT LAW FIRM, LLC



V. Elizabeth Wright



VEW
Enclosure(s)

cc: Elizabeth M. McMillan, Esq.

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