

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman

Appellate Case No. 2013-001843
(Trial Court Case No. 2011-CP-23-6376)

Kevin McCarthy and Courtney R. McCarthy, Appellants,

v.

The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South;
Keowee Falls Investment Group, LLC; Cliffs Real Estate, Inc.; The
Cliffs Golf and Country Club, Inc.; and S&ME, Inc., Defendants,

Of whom

S&ME, Inc. is Respondent.

FINAL BRIEF OF APPELLANTS

Thomas E. Dudley, III, Esquire
Townes B. Johnson, III, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. 864.242.4899
Fax 864.242.4844

Other Counsel of Record

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
864.327.5000
Attorney for Respondent

RECEIVED

SEP 16 2014

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	7
ARGUMENT	8
I. THE COURT ABUSED ITS DISCRETION IN FINDING THAT RESPONDENT WOULD BE PREJUDICED BY THE GRANT OF APPELLANTS' MOTION TO AMEND	8
II. THE COURT ERRED IN FINDING THAT APPELLANTS INEXCUSABLY DELAYED FILING THEIR MOTION TO AMEND.....	10
III. BY ESTABLISHING MATERIAL ISSUES OF FACT WHICH ARE CLEARLY IN DISPUTE, THE COURT ERRED GRANTING RESPONDENT S&ME, INC.'S MOTION FOR SUMMARY JUDGMENT.....	11
IV. PURSUANT TO SOUTH CAROLINA CODE ANN. § 40-22-20(14), SOUTH CAROLINA CODE OF REGULATIONS § 49-301 AND THE RELEVANT INDUSTRY STANDARDS, THE COURT ERRED IN FAILING TO FIND THAT RESPONDENT OWED A DUTY OF CARE TO APPELLANTS.....	13
V. BY FAILING TO VIEW THE EVIDENCE AND FAILING TO DRAW THE INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, THE COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT	20
A. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, RESPONDENT OWED A DUTY OF CARE TO APPELLANTS BASED ON THE PARTIES SPECIAL RELATIONSHIP	21
B. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, A REASONABLE INFERENCE CAN BE MADE THAT RESPONDENT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF APPELLANTS' DAMAGES	29
C. CONCLUSION.....	30
VI. PURSUANT TO THE COURT'S EXTENSION OF THE KENNEDY HOLDING, THE COURT ERRED IN FINDING THAT APPELLANTS'	

CLAIMS AGAINST RESPONDENT WERE BARRED BY THE ECONOMIC LOSS RULE	30
VII. THE COURT ERRED IN FINDING THAT APPELLANTS' WERE NOT ENTITLED TO RECOVER THE PURCHASE PRICE OF APPELLANTS' LOT.....	32
VIII. THE COURT ERRED IN FINDING THAT APPELLANTS' WERE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST RESPONDENT	33
CONCLUSION.....	34
CERTIFICATE OF COUNSEL.....	345

TABLE OF AUTHORITIES

Cases

Anders v. Nash, 256 S.C. 102, 180 S.E.2d 878 (1971)	8
Bailey v. Segars, 550 S.E.2d 910, 914, 346 S.C. 359 (S.C.App. 2001)	29
Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991)	21, 28, 32
Carson v. Adgar, 326 SC 212 (1997).....	13, 21
Citizens for Lee Cnty. v. Lee Cnty., 308 S.C. 23, 28-9, 416 S.E.2d 641, 645 (1992).....	13
Clyburn v. Sumter County Sch. Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994)	33
Collins Entertainment, Inc. v. White, 363 S.C.546, 611 S.E.2d 262 (Ct. App. 2005)	8, 9, 10
Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989)	13, 21
Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital, 344 S.C.426, 433, 544 S.E.2d 838, 842 (2001)	21, 28
Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996)	13, 21
Georgetown Steel Corp v. Law Engineering Testing Co., 7 F.3 rd 223 (4 th Cir. 1993).....	22, 28
Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993)	33
Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App.1989), aff'd, 302 S.C. 519, 397 S.E.2d 377 (1990).....	33
Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989)	21, 22, 23, 28, 29, 30, 31, 32
Kincaid v. Landing Dev. Corp., 289 SC 89, 344 SE2d 869 (Ct. App. 1986)	31
Mylin v. Allen-White Pontiac, Inc., 281 S.C. 174, 314 S.E.2d 354 (Ct. App.1984)	8
Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994)	13, 20

Parker v. Spartanburg Sewer Dist. 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005).....	10
Porter Bros., Inc. v. Specialty Welding, Co. 286 S.C. 39, 331 S.E.2d 783 (Ct.App.1985).....	7
Quail Hill, 387 S.C. at 234, 692 S.E.2d at 505	8, 20
Rogers v. Seyphers, 251 SC 128, 161 SE2d 81 (1968)	31
Ross Dress For Less, Inc. v. Lauth Construction Group, LLC (unreported) 2012 WL 2572042 (D.S.C 2012).....	22,28, 29
Sapp v. Ford Motor Co., 687 S.E.2d 47, 386 S.C. 143 (S.C. 2009)	22, 28, 29
State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986)	22, 28
Terlinde v. Neely, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980)	22, 23, 28, 29, 31
Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995)	21, 28
Yadkin Brick Co., Inc. v. Materials Recovery Company, 339 S.C.640, 529 S.E.2d 764 (Ct. App. 2000)	32
 <u>Statutes</u>	
<u>South Carolina Code Ann. § 40-22-20(14)</u>	13, 18, 19, 20
<u>South Carolina Code of Regulations § 49-301</u>	13,14, 18, 19, 20
<u>South Carolina Code of Regulations § 49-303</u>	13, 17
 <u>Rules</u>	
SCRCP Rule 15	7, 8
SCRCP Rule 56	8, 20
 <u>Treatises</u>	
4A Bruner & O'Connor Construction Law § 14:21	13

STATEMENT OF ISSUES ON APPEAL

- I. THE COURT ABUSED ITS DISCRETION IN FINDING THAT RESPONDENT WOULD BE PREJUDICED BY THE GRANT OF APPELLANTS' MOTION TO AMEND
- II. THE COURT ERRED IN FINDING THAT APPELLANTS INEXCUSABLY DELAYED FILING THEIR MOTION TO AMEND
- III. BY ESTABLISHING MATERIAL ISSUES OF FACT WHICH ARE CLEARLY IN DISPUTE, THE COURT ERRED GRANTING RESPONDENT S&ME, INC.'S MOTION FOR SUMMARY JUDGMENT?
- IV. PURSUANT TO SOUTH CAROLINA CODE ANN. § 40-22-20(14), SOUTH CAROLINA CODE OF REGULATIONS § 49-301 AND THE RELEVANT INDUSTRY STANDARDS, THE COURT ERRED IN FAILING TO FIND THAT RESPONDENT OWED A DUTY OF CARE TO APPELLANTS
- VI. BY FAILING TO VIEW THE EVIDENCE AND FAILING TO DRAW THE INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, THE COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
 - A. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, RESPONDENT OWED A DUTY OF CARE TO APPELLANTS
 - B. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, A REASONABLE INFERENCE CAN BE MADE THAT RESPONDENT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF APPELLANTS' DAMAGES
 - C. CONCLUSION
- VI. PURSUANT TO THE COURT'S EXTENSION OF THE KENNEDY HOLDING, THE COURT ERR IN FINDING THAT APPELLANTS' CLAIMS AGAINST RESPONDENT WERE BARRED BY THE ECONOMIC LOSS RULE
- VII. THE COURT ERRED IN FINDING THAT APPELLANTS' WERE NOT ENTITLED TO RECOVER THE PURCHASE PRICE OF APPELLANTS' LOT
- VIII. THE COURT ERRED IN FINDING THAT APPELLANTS' WERE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST RESPONDENT

STATEMENT OF THE CASE

On September 27, 2011, Appellants Kevin and Courtney McCarthy (“Appellants”) brought this action alleging professional negligence against Respondent S&ME, Inc. (“Respondent”) for its failure to accurately diagnose an active slope failure occurring on and around Appellants’ lake front lot at The Cliffs at Keowee Falls South, its failure to fully describe the conditions which it observed on and around the lot, and its failure to disclose all relevant information in its report in regard to the lot and surrounding lots. On or about January 15, 2013, Respondent moved for summary judgment on Appellants’ professional negligence claim against Respondent. Thereafter, on or about March 20, 2013, Appellants moved to amend their complaint against Respondent to add a cause of action for negligent misrepresentation.

On May 3, 2013, a hearing on both motions was heard before the Honorable Clifton Newman. On or about July 22, 2013, Judge Newman issued an Order denying Appellants’ Motion to Amend and a separate Order granting Respondent’s Motion for Summary Judgment. On or about August 2, 2013, Appellants moved to alter or amend the Court’s Order granting Respondent’s Motion for Summary Judgment.

On August 22, 2013, Appellants served their Notice of Appeal on Respondent with respect to the Court’s denial of Appellants’ Motion to Amend. On or about December 3, 2013, Judge Newman issued an Order denying Appellants’ Motion to Alter or Amend. On December 9, 2013, Appellants served their Notice of Appeal on Respondent with respect to the Court’s grant of Respondent’s Motion for Summary Judgment and denial of Appellants’ Motion to Alter or Amend same and served a Motion

to Consolidate the two Notices of Appeal. On or about December 18, 2013, this Court consolidated Appellants' appeals.

STATEMENT OF FACTS

This dispute arises out of Appellants' 2005 purchase of a residential lake lot, Lot 32 ("Lot 32" or "Appellants' Lot"), at The Cliffs at Keowee Falls South ("Keowee Falls South") which has been identified as experiencing an active slope failure and Respondent's alleged professional negligence in failing to accurately diagnose the slope failure, failing to fully describe the conditions in which it observed on the lot, and failing to disclose all relevant information in its report in regard to the lot. Appellants did not learn of any issue of a slope failure on their lot until 2011. (-R. p. 556).

On December 16, 2002, approximately two thousand (2000) acres of land was purchased from Crescent Resources, LLC for residential development by The Cliffs. (R. p. 960). A portion of that land was developed as Keowee Falls South. On May 3, 2004, Keowee Falls South's HUD Disclosure was prepared for dissemination to any prospective buyer. Pursuant to the HUD Disclosure, Keowee Falls South is a residential subdivision and the only use for Appellants' Lot was residential construction. (R. p. 455).

In early 2005, Appellants began looking for a lot to build a home upon in the Lake Keowee area. (R. p. 924). Appellants chose Lake Keowee because it was equidistant between Kevin McCarthy's then residence in Atlanta, Georgia and Courtney McCarthy's then residence in Charlotte, North Carolina. (R. p. 933). The McCarthys were engaged at the time and after getting married, they contemplated living in the separate cities because of their respective jobs. That changed when Kevin McCarthy got

a job in Charlotte, North Carolina. Neither Kevin McCarthy nor Courtney McCarthy had ever purchased raw real estate before. (R. p. 925).

On June 2, 2005, unbeknownst to Appellants, Alpha Environmental Sciences, Inc. (“Alpha”) evaluated and issued a report (“Alpha Report”) to Larry Hutchinson of the Paragon Group, the residential builder hired by the owner of the lot adjacent to Appellant’s Lot known as Lot 31 at Keowee Falls South (“Lot 31”). (R. p. 485). Appellants’ Lot is to the south of Lot 31. Pursuant to the Alpha Report, there was evidence of a slope failure on Lot 31 and it further appeared that the slope failure extended beyond “the boundaries of [Lot 31] in both north and south directions”; north to lot 30 (hereinafter “Lot 30”) and south to Appellant’s Lot. (Id.). The Alpha Report concluded that Lot 31 should “not be utilized for residential construction” and perhaps neither Lot 30 nor Appellants’ Lot. (Id.). Thereafter, the owner of Lot 31 presented the Alpha Report to The Cliffs and The Cliffs, in reliance on the report, agreed to buy back or trade another lot with the then owner of Lot 31. (R. pp. 500-501). The Cliffs then decided to inquire further into the slope failure on Lot 30, Lot 31 and Appellants’ Lot and logically turned to Respondent, with whom they had a fifteen (15) year plus working relationship. (R. pp. 500; 517; 519). Accordingly, at some point prior to June 22, 2005, The Cliffs reached out to Respondent to perform an investigation of the lots implicated in the Alpha Report’s findings: Lot 30, Lot 31, and Appellants’ Lot. (R. pp. 500; 517; 519; 719).

Also in June 2005, Appellants met Jay Scott, an independent real estate salesman for Cliffs Real Estate, Inc. to look at waterfront property at Lake Keowee. (R. p. 928). Appellants looked at a number of potential lots, including Appellants’ Lot, as well as

several homes which had been constructed (R. p. 927; R. pp. 954-955). Thereafter, Appellants decided to purchase Appellants' Lot and on June 20, 2005, Appellants entered into a Real Estate Sale and Purchase Agreement for the purchase of Appellants' Lot for \$1,105,000.00. (R. pp. 270, 295; R. p. 941). Appellants were never told about the Alpha Report or that The Cliffs was having their lot investigated by Respondent. (R. p. 557)

Two (2) days after Appellants entered into their agreement to purchase Appellants' Lot, on June 22, 2005, Respondent sent Proposal No. 05471 ("Respondent's Proposal" or "Proposal No. 05471") to The Cliffs to perform a geotechnical evaluation of "three lots" at Keowee Falls South (R. p. 517). The Cliffs identified those lots as Lot 30, Lot 31, and Appellants' Lot. (R. p. 519). In Respondent's Proposal to The Cliffs regarding the "three lots", Respondent stated from its initial walk of the property that "[i]t appears that about three sloughs have occurred at the property, approximately paralleling the water surface and the contour of the lots. These surface features are very unique", inferring that the conditions observed spanned Lot 30, Lot 31, and Appellants' Lot (R. p. 517). At no time in Respondent's Proposal did Respondent make any reference that its observations were limited to Lot 31. (Id.). On or about June 27, 2005, The Cliffs executed Respondent's Proposal for Respondent to perform the investigation on the "three lots" (R. p. 529).

Despite Proposal No. 05471 stating that "[n]o amendment or modification of this agreement or any waiver of any provisions hereof shall be effective unless in writing, signed by both parties", sometime after The Cliffs' execution of Respondent's Proposal for Respondent to perform an investigation on the "three lots", Respondent and The

Cliffs allegedly agreed that Respondent's investigation would be limited to Lot 31 (R. pp. 198, 529). Don Nickell of The Cliffs could not explain why or how Respondent's evaluation went from three lots (Lot 30, Lot 31 and Appellants' Lot) to one (Lot 31) (R. pp. 527-528). Furthermore, neither Respondent nor The Cliffs has produced any written amendments or modifications to Proposal No. 05471 wherein the scope of the work was limited to just Lot 31.

On June 18, 2005, Respondent issued a report to The Cliffs of its findings and recommendations as to Lot 31 only (hereinafter "Respondent's Report") (R. p. 201). Respondent's Report identified "three 'scarp' areas across" Lot 31 which it described as "very unique" surface features, but concluded that there was not an active slope failure on the lot (R. p. 537). Respondent further noted that due to the "unique surface and subsurface anomalies", specifically, the low consistency soils, modifications would be required for Lot 31 to support a residential structure and recommended that fifty (50) to seventy-five (75) rammed aggregate piers costing up to Six Hundred Dollars (\$600) per pier would need to be put in place (Id.). However, despite these findings and the significant foundation recommendations for Lot 31 and contrary to Respondent's Proposal and Respondent's prior observation that "three sloughs" extended to the three lots, Respondent's Report did not contain any references to Lot 30 or Appellants' Lot and made no mention of the significant foundation recommendations for Lot 31 extending to Lot 30 or Appellants' Lot. (Id.). The Cliffs never gave Appellants a copy of the Alpha Report or Respondent's Report and Appellants closed on their purchase of their lot on August 5, 2005 without knowing that both Alpha and Respondent observed unique surface and subsurface abnormalities on

their property. (R. pp. 270, 938-939). In 2010, Bunnell-Lammons Engineering, Inc. ("BLE") was hired by the owner of lot 29 ("Lot 29") at Keowee Falls South, in close proximity to Appellants' Lot, to diagnose an issue with Lot 29's driveway. (R. p. 588). That BLE Engineer diagnosed an active slope failure spanning Lot 29, Lot 30, Lot 31 and Appellants' Lot. (Id.) As a result, BLE was hired by The Cliffs to conduct inclinometer readings on Lot 30, Lot 31, and Appellants' Lot. (R. p. 595). Ultimately, BLE's Bill Mathews opined that a deep seated slope failure was present on Lot 30, Lot 31, and Appellants' Lot. (R. pp. 624, 634). After learning of the issues with their lot in April 2011, Appellants hired an expert who has also diagnosed an active slope failure on Appellants' Lot. (R. p. 666).

Appellants first learned of the problems with their lot in April 2011 when Appellants received a call from the owner of Lot 31, who purchased that lot in 2009. (R. p. 556). Shortly thereafter, Appellants also obtained a portion of Respondent's Report. (R. p. 937). Appellants would not have bought Appellants' Lot had they known of the problems raised by the Alpha Report or what Respondent observed and recommended. (R. p. 556). Subsequent testing has indicated that Appellants' Lot, Lot 30 Lot 31, and the cul-de-sac above connecting the three lots are continuing to move, resulting in the loss of use of Appellants' Lot.

STANDARD OF REVIEW

Under Rule 15(a) and (b), SCRCP, the court has the power to amend pleadings beyond the time allowed for an amendment when to do so does not prejudice another party. Courts have wide latitude in amending pleadings. *Porter Bros., Inc. v. Specialty Welding, Co.* 286 S.C. 39, 331 S.E.2d 783 (Ct.App.1985). While this power should not be

used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. *Id.* The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Anders v. Nash*, 256 S.C. 102, 180 S.E.2d 878 (1971); *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 314 S.E.2d 354 (Ct. App.1984).

In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill*, 387 S.C. at 234, 692 S.E.2d at 505. Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505.

ARGUMENT

I. THE COURT ABUSED ITS DISCRETION IN FINDING THAT RESPONDENT WOULD BE PREJUDICED BY THE GRANT OF APPELLANTS' MOTION TO AMEND

Pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, leave to amend shall be freely given when justice so requires and does not prejudice any other party. Rule 15, SCRCP. "The prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is lack of notice that the new issue is to be tried and a lack of opportunity to refute it." *Collins Entertainment, Inc. v. White*, 363 S.C.546, 611 S.E.2d 262 (Ct. App. 2005)

In the matter at hand, Appellants' new cause of action was based on facts Appellants learned for the first time through discovery in November and December 2012; specifically, that Respondent had the Alpha Report before its initial walk of Lot 30, Lot 31, and Appellants' Lot and used that to base its proposal. Appellants' Motion to Amend was filed shortly thereafter in March 2013. (R. p. 208).

Respondent has never alleged nor is there any other evidence indicating that Respondent would lack the opportunity to refute the new allegations of Appellants' amended complaint. Moreover, there would have been no further discovery necessary to prosecute or defend the additional claim, as every pertinent deposition had already been taken. The Court's own order articulates the relevant discovery that had already occurred:

“[Appellants'] proposed claim for negligent misrepresentation is premised on the July 18, 2005 report prepared by [Respondent]. By their own admission, [Appellants] knew of the existence of this report in April 2011. In their original Complaint, [Appellants] asserted that they received a copy of a portion of the report to their original Complaint. [Respondent]'s employee witnesses involved in preparing the report were deposed in [a related] matter long ago. Walter Birdsong and Howard Perry were deposed on November 26, 2012 and Michael Revis was deposed on November 29, 2012. The deposition of Don Nickell, The Cliff's employee who asked [Respondent] to prepare the report, occurred on November 5, 2012.”

R. p. 6.

Accordingly, with the case already extending well beyond Judge Newman's Scheduling Order (the hearing on this motion was held in May 2013 – two months beyond any date on the Scheduling Order) and without a trial date being scheduled even as of March 2014, Respondent could not claim a lack of notice that the new issues would be tried. In accordance with Collins Entertainment, Inc., therefore, Respondent would

not have been prejudiced by the Court's grant of leave to allow Appellants to amend.

Collins Entertainment, Inc. v. White, 363 S.C.546, 611 S.E.2d 262 (Ct. App. 2005).

With no prejudice being shown and South Carolina law "strongly favor[ing] amendments", justice required that the Court grant Appellants' leave to amend. *Parker v. Spartanburg Sewer Dist.* 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). The Court's denial of Appellants' Motion to Amend, therefore, was an abuse of its discretion and in error.

II. THE COURT ERRED IN FINDING THAT APPELLANTS INEXCUSABLY DELAYED FILING THEIR MOTION TO AMEND

On or about July 9, 2012, the Court issued a Scheduling Order articulating the following relevant dates: 1) Discovery deadline of December 31, 2012; 2) Motion deadline of January 15, 2013; and 3) a date certain trial date on or about March 1, 2013. (R. p. 1). After the articulated Motion deadline of January 15, 2013, Appellants filed their Motion to Amend on or about March 20, 2013 based on discovery learned during depositions in November and December 2012. At the time Appellants filed their motion, no trial date had been set and, in fact, to date – a full year after the motion was filed – no trial date in this matter has been set. As discussed in the prior section, since no prejudice would have occurred to Respondent if leave to amend would have been given, justice required granting Appellants' Motion to Amend in spite of the Appellants' filing its motion after the articulated deadline. *Collins Entertainment, Inc. v. White*, 363 S.C.546, 611 S.E.2d 262 (Ct. App. 2005).

Accordingly, the Court's denial of Appellants' Motion to Amend was an abuse of its discretion and in error.

III. BY ESTABLISHING MATERIAL ISSUES OF FACT WHICH ARE CLEARLY IN DISPUTE, THE COURT ERRED GRANTING RESPONDENT S&ME, INC.'S MOTION FOR SUMMARY JUDGMENT

In its Findings of Fact, the Court's Order erroneously decides three issues of material fact which are clearly in dispute:

1. Paragraph 6 of the Order states that Respondent sent a proposal to Don Nickell of The Cliffs to perform a geotechnical evaluation of "three unidentified lots". In the matter at hand questions of fact clearly exist as to whether Appellants' Lot was one of those lots and viewing the evidence in a light most favorable to Appellants, Appellants' Lot must be included. Respondent's Proposal referenced "three lots". The Cliffs agreed to Respondent's Proposal and the proposal became Project No. 1261-05.42, which is the same Project No. which appears on Respondent's Report. Furthermore, Don Nickell of The Cliffs testified that the three lots were Lot 30, Lot 31, and Appellants' Lot because the Alpha Report, which Nickell had given to Respondent, "focused on [L]ot 31", but also said something about the lots on "either side"; including Lot 30 and Appellants' Lot. (R. pp. 485, 522). Walter Birdsong, of Respondent, also testified he had received the Alpha Report, which identifies Lot 30 and Appellants' lot, and discussed it with The Cliffs' Don Nickell in connection with the geotechnical work on Lot 31 (R. pp. 720, 721). Characterizing Respondent's work as being on three unidentified lots is inaccurate and unsupported by the testimony presented.

2. Paragraph 7 of the Order states that "[Respondent] never investigated geotechnical conditions at [Appellants' Lot]". In the matter at hand questions of fact clearly exist as to whether Respondent ever investigated geotechnical conditions at Appellants' Lot. In its proposal to The Cliffs on "3 lake front lots", Proposal No. 05471, Respondent states: "It appears that about three sloughs have occurred at the property,

approximately paralleling the water surface and the contour of the lots. These surface features are very unique”. (R. p. 517). As stated above, viewing the evidence in a light most favorable to Appellants, Appellants’ Lot must be included in the three lots where Respondent observed these very unique surface features, the “three sloughs”. It is clear, therefore, that Respondent performed some sort of an investigation on Appellants’ Lot in drafting Proposal No. 05471 in order to make these observations. (Id.). Accordingly, viewing the evidence in a light most favorable to Appellants, Respondent performed a preliminary investigation of the geotechnical conditions on Appellants’ Lot and proposed to its client, The Cliffs, that based on what was observed a further investigation was necessary.

3. Paragraph 8 of the Order states that “On June 27, 2005, Don Nickell executed an Agreement for Services for [Respondent]’s services to be performed at Lot 31”. The Respondent’s scope of work under the Agreement for Services was for everything included in Proposal No. 05471, which was unequivocally the three lots, not just Lot 31. (R. p. 529). As stated above, viewing the evidence in a light most favorable to Appellants, Appellants’ Lot must be included in the three lots where these very unique surface features, the “three sloughs”, occurred. Accordingly, viewing the evidence in a light most favorable to Appellants, Respondent agreed to perform a full investigation of the geotechnical conditions on Appellants’ Lot.

By failing to view the evidence in a light most favorable to Appellants and establishing material facts against the evidence Appellants’ proffered, the Court erred in granting Respondent’s Motion for Summary Judgment.

IV. PURSUANT TO SOUTH CAROLINA CODE ANN. § 40-22-20(14), SOUTH CAROLINA CODE OF REGULATIONS § 49-301 AND THE RELEVANT INDUSTRY STANDARDS, THE COURT ERRED IN FAILING TO FIND THAT RESPONDENT OWED A DUTY OF CARE TO APPELLANTS

In order to recover in a negligence action, the plaintiff must show a duty of care owed by the defendant to the plaintiff. *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). Whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996).

Pursuant to South Carolina law, “an affirmative duty to act exists only if created by statute, contract, relationship, status, property interest or other special circumstance”. *Carson v. Adgar*, 326 SC 212 (1997). When a statute does not specifically create a private cause of action, such claim can be implied if the legislation was enacted for the special benefit of a private party. *Citizens for Lee Cnty. v. Lee Cnty.*, 308 S.C. 23, 28-9, 416 S.E.2d 641, 645 (1992). To determine whether a cause of action is implied, the Court must consider: 1) whether the essential purpose of the statute or regulation is to protect from the kind of harm suffered by Appellants; and 2) whether Appellants are a member of persons the statute or regulation is intended to protect. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994).

There is no question that Respondent had a duty to disclose and describe in detail the extent of the geotechnical investigation and factual results to its client, The Cliffs. South Carolina Code of Regulations § 49-303 (an engineer shall be completely objective and truthful in all professional reports; He shall include all relevant and pertinent information in such reports, statements or testimony) and 4A Bruner & O’Connor Construction Law § 14:21 (citing Brierley, Subsurface Investigations and Geotechnical Report Preparation, in Subsurface Conditions 49 (1998)). There is also no question that

Respondent had the following duties that directly affected Appellants who had a pending contract when Respondent was performing its work: 1) to not conceal information in which others might rely on; 2) to protect the safety, health, property and welfare of the public; and 3) to conduct their practice in a manner as to fulfill their obligation to protect the safety, health, property and welfare of the public. South Carolina Code Ann. § 40-22-20(14) (which defines “fraud” in the practice of engineering to be “to conceal, mislead or misrepresent the truth in a manner that others might take some action in reliance on or an act which provides incorrect, false or misleading information on which others might rely.”); and South Carolina Code of Regulations § 49-301 (an Engineer shall at all times recognize that his primary obligation is to protect the safety, health, property and welfare of the public and shall conduct his practice to fulfill this obligation. If the judgment of the engineer is overruled under circumstances where the safety, health, and welfare of the public are endangered, he shall inform his employer of the possible consequences and notify other proper authority of the situation, as may be appropriate). Because Appellant had a contract on Appellant’s Lot with Respondent’s client, The Cliffs, at the same time Respondent had a contract to perform an investigation of Appellant’s Lot, Appellants fall into the class of persons to be protected by statute and regulations. Also, Appellants were foreseeable persons that would rely on Respondent’s work.

Respondent’s duty is further defined by the industry standard which also required that professional engineers disclose all relevant information and acknowledge the full extent of the geological condition they observe even if it goes onto adjacent property, as testified to by every engineer or geologist engaged in this matter:

Walker Birdsong (Respondent): Agrees that slope failures do not stop at property lines. (R. p. 722).

Roger Moore (Alpha): His practice is to fully describe conditions regardless of property lines. (R. pp. 751-752). On two occasions, Moore's report mentions conditions extending beyond Lot 31; says it is a part of his practice and that it is a practice in the industry. (Id.) Moore's report, the Alpha Report, fully described and diagnosed the geological conditions observed extending into multiple lots, including Appellants' Lot. (R. p. 485).

Bill Mathews (BLE): When offering an opinion as to a geological condition, you describe the full extent of the condition observed - don't limit description to property line. (R. p. 753). Industry standard to describe geological conditions to the fullest extent capable. (R. pp. 754-755). Mathews believes it is professional obligation when engaged to fully identify the conditions he is offering an opinion on. (R. p. 756). Mathew's report to The Cliffs fully described and diagnosed the geological conditions observed extending into multiple lots, including Appellants' Lot (R. p. 588).

Doug Chappell (Wurster Engineering - Respondent's Damages Expert): Admits geological conditions do not respect property lines. (R. p. 631). An Engineer has to account for adjacent lots. (Id.)

Carroll Crowther (Appellants' Expert): Respondent would at least have to acknowledge that what it saw on Lot 31 extended into Appellants' Lot and Lot 30. (R. p. 757). Even if just Respondent hired to look at Lot 31, it cannot look at Lot 31 without saying what it observed extending into adjacent lots. (R. p. 758). "I have an opinion that I think Dr. Borden is certainly an honest, forthright man. And he was asked the question

by Mr. Dudley – and you’ll have to take a look at the transcript – that if you were asked to go out and look at a crack in one corner of a slab and you see a crack in the other corner of the slab, do you have an obligation to comment on it. And his answer was yes. And I thought that was a very truthful opinion. [QUESTION] Meaning what? What’s the point? [ANSWER] That you can’t be restricted to say, I’m only going to look at one little portion. If your client ask you to look at a little portion, you have an obligation to – if there are other things that would affect that property or that project, that you have an obligation to say so. [QUESTION] So what’s the point, with respect to Respondent? You’re obviously trying to make a point with respect to my client. What is it? [ANSWER] That if they saw a problem on [Lot] 31, they should have told their client that they – that problem likely extends to [Lot] 30 and [Lot] Appellants’ Lot.” (R. p. 759, l. 19 - R. p. 760, l. 16).

Dr. Roy Borden (Respondent’s liability expert): Dr. Borden admitted that if an engineer sees a condition that “we believe endanger life, safety or property even if we are not contractually involved with an individual we do have a professional duty to bring that to someone’s attention”. (R. p. 761). Accordingly, even Respondent’s own expert readily admits that if public health, safety, or welfare is endangered, Respondent would have a duty to seek out the owners of Lots 30 and Appellants’ Lot. (Id.)

In the matter at hand, Respondent has breached each of the foregoing duties and the industry standard; especially when viewed in conjunction with the surrounding facts and circumstances. First, instead of disclosing all relevant facts and describing in detail the extent of the geotechnical conditions observed in this matter to The Cliffs, Respondent failed to comply with its statutory obligation and the industry practice by

failing to reference the geological conditions it observed on Lot 30 and Appellants' Lot when it issued its report on Lot 31 only. South Carolina Code of Regulations § 49-303.

When The Cliffs approached Respondent, they asked Respondent to look at the Alpha Report and evaluate Lot 30, Lot 31 and Appellants' Lot to determine whether the soils would be suitable to support a residential structure. (R. pp. 521, 523, 721; R. p. 725, ll. 4-6). Respondent's Proposal to The Cliffs, which implicated Lot 30, Lot 31 and Appellants' Lot and determined that a further investigation needed to be performed, was generated from Respondent's own visit to the lots not on its review of the Alpha Report. (R. pp. 517, 722-723). Accordingly, it is clear that Respondent's own site visit led to Respondent's recognition that the condition spread across all three lots (Lot 30, Lot 31 and Appellants' Lot) and that a thorough examination would require testing on all three lots, as contemplated by Respondent's Proposal. (Id.) The Cliffs assumed the Respondent's Proposal intended to look at Lot 30, Lot 31 and Appellants' Lot because they were the ones mentioned in the Alpha Report. (R. pp. 522, 526-528). However, despite the parties clear intent in June that Lot 30, Lot 31 and Appellants' Lot be evaluated, in July, Respondent submitted a report to The Cliffs on Lot 31 only and made zero reference to the conditions observed extending onto Lot 30 and Appellants' Lot; a clear violation of the statute, regulation and industry practice. (R. p. 537). Similarly, based on the representations in The Cliffs' HUD disclosure, that no lots contained expansive soils requiring special construction techniques, the failure of Respondent to investigate or warn that its recommendations for Lot 31 were also attributable to Appellants' Lot is a breach of its duty to disclose all relevant information and fully describe the geological conditions it observed. (R. p. 455).

Furthermore, Respondent's silence on Lot 30 and Appellants' Lot amounts to Respondent's concealment and failure to provide all relevant information and fully describe the geological conditions observed. Accordingly, by limiting their scope of review to just Lot 31, where they recommended that major foundational work needed to be done in order to make it buildable, when they had previously observed the same conditions on Lot 30 and Appellants' Lot, Respondent failed to comply with their statutory obligation to not conceal information in which others might rely on and their statutory obligation to conduct their practice in a manner as to fulfill their obligation to protect the safety, health, property and welfare of the public. South Carolina Code Ann. § 40-22-20(14) and South Carolina Code of Regulations § 49-301. Lastly, by misdiagnosing what was actually going on, and thereby, failing to identify the safety hazards inherent with an active slope failure, Respondent failed to comply with their statutory obligation to protect the safety, health, property and welfare of the public. South Carolina Code of Regulations § 49-301.

In addition to Respondent's breaches above, viewing the evidence in a light most favorable to Appellants, as required, an inference can be drawn that Respondent had a pecuniary interest in limiting its review to just Lot 31 and, thereby, again failing to their statutory obligation to conduct their practice in a manner as to fulfill their obligation to protect the safety, health, property and welfare of the public. SCRCP 56 and South Carolina Code of Regulations § 49-301. Respondent had worked for The Cliffs for fifteen (15) plus years and knew that The Cliffs was in the business of marketing and selling real estate and knew, or should have known, that The Cliffs would continue to actively market Lot 30 and Appellants' Lot. (R. pp. 519, 724). At the time Respondent

performed their work in 2005, Respondent had a copy of the Alpha Report and was also aware that The Cliffs had traded the prior owner of Lot 31 another lot due to the concerns about Lot 31 raised therein. (R. pp. 522, 719-720). Respondent was further aware that The Cliffs was forced to take Lot 31 off the market after unsuccessfully trying to sell it due to the disclosure of Respondent's Report and the lot's issues. (R. p. 524). It is no surprise, therefore, that Respondent limited the scope of its review to Lot 31 so that The Cliffs did not have to take Lot 30 and Appellants' Lot off the market and potentially lose Appellants' purchase of a million dollar lot. This is particularly likely in light of the fact that Don Nickell of The Cliffs could not explain why or how Respondent's evaluation went from three lots (Lot 30, Lot 31 and Appellants' Lot) to one (Lot 31) and in light of the fact that there was not a written amendment to agreement between Respondent and The Cliffs as required by Respondent's Proposal. (R. pp. 527-528).

The statutes and regulations confirm an engineer's duty to foreseeable persons who would rely on their reports and imply that a private cause of action exists and the above referenced facts further define Respondent's duty to Appellants in its investigation of their lot while they awaited closing. The essential purposes of the aforementioned regulations are clearly to protect the safety, health, property and welfare of the public and to protect others that might rely on information which was concealed from them. South Carolina Code Ann. § 40-22-20(14) and South Carolina Code of Regulations § 49-301. Appellants are undoubtedly, therefore, members of the persons in which these regulations are intended to protect from the harm they suffered since Appellants are clearly part of the public entitled to Respondent's protection of their safety and property and "others" who would certainly have relied on Respondent's Report but for it being concealed from

them. (Id.) Furthermore, Appellants are clearly foreseeable to Respondent since, at the very least, the dates of Appellants contract for purchase of Appellants' Lot and closing on same were contemporaneous with Respondent's Proposal, which implicated Appellants' Lot, and Respondent's Report, in which Appellants' Lot was excluded. The more likely scenario is that Respondent specifically excluded Appellants' Lot from its report due to Appellants' contract to purchase the lot from Respondent's client.

For the foregoing reasons, Appellants were members of the persons intended to be protected by South Carolina Code Ann. § 40-22-20(14) and South Carolina Code of Regulations § 49-301 and the essential purpose of South Carolina Code Ann. § 40-22-20(14) and South Carolina Code of Regulations § 49-301 is to protect persons, like Appellants, for the kind of harm they suffered. Accordingly, Respondent owed Appellants a duty and the Court erred in granting Respondent's Motion for Summary Judgment. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994).

V. BY FAILING TO VIEW THE EVIDENCE AND FAILING TO DRAW THE INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, THE COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505.

**A. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN
A LIGHT MOST FAVORABLE TO APPELLANTS, RESPONDENT
OWED A DUTY OF CARE TO APPELLANTS BASED ON THE
PARTIES SPECIAL RELATIONSHIP**

In order to recover in a negligence action, the plaintiff must show a duty of care owed by the defendant to the plaintiff. *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). Whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996). Pursuant to South Carolina law, “an affirmative duty to act exists only if created by statute, contract, relationship, status, property interest or other special circumstance”. *Carson v. Adgar*, 326 SC 212 (1997). Whether a duty based on special circumstance or relationship exists, however, “depend[s] on the facts and circumstances of each case”. *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995) and *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital*, 344 S.C.426, 433, 544 S.E.2d 838, 842 (2001).

South Carolina Courts have often found that the facts and circumstances with respect to professionals and third parties with whom they are not in privity of contract, similar to the case at hand, rises to the level of creating a duty between the two based on their “special relationship”. *Tommy L. Griffin Plumbing and Heating Co.*, 463 S.E.2d 85 (engineer owed a duty to contractor without privity based on working relationship between the parties); *Cullum Mechanical Construction, Inc.*, 544 S.E.2d 838, 842 (architect owed a duty to subcontractors without privity based on architect’s contractual obligation to supervise payments); *Beachwalk Villas Condominium Assoc., Inc. v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991) (architect owed a duty to homeowners without privity); *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d

730 (1989) (builders owed a duty to home owner without privity based on future owners being foreseeable); *State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (consultant owed duty to non-contracting parties who reasonably relied on their reports in taking some action); *Georgetown Steel Corp v. Law Engineering Testing Co.*, 7 F.3rd 223 (4th Cir. 1993) (engineer owed a duty to 3rd party without privity based on discussion with 3rd party).

South Carolina Courts have further recognized that in the residential home building context, as the case is here, parties are entitled to additional protections as compared to commercial construction. *Terlinde v. Neely*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980); *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989) (carving out an exception to the economic loss rule for homeowners); *Sapp v. Ford Motor Co.*, 687 S.E.2d 47, 386 S.C. 143 (S.C. 2009) (recognizing the long line of South Carolina cases directed toward protecting consumers only in the residential home building context); *Ross Dress For Less, Inc. v. Lauth Construction Group, LLC* (unreported) 2012 WL 2572042 (D.S.C 2012) (recognizing the special relationships created in the residential construction context and distinguishing the case since it involved commercial property). In *Terlinde*, the Court determined that a homebuilder had a duty to future homeowners because it was “clearly foreseeable that more than the original purchaser [would] seek to enjoy the fruits of the builder's efforts. *Terlinde*, 271 S.E.2d at 770. The Court reasoned, therefore, that “[t]he Appellants, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards”. *Id.* Similarly, in *Kennedy*, the Court focused on foreseeability: “building a house which one knows or should know will

later be sold by a party to an innocent buyer is an act adequate to constitute placing that house into the stream of commerce. Any builder who violates such a duty should justly be held accountable for the losses that his breach caused, whether they be physical harm or the diminution in the value of the house”. *Kennedy*, 384 S.E.2d at 737.

The matter at hand is clearly within this heightened residential home building context as contemplated by Terlinde since: 1) Appellants’ Lot is in a planned residential development and the sole use for the lot is residential construction (R. p. 455); and 2) Respondent’s Report focused solely on whether the lot was suitable for residential construction and specifically provided recommendations about the foundation requirements for a house on the lot. *Terlinde*, 271 S.E.2d at 770. Accordingly, the pertinent facts, circumstances and inferences therefrom, viewed in a light most favorable to Appellants, as required, which give rise to Respondent’s duty to Appellants is as follows:

1. On June 2, 2005, the Alpha Report implicated Appellants’ Lot as having an active slope failure (R. p. 485).
2. The Alpha Report was thereafter passed along to The Cliffs (R. pp. 500-501).
3. The Cliffs, in turn, engaged Respondent (R. p. 517).
4. The inference that The Cliffs engagement of Respondent included an investigation of the slope failure on Appellants’ Lot (R. p. 517). This inference is premised on:
 - (a) The Alpha Report’s implication of Appellants’ Lot (R. p. 485);
 - (b) The Alpha Report instigating The Cliffs’ engagement of Respondent;

- (c) The Cliffs providing Respondent with a copy of the Alpha Report (R. pp. 720-721);
- (d) The Cliffs' instruction to investigate the lots of the Alpha Report (R. pp. 485, 522);
- and
- (e) Respondent's Proposal to investigate the very unique features it observed occurring on the three lots (R. p. 517).

5. The inference that on some date after June 2, 2005 but prior to June 22, 2005, Respondent performed an initial investigation of Appellants' Lot. This inference is premised on:

- (a) Respondent's Proposal being dated June 22, 2005 (R. p. 517);
- (b) Respondent having already walked the property (Lot 30, Lot 31, and Appellants' Lot) at the time of drafting its proposal (R. pp. 517, 723); and
- (c) Respondent's Proposal to further investigate Appellants' Lot based on its initial observations (R. pp. 722-723).

6. The inference that from Respondent's initial investigation, Respondent observed unique features on Appellants' Lot and determined that those features needed to be further investigated. This inference is premised on:

- (a) Respondent's Proposal stating "[i]t appears that about three sloughs have occurred at the property, approximately paralleling the water surface and the contour of the lots. These surface features are very unique" (R. p. 517) (*emphasis added*); and
- (b) Respondent's Proposal to further investigate the three lots (Id.).

7. On June 20, 2005, Appellants agreed to purchase Appellants' Lot for \$1,105,000.00 (R. pp. 270, 295, 941).

8. Two days later, on June 22, 2005, Respondent sent The Cliffs Respondent's Proposal to perform work on Appellants' Lot (R. p. 517).

9. On June 27, 2005, The Cliffs entered into a contract with Respondent for Respondent to perform an investigation of Appellants' Lot (R. p. 529).

10. Despite the agreement between Respondent and The Cliffs requiring written amendments executed by both parties, sometime between June 27, 2005 and July 18, 2005, Respondent and The Cliffs, without a written amendment, agreed not to investigate the conditions observed on Appellants' Lot (R. p. 198).

11. The Cliffs cannot explain why Respondent's scope of work was limited to Lot 31 (R. pp. 527-528).

12. The inference that sometime after June 27, 2005, The Cliffs informed Respondent of Appellants and Appellants purchase of Appellants' Lot and requested that Respondent cease its investigation into Appellants' Lot. This inference is premised on:

- (a) The Cliffs' engagement of Respondent to investigate Appellants' Lot;
- (b) Respondent's initial investigation of Appellants' Lot and its observation of Appellants' Lot's "very unique features" (R. p. 517);
- (c) Respondent's Proposal to investigate Appellants' Lot further (R. p.517);
- (d) The Cliffs' contract with Respondent for Respondent to further investigate Appellants' Lot as of June 27, 2005 (R. p. 529);
- (e) Appellants' agreement to purchase Appellants' Lot on June 20, 2005;
- (f) Respondent's Report being silent on Appellants' Lot (R. p. 537);
- (g) The Cliffs not being able to explain why the scope of Respondent's investigation was changed (R. p. 519); and

(h) The lack of a written amendment to the contract between Respondent and The Cliffs.

13. The inference that because of Respondent's pecuniary interest in preserving its long standing working relationship with The Cliffs, Respondent agreed to turn a blind eye and not address any issues with Appellants' Lot since an investigation of same may have led to The Cliffs' loss of their million dollar sale to Appellants. This inference is premised on:

- (a) Respondent's fifteen (15) plus year working relationship with The Cliffs (R. pp. 519, 724);
- (b) Respondent's knowledge that The Cliffs was in the business of marketing and selling real estate (Id.);
- (c) Respondent's knowledge that The Cliffs would continue to actively market Appellants' Lot (Id.);
- (d) Respondent's knowledge that The Cliffs had to trade the prior owner of Lot 31 another lot due to the concerns about Lot 31 (R. pp. 522, 719-720);
- (e) Respondent's knowledge that The Cliffs was forced to take Lot 31 off the market after unsuccessfully trying to sell it due to the disclosure of Respondent's Report and the lot's issues (R. p. 524);
- (f) The Cliffs' engagement of Respondent to investigate Appellants' Lot;
- (g) Respondent's initial investigation of Appellants' Lot and its observation of Appellants' Lot's "very unique features" (R. p. 517);
- (h) Respondent's Proposal to investigate Appellants' Lot further (R. p. 517);
- (i) The Cliffs' contract with Respondent for Respondent to further investigate Appellants' Lot as of June 27, 2005;

- (j) Appellants' agreement to purchase Appellants' Lot on June 20, 2005, the same time period as Respondent's investigation;
- (k) Respondent's Report being silent on Appellants' Lot (R. p. 537);
- (l) The Cliffs not being able to explain why the scope of Respondent's investigation was changed to exclude Appellants' Lot (R. p. 519); and
- (m) The lack of a written amendment to the contract between Respondent and The Cliffs.

14. The inference that Appellants were contemporaneous with Respondent and clearly foreseeable to Respondent. This inference is premised on:

- (a) The Cliffs' engagement of Respondent to investigate Appellants' Lot;
- (b) Respondent's initial investigation of Appellants' Lot and its observation of Appellants' Lot's "very unique features" (R. p. 517);
- (c) Appellants' agreement to purchase Appellants' Lot on June 20, 2005;
- (d) Respondent's June 22, 2005 proposal to investigate Appellants' Lot further (R. p. 517);
- (e) The Cliffs' contract with Respondent for Respondent to further investigate Appellants' Lot as of June 27, 2005 (R. p. 529);
- (f) Respondent's July 18, 2005 report being silent on Appellants' Lot (R. p. 537); and
- (g) Appellants' August 5, 2005 closing on Appellants' Lot.

15. On July 18, 2005, Respondent provides The Cliffs with Respondent's Report on Lot 31, the lot neighboring Appellants' Lot to the north (R. p. 537).

16. Respondent's Report recommends significant foundation modifications in order for Lot 31 to be buildable but fails to accurately identify an active slope failure (Id.)

17. Respondent misdiagnosed the active slope failure that is occurring on Lot 31 and Appellants' Lot (R. pp. 485, 537, 588).

18. A slope failure is inherently hazardous to safety and property (R. pp. 485, 588).

19. On August 5, 2005, eighteen days after Respondent issued its report, Appellants closed on Appellants' Lot without any knowledge of Respondent's initial investigation or findings on Appellants' Lot and without any knowledge of the significant recommendations Respondent made for Lot 31 (R. pp. 270, 556, 938-939).

20. Appellants would not have purchased Appellants' Lot had they known about Respondent's initial investigation and findings on Appellants' Lot or had they known about the significant recommendations Respondent made for Lot 31 (R. p. 557).

In accordance with Tommy L. Griffin Plumbing and Heating Co., Cullum Mechanical Construction, Inc., Beachwalk Villas Condominium Assoc., Inc., Kennedy, Booz-Allen & Hamilton, Inc., Georgetown Steel Corp., Terlinde, Sapp, and Ross Dress For Less, Inc., a special relationship between Appellants and Respondent clearly exists under these facts and circumstances and Respondent owed Appellants a duty to accurately diagnose the slope failure, a duty to fully describe the conditions in which it observed on Appellants' Lot, and a duty to disclose all relevant information in its report in regard to Appellants' Lot. *Tommy L. Griffin Plumbing and Heating Co.*, 463 S.E.2d 85; *Cullum Mechanical Construction, Inc.*, 544 S.E.2d 838, 842; *Beachwalk Villas Condominium Assoc., Inc. v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991); *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989); *State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986); *Georgetown Steel*

Corp v. Law Engineering Testing Co., 7 F.3rd 223 (4th Cir. 1993); *Terlinde*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980); *Kennedy*, 299 S.C. 335, 384 S.E.2d 730 (1989); *Sapp v. Ford Motor Co.*, 687 S.E.2d 47, 386 S.C. 143 (S.C. 2009); *Ross Dress For Less, Inc. v. Lauth Construction Group, LLC* (unreported) 2012 WL 2572042 (D.S.C 2012).

B. VIEWING THE EVIDENCE AND INFERENCES THEREFROM IN A LIGHT MOST FAVORABLE TO APPELLANTS, A REASONABLE INFERENCE CAN BE MADE THAT RESPONDENT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF APPELLANTS' DAMAGES

“Ordinarily, the question of proximate cause is one of fact for the jury. The trial court’s sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence.” *Bailey v. Segars*, 550 S.E.2d 910, 914, 346 S.C. 359 (S.C.App. 2001) (*internal citations omitted*).

In the matter at hand, the question of proximate cause is one of fact for the jury as a reasonable inference can be made that but for Respondent’s failure as a professional engineer to comply with its obligation to fully describe all relevant facts and describe the full extent of all geological conditions, Appellants would have never been in the position they are in as owners of Appellants’ Lot as Appellants would not have purchased the lot if they had known what Respondent observed and recommended or if the slope failure had been properly diagnosed. A reasonable inference can also be made that Appellants would have never purchased their lot had Respondent complied with its duty to describe the full extent of the geological condition and correctly implicated Appellants’ Lot, since The Cliffs would have taken Appellants’ Lot off the market, as they did with Lot 31, or, at a minimum, had to disclose that information to Appellants since it was in direct contravention of the HUD Disclosure’s declaration that the lots contained expansive soils requiring special construction techniques.

Accordingly, while it is true Respondent's actions did not create the slope failure itself, Appellants relied on both the Respondent's Report's concealment of the fact that the geological condition extended onto Appellants' Lot and the Respondent's failure to correctly identify the active slope failure.

C. CONCLUSION

Viewing the evidence and the inferences therefrom in a light most favorable to Appellants, Respondent owed Appellants a duty of care and Respondent's breach of that duty was the proximate cause of Appellants' damages. By failing to view the evidence and failing to draw inferences therefrom in a light most favorable to Appellants, the Court erred in granting Respondent's Motion for Summary Judgment.

VI. PURSUANT TO THE COURT'S EXTENSION OF THE KENNEDY HOLDING, THE COURT ERRED IN FINDING THAT APPELLANTS' CLAIMS AGAINST RESPONDENT WERE BARRED BY THE ECONOMIC LOSS RULE

The economic loss rule generally stands for the proposition that there is no tort liability if the damages suffered by the plaintiff are only to the product itself. *Kennedy*, 384 S.E.2d at 734. With regards to the "economic loss rule" as it applies in this matter, the Court need only look at the *Kennedy* case its progeny since 1989. *Kennedy*, 384 S.E.2d 730. *Kennedy, supra*, was the culmination of the shift from caveat emptor to caveat venditor and determined in the residential construction context that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The "economic loss" rule will still apply where duties are created solely by contract. In that situation, no cause of action in negligence will lie". *Id.* at 735, 737.

Our Supreme Court took the opportunity in Kennedy to clearly set the distinction between residential construction and other commercial transactions. The Court stated:

“We have therefore taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.”

Id. at 735-736, citing also *Terlinde v. Neely*, 275 SC 395, 271 SE2d 768, 769 (1980). The Court then went on to state:

“We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.”

Id. at 786. In so finding, the Supreme Court clearly recognized and carved out distinct treatment for residential home buyers.

Accordingly, in Kennedy, the Supreme Court not only expanded to whom a residential consumer could sue, it also expanded what it could sue for, eroding the economic loss rule defense. The Court recognized a violation of a legal duty, for example, a violation of a building code or an industry standard would not apply to limit the type of recovery to foreseeable parties. Id. at 737, citing *Kincaid v. Landing Dev. Corp.*, 289 SC 89, 344 SE2d 869 (Ct. App. 1986) and *Rogers v. Seyphers*, 251 SC 128, 161 SE2d 81 (1968). In Terlinde, the Court discounted the necessity of showing physical harm and recognized in Kennedy, that a builder who violates a legal duty should be held accountable for losses of either physical harm or diminution in value. *Terlinde v. Neely*, 275 SC 395, 271 SE2d 768, 769 (1980).

There are no cases, yet, where our Courts have dealt with the work of a geotechnical engineer's work being used by a developer to evaluate lots for residential construction. However, given our Supreme Court's willingness to protect new home buyers in Kennedy, it is logical that an engineer investigating, offering opinions and

making recommendations to a developer as to the ability of a lot to be used for residential construction will be judged the same way. It would not make sense to treat the suitability of the land upon which a new home or foundation recommendations for a new home will be built any differently. Furthermore, in *Beachwalk Villas v. Martin*, the Supreme Court expanded the holding in *Kennedy, supra*, regarding the economic loss rule to also apply to architects in the residential construction area. The Court held that:

“the extension of the holding in *Kennedy* to architects is a logical expansion of our law to provide protection for home buyers.”

Beachwalk Villas v. Martin, 305 SC 144, 406 SE2d 372 at 374 (1991). It is equally logical that the Court would apply *Kennedy, supra*, to engineers regarding the evaluation of lots for residential construction, as well as in making recommendations for foundations for residential construction. It would be illogical to hold otherwise.

The holdings in *Kennedy, supra*, and *Beachwalk Villas, supra*, spell out the policy of protecting residential homeowners and establish both the duty of Respondent to Appellants and also the removal the economic loss rule defense. Accordingly, Appellants’ claim is not barred by the economic loss rule and summary judgment was not proper.

VII. THE COURT ERRED IN FINDING THAT APPELLANTS’ WERE NOT ENTITLED TO RECOVER THE PURCHASE PRICE OF APPELLANTS’ LOT

Pursuant to Yadkin Brick Co., Inc., recovery of the purchase price to real property is not the proper measure of damages unless the injury to the real property is permanent. *Yadkin Brick Co., Inc. v. Materials Recovery Company*, 339 S.C. 640, 529S.E.2d 764 (Ct. App. 2000). In the matter at hand, the Appellants’ Lot is continuing to experience an active slope failure and there is no evidence that once the slope fails, the injury to the real

property will not be permanent. Furthermore, Respondent's "repair" expert proposed a possible repair in the amount of \$750,000.00 with no warranty it would work; hardly evidence of a reasonable repair. Accordingly, the Court erred in ruling that Appellants were not entitled to recover the purchase price of Appellants' Lot.

VIII. THE COURT ERRED IN FINDING THAT APPELLANTS' WERE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST RESPONDENT

Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). It is the failure to exercise slight care. Clyburn v. Sumter County Sch. Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994).

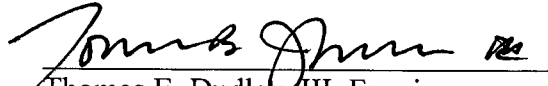
Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990). Gross negligence is a mixed question of law and fact and should be presented to the jury unless the evidence supports only one reasonable inference. Clyburn, 317 S.C. 50, 451 S.E.2d 885.

In the matter at hand, an inference can be made that Respondent intentionally and consciously failed to address the geological conditions extending into Appellants' Lot despite its duty to do so. Whether Appellants are entitled to punitive damages, therefore, is a question of fact which should be presented to the jury. *Id.* Accordingly, the Court erred in ruling that Appellants were not entitled to punitive damages.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court reverse the Circuit Court and remand the case back to the Circuit Court.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas E. Dudley, III", is written over a horizontal line.

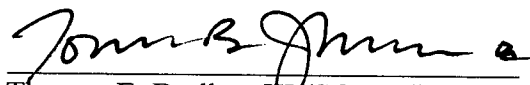
Thomas E. Dudley, III, Esquire
Townes B. Johnson III, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899

Attorneys for Appellant

September 11, 2014
Greenville, SC

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Brief complies with Rule
211(b), SCACR.



Thomas E. Dudley, III (SC Bar# 66154)
Townes B. Johnson III (SCBar#75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899

Attorneys for Appellants

September 11, 2014
Greenville, SC

RECEIVED

SEP 16 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001843
(Trial Court Case No.: 2011-CP-23-63768)

Kevin McCarthy and Courtney R. McCarthy, Appellants,

v.

The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South;
Keowee Falls Investment Group, LLC; Cliffs Real Estate, Inc.; The
Cliffs Golf and Country Club, Inc.; and S&ME, Inc. Defendants,

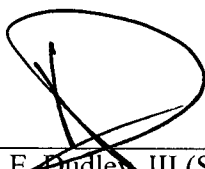
Of Whom

S&ME, Inc. is Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellants' Final Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 15 day of September, 2014, addressed as follows:

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
Attorney for Respondent



Thomas E. Dudley, III (SC Bar # 66154)
Townes B. Johnson, III (SC Bar # 75412)
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4988

Attorneys for Appellants

RECEIVED

SEP 16 2014

SC Court of Appeals