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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Hugh T. Watson

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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In 2015, Hugh Watson was considering purchasing a home on Lake Keowee in Salem, South Carolina. He became hesitant when it was disclosed to him that the home had undergone slope stabilization measures years earlier to prevent the structure from sliding downhill towards the lake. The owners assured him that he had nothing to worry about and explained that the engineer in charge of that project, John Wolosick with Keller North America, Inc.[1] ("Keller"), had offered to talk to prospective purchasers. Mr. Watson therefore reached out to Mr. Wolosick and, during a phone call, Mr. Wolosick assured him that the system was performing, would last for at least sixty years, that the slope was stable, and that the lake house "wasn't going anywhere." Based on this, Mr. Watson purchased the home as his primary residence.

But – as Mr. Watson would later learn – there was much more to the story than Mr. Wolosick had let on. Prior readings of a built-in inclinometer had shown that, in just three years, the system had experienced twice the movement that Keller had expected over a five-year period. Further readings demonstrated that the system was continuing to move, which data Mr. Wolosick described as "unusual and a bit perplexing . . . ." Wolosick had discovered that the soils were weaker than he had anticipated and that there was a "progressive slide" in soils to the right of the stabilization system that was "tugging" on the system. In 2006, the owners had reached out to Wolosick with concern after a water line broke – something that had occurred with prior slide movement, prompting further readings and investigation. And, at the point of the call with Watson, Wolosick had not visited the property for eight years. Mr. Wolosick mentioned none of this on the call – not even the existence of the built-in inclinometer. He simply assured Watson that the system on the home he was considering purchasing was fine and he had no cause for concern.

[1] Hayward Baker, Inc. performed the stabilization work in this matter. Keller North America is the successor by merger to Keller, Inc. (R. p. 23). As the lower court refers to this defendant as Keller, Appellant will do so here.

In May of 2020, Watson discovered a crack in his kitchen wall and called Mr. Wolosick. The engineer visited the property a couple months later and, during that visit, suggested that Mr. Watson have measurements taken from the built-in inclinometer. When another company then came to the site and attempted to take readings, they were unable to get the probe to descend to a sufficient depth within the inclinometer casing. Ultimately, a camera lowered into the tubing revealed that the reason the probe would not descend was that the system had undergone such severe movement that the casing had been bent.

Mr. Watson engaged two engineers – one with experience in foundations and soil movement and another geotechnical engineering experience. The engineers opined – in affidavits attached to the Complaint and in depositions – that the residence is not stable and that the slope stabilization system has not stopped movement of the slope. The engineers further opined that Keller, as well as the company it hired to design the system, were negligent and grossly negligent in the design and construction of the system. The engineers also stated that Mr. Wolosick and his company were grossly negligent in failing to recognize and respond to the warning signs that showed that the system was not effective. Notably, even Mr. Wolosick agrees that "significantly more movement has occurred" since the system was installed, which has resulted in new cracks in the home, though he blames other causes.

Despite all of this, the lower court granted the Defendants' motions for summary judgment. Oddly, the lower court felt that the "overarching principle" behind its summary judgment holding was that the prior homeowners had a five-year express warranty, even though none of Mr. Watson's claims is for breach of the express warranty. Further, the court – after reciting evidence viewed in the light most favorable to the *Defendants* – stated that there was simply "no evidence from which a jury could conclude" that the Defendants were grossly

negligent and granted summary judgment as to all of Plaintiff's claims other than promissory estoppel, which was granted separately.

This appeal followed.

STATEMENT OF THE CASE

A. Construction and Initial Settlement

In the early 1990s, Bart and Stephanie Schmidt constructed a home at Lake Keowee. (R. p. 1377, lines 8-14). Approximately five years later, the lakeside of the home had experienced significant settlement. (Id. at R. p. 1378, lines 17-24.) After failed attempts to lift the foundation of the home using helical piles, the Schmidts hired Keller. (Id. at R. p. 1379, lines 7-10).

Mr. Wolosick visited the property and quickly identified the problem – the helical piles had effectively attached the home to an underground landslide. (R. p. 852, lines 1-4). Keller then detached the helical pile anchors. (Id. at R. p. 852, lines 18-25). Wolosick then reached out to Brad Campbell with D'Appolonia Engineering to design a slope stabilization system to address the landslide. (Id. at R. p. 854, lines 19-25; R. p. 855, lines 1-3).

B. Completion of Work and Installation of Inclinometer

The companies performed their work in 2002. (Id. at R. p. 1031, lines 22-24). As part of the work, Keller installed an inclinometer – an encased tube that descended into the earth into which a measuring device could be lowered to monitor movement. (Id. at R. p. 933, lines 2-20). Mr. Wolosick explained that the installation of an inclinometer on a residential project was not typical and this was the only residential project he could recall where that was done. (Id. at R. p. 935, lines 2-7).

C. Warranty

Keller also provided an express warranty to the Schmidts at the conclusion of the project. (R. p. 1153). Mr. Wolosick explained that this was not a standard practice of the company and was specially drafted at the request of Mr. Schmidt. (R. p. 914 lines 16-22).

The warranty provided, in part, as follows:

> For a period of 5 years from the completion date (April 6, 2002) of the work at the above referenced property, HBI warrants that the slope area affected by the slope retention program (hereinafter "the Area") shall not experience movements greater than ¾ inch horizontal, as measured by the installed slope inclinometer over the term of this Warranty. . . .
>
> Additional slope stabilization work will be performed, if required by detailed engineering review, at no additional cost to Owner if movement in "the Area" exceeds ¾ inch horizontal movement within the 5-year period from the completion date. The obligations of HBI *under this Warranty* will be limited to performing additional slope stabilization work to stop any additional movements within the herein stated ¾ inch criteria. In no event shall the cost expended by HBI to perform such additional work exceed $100,000.

(R. p. 1153 (emphasis added)).

Asked about the express warranty in his deposition, Mr. Wolosick stated that he was not involved and minimized the idea of the 3/4-inch benchmark set out in the warranty. (R. p. 916, lines 4-19). Asked whether there would be an outer limit at which the amount of movement was excessive, Mr. Wolosick replied: "Yes, definitely. Anything that would cause damage to the house is excessive." (Id. at R. p. 916, lines 20-25; R. p. 917, lines 1-15).

D. Movement in November 2004

As noted, the system installation was completed in April of 2002. In November of 2004, inclinometer readings showed movement of one inch. (R. p. 1155; R. p.939, lines 19-24). Rather than expressing a lack of surprise at such movement, Mr. Wolosick sent the data to others to attempt to determine if the inclinometer had malfunctioned and provided faulty readings. (Id.

at R. p. 940,lines 1-16; R. p. 942, lines 7-19). The third-party – Erik Mikkelsen with Geometron – confirmed the readings were valid. (R. pp. 1157-1164). Mr. Wolosick then went to the residence and had lunch with the Schmidts. (Id. at R. p. 943, lines 4-10). At that visit, he "looked around the house, looked at the old cracks. They were gone and all their finish, you know, was still looking good. So there was no damage whatsoever." (Id.) In his deposition, Mr. Wolosick minimized the importance of the reading, stating that "one inch isn't going to damage the house. I mean it's – one inch horizontally is nothing." (Id. at R. p. 943, lines 17-19).

Mr. Wolosick reported the readings to D'Appolonia, as the designer of the system. (R. pp. 1157-1164). In doing so, Mr. Wolosick reported that there was no damage to the house. (Id.) D'Appolonia took no action and made no investigation, but simply replied, noting the lack of distress to the residence and concluding that the slope stabilization system was performing well and no additional measures were required. (Id.). Mr. Wolosick then wrote to the Schmidts, advised of the reading, and stated: "Based on the evaluations of the data by our engineers, the system is performing well, and as intended. No additional work is required at your residence." (Id.)

E. June 2005 – Further Movement

In its letter in October of 2004, Mr. Mikkelsen recommended an additional set of readings of the inclinometer in March or April of 2005 to verify that the system was functioning properly. (R. pp. 1157-1164). When this was done by a company called QORE in June of 2005, the readings showed that another ½ inch of movement had occurred since the last reading, resulting in total movement of 1.5 inches since the initial reading at the installation of the system. (R. pp. 1165-1171). The report noted: "The majority of the slope movement appears to have occurred near the ground surface and at about 28 feet below grade level." (Id.).

Mr. Wolosick wrote an e-mail to Mr. Schmidt relaying the findings:

> Bart: Well, the inclinometer shows some more slight movement. I have attached Tim Russell's report to this email. The readings indicate movement of about ¼ inch over the last year. *This is a very small amount of movement, but it is somewhat unusual and a bit perplexing to us. We have studied the movement profile and find that the soil is continuing to bulge, ever so slightly under the anchor system. In addition, there has been some surface movement, which is in itself not usually a big concern. These movements have caused the anchor system to deflect about 1/8 inch, so it is taking on more load*.
>
> We think we should wait another 6 months and take an additional reading that we will pay for. There is a possibility that all the wet weather has raised the ground water table in general, which can add loading.[2]

(R. p. 1172 (emphasis added)). Bart Schmidt then responded, joking: "Should we put a rope around the house and tie it to a tree?" (Id.). Mr. Wolosick responded with a reassuring e-mail, noting the movements are "very small" and only detectable due to the inclinometer. (Id.). He continued: "So far, this movement is not enough to cause problems. We just need it to stop!" (Id.). Mr. Wolosick did visit the property in that summer but took no further action. (R. p. 974, lines 9-13).

Mr. Wolosick testified as follows about his reaction to the QORE report:

> The only thing I recall is that we were concentrating on damage to the house and I believe I reported to him that I talked to the Schmidts and they said we don't have any damage. And I said well, if you – if you see anything that you're concerned about, you know, you hear a pop, you see a crack, call us.

(R. p. 966, lines 2-8).

F. <u>October 2006 – Water Line Break</u>

The Schmidts e-mailed Mr. Wolosick in October of 2006 to report that a water line had broken:

[2] Notably, despite citing this to the Schmidts as a possible explanation, Mr. Wolosick testified early in his deposition that the design had assumed a higher water table to account for just such eventualities. (R. p. 867, lines 17-33).

> Dear John: Hope all's well with you! Probably the first time we have had to call a plumber in two and a half years. Last night just before midnight our water main PVC pipe broke just outside the house wall. This has happened about the same point at least three times prior to your big fix. There was a tension break in the one inch fitting at a joint about two feet from the outside house wall. The break, or pipe movement gap was about 5/8" after we had dug it up. The main water line goes out of the house directly towards the lake, about 15 feet (past the walkway), then a 90 degree turn to the right and up the hill to the street. The previous breaks were attributed to the landslide movement towards the lake, pulling the pipe with it. Your comments would be appreciated. May we supply any additional information, and we may have a photo if that would help (if we can get it onto my machine!). Kind regards, and thanks for your assistance.
> Bart & Stephanie

(R. pp. 1173-1180) . Mr. Wolosick responded:

> Bart: Please send the photo when you can.
>
> As I mentioned when we had lunch at your house, there is another landslide that has developed to the right side, looking downhill, in your yard. That landslide is pulling on the right side of the block of earth that failed previously. The scarp of that slide exposes the big PVC pipe that runs along the edge of your yard.
>
> I would guess that this slide has progressed and you have a taller scarp showing even more PVC pipe than when I was there last time. Has the separation at the top of the stairs grown?
>
> This secondary slide is tugging, through friction, on the side of the previous block. We should have your inclinometer read again.
>
> Unfortunately, I have been working out of town quite a bit and out of the office. But you can always call or email me. I will try to get over, but I am unavailable for a few weeks.

(Id.). Mr. Schmidt responded with five photographs. He commented that one photo was showing earth movement towards the lake and asked if they should contact QORE. (Id.).

Mr. Wolosick reviewed the photos and responded:

> Bart: OK. Wow, there is a progressive slide that has developed in front of the big scarp of the new slide. I think it would be prudent to have Qore read the inclinometer again.

(Id.).

G. November 2006 – Continued Movement

As suggested, Mr. Schmidt engaged QORE to take another inclinometer reading, which was done on October 31, 2006. QORE found that "[t]he slope has experienced an additional movement of 0.1 to 0.2 inches, depending on the depth and axes, since our last survey on June 28, 2005" and that "the majority of the slope movement appears to have occurred at about 28 feet below grade." (R. pp. 1181-1188).

Asked what he did in response to this report showing, on the heels of the water line break, continuing movement in the slope, Mr. Wolosick responded as follows:

> And so I talked with the Schmits and I said, okay, any cracks, any pops in the house, any damage you're hearing? No, everything's fine. And so I said, well, if you recall when we looked at the hill and the photos you sent, I believe that the second slide is occurring and is rubbing on the side of what we've got going on there. The good thing is, is that our system is powerful enough to resist that and as long as you don't have any damage we're good.

(R. p. 983, lines 12-21). This conversation took place in December of 2006. (Id. at R. p. 983, lines 22-24).

H. No Further Investigation

Mr. Wolosick cannot recall with any certainty any other communication with the Schmidts until he was contacted by Stephanie Schmidt in 2015. Asked why he conducted no further investigation during this nine-year period, and just assumed that the movement had stopped, Mr. Wolosick replied: "*It may not have stopped* but it didn't move enough to damage the house." (R. p. 985, lines 1-2 (emphasis added)).

I. Sale of the Residence

In 2015, Mr. Wolosick received a call from Stephanie Schmidt in which she explained that she and her husband were selling their house. (R. p. 870, lines 17-25). According to Mr. Wolosick, Stephanie Schmidt stated that she assumed a buyer would want to see the documents

relating to the fix and she was unable to locate them. (Id. at R. p. 871, lines 14-17). Mr. Wolosick agreed to provide documents and then asked his assistant "to take the whole file and copy everything that was there . . . ." (Id. at R. p. 986, lines 2-5). Mr. Wolosick commented on the sheer volume of documents – which apparently numbered approximately 600 pages – remarking it was "a stack a foot tall of stuff." (Id. at R. p. 986, lines: 1-5).

J. Hugh Watson Purchases Residence After Conferring with Wolosick

Hugh Watson was looking at another home on Shipmaster Drive when he became aware of the Schmidt residence. (R. p. 571, lines 1-7). The Schmidts disclosed prior slope stabilization work and provided a brief explanation of the work that had been done and Mr. Wolosick's contact information. (Id. at R. p. 574, lines 3-11). Documentation on the work was not provided to Mr. Watson but was available in the house for him to review. (Id. at R. p. 574, lines 11-15; R. p. 575, lines 20-23).

Mrs. Schmidt provided prospective buyers with a note that included Mr. Wolosick's contact information. (R. p. 1393). Within the note, she relayed that: "John assured me that the house is stable and 'won't go anywhere' but the company legally cannot write a letter to that effect." (Id.). She offered that buyers could contact Mr. Wolosick. (Id.).

Hugh Watson called Mr. Wolosick and explained that he was planning to purchase the home and that the Schmidts had told him that Wolosick would be willing to speak with him about the work. (R. p. 988, lines 11-20; R. p. 577, lines 17-25; R. p. 578, lines 1-4). Mr. Wolosick agreed to do so, and he told Mr. Watson about the slope stabilization project and what it consisted of. (Id. At R. p. 578, lines 15-24). He talked about the company, how they were leaders in the field of soil movement stabilization and do work around the country and world. (Id.). And Mr. Wolosick expressed confidence in the system, explaining "it was a heavy duty

system and that [Watson] didn't have anything to worry about because it's solid." (R p. 989, lines 12-16). Mr. Wolosick also stated that the system would last for another sixty years or more. (R. p. 578, lines 22-24).

The call was notable for what Mr. Wolosick *did not* share. Mr. Wolosick shared none of the details of the movement that had taken place between 2002 and 2006. He did not share that he believed that another landslide had developed that was impacting the installed system and having effects upon the house. He did not share that the system had moved beyond the expected threshold within just the first couple of years. He did not share that the readings had been "unusual and a bit perplexing" to him. He did not share that he had discovered that the soils were weaker than he had or that he had observed a soil bulge. He did not share that slope movement had caused water line breaks. He did not share that he had not been to the property for nine years or that the slope may still be moving. He did not even share that an inclinometer was installed on the property and could be utilized to diagnose the movement. Instead – in Mr. Wolosick's own words – he simply told this prospective purchaser "he didn't have anything to worry about . . . ."

Mr. Watson was reassured by the call and felt that Mr. Wolosick seemed "very credible." (R. p. 579, lines 1-2). He was also impressed by the description of the company and did online research that confirmed that Keller was "a big geotechnical company" that seemed "qualified for complex work." (Id. at R. p. 579, lines 16-21). Mr. Watson then closed on the property in May of 2015. (Id. at R. p. 572, lines 15-17).

K. Problems Develop

A few years after moving into the house, in May of 2020, Hugh Watson noticed a crack in the kitchen wall. (R. p. 584, lines 6-17; R. p. 606, lines 3-8). Mr. Watson called and reported

this to John Wolosick on May 17, 2020 and then sent a follow-up e-mail a few days later. (Id. at R. p. 606, lines 9-16). Mr. Wolosick then visited the property on July 8, 2020. (Id. at R. p. 607, lines 3-7).

At the visit, Mr. Wolosick walked the property, looked through the house, examined the crack, and then informed Mr. Watson that there was a way to measure to see if movement is taking place. (Id. at R. p. 607, lines 18-25; R. p. 608, lines 1-2). This was the first that Mr. Watson was aware that there was an inclinometer built-in at the property. (R. p. 604, lines 4-7).

Mr. Watson then arranged for Mr. Mirocha with QORE – now operating under the name S&ME, Inc. – to visit to take measurements. (Id. at R. p. 609, lines 20-22). However, during the visit, Mr. Mirocha was not able to get the probe to descend completely into the tubing. (Id. at R. p. 610, lines 14-19. He opined that the problem was likely due to a kink in the tubing at a depth of approximately 27 feet and a camera probe later confirmed this. (Id. at R. p. 653, lines 8-16).

L. Wolosick and D'Appolonia Reaction

Mr. Watson forwarded the S&ME findings to Mr. Wolosick and asked for his thoughts. (R. pp. 1189-1192). Rather than reply, Mr. Wolosick forwarded the e-mail to Brad Campbell, the person who had designed the system while at D'Appolonia, and asked that he call him. (Id.). Mr. Campbell – no longer employed with D'Appolonia – forwarded the e-mail to D'Appolonia and asked if they would provide him with the file documents. (Id.). Notably, in the e-mail he wrote: "John indicated that it looks like the slide is extending to the east of the remediated zone. *However this inclinometer is between the house and the row of anchor blocks*." (Id.). (emphasis added). Receiving the e-mail from Mr. Campbell, a D'Appolonia representative wrote to other D'Appolonia employees: "We should think about what we send to Brad since we were the designer of the 2006 [sic] rehabilitation." (Id.).

M. Watson Engages Experts

Getting no help from Mr. Wolosick, Mr. Watson engaged his own experts to advise him – Skip Lewis and Jim Kahle. Mr. Kahle has over four decades of experience in geotechnical engineering and significant experience with inclinometers over that period. After being engaged, he and Mr. Lewis visited the property in the fall of 2022. (R. p. 1210, lines 23-25.) At the visit, they took photos of the conditions, examined drywall cracks, and the settlement of a patio. (Id. at R. p. 1210, lines 19-22). They subsequently installed four crack monitors on cracks within the home and at the back patio. (Id. at R. p. 1211, lines 2-7). They also used the available data to do independent stability analysis. (Id.).

Based on their findings, Mr. Kahle and Mr. Lewis discussed whether to condemn the house due to the evidence of continuing creep and subpar safety values. (Id. at R. p. 1216, lines 3-25; R. p. 1217, lines 1-8). They ultimately determined that they would install the monitors for Mr. Watson to watch and, if they began to open up significantly, he may need to leave the house. (Id. at R. p. 1217, lines 1-8). Mr. Kahle stated that there is continued movement of the slope with resulting soil settlement. (Id. at R. p. 1218, lines 11-23). It is very possible that, as a result, soil is settling and slipping down the slope, resulting in the house being left cantilevered over a void. (Id.).

Mr. Kahle found errors in the D'Appolonia design and drawings. First, he noted that 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 R. p. 1220, lines 1-8). Second, he found that the water table was actually higher than that used by D'Appolonia in its analysis. (Id. at R. p. 1220, lines 24-25; R. p. 1221, lines 1-2). Third, D'Appolonia did not properly estimate the slope level below lake level, even though this information was available

from publicly-available sources. (Id. at R. p. 1222, lines 17-25; R. p. 1223, lines 1-4). Fourth, D'Appolonia used incorrect figures in calculating the load on the ground floor, failing to take into account loads from upper floors. (Id. at R. p. 1223, lines 6-20). Finally, he found that 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 R. p. 1223, lines 21-25; R. p. 1224, lines 1-8).

Mr. Lewis similarly found errors in the design and calculations. In particular, Mr. Lewis uncovered a significant math error demonstrating that, rather than upsizing the system tendons as intended, D'Appolonia *downsized* them. (R pp. 1615-1616). As a result, the system was under-designed and had a low safety factor. (Id.).

N. Wolosick's Speculation as to Cause

Mr. Wolosick admitted in his deposition that, today, "significantly more movement has occurred" since the system was installed, which has resulted in new cracks. (R. p. 953, lines 12-21). He admits that – well beyond the ¾-inch figure the parties discussed years ago – there has now been three-to-six inches of movement. (Id.).

However, Mr. Wolosick denies that any of this is the responsibility of Keller or that it could be due to some failure of the system or design. Instead, he speculates that the cause is grading work done during Mr. Watson's ownership. (Id. at R. p. 953, lines 23-25; R. p. 954, lines 1-9). Mr. Wolosick stated that, when he visited the property in 2020 – *fourteen years* after his last visit – he noticed that the backyard was very different.

> When I was nice enough to stop by Hugh's house because I had a friend who had just recently built a house on the lake and I was going up there anyway to look at it, we saw – Hugh showed us all the documentation that was about a foot tall. We reviewed the plans and everything and I told him I'd just – this just doesn't make sense to me because he showed me – there was one little crack in the kitchen, but there was a big crack in the basement that they had just recently drywalled,

> repaired okay. And then, after all that we went around the backyard. I didn't recognize that place. It was like it was so different it was incomprehensible. *I would say* hundreds of tons of soil were shifted, moved, placed in that backyard which was an absolute terrible idea. And it added – what is causing all this movement and there was no doubt in my mind – there was no movement at that place from 2006 until he noticed it. He lived there for four years without any movement. But oh, we do a mass – we do a $50,000, eight week – they spent much longer than we spent repairing the thing, grading project in the backyard and they completely destabilized the thing. The anchors are hanging in there because we tested them to 33 percent over, but *heaven knows what they're stressed at right now* because of a[n] incomprehensible mistake that somebody would make. And not only that, with all the digging they did they could have – *they could have* struck the anchor system and damaged it. That place doesn't look anything like it looked before.

(Id. at R. p. 955, lines 3-25; R. p. 956, lines 1-9 (emphasis added)). When pressed on these claims, Mr. Wolosick admitted he was speculating on his claim of "hundreds of tons" of grading, simply based on what he understood Watson to have spent.[3] (Id. at R. p. 958, lines 4-19). He also admitted he had not visited the property since 2006 – fourteen years earlier. (Id. at R. p. 957, lines 9-17).

Mr. Wolosick believes that the grading work – specifically installation of a cart path activated a second, formerly inactive landslide, which is now pulling on the system. (Id. at R. p. 960, lines 9-25). However, he admits that this is an "assumption." (Id.). He even admits that the entire underlying theory – that the second slide is "rubbing on the side of our slide repair" is simply "postulating." (Id. at R. p. 982, lines 1-10). Additionally, as noted above, Mr. Wolosick pins the blame for this entirely on Mr. Watson despite the fact that he told the Schmidts in *2006* that such movement was taking place. (R. pp. 1173-1180).

[3] Notably, Jim Kahle actually reviewed aerial photographs and corresponding topographical maps from 2011, 2015, and 2020 in assessing this claim. He testified that these do not show any change in contour levels where – that would represent a significant amount of filling. (R. p. 1238, lines 11-22). Mr. Kahle also testified he investigated Mr. Wolosick's claim on a visit to the property and "I don't see any evidence of any significant amounts of fill on the lower part of the – on the slope between the house and the . . . fill slope under the patio. . . . I didn't see significant amounts of filling on the site." (Id. at R. p. 1239, lines 5-25; R. p. 1240, lines 1-5).

O. Present Posture

Based on the evidence and opinions of his experts, Mr. Watson brought suit against Keller and D'Appolonia. Following discovery, both Defendants moved for summary judgment, which was granted. This appeal followed.

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is appropriate only 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. See Rule 56, SCRCP; Robinson v. Estate of Harris, 388 S.C. 630, 638, 698 S.E.2d 222, 226 (2010). "In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." See Major v. City of Hartsville, 398 S.C. 257, 259, 728 S.E.2d 52, 53 (Ct. App. 2012). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. See Brandt v. Gooding, 368 S.C. 618, 630 S.E.2d 259 (2006). Where the evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury, rather than resolved at the summary judgment stage. See Vaughan v. Town of Lyman, 370 S.C. 436, 444, 635 S.E.2d 631 (2006). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. See Jericho State Cap. Corp. of Fla. v. Chicago Title Ins. Co., 431 S.C. 437, 444, 848 S.E.2d 572, 575 (Ct. App. 2020).

DISCUSSION

Following a hearing, the trial court granted Motions for Summary Judgment for both Keller and D'Appolonia. As these motions were granted in separate orders, they be addressed in turn:

Summary Judgment as to Keller

Plaintiff asserted six causes of action against Keller: (1) Promissory Estoppel; (2) Negligence; (3) Gross Negligence; (4) Breach of Implied Warranties; (5) Negligent Misrepresentation; and (6) Constructive Fraud[4]. The lower court seemingly ruled for Keller on the majority of the issues based on three grounds: (1) that Mr. Watson cannot place himself in a position superior to that of the Schmidts; (2) that Mr. Watson's claims are barred by the statute of limitations; and (3) that Mr. Watson's claims are barred by statute of repose, finding no genuine issue of material fact as to any issue. The Court then granted summary judgment on the remaining issues.

A. The Court Erred in Applying its "Over-Arching Principle" Which is Unsupported by Law

(1) Preamble to Order

The Discussion section of the Court's order begins as follows:

> *The fundamental flaw in all of Plaintiff's claims against Keller* is that they seek to place Plaintiff in a position superior to that of C.B. and Stephanie Schmidt – the prior owners of the subject project who commissioned Keller to stabilize the slope beneath their residence. Keller's five-year warranty on the stabilization work was provided directly to the Schmidts and limited to $100,000 for additional stabilization if horizontal movement exceeded ¾ inch.
>
> . . .
>
> It bears repeating that the Schmidts, as the contracting homeowners, were entitled to only a five-year warranty limited to $100,000. Plaintiff, however, attempts to

[4] Plaintiff also included a cause of action for Fraud but this cause of action is not being pursued on appeal.

> assert rights under that expired warranty while simultaneously demanding recovery far exceeding its express limitations.
>
> Plaintiff's argument – that Keller failed to perform additional stabilization "[d]espite this clear evidence of continued movement["] – is both legally and factually unfounded.[5] This mischaracterization underscores the implausibility of Plaintiff's position: he seeks to assert rights the Schmidts waived long ago and recover damages far beyond anything they could have plausibly claimed under the warranty.
>
> It defies law and logic to place Plaintiff in a better position than the contracting homeowners for alleged defects on a project governed by a limited five-year warranty. *This overarching principle guides the Court's evaluation of the Plaintiff's claims and Keller's Motion for Summary Judgment*.

(R. pp. 30-31 (emphasis added) (internal citations omitted)).

(2) The Over-Arching Principle is Unsupported by Case Law

There are a number of problems with the above. First, the Order states that Mr. Watson "attempts to assert rights under [the] expired warranty . . . ." (R. p. 30). The face of the Complaint makes clear that this is not the case. Plaintiff does not include a cause of action for Breach of Express Warranty.

Second, the Court incorrectly states that "the Schmidts, as the contracting homeowners, were entitled to *only* a five-year warranty limited to $100,000." (See id. (emphasis added)). This was certainly the case under the terms of the *express* warranty, but the Order cites to no authority or principle of law which would bar the Schmidts from asserting the causes of action asserted by the Plaintiff, based on the alleged failure to properly design, construct, and then repair the system. For example, had the Schmidts chosen to file suit, they might have brought claims in tort despite the express warranty, based on defective design or construction or failure to respond to the inclinometer readings. South Carolina has long recognized a legal duty imposed

[5] The only way to reach this conclusion is by considering the evidence in the light most favorable to the *moving* party. This statement demonstrates that the Court considered the Motions for Summary Judgment through an incorrect lens – failing to view the evidence and all inferences in the light most favorable to the non-moving party. This will be further addressed below.

on builders to undertake construction that is commensurate with existing industry standards. See, e.g., Kennedy v. Columbia Lumber and Mfg. Co., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). For example, in a situation where the owner of a newly-constructed home discovers defective work, his remedies are not limited only to any express warranty.

Third, it is axiomatic that different parties have different claims – and are subject to different defenses – based on their differing circumstances. A simple example would be that Keller could raise defenses – and potentially assert claims – in relation to the Schmidts based on their contract or individual dealings.

That the Court begins the Order by reciting this unsupported "principle" as evidence of a "fundamental flaw" in Plaintiff's case and further notes this as an "overarching principle" guiding the Court's evaluation of the claims is a clear indication at the outset that the ruling is flawed.

B. The Court Erred in Finding that All of the Plaintiff's Claims are Barred by the Statute of Limitations

The Court next found that all of the Plaintiff's claims against Keller – with the exception of promissory estoppel – are barred by the three-year Statute of Limitations. In support of this argument, the Court held: "The undisputed evidence shows that Plaintiff knew or should have known of a potential claim against Keller in 2015." (R. p. 33). The Court's finding – and the evidence and statements made in support of it – demonstrate that the Court inverted the standard for summary judgment, viewing the evidence and all inferences in the light most favorable to the *Defendant*.

(1) Law – Statute of Limitations Ordinarily a Question for Jury

The statute of limitations is governed by the discovery rule which provides that the statute of limitations period begins to run when a person knew or, by exercising reasonable diligence, should have known of the claim. See Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). Where there is a question of fact, as to the date of discovery, the question is one for a jury. See Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 185, 708 S.E.2d 787 (Ct. App. 2011).

The statute of limitations defense is an affirmative defense. See Rule 8(c), SCRCP. As such, the burden for proving the applicability rests with the party asserting it. See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116, 687 S.E.2d 29, 33 (2009).

(2) The Court Improperly Applied the Law and Applicable Standard

The Court found that the statute of limitations on all of Mr. Watson's claims (other than promissory estoppel) began running in 2015, when he purchased the residence. (R. p. 32). The question on appeal is therefore as follows: **Viewing all evidence and inferences in the light most favorable to Mr. Watson, is it true that the only reasonable inference from the evidence is that Mr. Watson was on notice of his claims when he purchased the property?**

The Order cites to the following in holding that there is no genuine issue for a jury on this point:

- Mr. Watson was aware, through the Seller Disclosure Statement, that Keller had performed slope stabilization work. (R. p. 32).
- The Schmidts had documentation available for Mr. Watson's review when he visited the home. (See id.).
- Once he purchased the house, additional documentation was left within the house. (Id.).

On top of this, the Court claims that Mr. Watson failed to conduct reasonable diligence, holding as follows:

> Crucially, the Schmidts provided an overview of the work that was done by Keller and had documentation available for potential buyers' review. Yet Plaintiff admits he merely "thumb[ed] through the – the documentation.["] Plaintiff also admits he did nothing to investigate the slope stabilization project before he purchased the house other than having one conversation with Wolosick. Furthermore, Plaintiff acknowledges that the documentation he now uses to support his claim was readily available in his own home at the time he purchased it. Still, once he found these documents, he did not reach out to the Schmidts regarding the slope stabilization project or conduct any investigation into the matter. What's more, in addition to the crack that Plaintiff noticed in 2020, which prompted him to call Wolosick (allegedly beginning the statute of limitations clock), there were numerous cracks, erosion, and slopes in the flooring noted and photographed on the inspection report conducted for Plaintiff prior to his purchase of the property.

(R. p. 32). A basic look at each of these points reveals that the Court is viewing the evidence – and all inferences – in the light most favorable to *Keller*.

(3) Mere Awareness of the Work Performed

First, it cannot be said that mere awareness of the fact that Keller performed soil stabilization work constitutes notice to Mr. Watson of a claim. The Plaintiff's claims are not based on the fact that Keller performed the work, but on the Plaintiff's allegations (supported by experts) that Keller performed the work improperly and failed to repair or respond to movement – in a negligent or grossly negligent manner. An analogy to this assertion would be that a homeowner is on notice of claims of defective construction simply by being aware that the house was built. It simply cannot be said that the only reasonable inference to be drawn from Mr. Watson being aware that Keller had done soil stabilization work is that he was aware of a *claim* regarding the same.

(4) Availability of Documentation is Not Notice of a Claim

Second, the mere availability of documentation relating to the work performed by Keller is not conclusive evidence of notice of a claim. To begin with, it must be remembered that the documents in question are documents reflecting complex geotechnical engineering findings.[6] Defense counsel joked about the complexity of the documents during the summary judgment hearing, remarking: "we've got these calculations package, I'd be happy to hand it up, it's a bunch of trig[onometry] that, you know, I can get ChatGPT to help me solve." (R. p. 1414, lines 10-13). Mr. Wolosick repeatedly stressed the complexity to Plaintiff's counsel during his deposition. (R. p. 944, lines 18-20 ("if you haven't studied plastic bodies and elastoplastic theory I can't give you a primer on that this afternoon"); R. p. 952, lines 3-12 ("I'm sorry. But this is incomprehensible questioning. I don't know how to explain to you without going to school for four years.")).

At one point, Plaintiff's counsel asked Mr. Wolosick about one of the reports contained within that documentation – from Erik Mikkelsen at Geometron discussing inclinometer data from a reading and the following exchange occurred:

> Q. There you go. So what is – what is he – what is Mr. Mikkelsen explaining here? There are two data points. There's February 13th of '04 and July 9th.
>
> A. *So this is a complicated thing*. So he's got – so he's got the readings from one way and he's got readings from the other way. The question is what is the real reading. And the real reading as I understand it is the vector sum of these two. Okay. And to know what the downhill measurement is you try to align the A axis downhill, but you're handling a 50 foot long PVC pipe and trying to grout it into the earth while it's trying to float as you pump grout around it.

[6] It must be remembered as well that the documentation in question was a complete copy of Mr. Wolosick's file, which was approximately *600* pages and was described by Mr. Wolosick as "a stack a foot tall of stuff." (R. p. 986, lines 1-5). Mr. Watson also testified that he found the various documents over time, as they had been left in the home, but in various places, and not all together. (R. p. 859, lines 17-25; R. p. 860, lines 1-8).

> And so sometimes the axes don't match up very well or downhill. And so this shows that the axes were slightly off of perfectly downhill because you have a B reading. In the perfect world that B reading would be zero. And so there's a slight skew and he's assessing that skew at 55 degrees. And so you'd have to go in the field with a compass and figure that out.
>
> But basically he was saying that the data that was being reported was accurate.

(R. p. 946, lines 13-25; R. p. 947, lines 1-11 (emphasis added)).

In truth, the only way that a layperson with no geotechnical engineering experience – like Mr. Watson – could make heads or tails of the documentation would be by asking an engineer to interpret the information.[7] And this is precisely what Mr. Watson did when he reached out to Mr. Wolosick prior to purchasing the residence, who assured him that the system was working at the house, "won't go anywhere," and that Mr. Watson didn't have "anything to worry about because it's solid." (R. p. 989, lines 12-16; R. p. 1393). In fact, according to Mr. Wolosick, even then different engineers might have different opinions regarding the data. (R. p. 952, lines 20-25 ("that was and is my educated engineering judgment . . . [a]nd you can ask another geotechnical engineer and perhaps they would have a different opinion")).

Finally, it must be noted that the Defendants present a particularly odd contradiction on this point, arguing that (1) on the issue of *liability*, the documents and data can be read to show a perfectly functioning system and (2) on the issue of the *statute of limitations*, that the documents and data present clear proof of a claim for defective work which started the clock on the statute of limitations the moment Mr. Watson received them.

Here too, it cannot be said that the only reasonable inference from the mere fact that the various documents were available to Mr. Watson was that he was necessarily on notice of a

[7] It is perfectly conceivable that, even if able to wade through the qualifying language and data to ascertain movement within the system of 1 ½ inches, this might sound like a small number signifying a well-functioning system to a layperson while it may be a red flag to a geotechnical engineer.

potential claim such that the statute of limitations period began to run. The only way such a conclusion can be reached is by viewing the evidence – and all inferences – in the light most favorable to *Keller*.

(5) Cracks in the Residence at the Time of Purchase

The same analysis holds true with regard to claims within the Order that the existence of cracks in the home – observed by the home inspector at the time that Mr. Watson purchased the property – somehow constitute conclusive proof that Mr. Watson was on notice of claims. It is undisputed that Mr. Watson was aware that the prior owners had to engage a soil stabilization company. This was the reason that Mr. Watson called Mr. Wolosick. It therefore should not surprise a buyer in this situation if – when he looks to purchase the home – cracks are observed. In fact, Mr. Wolosick testified that there were cracks in the residence during the time the *Schmidts* owned the property. (R. p. 943, lines 4-10 (noting that on a visit in 2004 he "looked around the house, looked at the old cracks")). The key is not the existence of cracks but the existence of *new* cracks. Once Mr. Watson observed a new crack in May of 2020, he reached out to Mr. Wolosick.

(6) Claims of Lack of Reasonable Diligence are Unsupported by the Evidence

The Order also asserts that the statute of limitations period ran from the moment that Mr. Watson acquired the home because of an alleged lack of reasonable diligence on the part of Mr. Watson. (R. p. 33). The Court wrote:

> Plaintiff was far from reasonably diligent after acquiring knowledge of the purported soil stabilization issue and was on notice of potential claims against Keller as early as 2015. Plaintiff knew the Schmidts had previous stabilization work done by Keller during the very time period that Plaintiff was determining whether to purchase the property and conducting inspections of the residence. Plaintiff admits he called Wolosick to discuss the work done by Keller *decades* earlier. But that is where Plaintiff's "diligence" stopped: thumbing through the documents regarding the project and one phone call to Wolosick.

(R. p.33 (internal citations omitted) (emphasis in original)).

Mr. Watson was made aware of the soil stabilization work but assured by the prior owner that the issue had been resolved and that the engineer who oversaw the project stated that the house was secure. Yet, rather than accept this, Mr. Watson called the engineer himself and had a conversation in which Mr. Wolosick admits that he assured Mr. Watson that he didn't have "anything to worry about because it's solid . . . ." (R. p. 989, lines 12-16).

The Defendants certainly may argue that Mr. Watson should have done more. Perhaps they will argue at trial that Mr. Watson should not have believed Mr. Wolosick and should have engaged his own engineers. They may certainly make such arguments, but these are questions for a jury. As with the other points, it cannot be said that the *only* reasonable inference to be drawn from these facts is that Mr. Watson did not exercise reasonable diligence. Only by reading these facts and the inferences in the light most favorable to Defendants can this be done.

(7) Summary – The Light Most Favorable to the *Moving* Party

The above taken together establishes firmly that – in considering the evidence and inferences relating to the running of the statute of limitations – the lower court simply inverted the standard to be applied in considering a motion for summary judgment. All evidence was construed in the manner most critical to the Plaintiff and all inferences therefrom were construed against Mr. Watson.[8]

C. <u>The Court Erred in Finding Plaintiff's Claims Barred by the Statute of Repose</u>

In addition to ruling on the statute of limitations, the Court found that there was no genuine issue of material fact as to the application of the statute of repose. In so holding, the

[8] The Order is replete with adversarial comments which assume the worst about Mr. Watson. (R. p. 34 ("Plaintiff turned an unreasonable, and perhaps intentional, blind eye to the very claims that he now asserts he 'discovered' in 2020.")).

Court found that the Plaintiff presented "no evidence" to meet the exceptions to the statute of repose and there was therefore no remaining jury question as to the same.[9]

(1) Law

S.C. Code Ann. § 15-3-640 provides that "[n]o 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." Section 15-3-670 provides, in part:

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

The statute of repose is an affirmative defense. See F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 37 (4th ed. 2011). As such, the burden rests with the party asserting it.

"Gross negligence is ordinarily a mixed question of law and fact." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). "When the evidence supports but one reasonable inference, it is solely a question for the court, otherwise it is an issue best resolved by the jury." Id. "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Id. Whether conduct constitutes gross negligence is a jury issue if the evidence is conflicting or allows for more than one reasonable inference. Bass v. S.C. Dep't of Soc. Servs., 414 S.C. 558, 572, 780 S.E.2d 252, 259 (2015).

[9] Though the Order does not specify which claims are barred by the statute of repose, causes of action for Breach of Implied Warranties, Negligent Misrepresentation, and Promissory Estoppel are apparently not included as they are addressed in the following section regarding "Plaintiff's Remaining Claims." (R. p. 40).

(2) Genuine Issue of Material Fact as to Exceptions

Plaintiff contends that exceptions to the statute of repose based on gross negligence and recklessness apply. These arguments were supported by affidavits and deposition testimony from the Plaintiff's experts – Skip Lewis and Jim Kahle. In his deposition, Mr. Kahle testified as follows regarding the acts of Keller:

> It's my opinion that the movement of the inclinometers was dismissed by John Wolosick, yes, and that that should have raised more red flags and prompted a more detailed investigation of why the inclinometer was still moving, because it should have stopped.
> . . .
>
> [Mr. Schmidt] called and said he had a water line break, and Mr. Wolosick went out to the site and all he said was, do another reading, have another reading done. I think there should have been more alarm at that point, more thorough investigation of the house by Mr. Wolosick.
>
> . . .
>
> So I think we're talking about potential life safety issues. It was important to investigate it.

(R. p. 1278, lines 3-24). Mr. Kahle further testified: "When the data says that something is not performing as intended, and then if that data is ignored, it's my opinion that would be gross negligence." (Id. at R. p. 1364, lines 14-20).

(3) The Court's Assertion of No Evidence as to Gross Negligence is Factually Wrong

The Order discounted the claims of gross negligence for two reasons: First, the Court held, without any further discussion or evidentiary citation, that the expert opinions rest on no factual basis. (R. pp. 38-39). Second, the Court found that "the evidence establishes that Keller exercised at least slight care in performing its work and Plaintiff has adduced no admissible evidence from which a jury could conclude otherwise." (Id. at R. p. 37).

As to the first point, the assertion that the expert opinions have no factual basis is a conclusory statement that is simply unsupported by the record. As noted above, Mr. Kahle was specific in his affidavit – which he adopted and reaffirmed in his deposition – and in his deposition testimony. Both experts submitted detailed affidavits, which were included with the Complaint, providing reference to specific facts and evidence in support of their conclusions. (R. pp. 79-88; R. pp. 69-78).

As to the second point, the Court misinterpreted the holdings of our courts as to the "slight care" standard and thereby eliminated a question which should have been put to the jury. It is true that our courts have defined "gross negligence" as "the failure to exercise slight care." See, e.g., Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). However, there is more to the definition, and the standard does not allow that a defendant can defeat the suggestion of gross negligence by citing to just *any* action. Instead, our courts have held that "slight care" is contextual and must be measured by what the circumstances reasonably require.

"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." Etheredge, 341 S.C. at 310, 534 S.E.2d at 277, citing Clyburn v. Sumter County District Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994). Gross negligence has also been defined as a relative term and means the absence of care that is necessary under the circumstances. See id.

Our courts have repeatedly found that just any minimal act is not enough to constitute "slight care" and have reversed summary judgment rulings where there was a question for a jury. For example, the facts of Rainey v. S.C. Dep't of Soc. Servs., 434 S.C. 342, 863 S.E.2d 470 (Ct. App. 2021), while from a different context, are analogous with regard to the assessment of the

"slight care" standard. There, DSS caseworkers were summoned to a hospital based on injuries to a child which might indicate abuse. Id. at 345, 863 S.E.2d at 472. The caseworker made visits to the residence three times, without success, then mailed a letter to the parents to schedule a home assessment. Id. at 346, 863 S.E.2d at 472. The caseworker reported the matter to law enforcement and then visited with the mother prior to the scheduled visit, finding no concerns. Id. He then conducted the home assessment and began gathering medical records. Id. at 347, 863 S.E.2d at 473.

When the father again injured the child, the child's guardian sued DSS and asserted gross negligence under the Tort Claims Act. Id. at 348, 863 S.E.2d at 473. The lower court granted summary judgment and the Court of Appeals reversed. Id. On appeal, the agency argued that it had exercised at least "slight care" but the Court of Appeals found that there was evidence to support a reasonable inference that DSS did not meet the standard. Id. at 357, 863 S.E.2d at 478.

In short, Rainey makes clear that slight care does not mean any minimal act but instead the care the situation reasonably called for. Moreover, it is important to note that – in the context of summary judgment – the question for the court was not whether there was any evidence to demonstrate that Keller exercised slight care, but whether *the only reasonable inference from the evidence* is that Keller exercised slight care. In Bass, the Supreme Court of South Carolina reversed the decision to uphold summary judgment, noting:

> the court of appeals seems to have searched the record for evidence to corroborate DSS's theory of the case—that it acted with slight care. However, even though DSS presented some evidence that it acted with slight care regarding certain aspects of its investigation, especially in the pre-EPC removal setting, there was likewise ample evidence in the record that DSS acted with gross negligence with respect to the post-EPC investigation—or lack thereof. Accordingly, we cannot say that the record was devoid of evidence to support the jury's verdict, and we reverse the court of appeals.

Id. at 574, 780 S.E.2d 252. As in Bass, the lower court here searched for evidence to show slight care but disregarded or ignored evidence to the contrary.

(4) Evidence in the Present Case

In the instant case, the evidence is as follows:

- Keller installed the slope stabilization system in 2002.

- At the conclusion of the work, the company provided an express warranty to the Schmidts warranting that the system would not move more than ¾ of an inch within a five-year period.[10]

- In November of 2004, inclinometer readings showed movement of one inch, already beyond the ¾-inch expectation. Mr. Wolosick sent the data to others for interpretation, but took no action, and recommended no action to the Schmidts, minimizing the significance of the movement and insisting the system was performing well.

- In June of 2005, inclinometer readings showed another ½ inch of movement from the last reading. At this point, Mr. Wolosick admitted that the movement was "somewhat unusual and a bit perplexing to us" and noted that data showed that the soil was bulging under the anchor system. Still, he recommended only monitoring but admitted: "We need [the movement] to stop!" He did not visit the property and took no action, simply advising the Schmidts: "well, if you – if you see anything that you're concerned about, you know, you hear a pop, you see a crack, call us." (R. p. 966, lines 2-8).

- In October 2006, the Schmidts reported a water line break outside of the house, which he noted had occurred three times prior to the Keller fix, which breaks were attributed to landslide movement. The Schmidts provided photos and Mr. Wolosick responded "[w]ow" and opined that there was a secondary slide now impacting the anchoring system. But again, Mr. Wolosick did not recommend any action or propose any repairs – which would presumably be covered by the warranty – only more monitoring.

- On October 31, 2006, an inclinometer reading showed continued movement of another 0.1 to 0.2 inches. Again, Mr. Wolosick recommended no action and took no action, instead conducting another phone call: "I said, okay, any cracks, any pops in the house, any damage you're hearing?" (R. p. 983, lines 12-21).

- Asked about the movement in the deposition, Mr. Wolosick testified that the numbers regarding movement were immaterial, but admitted that "anything that would cause damage to the house is excessive." (R. p. 916, lines 2-25; R. p. 917, lines 1-15).

[10] While the Plaintiff is not making a claim under the express warranty, this warranty is evidence of the reasonable expectations of Keller for how a properly-functioning system would perform.

- It is undisputed that damage to the house occurred even during the Schmidt ownership, including multiple broken water lines and the separation of the front stairs. The Order also cites to various cracks in the home which the Defendants attribute to settlement.

- It is undisputed that damage to the house occurred during Mr. Watson's ownership as a result of movement, though the parties dispute the cause.

In addition to these facts, Plaintiffs' experts have each testified that the post-construction actions of Keller and D'Appolonia constitute gross negligence. For example, in the Addendum Affidavit of Mr. Lewis, he states:

> As previously stated in the initial affidavit, I find the actions taken by Hayward Baker and D'Appolonia following post-construction inclinometer readings which confirmed continuing movement of the soil slope to be evidence of gross negligence. I do not make these allegations lightly. Findings which lead me to conclude the post-construction actions of both defendant parties were grossly negligent include:
>
> (a) The initial and subsequent inclinometer readings between April 2002 and October 2006 that show a continuing, progressive lateral movement of the soil mass above and below the anchor blocks. These movements indicate to me a lack of intended restraint, the measurements of which exceed the Hayward Baker performance warranty limiting lateral movement. Following installation of inclinometer and initial inclinometer readings in April 2002, the first monitoring of slope movement occurred in February 2004 and at that time confirmed that movement had already exceeded the 5-year warranty limit issued by Hayward Baker. Hayward Baker represented to the then owner of Plaintiff's house the movement was inconsequential and not problematic.
>
> (b) Subsequent complaints by the original homeowners (the Schmidts) of wall cracks, utility line breaks, and other evidence of soil movement were not taken seriously by Hayward Baker or D'Appolonia in their responses to complaints. Specifically, there is no evidence of any critical analysis or peer review of the design calculations or drawings having been made by either party or any third party following repeated inclinometer readings that illustrated continuing movement of slope soils uphill of the anchor blocks.
>
> . . .
>
> (f) In recent reviews of the D'Appolonia calculations, it has become apparent that a serious design error was also made by D'Appolonia 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. Based on analyses by H2L, it is our opinion the most egregious error is a simple mathematical error which resulted in

a Lock-Off load of 271.5 Kips being specified on plans versus a D'Appolonia calculated load of 380 Kips which we believe to be a correctly calculated tendon load sized to provide a target slope failure Safety Factor of 1.5 as reflected in the D'Appolonia calculations. The impact of this error resulted in an actual Safety Factor of 1.07…well below any standard for an acceptable Safety Factor.

(g) In addition to hand calculations for upslope stability analyses, D'Appolonia performed computer analyses to investigate the effects of installing anchor blocks to stabilized the entire slope from house to lake level. The location of anchor blocks for this study is the same location used for stabilization of only the slope uphill from the blocks. Results from the computer analysis indicate that with anchor tendon loadings of 210 Kips, 350 Kips, and 490 Kips, respectively, the corresponding factors of safety would be 1.139, 1.248, and 1.370 respectively. By comparison, it seems illogical that an anchor load of 271.5 Kips could provide a safety factor of 1.5 for the uphill segment as intended by D'Appolonia.

(R. pp. 1615-1617).

The question before the Court is whether – considering all of the evidence set forth above in the light most favorable to the Plaintiff and with all inferences construed in his favor – does this evidence yield only one reasonable inference, which is that Mr. Wolosick was not grossly negligent? The answer is plainly no.

Keller may certainly argue at trial that the best inference from the evidence is that Mr. Wolosick was not grossly negligent, but there is certainly evidence from which a reasonable juror could find otherwise.

(5) Defendant Has Not Met Burden to Prove Statute of Repose Predicates Have Been Met

Finally, in addition to the application of the gross negligence exception, the Statute of Repose does not apply here as Keller has not satisfied its burden that it has complied with all requirements to invoke the statute of repose as a defense. S.C. Code Ann. § 15-3-640 requires that, in order for the statute of repose to apply, the building permit for the project "must" contain in bold type a notice to the owner or possessor of the property of his rights to contract for a guarantee of the structure being free from defective or unsafe conditions for longer than the

statute of repose period. The "must" language contained within the statute indicates the legislature's intent that this is a mandatory requirement. See Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). No Defendant has produced evidence to satisfy this requirement.

D. The Court Erred in Granting Summary Judgment as to the Plaintiff's Cause of Action for Constructive Fraud

The trial court improperly granted summary judgment to Keller on Plaintiff's claim for constructive fraud, holding "there is no evidence Keller knowingly or recklessly made a false representation to Plaintiff." This reasoning conflates actual fraud with constructive fraud and again improperly construes the evidence and inferences in the light most favorable to the *moving* party.

(1) Lower Court Analyzed Constructive Fraud Cause of Action Applying Law on Fraud

The Order addresses the Plaintiff's cause of action for fraud at page 13.[11] The heading includes a footnote which provides: "The same analysis applies to Plaintiff's claim of constructive fraud." (R. p. 35). This makes clear that the lower court erred in failing to grasp the very significant differences between the two causes of action.

Unlike actual fraud, neither intent to deceive nor actual dishonesty is an element of constructive fraud. See Greene v. Brown, 199 S.C. 218, 19 S.E.2d 114 (1942). Instead, it is sufficient that it be alleged that the defendant ought to have known the falsity of the misrepresentation. See Giles v. Langford & Gibson, Inc., 285 S.C. 285, 328 S.C.2d 916, 918 (Ct. App. 1985).

(2) Jury Question Exists as to Constructive Fraud

The evidence, construed properly, provides that Mr. Wolosick assured Mr. Watson in 2015 that he had nothing to worry about and that the "heavy duty system" was "solid." He

[11] Plaintiff is not pursuing the cause of action for Fraud on appeal.

further stated that the system had an additional 60-year life expectancy. Yet, as outlined in the preceding section, at the time those assurances were made, Mr. Wolosick knew that inclinometer readings had far exceeded the expectations, that the system was showing continuing movement, that the data was "somewhat unusual and a bit perplexing", that the soil was bulging, and that he believed an additional landslide was impacting the system. Given this context, jury could reasonably find these assurances to Mr. Watson were false and that Mr. Wolosick ought to have known they were false, regardless of whether he intended to deceive Mr. Watson.

The lower court's assertion that "there is *no evidence* Keller knowingly or recklessly made a false representation to Plaintiff" misunderstands the analysis of this cause of action. (R. p. 35 (emphasis added)). Viewing the evidence and inferences in the light most favorable to the Plaintiff, there is a question for a jury on this matter and this ruling should be reversed.

E. The Court Erred in Granting Summary Judgment as to the Plaintiff's Cause of Action for Negligent Misrepresentation

In the Keller Order, the Court also found that summary judgment was warranted as to the Plaintiff's cause of action for Negligent Misrepresentation, finding that even if Mr. Wolosick made a misrepresentation, the cause of action fails because the evidence establishes that Mr. Wolosick did not have a pecuniary interest in making the statement. This holding is contrary to South Carolina case law.

Recovery in a negligent misrepresentation action is "based upon negligent conduct and predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation" inducing him to enter into a contract or business transaction. Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 799 (Ct. App. 1992). Negligent misrepresentation is distinguishable from fraud in that, to prove the

latter, the plaintiff must show that the defendant conveyed a "known falsity." See Hurst v. Sandy, 329 S.C. 471, 482, 494 S.E.2d 847, 853 (Ct. App. 1997).

The elements of the tort of negligent misrepresentation are:

(1) A false representation made by the defendant to the plaintiff

(2) A pecuniary interest by the defendant in making the statement

(3) A duty of care owed by the defendant to see that truthful information was communicated to the plaintiff

(4) A breach by the defendant by failing to exercise due care

(5) The plaintiff's reliance upon the representation.

(6) The plaintiff suffered a pecuniary loss as a direct and proximate result of the reliance upon the representation.

See Hurst, 329 S.C. at 481, 494 S.E.2d at 852.

On the element of pecuniary interest, the Supreme Court of South Carolina has adopted § 552 of the Restatement (Second) of Torts (1977) which provides, in part:

> One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability . . . .

Michael G. Sullivan et al., Elements of Civil Causes of Action 455 (5th ed. 2015), citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Our courts have held that not every statement made in the course of commercial dealings is actionable, as statements of puffery, such as expression that a bargain will be satisfactory, do not give rise to tort. See AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868, 874 (Ct. App. 1992).

> However, if the defendant has a pecuniary interest in making the statement and he possesses expertise or a 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. *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.*

See id. at 222-23, 420 S.E.2d at 874 (emphasis added).

In the case at hand, Mr. Wolosick plainly possessed "expertise or special knowledge" that would make it reasonable for Mr. Watson to rely on his judgment. On the call, Mr. Wolosick told Mr. Watson about his company and that Keller was a leader in the field of soil movement stabilization and does work around the country and world. (R. p. 578, lines 15-24). He told Mr. Watson about the slope stabilization project and what it consisted of. (Id.).

As discussed above, the data and documentation in this matter was – by accounts of all parties – very complicated. Mr. Watson was seeking Mr. Wolosick's analysis in his professional capacity. Moreover, the statements made by Mr. Wolosick on the call were made in the course of his business, profession, and employment. Mr. Wolosick had performed the work, monitored the work, and agreed to the request of his client, Mrs. Schmidt, that he speak with prospective purchasers in an effort to help facilitate the sale of the house. Consequently, the pecuniary interest element is satisfied and the lower court erred in holding otherwise.

F. The Court Erred in Granting Summary Judgment as to the Plaintiff's Cause of Action for Breach of Implied Warranties

The Court also granted summary judgment as to Watson's claim for implied warranty, finding that "[a]ny information Wolosick may have provided does not give rise to a cause of action for breach of implied warranty, as there is no evidence of an actionable representation or duty."

South Carolina has long recognized an implied warranty of design adequacy. See Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885, 888 (1951) ("if a party furnishes specifications and

plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view."). Furthermore, the law recognizes an implied warranty of workmanlike service. Where "a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use. Id., accord, e.g. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1994) ("We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties.").

In Robert E. Lee & Co. v. Comm'n of Pub. Works of Greenville, the South Carolina Supreme Court expanded its holding in Polar Pantries by adopting the Spearin Doctrine where it held an owner liable for breach of the implied warranty for furnishing plans and specifications to a contractor based upon the owner's affirmative misrepresentations as to subsurface soil conditions. 250 S.C. 394, 158 S.E.2d 185 (1967). There the owner had furnished the contractor with plans which purported to reveal certain information relating to subsurface materials and conditions along a pipeline route. The South Carolina Supreme Court specifically upheld the trial judge's instructions to the jury which provided in relevant part: "I charge you that failing to record upon the plans the water and subsoil conditions actually encountered constitutes a breach by the defendant of its implied warranty." Id. at 398, 158 S.E.2d at 186.

Here, Wolosick, Keller's agent, failed to inform Watson that the subsoil movements that exceeded the ¾" inch warranty while Watson was contemplating the purchase of the home. Instead, he stated that the system was solid and Watson had nothing to worry about. Watson

relied upon that superior expertise of Wolosick when deciding whether or not to purchase the property. Policy dictates that "[t]he law should not orphan the purchaser of a house, who has likely invested his life savings and executed a 20, 30, or 40 year mortgage." Lane v. Trenholm Bldg. Co., 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976); see also supra, Tommy L. Griffin., 320 S.C. at 55, 463 S.E.2d at 89 (engineer generally has superior expertise than the buyer). Furthermore, the fact that Watson was not in privity with Keller is of no consequence. See, e.g., Terlinde v. Neely, 275 S.C. 395, 398, 271 S.E.2d 768, 769 ("The fact that the subsequent purchaser did not know the home builder, as did the original purchaser, does not negate the reality of the 'holding out' of the builder's expertise and reliance which occurs in the market place.").

G. The Court Erred in Granting Summary Judgment as to Plaintiff's Cause of Action for Promissory Estoppel

The Court also granted summary judgment as to the Plaintiff's cause of action for Promissory Estoppel, finding that Wolosick did not make any promise to Plaintiff, nor could Keller reasonably foresee that the Plaintiff would rely on any statements he made.

(1) Law

South Carolina courts have consistently characterized promissory estoppel as an equitable claim. See Thomerson v. Devito, 430 S.C. 246, 256, 844 S.E.2d 378, 384 (2020). "Promissory estoppel 'is a flexible doctrine that aims to achieve equitable results' and to provide 'a remedy where contract law cannot.'" Id., citing Craft v. S.C. Comm'n for the Blind, 385 S.C. 560, 564, 685 S.E.2d 625, 627 (Ct. App. 2009).

(2) Reliance

To begin with the lower court's latter point, it is difficult to fathom how – viewing the evidence and all inferences in the light most favorable to the Plaintiff – Mr. Wolosick could not

reasonably foresee that a potential purchaser of a home, calling to ask questions about the viability of the slope stabilization system installed by Wolosick, would not be intending to rely on Mr. Wolosick's statements as to the system. There is simply no other conceivable reason for the phone call and the lower court erred in finding that such reliance was not reasonably foreseeable. Mr. Watson testified that he did rely on the promises in deciding to purchase the property and would not have gone through with the purchase otherwise.

(3) Promise

The trial court also erred in holding that Keller's representative made no "promise" to Plaintiff. South Carolina law requires only that the promise be unambiguous in its terms, that the party to whom the promise was made reasonably relied upon the promise, and that the reliance was reasonably foreseeable. Powers Constr. Co. v. Salem Carpets, Inc., 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984).

Here, Plaintiff testified that Keller's engineer affirmatively represented that the stabilization system at issue was "a heavy duty system", was "solid", and would continue to properly perform for another 60 years. (R. p. 989, lines 12-16; R. p. 578, lines 22-24). This was not a casual opinion but a professional assurance from the very company that designed and installed the system—an assurance given directly in response to Plaintiff's inquiry about whether he should purchase the property. Given the known history of slope instability, Keller reasonably should have expected Plaintiff to rely on such assurances in deciding whether to acquire the property.

At the very least, whether Keller's statements amounted to a "promise" under South Carolina law, and whether Plaintiff's reliance was reasonable, are questions of fact for the jury,

not matters for resolution at summary judgment. See Faile, 350 S.C. at 333, 566 S.E.2d at 545 (factually controlled issues are for the jury).

Accordingly, the trial court's ruling granting summary judgment on this cause of action should be reversed.

Summary Judgment as to D'Appolonia

A. The Court Erred in Granting Summary Judgment to D'Appolonia Based on the Statute of Repose

Plaintiff asserted claims against D'Appolonia based on Negligence and Gross Negligence. The trial court found that Plaintiff's claims against D'Appolonia failed because (1) the statute of repose barred the claims and (2) a lack of a legal duty to the Plaintiff.

(1) Statute of Repose

As with Keller, the court found that Mr. Watson did not file his lawsuit within the applicable statute of repose – here 13 years – and that there is no genuine issue of material fact as to whether an exception applies. The same analysis applies here.

As noted above, the question of gross negligence is ordinarily one for the jury. See Faile, 350 S.C. at 333, 566 S.E.2d at 545. Only when the only inference that can be drawn from the evidence – when viewed under the summary judgment standard – is in favor of the Defendant should summary judgment be granted in finding that the statutory exception does not apply.

Here, the evidence establishes that D'Appolonia was apprised of the inclinometer readings by Mr. Wolosick yet did not act and instead made representations that the system was functioning appropriately.[12] Both of the Plaintiff's experts opined that this post-construction failure to act constituted gross negligence. Mr. Lewis testified that D'Appolonia's "failure to review the design . . . and get back to Hayward Baker on whether or not the – the design was

[12] The specific evidence and opinions of the Plaintiff's experts are set forth in detail in the Statement of the Facts and within the Statute of Repose section relating to Keller.

adequate or was short in any particular area, was an act of gross negligence on the part of D'Appolonia." (R. p. 812, lines 2-23). Jim Kahle testified similarly: "When the data says that something is not performing as intended, and then if that data is ignored, it's my opinion that would be gross negligence." (R. p. 1364, lines 14-25; R. p. 1365, line 1). Mr. Kahle emphasized that all of this was of particular importance when talking about life safety issues. (Id. at R. p. 1278, lines 22-24).

The Plaintiff's experts also found gross negligence in the initial design of the system. As noted above, Mr. Kahle found numerous errors in the D'Appolonia design and drawings. First, he noted that 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." (R. p. 1220, lines 1-8). Second, he found that the water table was actually higher than that used by D'Appolonia in its analysis. (Id. at R. p. 1220, lines 24-25; R. p. 1221, lines 1-2). Third, D'Appolonia did not properly estimate the slope level below lake level, even though this information was available from publicly-available sources. (Id. at R. p. 1222, lines 17-25; R. p. 1223, lines 1-4). Fourth, D'Appolonia used incorrect figures in calculating the load on the ground floor, failing to take into account loads from upper floors. (Id. at R. p. 1223, lines 6-20). Finally, he found that 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 R. p. 1223, lines 21-25; R. p. 1224, lines 1-8). Mr. Lewis Found mathematical errors such that, rather than upsizing the system tendons as intended, D'Appolonia *downsized* them. (R. pp. 1615-1616).

Nonetheless, the Court found – as a matter of law – that the steps taken by D'Appolonia in response to the findings of movement (reviewing the inclinometer readings, the report of Mr.

Mikkelsen, and comments from Mr. Wolosick) and in its initial design demonstrated that the company acted with "slight care." However, as discussed above with regard to Keller, this standard does not require just any minimal act, but the absence of care that is necessary under the circumstances. Considering the evidence and all inferences in the proper light, it cannot be said that the only possible inference is that the standard was satisfied.

(2) D'Appolonia's Duty to Plaintiff

The Court also found that summary judgment was appropriate as it found that D'Appolonia had no legal duty to Mr. Watson. This holding does not accord with South Carolina case law.

South Carolina law imposes a duty of care on design professionals to foreseeable third parties who will rely on their work, even absent contractual privity. In Tommy L. Griffin, 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." 320 S.C. at 54, 463 S.E.2d at 88. Likewise, in Kennedy, 299 S.C. at 345, 384 S.E.2d at 737, the Court recognized that construction professionals owe a duty "to exercise due care in planning, inspecting, and supervising" their work, notwithstanding the absence of direct contractual relationships.

Here, Keller retained D'Appolonia to prepare the plans for the slope stabilization system installed on the property to protect the residence. The very purpose of that design work was to stabilize the Schmidts' home and ensure its continued safety. It was therefore entirely foreseeable that the homeowners – and any subsequent purchaser such as Watson – would rely

on the adequacy of that design. Under Griffin and Kennedy, the design group owed a duty of due care to those foreseeable users of its professional services.

Whether D'Appolonia breached its duty and whether such breach caused the Plaintiff's damages are questions for the jury. The trial court erred in concluding otherwise and granting judgment as a matter of law.

CONCLUSION

The Defendants may certainly argue at trial that the statute of limitations or statute of repose applies. They may argue that the evidence asserts their claim that the design and construction were adequate and that the movement Mr. Watson is experiencing is being caused by unrelated forces or due to his landscaping work. They may argue that the actions of the Defendants do not rise to the level of gross negligence.

But it cannot be said that the evidence – especially when viewed through the prism of the summary judgment standard – can yield only conclusions in their favor. The Plaintiff, through documents, testimony, and experts, has presented a jury question. And while Mr. Watson is not entitled to any particular result, he is entitled to his day in court.

Respectfully Submitted,

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