

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Hugh T. Watson,)
)
 Plaintiff,)
)
 v.)
)
 Hayward Baker, Inc.; Keller North America,)
 Inc.; and Ground Technology, Inc. d/b/a)
 D'Appolonia Engineering Division of Ground)
 Technology, Inc.,)
)
 Defendants.)
)
 _____)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2023-CP-37-00329

**ORDER GRANTING MOTION FOR
 SUMMARY JUDGMENT OF
 DEFENDANT GROUND
 TECHNOLOGY, INC. D/B/A
 D'APPOLONIA ENGINEERING**

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SC Court of Appeals

This matter came before the Court on motion for summary judgment of Defendant Ground Technology, Inc. d/b/a D'Appolonia Engineering ("D'Appolonia"). A hearing was held on January 29, 2025. Mason A. Goldsmith, Jr. and H. Drennan Quattlebaum appeared on behalf of Plaintiff. Kirby D. Shealy III appeared for Defendants Hayward Baker, Inc. and Keller North America, Inc. ("Hayward Baker"). Stephanie H. Burton appeared for D'Appolonia. For the reasons set forth below, the Court grants D'Appolonia's motion for summary judgment.

FINDINGS OF FACT

Background Relating to the Property

This case relates to a house located on Lake Keowee at 113 Shipmaster Drive. ("Property"). By deed dated February 28, 1988, C.B. (Bart) and Stephanie B. Schmidt purchased the Property. (February 28, 1988 Deed; Schmidt Dep. 36:22-37:3.) They built a house on the lot and they moved into the house in 1992. (Schmidt Dep. 11:8-11; 36:25.) The Schmidts experienced substantial structural issues with the home involving cracks in walls and floors. (Id. at 31:1-15.) They consulted the builder, which attempted to repair the structural issues. This

included installation of twelve helical piers under the house in 1999. (Id. at 31:15-18.) When those attempted repairs did not alleviate the ongoing structural issues, Hudson Construction retained Law Engineering and Environmental Services, Inc. to conduct a geotechnical investigation and issue a report. (Wolosick Dep. Ex. 34.) Law performed a geotechnical investigation, soil testing, and issued a report of its data and analysis to Hudson Construction dated September 21, 2001. (Id.)

Hudson Construction apparently contacted Kevin Day, a foundations engineer. Kevin Day contacted a business acquaintance, John Wolosick of Hayward Baker. (Wolosick Dep. 20, 1-25.) Hayward Baker was a recognized geotechnical contractor and Wolosick is apparently well-known in the geotechnical engineering and construction field.

D'Appolonia's Design

Hayward Baker retained D'Appolonia to provide a design for a remediation system. On August 7, 1998, D'Appolonia entered into a general agreement for professional engineering services with Hayward Baker. That agreement served as a master agreement for future projects between those parties. That agreement included a provision relating to the standard of care:

D'Appolonia will strive to perform services provided under this agreement in a manner consistent with that level of care and skill ordinarily exercised by other members of D'Appolonia's profession currently practicing in the same locality under similar conditions. No other representation, express or implied, and no warranty or guarantee is included or intended in this agreement, or in any report, opinion, document, or other instrument of service.

(Shusko Dep. Ex. 73, at 2.) On January 8, 2002, John Wolosick provided Brad Campbell of D'Appolonia with a copy of the Law report to use in connection with its engineering services. (Wolosick Dep. Ex. 37.) In addition, Hayward Baker identified the location of the area to be remediated. (Id. at 35:4-20; Ex. 38.)

Notably, D'Appolonia prepared detailed design calculations for construction of a reaction block system to remediate the movement of the house, a copy of which was submitted to the Court. (Id. at Ex. 41.) It is uncontested that D'Appolonia did not perform a design to remediate the entire slope, but only a portion near the house as it noted in its calculations: "The proposed plan is to provide stability to the Schmidt residence and not the entire slope." (Id. at Ex. 41, at 1.)

It is undisputed that D'Appolonia performed computer modeling and used information from that modeling to perform detailed mathematical hand-written calculations to design the system. (Id.) The calculations indicate on their face that they were prepared by Brad Campbell and were reviewed by another D'Appolonia employee. (Id.) On February 19, 2002, the calculations and shop drawings prepared by D'Appolonia were sent to Hayward Baker. (Id. at Ex. 44.)

The Hayward Baker Contract with the Schmidts

By letter dated January 28, 2002, Hayward Baker issued a proposal to the Schmidts. (Wolosick Dep. Ex. 40.) Hayward Baker proposed to design and build an anchored panel system. That system entailed construction of reinforced concrete panels into the side of the slope which were anchored into bedrock with seventy-foot-long steel cables. Notably, the proposal specifically limited the geographic area that would be stabilized in an accompanying sketch. (Id.)

The 2002 Project and the Hayward Baker Five Year Warranty

According to Hayward Baker's daily site reports, construction commenced on February 20, 2002, and was completed by April 8, 2002. (Wolosick Dep. Ex. 48.) Near the end of construction, the Schmidts negotiated a five-year warranty with Hayward Baker. Interestingly, Hayward Baker's John Wolosick was not aware of the warranty until this lawsuit was filed. (Id. at 102:3-9.) There is no evidence that D'Appolonia was aware of or consulted about the warranty.

(Id. at 209: 13-16.) Plaintiff's engineer James Kahle testified that "Engineers don't normally guarantee or warranty their work." (Kahle Dep. 174: 11-16.) Although some movement was expected given the nature of the slope and the system, there is also no evidence that D'Appolonia calculated projected future movement of the remediated area following installation of the reaction block system. The Hayward Baker warranty provides in pertinent part:

For a period of 5 years from the completion date (April 6, 2002) of the work at the above referenced property, HBI warrants that the slope area affected by the slope retention program (hereinafter "the Area") shall not experience movements greater than $\frac{3}{4}$ inch horizontal, as measured by the installed slope inclinometer over the term of this Warranty. "The Area" shall be defined as the slope between the back portion of the primary dwelling and the installed anchor panels at 113 Shipmaster Drive, Salen, South Carolina 29676 (See attached sketch). The slope downhill of the anchored panels is not covered under this warranty. HBI does not warrant any other slope or area not included in "the Area". The slope inclinometer will serve as the sole reference of movement for this Warranty.

Additional slope stabilization work will be performed, if required by detailed engineering review, at no additional cost to Owner if movement in "the Area" exceeds $\frac{3}{4}$ inch horizontal movement with the 5-year period from the completion date. The obligations of HBI under this Warranty will be limited to performing additional slope stabilization work to stop any additional movements within herein stated $\frac{3}{4}$ inch criteria. In no event will the costs expended by HBI to perform such additional work exceed \$100,000.

Any damage caused or worsened by the following conditions are excluded from this Warranty:a failure of Owner to give timely notice as required herein....a change to the grading of the ground.

(Wolosick Dep. Ex. 49.)

Post-Construction Inclinometer Readings

To monitor future movement of the slope after the Project was complete, Hayward Baker installed a single inclinometer. The Court understands that an inclinometer involves drilling a hole deep into the ground and the installation and grouting of a pipe into that hole. An electronic device can be lowered into the pipe along grooves in the pipe to measure movement of the pipe along its length in different directions. After installation, an initial baseline reading was taken. Thereafter,

readings were taken by QORE for Hayward Baker on February 13, 2004, and July 9, 2004. (Wolosick Dep. Ex. 52.) Those readings indicated movement along the A axis of the inclinometer casing of 1 inch and along the B axis of the inclinometer casing of about ¼ inch. (Id.)

2004 Review of the Inclinometer Readings

In 2004, Hayward Baker retained P. Erik Mikkelson of Geometron to review and analyze the inclinometer data and offer his opinion. (Wolosick Dep. 111:7-112:16.) According to the testimony, Mr. Mikkelson is recognized as a nationwide expert on geotechnical instrumentation, including inclinometers. (Id. at 111:22-24; 213:17-23.) Mr. Mikkelson issued a letter dated October 29, 2004, opining that movement at ground surface had stabilized at ¾ inches total, displacement at the tendons of the reaction block system had stabilized at .02 inches total, and displacement below the tendon elevations had stabilized. He recommended additional inclinometer readings in March/April 2005. (Id. at Ex. 52.)

Hayward Baker provided the Geometron report to D'Appolonia and asked for it to review the data and the report of Geometron. (Id. at 114:15-115:10.) Notably, it is undisputed that Hayward Baker told D'Appolonia that the Property had not experienced any distress since installation of the system. Mr. Wolosick testified:

Q: Did you or did Hayward Baker state to D'Appolonia that there was no damage at that time to the residents on the property?

A: Yes.

(Id. at 214:22-25; Ex. 51.)

D'Appolonia reviewed the inclinometer data provided by Hayward Baker, the expert opinion of Mr. Mikkelson of Geometron, and the fact that the Schmidts had not reported any damage to their house in the two and a half years since installation of the system and concluded that the “system [was] performing well and no additional measures are required.” (Id. at Ex. 51.)

There is no evidence that D'Appolonia had any further involvement with the Schmidt property after issuance of its letter. There is no evidence that any later inclinometer data was provided to D'Appolonia or that any information about the Schmidt house after that date was provided to D'Appolonia.

Hayward Baker Communications with the Schmidts

Importantly, the inclinometer data, the Mikkelson report, and the 2004 D'Appolonia letter were provided by Hayward Baker to the Schmidts by letter dated November 10, 2004. (Wolosick Dep. Ex. 52.) Even though the data showed movement exceeding Hayward Baker's $\frac{3}{4}$ inch warranty, which was expressly pointed out by Hayward Baker in the letter, the Schmidts did not exercise their rights under the warranty. According to Stephanie Schmidt, the issues with the house ceased in 2002 and they were satisfied with the remediation project. Stephanie Schmidt testified:

Q: And then from 2002 until you all moved in 2012, you didn't have any more issues with cracking or things like that with the house. Is that right?

A: That was right.

(Schmidt Dep. 15:20-24.)

Inclinometer Readings After 2024

As recommended by Mr. Mikkelson, Hayward Baker retained QORE to conduct another reading of the inclinometer in 2005. QORE issued a report dated June 28, 2005 to John Wolosick. QORE concluded, "As such, the results of our inclinometer survey indicate that there appears to be movement on the order of about $1\frac{1}{4}$ inches in the slope at the location of the inclinometer casing since our initial base line survey and about $\frac{1}{2}$ inch since the July 9, 2004 survey." (Wolosick Dep. Ex. 54). Mr. Wolosick testified that this report was also sent to the Schmidts. (Id. at 137:2-5; Ex. 55.) There is no evidence that this report was sent to D'Appolonia. Again, although the warranty

period had not yet expired, the Schmidts did not exercise their rights under the Hayward Baker warranty.

QORE read the inclinometer again in 2006. Importantly, QORE issued a report dated November 21, 2006 directly to Mr. Schmidt. QORE reported that in the last eighteen months, the slope had moved very little: .1 to .2 inches. (Id. at Ex. 57.) There is no evidence that anyone sent this report to D'Appolonia.

The Schmidts remained satisfied with the remediation project. According to Mrs. Schmidt, they experienced no further issues with movement of the house while they owned the house. (Schmidt Dep. 14: 20-24.) She also stated that “we didn’t have trouble, so there was no reason for my husband to pull this [Warranty] out.” (Schmidt Dep. 44:3-18.) It is uncontested that during the five-year warranty period, the Schmidts were provided with data showing movement exceeding $\frac{3}{4}$ inch, but never invoked the warranty that they had negotiated with Hayward Baker because they were satisfied with the project.

The Property is Sold to Plaintiff

When Bart Schmidt suffered from health concerns, the Schmidts moved to the Woodlands in Greenville, South Carolina in 2012. (Schmidt Dep. 60:22-25.) Accordingly, the Schmidts decided to sell their home.

Plaintiff testified that he had been looking for a house on Lake Keowee because he had friends who lived in the area. (Watson Dep. 8:17-22.) He was interested in the house next door, but it went under contract before he could make an offer. (Id. at 20: 3-7.) When he looked at 113 Shipmaster Drive, the Schmidts made him aware of the geotechnical repairs that had been made to the house but did not issue any warning relating to the house because “we thought everything

was fine.” (Schmidt Dep. 67:5-16.) Plaintiff acquired the house by Deed dated May 26, 2015. (May 26, 2015 Deed.)

Plaintiff filed this action on April 27, 2023, twenty-one years after the remediation project was substantially completed and more than eighteen years after D’Appolonia’s last involvement with the Schmidt house in 2004. Plaintiff asserts two legal claims against D’Appolonia in this lawsuit: (1) professional negligence; and (2) gross professional negligence.

CONCLUSIONS OF LAW

The Statute of Repose Bars Plaintiff’s Claims

Section 15-3-640 sets forth South Carolina’s statute of repose. S.C. Code Ann. § 15-3-640 (2005). The South Carolina Supreme Court has recognized its purpose as: “A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time.” Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). At the hearing, Plaintiff argued that application of the statute of repose is unfair because he did not own the Property during the limitations period, and he is “an orphan” as a result. The South Carolina Supreme Court expressly addressed and rejected this argument. As the Court has explained:

A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. ... A statute of repose is “[a] statute barring any suit that is brought after a specified time since the defendant acted... even if this period ends before the plaintiff has suffered a resulting injury.” **“Statutes of repose by their nature impose on some Plaintiffs the hardship of having a claim extinguished before it is discovered or perhaps even before it even exists.”**

Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). A statute of repose cannot be defeated by estoppel, waiver, or claims of tolling. See

G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003).

Section 15-3-640 provides that “no actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement.” S.C. Code Ann. § 15-3-640 (2005). For improvements that were substantially completed prior to July 1, 2005, like those at issue in this case, the statute of repose was thirteen years. S.C. Code Ann. § 15-3-640 (2000).

There is no dispute that the slope remediation system was substantially completed in April 2002, when Hayward Baker finished construction. Thus, Plaintiff had until April 2015 to file an action against D’Appolonia alleging any defect or deficiency in the design or construction of that system under the statute of repose. This Action was filed on April 27, 2023, twenty-one years after the work was completed. Accordingly, Plaintiff’s claims are barred by the statute of repose.

The Gross Negligence Exception

Plaintiff argues that the gross negligence exception in Section 15-3-670 applies. That section provides in pertinent part:

The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

S.C. Code Ann. § 15-3-670 (2011). The undisputed evidence, including admissions by Plaintiff’s own engineers, establishes that D’Appolonia exercised at least slight care in performing its design services and there is no evidence from which a jury could conclude otherwise.

Gross negligence is well defined in South Carolina as the failure to exercise even the slightest care. Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); Jackson v. S.C. Dept. of Corr., 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) (“A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give **slight care** to what is he doing.”); Steinke v. S.C. Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) (“We have defined gross negligence as ‘the failure to exercise **slight care**’.”); Chakrabarti v. City of Orangeburg, 403 S.C. 308, 315, 743 S.E.2d 109, 113 (Ct. App. 2013) (quoting Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000)) (“Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.”) Even if a defendant could have done more does not “negate the fact that it exercised **slight care**.” Etheredge at 307, 534 S.E.2d at 278.

D'Appolonia's 2002 Design of the Remediation System

It is undisputed that D'Appolonia performed detailed design calculations to analyze the likely existing conditions of the slope at the Schmidt home which are part of this Court's record. (Wolosick Dep. Ex. 41.) It is uncontested that D'Appolonia used available computer software to model the existing conditions and also prepared detailed hand calculations relating to the existing conditions to determine the driving forces acting on the slope. (Id.) It is uncontested that D'Appolonia used calculations to design the components of the anchor block system to resist those driving forces and include a factor of safety. (Id.) Although he admittedly has never designed such a system, Plaintiff's geotechnical engineer James G. Kahle admits that the anchor block system designed by D'Appolonia was and continues to be used often for slope instability. (Kahle Dep. 137:12-15; 139:14-22.) In fact, in his deposition, Mr. Kahle testified that D'Appolonia was

not grossly negligent in performing its design services in 2002.¹ Mr. Kahle offered the following opinion:

No, I - - I think there is some negligence involved in the not having all of the - - not designing the system to handle the worst case, the distance from the house on the lake, elevated water tables, steeper slope. And I think that's negligent, but I don't know if that's gross negligence - - **-I don't think that's gross negligence.**

(Id. at 173:21-174:1-3.) (emphasis added.)

In addition, Plaintiff's structural engineer, L.G. "Skip" Lewis, Jr., who admittedly is not a geotechnical engineer nor ever involved in performing a similar design, also admitted that D'Appolonia was not grossly negligent in performing its design services in 2002.² (Lewis Dep. 130, 8-13.) Given the calculations and the testimony in the record, there is no genuine issue of material fact as to whether D'Appolonia failed to exercise slight care when it performed its calculations and analysis in 2002. Thus, any claim against D'Appolonia relating to its original design of the system is barred by the statute of repose.

¹ Mr. Kahle defined gross negligence as "ignoring data that has the potential for damage or for loss of life." (Kahle Dep. 172: 1-2.). He also defined gross negligence as "when the data says that something is not performing as intended and then if that data is ignored, it's my opinion that would be gross negligence." (Id. at 172:17-20.)

² On January 27, 2025, two days before the scheduled hearing in this matter, Plaintiff submitted an Addendum to the Affidavit of Mr. Lewis. Defendant D'Appolonia moved to strike such affidavit as a sham affidavit. To the extent that Mr. Lewis contradicts his deposition testimony in this case, the Court has disregarded his supplemental affidavit. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004); See also McMaster v. DeWitt, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2015). The Court notes that while Mr. Lewis contends that there are errors in D'Appolonia's calculations, which he recently discovered, he does not contend that D'Appolonia failed to exercise even slight care in performing its engineering design. The Court concludes that D'Appolonia exercised at least slight care in performing what the parties agree are complex engineering calculations such that even Plaintiff's engineers have engaged in further analysis of those calculations throughout this litigation.

Plaintiff's Claims Relating to D'Appolonia's November 3, 2004 Letter

Plaintiff also contends that D'Appolonia failed to exercise slight care in writing its November 3, 2004 letter to Hayward Baker. Plaintiff posits that D'Appolonia should have concluded that the one-inch movement was excessive, revisited its calculations, and then advised Hayward Baker that the movement was excessive. Plaintiff further speculates that Hayward Baker would have done something different than continue to monitor the inclinometers as recommended by Geometron, despite the fact that the Schmidts remained content with the repair. In opining about this issue, Mr. Kahle indicated that his opinion was based upon an assumption that D'Appolonia was aware of the Hayward Baker $\frac{3}{4}$ inch warranty and that D'Appolonia's system was designed to limit movement of the remediated portion of slope to $\frac{3}{4}$ inch or less. Mr. Kahle testified as follows:

Q: And is it your opinion that D'Appolonia was only grossly negligent because it didn't recommend further action or investigation?

A: Yes. They knew about the data, and it exceeded their – it exceeded the limit of the warranty, which **I'm assuming** that D'Appolonia agreed with the warranty of three-quarters of an inch. I don't know the answer to that question. **But if they did, then there should be more investigation into, why is our system not performing as we intended it to perform?**

(Kahle Dep. 175: 3-13.)

As Mr. Kahle later admitted, he is aware of no evidence that D'Appolonia was involved in the warranty issued by Hayward Baker and no such evidence has been presented to this Court. (Id. at 180:8-14.) In addition, no evidence has been presented that D'Appolonia's system was designed to limit movement of the remediated slope to .75" or less. Thus, there is no evidence that the readings from the inclinometers identified unexpected movement to D'Appolonia.

The uncontested evidence establishes that a recognized expert in the field, Erik Mikkelsen of Geometron, analyzed the same inclinometer data and concluded that the ground movement had

stabilized. (Wolosick Dep. 111:22-24; 213:17-23; Ex. 52.) The uncontested evidence establishes that John Wolosick reported to D'Appolonia that the structural issues of the Schmidt house had abated and the Schmidts did not have further problems with their house. (Id. at 214: 22-25; Ex. 51.)

Given this, this Court finds that there is no material issue of fact from which a jury could conclude that Appolonia failed to exercise even slight care in offering its 2004 opinion to its client Hayward Baker that the system was performing. As its letter to Hayward Baker demonstrates, D'Appolonia reviewed the two inclinometer readings taken by QORE, the expert opinion of Mr. Mikkelson, the fact that the house was no longer experiencing distress and the homeowners were satisfied, and performed additional calculations to analyze the average movement of the slope. (Id. at Ex. 52.) The Court finds that performing such review and analysis is at least the exercise of slight care. Thus, to the extent that D'Appolonia owed Plaintiff any legal duty when it prepared its 2004 letter to Hayward Baker, the statute of repose bars Plaintiff's claim.

The Building Permit Issue

Plaintiff also argues that there is no evidence about the building permit issued by the local building official and that the statute of repose does not apply as a result. Plaintiff relies upon the following language in Section 15-3-640:

Any building permit for the construction of an improvement to real property shall contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond thirteen years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of any owner or possessor to contract for such extended liability under this section. Nothing in this section shall prohibit any person from entering into any contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond thirteen years after substantial completion of the improvement or component.

S.C. Code Ann. § 15-3-640 (2000). Plaintiff argues that the statute of repose does not apply to his claims against D’Appolonia because D’Appolonia had some unidentified obligation relating to the language in the building permit. There are no South Carolina appellate cases addressing this argument. However, the Court agrees with the analysis of the United States District Court for the District of South Carolina which has addressed this issue. See Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc., No. CV 9:17-1575-RMG, 2017 WL 6622508, at *3 (D.S.C. Dec. 27, 2017), order amended on other grounds on reconsideration, No. CV 9:17-1575-RMG, 2018 WL 679454 (D.S.C. Feb. 2, 2018), on reconsideration, No. CV 9:17-1575-RMG, 2018 WL 1305427 (D.S.C. Mar. 12, 2018)(In granting a motion for partial summary judgment, the District Court stated: “Plaintiff also argues the building permit lacked the bold-type notice of the statute of repose required by S.C. § 15-3-640. That argument is without merit. The building permit was issued by Beaufort County municipal officials, not Defendants. *See* S.C. Code § 5-25-310. If Plaintiff believes those officials injured Plaintiff by violating a statutory requirement to provide notice of a statute of repose, Plaintiff should seek remedy from Beaufort County. Plaintiff cites no authority for the proposition that a county building inspector may unilaterally waive a builder’s ability to assert the statute of repose as a defense to liability.”)

First, Plaintiff has provided no evidence that as the engineer for the Project, D’Appolonia had responsibility to obtain the building permit for the 2002 project. Second, D’Appolonia was not responsible for drafting the building permit issued by the local building officials. Third, there is nothing in the statute that addresses the failure of a local building official to include such language nor that addresses what happens if the Department of Consumer Affairs fails to take the action required of it. There is nothing in the statute that indicates any legislative intent to waive the application of the statute of repose for participants in design and construction projects if a

governmental entity fails to adhere to the requirements of the statute and this Court will not impose such a responsibility here.

D'Appolonia Does Not Owe Any Legal Duty to Plaintiff

Given that its engineers conceded that D'Appolonia exercised at least slight care in performing its 2002 design, the Court must address whether D'Appolonia owed a legal duty to Plaintiff when it prepared its 2004 letter to its client, Hayward Baker. The Court also finds that D'Appolonia did not. The question of whether D'Appolonia owed a legal duty to Plaintiff is a question for this Court. "A motion for summary judgment on the basis of the absence of a duty is **a question of law for the court** to determine." Oblachinski v. Reynolds, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011) (upholding trial court's grant of summary judgment finding that the defendant did not owe a duty of care). In an action for negligence, the court must determine whether the defendant owed a duty of care to the plaintiff and if there is no duty, the defendant is entitled to judgment as a matter of law. Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276-77 (2003).

Review of South Carolina's cases demonstrates that a duty exists only if imposed by statute, contract, relationship, status, property interest, or other special circumstance. McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007); Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). Foreseeability itself does not give rise to a duty. South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, n. 2, 346 S.E. 2d 324, n.2 (1986). A duty may arise from an alleged tortfeasor's contractual relationship with another party; however, "it is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tort-feasor." Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986).

A professional may owe a duty to a plaintiff when a relationship exists between the professional and the plaintiff that gives rise to a duty of care, separate and distinct from any contractual obligations with a third party. See id. (holding that an insurance broker who contracted to sell workers' compensation coverage to an employer was liable to the employee who was denied workers' compensation benefits because the broker failed to procure coverage on behalf of the employer); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995) (holding that an engineer owed a duty to a contractor because the engineer had control over and the right to halt construction); Shaw v. Psychomedics Corp., 426 S.C. 194, 199, 826 S.E.2d 281, 283 (2019) (concluding that a drug testing laboratory may owe a duty of care to an employee arising from the laboratory's contractual relationship with the employer because the laboratory exercised control over the employee's sample which was the primary purpose of the contract).

In its memorandum, Plaintiff contends that D'Appolonia owed him a legal duty because it was "the design-engineer of the Soil Stabilization System." (Plaintiff's Memo. in Opp., pp. 2-3.) In support of his argument, Plaintiff cites two cases, Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) and City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987). Those cases do not support imposition of a duty in this case.

In Tommy L. Griffin, the South Carolina Supreme Court addressed a claim by the low bid contractor of a water main project against the project engineer. 320 S.C. at 51-52, 463 S.E.2d at 86-87. The engineer and contractor had numerous disagreements during the Project leading, among other things, to the engineer shutting the project down. Id. The primary issue addressed by the Court in that case was application of the economic loss rule. Id. at 52-57, 463 S.E.2d at 87-

89. In so doing, the court held that if there is a “special relationship” between the parties, the breach of that duty of care may give rise to a tort claim, but whether such a duty exists will depend upon “the facts and circumstances of each case.” Id. at 56, 463 S.E.2d at 89. In that case, the Court found it important that the engineer not only performed the design utilized by the contractor, but also supervised construction and had the contractual right to both inspect and halt construction. Id. Thus, Tommy L. Griffin stands for the proposition that where the parties have a close working relationship on a construction project, there may be a duty owed by a design professional.

City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987) is a product liability case against the manufacturer of Monokote, which included asbestos. The United States Court of Appeals for the Fourth Circuit addressed application of the economic loss rule to the claims in that case. Id. at 977. The Court of Appeals found that the City could pursue tort claims against the product manufacturer “whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment, thereby causing damage to the property owner who has installed the harmful product in his building.” Id. at 978.

Neither case supports imposition of a duty owed by D’Appolonia to Plaintiff under the facts and circumstances of this case. D’Appolonia did not manufacture a product and put it into the stream of commerce nor was D’Appolonia a new home builder.³ D’Appolonia did not have any relationship with Plaintiff. This Court finds that under the facts and circumstances of this case, there is no special relationship between D’Appolonia and Plaintiff to give rise to a legal duty by D’Appolonia.

³ South Carolina’s courts have adopted *caveat venditor*, recognizing that a new home builder who puts new home construction into the stream of commerce and violates a legal duty is liable in tort to subsequent purchasers of that house. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989).

The South Carolina Court of Appeals recently addressed when a duty arises in a case involving an assisted living resident who fell and whose fall was not discovered for several days by the facility, even though the facility had adopted a policy to perform daily checks of the residents. Estate of Parrott v. Sandpiper Indep. & Assisted Living-Delaware, LLC, 443 S.C. 405, 904 S.E.2d 455 (Ct. App. 2024). In reversing the verdict in that case, the Court of Appeals noted that a duty arises from a relationship “recognized by law as the foundation of a duty of care.” Id. at 416, 904 S.E.2d at 461. That court noted a number of factors to be considered in determining the existence of a duty:

[t]here is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.

Id. at 417, 904 S.E.2d at 461-62.

South Carolina’s courts have addressed what duties a consultant hired to prepare a report owes to third parties. S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986). See also First Fed. Savings Bank v. Knauss, 296 S.C. 136, 140, 370 S.E.2d 906, 908 (Ct. App. 1988) (applying Booz-Allen to claim for negligent preparation of appraisal).

In Booz-Allen, the Georgia Ports Authority contracted with Booz-Allen & Hamilton, a consulting firm, to prepare a report comparing the merits of the Savannah, Georgia port with the Charleston, South Carolina port in terms of commercial traffic. Booz-Allen, 289 S.C. at 375, 346 S.E.2d at 325. Booz-Allen failed to obtain facts and figures concerning the Charleston port from the South Carolina Ports Authority and the completed report contained false facts concerning the Charleston port, such as depth of channels and bridge clearances. Id. As a result, the completed

report was favorable to the Savannah port. Id. The Georgia Ports Authority distributed the report to customers and potential customers, resulting in decreased traffic in the Charleston port. Id.

The Charleston Ports Authority and two unions, the Pilots Association and International Longshoremen's Association, filed a lawsuit in federal court alleging, among other causes of action, negligence against Booz-Allen. Id. The plaintiffs argued that Booz-Allen owed them a duty because it was foreseeable that the report, falsely disparaging the Charleston port, would have a direct economic impact on them. Id. at 376, 346 S.E.2d at 325. The district court granted Booz-Allen's motion to dismiss the negligence cause of action, finding that Booz-Allen owed no duty to the plaintiffs. Id. at 375, 346 S.E.2d at 325. On appeal, the United States Court of Appeals for the District of Columbia certified the following question to the South Carolina Supreme Court:

Under South Carolina law, which, if any, of the following entities has a tort claim for negligence against a consultant who prepares a report intended for public distribution, comparing two ports, where the port authority of one port has contracted with the consultant for the report, and where the report sets forth statements of fact that reasonable investigation would have shown to be false, portraying the other port as inferior and causing traffic to avoid that port:

- (a) The governmental agency responsible for the administration of the port described as inferior?
- (b) The association of harbor pilots for that port?
- (c) Labor unions whose members are employees servicing vessels in that port?

Id. at 375, 346 S.E.2d at 325.

Each of the plaintiffs argued that Booz-Allen owed them a duty because it was foreseeable that the negligently prepared report would injure them and that the consultant owed each of them a duty to prevent injury. Id. at 376, 346 S.E.2d at 325. The court rejected that argument and held that “[f]oreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability.” Id.

Rather, the court identified cases imposing a duty to “non-contracting parties who have reasonably relied on their reports in taking some action.” Id. Issuing a ruling of limited scope, the Supreme Court found that a duty existed when a consultant issues an allegedly objective report giving one entity a business advantage. Id. Accordingly, the court limited the consultant’s duty to the South Carolina Ports Authority. Id. at 377, 346 S.E.2d at 326. The court found no duty owed to the other two plaintiffs because the relationship was “far too attenuated to rise to the level of a duty flowing between them.” Id.

In this case, D’Appolonia entered into an agreement with Hayward Baker in 1998. D’Appolonia prepared design of the reaction block system for Hayward Baker pursuant to that agreement. D’Appolonia responded by letter to Hayward Baker’s request to review the inclinometer data, Geometron report, and information in 2004. The holding in Booz-Allen is clear: a consultant who negligently prepares a report (or in this case, a letter) only owes a duty to non-contracting parties who actually rely on the report (letter). Booz-Allen, 289 S.C. at 376, 346 S.E.2d at 325. There is no evidence that Plaintiff relied upon D’Appolonia’s letter; in fact, there is no testimony that it was provided to him in due diligence or that he ever spoke to D’Appolonia. In addition, there is no close working or “special” relationship between Plaintiff and D’Appolonia.

Here, in considering the factors identified by the Court of Appeals in Estate of Parrott, the link between D’Appolonia and Plaintiff is too attenuated to impose a duty of care owed by D’Appolonia to Plaintiff. There is no South Carolina law which supports imposition of a legal duty under the facts of this case.

For the reasons set forth above, the Court grants the motion for summary judgment of D’Appolonia.

AND IT IS SO ORDERED.

R. Lawton McIntosh, Judge
Court of Common Pleas



Oconee Common Pleas

Case Caption: Hugh T Watson VS Hayward Baker Inc , defendant, et al

Case Number: 2023CP3700329

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