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Dec 29 2025
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.

APPELLANT REPLY BRIEF TO RESPONDENT KELLER NORTH AMERICA, INC.

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As the Court is well aware, in considering summary judgment, the evidence and all inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Yet, like the underlying order, Keller supports its arguments by simply ignoring facts favorable to the Appellant rather than addressing them. There is, for example, no mention in Keller's factual background or analysis of the water line at the residence breaking as a result of soil movement or of Mr. Wolosick's comments that he found the continued movement "perplexing" or of his admission that a second underground landslide had developed, which was pulling on the system.

There are statements by Keller like the assertion that the inclinometer, rendered unusable due to soil movement, was merely evidence of a failed inclinometer, much like suggesting that a gas gauge on empty is only evidence of the direction of the needle rather than an empty fuel tank. Most perplexing, Keller claims repeatedly that Hugh Watson did not investigate before buying the home, in one instance asserting that "if Watson had simply read the documents in his possession *or retained a third party to review them in 2015* . . . he would have 'discovered' the same information upon which his 2023 complaint now relies." See Brief of Respondent Keller, p.12 (emphasis added). This statement pretends that Watson did not consult with a third party when, in fact, he consulted a geotechnical engineer prior to the purchase, and not just any geotechnical engineer, but the one who installed and monitored the system – John Wolosick. Keller simply ignores this conversation and the assurances Mr. Wolosick provided to Mr. Watson.

If the evidence, considered in light of the proper standard, were as clear as Keller claims, there would be no need for such sleight of hand. But it is not. The evidence is conflicting. And

the numerous evidentiary arguments advanced by Keller should be presented to a jury, not a judge.

DISCUSSION

Keller argues that Watson's appeal fails for three reasons: (1) the statute of limitations; (2) the statute of repose; and (3) the alleged failure to present evidence in support of the causes of action. Each is addressed below in turn.

I. Statute of Limitations

A. Keller's Argument

First, Keller contends that Watson failed to file the lawsuit within the three-year statute of limitations. Keller argues this period began running in 2015 – the moment that Watson purchased the house and came into possession of the approximately 600 pages of John Wolosick's file documents. See Brief of Respondent Keller, p.10 ("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."); (R. p. 986, lines 1-5).

B. A Person of Common Knowledge and Experience

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. See 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 when 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).

Keller recites the law on this properly, but glosses over the phrase "a person of common knowledge and experience". Hugh Watson looked at these hundreds of pages of documents as a layperson. And, as noted in the Appellant's Brief, counsel and experts in this case repeatedly acknowledged the complexity of the material, sometimes joking about the matter. (See, e.g., R. p. 1414, lines 10-13) (comments of counsel for D'Appolonia at the summary judgment hearing: "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").

C. Consultation with the Author of the Documents

The fact is that an expert performed this work and generated these documents. And an expert is the only one to properly interpret and understand the documents. A "person of common knowledge and experience" can do only one thing with this data – call a person of *uncommon* knowledge and experience. And this is precisely what Hugh Watson did.

Hugh Watson reached out to a geotechnical engineer. And the person he contacted was not just any geotechnical engineer, it was the one who installed the system and, importantly, the one who generated these documents and from whose file the documents were produced. And Mr. Wolosick, who was more familiar with the documents than anyone, assured Mr. Watson that the system was functioning properly and would hold for at least another sixty years. (R p.989, lines 12-16; R. p. 578, lines 22-24).

Despite these undisputed facts, Keller contends that Hugh Watson should have done more. In particular, Keller asserts that Mr. Watson should have "retained a third party to review" the documents. See Brief of Respondent, p.12. This is a puzzling assertion considering that, at

this point in time, Mr. Watson had just hung up the phone after getting analysis from the very geotechnical engineer who produced the documents.[1]

Presumably, Keller suggests that Hugh Watson should not have believed Mr. Wolosick and should have gotten a second opinion. Keller is certainly free to argue this to a jury but it is worth remembering the posture of this case – the grant of summary judgment to the Respondents on the basis of the statute of limitations. The burden of establishing this affirmative defense rests with Keller. See Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116, 687 S.E.2d 29, 33 (2009). And where there is a question of fact as to the date of discovery, the question is one for the 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 question before this Court is simply whether there is a question of fact as to the date of discovery of the claim in this case. Put more precisely, is Keller correct in saying that the only reasonable inference is that statute of limitations began to run against Hugh Watson on the date when Keller's very own geotechnical expert assured the plaintiff there was no claim?

II. Statute of Repose – The Gross Negligence Exception

Keller next argues that there is no question for the jury as to whether Keller was grossly negligent, such that the statute of repose bars Appellant's claims. Keller acknowledges that, if there is a question of fact as to whether the company was grossly negligent, then summary judgment on this issue was not warranted. But Keller contends that the exception does not apply because the alleged gross negligence – Keller's failure to address the continued movement and

[1] This is particularly true given that Mr. Wolosick spent part of the call telling Mr. Watson of how his company was a leader in the field of soil movement stabilization and does work around the country and, indeed, around the world. (R. p. 578, lines 15-24).

indications of failure of the system[2] – cannot satisfy the gross negligence exception because, according to Keller, these acts and omissions were not done "in connection with" any improvement to real property.

The two sections provide, in relevant part, as follows:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement.

S.C. Code Ann. § 15-3-640.

> 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* .

S.C. Code Ann. § 15-3-670 (emphasis added).

Keller's argument is that it should be given cover under the statute of repose because Watson's claims seek damages "based upon or arising out of the defective or unsafe condition of an improvement to real property" but that it should not be subject to the gross negligence exception because this same conduct was not done "in connection with such an improvement." [3] This contention by Keller amounts to "having your cake and eating it too" and simply defies logic and the intention of the Legislature.

If Watson's claim is encompassed by the "arising out of" language of § 15-3-640, then it necessarily is also encompassed by the "in connection with" language of § 15-3-670. If the Court were to adopt Keller's narrow reading of such language (suggesting construction and post-

[2] As noted below, though the lower court's order indicates otherwise, Keller argues that the statute of repose bars not only the causes of action relating to Keller's post-construction acts and omissions, but also those causes of action based on Wolosick's phone call with Watson. This is further addressed below.

[3] The lower court, too, did not take such an extreme position and this argument is not found within the order.

construction activities are unrelated), then the language of 15-3-640 is similarly not applicable and Keller cannot avail itself of the statute of repose. The question of the application of the exception is then moot.

In reality, the Legislature's clear intent was to create a statute of repose for claims based on improvements to real property but to deny that protection to those who acted in a manner beyond mere negligence. No contortion of the language can allow Keller to seize the protection and leave the exception.

III. Statute of Repose – Applicability to Causes of Action

In its brief, Keller goes even further than the lower court's order and argues that the statute of repose bars not only those causes of action related to the post-construction activity but also those which relate to the representations made by Mr. Wolosick in his call with Hugh Watson. See Brief of Respondent, p.16, FN3. Consequently, Keller contends that even Appellant's causes of action for Constructive Fraud, Negligent Misrepresentation, and Promissory Estoppel, which are based on a phone call which occurred in 2015, began to run in 2002. See Brief of Respondent, p.16.

Watson's claims against Keller based on the telephone conversation in 2015 cannot be said to be claims "arising out of the defective or unsafe condition of an improvement to real property." Watson's claims on these points are not based on the work performed but the representations made. The elements of each cause of action bear this out and Respondent's discussion of the elements within its own brief demonstrate the same. Consequently, while the statute of repose will apply to causes of action based on the post-construction activity, it is too great a leap to apply it to the causes of action based on the call which occurred years later.

IV. Statute of Repose – Slight Care

Keller next argues that summary judgment was warranted on all claims as it argues that "the record, viewed in Watson's favor, supports only one reasonable inference: Keller exercised at least slight care." See Brief of Respondent, p.21.

A. Foundational Principles

As noted in Appellant's Brief, the analysis must begin with the foundational principles that "[g]ross negligence is ordinarily a mixed question of law and fact" and that, "[i]n most cases, gross negligence is a factually controlled concept whose determination best rests with a jury." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). If the evidence on this point is conflicting, then the question is one for a jury. See Bass v. S.C. Dep't of Soc. Servs., 414 S.C. 558, 572, 780 S.E.2d 252, 259 (2015). These principles are to be cast aside here only if the evidence, construed in the light most favorable to Mr. Watson, is such that no reasonable juror could find gross negligence.

B. Keller's Evidentiary Support

Keller claims this is the case and, as evidence in support of this assertion, cites the following: (1) that a third party performed multiple inclinometer surveys; (2) that Keller provided inclinometer data to a geoengineering expert who then opined the soil had stabilized; (3) D'Appolonia concluded no additional measures were necessary; and (4) Keller funded continued monitoring through a certain date.

C. Omitted Evidence

As with other arguments within the brief, Keller leaves out key facts. For example, Keller neglects the timeline of these events. Importantly, the letter from the third party

geoengineering/instrumentation expert – Geometron – considered inclinometer readings from *February of 2004*. (R. pp. 1157-1164). The other letter mentioned by Respondent, from D'Appolonia, which relied on Geometron's report – was dated November 3, 2004 and took pains to note "[y]ou indicated to us that no distress to the Schmidt residence has been noted for the more than 2 years since completion of the slope stabilization system." (See id.).

Keller does not mention that, after obtaining these letters:

(1) inclinometer readings showed consistent, continued movement such that Mr. Wolosick admitted to the Schmidts that the movement was "somewhat unusual and a bit perplexing to us." (R. p. 1172).

(2) Wolosick concluded that the soil was continuing to bulge under the anchor system and that the system was taking on more load. (Id.).

(3) a water line at the house broke in October 2006, which the Schmidts attributed to the soil movement. (R. pp. 1173-1180).

(4) Mr. Wolosick concluded at that time that a second underground landslide had developed and was pulling on the block of earth that had failed previously. (Id.).

(5) a November 2006 reading showed continued movement within the system three years after the installation. (R. p. 1181-1188).

With this context, the third-party opinion letters provide little support to Keller. An analogous situation might be one in which an art dealer is sued for selling a forgery as an original. The dealer might point to letters of authentication from third parties, but if the dealer later obtained information suggesting the work was not authentic, reliance on the earlier third-party letters would not absolve him of gross negligence as a matter of law.

The same is true here. Keller might cite to these factors in arguing to the jury that its conduct did not rise to the level of gross negligence. However, considering all facts and inferences, it cannot be said that no reasonable juror could find that Keller did not provide the

level of care necessary under the circumstances. See Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

This is particularly true given that Appellant's experts opined, with specific examples, that the conduct of Keller constituted gross negligence. Appellant does not simply argue that Keller should have done more, as Respondent asserts. Instead, Appellant contends that Keller's inaction in response to the constant stream of evidence of a failing system constituted an absence of care necessary under the circumstances. Given the evidence within the record – laid out on pages 28 and 29 of Appellant's Brief – it cannot be said no reasonable juror could so find.

V. Statute of Repose – Duty

Keller makes an additional argument with regard to the statute of repose, arguing generally that Keller owed no duty to Watson as to any of his claims. It should first be noted that this is best addressed as to each individual cause of action, since the facts and legal duties differ with each. For example, the legal duties as to the causes of action for Promissory Estoppel, Constructive Fraud, and Negligent Misrepresentation arise from the phone conversation in 2015. Legal duties as to the other causes of action are centered on the post-construction acts and omissions of Keller.

As to the latter, Keller argues the only duty that could have existed during the post-construction period arose from Keller's express warranty to the Schmidts. Keller notes that Watson, as subsequent purchaser, was not a beneficiary of that expired warranty and had no relationship with Keller giving rise to a duty of care.

However, in Carroll v. Isle of Palms Pest Control, Inc., 446 S.C. 177, 918 S.E.2d 532 (2025), our supreme court found that a duty of care can arise where a party undertakes an act (whether negligence or misfeasance) outside of the contract and performs an act that carries a

foreseeable risk of harm. See also Roundtree Villas Ass'n., v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding one who undertakes a duty owes common law duty of due care); Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212–13, 826 S.E.2d 285, 290–91 (2019). As our courts have held:

> There is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.

Arajou v. Southern Bell Tel. & Tel. Co., 291 S.C. 54, 57-58, 351 S.E.2d 908 (Ct. App. 1986).

The analysis of duty in negligence law is closely tied to the concept of foreseeability. Foreseeability distinguishes between two kinds of risk: First, there are risks that are merely conceivable or statistically possible, such as the chance of being struck by a falling meteor. Such risks are so remote, infinitesimal, or speculative that it would be both unfair and inefficient to require a person to anticipate or guard against them. See, e.g., Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977). Second, there are risks that, while perhaps not probable or even likely, are nevertheless sufficiently realistic or capable of occurring that a reasonably prudent person should take them into account when deciding what precautions to take. See McQuillan v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974).

As discussed in the Appellant's Reply Brief to D'Appolonia, cases such as S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) and Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Grading, 320 S.C. 49, 463 S.E.2d 85 (1995) make clear that privity of contract is not required to establish a duty. Here, Watson, as a subsequent purchaser, suffered foreseeable harm due to the conduct of Keller.

VI. Statute of Repose – Building Permit

As noted to the lower court and in Appellant's Brief, S.C. Code Ann. § 15-3-640, which provides the statute of repose under which Respondent seeks protection, also contains the following language:

> A building permit for the construction of an improvement to real property *must* contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement.

S.C. Code Ann. § 15-3-640 (emphasis added). In this way, the Legislature provided a warning to consumers of the statute of repose and of their ability to negotiate for a longer warranty period. The language of the statute – "must" – is mandatory.

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 of establishing its applicability rests with the party asserting it. It is undisputed that Keller has not established that a building permit with the required notice was issued.

Keller argues this should not apply because (1) the responsibility for issuing permits rests with authorities, not builders; (2) the notice language would have only been given to the Schmidts, not Watson; and (3) there is no evidence that the permit lacked this provision.

Our courts have held that, in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. See State v. Black First South Savings Bank, Inc. v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990). When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. See id. Consequently, regardless of where the responsibility rests for the notice provision or the recipient of the notice, the plain language of the statute sets forth requirements which have not been met.

As for Keller's statement that there is no evidence that the permit lacked this provision, it is also true that there is no evidence that the permit included this provision, and the burden of establishing this rests with Keller.

VII. Causes of Action

Keller finally argues that, even if the statute of limitations and statute of repose do not bar Appellant's claims, the causes of action for Constructive Fraud, Breach of Implied Warranties, Negligent Misrepresentation, and Promissory Estoppel nonetheless fail on the merits.

A. Constructive Fraud

(1) False Statement

Keller first contends that Watson cannot satisfy the elements for constructive fraud, specifically arguing that there is no evidence in the record from which a juror could find that Keller made a false representation. Keller suggests that the comments made by Mr. Wolosick in his call with Hugh Watson were simply "general statements" and attemps to spin the comments regarding the 60-year lifespan of the system as applying to the technology only. Again, this interpretation belies the facts and turns the summary judgment standard on its head.

When Hugh Watson considered purchasing the Schmidt residence, he was shown a note written by Stephanie Schmidt which provided as follows:

> John assured me that the house is stable and "won't go anywhere" but the company legally cannot write a letter to that effect.
>
> A buyer or realtor can check the Hayward Baker website: www.haywardbaker.com or call John Wolosick.

(R. p. 1393).

Based on this, Hugh Watson called John Wolosick who agreed to speak with him. Watson recounted the conversation:

A. I introduced myself. I introduced the – who I was, in terms of the prospective buyer of the property. The Schmidts had provided his contact info and that he would be willing to speak with buyers about the work that was – had been done.

Q. So they had told you that he – that he would be willing?

A. Correct. Yeah. They – he had left his business card for that purpose –

. . .

Q. All right. And what do you recall Mr. Wolosick saying to you?

A. 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.

So, I – I found John to be very personable and nice to speak with. He seemed very credible. The firm is obviously very big. It – and it gave me peace of mind.

Q. And I didn't ask you this question directly, but you have no engineering background of your own, correct?

A. I don't, no.

Q. Did you do any research about Keller or about the solution that you just described?

A. About Keller – I'm sorry, I interrupted you.

Q. That's okay. Did you do any research about Keller or about the solution that had been offered or had been provided to the Schmidts for Shipmaster?

A. Not the solution. I didn't. You know, as far as Keller, yes. I – I looked at the company, just to understand, you know, this is not a local, you know, Ram Jack solution. This is a big geotechnical company. Seemed to be qualified for complex work.

Q. And, again, knowing you're not an engineer, and certainly neither am I, can you tell me what your understanding was, at the time that you talked to Mr. Wolosick, of the – of the solution that had been provided to the Schmidts?

A. My – my understanding, John basically described it as drilling into bedrock, securing high tension cabling, like a suspension bridge would have, and anchoring that on the outside with steel-reinforced concrete.

(R. p. 577, lines 19-25; R. p. 578, lines 1-2, and lines 13-25; R. p. 579, lines 1-25; R. p. 580, lines 1-6). Mr. Wolosick recounted the conversation as follows:

Q. Did Ms. Schmidt ask you if you would be willing to speak with prospective buyers?

A. I don't remember. Maybe. I don't remember.

Q. Do you recall receiving a phone call from Hugh Watson?

A. Yes.

Q. And did he identify himself as a prospective purchaser?

A. Yes.

Q. As best you can, in your own words, walk me through that conversation.

A. So he identified himself. He said, you know, what he was planning to do. And he asked me about the system and I described how robust it was.

. . .

But anyway, we just discussed it and he asked me some questions. I told him we've been doing this for a long time. I told him it was a heavy duty system and that he didn't have anything to worry about because it's solid.

(R. p. 988, lines 7-21; R. p. 989, lines 12-16).

Keller seeks to minimize the comments by Wolosick as mere "generalized assurances" but these statements were not mere "puffery" akin to sales talk from someone on a used car lot. Hugh Watson was considering buying a house which had undergone soil stabilization. He was clear about the purpose of his call and Mr. Wolosick clearly understood the purpose. Mr. Wolosick touted his company's experience and pedigree, described the workings of the system,

vouched for the quality of the system, stated that the system would function for decades more[4] and – most importantly – assured Hugh Watson that "he didn't have anything to worry about . . . ." (R. p. 989, lines 12-16).

Keller argues in brief that there is no evidence in the record that Wolosick's statements were false as "[t]he record contains no testimony, expert opinion, or data showing that the system was not 'heavy duty' or 'solid' in 2015, or that it had failed." See Brief of Respondent, p.27. Yet, there is simply no way to reach this conclusion other than by – again – ignoring evidence. Appellant recited the factual history in exhaustive detail in Appellant's Brief – explaining the continuous movement that had taken place between 2002 and 2006, Wolosick's conclusion that another landslide had developed that was impacting the installed system and having effects upon the house, that the system had moved beyond the expected threshold within just the first couple of years, that the readings had been "unusual and a bit perplexing" to Wolosick, that the engineer had discovered that the soils were weaker than he had expected or that he had observed a soil bulge, and that slope movement had caused a water line break.

Can Keller take the position at trial that the system was functioning properly and attempt to minimize or explain away the facts above? Most certainly. But it cannot be said that there is no evidence to create a factual question regarding whether Mr. Wolosick's statements were false. For this reason, summary judgment on this cause of action was inappropriate.[5]

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[4] As noted, Respondent puts its most favorable spin on the testimony of Wolosick regarding the life span of the system, but this inference in favor of Respondent is simply irrelevant for purposes of summary judgment.

[5] Respondent notes that the court granted summary judgment on all causes of action other than promissory estoppel – including Constructive Fraud and Negligent Misrepresentation – based on the statute of limitations. In short, the court and Respondent conclude that, even viewing all evidence and inferences in the light most favorable to the Appellant, Hugh Watson was on notice of a claim under these causes of action the moment that he spoke with Mr. Wolosick. Of course, if Mr. Watson was aware at that time, he would not have purchased the house.

(2) Right to Rely

Keller further argues that Hugh Watson had no right to rely upon the statements made by Wolosick. In support of this argument, Keller cites to Florentine Corp. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985), for the proposition that "[w]here 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." Yet the Florentine Corp. case bears no resemblance to the facts of the case at hand.

In Florentine Corp., the court considered a lease between a business owner and a shopping mall developer. The tenant – a shoe store – claimed to have received oral assurances of exclusivity but this condition did not appear in the lease. The court ruled that the tenant's fraud cause of action could not stand because it could not demonstrate a right to rely, holding:

> The respondents have failed to prove that they had a right to rely on the appellant's representation. The right to rely must be determined in light of the representee's duty to use reasonable prudence and diligence under the circumstances. The determination of what constitutes reasonable diligence and prudence must be made on a case by case basis. Various circumstances which will be considered include the form and materiality of the representation; the respective age, experience, intelligence and mental and physical conditions of the parties; and the relations and respective knowledge and means of knowledge of the parties.

Id. at 386, 339 S.E.2d at 114 (internal citations omitted).

The facts are, of course, dramatically different here. The case at hand does not involve two business owners with equal capabilities of reading a lease but instead a layperson and a geotechnical engineer discussing a complex, underground system for soil stabilization. The contrast with the fact pattern and the very factors recited by the court in Florentine Corp. mandate a different result.

B. Negligent Misrepresentation

Keller next contends that there is no jury question on the elements of Negligent Misrepresentation. Here, Keller advances the same arguments it presented with regard to Constructive Fraud: (1) that there was no actionable representation by Keller, just "generalized descriptors"; (2) that there is no evidence that the statements were false; and (3) that Hugh Watson had no right to rely upon the statements.[6] These points were addressed in the preceding paragraph. However, Keller further argues that Keller had no pecuniary interest in the statements.

Appellant addressed this argument in the Appellant's Brief, noting South Carolina case law which provides that:

> 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 AMA Management Corp. v. Strasburger, 309 S.C. 213, 222-23, 420 S.E.2d 868, 874 (Ct. App. 1992) (emphasis added). Respondent characterizes the phone call as gratuitous and alleges that, despite Mr. Wolosick plainly speaking from a position of expertise and in the course of his profession, Keller had no pecuniary interest. Yet, the evidence shows that Wolosick was speaking with Hugh Watson at the request of his client, Stephanie Schmidt, in connection with helping her to provide assurances to potential buyers to sell her home. Keller had been paid by Schmidt and faced potential liability if the Schmidts were unable to sell their home due to movement. It simply cannot be said that Wolosick had no pecuniary interest in the matter.

[6] Despite Respondent's statements to the contrary, these factors were not cited by the Court in the order for summary judgment.

C. Promissory Estoppel

In a related argument, Keller contends that there is no evidence to support the cause of action for Promissory Estoppel. As with the other arguments, Keller contends that Wolosick's statements on the phone call with Hugh Watson did not constitute promises and again argues they were mere "generalized descriptors." See Brief of Respondent at p.36. Again, this minimizing of the statements inverts the summary judgment standard and simply does not match up with the statements themselves and context surrounding them.

As the excerpts above make clear, Hugh Watson contacted John Wolosick because he wanted his opinion on the stability of the house in order to make a decision on purchasing the property. Hugh was clear about this purpose and Mr. Wolosick acknowledged that he understood the purpose. And Mr. Wolosick did not respond merely with statements which might amount to "puffery." He began by touting the expertise and experience of Keller in this area. He then described the system itself, the cables stretching between the reinforced concrete blocks, and talked about the history of the system. He told Hugh Watson that the system was "heavy duty" and "solid." He stated that the system would perform for another six decades.[7] And – most importantly – he told Hugh Watson, the man who was calling to ask if the house he was thinking of purchasing was stable, that he had nothing to worry about.

Mr. Watson was clear about his purpose. Mr. Wolosick answered those questions and, in the process, made multiple promises which assured Hugh Watson so much that he moved forward and bought the house. Minimizing these statements as mere "general descriptors" is contrary to the record.

[7] Again, Respondent's attempt to spin Mr. Wolosick's comments that the system would last for an additional 60 years views the testimony in the light most favorable to Respondent and is contrary to the summary judgment standard.

D. Breach of Implied Warranties

Keller next argues that Watson cannot support a cause of action for Breach of Implied Warranties because the Schmidts waived their implied warranty of workmanship claims and because Keller provided only information.

As to the first point, Appellant does not argue that this claim is based on workmanship but, as stated in the Amended Complaint, on the information provided to Watson. Keller makes the conclusive statement that there is no implied warranty of information, but cites not authority for this proposition. The information provided to Watson is similar to design information, which has been cited by South Carolina courts as the basis for such a cause of action.

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. Similarly, Wolosick's' failure to provide relevant information to Watson may support a breach of an implied warranty.

Keller attempts to distinguish the instant case from Polar Pantries and Robert E. Lee & Co. by emphasizing the lack of a direct construction relationship. However, these cases primarily address the principle that a party providing technical or professional information to

another can be liable for the fitness and adequacy of that work or design. Watson's claim does not require that Keller be the builder or the seller; rather, it hinges on whether Keller, as an expert in slope stabilization, provided information that was relied upon for its intended purpose. The principle from these cases, i.e., duty of care and implied quality based on professional expertise should apply here.

VIII. The Over-Arching Principle

Keller finally takes issue with Appellant's criticism of the lower court's reliance on the "over-arching principle" that Watson allegedly seeks to place himself in a better position than the Schmidts. In its brief, Keller minimizes this as a mere observation by the lower court rather than a dispositive legal doctrine.

The lower court was clear in its order that this "principle" constituted the "fundamental flaw in all of Plaintiff's claims against Keller" and that it "guide[d] 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)). However, as Keller agrees that this is not legal doctrine, further discussion on this point is unwarranted.

CONCLUSION

A well-known line from the movie *The Usual Suspects* goes: "The greatest trick the Devil ever pulled was convincing the world he didn't exist." In its brief, Keller attempts to create a world in which unfavorable facts, and the summary judgment standard, do not exist.[8] But the record and case law are stubborn and firm. Keller may make its various arguments to the jury in asserting that it has no liability here. But, on these facts and this evidence, Hugh Watson is

[8] Certainly, I do not intend any analogy to the Devil, or even Kevin Spacey, toward Keller or my friend, Mr. Shealy.

entitled to his day in court. Appellant respectfully asks that this Court reverse and provide him that chance.

Respectfully Submitted,

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December 29, 2025
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