

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2023-CP-37-00329
Appellate Case No. 2025-000537

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SC Court of Appeals

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.,

Respondent.

INITIAL BRIEF OF RESPONDENT KELLER NORTH AMERICA, INC.,
SUCCESSOR BY MERGER TO HAYWARD BAKER, INC.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT CORRECTLY HELD WATSON’S CLAIMS AGAINST KELLER FOR NEGLIGENCE, GROSS NEGLIGENCE, BREACH OF IMPLIED WARRANTIES, NEGLIGENT MISREPRESENTATION, AND CONSTRUCTIVE FRAUD WERE BARRED BY THE STATUTE OF LIMITATIONS.
- II. WHETHER THE CIRCUIT COURT CORRECTLY HELD WATSON’S CLAIMS AGAINST KELLER WERE ALL INDEPENDENTLY BARRED BY THE STATUTE OF REPOSE.
- III. WHETHER THE CIRCUIT COURT CORRECTLY CONCLUDED WATSON FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO HIS CLAIMS AGAINST KELLER FOR CONSTRUCTIVE FRAUD, BREACH OF IMPLIED WARRANTIES, NEGLIGENT MISREPRESENTATION, AND PROMISSORY ESTOPPEL.
- IV. WHETHER THE CIRCUIT COURT’S REFERENCE TO AN “OVER-ARCHING PRINCIPLE” WAS A PROPER FACTUAL OBSERVATION.

STATEMENT OF THE CASE¹

The underlying case arises from slope stabilization work Keller North America, Inc., successor by merger to Hayward Baker, Inc., (“Keller”) performed in 2002 for previous owners of a residence on Lake Keowee. Appellant Hugh T. Watson (“Watson”) purchased the home in 2015. At the time of purchase, Watson admits he was informed of Keller’s prior work, reviewed documentation in the home, and spoke with Keller’s engineer about the project. Despite this knowledge, Watson conducted no further investigation until 2020, when he observed a new crack in the home and sought additional expert opinions. He filed suit on April 27, 2023.

In his Amended Complaint, filed June 5, 2023, Watson asserted claims against Keller for negligence, gross negligence, breach of implied warranties, negligent misrepresentation,

¹ Keller adopts and incorporates by reference the factual recitations and legal arguments contained in the Brief of Respondent Ground Technology, Inc. d/b/a D’Appolonia Engineering Division of Ground Technology, Inc., insofar as they are applicable to Keller and the issues raised in this appeal.

constructive fraud, and promissory estoppel. On October 22, 2024, Keller moved for summary judgment as to all causes of action asserted against it by Watson, and hearing was conducted on January 29, 2025. On February 19, 2025, the circuit court entered an order holding that Watson's claims were barred by both the statute of limitations and the statute of repose, and that Watson had failed to present evidence to establish the elements of his causes of action.

On February 28, 2025, Watson filed a motion to alter or amend the circuit court's order granting Keller's motion for summary judgment, which the circuit court denied by a Form 4 order entered March 13, 2025. Watson filed a notice of appeal on March 19, 2025.

STATEMENT OF FACTS

The underlying case concerns a house located on Lake Keowee at 113 Shipmaster Drive. The residence was originally constructed by C.B. (Bart) and Stephanie B. Schmidt in 1992. (Schmidt Dep. 11:8–11, 36:22-37:3.) Shortly after moving into the house, 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. (Watson Dep. 82:15–21.)

The Hayward Baker (Keller) 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 to stabilize the slope behind their home. (Wolosick Dep. Ex. 40.) That system, designed by D’Appolonia, involved installation of reinforced concrete panels along the slope which were anchored into bedrock with seventy-foot-long, pre-tensioned steel cables. (*Id.* at 45:16–46:3, Ex. 40; Watson Dep. 20:2–6.) Notably, the proposal specifically limited the geographic area that would be stabilized in an accompanying sketch. (Wolosick Dep. Ex. 40)

The 2002 Project and 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, Salem, 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 the herein stated $\frac{3}{4}$ inch criteria. In no event will the costs expended by [Keller] to perform such additional work exceed \$100,000.

...
No implied Warranty of workmanship shall be provided beyond the 5-year period from the completion date of the slop stabilization scope of work.

It is the mutual understanding of the parties that [Keller] has provided construction services and not the sale of a product; therefore, no implied warranties of merchantability (quality of the product) or fitness of the product for use are part of the contract between [Keller] and Owner.

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.

(*Id.* at Ex. 49.)

Post-Construction Inclinometer Readings

To monitor possible movement of the soil along the slope after the project was complete, Keller installed a single inclinometer. (Lewis Dep. 116:12–16.) An inclinometer is a highly sensitive geotechnical instrument that requires drilling a hole deep into the ground and installing a specially-designed PVC pipe vertically into that hole. (Wolosick Dep. 112:17–24). To measure soil movement, an electronic device is lowered into the pipe and follows precise grooves in the pipe to measure deflection along its length in different directions. (*Id.* at 114:15–18.) In layman’s terms, “basically, it’s a plumb hole in the ground that you can measure to see if there’s movement of -- of the earth.” (Watson Dep. 59:2–4)

After installation, an initial baseline reading was taken. (Lewis Dep. 72:22–25; Wolosick Dep. 136:2–3) Thereafter, readings were taken by an engineering firm known as 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 1/4 inch. (*Id.*)

2004 Review of the Inclinometer Readings

In 2004, Keller retained P. Erik Mikkelson of a firm known as Geometron to review and

analyze the inclinometer data and offer his opinion as to its significance. (Wolosick Dep. 111:7-112:16.) According to the testimony adduced in discovery, 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 the ground surface had stabilized at 3/4 inches total, displacement at the tendons of the reaction block system had stabilized at .02 inches total, and a one-inch bulge-type displacement below the tendon elevations had also stabilized. He recommended additional inclinometer readings in March/April 2005. (*Id.* at Ex. 52.)

Keller provided the Geometron report to D'Appolonia to review. (*Id.* at 114:15-115:10.) D'Appolonia reviewed the inclinometer data provided by Keller, the expert opinion of Mr. Mikkelson of Geometron, and noted 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. It concluded that the "system [was] performing well and no additional measures are required." (*Id.* at Ex. 51.)

Keller Communications with the Schmidts

Importantly, Keller provided the inclinometer data, the Mikkelson report, and the 2004 D'Appolonia letter to the Schmidts by letter dated November 10, 2004. (Wolosick Dep. Ex. 52.) Even though the data showed movement exceeding Keller's 3/4-inch warranty, which was expressly pointed out by Keller in the letter, the Schmidts did not exercise their rights under the warranty. (Wolosick Dep. 219:2-4.) According to Stephanie Schmidt, the issues they had previously experienced with the house ceased in 2002 and they were satisfied with the remediation project. (Schmidt Dep. 14:20-23.) She 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.

(*Id.* at 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 Mr. Wolosick. 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.” (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 3/4 inch, but they never invoked the warranty that they had negotiated with Keller because they were satisfied with the project.

Watson Buys the Property

When Bart Schmidt suffered from health concerns, the Schmidts moved to a retirement community in Greenville, South Carolina in 2012 and decided to sell the Property. (Schmidt Dep.

60:22–25.) Watson 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.) When he looked at the Schmidts’ property, the Schmidts made him aware of the geotechnical repairs that had been made to the house but were unconcerned about the home’s current status because “[they] thought everything was fine.” (Schmidt Dep. 67:5–16.) The Schmidts provided an overview of the work done by Keller and had documentation available for potential buyers’ review. (Watson Depo. 23:8–22.) Watson admits he was aware of the Schmidts’ disclosure statement and Keller’s previous slope 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 Watson to John Wolosick for further details about the slope stabilization project, and Watson reached out to Wolosick by telephone to discuss it. The telephone conversation between Watson and Mr. Wolosick lasted approximately five minutes. (Wolosick Dep. 163:1–2, 219:16–18.) When asked what he recalled Wolosick said to him on the phone call, Watson 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).

Watson acquired the property by deed dated May 26, 2015. (Am. Compl. ¶ 34; Watson Dep. 21:15–17.) Watson acknowledges that the documentation he now uses to support his claim was readily available in the home at the time he purchased it. (Watson Dep. 30:19–32:14).

After living in the house for approximately five years with no issues,² Watson noticed a new crack in the kitchen wall and called Mr. Wolosick on May 17, 2020 to report it. (Watson Dep. 33:6–34:18, 55:3–16.) Wolosick visited the property within a few months. (*Id.* at 55:17–20, 56:3–7.) During his visit, Wolosick noticed the property had undergone extensive grading work, including the installation of a cart part, and reasoned that this work, performed during Watson’s ownership, had activated a formerly inactive landslide that was pulling on the system. (Wolosick Dep. 132:9–25.) Wolosick noted during his deposition that the documents regarding the system in Watson’s possession, including the warranty, provided that grading work should not be done, as it could undermine the stability of the slope stabilization system. (*Id.* at 132:2–4, Ex. 49.)

In an effort to help Watson, Wolosick recommended that QORE (now known as S&ME, Inc.) visit the site to take measurements with the inclinometer. (Watson Dep. 101:21–24) However, due to a kink in the inclinometer casing, S&ME was unable to get the probe into the pipe to take measurements. (*Id.* at 102:8–15.) Watson sent S&ME’s report to Wolosick, who then forwarded the email to the individual at D’Appolonia who had been responsible for designing the system. (Wolosick Dep. 220:14–18, 221:15–24.) Watson took no further action at this point.

Some two years later, in 2022, Watson engaged two experts, Skip Lewis and Jim Kahle, to visit the property, review the work that was done, and advise on the situation. (Watson Dep. 65:17–22, 108:14–22.) According to Messrs. Lewis and Kahle, Keller was grossly negligent in its post-construction response to soil movement beyond what was warranted to the Schmidts. (First Addendum to Aff. Lewis ¶ 6; Aff. Khale ¶¶ 9(e) & (g).)

Despite the supposed severity of the problem, at the time of the circuit court’s ruling,

² Watson indicated that his water line broke in 2016, but he attributed that problem to high pressure resulting from the house’s elevation below the water main. (Watson Dep. 93:4–25, 98:1–18)

Watson continued to reside in the home and had undertaken no repairs to arrest the alleged soil movement. (Watson Dep. 67:16–19, 116:13–15.)

Watson 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.

After extensive discovery was conducted by the parties, Keller moved for summary judgment on October 22, 2024. (Keller Mot. Summ. J.) A hearing was held on Keller’s motion, as well as Respondent D’Appolonia’s motion for summary judgment, on January 29, 2025. The circuit court granted Keller’s motion for summary judgment, finding that Watson’s claims were barred by both the statute of limitations and the statute of repose, and that Watson had failed to present evidence to establish the elements of his causes of action. This appeal followed.

STANDARD OF REVIEW

“When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *see also* Rule 56(c), SCRPC (providing summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

“Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161,

166 (2013) (citation omitted). “[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.” *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (quoting *Floyd*, 403 S.C. at 477, 744 S.E.2d at 166).

ARGUMENTS

The circuit court properly granted summary judgment in Keller’s favor. Each of Watson’s claims, whether framed in negligence, warranty, misrepresentation, or estoppel, is barred by the applicable statute of limitations and/or the statute of repose, both of which extinguish causes of action arising from conduct that occurred nearly two decades before suit was filed. Even apart from these dispositive time bars, the undisputed evidence demonstrates that Watson cannot establish essential elements of his claims. The record shows that Watson had access to all relevant documentation concerning Keller’s work when he purchased the property in 2015, failed to exercise reasonable diligence, and suffered no alleged injury until years later. The circuit court’s order was thorough, well-reasoned, and correct in both fact and law, and its judgment should be affirmed in full.

I. The Circuit Court Correctly Held Watson’s Claims Against Keller for Negligence, Gross Negligence, Breach of Implied Warranties, Negligent Misrepresentation, and Constructive Fraud Were Barred by the Statute of Limitations.

The circuit court properly concluded that Watson’s claims against Keller for negligence, gross negligence, breach of implied warranties, negligent misrepresentation, and constructive fraud were barred by the applicable three-year statute of limitations set forth in South Carolina Code Section 15-3-530. (Order 10.) Applying South Carolina’s objective discovery rule, the circuit court correctly found that Watson knew or should have known of the alleged defects and of Keller’s prior slope stabilization work no later than 2015, when he purchased the property and came into possession of all documentation upon which he now relies. (Order 9–12.)

A. Governing Law

Under South Carolina law, a cause of action accrues when a plaintiff knows, or by exercising reasonable diligence should know, that he has a potential claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). “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.* “South Carolina’s statute of limitations requires ‘very little to start the clock.’” *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994)).

B. Watson Knew or Should Have Known of His Claims in 2015

The undisputed evidence shows that Watson possessed actual or constructive notice of his alleged claims when he purchased the property in 2015. The Schmidts’ seller disclosure form expressly identified Keller’s slope stabilization work, and supporting documentation was available to Watson prior to closing. (Watson Dep. 23:8–22.) Watson admitted he received these materials, briefly “thumbed through” them, and made no further inquiry beyond a five-minute phone call with Wolosick regarding the work Keller had performed some 13 years previously. (*Id.* 24:13-16, 29:7-23; Wolosick Dep. 163:1–2, 219:16–18.)

Watson’s pre-purchase home inspection also documented visible signs of potential

instability, including cracks, floor sloping, and erosion. (Watson Dep. 77:2–80:3.) These conditions would have prompted a reasonably diligent purchaser to investigate further, particularly given his knowledge that substantial subsurface work had been performed on the property. After Watson purchased the property in 2015, he discovered more documents and correspondence related to the project, including Keller’s reports, warranty materials, and inclinometer readings showing movement in excess of Keller’s warranty to the Schmidts. (Watson Dep. 31:1–32:14.) Yet, Watson did nothing in 2015. The only thing that prompted Watson to look into the slope stabilization work in 2020 was a new crack that he noticed above the kitchen sliding glass door. (Watson Depo. 100:11–20.)

As the circuit court found, if Watson had simply read the documents in his possession or retained a third party to review them in 2015, as he later did, he would have “discovered” the same information upon which his 2023 complaint now relies. (Order 12.) The circuit court concluded Watson possessed actual or constructive knowledge of the underlying facts giving rise to his alleged claims as early as 2015. (*Id.*) Because the Amended Complaint was not filed until April 27, 2023—eight years later—the circuit court dismissed all claims against Keller, with the exception of promissory estoppel, as time-barred. (*Id.*)

This case is squarely governed by *Dean*, where the Supreme Court held that a plaintiff’s cause of action accrued upon first discovering structural cracks, not when a second crack and subsequent damage later appeared. 321 S.C. at 365–66, 468 S.E.2d at 648; *see also Barr v. City of Rock Hill*, 330 S.C. 640, 645–46, 500 S.E.2d 157, 160 (Ct. App. 1998) (affirming summary judgment where four annual termite reports indicated excessive moisture in the homeowner’s crawl space and an engineering report two years later identified multiple unrelated defects, but the homeowner did not file suit until two years after receiving that report); *Allwin v. Russ Cooper*

Associations, Inc., 426 S.C. 1, 20–21, 825 S.E.2d 707, 717 (Ct. App. 2019) (affirming summary judgment where plaintiff was on notice of water intrusion, roofing defects, and further construction deficiencies despite the plaintiff’s “conservative but conscious course of action in response to conflicting opinions” about the extent of the damage).

C. Watson’s Arguments Do Not Create a Genuine Issue of Material Fact

Watson contends the documents were too technical for a layperson and that the statute did not begin to run until 2020, when he noticed a new crack and contacted Wolosick. (Appellant’s Initial Br. 20–23.) This argument fails both legally and factually.

The discovery rule imposes an objective standard; it does not excuse a plaintiff’s failure to act because information is complex or requires expert assistance. *Gibson*, 383 S.C. at 406, 680 S.E.2d at 782; *Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (“[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.”); *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (“The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.” (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981))). The law is clear that “an injured party ‘must act with some promptness’ when they are on notice of a potential claim[.]” *Allwin*, 426 S.C. at 20, 825 S.E.2d at 717 (quoting *Dean*, 321 S.C. at 363–64, 468 S.E.2d at 647). Accordingly, a plaintiff may not toll the statute of limitations by ignoring available information or failing to make an inquiry. Furthermore, the record reflects that the inclinometer data was summarized in plain-language correspondence to the Schmidts, laypersons themselves, which Watson also possessed.

Watson’s reliance on his 2020 discovery of an additional crack does not change the analysis. As the circuit court observed, the only difference between 2015 and 2020 was Watson’s

decision finally to investigate. (*See* Order 12.) The law does not permit him to postpone accrual of his claims indefinitely until he chooses to review documents long in his possession. *See Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (limitations period triggered when facts existed that “would have put a reasonable person on notice”). Nor can he create a factual issue through speculation or unreasonable inference. *Floyd*, 403 S.C. at 477, 744 S.E.2d at 166 (“[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.”) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)); *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) (“To survive summary judgment, the evidence presented [by the non-movant] must amount to more than mere speculation and conjecture.”) (citing *McKnight v. S.C. Dep’t of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009)).

Watson’s own testimony and argument further defeat his position. He admitted that the documentation forming the basis of his expert opinions had been in his possession since 2015, including inclinometer readings showing movement beyond Keller’s warranty limits. (Watson Dep. 30:19–32:14; Lewis Dep. 153:20–156:18.) His claims rest entirely on work Keller performed between 2002 and 2006 and on documents generated during that time, none of which changed between 2015 and 2023. If those materials were sufficient to support Watson’s allegations in 2023, they were equally sufficient to put him on inquiry notice in 2015. This point bears emphasizing. A review of Watson’s Amended Complaint confirms Watson alleges that Keller “knew or should have known” during a single 2015 phone call that their statements about the soil stabilization system were false, that the system was failing, and that subsurface soils continued to move downhill. (Am. Compl. ¶ 25.) But how, according to Watson, should Keller have known this? By virtue of the inclinometer measurements taken between 2004 and 2006. (Am. Compl. ¶ 26.)

In other words, the very documents Watson cites as the basis for his claims—the same documents he alleges “show that [Keller] misrepresented the condition of the Property and the performance of their system” and that reveal “an in-ground inclinometer which could have easily been used by Watson to check for movement” (Am. Compl. ¶ 28)—are the documents he had in hand in 2015. That is precisely Keller’s point: if those documents were sufficient to alert Watson to potential defects and misrepresentations in 2020, they were equally sufficient to do so in 2015. Indeed, Watson’s own expert conceded that the materials underlying his opinions were readily available and in Watson’s possession in 2015. (Lewis Dep. 153:20–156:18.)

D. The Circuit Court Correctly Applied the Law to the Undisputed Facts

Watson’s assertion that the circuit court viewed the evidence in the light most favorable to Keller mischaracterizes the record. (Appellant’s Initial Br. 18.) The circuit court applied the correct summary judgment standard, viewing the evidence objectively and finding no genuine factual dispute. The record contains no inference that could reasonably delay accrual to 2020 or beyond.

As the circuit court observed, Watson’s position would place him in a better posture than the original homeowners, whose claims would have been barred years earlier under the same facts. Keller’s correspondence with the Schmidts between 2004 and 2006 documented movement beyond warranty limits and additional slope activity. Those communications, which were in the materials Watson possessed in 2015, would have triggered the statute of limitations for the Schmidts, and the same rule applies to Watson. To hold otherwise would allow a subsequent purchaser to resurrect stale claims simply by waiting.

Because the undisputed evidence establishes that Watson knew or should have known of the facts giving rise to his claims no later than 2015, the circuit court properly concluded that his

2023 lawsuit is time-barred as a matter of law. As the circuit court aptly observed, Watson turned an unreasonably blind eye to the very claims he now asserts he “discovered” in 2020. (Order at 12.) The order granting summary judgment to Keller should therefore be affirmed.

II. The Circuit Court Correctly Held Watson’s Claims Against Keller Were All Independently Barred by the Statute of Repose.

Additionally, all of Watson’s claims³ are barred by the statute of repose. South Carolina’s statute of repose 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 thirteen years after substantial completion of the improvement.” S.C. Code Ann. § 15-3-640 (2005).⁴ It is undisputed that more than thirteen years elapsed between substantial completion of Keller’s work (2002) and Watson’s suit in 2023. The claims are therefore barred unless Watson carried his burden to bring them within a statutory exception. The circuit court correctly found he did not.

Section 15-3-670(A) provides that the statute of repose is “not available as a defense to a

³ Watson asserts the circuit court’s order does not expressly extend its statute of repose ruling to his claims for breach of implied warranties, negligent misrepresentation, and promissory estoppel. (Appellant’s Initial Br. 24 n.9.) The circuit court’s order plainly states that Watson’s “claims are barred by the statute of repose,” without limitation or qualification. (Order 12.) In any event, the circuit court’s additional findings and conclusions addressing these individual causes of action provide independent, alternative grounds supporting summary judgment, as discussed below.

⁴ The statute of repose has since been modified to provide for an eight-year time period. *See* S.C. Code Ann. § 15-3-640 (Supp. 2024) (“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.”). The slope stabilization work was undisputedly completed in 2002, well before this amendment took effect. Nevertheless, the circuit court correctly observed that under either version of the statute, the repose period expired long before Watson filed his Amended Complaint in 2023. (Order 12 n. 2.) For purposes of analysis, and to view the record in the light most favorable to Watson, Keller applies the more generous thirteen-year period.

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) (Supp. 2024). Watson invokes only the “gross negligence” portion of this exception. (Appellant’s Initial Br. 25.)⁵ His attempt fails for three independent reasons, and in all events the record confirms Keller exercised at least slight care.

A. The Gross Negligence Exception Cannot Apply Where No Duty Was Owed to Watson

“Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. It is the failure to exercise slight care.” *Jinks v. Richland Cnty.*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) (citing *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000)). “Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances.” *Etheredge*, 341 S.C. at 310, 534 S.E.2d at 277 (citing *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993)).

⁵ Watson initially asserts the exceptions to the statute of repose apply based on gross negligence and recklessness. (Appellant’s Initial Br. 25.) However, Watson did not appeal the circuit court’s ruling that his Amended Complaint failed to allege recklessness, and as such, he cannot now invoke recklessness as an exception to the application of the statute of repose. (Order 17.) *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”). Moreover, Watson’s brief contains no substantive argument or supporting authority on recklessness, thereby abandoning the issue on appeal. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.” (citations omitted)). In any event, even if the Court were to consider it, the circuit court correctly concluded that Watson failed to state or support any claim for recklessness, and, as with his other tort claims, any such theory would in any case be barred by the applicable statute of limitations.

It is axiomatic that gross negligence presupposes a duty owed to the plaintiff. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (stating where no duty owed, unnecessary to consider whether conduct amounted to gross negligence).

Here, every act or omission Watson and his experts label as “grossly negligent” occurred between 2004 and 2006, approximately a decade before Watson acquired any interest in the property. (*See* Appellant’s Initial Br. 28–29; First Addendum to Aff. of Lewis (“I find the actions taken by [Keller] *following post-construction* inclinometer readings . . . to be evidence of gross negligence. (emphasis added)); Kahle Dep. 171:9–11 (“Q. So that gross negligence occurred in 2004 based on that inclinometer report? A. 2004, 2005, and 2006.”); Lewis Dep. 131:3–14 (“Q. Is there any indication that repairs were necessary in 2004, if there was no damage to the house occurring, at that time? A. I will say, . . . with the extent of soil movement subsequent to the installation, that there was sufficient data provided to both [Keller] 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.”).) The only duty that could have existed during that period arose from Keller’s express warranty to the Schmidts. Watson, a subsequent purchaser, was not a beneficiary of that expired warranty and had no relationship with Keller giving rise to a duty of care.

This case is far removed from situations where a builder’s duties extend to later homeowners for latent construction defects. *See generally, e.g., Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989). Watson’s allegations instead concern post-construction monitoring under an express, bargained-for warranty that had long since expired. Because Keller owed no duty to Watson during the 2004 to 2006 period, he cannot establish the predicate duty required to invoke the gross negligence exception, and the claim fails as a matter of

law. *Hendricks*, 353 S.C. at 458, 578 S.E.2d at 715.

B. Watson’s Allegations Concern Post-Construction Monitoring, Not Gross Negligence “in Connection with” the Construction Work Covered by § 15-3-670(A)

By its terms, Section 15-3-670(A) limits the gross negligence exception to acts committed “in connection with” the construction process itself. The exception applies only when the alleged gross negligence occurs while “providing components,” “furnishing materials,” “developing real property,” or “performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, [or] construction . . . in connection with such an improvement.” S.C. Code Ann. § 15-3-670(A). The language confines the exception to conduct directly related to the construction or improvement of real property and does not extend to later, post-completion activities.

Watson’s own allegations remove this case from the scope of the statute’s exception. His theory and expert testimony identify only *post-completion* events as the alleged basis for gross negligence. He claims Keller’s handling of inclinometer readings *after* construction (2004, 2005, and 2006) was grossly negligent. (Appellant’s Initial Br. 28–29; First Addendum to Aff. of Lewis ¶ 6 (“actions . . . following post-construction inclinometer readings” show gross negligence); Kahle Dep. 171:9–11 (providing alleged gross negligence occurred in 2004, 2005, and 2006). Neither Watson nor his experts contend that Keller’s 2002 construction was grossly negligent; to the contrary, Lewis withdrew any opinion to that effect. (See First Addendum Aff. of Lewis ¶ 9 (withdrawing opinion that Keller was negligent in failing to install the system in accordance with its own drawings and specifications); Lewis Dep. 107:11–109:6 (explaining his “issue” with the system is Keller’s response to the movements which exceeded what was warranted); Lewis Dep. 130:8–10 (criticizing “lack of responsiveness once the problems were identified,” not the design).)

The inclinometer readings that Watson relies on were taken after construction was complete. They were not part of “testing or observation of construction” as the statute contemplates, but rather a form of post-completion monitoring within the scope of Keller’s five-year warranty to the Schmidts. The statute of repose begins to run upon substantial completion of the improvement. S.C. Code Ann. § 15-3-640. Accordingly, the gross negligence exception must apply only to conduct connected to the construction of the improvement itself and performed before substantial completion. If later follow-up work or monitoring could trigger the exception, the repose period would never close, and the statute would lose its meaning.

If accepted, Watson’s theory would effectively toll or restart the statute of repose whenever a provider performs any follow-up review, communication, or evaluation even years after completion. This would be the functional equivalent to equitable tolling, a concept that is incompatible with the very purpose of a statute of repose. The South Carolina Supreme Court has made clear that 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.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993)); *see also* James Acret & Annette Davis Perrochet, *Construction Litigation Handbook* § 22:4 (3d ed.) (explaining that statutes of repose are “not subject to equitable tolling while promises or attempts to repair are pending”). Allowing post-construction conduct to extend the period of potential liability would create exactly the kind of open-ended exposure that the legislature sought to foreclose.

This case illustrates the problem. Keller completed its slope stabilization work in 2002. Under Watson’s view, Keller’s later review of inclinometer readings or even a brief conversation

years afterward could indefinitely suspend the repose period. Such an outcome would undermine the statutory goal of providing finality to those who design and construct improvements to real property. It would also discourage builders and design professionals from offering any assistance after a project's completion. If post-construction monitoring or advice could expose them to renewed liability, prudent providers would have every incentive to refuse follow-up inquiries or decline to assist property owners once the work is complete. That result would undermine both the legislative purpose of finality and the practical goal of promoting continued cooperation between providers and property owners.

In short, Watson's argument would transform the limited exception in Section 15-3-670(A) into an indefinite tolling mechanism. Because the alleged misconduct concerns later monitoring decisions, not the construction activities or other enumerated functions to which the exception expressly applies, they fall outside of the statute's exception.

C. The Statute of Limitations Has Run on Any Gross Negligence Claim, Precluding Use of the Exception

As explained in Section I, Watson's tort claims accrued no later than 2015 and are time-barred under the three-year statute of limitations, S.C. Code Ann. § 15-3-530. A plaintiff cannot resuscitate a time-barred gross negligence claim through Section 15-3-670(A). The exception applies only where the defendant is "guilty of" gross negligence, i.e., where a viable claim exists. Having allowed the limitations period to lapse, Watson cannot satisfy the predicate necessary to invoke the exception.

D. In Any Event, the Undisputed Evidence Shows Keller Exercised at Least "Slight Care," Defeating Gross Negligence as a Matter of Law

Even if the exception were theoretically available, the record, viewed in Watson's favor, supports only one reasonable inference: Keller exercised at least slight care. *See Etheredge*, 341

S.C. at 310, 534 S.E.2d at 277 (providing gross negligence becomes a question of law where the evidence supports only one inference) (citing *Clyburn v. Sumter Cnty. Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887–88 (1994)). It is undisputed that: (1) a third party performed multiple inclinometer surveys; (2) Keller provided the data to a geoengineering/instrumentation expert who concluded the soil mass had stabilized; (3) D’Appolonia concurred that no additional measures were necessary; and (4) Keller funded continued monitoring through November 2006. It is also undisputed that the Schmidts were fully aware of the fact the movement had exceeded the warranted tolerance but saw no need to invoke it, as they never experienced a structural problem with their home following the completion of Keller’s work. (Schmidt Dep. 14:20–24, 67:8–16.)

Watson’s experts critique Keller’s response but do not identify a required, specific measure or action Keller was obligated to take or link any alleged omission to the prevention of the later-asserted failures. Indeed, exactly how the system has allegedly failed remains unclear. That evidentiary void is insufficient to create a genuine issue of material fact. *See Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278 (stating the expert’s list of “deficiencies” without causal linkage and without negating slight care is insufficient, concluding “the fact that the [defendant] might have done more does not negate the fact that it exercised ‘slight care’”); *Harris Teeter*, 390 S.C. at 289, 701 S.E.2d at 749 (stating conclusory opinions on a breach of standard of care does not create a genuine issue of material fact, particularly where the proper standard of care is not presented); *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 408, 489 S.E.2d 647, 651 (Ct. App. 1997) (affirming summary judgment where evidence did not establish gross negligence).

At most, Watson’s proof suggests Keller “might have done more,” which does not negate the existence of slight care. *Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278.

The statute of repose squarely fulfills its intended purpose in this case. Watson’s own

argument proves as much. In attempting to avoid the statute of limitations, Watson analogizes Keller's position to the notion that "a homeowner is on notice of claims of defective construction simply by being aware that the house was built." (Appellant's Initial Br. 20.) Yet when viewed through the lens of the statute of repose, that is precisely the kind of protracted, open-ended exposure the General Assembly intended to eliminate. As this Court has explained, "[t]he purpose of the statute of repose is to provide a substantive right to developers to be free from liability after a certain time period." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 182, 708 S.E.2d 787, 793 (Ct. App. 2011). "Further, '[s]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.'" *Id.* (quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 244). Allowing Watson to pursue claims decades after completion, based on documents he possessed years before filing suit, would upend that legislative balance and nullify the repose the statute was designed to ensure.

E. Watson's "Building-Permit Notice" Argument Fails

Watson lastly argues Section 15-3-640 requires bold-type notice on a building permit and that Keller must prove compliance as a condition precedent to assert the statute of repose. (Appellant's Initial Br. 31.) This argument misapprehends the statute.

First, contractors do not issue building permits; municipal authorities do. *See* S.C. Code Ann. § 5-25-310. As a South Carolina District Court concluded, "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, the notice language protects the contracting owner or possessor by advising of the right to negotiate warranties beyond eight years. § 15-3-640. Watson was not the contracting owner and purchased the property more than a decade later. The notice provision does not protect future homeowners like Watson, who purchased the property more than a decade after the building permit was issued, to avoid the application of the statute of repose.

Third, there is no evidence in the record that whatever permit may have been issued lacked the statutory notice. As the circuit court observed, Watson points to no permit at all, only conjecture. (Order 18; Appellant’s Initial Br. 31; Pl.’s Mem. Opp’n 29). That is not enough. *See Floyd*, 403 S.C. at 477, 744 S.E.2d at 166 (“[I]t is not sufficient for [Plaintiff] to create an inference that is not reasonable or an issue of fact that is not genuine.”).

Because substantial completion occurred no later than 2002 and suit was filed in 2023, Section 15-3-640 extinguishes all claims. Watson cannot invoke subsection (A)’s limited exception: Keller owed no duty to Watson regarding post-construction monitoring; Watson’s allegations concern post-construction monitoring outside the statute’s enumerated activities; the gross-negligence claim is itself time-barred; and, in any event, the undisputed evidence shows Keller exercised at least slight care. The circuit court’s ruling on the application of the statute of repose should be affirmed.

III. The Circuit Court Correctly Concluded Watson Failed to Present Evidence Sufficient to Create a Genuine Issue of Material Fact on His Claims Against Keller for Constructive Fraud, Breach of Implied Warranties, Negligent Misrepresentation, and Promissory Estoppel.

As shown above, Watson’s claims are all independently barred by the statute of limitations and/or the statute of repose. The Court may affirm on those grounds alone. Even if reached, however, the claims also fail on the merits because Watson did not present evidence creating a genuine issue of material fact on essential elements of his claims for constructive fraud, breach of implied warranties, negligent misrepresentation, and promissory estoppel.

A. Constructive Fraud

Watson asserts that the circuit court improperly granted summary judgment to Keller on his claim for constructive fraud because it conflated actual fraud with constructive fraud and viewed the evidence in the light most favorable to Keller. (Appellant’s Initial Br. 31.) This argument does not withstand scrutiny.

To sustain a claim of fraud, a plaintiff must prove the following elements:

(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)). “To establish constructive fraud, all elements of actual fraud except the element of intent must be established.” *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 269 (Ct. App. 1993) (citing *O’Quinn v. Beach Assocs.*, 272 S.C. 95, 249 S.E.2d 734 (1978)). “Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from

constructive fraud.” *Id.* at 516, 431 S.E.2d at 269–70 (citing *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985)).

As an initial point, Watson is incorrect in his position that constructive fraud does not require actual dishonesty. (Appellant’s Initial Br. 32.) Actual dishonesty *of purpose* is not required, but the falsity of the statement is still a required element of constructive fraud. *See McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670 (Ct. App. 2008) (“The key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement.” (quoting *Armstrong*, 366 S.C. at 219–20, 621 S.E.2d at 375–76)).

The circuit court did not reject Watson’s fraud-based theories solely for lack of intent. Rather, it found no evidence of a false, material representation by Keller, and further concluded that Watson had the very information he claims made the statements false. (Order 13–15.) Those findings defeat multiple required elements common to actual and constructive fraud, including falsity, ignorance of falsity, right to rely, and proximate injury.

Watson points to Wolosick’s general statements in 2015 that the system was “heavy duty” and “solid,” and to his own recollection that the “life of that type of solution” was sixty years. (Appellant’s Initial Br. 32.) But generalized assurances do not establish falsity, particularly where (i) the alleged “continued movement” data he cites occurred a decade earlier and (ii) there is no record evidence that the system was not “heavy duty” or “solid” at the time of the 2015 call. *See Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985) (“The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date.”).

Moreover, Watson’s own testimony confirms the sixty-year reference related to Keller’s

experience with the technology, not a representation as to that particular system's performance characteristics. (Watson Dep. 27:13–24 (“I recall [Wolosick] telling me that -- that they do work all around the country, and perhaps around the world. . . . And that they had been employing that solution for 60-plus years. And that's -- that's the life of *that type* of solution.” (emphasis added)); *id.* at 83:22–23 (“There was a -- if I recall, a timing of 60, you know, 60-plus years experience with the systems.”).) In his Brief, Watson mischaracterizes the testimony by asserting Wolosick stated “*the system had an additional 60-year life expectancy.*” (Appellant's Initial Br. 32 (emphasis added).) Watson's testimony, at best, does not convey a representation that the Schmidts' specific system would last an additional sixty years, but rather that Mr. Wolosick told him 60 years is “*the life of that type of solution.*” (Watson Dep. 27:13–24 (emphasis added).) In contrast, Wolosick specifically denied ever stating the system would last sixty years. (Wolosick Depo. 160:22–161:11.)

Even assuming the statements were actionable as a representation, there is no evidence they were false. The record contains no testimony, expert opinion, or data showing that they system was not “heavy duty” or “solid” in 2015, or that it had failed. To the contrary, Watson's own expert conceded the system “may not have failed, but it's potentially . . . unstable.” (Kahle Dep. 177:3–4.) The movement measurements cited by Watson occurred between 2004 and 2006, and no readings exist after that period to show continued movement. (Lewis Dep. 68:6–11.) Indeed, Watson and his experts admitted that no stabilization system can completely eliminate movement. (Watson Dep. 107:8–13; Kahle Dep. 139:23–141:13.)

Wolosick was informed by Stephanie Schmidt that there had been no problems since Keller's involvement at the site, and there is no evidence of soil movement between 2006 and 2015 in the record. (Wolosick Dep. 42:20–44:3; Schmidt Dep. 14:20–24, 67:8–16; Lewis Dep. 68:6–

11.) Even Watson’s experts propose solutions that would incorporate portions of Keller’s original system, which is hardly consistent with a claim that the system is fundamentally defective or has no more “life.” (Kahle Dep. 165:9–166:16.) Based on the record, the only thing that has allegedly failed is the inclinometer, which is not the system itself and has no impact on the stabilization efforts, and Watson’s experts are not able to even attribute that failure of the inclinometer to soil movement. (Kahle Dep. 77:8–14, 147:18–23). Additionally, inclinometers typically do not remain serviceable beyond five years. (Wolosick Dep. 171:4–7.)

In addition to there being no evidence of a false representation, Watson failed to establish he had a right to rely or that the reliance was reasonable. “Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests.” *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). Based on the evidence in this case, it is appropriate to decide as a matter of law that Watson failed to establish and cannot establish several of the necessary elements of constructive fraud. *See id.* at 387, 339 S.E.2d at 114.

The Court need not reach these issues, however, because any claim for constructive fraud is independently barred by the statute of limitations. The undisputed evidence establishes that Watson obtained in 2015 all of the documentation and information on which his constructive fraud claim is now based. Accordingly, any such claim expired years before he filed suit in 2023. Summary judgment was therefore proper on multiple, independent grounds.

B. Negligent Misrepresentation

Watson contends the circuit court erred in concluding he failed to establish the “pecuniary interest” element of negligent misrepresentation. (Appellant’s Initial Br. 34–35.) That contention

misapprehends the Order. The circuit court did not rest its ruling on a single element; it found no actionable misrepresentation and, in any event, that Watson failed to produce evidence on multiple independent elements, including pecuniary interest.

To prove negligent misrepresentation, the plaintiff must allege and prove the following essential elements:

(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992) (citing *Winburn*, 287 S.C. 435, 339 S.E.2d 142).

“Not every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort.” *AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874. “However, if the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made to plaintiff.” *Id.* at 223, 420 S.E.2d at 874. “Proof that the statement was made in the course of the defendant's business, profession, or employment is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it.” *Id.* (citing *Winburn*, 287 S.C. at 442, 339 S.E.2d at 146–47). “The duty of care is not a duty to take every possible care, still less is it a duty to be right; it is the familiar duty to exercise that care a reasonable man would take in the circumstances.” *Id.*

“As part of his case, the plaintiff must establish that his reliance on the misrepresentation

was reasonable.” *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000) (citing *AMA Mgmt. Corp.*, 309 S.C. at 223, 420 S.E.2d at 874). “There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.” *AMA Mgmt. Corp.*, 309 S.C. at 223, 420 S.E.2d at 874. “Moreover, ‘there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.’” *West*, 341 S.C. at 134, 533 S.E.2d at 337 (quoting *Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996)). “A determination of justifiable reliance involves the evaluation of the totality of the circumstances, ‘including the positions and relations of the parties.’” *Id.* (quoting *Elders v. Parker*, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985)).

The circuit court expressly found “no evidence of an actionable representation” by Keller to Watson. (Order 18.) On appeal, Watson does not identify a specific false statement, only generalized descriptors (“heavy duty,” “solid”) and his contested recollection regarding “60-plus years.” Those are, at most, non-actionable opinions or commendations. *AMA Mgmt.*, 309 S.C. at 222, 420 S.E.2d at 874. As discussed above, there is no evidence that a false representation was made. It bears repeating that at the time of the conversation between Wolosick and Watson, Wolosick was informed the house was fine. (Wolosick Dep. 165:16–166:25.)

The context likewise defeats the pecuniary-interest and duty elements. While it is true a false representation made in the course of a defendant’s business may be sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it, that fact “is not, however, conclusive.” Restatement (Second) of Torts § 552, cmt. d (1977); *see also AMA Mgmt.*, 309 S.C. at 223, 420 S.E.2d at 874 (citing *Winburn*, 287 S.C. at 442, 339 S.E.2d at 146–47, which itself quotes Restatement (Second) of Torts § 552, cmt. d). In this case, the circumstances reveal the pecuniary interest argument fails. The five-minute, gratuitous phone call occurred while

Watson was a prospective purchaser; Keller had previously contracted with the Schmidts (the sellers), not Watson; Wolosick's work with the Schmidts had concluded a decade prior; and Wolosick understood Watson had the documents and would conduct his own diligence. (Wolosick Dep. 184:2–13.) On these facts, any inference of pecuniary interest is overcome, and no duty arose.

Any reliance was likewise not reasonable. Watson stood adverse to the Schmidts, had equal or superior access to the relevant documentation, and could verify the information independently. *See West*, 341 S.C. at 134, 533 S.E.2d at 337 (“A determination of justifiable reliance involves the evaluation of the totality of the circumstances, ‘including the positions and relations of the parties.’” (quoting *Elders*, 286 S.C. at 233, 332 S.E.2d at 567); *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992) (“[I]f both [the plaintiff] and [the defendant] had equal access to the fact that the potatoes were harmful to cattle, then [the plaintiff] had no cause of action.”). “There is no liability for . . . matters which plaintiff could ascertain on his own in the exercise of due diligence.” *AMA Mgmt.*, 309 S.C. at 223, 420 S.E.2d at 874.

As with the claim of constructive fraud, Watson's claim for negligent misrepresentation is also independently barred by the statute of limitations. The undisputed evidence establishes that Watson obtained in 2015 all of the documentation and information on which his negligent misrepresentation claim is now based. Accordingly, any such claim expired years before he filed suit in 2023. Summary judgment may be affirmed on any of these grounds.

C. Breach of Implied Warranties

Watson's Amended Complaint alleges that Keller “impliedly warranted that the *information* they were providing to Watson was fit for its particular purpose . . . and in

conformance with the standards of the engineering profession.” (Am. Compl. ¶ 72 (emphasis added).) There is no cause of action for implied warranty of *information*, and the circuit court correctly granted summary judgment.

On appeal, Watson abandons that theory and recharacterizes his claim as one for breach of implied warranties of design adequacy and workmanlike service. (Appellant’s Initial Br. 35.) This reframing fails as a matter of law and fact. There is no record evidence that Keller’s 2002 installation was defective or unworkmanlike. To the contrary, Watson’s experts criticize only Keller’s post-construction response to movement (2004–2006), not the installation itself. (First Addendum Aff. of Lewis ¶ 9; Lewis Dep. 107:11–109:6, 130:8–10.) The only alleged “breach” Watson identifies is Keller’s supposed failure to inform him, some ten years later, that movement had exceeded the 3/4-inch warranty issued to the Schmidts. (Appellant’s Initial Br. 36.) That theory fails for at least three reasons: (1) Watson was not a party to the Schmidts’ limited five-year warranty and cannot enforce it; (2) a past-movement figure is not evidence of unworkmanlike design/installation; and (3) Watson possessed or had access to the very documents disclosing movement. (Order 18.) On this record, no triable issue exists.

Even if Keller’s warranty could be construed to implicate implied warranty, its express terms foreclose Watson’s claim. The warranty provided that “no implied Warranty of workmanship shall be provided beyond the 5-year period from the completion date of the slope stabilization work,” and further stated that Keller “provided construction services and not the sale of a product; therefore, no implied warranties of merchantability (quality of the product) or fitness of the product for use” exists. (Wolosick Dep. Ex. 49.) Thus, any implied warranty expired in 2007, more than fifteen years before Watson filed suit. Additionally, the solutions proposed by Watson’s experts aim to stabilize the entire slope, which is admittedly beyond the scope of the

original repair and warranted area done by Keller. (Kahle Dep. 165:9–166:16.)

Moreover, Watson’s reliance on *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951), and *Robert E. Lee & Co. v. Commission of Pub. Works of Greenville*, 250 S.C. 394, 158 S.E.2d 185 (1967), is misplaced. (Appellant’s Initial Br. 35–46.) Both cases involved a contracting party’s liability for defective plans or misrepresentations made in connection with an active construction project. In *Hill*, the Court recognized an implied warranty of design adequacy where the defendant furnished plans and specifications to a contractor to follow in new construction, and the plaintiff filed suit against the defendant *three* years after completion. 219 S.C. at 266–67, 271, 64 S.E.2d at 886, 888. The Court in *Robert E. Lee* extended that principle to an owner’s liability for inaccurate soil data provided to a contractor. 250 S.C. at 399–400, 158 S.E.2d at 188. In contrast, Keller did not furnish plans, specifications, or design data to Watson and made no representations to Watson during any construction process. The alleged “failure to inform” occurred nearly ten years after completion, long after the Schmidts’ limited warranty expired. (See Appellant’s Initial Br. 36 (arguing Keller “failed to inform Watson that the subsoil movements [had] exceeded the [3/4] inch warranty[.]”)) These circumstances are the opposite of those in *Hill* and *Robert E. Lee*, where the alleged breach arose directly from the design and construction relationship between the contracting parties.

Watson’s argument regarding breach of implied warranty of workmanlike service fares no better. The express warranty itself expressly disclaims any implied warranty of workmanship beyond five years from the completion date (2002) and disclaims any implied warranty of fitness altogether. Moreover, the authorities upon which Watson relies bear no resemblance to this case. Each involved either the sale of a newly constructed home and/or a lawsuit brought by the owner within a reasonable amount of time. See *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 500, 229

S.E.2d 728, 729 (1976) (involving suit brought within one year after the purchase of a new home, and holding that “when a new building is sold there is an implied warranty of fitness for its intended use which springs from the sale itself”); *Tommy L. Griffin Plumb. & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (involving a suit filed five years after construction contract signed); *Terlinde v. Neely*, 275 S.C. 395, 397, 271 S.E.2d 768, 769 (1980) (considering “whether or not a subsequent purchaser of a house may pursue a cause of action in contract or tort against a home builder for a reasonable period after the dwelling's construction”). Watson, by contrast, was a subsequent purchaser of an existing home more than a decade after construction, and Keller neither built nor sold the home to him.

In short, none of the authorities Watson cites supports extending implied warranties to a subsequent purchaser based solely on post-construction statements or monitoring by a contractor who long ago completed its work for another party. The circuit court correctly recognized that there is no cause of action for breach of implied warranty of information and that Keller owed no implied warranty to Watson under South Carolina law.

Additionally, as discussed above, any claim for breach of implied warranty is also time-barred. The undisputed evidence shows Watson had at least constructive notice in 2015 of the very information he now contends Keller failed to disclose. Because the statute of limitations begins to run when a party knew or should have known of a potential claim, Watson’s 2023 filing, eight years later, comes far too late.

D. Promissory Estoppel

Watson’s promissory estoppel claim likewise fails. He contends the circuit court erred in finding Keller made no promise to him and could not reasonably have foreseen that he would rely on its statements. Yet Watson identifies no clear or unambiguous promise by Keller, and nothing

in the record suggests any statement was made under circumstances that could render his alleged reliance either reasonable or foreseeable.

To establish a claim of promissory estoppel, a plaintiff must prove the following elements: “(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance.” *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379–80, 769 S.E.2d 237, 241 (2015) (citing *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005)). Summary judgment is properly granted on a claim of promissory estoppel where there is no evidence of the presence of an unambiguous promise. *See, e.g., Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (affirming the circuit court’s grant of summary judgment where the plaintiff failed to produce evidence of an unambiguous promise in opposing summary judgment). In *Rushing v. McKinney*, this Court found the claimant failed to demonstrate the existence of an unambiguous promise because the terms of the alleged oral contract were unclear, including whether the money would be treated as a loan or capital contribution. 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006). The Court also noted that the claimant’s reliance on the alleged promise was unreasonable due to ambiguities and tensions between the parties. *Id.* Similarly, in *A&P Enterprises, LLC v. SP Grocery of Lynchburg, LLC*, the Court held that the absence of clearly articulated terms precluded recovery under promissory estoppel, as the promise must be unambiguous with definite terms. 422 S.C. 579, 588–89, 812 S.E.2d 759, 764 (Ct. App. 2018).

Here, Watson attributes to Mr. Wolosick (and thus Keller) three supposed “promises” during a brief five-minute call: the system was “heavy duty,” “solid,” and would continue to perform for “60 years.” (Appellant’s Initial Br. 38.) As shown above, the record does not support

an unambiguous promise of a 60-year remaining life. At most, Watson recalled that Keller had “60-plus years” of experience with the technology and that such systems have a long life. (Watson Dep. 27:22–24.) Statements like “heavy-duty” and “solid” are likewise not unambiguous, definite commitments. They are generalized descriptors. *Woods*, 314 S.C. at 505, 431 S.E.2d at 263.

The circumstances also defeat foreseeability and reasonable reliance. Mr. Wolosick did not represent Watson, knew Watson had the documents and would (or should) conduct due diligence, and was aligned with the sellers, not the buyer. (Wolosick Dep. 184:8–13.) In an arm’s-length context, with equal access to the pertinent information, reliance on generalized statements is not reasonable. *See Rushing*, 370 S.C. at 295, 633 S.E.2d at 925; *A&P Enters.*, 422 S.C. at 589–90, 812 S.E.2d at 764. Summary judgment was therefore proper.

Even apart from the dispositive time-bar rulings, Watson’s claims for constructive fraud, negligent misrepresentation, breach of implied warranties, and promissory estoppel fail as a matter of law. The circuit court correctly determined there is no genuine issue of material fact on essential elements, and the judgment should be affirmed.

IV. The Circuit Court’s “Over-Arching Principle” Was a Factual Observation, Not a Legal Error.

Watson’s criticism of the circuit court’s so-called “over-arching principle” mischaracterizes both the Order and the reasoning underlying it. The circuit court did not purport to create or apply a new rule of law; rather, it accurately observed a fundamental factual reality: that Watson, as a subsequent purchaser, sought to assert rights and remedies broader than those available to the original contracting homeowners, Bart and Stephanie Schmidt. The circuit court’s reference to this “principle” was not a dispositive legal doctrine, but a contextual explanation for why Watson’s claims fail under settled South Carolina law.

Contrary to Watson’s contention, the circuit court did not rely on the expired warranty as

the *basis* for dismissal, nor did it treat the absence of a breach of express warranty claim as dispositive. Rather, the court recognized that the Schmidts, the only parties in contractual privity with Keller, were afforded a limited five-year express warranty, capped at \$100,000, and that any rights arising from Keller's work were confined to that contractual relationship. (Order 8–9.) The court's point was straightforward: Watson, as a remote purchaser nearly a decade later, could not expand the scope of Keller's duty or resurrect time-barred claims that even the Schmidts themselves could no longer assert. That factual context informed, but did not replace, the circuit court's separate and detailed analysis under the statutes of limitation and repose, as well as the specific elements of each claim. The Order's reasoning is thus fully supported by the record and established precedent.

Watson's reliance on *Kennedy* and *Terlinde* is misplaced. Those cases recognize that a builder may, in certain circumstances, owe a duty of care to the homeowner to perform construction of a new home in a workmanlike manner. They do not hold that a subsequent purchaser, years removed from both the construction and the contractual relationship, acquires greater or perpetual rights against the builder. Indeed, this situation is entirely distinct, as the construction at issue is not of a new home and the alleged issue was not latent. The circuit court's recognition that Watson could not occupy a superior position to the Schmidts was therefore entirely consistent with *Kennedy* and its progeny.

The "over-arching principle" was not a substitute for legal analysis but rather a commonsense observation consistent with the statutes of limitation and the statute of repose. Moreover, Watson's assertion that the circuit court viewed the evidence in the light most favorable to the moving party is belied by the order itself, which recites undisputed facts and cites record evidence demonstrating that no genuine issue of material fact existed. The circuit court's

reasoning is firmly grounded in law and fact and reflects proper application of the summary judgment standard.

Even if framed as a “principle,” the circuit court’s observation remains legally sound. It is indeed contrary to law and logic to place a subsequent purchaser in a better position than the original contracting party, particularly where the subsequent purchaser had access to the same documentation, was not a party to the warranty, and purchased the property nearly a decade after Keller’s work was completed. As the circuit court recognized, Watson’s claims essentially seek to resurrect obligations long since extinguished by contract, statute, and time. Far from evidencing error, the “over-arching principle” reflects the circuit court’s correct understanding of the equities and the law governing this dispute.

CONCLUSION

For all of the foregoing reasons, the circuit court correctly granted summary judgment to Keller. Watson’s claims are time-barred by both the statute of limitations and the statute of repose, and he has failed to adduce evidence creating a genuine issue of material fact on any essential element of certain of his causes of action. Because the circuit court’s ruling is supported by both the law and the evidence, Keller respectfully requests that this Court affirm the order below in its entirety.

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