RECEIVED
Mar 16 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Jocelyn Newman, Circuit Court Judge

Case No. 2022-CP-40-02713
Appellate Case No. 2024-000995

Elizabeth and Melvin Ray,..... Appellants

vs.

Sunsetter Properties, LLC; Nancy Warner Agent for Coldwell Banker Residential Brokerage; and Home Inspection One, LLC, ... Respondents.

FINAL BRIEF OF RESPONDENT SUNSETTER PROPERTIES, LLC

CALLISON TIGHE & ROBINSON, LLC

s/ Demetri K. Koutrakos
Demetri K. Koutrakos, SC Bar No. 11318
1812 Lincoln Street, Suite #200 (29201)
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-404-6900
Email: jimkoutrakos@callisontighe.com

ATTORNEY FOR RESPONDENT SUNSETTER PROPERTIES, LLC

March 16, 2026

TABLE OF CONTENTS

PAGE

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

A. CASES PAGE

B. STATUTES PAGE

C. RULES AND OTHER AUTHORITIES PAGE

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT PROPERLY GRANT SUNSETTER SUMMARY JUDGMENT BY REJECTING APPELLANTS' LAST-MINUTE ARGUMENT THAT THEY NEEDED ADDITIONAL DISCOVERY EVEN THOUGH BETWEEN THE FILING OF THE MOTION AND THE HEARING OVER EIGHT MONTHS ELAPSED WITHOUT APPELLANTS CONDUCTING ANY DISCOVERY, APPELLANTS FAILED TO ADVANCE A GOOD REASON WHY THE TIME WAS INSUFFICIENT, APPELLANTS FAILED TO SHOW WHY FURTHER DISCOVERY WOULD UNCOVER ADDITIONAL RELEVANT EVIDENCE AND CREATE A GENUINE ISSUE OF MATERIAL FACT, AND APPELLANTS FAILED TO FILE AN AFFIDAVIT UNDER RULE 56(f)?

II. DID THE LOWER COURT PROPERLY STRIKE APPELLANTS' AFFIDAVIT WHEN THE AFFIDAVIT WAS NOT SERVED BY THE TIME LIMIT IMPOSED BY THE RULES, PREJUDICE IS NOT AN ELEMENT FOR THE LOWER COURT TO CONSIDER, AND STRIKING THE AFFIDAVIT WAS AT THE DISCRETION OF THE LOWER COURT?

III. DID THE LOWER COURT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT WHEN EVEN IF THE LOWER COURT HAD CONSIDERED APPELLANTS'AFFIDAVIT, THERE IS STILL NO EVIDENCE TO SUPPORT NEGLIGENT MISREPRESENTATION, THE ONLY CLAIM ASSERTED AGAINST SUNSETTER?

IV. DID THE LOWER COURT ERR WHEN IT DISMISSED THE CLAIMS AGAINST SUNSETTER FOR IMPROPER SERVICE AND LACK OF JURISDICTION WHEN SUNSETTER WAS NEVER SERVED WITH THE SUMMONS AND COMPLAINT, SUNSETTER RAISED IMPROPER SERVICE AS A DEFENSE IN ITS ANSWER AS REQUIRED BY RULE 12(h), APPELLANTS DID NOTHING TO CURE THE IMPROPER SERVICE, AND NO WAIVER OCCURRED AS A MATTER OF LAW?

V. DID THE LOWER COURT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT WHEN APPELLANTS MADE NO REQUEST TO AMEND THE COMPLAINT AS IT RELATES TO CLAIMS AGAINST SUNSETTER?

VI. DID THE LOWER COURT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT WHEN THE LOWER COURT DID NOT MENTION OR RELY UPON THE ECONOMIC LOSS RULE IN SO RULING?

STATEMENT OF THE CASE

On May 23, 2022, Appellants filed this action against Sunsetter Properties, LLC, Home Inspection One, LLC, and Nancy Warner, agent for Coldwell Banker Residential Brokerage ("Warner"). This action relates to Appellants' purchase from Sunsetter of 901 Valhalla Drive in Columbia, South Carolina (the "Home"). This purchase occurred on May 23, 2019, exactly three years before the filing of the action.

In their Complaint, Appellants solely assert a negligent misrepresentation claim against Sunsetter.

On September 22, 2022, which happens to be 122 days after the filing of the action, Appellants purported to serve Sunsetter's registered agent, Greg Langjahr, by providing copies of the Summons and Complaint to Langjahr's 17-year-old son, Nicolas Langjahr.

On October 24, 2022, Sunsetter filed its Answer, denying the material allegations of the Complaint. In addition, Sunsetter alleged as follows:

FOR A SECOND DEFENSE
(Rule 12(b)(5), SCRCP)

21. Each allegation, denial, objection, and/or defense asserted in this Answer is re-alleged as if repeated verbatim herein.

22. Plaintiffs purported to serve Sunsetter with the Summons and Complaint by purportedly providing copies of the Summons and Complaint to the 17-year-old son of the registered agent for Sunsetter, who is not and never was authorized to accept service of legal papers on behalf of Sunsetter.

23. Service of process was never properly effected on the registered agent for Sunsetter.

24. Plaintiffs failed to properly and effectively serve process on Sunsetter.

25. Due to the insufficiency of service of process, the Complaint should be dismissed under Rule 12(b)(5), SCRCP.

Despite being put on notice of this defective service, Appellants did nothing to cure the defective service.

Appellants served no discovery requests. Appellants took no depositions.

On August 9, 2023, Sunsetter filed its motion to dismiss and for summary judgment, with supporting affidavits from Greg Langjahr and Nicolas Langjahr. Nicolas Langjahr's affidavit concerned service of process issues. Greg Langjahr's affidavit concerned service of process issues and the substantive claims asserted. Despite being once again put on notice of the service of process issues, Appellants did nothing to cure the issues.

On March 26, 2024, the lower court notified the parties that Sunsetter's motions were scheduled to be heard on Tuesday, April 16, 2024, at 9:30 a.m. before the Honorable Jocelyn Newman. The next day, Sunsetter served a Notice of Hearing.

On Sunday, April 14, 2024, at 10:16 p.m., Appellants filed and served the Affidavit of Elizabeth Ray.

On April 15, 2024, at 9:50 p.m., less than 12 hours before the scheduled hearing, Appellants' counsel served Sunsetter's undersigned counsel with a document described as a deposition notice that contained no specific date, time, or location for the purported deposition of Naeem Shabazz, someone Appellants identified as a witness on the same date and time.

On Tuesday, April 16, 2024, at 8:52 a.m., Sunsetter filed and served a motion to strike Plaintiff Elizabeth Ray's Affidavit.

On Tuesday, April 16, 2024, at 8:52 a.m., Sunsetter filed and served the Reply Affidavit of Greg Langjahr.

The hearing on Sunsetter's motions took place on April 16, 2024, at 9:30 a.m. At the end of the hearing, Judge Newman orally granted Sunsetter's motions.

On May 13, 2024, Judge Newman entered an order granting Sunsetter's motions.

Appellants did not file a motion to reconsider under Rule 59(e), SCRCP.

Appellants filed their notice of appeal on June 12, 2024.

STATEMENT OF FACTS

Appellants did not set forth an adequate statement of facts in their brief but instead focused on procedural matters. Sunsetter assumes Appellants do not contest the facts outlined in the lower court's order, as they have not challenged any of them. In any event, a detailed statement of facts is set forth below.

On or about November 16, 2018, Sunsetter purchased 901 Valhalla Drive in Columbia, South Carolina (the "Home"). (R. p. 67). When Sunsetter purchased the Home, it was vacant and contained a sunroom/porch. (R. p. 67).

Sunsetter made some repairs and improvements to the Home: new flooring; painting; new light fixtures; replacing windows in the sunroom; replacing faucets; replacing the roof; installing a mini-split HVAC in the sunroom/porch; replacing the kitchen countertop; installing new kitchen appliances; and landscaping. (R. p. 67). None of this work required a permit, except for replacing the roof, which Sunsetter's roofing contractor obtained. *(Id.*)

On or about March 26, 2019, Sunsetter and Appellants entered into a contract for the sale of the Home to Appellants ("the Contract"). (R. p. 67). The Contract allowed Appellants to inspect the Home and note any repairs it wanted Sunsetter to make. *(Id.)*

Sunsetter provided a Residential Property Condition Disclosure Statement ("Disclosure Statement") with the Contract. (R. p. 68). The Disclosure Statement required Sunsetter to disclose whether it had any "actual knowledge or notice" concerning various matters. In the Disclosure

Statement, Sunsetter did not note any deficiencies or issues because it did not have actual knowledge or notice of any issues. *(Id.)*

In addition, Sunsetter purchased Home Warranty Coverage for Appellants as part of the Contract. (R. p. 68).

Appellants hired Home Inspection One, LLC to inspect the Home, which it did on April 3, 2019. Home Inspection One, LLC issued an inspection report. (R. p. 68). The parties then entered into an Addendum to Contract of Sale--Inspection Repairs ("Repair Addendum") on April 15, 2019, where Sunsetter and Appellants agreed that Sunsetter would repair some but not all the items shown on the inspection report. Sunsetter made the repairs noted in the Repair Addendum. (R. p. 68).

The inspection report provides that it does not cover mold and advised Appellants to hire someone else if they were concerned about mold or similar issues. (R. p. 68).

On the morning of closing, Sunsetter's hired painter had gone to the Home to get his tools and found a water leak in the kitchen ceiling. After investigation, the HVAC condensation line was broken, causing a leak. At closing, the parties agreed that Sunsetter would repair the problem and repair and repaint the kitchen ceiling, which was done. (R. p. 68).

The closing occurred on May 23, 2019, and Sunsetter conveyed the Home to Appellants. (R. p. 68).

Exactly three years later, on May 23, 2022, Appellants filed this action against Sunsetter and others. Appellants solely assert a negligent misrepresentation claim against Sunsetter. (R. p. 142).

STANDARD OF REVIEW

Summary judgment is appropriate where "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." Rule 56(c), SCRCP. The purpose of summary judgment is to expedite the disposition of cases that do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see also Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment "mirrors" standard for directed verdict).

A party opposing summary judgment must show a genuine dispute of fact—"the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (citing and overruling *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Moreover, "'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.*

ARGUMENT

I. THE LOWER COURT PROPERLY GRANTED SUNSETTER SUMMARY JUDGMENT BY REJECTING APPELLANTS' LAST-MINUTE ARGUMENT THAT THEY NEEDED ADDITIONAL DISCOVERY BECAUSE BETWEEN THE FILING OF THE MOTION AND THE HEARING, OVER EIGHT MONTHS ELAPSED WITHOUT APPELLANTS CONDUCTING ANY DISCOVERY, APPELLANTS FAILED TO ADVANCE A GOOD REASON WHY THE TIME WAS INSUFFICIENT, APPELLANTS FAILED TO SHOW WHY FURTHER DISCOVERY WOULD UNCOVER ADDITIONAL RELEVANT EVIDENCE AND

CREATE A GENUINE ISSUE OF MATERIAL FACT, AND APPELLANTS FAILED TO FILE AN AFFIDAVIT UNDER RULE 56(f).

Appellants filed this action on May 23, 2022, almost two years before the lower court heard Sunsetter's motion. Sunsetter's detailed motion and supporting affidavits were filed and served on August 9, 2023. Two hundred fifty-one days, or eight months and seven days, elapsed between filing the motion and the hearing on April 16, 2024. Between the date Appellants filed their case and the hearing, 694 days or over 22 months elapsed. Despite the age of this case and the abundance of time Appellants had to engage in discovery, Appellants engaged in no discovery, but now contend they needed more time for discovery.

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc*., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009*); see also Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding that a summary judgment motion heard four months after the action was filed and granted nine months after the action was filed was not premature); *Middleborough Horiz. Property Regime v. Montedison, S.p.A.,* 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion . . .").

Appellants had a full and fair opportunity to participate in discovery before the lower court heard the summary judgment motion. Appellants filed their Complaint almost two years before the hearing date. Sunsetter filed its fully supported and briefed motion for summary judgment 251 days before the hearing. Appellants had plenty of time to engage in discovery, but they failed to

engage in any discovery. Appellants provided no valid reason why the time elapsed was insufficient for them to have developed facts opposing Sunsetter's motion for summary judgment.

Most importantly, while Appellants cite Rule 56(f), SCRCP, to support their argument, they failed to comply with the rule by filing an affidavit explaining why they needed more time for discovery and exactly how that discovery would have created an issue of fact. *See* Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . the court . . . may order a continuance to permit . . . discovery to be had . . . ."); s*ee also Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.").

Appellants rely on *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) for the proposition that "summary judgment is inappropriate when relevant facts could still be discovered." *Appellants' Brief* at 4. In *Baughman*, our Supreme Court reversed a grant of summary judgment to the defendant as premature. *Id.* at 114, 410 S.E.2d at 545. However, the Supreme Court found the plaintiffs had demonstrated a likelihood that further discovery would uncover additional, relevant evidence. *Id.* at 112, 410 S.E.2d at 544. Also, the Supreme Court found the plaintiffs had not been dilatory in seeking discovery. *Id.* at 113, 410 S.E.2d at 544.

Here, the exact opposite is true. Appellants have not demonstrated how any additional discovery would have supported their claims that Sunsetter made a negligent misrepresentation. Additionally, Appellants undoubtedly were dilatory in seeking discovery—they engaged in no discovery for over 22 months.[1]

[1] Appellants complain they did not have the opportunity to depose Mr. Shabazz, someone unconnected to the transaction and perhaps an expert witness. Appellants it seems could have procured an affidavit from Mr. Shabazz but failed to do so.

Accordingly, the lower court did not err in finding Appellants had a full and fair opportunity to engage in discovery and that there was no reason to delay considering Sunsetter's summary judgment motion.

II. THE LOWER COURT PROPERLY STRUCK APPELLANTS' AFFIDAVIT BECAUSE IT WAS NOT SERVED BY THE TIME LIMIT IMPOSED BY THE RULES, PREJUDICE IS NOT AN ELEMENT FOR THE LOWER COURT TO CONSIDER, AND EVEN IF IT WERE, SUNSETTER WAS PREJUDICED, AND THE LOWER COURT DID NOT ABUSE ITS DISCRETION.

The lower court correctly found that Appellants failed to comply with the applicable time frame imposed by the South Carolina Rules of Civil Procedure to serve their affidavit.

Under Rule 6(d), "additional or opposing affidavits may be served not later than two days before the hearing." Rule 6(d), SCRCP. Under Rule 56(c), SCRCP, "The adverse party may serve opposing affidavits not later than two days before the hearing." Rule 56(c), SCRCP. In calculating the time required under the South Carolina Rules of Civil Procedure, "when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." Rule 6(a), SCRCP.

Under these straightforward rules, the latest that Appellants could have served an opposing affidavit was Friday, April 12, 2024. Instead, they did so less than 36 hours before the hearing, late on a Sunday evening, effectively giving Sunsetter one business day to consider the affidavit and respond.

Appellants assert *Black v. Lexington School District No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997) "suggests that 'two days' means two calendar days, regardless of weekends or holidays." *Appellants' Brief* at 4. That is not true.

In *Black*, the Supreme Court stated that the lawyer admitted "his failure to serve the affidavit within the time required by Rule 56" and did "not assert any good excuse for that failure. Under these circumstances, the lower court did not abuse its discretion by refusing to consider the

affidavit." *Id.* at 60, 488 S.E.2d at 329. The Supreme Court bolstered its affirmance of the lower court's proper refusal to consider the late affidavit by finding that, even if the affidavit had been considered, the grant of summary judgment was still proper. *See id.*

Appellants further argue that procedural rules are intended to facilitate justice, not obstruct it by imposing undue technicalities. To support that proposition, Appellants cite *Dixon v. Dixon*, 362 S.C. 388, 398, 608 S.E.2d 849, 853 (2005), saying that it emphasizes "that procedural requirements should not obstruct the fair presentation of claims." However, that case says no such thing and the undersigned could not find any case that supports that proposition.

Our rules provide deadlines in part to ensure predictability and fairness to litigants. Appellants have shown no good cause for failing to comply with the rules. Instead, Appellants are asking this Court to ignore their lack of good cause and instead establish a requirement that Sunsetter show prejudice. No rule or case supports shifting the burden in this situation. In any event, when one party's attorney ignores the rules and leaves opposing counsel with an unreasonable time frame to respond, this is prejudicial *per se*.

Despite having over eight months to prepare and serve an affidavit, Appellants failed to show good cause for failing to serve it in a timely manner. Appellants engaged in no discovery. In almost 22 months, they did nothing to prosecute their lawsuit or gather evidence. Accordingly, the lower court did not abuse its discretion in refusing to consider the Appellants' late-filed affidavit. *See West v. Gladney,* 341 S.C. 127, 133, 533 S.E.2d 334, 337 (Ct. App. 2000) ("In the present case, more than two months passed from the time West served his affidavit until the hearing. In spite of this generous amount of time, Gladney did not file his affidavit opposing summary judgment until the day of the hearing. Moreover, Gladney failed to present any good cause for his failure to timely file the affidavit. Thus, under these circumstances, we find the lower court did not

abuse its discretion in ruling the affidavit should not be considered. Accordingly, we will not consider the affidavit in our review."); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An abuse of discretion occurs when the lower court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.").

III. THE LOWER COURT DID NOT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT BECAUSE EVEN IF THE LOWER COURT HAD CONSIDERED APPELLANTS' AFFIDAVIT, THERE IS STILL NO EVIDENCE TO SUPPORT NEGLIGENT MISREPRESENTATION, THE ONLY CLAIM ASSERTED AGAINST SUNSETTER.

Appellants asserted one claim against Sunsetter, a claim for negligent misrepresentation. (R. p. 142). Even if this Court were to consider the late affidavit, as the Supreme Court did in *Black*, Appellants have not produced evidence that would support a negligent misrepresentation cause of action.

To establish liability for negligent misrepresentation, a plaintiff "must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003).

Appellants have failed to show that Sunsetter made any false representation to Appellants. In their Complaint, Appellants allege as follows:

> 8. Prior to purchasing the property Defendant Sunsetter Properties, LLC represented to the Plaintiffs in its State of South Carolina Residential Disclosure Statement that he had no knowledge of any defects with the property.
>
> 9. However, the Plaintiff's learned after closing on the property in May of 2019 that the Defendant failed to disclose material defects to the property including water leaks, mold and mildew issues, plumbing deficiencies, and that reconstruction was

> done to the home without the County inspecting it to determine if these improvements were up to code.
>
> 10. Upon information and belief, Defendant Sunsetter Properties, LLC knew or should have know that these deficiencies prior to selling the property to the Plaintiffs. Yet, it failed to disclose this information to the Plaintiff prior to closing. (R. p. 141).

In responding to an interrogatory requesting Appellants identify the claimed false representations, Appellants responded as follows:

> **Sunsetter properties had a duty to the plaintiff not to make false representations to the Plaintiff about the home. Sunsetter indicated that the hot water heater was replaced when it had not been replaced. Sunsetter properties did not seek permits for the sunroom which was an add on to the property, and did not have it inspected upon completion. Plaintiff is now experiencing leaks to the roof as a result. There is mold in the home also which required complete remediation. The representation was made in writing. Plaintiff did not learn of the misrepresentation for months if not years after she closed on the home. The Plaintiff reserves the right to supplement this request at a later date if necessary.**
> (R. p. 65).

In summary, Appellants identified three alleged false representations: (1) "Sunsetter properties did not seek permits for the sunroom which was an add on to the property, and did not have it inspected upon completion," (2) "hot water heater was replaced when it had not been replaced," and (3) "There is mold in the home."

It is not disputed that the sunroom/porch was already there when Sunsetter purchased the Home. Sunsetter submitted pictures from an inspection report conducted by its lender when Sunsetter purchased the Home that shows the sunroom/porch was there. (R. p. 67, 76-85).

Sunsetter did not add the sunroom/porch to the Home as alleged by Appellants. As a result, Sunsetter was not required to obtain a permit for an addition to the Home made by prior homeowners. Appellants' contention that Sunsetter made this representation and that it was false

is without merit and is not supported by any evidence. Furthermore, it is impossible to have been made and was never made.

Regarding the allegation of a water heater being replaced when it had not been replaced, Sunsetter made no such representation. (R. p. 69). As Appellants admit, all communications were made in writing. Neither the Contract nor the Disclosure Statement says anything to this effect. (R. pp. 86-100).

Finally, as to mold being in the Home, the Disclosure Statement did have a question regarding mold and other issues, and Sunsetter responded as follows:

VI. BURIED, UNBURIED, OR COVERED PRESENCE OF THE FOLLOWING: LEAD BASED PAINT, LEAD HAZARDS, ASBESTOS, RADON GAS, METHANE GAS, STORAGE TANKS, HAZARDOUS MATERIALS, TOXIC MATERIALS, OR ENVIRONMENTAL CONTAMINATION

A. Describe any known property environmental contamination problems from construction, repair, cleaning, furnishing, intrusion, operating, toxic mold, methamphetamine production, lead based paint, lead hazards, asbestos, radon gas, methane gas, formaldehyde, corrosion-causing sheetrock, storage tanks, hazardous materials, toxic materials, environmental contamination, or other: None

(R. p. 99).

Sunsetter answered "none" because it had no knowledge of any toxic mold in the Home. Mr. Langjahr clearly states in his affidavit that he had no knowledge or notice of any mold, toxic or otherwise in the Home. (R pp. 69-70). There is no evidence to the contrary. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285 (Ct. App. 1993) ("To be actionable, the representation must . . . be false when made."); *Calland v. Carr*, No. 9:14-cv-0420-DCN, 2015 U.S. Dist. LEXIS 59175, at *12 (D.S.C. May 6, 2015) (court granted summary judgment to sellers as buyers "have failed to put forth sufficient evidence that the [Sellers] knew of current problems with the house when they filled out the disclosure statement on November 22, 2010," with mold being raised as one of the issues).

To the extent there existed toxic mold in the Home on the date of the sale, Appellants had the opportunity to inspect the Home to determine if that was the case, something they opted not to

do, even though the home inspector they hired advised them to do so. *See Byrn v. Walker*, 275 S.C. 83, 88, 267 S.E.2d 601, 603 (1980) ("It is generally held that one has no right to rely on representations as to the condition, quality or character of property . . . where the parties stand on an equal footing and have equal means of knowing the truth.").

In their affidavit, which, as the lower court correctly concluded, "makes no sense," (R. p. 284, l. 13), Appellants failed to show any false representations they claim Sunsetter made. Throughout this case, Appellants made vague accusations without evidentiary support that are contrary to the documents. Although Appellants asserted a negligent misrepresentation claim against Sunsetter, Appellants have not pointed to or provided any evidence of any false representation made by Sunsetter or any reliance by Appellants on any representation made by Sunsetter.

Regarding the sunroom/porch, Appellants state, "Additionally, the Defendants misrepresented themselves by not disclosing that the sunroom was an addition completed without permits, a fact they were aware of, as indicated by statements made within their affidavit. Consequently, the 901 Valhala [sic] Property is not in compliance with building codes and regulations." (R. p. 13). This statement makes no sense. As stated in Sunsetter's affidavit, the sunroom/porch was built before Sunsetter purchased the Home. Sunsetter made no statements or representations regarding permits for the sunroom/porch, and Appellants produced no evidence showing Sunsetter knew no permits were obtained. (R. p. 6). Sunsetter did not check for old permits before or during its ownership of the Home. There is no requirement to do so. *(Id.)* Appellants have not pointed to any such requirement or provided any evidence that a homeowner should check the permit records to ensure that all prior home improvements done by previous owners were done with a permit. This claim and assertion make no sense.

In trying to decipher what Appellants say about mold, it appears they say that Sunsetter should have been aware of mold because of certain conditions, primarily the absence of moisture barriers. (R. p. 12). They further state that a report conducted later found mold. (R. p. 12). The inspection report that Appellants procured before closing says nothing about moisture barriers. (R. pp. 101-123). After receiving the inspection report, Appellants asked Sunsetter to make repairs as noted in the Repair Addendum. (R. p. 68). Some of those items in the inspection report and the Repair Addendum are the same items Appellants say in their affidavit somehow show that Sunsetter knew of mold.[2] Sunsetter made those repairs to the satisfaction of Appellants, and the closing took place. There is no evidence that Sunsetter knew anything about mold or made any false representations.

Most of Appellants' affidavit suggests that Sunsetter promised to do certain things but did not do them. Of course, that is because they conflate what was identified in the inspection report and what was repaired. The Repair Addendum is where Appellants and Sunsetter agreed that certain items (not all) identified in the inspection report should be repaired. Sunsetter made those repairs to Appellants' satisfaction. Now, Appellants wrongly claim that all the items in the inspection report should have been addressed.

Even disregarding this conflation, Appellants assert that Sunsetter agreed to perform certain actions but failed to fulfill them. Sunsetter was not sued for breach of contract but instead was sued for negligent misrepresentation. Moreover, for a false representation "to be actionable, the representation must relate to a present or pre-existing fact and be false when made" and "'[t]he

[2] In other words, Appellants appear to state that because certain conditions were noted in the inspection report, which they paid for and received, Sunsetter should have known there was mold. What Appellants ignore is that they were on notice of the same conditions. *McLaughlin v. Williams*, 379 S.C. 451, 457–58, 665 S.E.2d 667, 671 (Ct. App. 2008) ("there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.").

representation cannot ordinarily be based on unfulfilled promises or statements as to future events.'" *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). As a result, saying you are going to do something and not doing it, which is not what happened here in any event, does not support a claim for negligent misrepresentation.

Appellants have not provided evidence that Sunsetter made a false representation to Appellants and that they justifiably relied on any representation made by Sunsetter. Accordingly, even if the lower court had considered Appellants' late-filed affidavit, which the lower court properly rejected, summary judgment in favor of Sunsetter was proper.

IV. THE LOWER COURT DID NOT ERR WHEN IT DISMISSED THE CLAIMS AGAINST SUNSETTER FOR IMPROPER SERVICE AND LACK OF JURISDICTION WHEN SUNSETTER WAS NEVER SERVED WITH THE SUMMONS AND COMPLAINT, SUNSETTER RAISED IMPROPER SERVICE AS A DEFENSE IN ITS ANSWER AS REQUIRED BY RULE 12(h), APPELLANTS DID NOTHING TO CURE THE IMPROPER SERVICE, AND NO WAIVER OCCURRED AS A MATTER OF LAW.

The lower court correctly found that service of the Summons and Complaint on Sunsetter was improper and, therefore, properly dismissed the Complaint under Rule 12(b)(2) and 12(b)(5), SCRCP.

Appellants purported to serve Sunsetter's registered agent, Greg Langjahr, by providing copies of the Summons and Complaint to Langjahr's son at the Langjahr home. Nicolas Langjahr, Greg Langjahr's 17-year-old son, testified he has nothing to do with Sunsetter, he is not and never was authorized to accept service of legal papers on behalf of Sunsetter, and he never told anyone otherwise. (R. pp. 181-182).

Service on a limited liability company, such as Sunsetter, is governed by Rule 4(d)(3), SCRCP, which provides that "Service shall be made as follows:"

> (d)(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or

> general agent, or to any other .nt authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
>
> S.C. Code Ann. § 15-9-210 also applies, which provides as follows:
>
> (a) A domestic business or nonprofit corporation's registered agent is the agent of the corporation for service of any process, notice, or demand required or permitted by law to be served, and the service is binding upon the corporation.
>
> (b) The business or nonprofit corporation may be served under Rule 4(d)(8) of the South Carolina Rules of Civil Procedure by registered or certified mail, return receipt requested, addressed to the office of the registered agent, or the office of the secretary of the corporation at its principal office. Service is effective upon the date of delivery as shown on the return receipt. Entry of default and default judgments shall be subject to the conditions of Rule 4(d)(8).

Sunsetter's registered agent is and has always been Greg Langjahr. (R. p.66). Greg Langjahr was never served with the Summons and Complaint. Instead, his 17-year-old son was served, who was not authorized to accept service of process on behalf of Sunsetter. (R. p. 67).

This substitute service on a limited liability company is improper and not authorized by statute. Service on Sunsetter was, therefore, improper. *See* 19 Am Jur 2d *Corporations* § 1895 (2023) ("Service made on the spouse, minor child, or parent, of a corporate officer has been held invalid. Likewise, service cannot be made on the spouse, or employee of a registered agent or individual with whom a corporation's registered agent resided . . . "); *Phillips v. Incline Manor Ass'n*, 530 P.2d 1207, 1207–08 (Nev. 1975) ("Service of process was attempted by leaving a copy of the summons and complaint with the fourteen-year old son of the president of the defendant corporation at the president's residence. Service was ineffective for failure to comply with the requirements of NRCO 4(d)(1) which designates the manner in which a domestic corporation is to be served.").

Sunsetter raised this issue in its Answer with specificity. (R. pp. 147-148). By applicable rule, this did not and cannot result in a waiver. See Rule 12(h)(1), SCRCP ("A defense of lack of

jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion [made pursuant to Rule 12] or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."). Here, improper service was raised by answer and by motion.

Appellants argue that Sunsetter waived this argument by filing pleadings, engaging in discovery, and filing motions. Appellants raised this issue orally at the hearing, but the Court never ruled on this issue. This issue is, therefore, not preserved for review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Elam v. S. Carolina Dep't of Trans*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review").

Appellants cite the case of *Stewart v. Richland Mem'l Hosp*., 313 S.C. 402, 438 S.E.2d 897 (1993) for the proposition that when a "party actively participates in litigation effectively waives procedural defenses, including improper service." No such case appears in the citations provided by Appellants. There is a case with a similar name, *Stewart v. Richland Mem'l Hosp*., 350 S.C. 589, 591, 567 S.E.2d 510, 511 (Ct. App. 2002), but that case primarily addresses issues related to the South Carolina Tort Claims Act and the standard of care applicable to governmental entities in negligence actions.

Our courts have found a waiver of improper service but only in cases where it was not raised in the answer or not raised sufficiently. *Garner v. Houck*, 312 S.C. 481, 487, 435 S.E.2d

847, 850 (1993) ("The defendants concede that they waived improper service as a defense to this action by their failure to raise the issue in their answers."); *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542–43, 537 S.E.2d 559, 562 (Ct. App. 2000) (holding that defendant waived defense of insufficient service of process and statute of limitations by failing to object expressly to the sufficiency of the service of process and failing to point out how the plaintiff failed to properly serve).

Accordingly, under Rules 12(b)(2) and 12(b)(5), SCRCP, the lower court properly dismissed Appellants' Complaint.

V. THE LOWER COURT DID NOT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT WHEN APPELLANTS MADE NO REQUEST TO AMEND THE COMPLAINT AS IT RELATES TO CLAIMS AGAINST SUNSETTER.

Appellants argue the lower court should have allowed Appellants to amend their Complaint and, therefore, erred in granting Sunsetter summary judgment.

However, Appellants made that request only regarding the summary judgment motion filed by Home Inspection. (R. p. 251). No such request was made in response to Sunsetter's motion for summary judgment.

Accordingly, the lower court did not err in granting Sunsetter summary judgment when Appellants did not request to amend the Complaint related to the claims against Sunsetter.

VI. THE LOWER COURT DID NOT ERR IN GRANTING SUNSETTER SUMMARY JUDGMENT BECAUSE THE LOWER COURT DID NOT MENTION OR RELY UPON THE ECONOMIC LOSS RULE IN SO RULING.

Appellants argue the lower court erred in relying on the economic loss rule. This argument does not apply to Sunsetter. This was not the basis of the lower court's grant of summary judgment to Sunsetter.

Accordingly, the lower court did not err in granting Sunsetter summary judgment because the lower court did not mention or rely upon the economic loss rule in so ruling.

CONCLUSION

This Court should affirm the lower court's decision for the reasons mentioned above.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

s/ Demetri K. Koutrakos
Demetri K. Koutrakos, SC Bar No. 11318
1812 Lincoln Street, Suite #200 (29201)
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-404-6900
Email: jimkoutrakos@callisontighe.com

ATTORNEY FOR RESPONDENT SUNSETTER PROPERTIES, LLC

March 16, 2026

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

s/ Demetri K. Koutrakos
Demetri K. Koutrakos, SC Bar #11318

March 16, 2026