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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2025-000537

Hugh T. Watson, ... Appellant,

v.

Hayward Baker, Inc., Keller North America, Inc., and Ground Technology, Inc. d/b/a D'Appolonia Engineering Division of Ground Technology, Inc.,.....Respondents.

INITIAL BRIEF OF RESPONDENT GROUND TECHNOLOGY, INC. D/B/A D'APPOLONIA ENGINEERING DIVISION OF GROUND TECHNOLOGY, INC.

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4. Did the Trial Court correctly determine as a matter of law that under the facts and circumstances of this case D'Appolonia did not owe Appellant any legal duty?

STATEMENT OF THE CASE

By deed dated February 28, 1988, C.B. (Bart) and Stephanie B. Schmidt purchased a lakefront lot on Lake Keowee at 113 Shipmaster Drive to enjoy their retirement. (Deed, Feb. 28, 1988; Schmidt Dep. 36:22-37:3.) They commissioned Hudson of Oconee Construction to build a house on the lot, and they moved into the house in 1992. (Schmidt Dep. 16:25; 30:17-24.) Within five years, the Schmidts experienced substantial structural issues with the home involving cracks in walls and floors. (Id. at 31:1-15.) They consulted Hudson of Oconee Construction, 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., a recognized regional geotechnical firm, 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.)

Unable to arrest the damage to the structure, Hudson Construction apparently contacted Kevin Day, a foundations engineer. (Wolosick Dep. 20:1-25.) Kevin Day contacted a business acquaintance, John Wolosick of Hayward Baker. (Id.) Hayward Baker was a recognized geotechnical contractor and Wolosick is recognized as an expert in the geotechnical engineering and construction field.

Thereafter, Hayward Baker retained D'Appolonia to provide a design for a remediation system. Hayward Baker and D'Appolonia had worked together on similar projects. (Id. at 26:22-27:13.) D'Appolonia had entered into a general agreement for professional engineering services with Hayward Baker on August 7, 1998. (Shusko Dep. Ex. 73.) That agreement included a provision relating to the standard of care:

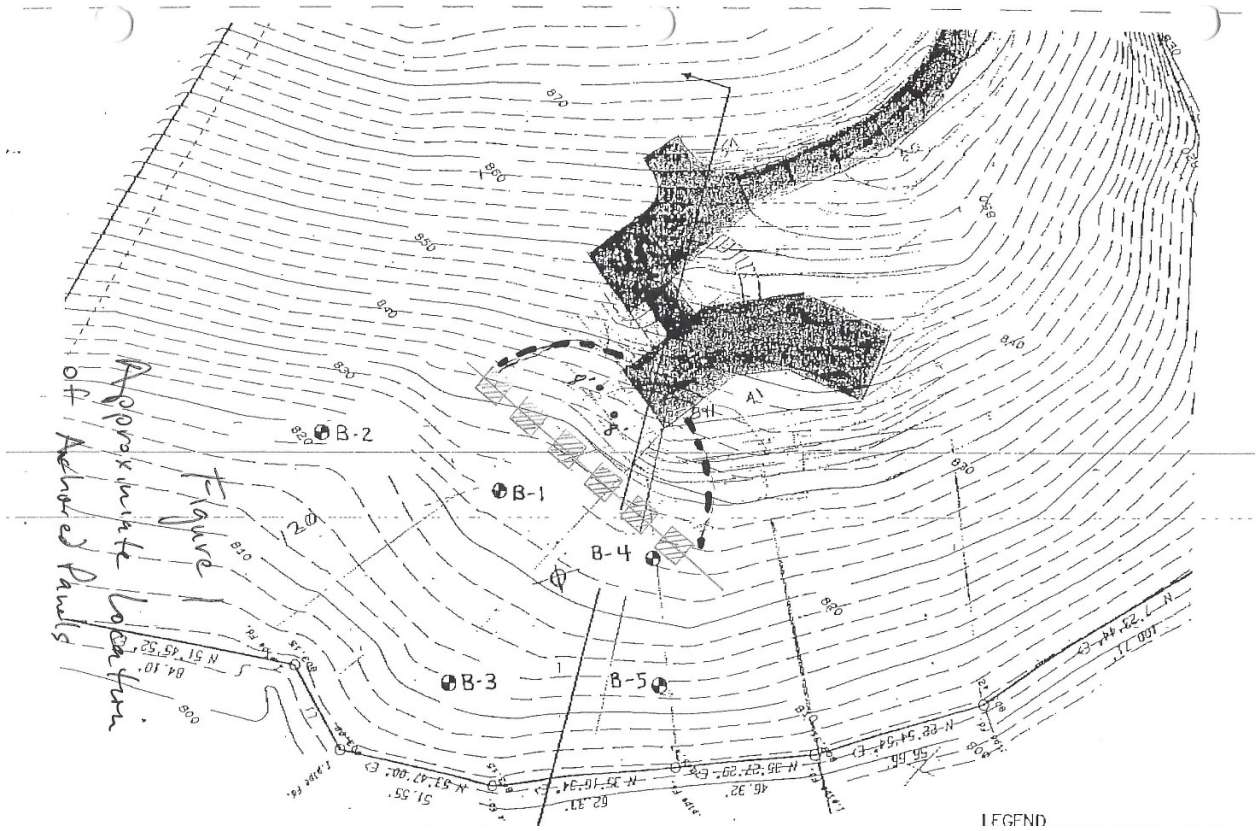
> D'Appolonia will strive to perform services provided under this agreement in a manner consistent with that level of care and skill ordinarily exercised by other members of D'Appolonia's profession currently practicing in the same locality under similar conditions. **No other representation, express 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**.

(Id.) (emphasis added). 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. (Wolosick Dep. 35:4-20; Ex. 38.)

D'Appolonia prepared detailed design calculations for construction of a reaction block system to remediate the movement of the house. (Wolosick Dep. 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 those calculations; "The proposed plan is to provide stability to the Schmidt residence and not the entire slope." (Id. 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 show 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. (Wolosick Dep. Ex. 44.)

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. (Id.) 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. (Id.) Notably, the proposal specifically limited the geographic area that would be stabilized in an accompanying sketch. (Id.) That sketch plainly delineated an area immediately downslope from the house. (Id.)



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.) Toward the end of construction, the Schmidts negotiated a five-year warranty directly with Hayward Baker. (Wolosick Dep. 86:4-9.) However, 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 ever aware of or consulted about the warranty. (Id. at 209:13-16.) There is also no evidence that D'Appolonia calculated projected deformation of the remediated area following installation of the reaction block system or ever developed a potential deformation of the system of 0.75" to anyone. 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 that ¾ 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 ¾ 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 ¾ 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.)

Inclinometer Readings

To monitor deep seated movement of the slope, Hayward Baker installed a single inclinometer. (Wolosick Dep. 89:7-12.) 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.)

In 2004, Hayward Baker retained P. Erik Mikkelson of Geometron to review and analyze the inclinometer data and offer his opinion. (Wolosick Dep. 111:7-25; 211:8-23.) By all accounts, Mr. Mikkelson is recognized as a nationwide expert on geotechnical instrumentation, including inclinometers. (Id. at 111:22-24; 213:17-23.) Mikkleson 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. (Wolosick Dep. Ex. 52.) He recommended additional inclinometer readings in March/April 2005. (Id.)

Hayward Baker provided the Geometron report to D'Appolonia and asked for it to review the data and the report of Geometron and offer its thoughts. (Wolosick Dep. 114:21-23.) Notably, Hayward Baker also specifically advised D'Appolonia that the Schmidt residence had not experienced any distress since installation of the system. Mr. Wolosick admitted:

> 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.

(Wolosick Dep. 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 years since installation of the system and concluded that the "system is performing well and no additional measures are required." (Wolosick Dep. Ex. 51.) There is no evidence that D'Appolonia ever had any further involvement with the Schmidt property after this 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.

Importantly, the inclinometer data, the Mikkleson 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 ¾ inch warranty, which was expressly pointed out by Hayward Baker in the letter, the Schmidts did not exercise their rights under the warranty and thus waived enforcement of same. (Schmidt Dep.44:16-18.) According to Stephanie Schmidt, the issues with the house ceased in 2002 and they were satisfied with the remediation:

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.)

In keeping with Mr. Mikkelson's recommendation, Hayward Baker retained QORE to conduct another reading of the inclinometer in 2005. QORE issued a report dated June 28, 2005 to John Wolosick. (Wolosick Dep. Ex. 54.) QORE concluded "As such, the results of our inclinometer survey indicate that there appears to be movement on the order of about 1¼ inches in the slope at the location of the inclinometer casing since our initial base line survey and about ½ inch since the July 9, 2004 survey." (Id.) Mr. Wolosick testified that this report was likewise sent to the Schmidts. (Wolosick Dep. 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. (Wolosick Dep. Ex. 57.) QORE reported that in the last eighteen months, the slope had moved very little, .1 to .2 inches. (Id.) There is no evidence that anyone sent this report to D'Appolonia.

In fact, the Schmidts remained satisfied. According to Mrs. Schmidt, they experienced no further issues with movement of the house while they owned the house. She testified:

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

A: That was right.

(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. (Id. at 44:3-18.)

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

Appellant Hugh Watson had been looking for a house on Lake Keowee because he had friends who lived in the area. (Watson Dep. 73:8-11.) 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.) There is no evidence that Appellant ever had any knowledge of or communication with D'Appolonia. (Watson Dep. 82:22-83:3; 84:15-17; 121:5-8.) Appellant acquired the house by Deed dated May 26, 2015. (Deed, May 26, 2015.)

Appellant 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. In his Complaint, Appellant asserted two legal claims against D'Appolonia: (1) professional negligence; and (2) gross professional negligence. (Am. Compl. June 5, 2023.) After extensive discovery, including the depositions of two engineers identified by Appellant as experts, on October 22, 2024, D'Appolonia filed a motion for summary judgment. (D'Appolonia Mot. Summ. J., Oct. 22, 2024.)

Apparently recognizing the weakness of his case, on January 27, 2025, Appellant filed a "First Addendum to the Affidavit of L.G. Lewis" in which Mr. Lewis improperly sought to contradict his prior sworn deposition testimony. (First Addendum of L.G. Lewis, Jr., Jan. 27, 2025) D'Appolonia filed a motion to strike the inconsistent Addendum Affidavit by motion filed the following day, on January 28, 2025. (Mot. Strike, Jan. 28, 2025.) After a lengthy hearing on

January 29, 2025, the trial court granted summary judgment in favor of D'Appolonia by order dated February 14, 2025. (Order, Feb. 14, 2025.) On March 13, 2025, the trial court denied Appellant's motion to alter or amend. (Order, Mar. 13, 2025.)

STANDARD OF REVIEW

This Court must review the Trial Court's grant of summary judgment under the same standard to be applied by the trial court. Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). Rule 56(c) of the South Carolina Rules of Civil Procedure requires that the moving party be granted summary judgment if the evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023). Once the moving party meets the initial burden by showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Instead, the non-moving party must present specific facts showing that there is a genuine issue for trial. Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003). It "is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Kitchen Planners at 463, 892 S.E.2d at 301. (citing Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party bears the burden of proof. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007).

ARGUMENT

"They are dead, they shall not live; they are deceased, they shall not rise." - Isaiah 26:14.

I. The Trial Court Correctly Determined that the Statute of Repose Bars Appellant's Claims Against D'Appolonia

Section 15-3-640 of the South Carolina Code provides "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. Id.

As the South Carolina Supreme Court has recognized: "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). As the Court 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 Appellant has suffered a resulting injury. Statutes of repose by their nature impose on some Appellants the hardship of having a claim extinguished before it is discovered or perhaps even before it even exits.

Capco of Summerville, Inc. v. J.H. Gayle Constr. 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).

It is uncontested that the slope remediation system was substantially completed in **April 2002**, when Hayward Baker finished construction. Thus, Appellant had until **April 2015** to file an action alleging any defect or deficiency in the design or construction of that system. This Action

was filed on **April 27, 2023**, twenty-one years after the work was completed. Accordingly, the trial court properly found that Appellant's claims are barred by the statute of repose.

Appellant argues that the fraud exception in Section 15-3-670 applies. That section provided 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 (2012). Thus, Appellant recognizes that his claim for simple negligence is barred by the statute of repose and, accordingly, he asserts a claim for gross negligence against D'Appolonia in an effort to resurrect his claim. As the trial court properly recognized, the evidence, including admissions by Appellant's own engineers, establishes only one reasonable inference—that D'Appolonia exercised at least slight care in performing its engineering services.

Gross negligence is defined as 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." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (citing Clyburn v. Sumter Cnty. Dist. Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994); Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988)). South Carolina's courts define gross negligence as the failure to exercise even slight care. Id. at 310, 534 S.E.2d at 277. "Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances." Id. (citing Hollins v. Richland Cnty. Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993)). As this Court noted in Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 245

n. 3, 606 S.E.2d 134, 138, n.3 (Ct. App. 2004), there can be no finding of gross negligence "when there is evidence a defendant exercised slight care." The definition of gross negligence is comprehensive and requires a "determination whether a defendant exercised at least slight care." Id.

On many occasions both this Court and the Supreme Court of South Carolina have granted summary judgment when considering a gross negligence claim. See Richardson v. Hambright, 296 S.C. 504, 507, 374 S.E.2d 296, 298 (1988) ("the facts show, at the very least, that the District exercised 'slight care'"); Clyburn v. Sumter Cnty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (affirming the grant of summary judgment finding that a school's acts to intervene following an altercation was sufficient to establish that the school district exercised slight care at the very least); Worsley Co., Inc. v. Town of Mount Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000) (affirming the grant of summary judgment whether there was evidence that the Town was grossly negligent); Moore v. Berkeley County School Dist., 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997) (This Court affirmed an order granting summary judgment in the face of allegations that the School District was grossly negligent.); Brooks v. Northwood Little League, Inc., 327 S.C. 400, 408, 489 S.E.2d 647, 651 (Ct. App. 1997) ("Gross negligence ordinarily presents a hybrid question of law and fact, but when evidence supports but one reasonable inference, the question becomes one of law for the court….Viewing the evidence in the light most favorable to Brooks, we find the record is devoid of any evidence of an intentional, conscious failure on the part of Respondents. The evidence presents only one reasonable inference: The Respondents were not grossly negligent. The trial judge, therefore, properly held the Respondents were not grossly negligent as a matter of law."); Marietta Garage, Inc. v. South Carolina Dep't of Public Safety, 337 S.C. 133, 140, 522 S.E.2d 605, 609 (Ct. App. 1999) ("Kimbrell's physical investigation of Marietta's former storage

location and delivery of the removal notice to Marietta indicate at least a slight degree of care thus barring a claim for gross negligence. We affirm the order granting the Department summary judgment on Marietta's gross negligence claim."); Pack at 249, 608 S.E.2d at 140 (affirming a grant of summary judgment and finding that employees exercised at least slight care in the performance of their jobs).

The South Carolina Supreme Court's decision in Etheredge is informative. That case involved a claim relating to the death of a child killed in a shooting at school. Etheredge, 341 S.C. at 309, 534 S.E.2d at 276. The Supreme Court addressed whether the School District was entitled to summary judgment pursuant to Section 15-78-60(25) of the South Carolina Tort Claims Act, which provides immunity to governmental entities unless they are grossly negligent. Id. at 310, 534 S.E.2d at 277; S.C. Code Ann. § 15-78-60(25) (2005). In reversing the decision of this Court and upholding the grant of summary judgment by the trial court, the South Carolina Supreme Court identified steps taken by the school to avoid a confrontation and thus found that the school "exercised at the very least 'slight care'" Etheredge, 341 S.C. at 312, 534 S.E.2d at 277. The Court further specifically noted that "the fact that the School District might have done more does not negate the fact that it exercised "slight care'". Id. at 312, 534 S.E.2d at 278.

It is uncontested that D'Appolonia performed detailed design calculations to analyze the existing conditions of the slope at the Schmidt home. (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. (Wolosick Dep. Ex. 44.) Having done so, it is uncontested that D'Appolonia used calculations to design the components of the anchor block system sufficient to resist those driving forces and include a factor of safety. (Id.)

Appellant retained a geotechnical engineer, James G. Kahle, to render testimony about D'Appolonia's geotechnical engineering services. Although he admittedly has never designed such a system, Mr. Kahle admitted 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.) While Appellant takes issue with some inputs used by D'Appolonia in performing its calculations, Mr. Kahle admitted that D'Appolonia was not grossly negligent in performing its design. Although his definition of "gross negligence" is not consistent with South Carolina law and is stricter than the "slight care" standard[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.***
>
> (Kahle Dep. 173:21-174:1-3.) (emphasis added.)

Mr. Kahle is correct. The undisputed evidence is that in performing its design services, D'Appolonia used at least slight care.

Given Mr. Kahle's admission that D'Appolonia exercised slight care in performing its calculations, Appellant tries to rely upon another engineer it hired, L.G. "Skip" Lewis, Jr., who admittedly does not practice geotechnical engineering nor has ever been involved in preparing a similar design. (Lewis Dep. 9:8-10:5, 10:18-25, 143:25, 144:1-3.) In his deposition, Mr. Lewis also admitted that D'Appolonia was not grossly negligent in performing its design services in 2002:

> Q. Is that the same basis for your opinion that D'Appolonia was also grossly negligent in this case?

[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." (Kahle Dep. 172:17-20.)

A. Yes. Yes. **It wasn't so much their design**, as it was their lack of responsiveness once the problems were identified.

(Lewis Dep. 130: 8-13.) It is uncontested that D'Appolonia performed sophisticated geotechnical engineering calculations in designing the anchor block system. There is no evidence that in so doing, it failed to exercise even the slightest care. Plaintiff's claims against D'Appolonia are barred by the statute of repose and the Trial Court correctly granted summary judgment in favor of D'Appolonia.

The Trial Court Properly Found that D'Appolonia Was Not Grossly Negligent by Writing its November 3, 2004 Letter

In his effort to salvage his very stale claim against D'Appolonia, Appellant contends that D'Appolonia failed to exercise even the slightest care in writing its November 3, 2004 letter to Hayward Baker. Problematically, Mr. Kahle testified that he assumed that D'Appolonia was aware of the Hayward Baker ¾ inch warranty and that D'Appolonia's system was designed to limit deformations of the remediated portion of slope to ¾ 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, there is no evidence that D'Appolonia was involved in or knew anything about the warranty issued by Hayward Baker. (Kahle Dep. 180:8-14.) In addition, there is no evidence that D'Appolonia's system was designed to limit deformations of the

remediated slope to .75" or less. Thus, there is no evidence that the readings from the inclinometers would have identified movement that was unexpected by D'Appolonia.

Beyond this, the evidence establishes that a recognized expert in the field, Erik Mikkelson of Geometron, analyzed the inclinometer data and concluded that the ground movement had stabilized. In addition, Hayward Baker told D'Appolonia that the structural issues of the Schmidt house had abated and the Schmidts did not have further problems with their house. (Wolosick Dep. 214:22-25; Ex. 51.) There is but one inference to be drawn from the evidence in this case: D'Appolonia exercised at least slight care in offering an opinion to its client Hayward Baker that the system was performing. As its letter to Hayward Baker demonstrates, D'Appolonia reviewed the inclinometer data and the expert opinion of a respected inclinometer expert, Mr. Mikkleson, considered the fact that the house was no longer experiencing distress, and performed additional calculations to analyze the average movement of the slope. (Wolosick Dep. Ex. 51.) Accordingly, the evidence shows that D'Appolonia exercised at least slight care and the Trial Court correctly granted summary judgment in its favor.

The Trial Court Correctly Rejected Appellant's Building Permit Argument

Although the majority of Appellant's brief is directed to Defendant Keller, Appellant briefly argues that that there is no evidence about a building permit issued by the local building official and that the statute of repose does not apply as a result. It is unclear if Appellant contends that this argument applies to D'Appolonia. To the extent that he does, the trial court correctly ruled that his argument is misplaced. Appellant relies upon Section 15-3-640 of the South Carolina Code which provides:

> **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 (2005). Appellant does not argue, nor can he, that D'Appolonia had any obligation to obtain a building permit. While there are no South Carolina appellate cases that address this creative argument, it has been addressed and rejected by the United States District Court for the District of South Carolina. See Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc., No. 9:17-1575-RMG, 2017 WL 6622508, at *3 (D.S.C. Dec. 27, 2017), order amended on other grounds on reconsideration, No. 9:17-1575-RMG, 2018 WL 679454 (D.S.C. Feb. 2, 2018), on reconsideration, No. 9:17-1575-RMG, 2018 WL 1305427 (D.S.C. Mar. 12, 2018). In that case, the Court granted a motion for partial summary judgment stating:

> 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.
>
> Id.

This Court should likewise reject Appellant's argument. Appellant has provided no evidence that as the engineer for the Project, D'Appolonia was responsible to obtain or issue the building permit for the 2002 project. 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. This Court should impose no such responsibility upon a design consultant like D'Appolonia and affirm the decision of the trial court accordingly.

The Trial Court Correctly Concluded that D'Appolonia Does Not Owe Any Legal Duty to Appellant

In his initial brief, Appellant briefly argues that D'Appolonia owed a legal duty to him, although he does not expound on the scope of this alleged duty. It appears that Appellant argues only that when D'Appolonia performed its original design in 2002, it owed a legal duty to him because it is foreseeable that a house can be sold at some time in the future.

It is abundantly clear that the question of whether D'Appolonia owed a legal duty to Appellant is a question of law for the Court and is appropriately addressed at summary judgment. "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 Appellant 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). Appellant does not address any of these categories in his brief. To the contrary, Appellant argues simply that

D'Appolonia owed him a legal duty because it is foreseeable that the Schmidts might sell their house at some unknown point in the future.

Appellant's foreseeability argument was rejected by the South Carolina Supreme Court in S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986). There, 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. Id. 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 South Carolina 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 Appellants 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 Appellants. 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 Appellants argued that Booz-Allen owed each of 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. (emphasis added). 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. The court found no duty owed to the other two Appellants because the relationship was "far too attenuated to rise to the level of a duty flowing between them." Id. at 377, 346 S.E.2d at 326. There is no evidence in this case that Mr. Watson knew that D'Appolonia existed when he purchased the house, much less saw and relied upon its design. (Watson Dep. 82:22-83:3; 84:15-17; 121:5-8.)

With limited discussion, Appellant primarily relies upon Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995). That decision does not provide purchase for his argument. In Tommy L. Griffin, the general contractor of a

water trunk project filed a complaint against another project participant, Jordan, Jones Goulding, the project engineer. Id. at 51, 463 S.E.2d at 86. The engineer supervised construction by Griffin and had the right not only to inspect the construction work, but also to halt construction. Id. at 56, 463 S.E.2d at 89. The South Carolina Supreme Court held that whether a legal duty exists "will depend on the facts and circumstances of each case." Id. at 56, 463 S.E.2d at 89. Under those facts and circumstances—a direct working relationship on a project—the South Carolina Supreme Court found that the Engineer owed a duty to the contractor "not to negligently design or negligently supervise the project." Id. There is no evidence of any relationship between D'Appolonia and Appellant. Prior to this lawsuit, neither knew that the other existed.

Appellant also briefly cites the South Carolina Supreme Court's decision in Kennedy v. Columbia Lumber Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989). That case likewise does not support Appellant's argument. That case involved a claim by a subsequent purchaser of a home against material supplier who had acquired title to the house through a mechanic's lien proceeding. Id. at 338, 384 S.E.2d at 732-33. The Court addressed application of the economic loss rule, finding that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." Id. at 345, 384 S.E.2d at 736. The Court found that a new home builder can be liable in tort to a home buyer for economic losses where: "(1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm." Id. at 347, 384 S.E.2d at 737. Although Appellant disingenuously suggests that Kennedy addressed "construction professionals", the Kennedy court did not address whether a design professional who is a consultant to a design-builder owes a duty to a person who buys a home

thirteen years after it has performed professional services for a remediation project for an existing home.

While a duty may arise from an alleged tortfeasor's contractual relationship with another party, "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) (emphasis added) (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); Shaw v. Psychemedics 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 this case, D'Appolonia entered into an agreement with Hayward Baker in 1998. D'Appolonia prepared engineering design of the reaction block system for Hayward Baker pursuant to that agreement. 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 Appellant relied upon D'Appolonia. In fact, there is no testimony that any of D'Appolonia's work product was provided to him in due diligence or that he ever spoke to D'Appolonia. Thus, there is no duty owed by D'Appolonia to Appellant. Here, the link, or lack thereof, between D'Appolonia and Appellant is too attenuated to impose a duty of care owed by D'Appolonia to Appellant. There is no South Carolina law which supports imposition of a legal duty under the

facts of this case. The Trial Court correctly concluded that D'Appolonia did not owe a legal duty to Appellant and its decision should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the order granting summary judgment in favor of Ground Technology, Inc.

Respectfully submitted,

September 24, 2025

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