

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONNE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Trial Court Judge

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SC Court of Appeals

Court of Common Pleas Case No. 2023-CP-37-00329
Appellate Court Case No. 2025-000537

Hugh T. Watson

Appellant,

v.

Respondents.

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

APPELLANT REPLY BRIEF TO RESPONDENT D'APPOLONIA

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TABLE OF CONTENTS

Table of Authorities i

Introduction1

I. Statute of Repose.....1

 A. Gross Negligence in Design of the System.....1

 B. Gross Negligence in Post-Construction Conduct..... 5

 C. Building Permit.....8

 D. Legal Duty.....11

Conclusion..... 12

TABLE OF AUTHORITIES

CASES

Bass v. S.C. Dep't of Soc. Servs., 414 S.C. 558, 780 S.E.2d 252 (2015).....3

Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E.2d 647 (Ct. App. 1997).....5

Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).....4

Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002).....1

Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects, AIA, Inc.,
No. 9:17 1575-RMG, 2017 WL 6622508 (D.S.C. Dec. 27, 2017).....10

Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719,
723 (Ct. App. 2005).....10,11

Protopapas v. Wall, Templeton & Haldrup, P.A.,
442 S.C. 217, 898 S.E.2d 150 (Ct. App. 2023).....8-10

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49,
54, 463 S.E.2d 85, 88 (1995).....12

S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373,
346 S.E.2d 324 (1986).....11,12

Wedgewood Condominium Ass'n v. Centex Homes, LLC, No. 6124
(Ct. App. Sep. 24, 2025).....3,4

Statutes

S.C. Code Ann. § 15-3-640.....1,8,9

S.C. Code Ann § 15-3-670.....1

In its brief, Respondent D'Appolonia asks this Court to uphold the lower court's grant of summary judgment on effectively three grounds: (1) D'Appolonia argues that the only reasonable inference from the evidence is that it was not grossly negligent; (2) D'Appolonia argues it owed no legal duty to Appellant, as a matter of law; and (3) D'Appolonia argues that S.C. Code Ann. § 15-3-640 has no bearing on the company's work. But beneath the surface, these arguments rest on an inverted view of the evidence and expert opinions and inapplicable case law.

I. Statute of Repose

Appellant alleged that D'Appolonia was grossly negligent in two ways with regard to the Residence: in its design of the stabilization system and in its failure to respond to the data that demonstrated the system failure. These will be taken in turn, as set forth in Respondent's Brief:

A. Gross Negligence in Design of the System

To begin with, Appellant acknowledges that the thirteen-year statute of repose set forth in S.C. Code Ann. § 15-3-640 would have run in April of 2015 – a month before Hugh Watson acquired the Residence. However, as all parties agree, § 15-3-670 provides an exception to this rule for gross negligence. The question for this Court, therefore, is whether – construing all evidence and inferences in the light most favorable to Appellant, the evidence is conflicting or allows for more than one reasonable inference. If so, then the question is for the jury. See Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002).

As to the design of the system, D'Appolonia argues in brief that the only reasonable inference from the evidence is that the company exercised “slight care” such that summary judgment was appropriate. In support of this assertion, D'Appolonia notes the following:

- (1) D'Appolonia performed detailed design calculations to analyze the existing conditions of the slope at the Residence;

(2) D’Appolonia used available computer software to model the existing conditions and also prepared hand calculations relating to the existing conditions to determine the driving forces acting on the slope; and

(3) D’Appolonia used calculations to design the components of the anchor block system.¹

Respondent’s Brief, p.13.

These arguments by Respondent demonstrate that Respondent believes that any act by Respondent meets the “slight care” standard. An apt analogy might be a situation in which a structural engineer designing a residence performed calculations to analyze the conditions, used state-of-the-art software to model the structure, and then used his calculations to design the building. All of these steps are laudable, but if the calculations contain basic errors, the fact that the math was done with impressive tools does not mean that – as a matter of law – the engineer was not grossly negligent.

This is, in fact, the situation here. Appellant’s experts opined as follows with regard to D’Appolonia’s design:

Jim Kahle, P.E., L. M. ASCE

- D’Appolonia mis-measured the distance from the house to the lake by about 20 feet, which “means that the slope is somewhat steeper than they’re showing.” Id. at 28: 1-8.
- The water table was actually higher than that used by D’Appolonia in its analysis. Id. at 28: 24-25; 29: 1-2.
- D’Appolonia did not properly estimate the slope level below lake level, even though this information was available from publicly available sources. Id. at 30: 17-25; 31: 1-4.
- D’Appolonia used incorrect figures in calculating the load on the ground floor, failing to take into account loads from upper floors. Id. at 31: 6-20.

¹ Respondent further contends that it is “uncontested” that D’Appolonia designed a system “sufficient to resist those driving forces and include a factor of safety.” See Respondent’s Brief, p.13. However, Respondent’s citation to this is the deposition testimony of John Wolosick, who certainly does not speak for Appellant. Appellant’s experts make clear that they do not believe that the system designed was sufficient to withstand the underground forces and instead included simple math errors that undermined the system.

- D’Appolonia improperly incorporated cohesion – a soil property – in its calculations, despite technical literature saying this should not be used where slopes are undergoing creep, as here. Id. at 31: 21-25; 32: 1-8.

Skip Lewis, P.E. F. NSPE

- D’Appolonia committed “a serious design error . . . in its determination of anchor tendon loads necessary to counteract the slip-plane forces causing movement of the soil mass upslope of the anchor blocks.” The “most egregious” error was “a simple mathematical error” with the result that, rather than upsizing the system tendons as intended, D’Appolonia instead downsized them. See First Addendum to Affidavit of L.G. Lewis, 2-3.

In considering the question before the Court, it is necessary to weigh the points made by Respondent (that D’Appolonia performed calculations, used computer software, and used calculations to design the system) against the points made by Appellant (that D’Appolonia made numerous errors in its calculations including using incorrect figures and committing an egregious, simple math error). Our case law is clear that, when evidence is conflicting or allows for more than one reasonable inference, the question is for a jury and summary judgment is not appropriate. Bass v. S.C. Dep’t of Soc. Servs., 414 S.C. 558, 572, 780 S.E.2d 252, 259 (2015). Moreover, the Supreme Court has held that even if the moving party presents some evidence that it acted with slight care, if there is also evidence that the party was grossly negligent, summary judgment is not warranted. Id. at 574, 780 S.E.2d 252.

The Court of Appeals recently affirmed this position in the recent case of Wedgewood Condominium Ass’n v. Centex Homes, LLC, No. 6124 (Ct. App. Sep. 24, 2025). There, homeowners sought to assert construction defects beyond the statute of repose based on allegations of gross negligence. In response, the builder argued that the evidence allowed only one inference – that it had exercised at least slight care. In support of this argument, the builder noted:

- that it conducted monthly technical training for field managers;

- that it regularly held “toolbox talks” and “tailgate talks” to discuss issues in the industry and issues it was observing in the field;
- that it conducted inspections on homes prior to closing with the buyers;
- that it performed internal inspections, used supervisors, and performed subcontractor oversight;
- that it engaged a third-party consultant for an extra layer of inspection at the complex; and
- that it possessed documentation showing inspections and that deviations were corrected when identified.

See id. at 6. Despite this, the trial court took note of competing evidence from the homeowners and determined that the issue of gross negligence was for the jury. The Court of Appeals affirmed this decision.

Respondent directs this Court to Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 534 S.E.2d 275 (2000), but this case presents a dramatically different set of facts (and a dramatically different presentation of evidence) than the case at hand. In Etheredge, a student at a high school was shot in the hallway by another student. Id. at 309, 310 S.E.2d at 277. The estate sued the school district for wrongful death and, when the district moved for summary judgment, the estate submitted a single affidavit of a campus monitor employed by the school. See id. In finding that the only reasonable inference was that the district had exercised at least “slight care”, our state supreme court noted that “the fact that the School District might have done more” was not sufficient to establish a jury question as to gross negligence. See id. at 312. This was doubly true in Etheredge as the Court found that there was no causal relationship between the alleged

deficiencies and the tragic incident. See id. In short, this case is not remotely analogous to the case at hand.²

The question with regard to the design work performed by D'Appolonia is – considering the evidence and all inferences in the lights most favorable to Appellant, can it be said that the only reasonable inference is that D'Appolonia exercised the care the situation reasonably called for? If not, then the trial court's ruling must be reversed.³

B. Gross Negligence in Post-Construction Conduct

In addition to noting the numerous defects in D'Appolonia's design work, Jim Kahle and Skip Lewis also opined as to the post-construction activities of D'Appolonia. Notably, in its brief, Respondent attempts to confine this to the narrow issue of whether D'Appolonia was grossly negligent "in writing its November 3, 2004 letter to Hayward Baker." See Respondent's Brief, p.15. However, the testimony of Mr. Kahle and Mr. Lewis are clearly not limited to this document.

Instead, in their depositions and affidavits, Mr. Kahle and Mr. Lewis stated repeatedly and adamantly that D'Appolonia was grossly negligent in ignoring data and information that showed that their fix was not working. In his deposition, Mr. Kahle testified as follows:

I think gross negligence is when you see that you're getting data that says, the system is not performing, that then you should go back and investigate it and maybe you'll answer those questions about the distance from the house to the lake, elevated water table, and recognize that you've got a problem. And they're not

² Other cases cited by Respondent present evidentiary presentations nothing like that in the present case. For example, Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E.2d 647 (Ct. App. 1997), involved unsupported allegations of gross negligence by a parent who stepped in a small, trench-shaped depression covered by grass at a Little League ballpark. See id. at 409, FN1.

³ Respondent attempts to cherry-pick portions of testimony from Appellant's experts to assert that the experts do not find gross negligence in the conduct of D'Appolonia. For example, Respondent asserts that Jim Kahle testified that he didn't "think" D'Appolonia's design errors constituted gross negligence. See Respondent's Brief, p.14. However, Respondent then admitted in a footnote that Mr. Kahle defined gross negligence as "ignoring data that has the potential for damage or for loss of life." See id., citing Deposition of Kahle, p.172: 1-2.

recognizing that they have a problem. They're just saying, no, don't worry about it.

Kahle, 176, ll. 4-13. Mr. Lewis testified:

But I will sit here and I will tell you that my honest assessment is that the D'Appolonia and the HB failures to aggressively pursue the reasons why this slug of soil, particularly the lower levels, continued to move, in my judgment – is [a] willful and wanton decision not to effect any type of repair of the benefit of the Schmidt property or the Watson property.

...

with the extent of soil movement subsequent to the installation . . . there was sufficient data provided to both Hayward Baker and D'Appolonia to suggest that, at a minimum, the cause of the continuing movement, some type of analysis was warranted and some type of recommendation to terminate the continued movement was warranted.

Deposition of Lewis, 130-131: 19-25; 1-14.

Respondent attempts to dodge this testimony in two ways: First, D'Appolonia suggests that the testimony of these experts was expressly conditioned on the assumption that D'Appolonia was aware of the Hayward Baker warranty. But this is expressly and repeatedly addressed:

My concern and my – my assessment of D'Appolonia's negligence deals with the failure of D'Appolonia, once being placed on notice of the – the soil movements on this residence, that it did not – that we don't have any indication that D'Appolonia went back and in any way analyzed its fix solution to determine why or to provide guidance in the assessment of the wedge of soil that, based on the inclinometer readings, show continued slope movement below the bottom elevation of the anchor blocks.

And my – my complaint with D'Appolonia's action and its professional services is being placed on notice of the extent of soil movements, *whether it knew one way or the other what the warranty may have been*, they were placed on notice, and I think the – of the extent of movement. And there was no indication of any subsequent analysis to either confirm that the original design by D'Appolonia was sufficient or to offer suggestions on what could or should be done to – to terminate the movement of the soil wedge that was – is reflected in the inclinometer readings on this site.

Deposition of Lewis 129-130: 10-25; 1-7 (emphasis added). Mr. Lewis testified further:

I think the . . . gross negligence on the part of D'Appolonia was its failure to review, analyze, and report on its original design basis, given the extent to which the soil movement had occurred.

I don't know whether D'Appolonia received subsequent inclinometer readings from Hayward Baker or not. But in any case, whether they did or whether they did not, once being placed on notice of significant soil movement below its – its fix, which it intentionally designed to stabilize the house, their . . . failure to review the design and . . . get back to Hayward Baker on whether or not the . . . design was adequate or was short in any particular area, in my judgment, was an act of gross negligence on the part of D'Appolonia.

See id. at 133: 8-23.

Second, Respondent attempts to avoid the testimony of Mr. Kahle and Mr. Lewis by seeking to hide behind the opinion of another expert – Erik Mikkelson of Geometron, noting that Mr. Mikkelson provided a letter in 2004 stating that he believed the system had stabilized. Respondent seems to suggest that D'Appolonia could simply rely on this letter and ignore the readings indicating the failure of its system. Mr. Kahle was asked about this in his deposition as testified as follows:

Q. Do you disagree with Geometron's conclusion that the displacement had stabilized?

A. I disagree with it.

Q. Do you think that D'Appolonia was entitled to rely on Geometron's conclusion that the displacement had stabilized, including that no work was necessary at that time?

A. You need some other readings that show that it has stabilized. Because the readings itself do not show that it's stabilized. They're still increasing. What you need is a flat line. You need a reading that's one inch and then another reading two months later that's one inch. Then you can stay it's stabilized, it's stopped.

But there never was a set of readings some distance apart in time where the readings were the same. So, I don't see how they can say it stabilized.

Dep. of Kahle 179: 7-24.

In asking this Court to find that the evidence yields only the inference that D'Appolonia was not grossly negligent, Respondent is again asking this Court to invert the standard for summary judgment. In short, Respondent is asking the Court to disregard the testimony of Appellant's experts and to adopt the findings of its own. However, case law is clear that evidence must be viewed in the light most favorable to Appellant as well as all inferences to be taken therefrom. And if there is conflicting evidence or more than one reasonable inference, then it is error to grant summary judgment.

C. Building Permit

Respondent relies on certain language within S.C. Code Ann. § 15-3-640 to assert the statute of repose as an affirmative defense. Yet, Respondent asks this Court to ignore other mandatory language within that same statute, which provides that “[a] building permit for the construction of an improvement to real property must 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 eight years after substantial completion of the improvement.” As the requirement is part of the statute setting forth the statute of repose, is mandatory, and it is uncontested that the notice was not provided, it is Respondent's burden to show that no building permit was required.

The Court of Appeals' decision in Protopapas v. Wall, Templeton & Haldrup, P.A., reinforces that strict compliance with statutory notice provisions is a condition precedent to invoking repose protections. 442 S.C. 217, 898 S.E.2d 150 (Ct. App. 2023). In Protopapas, the Court declined to apply the corporate dissolution statute's repose provisions because there was no evidence that the required publication notice had been made – even though prior court orders referenced compliance. The Court held that without affirmative proof of proper notice, repose

protections could not apply. This ruling underscores a core principle: statutory notice requirements cannot be assumed, implied, or bypassed – they must be followed exactly. The Court rejected vague inferences of compliance, insisting on direct evidence that all statutory steps had been satisfied before repose could be invoked.

The same logic applies to S.C. Code Ann. § 15-3-640. Like the publication notice in Protopapas, the statute’s bold-type notice to the property owner is mandatory and must be strictly complied with, not treated as a bureaucratic formality. D’Appolonia asks this Court to enforce the statute of repose while simultaneously ignoring the statute’s other express requirement: that the building permit “must contain in bold type notice to the owner” of their right to contract for an extended guarantee. This provision appears within the very statute being invoked and carries equal legal weight. Where, as here, it is uncontested that such notice was not provided, the burden shifts to D’Appolonia to demonstrate that no building permit was required. Allowing D’Appolonia to rely selectively on the statute while disregarding its mandatory prerequisites would directly contravene the reasoning in Protopapas and undermine the statute’s consumer-protection purpose.

D’Appolonia’s argument wrongly assumes that a party may invoke the statute of repose under S.C. Code Ann. § 15-3-640 without satisfying all of the statute’s express conditions. The statute explicitly states that the building permit itself must contain in bold type notice to the owner of their right to contract for extended liability protection. This language is mandatory and included within the very statute granting repose. To benefit from the statute’s protections, a party must accept its obligations, not just its advantages. Whether D’Appolonia personally obtained the permit is irrelevant; what matters is that D’Appolonia seeks to rely on § 15-3-640 to bar claims while failing to show that its requirements were met. Under basic principles of statutory construction and

cases like Protopapas, a party asserting a statute of repose bears the burden of proving full compliance with all statutory conditions precedent, including required notice.

Moreover, D'Appolonia's effort to shift all responsibility to government actors misreads the statute. Section 15-3-640 does not suggest that contractors, engineers, or builders are immunized when a permitting office omits required language. To the contrary, those directly involved in the design and construction process—especially those seeking the benefit of the statute—are in the best position to ensure that the required notice reaches the owner. If design professionals or contractors want the protection of repose, they must ensure the owner is properly informed under the statute. To hold otherwise would allow private actors to claim immunity based on government omission, effectively turning a consumer-protection statute into a liability shield without accountability. That result would frustrate the statute's plain language and protective purpose.

Respondent's citation to Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects, AIA, Inc., No. 9:17-1575-RMG, 2017 WL 6622508 (D.S.C. Dec. 27, 2017) is not binding on this Court and is contrary to the statute. The district court effectively read language into the statute which does not exist, discounting the mandatory "must" language and instead creating an exception which provides that this requirement cannot be enforced against a contractor. Yet, the statute itself provides no such caveat. Moreover, the clear intent of providing notice to homeowners would be promoted by encouraging contractors to ensure that the required notice is present on the permit. By the plain language of the statute, the key is whether the language was present. Here it was not, and therefore the statute of repose cannot be enforced. See Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005) ("When the terms of a statute are clear, the court must apply those terms according to their literal

meaning.”); id. at 231, 612 S.E.2d at 724 (“The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction.”).

D. Legal Duty

Finally, Respondent argues that D’Appolonia owed no legal duty to Appellant, arguing that foreseeability of injury itself does not give rise to a duty. Respondent seems to argue that S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) – militates against assignment of a duty in the present case.

Appellant agrees with the proposition that foreseeability alone does not give rise to a duty. This was not Appellant’s argument. And in fact, the Booz-Allen case presents a perfect contrast to the case at hand. There, the consulting firm hired by the Georgia Ports Authority to prepare a report contrasting the Savannah and Charleston ports was sued by the S.C. Ports Authority and two unions, the Pilots Association and the International Longshoremen’s Association. See id. at 375, 346 S.E.2d at 325. The Court did not hold that only those in contractual privity could have a legal duty. In fact, the Court found that the consultant owed a legal duty to the S.C. Ports Authority.⁴ See id. at 377, 346 S.E.2d at 326. The Court found no duty between the consultant and unions, noting that “[t]he relationship, if any, flowing between a consultant and someone distantly affected by his work is far too attenuated to rise to the level of a duty flowing between

⁴ Respondent argued in brief that: “That 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).” However, this cannot be the holding of Booz-Allen or the Supreme Court would not have found a duty in favor of the S.C. Ports Authority, which did not rely on the letter. Instead, the Court focused on the fact that Booz-Allen knew that the Georgia Ports Authority intended to use the report as a marketing device and that its false conclusions would be used to give GPA a market advantage over – and therefore harm – S.C. Ports Authority. In short, what the Court focused on was foreseeability of harm to a party not distantly affected by the work.

them. The concept of a duty in tort liability must not be extended beyond reasonable limits.” See id.

Mr. Watson cannot be reasonably described as someone “distantly affected” by the work of D’Appolonia and it cannot reasonably be said that the relationship between D’Appolonia and Watson, as the subsequent purchaser from the Schmidts, was “far too attenuated to rise to the level of a duty flowing between them” or “beyond reasonable limits.”

In fact, our supreme court has expressly recognized the duty of a design professional to a third party. In Tommy L. Griffin, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995), the Supreme Court held that an engineering firm could be sued in negligence by a subcontractor, reasoning that “a design professional may be held liable in tort to a third party who lacks privity of contract when it is foreseeable that the third party would rely on the professional’s work product.”

Given this, while it is certainly true that foreseeability of injury alone will not suffice when considering a party that is “distantly affected” by the work, this is not the case here. D’Appolonia performed the work on the Schmidt residence which was then acquired by Watson. Watson then suffered foreseeable harm from the defective conduct.

CONCLUSION

Hugh Watson seeks only his day in court. He has presented experts in the complex field of geotechnical engineering who have detailed multiple errors by D’Appolonia, both in design and in post-construction conduct. Appellant respectfully asks that this Court reverse the grant of summary judgment so that the case may proceed.

Respectfully Submitted,

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