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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas

JUN 29 2017

G. Thomas Cooper, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-28-0250

Clifford D. Holley and Sharon Holley, Appellants,

v.

Dan-Sa, Inc.; Charles E. Oman; Janis M. Niemi;  
Gina L. Pike; Dermac Contractors, LLC; Bluewater  
Development of South Carolina, LLC, and Blue  
Ridge Savings Bank, Inc., Defendants,

Of whom Charles E. Oman and and Janis M. Niemi are the Respondents.

PETITION FOR REHEARING

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## INTRODUCTION

The Court of Appeals issued its opinion in this matter on June 14, 2017 (Unpublished Opinion Number 2017-UP-243). This appeal is from the circuit court's grant of summary judgment on Appellants' claims against Respondents for (1) negligent nondisclosure of a hidden land defect (buried organic debris) and (2) negligence in developing and improving a residential lot ultimately purchased by Appellants. In its opinion, the Court of Appeals held that (1) Respondents did not owe any duty of care in improving the lot and (2) as to both claims the record did not contain evidence of a legally sufficient causal connection between Respondents' actions and omissions and Appellants' damages.

As set forth below, the Appellants respectfully petition the Court for a rehearing and reconsideration of its opinion on the grounds that, (1) the Court's holding on the issue of causation was based on construing evidence in favor of Respondents, contrary to the applicable standard on review of summary judgment, and (2) the Court's analysis of the Respondents' duty of care in improving their former property overlooks the factual circumstances of Respondents' sale of a partially improved lot to a contractor without disclosure of a concealed material defect.

## GROUND FOR PETITION

- I. **The Court should reconsider its opinion and hold that there is a question of fact as to whether Appellants' damages were caused by Respondents' failure to disclose buried debris.**

Respectfully, with regard to the issue of causation, the Court of Appeals has applied in reverse the liberal standard contemplated by Rule 56, SCRCP, by construing evidence in the light most favorable to the parties granted summary judgment, the Respondents. The Court acknowledged that Danny Gibson of Dan-Sa, the firm that purchased the lot from Respondents and built the home, testified to the effect that buried debris should be disclosed and that it is a problem to have buried organic debris underneath a house. (R. p. 120, In. 10-13, p. 121, In. 13-14). However, the Court then concluded that any factual inferences that might be drawn from this testimony (i.e., about what Gibson would have done differently had he known of the concealed debris) are barred as a matter of law based on additional testimony from Gibson that the home would not have sustained damage if the Appellants had never removed the debris out from under the retaining wall. (R. p. 114, In. 4-8, 20-24). The Court has essentially weighed and construed Gibson's conflicting testimony and made a factual determination.

The record shows that (1) Respondents buried organic debris on the lot, (R. p. 75, In. 2-12); (2) Respondents did not disclose the debris to Gibson when they sold him the property and Gibson did not otherwise become aware of the debris, (R. p. 116, In. 23 through p. 117, In. 3); (3) the debris field extended under a retaining wall (R. p. 138, In. 14-17; p. 144, In. 8-11); (4) Gibson placed structural supports for a porch both on top of and immediately adjacent to the

retaining wall, ((R. p. 107, In. 12-24; p. 110, In. 4-12; R. p. 141, In. 16-18); and (5) the home sustained damage when the debris was excavated and removed, (R. p. 138, In. 6-23; R. p. 135, In. 8-13). In the context of this set of facts, the Court has construed Gibson's testimony in favor of Respondents to determine that he would have placed structural supports on top of the retaining wall even if he had known about the underlying debris.

However, a reasonable jury could determine based on Gibson's testimony that he would not have knowingly built the porch and other components of the home over the buried debris. While it is certainly true, and unsurprising, that Gibson denies his work had anything to do with the damage to the home, a jury could certainly discount this portion of his testimony based on his clear motive to deny being connected in any way to a costly problem. While a factfinder may need to weigh Gibson's denial of a causal connection against his more candid testimony that concealed debris under a structural foundation is a problem, that factual determination is not properly part of a summary judgment ruling.

Furthermore, Gibson's statement that the buried debris did not lead to the damage to the home was based on his unfounded assertion that the structural supports for the porch were not in fact sitting over the debris field. (R. p. 120, In. 15 ("But the porch wasn't sitting on that anyway"). This assertion is clearly contradicted elsewhere in the record, (R. p. 138, In. 14-17; p. 144, In. 8-11) (debris excavation contractor's testimony that the debris field extended from the area where the pool was being installed to underneath the porch and its footers, and that debris was even pulled out "from underneath the house."), and was

made on the limited and highly questionable basis of Gibson's review of a photograph showing a portion of the debris excavation. (R. p. 114, ln. 4-8; p. 171). Gibson's claim also begs the question, appropriate for factual consideration by a jury, of how it is possible that the debris was not under the retaining wall supporting the porch if he claims that the damage only occurred because the debris was removed from under the retaining wall. This problematic portion of Gibson's testimony regarding causation does not provide grounds to rule on causation as a matter of law.

More fundamentally, the Court's analysis focuses on the question of what Gibson *now claims* caused the damage to the home, and not on the question of what he *would have done differently* had the buried debris been disclosed to him. Respectfully, only the latter question is at issue. Gibson's testimony regarding causation was his attempt to pose and then answer his preferred question of whether, in hindsight, and based on review of an excavation photograph, he would admit that his company's work was a cause-in-fact of the significant damage at issue in this litigation. Unsurprisingly, he did not so admit. However, the relevant factual question is entirely different: What would Gibson have done differently in the construction process had he been on notice at the time of buried organic debris in the general vicinity?

A jury could determine that this question is best answered by Gibson's testimony, regarding whether it is a problem to have organic material under a house, that "[o]h yeah . . . you don't want that. . . . It can sink. See, once this rots, you can sink. . . . it's not good. You see what's happened here, don't you?" (R. p.

120, In. 10-13, p. 121, In. 13-14). On that basis, a reasonable jury could find that Gibson would not have built over the debris had he known about it, and that the Respondents' nondisclosure was therefore a proximate cause of damage to the home. The record presents, at the very least, a scintilla of evidence to that effect.

**II. The Court should reconsider its opinion and hold that a residential lot owner who constructs home foundation footers on the lot and then sells it to a builder to complete construction of a speculative home owes a duty of care to a subsequent owner of the fully constructed home.**

In holding that the Respondents owed no duty of care to the Appellants with regard to their partial development of the lot at issue in this case, the Court focused exclusively on the intent of Respondents at the time they cleared the lot, buried debris, and constructed the footings and retaining wall. Respectfully, this analysis overlooks the fact that at the time the Respondents sold the property, and clearly had no intention to reside on it, they undertook in exchange for a significant sales contract price to enable and contribute to the construction of a speculative home on the lot for sale to a foreseeable class of future purchasers.

Pursuant to and as consideration for the sale of the partially improved property to Dan-Sa, the Respondents provided Dan-Sa the building permit and plans for a home to be built on the footings they had installed. (R. p. 200). It is undisputed that "[t]he 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. 185; R. p. 12). Prior to the transfer of the improved lot, construction plans, and building permit, Oman represented to the owner of Dan-Sa that he was in the construction industry. (R. p. 87, In. 14-18).

In other words, a material part of what the Respondents transferred to their contractor-vendee, Dan-Sa, was the capability to continue the specific construction process the Respondents had started. In undertaking to do so, the Respondents assumed a duty to act with due care in furthering this process. See Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006). The Respondents failed to meet this duty of care by failing to provide the contractor planning to continue the process with information about a latent defect in the property which, at that point, could still have been corrected. A party's duty of care includes acknowledging and correcting its own reasonably known errors. See, e.g., Dorrell v. S. Carolina Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). The key point in time for this analysis is not when the Respondents buried the debris, but instead when they sold the lot to a contractor for the purposes of continuing the construction process.

The Court of Appeals did not discuss in its opinion the legal impact of Respondents' undertaking to further the process of a speculative home at a point when they clearly had no intention of residing in the home. Upon reconsideration, the Court should rule that this factual scenario gave rise to a duty of care, and that there is a genuine question of fact as to whether the duty was breached. This facts of this case, in the respects discussed above, are fundamentally distinguishable from Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008), and much more akin to Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980), in which the former owner of the property had constructed a home never intended for his own use.

In reconsidering this issue, Appellants also request that the Court hold that the circuit court erred in ruling that the duty contemplated in Terlinde and Smith only applies to the party responsible for placing the "finished product" of a completed home into the stream of commerce. (R. p. 17). See, e.g., Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970) (roofing subcontractor owed property owner duty of care in performing work).

**III. On reconsideration, the Court should take up the additional issues on appeal and rule in favor of Appellants.**

As a result of the Court's determination on the issue of causation, it declined to reach certain other issues on appeal. The Appellants petition the Court to reach these issues and rule in their favor upon reconsideration of the issue of causation.

**a. The Court should reach the issue of materiality and rule that the circuit court erred in holding Respondents' burial of organic debris on their property was not a material fact in the sale of the property.**

The Court of Appeals did not reach the issue of materiality in its Opinion. On reconsideration and determination of the issue of causation in favor of Appellants, the Appellants submit that the Court should also rule in their favor on the issue of materiality on the basis of the following authorities and others cited in Appellants' prior briefs. Lawson v. Citizens & S. Nat. Bank of S. C., 255 S.C. 517, 520-21, 180 S.E.2d 206, 208 (1971); Culbreath v. Investors Syndicate, 203 S.C. 213, 26 S.E.2d 809, 812 (1943); Sub Station II of Tennessee, Inc. v. Oliver, 307 S.C. 166, 169, 414 S.E.2d 141, 142 (1992); Finley v. Dalton, 251 S.C. 586, 591,

164 S.E.2d 763, 766 (1968); Lebby v. Ahrens, 26 S.C. 275, 2 S.E. 387, 389 (1887); Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc., 338 S.C. 343, 348-49, 526 S.E.2d 253, 255 (Ct. App. 2000) aff'd as modified, 349 S.C. 356, 563 S.E.2d 331 (2002); Restatement (Second) of Torts § 538(2)(a) and cmt. e (1977).

**b. The Court should reach the issue of duty to disclose and rule that a vendor of partially improved land has a duty to disclose known latent defects affecting the suitability of the land for further residential improvements.**

The Court of Appeals did not reach the issue of a vendor's duty of disclosure in its Opinion. On reconsideration and determination of the issue of causation in favor of Appellants, the Appellants submit that the Court should also rule in their favor on the issue of the vendor's duty to disclose on the basis of the following authorities and others cited in Appellants' prior briefs. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 114, 512 S.E.2d 510, 519 (Ct. App. 1998); Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997); Pruitt v. Morrow, 288 S.C. 298, 300, 342 S.E.2d 400, 401 (1986); Lawson v. Citizens & Southern National Bank of S.C., 255 S.C. 517, 180 S.E.2d 206 (1971); Brooks v. Ervin Construction Co., 253 N.C. 214, 116 S.E.2d 454 (1960); Brooks Equipment & Mfg. Co. v. Taylor, 230 N.C. 680, 55 S.E.2d 311 (1949); Restatement (Second) of Torts § 311, cmt. d (1965).

**c. The Court should reach the issue of a vendor's duty to a subvendee and rule that a vendor's liability for tortious failure to disclose land defects extends to a subvendee.**

The Court of Appeals did not reach the issue of the extension of a vendor's duty to disclose to subvendees. On reconsideration and determination

of the issue of causation in favor of Appellants, the Appellants submit that the Court should also rule in their favor on the issue of a vendor's liability to a subvendee based on failure to disclose land defects, on the basis of the following authorities and others cited in Appellants' prior briefs. Dorrell v. S. Carolina 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); Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980); Pruitt v. Morrow, 288 S.C. 298, 301, 342 S.E.2d 400, 401 (1986); Lawson v. Citizens & S. Nat. Bank of S. C., ("Lawson I") 255 S.C. 517, 180 S.E.2d 206 (1971); Lawson v. Citizens & S. Nat. Bank of S. C., ("Lawson II") 259 S.C. 477, 193 S.E.2d 124 (1972); Restatement (Second) of Torts § 353 (1965); Restatement (Second) of Torts § 311(1) (1965).

#### CONCLUSION

For the foregoing reasons, the Appellants respectfully petition the Court for a rehearing and reconsideration of its Opinion.

[Signature block to follow]

Respectfully submitted,



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June 29, 2017

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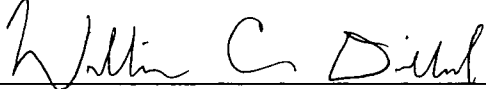
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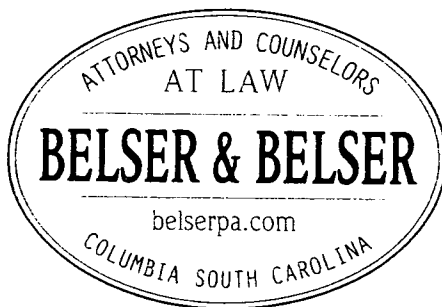
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I certify that on the date set forth below I have served the *Petition for Rehearing* on Respondents by United States First Class Mail to their attorneys of record, Catharine Garbee Griffin, Esquire and Jonathan Blake Asbill, Esquire, at 3710 Landmark Drive, Suite 400, Columbia, South Carolina 29204.

June 29, 2017

  
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SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1200 Senate Street  
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Re: *Clifford D. Holley and Sharon Holley v. Dan-Sa, Inc., et al.*  
Appellate Case No. 2015-000652

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of Appellants' *Petition for Rehearing and Proof of Service*. In addition to a check for the \$25 filing fee, I have also enclosed an additional copy of each of the above referenced documents. Please clock the additional copy and return it to my courier.

Thank you for your attention to this matter. I have served copies of the above referenced documents on counsel for Respondents by copy of this letter.

Sincerely,

William C. Dillard, Jr.

WCD/prd  
Enclosures

cc: Catharine Garbee Griffin, Esquire  
Jonathan Blake Asbill, Esquire  
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