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

RECEIVED
OCT 20 2015
SC Court of Appeals

Case No. 2013-CP-28-0250
Appellate Case No. 2015-000652

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 Janis M. Niemi are the Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS UPON FINDING THAT RESPONDENTS ARE NOT LIABLE TO APPELLANTS FOR FAILURE TO DISCLOSE BURIED DEBRIS TO DAN-SA

a. The circuit court properly found Respondents do not owe a duty to disclose to Appellants from the contract of sale between Respondents and Dan-Sa
b. The circuit court properly found Respondents owed no duty to Dan-Sa to disclose the buried debris
c. The circuit court properly found Respondents are not liable for failure to disclose the buried debris to Dan-Sa

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS UPON FINDING THAT RESPONDENTS OWED NO DUTY TO APPELLANTS IN CLEARING THE LAND AND BUILDING THE RETAINING WALL AND FOOTINGS.

STATEMENT OF THE CASE

On March 19, 2013, the appellants Clifford and Sharon Holley ("Appellants" or "the Holleys") commenced this action with the filing of a summons and complaint, naming as defendants Dan-Sa, Inc. and the respondents Charles E. Oman and Janis M. Niemi ("Respondents" or "Oman" and "Niemi"). (R. p. 20). The Holleys filed amended complaints on March 22, 2013 and February 18, 2014 and added other defendants to the action. (R. pp. 21-22, ¶¶4-7).

The second amended complaint contains a cause of action in negligence against Oman and Niemi. (R. pp. 25-26, ¶¶31-37). Specifically, it was alleged that Oman and Niemi owed all subsequent purchasers "a duty to act reasonably and with care in maintaining the property, dividing the property, and disclosing any defects or materials located on the property" and that they acted negligently in burying debris "on the property to be conveyed to Defendant Dan-Sa, Inc." and in failing to disclose the existence of the debris to Dan-Sa and subsequent purchasers.

(R. pp. 25-26, ¶¶32, 35). In their answer, Oman and Niemi set forth various defenses asserting, among others, that the Holleys were comparatively negligent; that the damages were the result of the negligence of third parties; that they owed no duty to the Holleys regarding the Holleys' purchase of the property from another defendant; and, that the Holleys' actions were not foreseeable. (R. pp. 37-38, ¶¶36-46).

Subsequently, Oman and Niemi filed a motion for summary judgment, which was heard on January 20, 2015, and granted by Order filed February 23, 2015. The appellants timely served and filed their notice of appeal.

STATEMENT OF FACTS

Oman and Niemi are previous owners of a lot they sold to Dan-Sa, Inc. ("Dan-Sa"), on which Dan-Sa constructed a building, and the improved property was subsequently purchased by Appellants. (R. pp. 203-204, 206-209, 219-221, 232-233). On October 20, 2006, Respondents, residents of Minnesota, purchased a property with a modular home on it at Lake Wateree, in Kershaw County. (R. p. 160, ¶¶1-3). Respondents then divided the property into two lots, planning to move the modular house from the original site onto the site of the smaller lot to use it as their residence. (R. p. 160, ¶¶4, 5; R. p. 196). In January or February of 2007, Oman hired a company, Bluewater Development, to clear the lot to prepare it for the footings[1] on which to move the modular home. (R. p. 160, ¶5). According to a Bluewater employee, Oman directed Bluewater to move the debris which had been cleared off the property into an area to the left side of the property and bury it. (R. p. 75, lines 2-12). Respondents believed that the area to the left of the new home site cleared by Bluewater was not buildable due to the slope, terrain, erosion and the floodplain. (R. p. 160-161, ¶¶6, 9). The land to the left of the new homesite sloped at a "pretty good little clip," being a five to six-foot slope. (R. p. 79, lines 24-25; R. p. 127, lines 7-

[1] Some of the witnesses referred to the footings as "footers" and these words will appear interchangeably.

11; R. p. 139, line 25; R. p. 198). On March 2, 2007, Respondents obtained a building permit to move the modular home. (R. p. 146, lines 12-15; R. p. 160, ¶7; R. p. 197).

Respondents retained a contractor, Dermac Contractors, LLC, another defendant, to pour the footings for the foundation where the modular home would be relocated. (R. p. 161, ¶8). On July 10, 2007, the Kershaw County building official approved the footings poured by the contractor. (R. p. 146, line 2-147, line 17; R. p. 199). At the county building official's recommendation, Respondents built a retaining wall around the area of the new homesite. (R. p. 161, ¶9). Respondents never completed the project. Instead, on October 23, 2007, Respondents entered into a "Land, Lots and Acreage Contract of Sale" with Dan-Sa for the sale of the smaller lot. (R. p. 200-202).

Danny Gibson, owner of Dan-Sa, a licensed building contractor since 1987 who had built many residential houses in his career, five being in the Lake Wateree area, intended to build a spec house on the lot. (R. p. 82, line 12-p.83, line 3; R. p. 84, lines 16-20; R. p. 92, lines 9-11; R. p. 118, lines 8-10). Gibson had the right to inspect the property prior to purchase and was aware that it had a driveway, septic tank, footings and a retaining wall. (R. p. 85, lines 9-14; R. p. 92, lines 4-6). Gibson estimated the contractor used a 2-foot bucket on the footings, which were at least 2-foot wide, and considered they were "good looking footers." (R. p. 86, lines 6-11; R. p. 106, line 9). At Gibson's request, Respondents provided a set of draftsman plans to Dan-Sa for a house which could be built on the existing footings. (R. p. 86, lines 15-16; R. p. 161, ¶11) The draftsman's drawings provided that a porch to the house be supported by posts which had their own footings. (R. p. 161, ¶11). On December 21, 2007, Oman and Niemi transferred the property to Dan-Sa. (R. p. 203-204).

After purchasing the property, Dan-Sa built a foundation on top of the footings and, on January 2, 2008, obtained a foundation survey to satisfy the bank providing its financing that the foundation was not in the floodplain. (R. p. 90, lines 3-4; R. p. 95, lines 3-25; R. p. 101, lines 14-20; R. p. 165). On January 3, 2008, a building permit was issued to Dan-Sa. (R. p. 91, lines 7-19; R. p. 205). During the construction of the home, Gibson modified the plans and built the house with two stories instead of one story and a half. (R. p. 88, lines 23-25; R. p. 96, line 22-p.97, line 6). Additionally, Dan-Sa also built a two-story porch on the house, using the retaining wall to support at least part of the porch on it. (R. p. 101, line 21-p. 102, line 5; R. p. 104, lines 17-20; R. p. 141, lines 13-18). Some parts of the porch were supported by posts dug about two feet in the ground. (R. p. 110, lines 4-12).

Four months after finishing the construction, Gibson gave the deed in lieu of foreclosure to Blue Ridge Savings Bank. (R. p. 93, lines 3-16; R. p. 206-210). On June 23, 2010, almost two years after it had acquired the property, Blue Ridge Savings Bank sold the property to Gina Pike. (R. p. 211-221). The contract of sale between the bank and Pike indicated the property was sold "AS-IS" and that "Buyer and Seller agree[d] that Seller will not complete nor provide a Residential Property Condition Disclosure Statement" pursuant to the applicable statute.[2] (R. p. 214). The property was conveyed pursuant to a Special Warranty Deed. (R. p. 219). On June 29, 2011, Pike contracted with Appellants for the sale of the property and on July 8, 2011, conveyed the property to Appellants. (R. p. 222-233). Before the closing, Appellants had the home inspected and it is undisputed that there were no structural defects, no issues inside the house, and no foundation problems. (R. p. 123, line 9-p. 125, line 17).

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[2] The South Carolina Residential Property Condition Disclosure Act excludes certain transfers from its requirement of providing a disclosure form, including a transfer where the bank takes title from a mortgagor whose indebtedness was in default. See S.C. Code Ann. § 27-50-30 (2) (2007).

Less than a month after purchasing the property, Appellants contracted with Alaglas Pools to build a pool to the left of the existing home. (R. p. 79, lines 13-21; R. p. 198; R. p. 234) Appellants did not test the soil before purchasing the house to determine whether the property was suitable for a pool. (R. p. 80, lines 10-13; R. p. 124, lines 5-7). Appellants were aware when they began their project to build the pool that the project was more complex, requiring dirt fill to raise the area for a six-foot raised pool with a retaining wall around it due to the one-hundred year floodplain. (R. p. 80, lines 2-6; R. p. 126, lines 1-23; R. p. 129, line 2-p. 130, line 18; R. p. 140, lines 1-11). In the area where the pool was projected, it was "a pretty big hill" where the slope started and it was not practical to try to build a building there. (R. p. 139, lines 22-23; R. p. 140, lines 8-11). The slope was so steep that a backhoe could not be driven around on it. (R. p. 80, lines 16-20). When Frank Bradshaw with Alaglas started work on the pool, he found brush debris (timber, limbs, and other organic material) buried underground. (R. p. 112, lines 21-25; R. p. 138, lines 6-10). While digging out the debris from the area where the pool was to be placed, the retaining wall on that side of the house was affected. (R. p. 138, lines 14-21). Within days, the roof of the porch began to sag. (R. p. 138, lines 21-23). The debris found while excavating the pool extended from the left side yard under the retaining wall on which the roof over the upper porch was supported. (R. p. 138, line 15; R. p. 141, lines 7-22; R. p. 144, lines 8-14). Appellants hired a contractor to provide support for the porch and the roof over the second story porch after the excavation of the debris was completed. (R. p. 134, line 17; R. p. 135, lines 8-13; R. p. 136, lines 3-10; R. p. 142, lines 8-11; R. p. 171). In removing the debris, there was no digging under the actual footers of the house. (R. p. 134, lines 17-24). There was no settlement in the house itself due to the debris. (R. p. 136, lines 16-23). It is undisputed that no

other work was necessary other than the work performed to provide support for the porch after the excavation of the debris. (R. p. 128, lines 3-6; R. p. 132, lines 1-5; R. p. 135, lines 2-7).

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, the Court applies the same standard as the trial court under Rule 56(c), SCRCP . . . ." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Worley Cos., Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). It is not sufficient that a party create an inference which is not reasonable or an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). Summary judgment should be granted against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case. Harris v. Rose's Stores, Inc., 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS UPON FINDING THAT RESPONDENTS ARE NOT LIABLE TO APPELLANTS FOR FAILURE TO DISCLOSE BURIED DEBRIS TO DAN-SA

The circuit court properly granted summary judgment in favor of Respondents because Appellants failed as a matter of law to show that Respondents are liable to Appellants for failure to disclose buried debris on a part of a lot not usable for a residential building to their purchaser, Dan-Sa, the builder of the home on the property.

a. Respondents do not owe a duty to disclose to Appellants from the contract of sale between Respondents and Dan-Sa

Appellants assert Respondents owed them, as subsequent purchasers, a duty to disclose buried debris on the lot at the time Respondents sold it to Dan-Sa. It is undisputed that Appellants were not in privity with Respondents in regard to the contract of sale of the property at 2834 Lake Road. In 2007, Respondents sold the lot located at 2834 Lake Road to Dan-Sa, a residential home builder. After building a house on the lot, Dan-Sa deeded the property in lieu of foreclosure to the bank that financed the construction project. The bank sold it to Gina Pike, who sold it to Appellants in 2011. South Carolina law does not determine that a subsequent purchaser can bring an action against a seller not in privity with them for negligent failure to disclose debris buried on a portion of land not to be used for a residential building.

In the context of contracts of sale, South Carolina cases recognize that a duty to disclose exists between the parties to the sale: (1) where the duty to disclose arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or the trust and confidence in that particular case can be inferred; (3) where the transaction itself, in its essential

nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993); Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 23 S.E.2d 372, 376 (1942). None of these situations apply to the contract of sale between Respondents and Dan-Sa to give rise to a duty to disclose in the circumstances of the sale between these two parties. See LoPresti v. Burry, 364 S.C. 271, 278, 612 S.E.2d 730, 734 (Ct. App. 2005) (noting that "the relationship between the buyer and the seller in a property transaction is 'ordinarily not fiduciary'"). Consequently, the contract of sale also did not give rise to a duty of the seller to subsequent purchasers of the lot.

Appellants argue that a vendor's liability for tortious failure to disclose land defects extends to a subvendee, quoting Dorrell v. S.C.Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004), Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970), and Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980). (App. Br. p. 13-14). In these cases, the contracts were not contracts of sale, like the contract between Respondents and Dan-Sa, but contracts under which one party was hired to do something for another and the former party did not exercise due care in the performance of the contract. Finding a duty to subsequent purchasers for negligent failure to disclose based on the contract of sale between seller and original purchaser would subject the seller to broader liability to subsequent purchasers than the seller could have potentially incurred from the relationship with the original purchaser. Therefore, these cases are distinguishable and cannot be construed as extending seller's liability to subsequent purchasers based on the contract of sale between the seller and the original purchaser or as finding a duty owed by seller to subsequent purchasers.

Appellants further rely on Pruitt v. Morrow, 288 S.C. 298, 342 S.E.2d 400 (1986). (R. p. 68-70; App. Br. 14-15). In Pruitt, the court referred to "actions based upon negligent or reckless non-disclosure of land defects." Id. at 301, 342 S.E.2d at 401. The case involved a defendant, the Ervin Company (Ervin), which purchased a tract of land and subdivided it, then roughed in streets and laid utilities. Id. at 299, 342 S.E.2d at 400. Another company purchased these properties in 1974, and then sold a lot to Anthony Morrow upon which he built a "spec" house. Id. Morrow sold this house to a couple, who subsequently sold it to Pruitt, the plaintiff in that case. Id. The house began to shift and it was discovered that it had been built over a gulley filled with stumps and construction materials capped with fill dirt. Id. at 299-300, 342 S.E.2d at 400.

The single issue addressed in Pruitt was whether the doctrine of *caveat emptor* afforded a defense to Ervin's successor against the causes of action in fraud and negligence/recklessness brought by Pruitt. Id. at 300-301, 342 S.E.2d at 400-401. Ervin's successor argued the exception to *caveat emptor* that applied to sales of new buildings did not extend to sales of undeveloped land. Id. at 300, 342 S.E.2d at 401. The court held that "the doctrine of *caveat emptor* is also inapplicable in actions based upon negligent or reckless non-disclosure of land defects," relying on the two opinions in Lawson v. Citizens and Southern National Bank of South Carolina (Lawson I, 255 S.C. 517, 180 S.E.2d 206 (1971), in which the plaintiffs appealed the trial court's decision to sustain the defendant's demurrer, and Lawson II, 259 S.C. 477, 193 S.E.2d 124 (1972), in which the defendant appealed the trial court's decision not to grant JNOV or new trial after the jury's verdict for the plaintiffs). Pruitt, 288 S.C. at 301, 342 S.E.2d at 401.

However, the court held "the remaining issues present no errors of law" and it is not apparent from the record what other issues were raised. Id. There is no indication that Ervin's

successor raised the issue that Pruitt did not have a cause of action based upon negligent non-disclosure of land defects against it. Therefore, the court did not decide whether Pruitt had such a cause of action against Ervin's successor. Appellant argues the Pruitt court "implicitly affirmed that a vendor's liability does in fact extend to innocent subvendees." (App. Br. 15). General preservation principles do not support it or an implication that the subsequent purchaser has a cause of action in negligence against the original seller for failure of that seller to disclose to its immediate purchaser. See Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (citing to State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.")). Because the defendant in Pruitt did not seek reversal of the jury verdict based on Pruitt being a subvendee to whom it did not have a duty, the South Carolina Supreme Court did not answer that question. See Austin, 306 S.C. at 19, 409 S.E.2d at 817.

The Lawson opinions, cited in Pruitt, also do not extend the duty to disclose between the parties to a contract for sale, if one exists, to subsequent purchasers. Mr. Lawson purchased a lot in a residential subdivision from the developer of the property. Lawson I, 255 S.C. at 519, 180 S.E.2d at 208. He and his wife built their home on the lot. Id. They subsequently divorced and Mr. Lawson conveyed the house to his wife. Id. Afterward, Mrs. Lawson discovered the house was built over a ravine filled with unsuitable material and capped with clay and the house suffered damage. Id. Mr. and Mrs. Lawson joined in bringing an action against the developer, asking for actual and punitive damages. Id. at 520, 180 S.E.2d at 208. The court held the trial court erred in sustaining demurrer on the ground of insufficiency of facts to state a cause of action. Id. at 520-21, 180 S.E.2d at 208-09. However, on the issue of the subsequent

conveyance of the property by Mr. Lawson to his ex-wife, the court decided it did not need to determine whether Mrs. Lawson was a proper party because the cause of action "ripened in Mr. Lawson upon completion of the dwelling." Id. at 522, 180 S.E.2d at 209. The court specified it did not need to inquire whether Mrs. Lawson was a proper party because "defect of parties, not multiplicity, is ground for demurrer." Id. Thus, Mrs. Lawson's inclusion in the suit was not a ground for demurrer because a proper party, Mr. Lawson, had a cause of action against the developer, and it did not matter that Mrs. Lawson did not.

In Lawson II, the court acknowledged the South Carolina law regarding the limitation of the duty to disclose as between the parties to the transaction by citing to Holly Hill Lumber Co. Lawson II, 259 S.C. at 481-82, 193 S.E.2d at 126. Lawson II, like Pruitt, does not decide whether Mrs. Lawson had a cause of action against the developer. Similarly, for the same reason as above, Lawson II does not support an implication that a subsequent purchaser has an action against a land seller in circumstances of negligent non-disclosure to the seller's purchaser.

Additionally, cases from other jurisdictions are informative in determining whether Appellants can maintain an action in negligence against Respondents. In Christy v. Glass, 415 Mich. 684, 697, 329 N.W.2d 748, 749 (1982), the court indicated that the principal issue in the case was "whether a vendor landowner ha[d] a common-law duty to subvendees of his vendee to avoid negligent behavior." It held that the seller of land with water problems had no duties of disclosure to the subvendees and its only liability for a failure to disclose would have been only to its vendee. Id. at 696, 329 N.W.2d 748, 753 In Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 100 (D. Mass. 1990), the court analyzed whether, given the relationship between two parties as seller and subsequent purchaser, the law imposed a duty of reasonable conduct upon the seller, a landowner. The court found the subsequent purchaser failed to state a

negligence claim because the exception to the general rule of nonliability[3] for vendors in the circumstances of any hidden defects does not apply when the relationship between the plaintiff and the defendant is not one of seller – purchaser. Id. at 101. See also DeAravjo v. Walker, 589 So. 2d 1292, 1294 (Ala. 1991) (affirming summary judgment granted to the vendor of land when the plaintiffs did not offer anything to indicate they were in privity with the vendor).

Appellants argue that section 353 of the Restatement (Second) of Torts "expressly states that tortiously nondisclosing vendors are subject to liability to subvendees," pointing to comment (a). (App. Br. 18). Section 353 was not specifically adopted by the South Carolina courts as other sections of the Restatement were. See, e.g. S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991) (adopting the general rule set forth in section 27 of the Restatement (Second) of Judgments regarding the offensive use of collateral estoppel but noting that in a previous case it has refused to adopt comment (g) to a related section containing exceptions to the general rule).

Appellants also argue that section 311 of the Restatement (Second) of Torts "also recognizes a negligent vendor's liability to foreseeably injured third-parties such as subvendees." According to the comments to this section, entitled "Negligent misrepresentation involving risk of physical harm," this liability "represents a somewhat broader liability than the rule stated as to liability for pecuniary loss resulting from negligent misrepresentation" with applicability particularly where a part of the actor's business or profession is to give information upon which the safety of the recipient or of third persons depends. Although this liability extends to any person who, in the course of an activity which is in furtherance of his own interests, undertakes

[3] This "exception to the general rule of nonliability" is the one referred to in section 353 of the Restatement. See Wellesley Hills Realty Trust, 747 F. Supp. at 100; Christy, 415 Mich. at 695 n. 7, 329 N.W.2d at 752 n.7. Christy specifically references section 353 of the Restatement.

to give information to another and knows or should realize that the safety of others may depend on the accuracy of the information, South Carolina has not adopted or even referred to this section of the Restatement in any cases. Further, Appellants did not argue at the motion for summary judgment hearing that this section of the Restatement or the comments incorporated by reference from section 310 applied to this case. Thus, this this argument is unpreserved. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating that imposing preservation requirements on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments" and noting that the purpose of an appeal is to determine whether the trial court erroneously acted or failed to act, because when appellant's contentions are not presented or passed upon by the trial court, such contentions will not be considered on appeal).

Consequently, the circuit court properly determined that a duty to disclose from the sale of Respondents' lot, if any, arose only as to Dan-Sa, their purchaser, and they cannot be liable to Appellants for failure to disclose buried debris.

b. Respondents owed no duty to Dan-Sa to disclose the buried debris

The circuit court also properly granted summary judgment in favor of Respondents because Appellants failed to present evidence showing that Respondents had a duty to disclose the debris buried to Dan-Sa.

Pruitt does not specify the elements of a cause of action in negligent non-disclosure of land defects but cites to Lawson, although the action in Lawson was determined to be one for fraud. In Lawson, the land purchaser's cause of action relied on the seller's knowledge that the land was unstable and unsuited for the intended purpose of building a residential house on it, which was material in the transaction between Lawson and the developer. Lawson II, 259 S.C.

at 478, 485, 193 S.E.2d at 126, 128. The facts in the present case are different from both Pruitt and Lawson. In those cases, the developer/seller of land failed to disclose debris buried on the lots in situations where the residential homes could be built anywhere on those lots. Additionally, Lawson II indicates that the purchaser of the lot placed the location of the house in such a manner as to avoid a gulley or ditch that was visible on the lot. Lawson II, 259 S.C. at 484, 193 S.E.2d at 128.

In this case, Dan-Sa purchased the lot for the possibility of building a house on the footings poured on the property. (R. p. 86, lines 1-16). Here, the location of the house was clearly established by the footings poured on the lot prior to the lot being sold to Dan-Sa. (R. p. 86, lines 1-6; R. p. 116, lines 15-16). The house built on the footings did not show any defects or signs that it was built on unsuitable footings. (R. p. 124, line 23-p. 125, line 17; R. p. 134, lines 22-24; R. p. 136, lines 16-23). The part of the lot where Appellants' pool was eventually installed was, to Oman's knowledge, not buildable, due to the topography of the land and the 100-year floodplain which shows a large portion of the remaining lot was not above the 100-year floodplain. (R. p. 127, lines 7-11; R. p. 160, ¶6). Danny Gibson, Dan-Sa's owner, actually agreed that a builder would know not to build in an area not above area the 100-year floodplain and it is general knowledge for builders that it could not be built upon. (R. p. 116, lines 9-12). Therefore, building anything on the part of the property known as unbuildable was not a material part of the transaction between Dan-Sa and Respondents to give rise to a duty to disclose under Pruitt and Lawson.

Appellant argues the circuit court erroneously restricted the materiality analysis to consideration of the buried debris being outside the perimeter of the footings, implying that the statement of one witness who said that tree debris was pulled out "from underneath the house"

indicates debris was pulled out from underneath the footings. (App. Br. 10). Appellants appear to argue that a jury issue exists as to whether debris was buried under the foundation of the house. However, "[a] jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror" but "this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (citing to Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)). The testimony of this witness, when read in context with his other statements in the record, shows he referred to the debris pulled from under the porch after the contractor started digging the pool in the yard on the outside of the retaining wall, because he viewed the porch as part of the house due to the roof of the house extending over the second story of the porch. (R. p. 138, lines 6-23; R. p. 141, lines 7-22; R. p. 144, lines 8-13; R. p. 168). There is no evidence that any debris was pulled out from underneath the footings on which the foundation of the house was built by Dan-Sa. The evidence indicates that the digging for debris stopped at the foundation wall. (R. p. 134, lines 17-24).

Additionally, Appellants' counsel argued at the summary judgment hearing that Pruitt applied because the material found when Appellants started to excavate the pool extended underneath the retaining wall and that the material was 50 yards away, "right adjacent to where the house was." (R. p. 67, line 6-p. 68, line 2; R. p. 70, line 17-p. 71, line 4). There was no argument that the footings were poured on top of the buried debris. Although it was stated that the contractor pouring the footings did not know about the debris buried on the lot, Appellants argued only that the retaining wall was constructed "over the area where the debris was located." (R. p. 62, line 14-p. 63, line 12). Thus, Appellants cannot argue now that the evidence indicates

buried debris was under the footings when they did not argue so before the circuit court. See I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

Appellant further argues "the circuit court incorrectly characterized the possibility of building a house on the existing footings as being, singularly, '*the* material fact' in the conveyance to Dan-Sa." (App. Br. 10). However, there is no evidence that Gibson entered into the sale contract with Respondents considering anything other than building a house on the existing footings. There is no evidence Dan-Sa planned to build anything on the part of the lot where Appellants dug their pool. Also, there is no evidence that Dan-Sa would not have purchased the lot if he knew about the buried debris outside the perimeter of the footings. Further, there is no evidence regarding the construction of the porch other than evidence that the porch was supposed to be supported by posts which had their own footings. (R. p. 161, ¶¶ 11 & 12). The plans, whether construction plans or draftsman's drawings, are not in evidence because Mr. Gibson could not locate them. (R. p. 86, lines 20-25). The analysis of material facts between Dan-Sa and Respondents in the context of their contract of sale is not changed by what a subsequent purchaser might have wished to do with the lot.

Consequently, the evidence supports the circuit court's finding that the material fact in the transaction between Dan-Sa and Respondents was the possibility of building a house on the existing footings and, therefore, Respondents had no duty to disclose the buried debris outside the perimeter of the footings.

c. Respondents are not liable for failure to disclose the buried debris to Dan-Sa

In addition to quoting Lawson, the Pruitt court cited to section 353 of the Restatement (Second) of Torts in support of its holding that "the doctrine of *caveat emptor* is inapplicable in actions based upon negligent or reckless non-disclosure of land defects." Pruitt, 288 S.C. at 301,

342 S.E.2d at 401. However, Respondents are not liable for failure to disclose the buried debris to Dan-Sa even under this section, if applicable, because Appellants failed to provide evidence proving the multiple conditions necessary to subject a seller of land to liability. Pursuant to section 353, the vendor of land is subject to liability for physical harm when the vendor fails to disclose to his vendee a condition "which involves unreasonable risk to persons on the land" IF

> (a) the vendee does not know or have reason to know of the condition or the risk involved, <u>and</u>
> (b) the vendor knows or has reason to know of the condition, <u>and</u> realizes or should realize the risk involved, <u>and</u> has reason to believe that the vendee will not discover the condition or realize the risk.

Restatement (Second) of Torts § 353 (1965) (emphasis added).

Comment (e) to this section explains one of the conditions necessary for vendor liability, namely that the vendor realized or should realize the risk involved:

> If the defect which he fails to disclose is one which does not make the land dangerous to persons upon it unless it is used for a purpose to which the vendor has reason to believe that it will not be applied, a reasonable man, though knowing of the condition, would not believe that it was likely to cause any harm to such persons.

The complaint indicates the discovery of the debris was a result of their contractor's work to install a pool. (R. p. 23, ¶¶15-17). This pool was to be placed on the portion of the lot to the left of the house that had been built by Dan-Sa on the footings. (R. p. 79, lines 13-21; R. p. 198). Respondents knew that area was not buildable and, thus, had no reason to believe that the buried debris would make the land unsuitable for building a pool there. (R. p. 160, ¶6). Respondents could not foresee, as Appellants contend, that a subsequent purchaser would decide, several years later, to build a six-foot retaining wall and add fill dirt to accommodate a pool. (App. Br. 11; R. p. 80, lines 2-6; R. p. 126, lines 1-23; R. p. 129, line 2-p. 130, line 18; R. p. 140, lines 1-

11). The evidence in the record shows that absent this new wall, water coming up to the hundred year floodplain would flood the portion of the lot where Appellants wished to install their pool. (R. p. 126, lines 17-23). In order to build this wall, Appellants had the property surveyed three times to satisfy the county and overcome the complaints of their neighbor to the left, a real estate agent, that Appellants were building in the floodplain. (R. p. 129, line 2-p. 130, line 18). Thus, Respondents could not have realized that the buried debris would have created a problem to a complex pool-building project in an area known as unbuildable.

Also, the plans Respondents provided to Dan-Sa were for a house that could be built on the existing footings, but did not include porches that would be supported on any part by the retaining wall. (R. p. 161, ¶12). The porches were to be supported by posts, each of them placed on its own footings. (R. p. 161, ¶11). Dan-Sa supported the second-floor roof of the porch with posts placed on the retaining wall, which violated the standard of care for a builder. (R. p. 141, lines 16-23; R. p. 142, lines 1-11). Respondents did not realize and could not have realized that Dan-Sa would decide to use a part of the retaining wall to support the porch and these Respondents cannot be liable to Dan-Sa for failure to disclose to him that the retaining wall was unsuited for such a use. Thus, Defendants could not have realized that removing the debris to accomplish the construction of a pool on the left side of the retaining wall would create a risk to the porch to be subsequently constructed by Dan-Sa on that side of the house.

Furthermore, section 353 relieves the vendor of liability when the vendee has knowledge of the land condition or has had reasonable opportunity to discover it and to take effective precautions against it. In our case, Dan-Sa had the opportunity to discover that some buried debris ran under the retaining wall when it dug footers to a depth of "a couple feet" for 6x6 posts six-foot apart to support the porch on the left side of the house. (R. p. 107, lines 18-24; R. p.

110, lines 4-23). Gibson estimated the debris was as deep down as one to four feet. (R. p. 108, lines 12-14; R. p. 109, lines 1-4; R. p. 113, lines 2-12; R. p. 168, 170-171). Consequently, contrary to Appellants' contention, the records contains evidence that Gibson had the opportunity to discover the top of the debris when he was digging holes for the posts to support the porch, even though he had no reason to dig as deep as the bottom of the hole created by the debris removal under the porch. (App. Br. 23; R. p. 113, lines 8-25).

Appellants did not allege in the complaint and did not specifically argue to the circuit court one other element required for section 353's applicability, namely that the condition of the land Respondents failed to disclose to Dan-Sa "involves unreasonable risk to persons on the land." Appellants disagree with the circuit court's finding that "[t]here is no dispute that the burial of the organic debris did not make the land dangerous to persons." (App. Br. 19, R. p. 14). Appellants now argue that "the record does support an inference that the undisclosed property defect could have made the property dangerous to persons." (App. Br. 19). Appellants rely on their expert's affidavit, according to which buried organic material will decay over time and will sink or settle. (App. Br. 19; R. p. 150, ¶5). However, no evidence exists to show how the debris buried in the yard where the pool was built could have sunk or settled and how it could have created an unreasonably dangerous condition. Also, there is no evidence that the decay of the debris would have affected the retaining wall if the debris was left buried and, further, that the potential condition that might have been created in the retaining wall would have affected the house.

Additionally, Mr. Baer's opinion regarding potential damage to the house is based on his understanding from the materials he reviewed that the debris "extended underneath the foundation of the home." (R. p. 149-150, ¶¶3-5). As addressed above, there is no evidence on

which Mr. Baer could rely in support of this contention. There is no dispute that the house itself did not have any damage when Appellants purchased it and nothing in the house indicated settlement at the time Appellants' contractor performed the work to support the porch after the debris was removed. (R. p. 125, lines 15-17; R. p. 135, lines 6-13; R. p. 136, lines 16-23). Also undisputed is the fact that the concrete blocks from the retaining wall started separating when debris was being pulled out from under the wall during the excavation for the pool. (R. p. 138, lines 14-21). According to the builder, the structural integrity of the house would not have been affected by the debris absent digging the pool and "the house would still be there like in 40 years from now." (R. p. 114, lines 4-24). Gibson further stated that if Appellants contended the house had collapsed, that would not have happened if Appellants' contractors would not have dug up the pool. (R. p. 119, lines 19-25). While Gibson acknowledged that high decks could potentially fall from the house when a lot of weight is put on them during parties, which are apparently held more often at lake houses, he did not refer to the possibility of the house he built collapsing because of the debris. (R. p. 111, lines 2-13). Thus, Appellants cannot create a dispute on appeal as to whether the property could have been dangerous to persons when they did not file a Rule 59(e), SCRCP, motion to raise this issue to the circuit court. See Padgett v. Mercado, 341 S.C. 229, 233, 533 S.E.2d 339, 341 (Ct. App. 2000) (requiring a post-trial motion to have been filed for disputing issues related to characterization of the facts in the circuit court's order).

Lastly, if Respondents would have made any disclosure to Dan-Sa, it would never have reached the Appellants because the property was sold "As Is" to Appellants' seller. Dan-Sa conveyed the property to Blue Ridge Savings Bank in lieu of foreclosure. (R. p. 93, lines 3-13; R. p. 206-210). At the time Dan-Sa gave a deed in lieu of foreclosure, it did not make any disclosures to the bank nor was it required to make any disclosures. When the bank conveyed

the property two years after acquiring it, the bank conveyed the property "AS-IS" to Gina Pike under a contract specifically stating that no Residential Property Condition Disclosure Statement was to be provided. (R. p. 211-221). For this reason, Respondents are not liable to Appellants even if Respondents should have disclosed the buried debris to Dan-San in their transaction and they were not otherwise relieved of liability.

Appellants argue "the relevant chain of causation relates not to the series of conveyances but, instead, to Dan-Sa's reliance on Respondents' silence" because "but for Respondents' failure to disclose the buried debris to Dan-Sa, Dan-Sa would not have built the home and porch without removing the debris . . . ." (App. Br. 21-22). Appellants did not allege in their complaint that Dan-Sa "relied" on Respondents' silence regarding debris buried in the yard when it purchased the lot, nor did Appellants make this argument to the circuit court. Thus, this argument is not preserved for review on appeal. See I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

Additionally, no evidence exists in the record in support of these statements. There is no evidence of reliance on Dan-Sa's part that no debris was buried in a part of the lot outside the perimeter of the footings. Although Gibson stated at his deposition that he would generally expect buried debris to be disclosed, he did not say that if disclosure was made in this case he would not have built the house on the footings without first removing the debris from the yard or that he would not have built the porch the way he did. Additionally, without the plans showing the porch to be constructed, an inference cannot be drawn that it was foreseeable to Respondents that Dan-Sa would use the retaining wall to support a part of the porch on it. Gibson decided to use the retaining wall for support of the porch, although he guessed the retaining wall had been built "just for looks" on that side of the house and the one on the other side of the house

"probably to hold the dirt back." (R. p. 115, lines 11-16). Further, the evidence in the record does not allow inferences as to what damage, if any, would have been caused to the porch from the removal of the debris in the yard if Dan-Sa had constructed the porch according to the plans, on their own footings, and had not used the retaining wall to support the porch he actually constructed on that side of the house. As Gibson believed, if a footing is properly dug, one "could dig the dirt out from under the footing and it still stay there." (R. p. 120, lines 5-7).

For all of the above reasons, the circuit court properly held that Respondents are not liable to Appellants for failure to disclose buried debris to Dan-Sa. Therefore, the circuit court's grant of summary judgment to Respondents should be affirmed.

II. THE CIRCUIT COURT PROPERLY FOUND THAT RESPONDENTS OWED NO DUTY TO APPELLANTS IN CLEARING THE LAND AND BUILDING THE RETAINING WALL AND FOOTINGS.

The circuit court properly found that Respondents owed no duty to Appellants to maintain the property in a certain condition while they owned it.

In a negligence action, [t]he court must determine, as a matter of law, whether the law recognizes a particular duty." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "An essential element in a cause of action for 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." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). No South Carolina case imposes a duty on a landowner in clearing his or her property and disposing of the cleared material by burying it on the land. Such a duty to future owners would be unreasonable especially when no future owners are contemplated, like in our case, and would interfere with the landowner's right of ownership. See Wellesley Hills Realty Trust, 747 F. Supp. at 100.

Further, the circuit court properly found that Respondents owed no duty to Appellants for building a retaining wall and pouring footings on the property prior to the sale to Dan-Sa. The case applicable to determine whether Respondents owed others a duty regarding the work performed on their property is Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008). In that case, Breedlove planned to build a residence for his family on a vacant lot he owned in Hilton Head and he did not have any agreement or intention to sell the residence. Id. at 418, 661 S.E.2d at 69. Breedlove built the house acting as his own general contractor. Id. at 418-19, 661 S.E.2d at 69. The family lived in the residence for a while, but unforeseen circumstances made it necessary for them to sell it. Id. at 419, 661 S.E.2d at 69. Several years later, the purchaser filed suit against Breedlove on several causes of action, including negligence in constructing the home. Id. at 419-20, 661 S.E.2d at 70. The supreme court affirmed the grant of summary judgment to Breedlove. Id. at 425, 661 S.E.2d at 73. In regard to the negligence argument, the supreme court noted "[t]he circuit court held that the undertaking or agreement to construct a dwelling for another is what creates the duty to exercise and use due care in the construction of that dwelling." Id. at 424, 661 S.E.2d at 72. Also, the supreme court agreed with the circuit court 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." Id. Because "it was not reasonably foreseeable that Breedlove's home would be exposed to a known or speculative 'class of purchasers,'" the court distinguished Breedlove's situation from that in Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). In Terlinde, the supreme court had held that a residential builder of a home built as speculative owes a duty of care in constructing it to the members of the class for which it was constructed, so as to render him accountable for negligent workmanship, even in absence of privity. 275 S.C. 395, 399, 271 S.E.2d 768, 770.

Respondents' work on their property falls under Smith rather than Terlinde because at the time they cleared the lot, built a retaining wall and retained a contractor to pour the footings, they were doing so for themselves, not to build a house for sale. Respondents purchased the property intending to establish their residence on a part of it. (R. p. 160, ¶5). To this end, they divided the property into two lots and, in January or February 2007, retained Bluewater Development to clear a portion of the yard where they wished to move the modular home already existing on the property. (R. p. 160, ¶¶3-5; R. p. 196). The county required Respondents to obtain a construction permit for moving the modular home. (R. p. 146, lines 2-20; R. p. 160, ¶7). Respondents obtained the building permit on March 2, 2007. (R. p. 197). On July 10, 2007, the building inspector approved the footings. (R. p. 199). Around July 2007, Respondents retained a contractor to pour the footings on which the modular home would be placed. (R. p. 161, ¶8). The building inspector recommended Respondents to build a retaining wall around the area where the modular home was to be moved and Respondents did so. (R. p. 161, ¶9). There is no evidence in the record that at the time Respondents cleared a portion of the property and poured footings on it and when they built the retaining wall, they were doing so to put the property into the stream of commerce, as Appellants allege. (App. Br. 24).

Appellants seem to rely on section 40-59-260(C) of the South Carolina Code (2011) as evidence that Respondents' work on the property was performed for the purpose of sale. However, the presumption created under this section applies to the sale of completed buildings in actions "brought under [the Residential Home Builders] chapter." Its purpose is to subject the property owner/builder to "the penalties provided in this chapter" for violation of the exemption this section provides to property owners who build a house without being licensed residential builders. S.C. Code Ann. 40-59-260(B) & (C) (2011). The penalties listed in this chapter are

issuance of cease and desist orders, administrative citations and penalties, fines, or temporary or permanent injunction. S.C. Code Ann. §§40-59-100, -105, -120, -200, -210. Hence, this statute does not create a presumption applicable in the context of a negligence action like that of Appellants. Additionally, this is yet another argument that Appellants did not raise before the circuit court. See I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

Appellants contend the evidence creates an inference that at the time the footings were poured, "Respondents had already decided not to use the lot for residence in the modular home." (App. Br. 25). In support, Appellants refer to a note made on the construction permit entered by the building inspector according to which the home was no longer modular but it was going to be "stick" built. (R. p. 199). There is no evidence that at the time the footings were dug and then poured, Respondents had decided not to use the lot for their residence. The fact that Respondents later provided to Dan-Sa plans for a house which could be built on the footings does not mean that Respondents had planned, prior to the time the footings work was undertaken, to construct a house that would be put into the stream of commerce. Such an assumption would be a mere speculation, not a reasonable inference creating a genuine issue of material fact. Jackson, 383 S.C. at 17, 677 S.E.2d at 616.

The key distinction between Terlinde and the facts in our case is that at the time Respondents undertook the work on the property, they intended to make the property their residence, same as in Breedlove's situation. They did not foresee that others "will seek to enjoy the fruits" of their efforts as in Terlinde, but were working for themselves. Appellants contend it is significant that Respondents provided Dan-Sa the building permit and plans. (App. Br. 25). However, Respondents did not engage in the construction of a house to be placed in the stream of commerce within the meaning of Terlinde by releasing to Dan-Sa the permit they obtained for

moving the modular house on the footings and by providing to Dan-Sa draftsman's drawings of a house which could be built on the footing because Dan-Sa, a licensed residential builder, used its own judgment and discretion to build the house Appellants eventually purchased on the footings poured by Respondents. The responsibility for building the house on the footings fell on Dan-Sa because, according to Appellants' expert, a residential builder should have noticed if the house was located on fill and should have had soil tests performed unless documentation was given to him showing that satisfactory soil tests had previously been performed. (R. p. 237).

The evidence in the record shows that Dan-Sa was a South Carolina licensed residential builder who was building a house for speculative sale and obtained financing for this purpose. (R. p. 82, lines 19-20; R. p. 90, lines 3-5; R. p. 92, lines 9-11). Respondents released to Dan-Sa their permit for moving on the footings the modular home existing on the original property. (R. p. 164; R. p. 197). The county required Dan-Sa to obtain a new permit. (R. p. 91, lines 7-19; R. p. 105, line 20-p.106, line 4). Respondents did provide Dan-Sa draftsman's drawings of a house which could be built on the footings. (R. p. 161, ¶11). Nevertheless, Gibson admitted he modified the plans and could not find the plans received from Respondents. (R. p. 86, lines 20-25; R. p. 88, lines 23-25; R. p. 96, line 22-p. 97, line 6; R. p. 161, ¶11). Dan-Sa's building permit shows Dan-Sa was planning to build a house with more square footage than indicated on Respondents' permit for the modular home to be moved. (R. p. 105, lines 8-19). Dan-Sa determined the footings were suitable for building the larger house on it because they looked very good and "had been passed by the county." (R. p. 86, lines 1-11; R. p. 89, lines 2-3; R. p. 103, lines 4-8; R. p. 106, lines 5-9). Further, Dan-Sa also decided how to support the porches that he actually built and supported the roof over the second story of the porch on the retaining wall. (R. p. 104, lines 9-20; R. p. 107, lines 4-24; R. p. 110, lines 7-23; R. p. 141, lines 13-18).

The Terlinde duty of care in constructing the residence applies to the residential builder who actually constructs the residential building to be placed in the stream of commerce. It would be unreasonable to impose a duty of workmanship on Respondents, the sellers of property, who built for themselves footings and a retaining wall that was not even supposed to be a part of the residential building, when Respondents did not perform any work for Dan-Sa.

Furthermore, the Terlinde court's imposition of liability in tort in the absence of privity between the tortfeasor and the third party was limited to protecting an innocent purchaser in the context of defective construction. Therefore, there could not be any liability imposed on Respondents because the house constructed on the footings by Dan-Sa was not defective. (R. p. 123, line 9-p. 125, line 17; R. p. 136, lines 16-23). Also, as indicated above, there is no evidence that debris ran under the footings. According to Dan-Sa's owner, Gibson, who built the house, "if [the plaintiffs] had never dug that pool, the house would still be there like in 40 years from now." (R. p. 114, lines 22-24). His statements are supported by the allegations in the complaint, where it is explained that the discovery of buried debris was the result of Appellants' contractor's work to install a pool, and not by finding any defects in the house. (R. p. 23, ¶¶15-17; R. p. 123, line 9-p. 125, line 17). Also, any issues to the porch were caused by the defective construction of the porch by Dan-Sa, who supported a part of it on the retaining wall, and was not created by the debris running partially under the retaining wall. (R. p. 136, lines 21-23; R. p. 138, lines 16-23).

Therefore, the circuit court properly granted summary judgment to Respondents because Appellants also failed to show that Respondents had a duty of care in the construction of the residential home that was purchased by Appellants.

CONCLUSION

The circuit court properly granted Respondents' motion for summary judgment because as a matter of law, Respondents are not liable to Appellants. The contract of sale between Respondents and Dan-Sa does not create a duty to disclose buried debris that Respondent owed Appellants and does not provide a basis for Respondents' liability to Appellants for failure to disclose buried debris to Dan-Sa.

To the extent that Appellants have a cause of action in negligence against Respondents as a result of the contract of sale between Respondents and Dan-Sa, Appellants failed to provide evidence that Respondents should have disclosed the buried debris to Dan-Sa. Specifically, there is no evidence that building a pool in that portion of the lot or supporting the porch on that side of the house on the retaining wall was a material part of the transaction between Respondents and Dan-Sa or that Respondents realized or should have realized any risk was involved in failing to disclose the buried debris to Dan-Sa. Further, there is no evidence that Respondents' disclosure would have reached Appellants.

Lastly, Respondents are not liable as a matter of law to Appellants because Respondents' work was for themselves and no evidence exists that when they buried the debris and built the retaining wall and footings for the modular home to be moved on they were doing so for others. Therefore, for all the above reasons, the circuit court's grant of summary judgment in favor of Respondents should be affirmed.

(signature page to follow)

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October 19, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-CP-28-0250
Appellate Case No. 2015-000652

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 Janis M. Niemi are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), *SCACR*.

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October 19, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-CP-28-0250
Appellate Case No. 2015-000652

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 Janis M. Niemi are the Respondents.

PROOF OF SERVICE

I, Teresa K. Todd, Legal Assistant to Catharine Garbee Griffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Respondents' Final Brief, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Stephen "Chip" Burn, Esquire
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and

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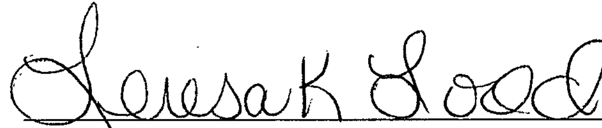

Teresa K. Todd

Columbia, SC

October 20, 2015