THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2011-CP-42-000618

Fireman's Fund Insurance Company, a/s/o Stig Wennerstrom, Appellant

v.

Searcy Custom Homes, LLC and B&B Plumbing, Inc., Respondents.

FINAL REPLY BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE COMPANY

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I. CORRECTION OF REPRESENTED FACTS

The Respondents in this case have made several misstatements of the facts of the case that directly bear on the issues on appeal. A correct understanding of the facts will make clear to the Court that the trial court erred in making its rulings and that those rulings created the basis for a remand and/or judgment by this Court in favor of the Appellant.

A. The Respondents' expert testified as to the cause of the failure of the subject valve.

As the Court will recall, this case stems from a water loss that occurred at the home of Stig Wennerstrom (hereinafter the "Home"). (Respondents' Brief at p. 5). The Home, as respondents readily admit, was located in a mountain community, which, by its nature, would cause wide fluctuations in the water pressure being supplied to the Home. (*Id.*) The Respondents installed a pressure reducing valve (hereinafter the "Valve") in an attempt to address the pressure fluctuations, but did nothing, whatsoever, to protect the Home if the Valve failed. (*Id.*) The Respondents have further admitted that the water loss occurred when the Valve did, in fact, fail and that failure proximately caused a fitting on the Home's bidet to fail due to excess pressure. (*Id.*) The resulting water leak is the subject of the underlying litigation--which brings us to the Respondents' most egregious misrepresentation of the facts and, perhaps, the crux of the matter before this Court. In an attempt to obfuscate the fact that the Valve was indeed destined to fail, Respondents stated, "No evidence or testimony was offered as a reason for the device's [the Valve] failure." (*Id.*) This is categorically untrue.

At trial, the Respondents' called Randall Blythe as a witness, and without objection from the Appellant, Mr. Blythe was proffered as an expert in residential plumbing. (R. p. 500, lines 4-6). In addition to being the Respondents' designated expert, Mr. Blythe was also the principal of Respondent B&B Plumbing, Inc. (hereinafter "B&B")(R. p. 428, lines 21-22). When asked on the stand if he had any opinion regarding the cause of the Valve's failure, Mr. Blythe testified that the Valve failed because it was subjected to the high pressure in the community's water system. (R. p. 532, lines 13-19).

The significance of Mr. Blythe's expert opinion cannot be understated. His admission that the Valve failed because it was subjected to high water pressure, coupled with the further admission that the high pressures that caused it to fail were inherent in mountain communities (Respondents' Brief, p. 6) where the Home was built, establishes the complete legal basis for liability under South Carolina's implied warranty of habitability. The Home, as built, was going to be inundated with water from the inevitable failure of the Valve, and was therefore not habitable.

B. <u>The Home, when repaired by the Respondents, was constructed so that it would not succumb to the failure of a pressure relief valve.</u>

Respondents further attempt to obfuscate the facts by representing to this Court that the Home, when repaired after the water loss by the Respondents, was constructed exactly as it was when first completed, ostensibly to show that any prior failure by the Respondents to make the Home habitable was so insignificant that it was ignored during the repair. This is, again, categorically untrue.

In addition to Mr. Blythe, the Respondents also proffered B&B employee Charles Hafner as an expert in residential plumbing. (R. p. 544, lines 3-6). Mr. Hafner testified

that in the course of the repairs, the Home had been equipped with a safety device that shuts off the water to the Home in the event of a leak. (R. p. 559, lines 17-21). Mr. Hafner further testified that the safety device, as installed, would protect the Home from the type of failure that they admitted caused the water loss that is the subject of this case.[1] (R. p. 565, lines 17-21). The facts therefore show that the Respondents' failure to protect the Home WAS significant, and was addressed when the repairs were made after the loss.

C. The facts dictate that Mr. Wennerstrom bought the Home from Respondent Searcy Custom Homes, LLC, regardless of how the transaction was labeled.

In reference to the transaction between Mr. Wennerstrom and Searcy Custom Homes, LLC (hereinafter "Searcy"), Respondents state that, "No way could it ever be construed that Mr. Searcy sold the home to Mr. Wennerstrom." However the facts, as outlined in Appellant's brief, are clear that in contracting with Mr. Wennerstrom to construct the Home, Searcy held itself out to Mr. Wennerstrom as a competent builder that could build a home that Mr. Wennerstrom could live in. (R. p. 244, lines 2-5). Searcy took over the project to build the Home in its very early stages and took full responsibility for the construction of the Home. (R. p. 244, lines 13-18). During the course of construction, Searcy had the final say on how the Home was built and what was used to construct it. (R. p. 246, lines 3-12). Searcy was paid to build the Home. (R. p. 248, lines 19-23). When Searcy first contracted to build the Home, there was nothing at the site that could be in any way considered a home. (R. p. 241, lines 14-17). Searcy was

[1]As an aside, the Respondents imply on p. 5 of their brief that Mr. Wennerstrom modified or tampered with the Valve, and that such tampering may have contributed to the Valve's failure. Mr. Hafner completely extinguished any implication that anything Mr. Wennerstrom may have done to the Valve contributed to the Valve's failure. (R. p. 571, lines 8-20). The Appellant would therefore ask that any such implication that the responsibility for the water incursion falls to anyone other than the Respondents be ignored.

solely responsible for obtaining the certificate of occupancy for the Home. (R. p. 248, lines 13-14). Before Searcy built the Home and got the certificate of occupancy, there was no Home and it could not be occupied and used as a home. (R. p. 248, lines 7-9). After Searcy obtained the Home's certificate of occupancy, it was suitable and legal to use and occupy as a home. (R. p. 248, lines 10-12). If something walks like a duck and quacks like a duck, then it is a duck. In every way that the law of South Carolina would recognize a sale, Searcy sold the Home to Mr. Wennerstrom.

D. Mr. Wennerstrom lived out of state during the entire time the Home was under construction, making the Respondents solely responsible for ensuring that the Home was habitable.

In its Brief, the Respondents assert that Searcy took over the job of completing the Home from a previous contractor, and that it built the Home in accordance with the plans and specifications provided by other subcontractors, namely architects and engineers. (Respondents' brief, p. 5). They later argue that Mr. Wennerstrom was intimately involved in the construction of the Home, such that he should not be afforded the protection offered the normal innocent home buyer in South Carolina. (Respondents' Brief, pp. 1-11). However, the Respondents readily admit that the contract between Searcy and Mr. Wennerstrom made Searcy responsible for managing all the subcontractors working at the Home. (*Id.*) In addition, Mark Searcy, Searcy's principal, testified at trial that Searcy had the final say on how the Home was built and what was used to construct it. (R. p. 249, lines 11-16). Finally, and most importantly, at all times during the construction of the Home, Mr. Wennerstrom lived in Florida. (R. p. 178, lines 9-11). In short, the facts and the contract dictate that Mr. Wennerstrom, even as an involved layman, had to rely upon Searcy to complete the Home so that it would be habitable.

II. ARGUMENT

Aside from the factual dispute discussed above that there was no "sale" that triggered the existence of the warranty of habitability, the underlying theme of Respondents' brief is that they would like this Court to turn back the clock to 1970 when the law of South Carolina did not recognize the existence of the warranty of habitability as to custom built homes. *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970). In doing so, the Respondents are asking this Court to ignore subsequent rulings that the Supreme Court of South Carolina has made in three of the handful of cases in which the implied warranty of habitability has been addressed since 1970.

A. South Carolina Law has progressed beyond *Rutledge* to expand the warranty of habitability.

1. *Arvai v. Shaw*

While the underlying premise of *Rutledge*, that home builders/vendors impliedly warrant that the homes they build are habitable, South Carolina has since over-ruled the specific holding that the implied warranty of habitability only applies to "spec" homes, and specifically determined that builders of custom homes were also warranting that the custom homes they built for individual buyers are habitable. *Arvai v. Shaw,* 289 S.C. 161, 345 S.E.2d 715 (1986). Any reading of the facts in this case that determines that the transaction between Searcy and Mr. Wennerstrom did not give rise to a warranty of habitability would be made in direct contrast to the *Arvai* ruling. (*Id.*) There is no doubt under any facts as represented by any of the parties that Searcy was paid to take what Mr. Searcy testified was not a home, and turn it into a home. (R. p. 248, lines 7-9). In other words, Searcy built a custom home for a specific customer- Mr. Wennerstrom. Under *Arvai,* there is a warranty of habitability. *Arvai v. Shaw,* 289 S.C. 161, 345 S.E.2d 715

(1986). Likewise, under *Arvai* at a minimum, it can be implied that the requisite sale occurred- if a contract to build a custom home does not give rise to a sale, the ruling in *Arvai* would be completely pointless.(*Id.*).

2. ***Terlinde v. Neely.***

Even if this Court found that the ruling in *Arvai* did not apply to the facts of this case, the question would then become how that ruling would be consistent with the holding in *Terlinde v. Neely* where the South Carolina Supreme Court extended the warranty of habitability to subsequent purchasers of homes. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). If the trial court's ruling in this case is upheld, it would dictate that subsequent purchasers of custom built homes, built in the manner in which the Home was built, would not have the benefit of any warranty of habitability. That would be in direct contrast to the ruling in *Terlinde* where the court stated, "As we said in Lane, supra, our objective is to protect the innocent purchaser from latent defects. The reasoning, which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving, is incomprehensible." *Id.* at S.C. 399, S.E.2d 770.

3. ***Kennedy v. Columbia Lumber and Mfg. Co. Inc.***

Finally, in *Kennedy v. Columbia Lumber and Mfg. Co. Inc.*, the South Carolina Supreme Court took great pains to explore the reasoning behind the existence of the warranty of habitability. *Kennedy v. Columbia Lumber and Mfg. Co. Inc*, 299 S.C. 335, 342, 384 S.E.2d 730, 735 (1989). As part of that explanation, it voiced its continuing commitment to eschewing caveat emptor and embracing caveat venditor, "As previously outlined, in Lane we extended our ruling to hold a developer liable in warranty for selling a new home, although he was not also the builder. In so doing, we discussed South Carolina's historic tendency to reject caveat emptor and to embrace the maxim caveat

venditor. (*Id.*). If this Court were to uphold the trial court's ruling in this case, it would signal a contraction, rather than an expansion, of the theory of caveat venditor in South Carolina, in direct contravention with the ruling in *Kennedy*.

B. Mr. Wennerstrom was a member of the class of customers that the warranty of habitability was meant to protect.

In their brief, Respondents argue, and the Appellant agrees, that the warranty of habitability was meant to protect innocent consumers who did not have the ability to inspect or identify **hidden** defects in their homes. (Respondents' Brief, p. 10) (emphasis added). Respondents further argue that Mr. Wennerstrom had hired architects and engineers to draft the plans, so he was in essence not a member of the class of innocent consumers that the implied warranty of habitability was meant to protect. In the *Arvai* case, the subject home was built to the plans and specifications provided by the owner, as is the case here. *Arvai v. Shaw,* 289 S.C. 161, 162, 345 S.E.2d 715, 716 (1986). The *Arvai* court ruled that the fact that the home was built at the owner's direction was not determinative of the existence of the warranty of habitability. *Id.* at S.C. 164, S.E.2d 717. It should not be determinative here either.

As was discussed above, Mr. Wennerstrom still relied upon Searcy to build the Home and supervise all of the subcontractors that performed work at the Home. (Respondents' Brief, p. 5). And most importantly, Mr. Wennerstrom lived in Florida during the entire construction process. (R. p. 178, lines 9-11). While it may be argued that Mr. Wennerstrom, or even the architects and engineers who drew up the plans, may have been able to identify obvious errors with the construction of the Home, only Searcy was there at all times and therefore capable of safeguarding the Home from **hidden** defects.

Looked at from a different direction[2], could a court interpret Mr. Wennerstrom's participation in the construction of the Home sufficient to vest him with the duty to identify, and thereafter remedy, any latent defects in the Home? Would that vesture allow some subsequent purchaser to look to Mr. Wennerstrom for compensation for damages caused by some hidden defect that Mr. Wennerstrom did not identify on one of his visits from Florida? Logic and common sense say otherwise. That being the case, the facts show that Mr. Wennerstrom was an innocent purchaser that relied upon Searcy to protect him from some hidden defect in the Home, and the cases cited by the Respondents act to extend the warranty of habitability to Mr. Wennerstrom, and thus to the Appellant who is subrogated to the rights of Mr. Wennerstrom.

C. The damages stipulated by the Appellant for the purposes of this Appeal are uncontested by the Respondents.

If a litigant fails to address an issue on appeal, or fails to support its assertion with some authority, the issue in question is deemed abandoned. *Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 51 (Ct.App. 2006). In its Initial Brief, the Appellant asked the Court to grant its motion for a directed verdict based on the existence of undisputed damages. The Respondents made no mention in their Brief regarding those damages. As such those damages are no longer disputed for the purposes of this Appeal. (*Id.*). Should the Court agree with Appellant that the Respondents have admitted that the Home was defective at the time it was built, and that hidden defect caused the water leak, the amount of damages to be awarded is $300,504.34. (R. p. 188, lines 20-21).

[2] With due regard for the ruling in *Terlinde,* which held that the warranty of habitability applied to subsequent purchasers.

D. If this Court reverses the trial court's judgment, any of the trial court's rulings regarding B&B and Searcy are moot.

If a trial court fails to charge a jury on a required charge, and such error prejudices the party asking for the charge, the appropriate remedy is a new trial. *Fairchild v. S.C. DOT,* 398 S.C. 90, 727 S.E.2d 407 (S.C. 2012). It is undisputed that the trial court did not charge the jury on the warranty of habitability. The Appellant, through its Brief and this Reply, has established that the facts as revealed in the case merited it. The Appellant has also shown that the trial court's failure to charge the jury prejudiced the Appellant.

The Appellant will agree that B&B did not impliedly warrant that the Home was habitable, nor did it sell the Home to Mr. Wennerstrom. However, if this Court should agree at a minimum that the trial court erred in failing to charge the jury on the warranty of habitability, but thereafter does not agree that the trial court failed to grant the Appellant's directed verdict, this Court may order a new trial. (*Id.*) If that occurs, any motions granted by the trial court are set aside and a new trial is held. (*Id.*)

III. CONCLUSION

The undisputed facts in the Record on Appeal show that Searcy built a custom home for Mr. Wennerstrom pursuant to a transaction that cannot be construed as anything but a sale. That sale involved an innocent purchaser, Mr. Wennerstrom, who relied upon Searcy to construct the Home free of hidden defects. Further, undisputed facts in the Record established that high water pressure, endemic to the community where the Home was built and existing at all times relevant to the Complaint that initiated this Appeal, caused the Valve to fail. When the Valve failed, the Home was inundated with water causing undisputed damages of $300,504.34. All of the elements necessary to assign

liability for those damages on the Respondent Searcy under the Home's implied warranty of habitability exist in the undisputed Record. The Appellant would therefore, again, ask that this Court award damages to the Appellant in the undisputed amount of $300,504.34 or remand this matter to the trial court with directions to take the appropriate actions to accomplish same. In the alternative, the Appellant would ask that this matter be remanded to the trial court for a new trial, *de novo*.

Respectfully submitted,

Date: 1/6/15

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

Date: 2/5/15

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CERTIFICATE OF SERVICE OF REPLY BRIEF AND FINAL BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE COMPANY

Appellant, Fireman's Fund Insurance Company, by and through counsel, certifies that it served a true and correct copy of the foregoing Reply Brief and Final Brief of Appellant on Respondents via Electronic Mail and UPS in the manner below described, on the **6th day of January, 2015** (as follows:

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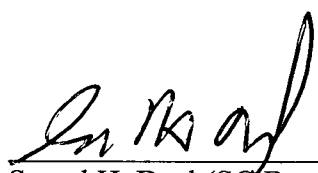

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