

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	
)	
)	
Hugh T. Watson,)	Civil Action No. 2023-CP-37-00329
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING DEFENDANT
)	KELLER NORTH AMERICA, INC.’S
Hayward Baker, Inc.; Keller North)	MOTION FOR SUMMARY
America, Inc.; and Ground Technology,)	JUDGMENT
Inc. d/b/a D’Appolonia Engineering)	
Division of Ground Technology, Inc.,)	
)	
Defendants.)	

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SC Court of Appeals

This matter came before the Court on January 29, 2025 for a hearing upon a motion for summary judgment filed by Defendant Keller North America, Inc., successor by merger to Hayward Baker, Inc.), incorrectly identified in the Amended Complaint as Hayward Baker, Inc. and Keller North America, Inc. Mason A. Goldsmith, Jr., Esquire and H. Drennan Quattlebaum, Esquire appeared on behalf of Plaintiff. Kirby D. Shealy III, Esquire appeared for Defendants Hayward Baker, Inc. and Keller North America, Inc. (“Keller”). Stephanie H. Burton appeared for D’Appolonia. For the reasons set forth below, the Court grants Keller’s motion for summary judgment.

After consideration of the pleadings, motion, memoranda, and arguments of counsel presented in this case, this Court finds that no genuine issues of material fact exist and concludes that Keller is entitled to judgment as a matter of law pursuant to Rule 56, SCRCF.

LEGAL STANDARD

Summary judgment shall be granted when “the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCF; *see also Fleming v. Rose*, 567 S.E.2d 857, 859, 567 S.E.2d 857, 860 (2002). “The proper standard [under Rule 56(c)] is the genuine issue of material fact standard.” *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (internal quotations omitted) (rejecting the “mere scintilla” standard for summary judgment). When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

“In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015). “Once the moving party carries its initial burden [of demonstrating the absence of a genuine issue of material fact], the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial.” *Vista Del Mar Condo. Ass'n v. Vista Del Mar Condominiums, LLC*, 441 S.C. 223, 232–33, 892 S.E.2d 532, 537 (Ct. App. 2023) (quoting *Lord v. D & J Enters.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014)) (alterations in original).

“To survive summary judgment, the evidence presented [by the non-movant] must amount to more than mere speculation and conjecture.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) (Hearn, J., concurring in part and dissenting in part) (citing *McKnight v. S.C. Dep't of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App.

2009)). South Carolina courts have consistently held that a party cannot create a genuine issue of material fact through conjuncture and speculation. *McKnight*, 385 S.C. at 389-90, 684 S.E.2d at 570-71. “[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)).

UNDISPUTED FACTS

This case concerns 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, Hudson Construction, which attempted to repair the structural issues, including installing 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 Engineering and Environmental Services, Inc. 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 then contacted Kevin Day, a foundations engineer, who in turn contacted a business acquaintance, John Wolosick of Keller. (Wolosick Dep. 20, 1-25.) Keller was a recognized geotechnical contractor, and Wolosick is apparently well-known in the geotechnical engineering and construction field.

The Hayward Baker Contract with the Schmidts

By letter dated January 28, 2002, Keller issued a proposal to the Schmidts to design and build an anchored panel system. (Wolosick Dep. Ex. 40.) 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 Keller's Five Year Warranty

According to Keller'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 Keller. The Keller 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, [Keller] 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. [Keller] 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 within the 5-year period from the completion date. The obligations of [Keller] 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 [Keller] 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, Keller 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 Keller 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, Keller 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.) D'Appolonia reviewed the inclinometer data provided by Keller, 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.)

Keller Communications with the Schmidts

Importantly, the inclinometer data, the Mikkelson report, and the 2004 D'Appolonia letter were provided by Keller to the Schmidts by letter dated November 10, 2004. (Wolosick Dep. Ex. 52.) Even though the data showed movement exceeding Keller's $\frac{3}{4}$ inch warranty, which was expressly pointed out by Keller 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 2004

As recommended by Mr. Mikkelson, Keller 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.) Again, although the warranty period had not yet expired, the Schmidts did not exercise their rights under the Keller 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.)

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 Property. (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 Keller 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 the Property.

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 the Property, 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.) The Schmidts provided an overview of the work that was done by Keller and had documentation available for potential buyers’ review. (Watson Depo. 23:8-22.) Plaintiff admits he was aware of the Schmidts’ disclosure statement and previous soil stability work prior to purchasing the Property but that he merely “thumb[ed] through . . . documentation.” (*Id.* at 23:8-22, 24:13-16).

The Schmidts referred Plaintiff to John Wolosick for further details about the slope stabilization project, and Plaintiff reached out to Wolosick by telephone to discuss it. When asked what he recalled Wolosick said to him on the phone call, Plaintiff testified:

I recall that he recalled the property, recalled the Schmidts. Talked to me about the project and what it consisted of. That they were leaders in that field, in terms of soil movement stabilization or to the fact that I recall him telling me that -- that they do work all around the country, and perhaps around the world. I don't recall if that was right or not. And that they had been employing that solution for 60-plus years. And that's -- that's the life of that type of solution.

(*Id.* at 27:15-24).

Plaintiff acquired the Property by Deed dated May 26, 2015. Plaintiff acknowledges that the documentation he now uses to support his claim was readily available in the home the Property at the time he purchased it. (*Id.* at 30:19–32:14).

Plaintiff filed this action on April 27, 2023, twenty-one years after the remediation project was substantially completed and more than sixteen years after Keller's last involvement with the Schmidt house in 2006. His amended complaint alleges causes of action for promissory estoppel, negligence, gross negligence, breach of implied warranties, and negligent misrepresentation against Keller.

DISCUSSION

The fundamental flaw in all of Plaintiff's claims against Keller is that they seek to place Plaintiff in a position superior to that of C.B. and Stephanie Schmidt—the prior owners of the subject project who commissioned Keller to stabilize the slope beneath their residence. Keller's five-year warranty on the stabilization work was provided directly to the Schmidts and limited to \$100,000 for additional stabilization if horizontal movement exceeded 3/4 inch.

Plaintiff acknowledges this warranty's terms and scope. (Pl.'s Memo. Opp'n Def. Keller's Mot. Summ. J. 2 (hereinafter, Pl.'s Memo. Opp'n); *see also* Wolosick Depo. Ex. 49). Plaintiff also acknowledges that data indicated movement exceeding the 3/4 inch threshold, but the Schmidts—fully aware of this information—chose not to exercise their rights under the warranty and remained satisfied with Keller's work. (Wolosick Depo. Exs. 51, 52 & 57; Stephanie Schmidt Depo. 14:14-

24.).¹ Moreover, it is undisputed that by 2015, Plaintiff was aware of Keller’s soil stabilization work. (Pl.’s Memo. Opp’n 6; **Exhibit 3**, Watson Depo. Tr. 23:3-22, 25:20-21).

Despite these facts, Plaintiff now seeks to recover the “staggering repair costs he now faces,” including an estimated budget of \$2,200,000.00—this, over two decades after the project’s completion and eight years after Plaintiff became aware of the work. (Pl.’s Memo. Opp’n at 1–2 & n.2). It bears repeating that the Schmidts, as the contracting homeowners, were entitled to only a five-year warranty limited to \$100,000. Plaintiff, however, attempts to assert rights under that expired warranty while simultaneously demanding recovery far exceeding its express limitations.

Plaintiff’s argument—that Keller failed to perform additional stabilization “[d]espite this clear evidence of continued movement (*id.* at 5)—is both legally and factually unfounded. This mischaracterization underscores the implausibility of Plaintiff’s position: he seeks to assert rights the Schmidts waived long ago and recover damages far beyond anything they could have plausibly claimed under the warranty.

It defies law and logic to place Plaintiff in a better position than the contracting homeowners for alleged defects on a project governed by a limited five-year warranty. This overarching principle guides the Court’s evaluation of the Plaintiff’s claims and Keller’s Motion for Summary Judgment.

I. Plaintiff’s Claims Are Barred by the Statute of Limitations

In its Memorandum, Plaintiff attempts to argue the applicable statute of limitations does not apply because Plaintiff could not and did not know through the exercise of reasonable diligence that a cause of action against Keller existed until on or after July 28, 2020, when representatives

¹ The Schmidts inaction was undoubtedly due to the fact that they had no other problems with the residence for the next thirteen years. *See* Stephanie Schmidt Depo. 13:15-21).

from S&ME provided him with a letter reporting the findings from their attempted inclinometer reading. (*Id.* at 24–25). Plaintiff also asserts that the very earliest he knew or should have known was May 2020 when he noticed a crack had formed inside the kitchen of the residence, prompting him to call John Wolosick. (*Id.* at 25).

Both of these proposed dates ignore the fact that Plaintiff admits he was aware of the Schmidts' disclosure statement and previous soil stability work at the time Plaintiff purchased the residence in 2015. (Pl.'s Memo. Opp'n 6). Crucially, the Schmidts provided an overview of the work that was done by Keller and had documentation available for potential buyers' review. (Watson Depo. 23:8-22). Yet, Plaintiff admits he merely "thumb[ed] through the -- the documentation." (*Id.* at 24:13-16). Plaintiff also admits he did nothing to investigate the slope stabilization project before he purchased the house other than having one conversation with Wolosick. (*Id.* at 29:7-23). Furthermore, Plaintiff acknowledges that the documentation he now uses to support his claim was readily available in his own home at the time he purchased it. (*Id.* at 30:19–32:14). Still, once he found these documents, he did not reach out to the Schmidts regarding the slope stabilization project or conduct any investigation into the matter. (*Id.* at 32:15-18). What's more, in addition to the crack that Plaintiff noticed in 2020, which prompted him to call Wolosick (allegedly beginning the statute of limitations clock), there were numerous cracks, erosion, and slopes in the flooring noted and photographed on the inspection report conducted for Plaintiff prior to his purchase of the property. (*Id.* at 76:3–80:3).

All of Plaintiff's claims against Keller, with the exception of promissory estoppel, are governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530. Because Plaintiff first asserted its claims against Keller on April 27, 2023, some eight years after he first became aware of the issues that form the predicate for the current lawsuit, Keller is entitled to summary judgment.

See id. The undisputed evidence shows that Plaintiff knew or should have known of a potential claim against Keller in 2015.

“The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). The fact “that an injured party may not comprehend the full extent of the damage is immaterial” *Id.* at 782. The statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, *diligently acquired*, sufficient to put a person on notice of the existence of a cause of action against another. *Id.* This is an *objective*, not a subjective, determination. *Id.* Therefore, “it takes very little to start the clock” in South Carolina. *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994).

Plaintiff was far from reasonably diligent after acquiring knowledge of the purported soil stabilization issue and was on notice of potential claims against Keller as early as 2015. Plaintiff knew the Schmidts had previous stabilization work done by Keller during the very time period that Plaintiff was determining whether to purchase the property and conducting inspections of the residence. (Watson Depo. 21:15–22:6). Plaintiff admits he called Wolosick to discuss the work done by Keller *decades* earlier. (*Id.* at 22:2-4). But that is where Plaintiff’s “diligence” stopped: thumbing through the documents regarding the project and one phone call to Wolosick. (*Id.* at 29:7-23). After Plaintiff purchased the property in 2015, he discovered more documents and correspondence related to the project—in particular, the documents related to post-construction inclinometer readings showing movement in excess of Keller’s warranty-- but did nothing. (*Id.* at 30:19–32:18). At any time following 2015, Plaintiff could have simply confirmed the results of

the slope stability work with the Schmidts and/or by having the inclinometer checked again. Had Plaintiff conducted a simple inquiry into the underlying work and results, including thoroughly reading the documentation made available to him or hiring a third party to inspect the work as Plaintiff eventually did in 2020, Plaintiff would have discovered everything that he ultimately learned in 2020. Instead, Plaintiff turned an unreasonable, and perhaps intentional, blind eye to the very claims that he now asserts he “discovered” in 2020. Plaintiff’s alleged 2020 “discovery” is belied by the undisputed facts.

For purposes of the statute of limitations, Plaintiff possessed enough actual or constructive knowledge of facts giving rise to a potential claim against Keller as early as 2015. It does not matter whether Plaintiff had knowledge of the full extent of his damages until a later date. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) (“[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.”). Because the accrual of his causes of action predate Plaintiff’s filing of his complaint by eight years, Plaintiff’s claims against Keller must be dismissed with prejudice.

II. Plaintiff’s Claims Are Barred by the Statute of Repose.

Likewise, Plaintiff’s claims are barred by the statute of repose. The applicable statute of repose required Plaintiff to bring his action within eight years of substantial completion of improvement to real property. S.C. Code. Ann. § 15-3-640.² Because Keller completed its work to the property in or around 2002, and ceased monitoring conditions at the property in 2006, the

² At the time Keller performed its work in 2002, the statute of repose was thirteen years, but § 15-3-640 was amended in 2005 to shorten the limitations period to eight years. Because Keller’s involvement with the Schmidt project extended into 2006, the shorter statute applies with respect to Watson’s allegations concerning Keller’s failure to appropriately respond to inclinometer readings taken after July 1, 2005, but irrespective of which version of § 15-3-640 applies, the statute would have run well before Watson filed his complaint in 2023.

statute of repose bars Plaintiff from pursuing Keller for any problems relating to the installation or performance of the system.

Plaintiff first argues the statute of repose does not apply based on the applicability of Section 15-3-670(A). This section provides in pertinent part that the statute of repose is “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(A).

Plaintiff asserts Keller is liable for fraud, gross negligence, and recklessness. (Pl.’s Mem. Opp’n 26). However, Plaintiff has failed to adduce admissible evidence in support of these claims.

A. Fraud³

“To sustain a claim of fraud, all of the following elements must be proven: ‘(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury.’” *Armstrong v. Collins*, 366 S.C. 204, 218, 621 S.E.2d 368, 375 (Ct. App. 2005) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444–45 (Ct. App. 2003)). Here, there is no evidence Keller knowingly or recklessly made a false representation to Plaintiff.

Plaintiff’s reliance on *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986), to argue that Keller’s alleged fraud precludes the application of the statute of repose is misplaced. (Pl.’s Mem.

³ The same analysis applies to Plaintiff’s claim of constructive fraud.

Opp'n 23–24). The facts of *Pruitt* are materially distinguishable and do not support Plaintiff's claims.

In *Pruitt*, the Supreme Court analyzed whether the doctrine of *caveat emptor* applied as a defense to fraud in a case alleging that a subdivider committed fraud by failing to disclose material facts about unstable soil conditions that were exclusively known to the subdivider and were inaccessible to the subsequent purchaser. *Id.* at 299–300, 342 S.E.2d at 400–01. The plaintiff's house in *Pruitt* began to shift, and upon investigation, she discovered that it had been built over a gully filled with stumps and construction debris—a condition that was concealed and known only to the subdivider. *Id.* The Court held “[w]here material facts are accessible *to the vendor only*, and *he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser*, the vendor is bound to disclose such facts and make them known to the purchaser.” *Id.* at 300, 342 S.E.2d at 401 (quoting *Lawson v. Citizens & Southern National Bank of S.C.*, 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1974)).

Here, in stark contrast to *Pruitt*, Plaintiff was not in a position analogous to the subsequent purchaser in that case. Unlike the plaintiff in *Pruitt*, Plaintiff was not solely reliant on Keller for information about the subject property or the soil stabilization system. Instead, multiple parties—including the Schmidts and D'Appolonia—had knowledge of the material facts concerning the system's installation and performance. This information was not uniquely within Keller's control.

Critically, Plaintiff himself had notice of the relevant facts as early as 2015, when he became aware of the soil stabilization work performed on the property. Plaintiff had access to documentation related to the project, including disclosures provided at the time of purchase. Additional documents in Plaintiff's possession further detailed the work performed, and Plaintiff could have sought information from other knowledgeable parties, including the Schmidts and

D'Appolonia. Unlike the plaintiff in *Pruitt*, who was entirely unaware of the concealed unstable conditions, Plaintiff had access to multiple sources of information and the opportunity to investigate further.

Plaintiff's argument that Keller's alleged representations or omissions mirror those in *Pruitt* is also unavailing. The material facts in this case were not "buried" or concealed in a manner that prevented diligent inquiry. Plaintiff acknowledges that data existed showing movement in excess of the warranty threshold and that no additional remedial action was undertaken. Plaintiff's reliance on Wolosick's alleged representations ignores the wealth of information already available to Plaintiff, as well as his ability to obtain further knowledge from third parties.

In sum, Plaintiff's position is fundamentally different from that of the *Pruitt* plaintiff, who had no reasonable means to uncover the concealed unstable conditions. Here, the facts were not exclusively within Keller's knowledge, and Plaintiff had ample notice and opportunity to investigate the conditions of the property and the performance of the soil stabilization system. For these reasons, *Pruitt* is distinguishable, and Plaintiff's fraud claim fails as a matter of law.

B. Gross Negligence

Plaintiff asserts a claim for gross negligence, but the evidence establishes that Keller exercised at least slight care in performing its work and Plaintiff has adduced no admissible evidence from which a jury could conclude otherwise.

The South Carolina Supreme Court has defined "gross negligence" as "the failure to exercise slight care." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (citing *Clyburn v. Sumter County District Seventeen*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994)). When the evidence supports but one reasonable inference, the question of gross negligence is a matter of law for the Court to decide. *Id.*

In *Clyburn*, the Supreme Court affirmed the Court of Appeals and the trial court's decision granting summary judgment to the defendant school district. The Court held the school district was not grossly negligent as a matter of law in its handling of a dispute between a student and a nonstudent, during which the nonstudent attacked the student on a bus with a knife. The Court found that the school district exercised, at a minimum, "slight care." *Id.* at 54, 451 S.E.2d at 888. The evidence supporting this finding was that, after hearing of an initial altercation on the bus, the school bus administrator intervened by calling the student and the nonstudent's sister into the office to discuss the situation. The administrator warned the sister that the nonstudent would face criminal charges if she boarded the bus again and attempted to contact the parents. Additionally, the bus driver kept a lookout for the nonstudent and stated she would not stop the bus if the nonstudent was spotted. This series of actions demonstrated that the school district exercised, at the very least, the minimal level of care required under the law.

The facts present in this case likewise demonstrate that Keller exercised at least slight care. It is undisputed that a third party, QORE, performed multiple inclinometer surveys for Keller after completion of the job, and the data it generated was provided to a geoenvironmental and instrumentation expert, Erik Mikkelson, who provided an analysis indicating that the soil mass had stabilized. D'Appolonia likewise concurred in this conclusion and opined that no additional measures were necessary. (Pl.'s Mem. Opp'n, Exhibit 6). QORE continued monitoring the slope for movement at Keller's expense through November of 2006. (*Id.*). The Schmidts were fully aware of the facts as they existed and chose not to act. The evidence is thus clear that, as a matter of law, Keller exercised at a minimum slight care in its post-construction acts. Accordingly, summary judgment is appropriate in this case based on the application of the statute of repose.

Plaintiff's experts have opined that Keller was grossly negligent in their response to the

inclinometer readings, but to be admissible, their opinions must rest upon a sufficient factual basis. *See, e.g., Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 422, 315 S.E.2d 116, 118 (1984), quoting *Young v. Tide Craft*, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) (only when expert's opinion is based upon sufficient factual foundation is jury to determine its probative value).

C. Recklessness

Plaintiff's Amended Complaint does not allege that Keller acted recklessly, and as such, Plaintiff cannot now raise recklessness as an exception to the application of the statute of repose.

D. Notice Provided by Building Permit

Plaintiff also asserts the statute of repose is inapplicable "based upon the mandatory and explicit language found in Section 15-3-640 that requires specific bold type notice language to be included on a building for the construction of an improvement to real property." (Pl. Mem. Opp'n 26-27). Plaintiff's argument is without merit.

First, Plaintiff asserts without any citation to legal authority that Keller bears the burden of proving that it complied with all conditions precedent, including the bold-typed notice in the building permit, to invoke the statute of repose defense. (Pl. Mem. Opp'n 29). This ignores the fact that Keller, or any contractor for that matter, does not issue building permits. Rather, the building permit would be issued by the municipal officials. *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 [the appropriate 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." *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).

Second, as Plaintiff pointed out, no building permit has been produced or shown that in fact it was missing the mandatory bold-typed notice on the building permit. (Pl.'s Mem. Opp'n 29). "[I]t is not sufficient for [Plaintiff] to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

Third, the purpose of the statute's requirement regarding the building permit is to protect and give 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 eight years after substantial completion of the improvement." S.C. Code Ann. § 15-3-640. Accordingly, this statute was not intended to protect future homeowners like Plaintiff that purchased the property more than ten years after the building permit was issued.

III. Summary Judgment is Warranted on Plaintiff's Remaining Claims.

Summary judgment is appropriate on Plaintiff's claim for breach of implied warranty for the reasons stated in Keller's Motion for Summary Judgment and Memorandum of Law in support of same. Plaintiff argues Wolosick failed to disclose that subsoil movements exceeded the 3/4-inch warranty when Plaintiff was considering purchasing the home. (Pl.'s Mem. Opp'n 18). However, by Plaintiff's own admission, Wolosick made no representation to Plaintiff regarding past soil movement. Any *information* Wolosick may have provided does not give rise to a cause of action for breach of implied warranty, as there is no evidence of an actionable representation or duty.

With respect to Plaintiff's claim for negligent misrepresentation, summary judgment is

likewise warranted. Keller's Motion for Summary Judgment establishes that Keller had no pecuniary interest in making any statements to Plaintiff. In response, Plaintiff argues Keller's alleged pecuniary benefit in making such statements was to avoid liability to the Schmidts or avoid performing under its warranty (Pl.'s Mem. Opp'n 20). However, Plaintiff's argument misconstrues the facts and the law. There is no question of fact that any claims the Schmidts might have had arose during the five-year warranty period, which had long expired by the time of the alleged representation to Plaintiff in 2015.

Moreover, Keller's conduct demonstrates that it fulfilled its obligations to the Schmidts during the warranty period, including providing them with all information regarding soil movement as it became available. It is undisputed that Keller had no outstanding duty to the Schmidts under the warranty at the time of the alleged representation to Plaintiff. Without a pecuniary interest or a duty to Plaintiff, Plaintiff cannot sustain a claim for negligent misrepresentation.

Lastly, summary judgment is warranted as to Plaintiff's claim of promissory estoppel. Despite the "evidence of positive assurances by Wolosick" advanced by Plaintiff, the fact remains that Keller, through Wolosick, did not make any *promise* to Plaintiff, nor could Keller reasonably foresee that Plaintiff would rely on any statements allegedly made by Keller.

CONCLUSION

Therefore, for the reasons set forth above, the Court, construing the evidence and all inferences therefrom in the light most favorable to the non-moving party, concludes there is no genuine issue of material fact and Defendant Keller is entitled to judgment as a matter of law as to all causes of action alleged in Plaintiff's Amended Complaint. The Court hereby GRANTS the Defendant Keller's motion for summary judgment pursuant to Rule 56, SCRCP, and this action is

hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

(Judge's E-Signature Page to Follow).



Oconee Common Pleas

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

Case Number: 2023CP3700329

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S/R. LAWTON McINTOSH

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