IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30004

MICHAEL HOVEN AND MADELYNN HOVEN,
Plaintiffs and Appellees

vs.

BANNER ASSOCIATES, INC.,
Defendant and Appellant.

APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The South Dakota Supreme Court has jurisdiction over this appeal pursuant to the Court's Order granting the Petition for Discretionary Appeal of Appellant, Banner Associates, Inc. ("Banner"). The appeal is of the May 13, 2022, Order of the Circuit Court for the Fifth Judicial Circuit, Judge Jon S. Flemmer, denying in part and granting in part Banner's Motion for Summary Judgment. (CR 427). This Court granted Banner's Petition pursuant to SDCL 15-26A-17 on June 17, 2022. This Court also granted the Parties' Joint Moton for Extension of Time to File Appellants' Briefs, granting an extension until August 16, 2022, for filing Appellants' briefs.

STATEMENT OF ISSUES

1. Whether the Circuit Court erred in not properly applying the statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3 to the claims asserted against Banner.

The Circuit Court should have applied both statutes in ruling on Banner's Motion for Summary Judgment and the claims against Banner are barred by SDCL 15-2-13 and SDCL 15-2A-3.

SDCL 15-2-13
SDCL 15-2A-3
Gades v. Meyer Modernizing Co., Inc. 2015 S.D. 42, 865 N.W.2d 155 (2015)
East Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, 852 N.W.2d 434 (2014)
Cleveland v. BDL Enters., Inc., 2003 S.D. 54, 663 N.W.2d 212 (2003)

2. Whether the statute of limitations in SDCL 15-2-13 or the statute of repose in SDCL 15-2A-3 bars the Hovens' claims.

The statute of limitations in SDCL 15-2-13 accrued at the latest in May 2010 and the claims were barred in May 2016, three years before the lawsuit was filed. The statute of repose in SDCL 15-2A-3 accrued in 2007 and the claims were barred in 2017, two years before the lawsuit was filed.

SDCL 15-2-13
SDCL 15-2A-3
Gades v. Meyer Modernizing Co., Inc. 2015 S.D. 42, 865 N.W.2d 155 (2015)

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Strassburg v. Citizens State Bank, 1998 S.D. 72, 581 N.W.2d 510, 514 (1998)

3. Whether there was any fraudulent concealment on the part of Banner in concealing the existence of the Hovens' claims.

Because there was no fiduciary relationship between Banner and the Hovens, fraudulent concealment of the existence of the claim had to be shown, and fraudulent concealment was not, as a matter of law, shown by the Hovens.

SDCL 15-2A-7
Yankton County v. McAllister, 2022 S.D. 37, ---- N.W.2d ----, 2022 WL 2253691 (S.D. June 22, 2022).
Gades v. Meyer Modernizing Co., Inc. 2015 S.D. 42, 865 N.W.2d 155, 160, (2015)
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Strassburg v. Citizens State Bank, 1998 S.D. 72, 581 N.W.2d 510, 514 (1998)

STATEMENT OF THE CASE

Banner filed a motion for summary judgment in the Circuit Court on March 16, 2022. (CR 28-104). The Hovens filed their responsive pleadings on April 6, 2022. (CR 105-373). A hearing was held before the Circuit Court on April 20, 2022. (CR 374-375). The Circuit Court entered an Order dated May 17, 2022, denying in part, and granting in part, Banner's motion for summary judgment. Notice of the Entry of the Order was filed on May 17, 2022. (CR 438-441).

Banner filed its Petition for Discretionary Appeal with this Honorable Court on May 25, 2022. The Petition was granted on June 17, 2022.

STATEMENT OF THE FACTS

The facts of this case arise out of certain services provided by Banner in relation to properties at Blue Dog Lake in Day County, South Dakota, near the city of Waubay.

(CR 30). The services were performed at various times, but the plaintiffs' claims relate to surveying and engineering services provided by Banner for Dennis and Carol Gregerson ("Gregersons") in 2006 and 2007, and certain professional surveying and engineering services that were provided by Banner for the Hovens in 2009 and 2010. (CR 50-52; 75).

The Gregersons, who were not parties to this case, retained Banner to perform certain surveying services in relation to their property in 2006. (CR 50). The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to Madelynn Hoven in 2007. (CR 83). One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (CR 50; 54-66). The elevation Certificate was prepared for the Gregersons in 2006. (CR 50; 54-66).

In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (CR 51; 93-94). The location of the iron pin ended up being on the portion of the property that was subdivided and later sold to Madelynn Hoven. (CR 51; 85).

In mid-2007, Mike Hoven contacted Steve Rames, a former employee of Banner, regarding the benchmark. (CR 85). Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (CR 85). Banner sent a surveyor to mark the elevation of the iron pin in 2007. (CR 87-88; 95). The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (CR 87-88; 95). There were no improvements on the Hoven property at that time – the house had not yet been constructed. (CR 85-86). The house

was built by the end of 2007. (CR 83-84; 97-99). Banner performed no work on the Hoven or Gregerson properties until 2009. (CR 51; 96; 104).

The elevation of the pin that was noted on the lathe stake was 1806.96 NAVD88. (CR 87-88; 95). It matched the elevation from the Elevation Certificate provided to the Gregersons, and the lathe stake was marked using what had previously been determined for the Gregersons. (CR 54-66; 93-95). Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (CR 100-103). The document was never used by Appellees Michael Hoven and Madelynn Hoven ("Hovens") in any way. (CR 86). Instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. (CR 86).

Banner was never officially retained by the Hovens in 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (CR 51). Banner was not involved in the staking, layout, or construction of the Hovens' house. (CR 51).

Over the next few months, the Hovens built the house on the property. (CR 83). The house was constructed and enclosed by the end of 2007. (CR 83-84; 97-99). The Hovens admitted that it was built by the end of 2007 and the photographs support that admission. (CR 83-84; 97-99). All elevations of the house were set at that time, even though the plaintiffs claim that they continued to work on the inside of the house over a longer period of time. (CR 83-84; 97-99).

The first time Banner was actually retained and paid by the Hovens was in 2009. (CR 51). In 2009, Banner shot an elevation for the first floor of the Hoven house that was provided in early 2010. (CR 51; 96; 104). The house was obviously constructed at that time. (CR 104). The floor elevation was listed at 1810.19 NAVD88. (CR 104).

Also in 2010, Banner provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (CR 51; 67-74). It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (CR 51; 67-74). On the sixth page of the Elevation Certificate, there is a diagram showing all of the elevations at issue in each of the datum, it lists the conversion, and it clearly shows the Base Flood Elevation (BFE) at 1810.0 (NGVD29) = 1810.9 (NAVD88). (CR 17; 72). It also clearly shows the Finished Floor Elevation (FFE) at 1810 (NAVD88). (CR 17; 72). On its face, it shows that the FFE is 0.9 feet (10.8 inches) below the BFE. (CR 17; 72). This information was responsive to the request of the Hovens, it was open, obvious, and easy to understand on the drawing included in the Elevation Certificate. (CR 17; 72). The Hovens used that diagram, which showed those elevations and the conversion, to support their claims by attaching it as Exhibit "C" to their Complaint. These elevations and conversions are also included in the rest of the Elevation Certificate. (CR 67-74).

There is no expert or other evidence that there is anything wrong with the Elevation Certificate. (CR 51). The elevations and conversions are accurate. (CR 51). In fact, the plaintiffs rely upon those elevations being accurate in the pursuit of their claims. (CR 3-9; 17). The affidavits provided by Banner established that the professional services performed by Banner were performed in accordance with the professional standard of care. (CR 50-53; 75-77). There is no expert evidence to the contrary. (CR 51).

Banner provided no other services for, or in relation to, the Hovens or their house after May 11, 2010. (CR 50-51). Banner had no contact with the Hovens after May 11, 2010. (CR 89). Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any potential claim they may have relating to any of the services provided by Banner. (CR 52; 76).

The Summons was served in this matter in July 2019. (CR 2). The plaintiffs' Complaint was not filed until July 26, 2019. (CR 3-7). Banner filed its motion for summary judgment in the Circuit Court on March 16, 2022. (CR 28-104). The Hovens filed their responsive pleadings on April 6, 2022. (CR 105-373). A hearing was held before the Circuit Court on April 20, 2022. (CR 374-375). The Circuit Court entered an Order dated May 17, 2022, denying in part, and granting in part, Banner's motion for summary judgment. Notice of the Entry of the Order was filed on May 17, 2022. (CR 438-441).

ARGUMENT

The Circuit Court erred in failing to apply the statute of limitations in SDCL 15-2-13 which bars the Hovens' claims. The six-year statute of limitations applies to the Hovens' claims regardless of the possibility that the statute of repose in SDCL 15-2A-3 also applies. The limitation period in SDCL 15-2-13 accrued at the latest in 2010, and the claims were barred in 2016, three years before the claims were filed. Additionally, the Hovens' claims are barred by SDCL 15-2A-3 in that they accrued in 2007 and were barred in 2017. The Circuit Court properly ruled that Banner did not fraudulently conceal the existence of the Hovens' claims from the Hovens, and there was no tolling of the

statute of limitations or statue of repose. Banner was entitled to summary judgment as to all of the Hovens' claims.

1. The Review of a Motion for Summary Judgment Ruling is *de novo*.

The Supreme Court reviews a ruling on a motion for summary judgment *de novo*. See, *Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40, ¶ 13, 962 N.W.2d 626, 629; *Stoebner*, 2019 S.D. 58, ¶ 16, 935 N.W.2d at 266. "In reviewing a grant or a denial of summary judgment under SDCL 15–6–56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Gades v. Meyer Modernizing Co., Inc*. 2015 S.D. 42, 865 N.W.2d 155, 158 (2015). "If the moving party properly supports the motion, the nonmoving party may only avoid summary judgment by 'set[ting] forth specific facts showing that there is a genuine issue for trial.'" *Id*. SDCL 15–6–56(e). "Any material fact asserted by the moving party in support of the motion for summary judgment is deemed admitted by the nonmoving party unless controverted." *Id*. SDCL 15–6–56(c)(3). Pursuant to SDCL § 15-6-56 (c), a party is entitled to summary judgment "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 judgment as a matter of law." SDCL 15-6-56(c); *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227, 229 (S.D. 1994). The party opposing the motion for summary judgment must establish the specific facts, and said facts must show that a genuine, material issue for trial exists. *Anderson v. Production Credit Ass'n.*, 482 N.W.2d 642, 644 (S.D. 1992). Mere allegations are not sufficient to preclude summary judgment. *Mark, Inc.*, 518 N.W.2d at 229. When a

plaintiff fails to make a sufficient showing regarding an essential element of his or her case for which the plaintiff bears the burden of proof, a trial court is obligated to grant defendant's motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

2. The Statute of Limitations in SDCL 15-2-13 Is Applicable to the Hovens' Claims.

The statute of limitations applicable to this case is in SDCL 15-2-13. The pertinent sections of that statute are as follows: "[T]he following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued . . . (1) An action upon a contract, obligation, or liability, express or implied; . . . . (3) An action for trespass upon real property." *Id*.

The claims made by the Hovens relate to alleged damage to their real property, and SDCL 15-2-13 applies to their claims. SDCL 15-2-13 has been applied to construction cases involving the alleged damage to real property. *See*, *Gades v. Meyer Modernizing Co., Inc*. 2015 S.D. 42, 865 N.W.2d 155 (2015); *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, 852 N.W.2d 434 (2014). SDCL 15-2-13 applies to the claims.

3. **The Statute of Limitations in SDCL 15-2-13 and the Statute of Repose in SDCL 15-2A-3 are Not Mutually Exclusive.**

The application of the statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3 are not mutually exclusive. They can both apply to the claims that fall within those statutes, or either one of them can apply to bar claims not made in accordance with their requirements.

SDCL 15-2A-3, the statute of repose for construction claims, provides as follows:

> No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, or construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended.

Id.

This Court has noted in a footnote that: "SDCL 15-2A-3 does not operate to extend the time for filing an action otherwise barred by the running of the applicable period of limitation." *Gades v. Meyer Modernizing Co., Inc*. 2015 S.D. 42, n. 6, 865 N.W.2d 155, 160,n. 6 (2015), referencing *Peterson v. Bruns*, 2001 S.D. 126, 635 N.W.2d 556, 570 (SD 2001), quoting *Zacher v. Budd Co.* 396 N.W.2d at 129, n. 5 (SD 1986).

In *Gades*, this Court referenced the interplay between the six-year statute of limitations in SDCL 15-2-13 (that applied to the claims in *Gades*), and the statute of repose in SDCL 15-2A-3. This Court first stated: "There does not appear to be a genuine dispute as to the applicable period of limitation in this case.[6] SDCL 15–2–13(1) provides that "[a]n action upon a contract, obligation, or liability, express or implied," may only be filed "within six years after the cause of action shall have accrued[.]" *Gades,* 865 N.W.2d at158. Footnote 6, referenced in that quote, was as follows:

> The Gadeses argued to the circuit court that their action was timely based on the ten-year period of repose established in SDCL 15–2A–3. In their brief to this Court, the Gadeses again assert, if only in passing, that "they commenced their action well within the time allowed for actions for construction deficiencies." It is unclear whether the Gadeses intend this

> mention to be an affirmative assertion that their claim is timely, or if it was offered merely in anticipation of an argument from Meyer regarding the ten-year period of repose. Regardless, a period of repose "is not designed to allow a reasonable time for the filing of an action once it arises." *Peterson ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 41, 635 N.W.2d 556, 570 (quoting *Zacher v. Budd Co.*, 396 N.W.2d 122, 129 n. 5 (S.D.1986)). *Thus, SDCL 15–2A–3 does not operate to extend the time for filing an action otherwise barred by the running of the applicable period of limitation*. *Id.* (quoting *Zacher*, 396 N.W.2d at 129 n. 5).

Gades, 2015 S.D. 42, 865 N.W.2d at n. 6 (emphasis added). Thus, in *Gades*, the statute of limitations in SDCL 15-2-13 was applied to the plaintiff's claims despite the fact that the claims were also potentially subject to the statute of repose in SDCL 15-2A-3. It is clear that SDCL 15-2-13 *and* SDCL 15-2A-3 can each apply to applicable claims. Also, SDCL 15-2A-3 did not extend the statute of limitations in SDCL 15-2-13 to ten years.

Other decisions of this Court also indicate that the statute of limitations should apply to a case such as this, with no suggestion that the statute of limitations was replaced or preempted by the statute of repose. See, *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, 852 N.W.2d 434 (2014); *Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, 650 N.W.2d 544 (S.D. 2002). The statute of limitations in SDCL 15-2-13 was applied to the plaintiff's construction claims in *East Side Lutheran*. (See also, *McMacken v. State*, 320 N.W.2d 131, 139 (S.D 1982), overruled by *Daugaard v. Baltic Co-Op Bldg. Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984), stating that the unconstitutional predecessor to SDCL 15-2A-3 (SDCL 15-2-9) was to "be read in conjunction with other statutes of limitation. It does not create a new six-year statute of limitations for personal injuries accruing prior to expiration of the sixth year after completion. The three-year statute of limitations for personal injuries, SDCL 15-2-14, is still applicable, so far as, it is not limited by the abrogation of the statute." *McMacken*, 320 N.W.2d at 139.).

There is nothing in the legislative intent behind SDCL 15-2A-3 that indicates that it was intended to replace any other, applicable statutes of limitations, and, in fact, the opposite is true. SDCL 15-2A-3 provides an outside time when claims related to the design and construction of improvements to real property are barred as a matter of law.

SDCL 15-2A-6 provides, in part: "Nothing in §§ 15-2A-3 to 15-2A-5, inclusive, may be construed as extending the period prescribed by the laws of this state . . . ." *Id*. Additionally, SDCL 15-2A-1 provides, in part:

> The Legislature finds that subsequent to the completion of construction, persons involved in the planning, design, and construction of improvements to real estate lack control over the determination of the need for, the undertaking of and the responsibility for maintenance, and lack control over other forces, uses and intervening causes which cause stress, strain, wear, and tear to the improvements and, in most cases, have no right or opportunity to be made aware of or to evaluate the effect of these forces on a particular improvement or to take action to overcome the effect of these forces. Therefore, *it is in the public interest to set a point in time following the substantial completion of the project after which no action may be brought* for errors and omissions in the planning, design, and construction of improvements to real estate, *whether these errors and omissions have resulted or may result in injury or not,* unless the person involved in the planning, design, and construction of the improvements was guilty of fraud, fraudulent concealment, fraudulent misrepresentation, willful or wanton misconduct, or unless the person involved in the planning, design, and construction of improvements to real estate expressly warranted or guaranteed the improvement for a longer time period.

Id. (See also this Courts analysis and discussion of the constitutionality of SDCL 15-2A-3 in *Cleveland v. BDL Enters., Inc.*, 2003 S.D. 54, ¶ 18, 663 N.W.2d 212 (2003).

Banner argued to the Circuit Court that both statutes applied to the Hovens' claims. The Circuit Court found that the six-year statute of limitations in SDCL 15-2-13 did not apply because the statute of repose in SDCL 15-2A-3 was the only period of limitation that applied. That ruling is inconsistent with the rulings of this Court and was

erroneous. The six-year statute of limitations and the ten-year statute of repose were both potentially applicable to the Hovens' claims against Banner.

4. The Statute of Limitations in SDCL 15-2-13 Accrued in May 2010, at the Latest, and the Claims were Barred in May 2016, at the Latest.

A claim accrues when a plaintiff has actual or constructive notice of a cause of action. *Strassburg v. Citizens State Bank,* 1998 S.D. 72, ¶ 10, 581 N.W.2d 510, 514. "Actual notice consists in express information of a fact." SDCL 17–1–2. "Constructive notice is notice imputed by the law to a person not having actual notice." SDCL 17–1–3. "One having actual notice of circumstances sufficient to put a prudent person on inquiry about 'a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.'" *Strassburg,* 1998 S.D. 72, ¶ 10, 581 N.W.2d at 514 (quoting SDCL 17–1–4).

In *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.,* 852 N.W.2d 434, 438, 2014 S.D. 59 (2014), this Court held that "A claim can accrue "even when one may not yet know all the underlying facts or the full extent of damages." *Id*. at 440, *quoting Strassburg*, 1998 S.D. 72, ¶ 13, 581 N.W.2d at 515. "Statutes of limitations begin to run when plaintiffs first become aware of facts prompting a reasonably prudent person to seek information about the problem and its cause." *East Side Lutheran Church*, 852 N.W.2d at 440, *quoting Strassburg*, 1998 S.D. 72, ¶ 13, 581 N.W.2d at 515.

Here, when the six-year statute of limitations in SDCL 15-2-13 is applied, all of the claims of the Hovens are barred. Under *East Side Lutheran Church* and *Gades*, the plaintiffs had constructive, if not actual, knowledge of the fact that the finished floor elevation of their house was built 0.9 feet below the base flood elevation in May 2010. It

was clearly shown, and spelled out, in the Elevation Certificate provided to them in 2010 – the very exhibit they attached as Exhibit "C" to their Complaint in supposed support of their claims. A "reasonably prudent person" would have reviewed the Elevation Certificate they paid to have performed in 2010, and the elevations at issue are clearly shown and drawn in the Elevation Certificate. In fact, the Hovens later realized that the finished floor elevation was below the base flood elevation based on the elevations overtly shown in that very Elevation Certificate as evidenced by Exhibit "C" to their Complaint. They just claim that they did not pay attention to it in 2010. They, nonetheless, had at least constructive knowledge of the issues with their house in May 2010. Any claims against Banner were barred by the six-year statute of limitations as of May 2016 – more than three years before the lawsuit was filed in 2019.

5. The Statute of Limitations Was Not Tolled.

The Circuit Court correctly ruled that there was no fraudulent concealment or other fraudulent misconduct on the part of Banner that tolled the statute of limitations.

"Fraudulent concealment may toll the statute of limitations." *Yankton County v. McAllister*, 2022 S.D. 37, ---- N.W.2d ----2022, WL 2253691 (S.D. June 22, 2022). *McAllister* involved a notice requirement under a different statute, but still involved the issue of the tolling of the statute due to fraud. There, this Court held that: "In the absence of some trust or confidential relationship between the parties there must be some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence, in the absence of a duty to speak, is not ordinarily sufficient.... [I]f a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the one under that

duty constitutes fraudulent concealment." *Id*. Generally, in such a relationship, the "property, interest or authority of the other is placed in charge of the fiduciary." *Id*. "Normally, in a fiduciary relationship, one of the parties has a superior power over the other." *Id*. "In the absence of a fiduciary relationship, fraudulent concealment does not exist simply because a cause of action remains undiscovered, but only when the defendant affirmatively prevents discovery." *Id*. "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Id*.

This same reasoning has been applied in other cases involving the statute of limitations and the statute of repose in this case. The Court has first look at whether there is a confidential or fiduciary relationship between the parties and have found that such a relationship did not exist under these circumstances. Then, the Court has looked to see if there was active concealment of the existence of the claim and whether the concealment actually prevented the plaintiffs from knowing of the existence of their claims.

First, in *Gades*, this Court stated: "The Gadeses contended that the statute of limitations in SDCL 15-2-13 should have been tolled due to the defendant's fraudulent concealment." *Gades*, 865 N.W.2d at 160. There, this Court noted the following:

> "[F]raudulent concealment applies ... when actionable conduct or injury has been concealed by deceptive act or artifice." *Strassburg,* 1998 S.D. 72, ¶ 14, 581 N.W.2d at 515. *In the absence of "a confidential or fiduciary relationship," a plaintiff alleging fraudulent concealment must allege "some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action*." *Id.* (quoting *Koenig v. Lambert*, 527 N.W.2d 903, 905–06 (S.D.1995), *overruled on other grounds, Stratmeyer v. Stratmeyer*, 1997 S.D. 97, 567 N.W.2d 220) (internal quotation marks omitted). Here, the Gadeses do not claim, and the record does not suggest, a relationship of trust or confidence between the Gadeses and Meyer. "*Fiduciary duties ... are not inherent in normal arm's-length business relationship[s] and arise only when one undertakes to act primarily for another's benefit*." *Cleveland v. BDL Enters., Inc.*, 2003 S.D. 54, ¶ 18, 663 N.W.2d

> 212, 218 (quoting *Schwaiger v. Mitchell Radiology,* 2002 S.D. 97, ¶ 19, 652 N.W.2d 372, 380) (internal quotation marks omitted). Therefore, the *Gadeses are required to prove some affirmative act on Meyer's part, that Meyer designed such act to prevent the Gadeses to prevent the Gadeses from detecting their cause of action and that they were actually prevented from discovering their cause of action*.

Gades, 865 N.W.2d at 160 (emphasis added).

Similarly, *Cleveland v. BDL Enters., Inc.,* 2003 S.D. 54, ¶ 18, 663 N.W.2d 212 (2003), involved reports made by an engineering firm. In determining whether there was the type of relationship between the parties that led to a fiduciary duty on the part of the engineering firm to the homeowners, this Court held that: "[A]t no time did FMG hold itself out as being in charge of the Homeowners' property rights or in some manner representing their interests." *Id*. at 219. "We find that no confidential or fiduciary relationship existed between FMG and the Homeowners. FMG was employed by BDL to conduct soil engineering work. FMG stood in the shoes of BDL and had an arms-length relationship to the Homeowners. *See Trouten v. Heritage Mut. Ins. Co.,* 2001 SD 106, ¶ 32, 632 N.W.2d 856, 864." *Cleveland,* 663 N.W.2d at 219. "Having determined that no confidential relationship existed between FMG and the Homeowners, *we next turn to whether FMG took affirmative steps to conceal the facts that supported Homeowners' causes of action*." *Cleveland*, 663 N.W.2d at 219 (emphasis added). See also, *Klinker v. Beach,* 1996 S.D. 56, 547 N.W.2d 572 (S.D. 1996).

Under *Cleveland*, *Gades,* and other cases (See, *Purdy v. Fleming*, 2002 SD 156, ¶ 20, 655 N.W.2d 424, 431, *Bruske v. Hille,* 1997 SD 108, ¶ 19, 567 N.W.2d 872, 879), *Koenig v. Lambert*, 527 N.W.2d 903, 905–06 (S.D.1995), *Conway v. Conway*, 487 N.W.2d 21, 23 (S.D.1992)) there has to be active concealment of the existence of the

claim from the party making the claim for the statute to be tolled (or for SDCL 15-2A-7 for the statute of repose).

Here, there was, first of all, no confidential or fiduciary relationship between Banner and the Hovens. The 2010 Elevation Certificate involved nothing more than an arms-length business transaction between Banner and the Hovens. There was not even a contractual relationship between Banner and the Hovens for the 2006 and 2007 work. It is clear that Banner was never required to "act on behalf of the Hovens" in any respect. Because there was no fiduciary relationship, The Hovens had to show actual concealment of the existence of any claim on the part of Banner.

Banner did not actively conceal the existence of the Hovens' claims from the Hovens. The claims made by the Hovens are based on their finished floor elevation being below the base flood elevation. The Elevation Certificate provided by Banner to the Hovens in May 2010 told them exactly that fact. The Certificate has all of the elevations, the conversion between the different datum and a diagram that shows the house, the Base Flood Elevation (BFE) at "1810.0 (NGVD29) = 1810.9 (NAVD88)" and the Finished Floor Elevation (FFE) at "1810 (NAVD88)." On its face, it shows that the FFE is 0.9 feet (10.8 inches) below the BFE. The Elevation Certificate fully, openly and overtly told the Hovens everything they needed to know to pursue the claims they are now pursuing. In fact, the information in that Elevation Certificate is what the Hovens rely upon in making the allegations in this case that the finished floor elevation of the house is 0.9 feet below the base flood.

Further, it is undisputed that there was no contact or interaction whatsoever between Banner and the Hovens after May 2010 until 2019. Banner has shown in the

affidavits submitted by Banner, that Banner did not do anything to prevent the Hovens from knowing of the existence of their claims, and the Hovens have not provided anything to the contrary. There was no fraudulent concealment, or any other fraud, on the part of Banner that prevented the Hovens from knowing of their claims.

There was no fraud to toll the statute of limitations in SDCL 15-2-13. The Hovens' claims accrued at the latest in May 2010 and were barred in May 2016 – more than three years before suit was filed. The Circuit Court correctly ruled that there was no active fraudulent concealment on the part of Banner. The statute of limitations was not, therefore, tolled.

Even if it could be argued that there was a fiduciary relationship between Banner and the Hovens, there was no fraudulent omission on the part of Banner that prevented Hovens from detecting their claims. Banner was not involved in the original construction of the house and would have had no reason to know how the Hovens had used the elevation information on the lathe stake, or to know that the house was built too low, to observe that the house was built 0.9 feet too low. There is no evidence that Banner had any reason to say anything to the Hovens about their house being too low until 2010. In 2010, Banner informed the Hovens in writing in the Elevation Certificate exactly what was going on with the elevation of the house in relation to the base flood elevation, as outlined above. At that time, the house was built, and the damage was done. The work performed by Banner for the Hovens in 2010 openly and patently disclosed what the Hovens had done – they had built their house below the base flood elevation. There was no contact, whatsoever, between Banner and the Hovens after Banner provided the

Hovens with the Elevation Certificate in May 2010. There is simply no fraudulent conduct on the part of Banner, at all. The statute of limitations was not tolled.

6. The Statute of Repose in SDCL 15-2A-3 Bars the Hovens' Claims.

The Hovens' claims were also barred by the statute of repose in SDCL 15-2A-3. That statute is quoted above in Section 2. Under the clear terms of the statute, the focus is to be on when the construction or improvement to real property at issue *can be used for its intended purpose*. Here, that was in the fall of 2007 when the house was built and closed in with doors, windows, etc.

It is undisputed that Banner was not at all involved in the actual construction of the Hoven house. The only use for the elevation provided on the lathe stake, by Mike Hoven's own testimony, was that it was only used for setting the finished floor elevation of the house. He clearly testified that he wanted the benchmark elevation for that one reason, and that one reason only. Mr. Hoven stated: "I needed a benchmark for elevation." (CR 84). When the house was built, the damages alleged by the Hovens were set, and in place. They claim that the house was built below the base flood elevation and that construction work was completed in the fall of 2007.

The "construction" or "improvement to real property" associated with the benchmark was pouring the walls for setting the elevations for the house – the walls, the finished floor, and the structure. The walls and structure of the house, the only things dependent upon a benchmark elevation, were clearly complete in the fall of 2007. There are photographs showing its completion, and it was confirmed by Mr. Hoven in his deposition. (CR 83-84; 97-99). The construction at issue (a structure that the plaintiffs built supposedly using the elevation provided to them by Banner) was sufficiently

complete for the plaintiffs to "use" it for its intended purpose" at that time. The statute of repose accrued in the fall of 2007 and the ten-year limitation period ran in the fall of 2017 – two years before the lawsuit was filed. Any activities or conduct on the part of Banner that were alleged to be negligent, or otherwise improper, would be traced to the fall of 2007. All of the claims are barred.

The Hovens claimed that they continued to work on the house until 2013, when they added countertops, fixtures, etc. The elevation provided by Banner had absolutely nothing to do with anything inside the house, including finishing out the interiors of the house, building decks, or other like activities. The "construction" at issue, giving every benefit of the doubt to the plaintiffs, was setting the FFE (finished floor elevation) of the house.

An alternate way of looking at the issue is to determine when the plaintiffs could have asserted their claim. When the finished floor was constructed, and certainly when the house was built in 2007, they could have asserted their claim. Could Banner have said in response to a claim by the Hovens in 2008 that they had no claim because they had not substantially completed the construction of the house because there were no sink fixtures in the kitchen or bathroom? Of course not. The improvement to real property associated with the benchmark elevation was complete when the structure of the house was built and completed in 2007. At that time, the house could be used for its intended purpose.

The "construction" or "improvement to real property" associated with the marking of the elevation of the benchmark was complete (substantially and finally) in the fall of 2007. The statute of repose in SDCL 15-2A-3 ran in 2017, almost two years before suit was filed. The plaintiffs' claims related to that work are barred as a matter of law.

There is nothing wrong with any subsequent work (the Elevation Certificate in 2010, etc.), and the heart of the Hovens' claim goes back to 2007. The Circuit Court should also have granted summary judgment to Banner based on these grounds.

The Hovens appear to have known that the claims were barred by SDCL 15-2A-3 when they filed their Complaint. They alleged in the Complaint that there was fraud under SDCL 15-2A-7. That statute provides an exception to the application of SDCL 15-2A-3, as follows: "The limitations contained in this chapter may not be asserted as a defense by any person who is guilty of fraud, fraudulent concealment, fraudulent misrepresentations, or willful or wanton misconduct, in furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of improvements to real property." *Id.*

This standard for the application of SDCL 15-2A-7 is the same as outlined in Section 5 of this Brief, above. (*Cleveland* involved SDCL 15-2A-3 and 15-2A-7). That analysis applies equally to the statute of repose. There was no fraudulent concealment by Banner of the existence of the Hovens' claims, nor any reliance on that alleged fraud by the Hovens. The claims were barred by SDCL 15-2A-3, and they were not tolled by SDCL 15-2A-7. They were barred by the statute of repose, in addition to the statute of limitations.

For this additional reason, Banner was entitled to summary judgment and the Circuit Court erred in denying Banner's motion.

CONCLUSION

For the reasons outlined above, Banner respectfully requests that this Honorable Court overrule the Order of the Circuit Court insofar as it denied Banner's motion for

summary judgment under the statute of limitations in SDCL 15-2-13 and also the statute of repose in SDCL 15-2A-3. Banner also requests that this Court affirm the ruling of the Circuit Court on the finding that there was no fraudulent concealment on the part of Banner that tolled the statute of limitations, the statute of repose, or otherwise. Banner would therefore request that this Court direct the Circuit Court to enter summary judgment in Banner's favor as to all of the Hovens' claims.

Respectfully submitted this ___ day of August 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 6,205 words as counted by Microsoft Word.

_____

Gregory H. Wheeler

CERTIFICATE OF SERVICE

I, Gregory H. Wheeler, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 25th day of August 2022, Appellant's Brief and this Certificate of Service were electronically served upon the following:

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APPENDIX-TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAY)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, vs. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **ORDER DENYING IN PARTAND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Court on April 20, 2022, on Defendant Banner Associates, Inc.'s Motion for Summary Judgment; and Defendant Banner Associates, Inc., having appeared through a representative, Greg Jorgenson, and with its counsel, Gregory H. Wheeler, and Plaintiffs Michael Hoven and Madelynn Hoven having appeared personally and with their counsel, Steven J. Oberg, and; and the Court having read and considered the motion and all pleadings herein; and having heard and considered the arguments of counsel; and having reviewed the evidence in a light most favorable to Plaintiffs, and having determined that genuine issues of material fact exist regarding when substantial completion occurred and when the cause of action accrued; Now Therefore, it is HEREBY:

ORDERED that Defendant Banner Associates, Inc.'s Motion for Summary Judgment should be and is DENIED in part and GRANTED in part. The Court finds that material questions of fact remain as to whether the Plaintiffs' claims are barred by the statute of repose in SDCL 15-2A-3, and the Court, therefore, DENIES that part of Banner's Motion. The Court finds that there are no material issues of fact relating to the

Plaintiffs' claims of fraudulent concealment and the Court, therefore, GRANTS the motion for summary judgment on the issue of fraudulent concealment. Finally, the Court finds that the statute of limitations in SDCL 15-2-13 does not apply to the Plaintiffs' claims and the Court, therefore, DENIES the motion for summary judgment as it relates to the issues involving SDCL 15-2-13.

Dated May 13, 2022.

Honorable Jon S. Flemmer

Clerk

STATE OF SOUTH DAKOTA) :SS COUNTY OF DAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, v. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **BANNER ASSOCIATES, INC. STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Defendant, Banner Associates, Inc. ("Banner"), and pursuant to SDCL 15-6-56 (c), submits this statement of undisputed material facts in support of its motion for summary judgment. The citations below refer to Affidavits of Kent Johnson, Nathan Nielson and Gregory Wheeler and the Exhibits to those Affidavits, including the deposition transcript testimony attached to the Affidavit of Gregory Wheeler. The following facts are not in dispute and support the motion for summary judgment:

1. Dennis and Carol Gregerson ("Gregersons") retained Banner to perform surveying services in relation to their property in 2006. (Johnson Affid., ¶ 3).

2. The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to the Hovens in 2007. (Mike Hoven depo., p. 17).

3. One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (Johnson Affid., ¶¶ 4-5).

4. The elevation Certificate was prepared for the Gregersons in 2006. (Johnson Affid., ¶ 5; Exhibit "A").

Filed: 3/16/2022 4:20 PM CST Day County, South Dakota 18CIV19-000037

5. In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (Rames depo., pp. 39-41; Johnson Affid., ¶ 6).

6. The location of the iron pin ended up being on the portion of the property that was subdivided and later sold to the Hovens (specifically Madelynn Hoven). (Mike Hoven depo., p. 29; Johnson Affid., ¶ 7)

7. In mid-2007, Mike Hoven contacted Steve Rames, who was at the time an employee of Banner, regarding the benchmark. (Mike Hoven depo., p. 29).

8. Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (Mike Hoven depo., p. 29).

9. Banner sent a surveyor to mark the elevation of the iron pin. (Rames depo., pp. 45-47; Mike Hoven depo., pp. 49-54).

10. The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (*Id.*).

11. The work referenced in paragraphs 7 through 10 above occurred in 2007. (*Id.*).

12. The elevation of the iron pin was noted as 1806.96 NAVD88 in the Elevation Certificate provided to the Gregersons and the lathe stake was marked using what had previously been determined for the Gregersons. (Rames depo., pp. 39-47; Johnson Affid., Exhibit "A" p.12).

13. Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (See Exhibit 5 to Mike Hoven depo.).

14. No datum is referenced in the document and there were never any discussions between Banner and the plaintiffs about the datum used. (*Id.*; Mike Hoven depo., p. 56).

15. Mr. Hoven stated that he did not even ask any questions because he did not know there were different datum. (Mike Hoven depo., p. 47).

16. The document was never directly used by the Hovens in any way. (Mike Hoven depo., p. 47), but instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. *Id.*

17. Banner was never officially retained by the Hovens in 2006 or 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (Johnson Affid., ¶ 8).

18. Banner was not directly involved in the staking, layout or construction of the Hovens' house. (Johnson Affid., ¶ 9).

19. Over the next few months in 2007, the Hovens built the house on the property. (Mike Hoven depo., pp. 18-19).

20. The house was constructed and enclosed by the end of 2007. (Mike Hoven depo., p. 20-21; Exhibit 1 to Mike Hoven Depo., Bates 150 to 152).

21. The Hovens admitted that it was built by the end of 2007 and the photographs support that admission. (*Id.*).

22. All elevations of the house were set at that time. (*Id.*)

23. The first time Banner was actually retained and paid by the Hovens was in 2009. (Johnson Affid., ¶ 10).

24. In 2009, Banner shot an elevation for the first floor of the Hoven house. (Rames depo., p. 67, Exhibit 10 (from Mike Hoven depo.); Johnson Affid., ¶ 10).

25. The house was obviously constructed at that time. The floor elevation was listed at 1810.19 NAVD88. (Hoven depo., Exhibit 10).

26. The date of the service was February 2, 2009 and was documented in a letter dated January 25, 2010. (*Id.*).

27. Banner also provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (Johnson Affid., ¶ 11; Exhibit "B").

28. It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (*Id.*).

29. There is no expert or other admissible evidence that there is anything wrong with the 2010 Elevation Certificate, that the elevations listed, and conversions shown, are inaccurate, or that the Elevation Certificate violates the applicable professional standard of care, and, in fact, the evidence is that it is accurate and complies with the professional standard of care. (Johnson Affid., ¶ 12).

30. The Hovens claim to have sent the Elevation Certificate to their insurance carrier so they could purchase flood insurance in 2010, which they did. (Mike Hoven depo., p.79-80; 88).

31. The Hovens did not even look at the Elevation Certificate at that time. (Mike Hoven depo., p. 83).

32. Nothing happened until 2019, when using the same 2010 Elevation Certificate, the insurance carrier for the Hovens noted that the finished floor elevation of the house was below the base flood elevation. (Mike Hoven depo., p. 79).

33. The Hovens had not renewed the flood insurance in the years between 2010 and 2019 and asked again for the insurance in 2019, which is when the issue was noted, and the cost of flood insurance was quoted to be higher. (Mike Hoven Depo., p. 88).

34. The finished floor elevation of the house is 1809.1 (NGVD29)/1810.0 (NAVD88). The Base Flood Elevation is 1810.0 (NGVD29)/1810.9 (NAVD88). The finished floor elevation of the house constructed in 2007 was at an elevation 0.9 feet below the Base Flood Elevation. (See exhibits to Johnson Affid.).

35. The professional services performed by Banner were performed in accordance with the professional standard of care. (Johnson Affid., ¶ 13; Nielson Affid., ¶ 5).

36. Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any potential issues they may have with any of the services provided by Banner. (Johnson Affid., ¶ 14; Nielson Affid., ¶ 6).

37. The Summons was served in this matter in July 2019. The Complaint was not filed until July 26, 2019.

Dated this 16th day of March 2022.

/s/ Gregory H. Wheeler

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CERTIFICATE OF SERVICE

I, Gregory H. Wheeler, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 16th day of March 2022, a true and correct copy of the foregoing was filed and served through Odyssey upon the following:

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Gregory H. Wheeler

STATE OF SOUTH DAKOTA) : SS COUNTY OF DAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, vs. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs, Michael Hoven and Madelynn Hoven ("Hovens"), pursuant to SDCL § 15-6-56(c)(2), hereby submit their Response to the Statement of Undisputed Material Facts by Defendant Banner Associates, Inc. ("Banner").

1. Dennis and Carol Gregerson ("Gregersons") retained Banner to perform surveying services in relation to their property in 2006. (Johnson Affid., ¶ 3).

RESPONSE: Admit.

2. The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to the Hovens in 2007. (Mike Hoven depo., p. 17).

RESPONSE: Admit.

3. One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (Johnson Affid., ¶¶ 4-5).

RESPONSE: Admit.

4. The elevation Certificate was prepared for the Gregersons in 2006.

(Johnson Affid., ¶ 5; Exhibit "A").

RESPONSE: Admit.

5. In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (Rames depo., pp. 39-41; Johnson Affid., ¶ 6).

RESPONSE: Unknown. Banner's records do reflect that a control point (CP) with a recorded elevation of 1806.959 was established on June 9, 2006, presumably to "shoot" elevations of the Gregerson cabin reflected in the Elevation Certificate dated July 24, 2006. (See Kent Johnson Affidavit Ex. A, Bates Nos. 020-021, and 028).

6. The location of the iron pin ended up being on the portion of the property that was subdivided and later sold to the Hovens (specifically Madelynn Hoven). (Mike Hoven depo., p. 29; Johnson Affid. ¶ 7)

RESPONSE: Unknown. Mike Hoven's cited testimony does not support this assertion nor does it establish as undisputed fact that an iron pin was set on June 9, 2006, or that "the iron pin" referenced was on the lot Hovens later purchased. (Michael Hoven depo., p. 29). If an elevation benchmark ("the iron pin") was set by Banner in 2006 was on the lot before Hovens purchased their lot, they were unaware. (Michael Hoven Affidavit ¶ 10). Hovens had never seen it or the Gregerson Elevation Certificate until Banner produced it to them in discovery in this lawsuit. Banner cites the Affidavit of Kent Johnson, who apparently assumes that the control point (CP Lake Home) set for Gregersons in 2006 was the benchmark (BM) that Banner later provided to Hovens for

their construction with a stated elevation of 1806.96. (Mike Hoven depo. Ex. 2). Banner's records reflect a control point (CP) with a recorded elevation of 1806.959 was set on June 9, 2006, presumably to "shoot" the elevations of Gregersons' cabin as reflected in the Elevation Certificate dated July 24, 2006. (See Johnson Affidavit Ex. A, Bates Nos. 020-021, and 028). Banner's records reflect the precise location of the "control point," but no such information was given for the "elevation benchmark" Banner provided to Hovens for the construction of their lake home. The fact that Banner recorded and provided benchmarks with nearly identical elevations for two different clients at two different times does not establish that "the iron pin" was in fact the same as the "CP Lake Home" used for Gregersons' elevation survey. If it was, Mike Hoven was not aware. (Mike Hoven Affidavit ¶ 10).

7. In mid-2007, Mike Hoven contacted Steve Rames, who was at the time an employee of Banner, regarding the benchmark. (Mike Hoven depo., p. 29).

RESPONSE: Deny. See Response Nos. 6 and 7. Banner suggests that Mike Hoven knew about an existing benchmark on the lot that Hovens purchased. There is no support for this assertion, and Mike Hoven was unaware of any existing benchmark. (Mike Hoven Affidavit ¶ 10). Mike Hoven contacted Banner and Steve Rames requesting a certified elevation benchmark for their construction. See Response No. 6. Mike Hoven did not know about any existing CP Lake Home that existed or may have existed on the lot they purchased, or its location. (Mike Hoven Affidavit ¶ 10). Mike Hoven never contacted Banner regarding "the benchmark" referenced in Response Nos. 5 and 6. Hovens admit Mike Hoven contacted Banner and its former professional land

surveyor, Steve Rames, to request an elevation benchmark for construction after pouring the footings, so forms could be set and walls poured to a sufficient height that the floor would meet and exceed the 1810' Base Flood Elevation (BFE) at the location. (Mike Hoven depo., pp. 27-32).

8. Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (Mike Hoven depo., p. 29).

RESPONSE: Deny. See Response Nos. 6 and 7. Mike Hoven spoke with Mr. Rames after the footings had been poured for the lake home below grade, about the Hovens' need for an elevation benchmark before proceeding further, to ensure the walls would be poured high enough so that the floor would meet or exceed 1810', established BFE set for the area and City building permit requirements. (Mike Hoven depo., pp. 27-28; 40-41).

9. Banner sent a surveyor to mark the elevation of the iron pin. (Rames depo., pp. 45-47; Mike Hoven depo., pp. 49-54).

RESPONSE: Admit in part and deny in part. For reasons set forth in the foregoing responses, Hovens deny and dispute that Banner sent a surveyor to mark "the elevation of the iron pin." If an iron pin had been set in connection with the Gregerson elevation survey in 2006, Hovens were not aware. (Mike Hoven Affidavit ¶ 10). Admit that Banner sent an employee to set or locate and monument an elevation benchmark on Hovens' lot for their construction. Steve Rames sent Ron Bergen, an unlicensed surveyor who was not qualified to work without supervision or to stamp and sign surveys. (Steven Rames depo., pp. 43-44, 47-48). Mr. Rames sealed and signed the survey depicting the

location of the benchmark and its elevation, as Mike Hoven had requested for the continued construction. The survey depicted an elevation of 1806.96 without any reference to any vertical datum. (Mike Hoven depo. Ex. 2).

10. The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (*Id.*).

RESPONSE: Admit.

11. The work referenced in paragraphs 7 through 10 above occurred in 2007. (*Id.*).

RESPONSE: Admit.

12. The elevation of the iron pin was noted as 1806.96 NAVD88 in the Elevation Certificate provided to the Gregersons and the lathe stake was marked using what had previously been determined for the Gregersons. (Rames depo., pp. 39-47; Johnson Affid., Exhibit "A" p.12).

RESPONSE: Deny. First, 1806.96 is not referenced anywhere in the Elevation Certificate. (See Johnson Affidavit Ex. A). The assertion than "the iron pin" was later used to provide Hovens an elevation benchmark for their construction has not been established. See Response Nos. 6 and 7. Further, deny any implication that the Elevation Certificate Banner or the information that Banner had conveyed to Gregersons or the City related thereto was ever provided to Hovens. A recorded elevation of 1806.959 is referenced in documents produced by Banner, as a "CP" (control point) and was apparently used to "shoot" elevations of Gregersons' cabin. Hovens specifically deny any implied assertion that the wooden lathe staked next to the elevation benchmark that

Banner provided had anything but "1806.96" written on it or had any written reference to any vertical datum on it. No vertical datum information was provided either on the lathe at the site or on the corresponding survey "Mike Hove[n] Bench Mark" that Banner prepared and sent to Mike Hoven. (Mike Hoven depo. Ex. 5). Banner and Mr. Rames are not aware that it ever provided any vertical datum information of any kind in providing Hovens with an elevation benchmark for their construction. (Mike Hoven Affidavit ¶¶ 9, 13; Rames depo. p. 65).

13. Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (See Exhibit 5 to Mike Hoven depo.).

RESPONSE: Admit that Mr. Rames sent Exhibit 5 to Mike Hoven.

14. No datum is referenced in the document and there were never any discussions between Banner and the plaintiffs about the datum used. (*Id.*; Mike Hoven depo., p. 56).

RESPONSE: Admit.

15. Mr. Hoven stated that he did not even ask any questions because he did not know there were different datum. (Mike Hoven depo., p. 47).

RESPONSE: Admit that Mike Hoven testified he didn't know there were different datums. However, he knew Banner had extensive experience in this flood-susceptible area and Banner knew the elevation benchmark was to be used for constructing a lakeside home. Banner was well aware of the discrepancy in elevations determined by NAVD 1988 versus elevations stated in the datum used by FEMA for the

BFE of 1810' and of the need for conversion to "the appropriate datum" NGVD 1929, as required by the FIRM adopted by the City of Waubay.

16. The document was never directly used by the Hovens in any way. (Mike Hoven depo., p. 47), but instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. *Id.*

RESPONSE: Deny. Hovens used the Mike Hove[] Bench Mark survey to convey information about its location and elevation to the concrete contractor. It is undisputed that the elevation benchmark Banner identified or set and conveyed to Mike Hoven for construction of their home was in fact used at Mike Hoven's direction by their concrete contractor to establish the correct height of the formed concrete walls to ensure that the floor of their home would meet or exceed the BFE 1810' at the site, and was in fact transferred from the benchmark to the construction site a short distance away for this purpose. (Mike Hoven Affidavit ¶¶ 14-17). Banner's later elevation survey reflected that the floor of the home was 1810.19, exactly 2.28 inches over the 1810' level, and confirmed that the contractor had used the benchmark and had added a few inches at Mike Hoven's direction to ensure the floor would meet or exceed the 1810' Base Flood Elevation. (Mike Hoven depo., pp. 30-31; Mike Hoven Affidavit ¶ 20; Mike Hoven depo. Ex. 10). Unfortunately, because the elevation benchmark was not converted into the appropriate datum NGVD 1929 as the FIRM adopted by Waubay City Ordinance required; and therefore, the home was built to meet an elevation of 1810 in the inappropriate datum of NAVD 1988.

17. Banner was never officially retained by the Hovens in 2006 or 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (Johnson Affid., ¶ 8).

RESPONSE: Deny in part and admit in part. Deny that Hovens did not "officially retain" Banner. It is undisputed that Hovens reached out to and requested Banner's professional land-surveying services to provide an elevation benchmark for construction to ensure the home would meet or exceed BFE published by FEMA in the FIRM and as required by the City of Waubay at this location. (Mike Hoven depo., pp. 27, 28, 38-39). Banner corresponded directly with the Hovens and provided a signed, sealed and dated survey to show the benchmark and its elevation. (Mike Hoven depo. Ex. 2). Admit that Banner apparently did not bill Hovens directly for this particular professional services. Mike Hoven believes that they paid Gregersons for part of the services billed to them related to surveying their lot. (Mike Hoven depo., p. 25).

18. Banner was not directly involved in the staking, layout or construction of the Hovens' house. (Johnson Affid., ¶ 9).

RESPONSE: Admit in part and deny in part. Admit Banner did not stake or lay out the structure of Hovens' home. Deny that Banner had no direct involvement in the construction. Banner's direct involvement included staking out Hovens' lot for replatting the lot they purchased for construction of their lake home. Banner's further direct involvement included setting the elevation benchmark for further the construction after the footings had been poured, so that this elevation could be transferred to the project for construction of the walls to the proper height so the floor of the home would meet or

exceed the 1810' BFE at the location, and without which, no construction could have proceeded. (Mike Hoven depo. pp. 27, 30, 31; Mike Hoven Affidavit ¶¶ 11-17).

19. Over the next few months in 2007, the Hovens built the house on the property. (Mike Hoven depo., pp. 18-209).

RESPONSE: Deny. The home was not "built" in 2007. In 2007, the structure was merely framed up, roofed, and sealed. (Mike Hoven depo. pp. 18-19) It remained uninsulated, unheated, and without permanent electrical service. The home was not substantially complete or "livable" for several more years. Receipts for countertops, vanities, sinks, and drawers later installed in the lake home bearing dates in 2012 were produced in written discovery. (Plaintiffs' discovery Exhibit C – Pages 000083, 000087). In 2010, Mike Hoven received a homeowner wiring permit for the structure, a copy of which was produced in written discovery. (Plaintiffs' discovery Exhibit C – Page 000063). Permanent electrical service was not established to the home until several years after construction began. (Mike Hoven depo., pp. 19-20). The home was not "livable" until 2013. (Mike Hoven depo., p. 19).

20. The house was constructed and enclosed by the end of 2007. (Mike Hoven depo., p. 20-21; Exhibit 1 to Mike Hoven Depo., Bates 150 to 152).

RESPONSE: Admit in part and deny in part. See Response No. 19. The home was not "constructed" by the end 2007. Admit that the house was fully enclosed by the end of 2007, but remained uninsulated, unheated, unsided, and without electrical services. See Response No. 19.

21. The Hovens admitted that it was built by the end of 2007 and the

photographs support that admission. (*Id.*).

RESPONSE: Deny. See Response Nos. 19 and 20.

22. All elevations of the house were set at that time. (*Id.*)

RESPONSE: Deny. The structure was merely a shell and the floor of the garage and finished floor inside had not been installed. See Response Nos. 19 and 20.

23. The first time Banner was actually retained and paid by the Hovens was in 2009. (Johnson Affid., ¶ 10).

RESPONSE: Deny in part and admit in part. Deny that Hovens first retained Banner in 2009. Mike Hoven personally retained Banner to locate and establish an elevation benchmark for construction of their lake home on a lot that Banner had surveyed before their purchase. See prior responses. Admit Banner may not have billed Hovens directly for any professional survey work before 2009. However, Mike Hoven believes that he and his wife split the survey costs for subdividing their lot with the Gregersons. (Mike Hoven depo., p. 25).

24. In 2009, Banner shot an elevation for the first floor of the Hoven house. (Rames depo., p. 67, Exhibit 10 (from Mike Hoven depo.); Johnson Affid., ¶ 10).

RESPONSE: Admit.

25. The house was obviously constructed at that time. The floor elevation was listed at 1810.19 NAVD88. (Hoven depo., Exhibit 10).

RESPONSE: Admit in part and deny in part. Deny that the house was "obviously constructed" by 2009. See Response Nos. 19-21. Admit that the floor elevation was determined to be 1810.19 in the vertical datum NAV88 when it was

surveyed in 2009. (Mike Hoven depo. Ex. 10).

26. The date of the service was February 2, 2009 and was documented in a letter dated January 25, 2010. (*Id.*).

RESPONSE: Admit.

27. Banner also provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (Johnson Affid., ¶ 11; Exhibit "B").

RESPONSE: Admit.

28. It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (*Id.*).

RESPONSE: Deny. The Elevation Certificate speaks for itself. It simply lists vertical elevations in feet and does not list them in both vertical datums. It only lists them in NAVD88. (Mike Hoven depo. Ex. 10).

29. There is no expert or other admissible evidence that there is anything wrong with the 2010 Elevation Certificate, that the elevations listed, and conversions shown, are inaccurate, or that the Elevation Certificate violates the applicable professional standard of care, and, in fact, the evidence is that it is accurate and complies with the professional standard of care. (Johnson Affid., ¶ 12).

RESPONSE: Deny. Although Hovens have not hired an expert at this point, the 2010 Elevation Certificate speaks for itself and it states an elevation for the main floor that differs from that set forth in Steven Rames's letter dated January 25, 2010, which he signed and sealed on Banner letterhead. (Compare Mike Hoven depo. Exhs. 10 and 11; See also, Defendant's Statement of Undisputed Fact No. 25 herein). Further, the

Elevation Certificate is confusing and does not indicate that the Hovens' lake home was built at an elevation below City requirements. It also does not provide the mandatory conversion to "the appropriate datum" as is required by the FIRM adopted by Waubay City Ordinance. (Compare Johnson Affidavit Ex. A and Ex. B; Banner 026).

30. The Hovens claim to have sent the Elevation Certificate to their insurance carrier so they could purchase flood insurance in 2010, which they did. (Mike Hoven depo., p.79-80; 88).

RESPONSE: Deny in part and admit in part. Admit that Hovens sent the Elevation Certificate to their insurance carrier to purchase flood insurance but deny that this was done in 2010. The cited portions of Mike Hoven's testimony do not establish that it was sent to their insurance carrier in 2010. Mike Hoven said it was sent in 2019. (Mike Hoven depo., p. 79). He further testified that they had purchased flood insurance once before, but he did not know when. (Mike Hoven depo. p., 88). Madelynn Hoven thought it was in 2010. (Madelynn Hoven depo., pp. 19-21). However, a FEMA representative wrote to Kent Johnson at Banner after the problem came to light and indicated that "the last policy that they had from the NFIP was in 2013." (Banner 038).

31. The Hovens did not even look at the Elevation Certificate at that time. (Mike Hoven depo., p. 83).

RESPONSE: Deny. Madelynn Hoven testified that they were required to get it in order to obtain flood insurance and that she called Banner to get an Elevation Certificate. (Madelynn Hoven depo., pp. 19-21). Obviously, Hovens would have had to "look at" it when they received it and when it was submitted in order to get flood

insurance.

Mike Hoven testified that he did not "really look at it." (Mike Hoven depo., p. 83). However, having just recently received Steve Rames's verification that the elevation was 1810.19', at least a couple of inches above the minimum 1810', there would have been little reason for Hovens to be concerned at the time. (Mike Hoven Affidavit ¶ 20; Mike Hoven depo. Ex. 10).

32. Nothing happened until 2019, when using the same 2010 Elevation Certificate, the insurance carrier for the Hovens noted that the finished floor elevation of the house was below the base flood elevation. (Mike Hoven depo., p. 79).

RESPONSE: Admit in part and deny in part. Admit that Hovens were first notified that the finished floor elevation was below BFE in the spring of 2019. Deny that "nothing happened until 2019." Between the time of the Hoven Elevation Certificate and 2019, Hovens continued working to complete the home, including wiring the home, sheetrocking, installing fixtures, decks, and other things before the lake home was livable. (See Responses to Nos. 19 and 20). Further, Hovens secured flood insurance once before 2019. (See Response No. 30).

33. The Hovens had not renewed the flood insurance in the years between 2010 and 2019 and asked again for the insurance in 2019, which is when the issue was noted, and the cost of flood insurance was quoted to be higher. (Mike Hoven Depo., p. 88).

RESPONSE: Deny in part and admit in part. Correspondence between FEMA and Banner suggests that Hovens purchased flood insurance only once before 2019, but that it may not have been in 2010. (Banner 038).

34. The finished floor elevation of the house is 1809.1 (NGVD29)/1810.0 (NAVD88). The Base Flood Elevation is 1810.0 (NGVD29)/1810.9 (NAVD88). The finished floor elevation of the house constructed in 2007 was at an elevation 0.9 feet below the Base Flood Elevation. (See exhibits to Johnson Affid.).

RESPONSE: Deny in part and admit in part. Banner's surveyed elevations for the first floor of the lake home differ. Steve Rames verified the elevation at 1810.19' NAVD88. (Mike Hoven depo. Ex. 10). Kent Johnson later surveyed the elevation at 1810' NAVD88. Admit that the BFE is 1810.0 (NGVD 29) but deny that this elevation equals 1810.0' (NAVD88). Instead, upon information and belief, it equals 1810.915' in vertical datum NAVD 1988. Admit that whatever elevation Banner provided (Rames's or Johnson's) in NAVD 1988 for the floor elevation, when the appropriate datum conversion was completed, equates to less than the 1810' BFE required under NGVD 1929. (Compare Mike Hoven depo. Ex. 10 and Johnson Affidavit Ex. B).

35. The professional services performed by Banner were performed in accordance with the professional standard of care. (Johnson Affid., ¶ 13; Nielson Affid., ¶ 5).

RESPONSE: Deny. Notwithstanding Banner's self-serving assertion that the professional standard of care for professional surveyors was met in this instance, the evidence reflects otherwise. The former Banner professional surveyor and engineer involved, Steve Rames, acknowledged that determining and depicting an elevation benchmark is a function of the professional practice of land surveying. (Rames depo., p. 48). In response to Mike Hoven's request for an elevation benchmark for their

construction, Mr. Rames directed an unlicensed former Banner employee to go to the site to identify and "monument" the benchmark. *Id.* Because the other Banner employee was not licensed, he could not seal and sign the documents as a professional land surveyor and could only act under Mr. Rames's supervision. *Id.* SDCL § 36-18A-45. This former Banner employee went to the site, located the vertical benchmark, and put a wooden lathe in the ground, to "monument" it so that Hovens would know where it was, what it was, and the elevation at its location. (Rames depo., pp. 47-48). A survey depicted the location of "Mike Hove[n] Bench Mark" as "BM" and its elevation as "1809.97" without reference to any vertical datum. (Mike Hoven depo. Ex. 2). Mr. Rames stamped the survey with his seal and signed and dated it "9-5-07." On it, he wrote a note to Mike Hoven: "Mike, This is what I have." (Rames depo., p. 47; Mike Hoven depo. Ex. 2).

Mr. Rames is familiar with the Guidelines for the Professional Practice of Land Surveying in South Dakota published by the South Dakota Society of Professional Land Surveyors, Inc. (Rames depo., p. 51; Rames depo. Ex. 5). He acknowledges that if a professional surveyor's work is "preliminary," then it should include a note that it is "not for construction, preliminary" or some other such explanation should be provided. The document depicting the "Mike Hove[n] Bench Mark" was not noted to be preliminary or unsuitable for construction. (Rames depo., pp. 49-50). Under professional guidelines, a professional surveyor is supposed to "to obtain sufficient information from the client so as to obtain an understanding of the client's needs and requirements [and] [i]f the required scope of services is not evidence based on the client's request and the expertise of the surveying professional, and it is necessary to obtain additional information not

supplied by the client, it is recommended that the land surveyor advise the client that such information should be furnished or obtained prior to determining the necessary services." (Rames depo., pp. 52-53). Mr. Rames acknowledges that is important for a professional surveyor to know why the client is requesting land surveying services. (Rames depo., p. 53).

Mr. Rames acknowledges that a benchmark is similar to a topographical survey in that it records a known positions in three dimensions. (Rames depo., p. 55). Professional guidelines recommend that a "vertical datum" be included on any topographical survey. (Rames depo., pp. 55-56). Mr. Rames, who now lives and practices in Nebraska, acknowledged that Nebraska's minimum standards adopted by the Professional Surveyors Association of Nebraska define a benchmark as "an identifiable stable point for which there is a known elevation referenced to an assumed local, state or national datum plane." (Rames depo., pp. 57-58). A vertical benchmark is a known point in reference to some datum plane. (Rames depo., p. 58). He acknowledges that under Nebraska standards, three-dimensional descriptions must contain elevations referenced to a defined datum. (Rames depo., p. 59). When asked whether vertical benchmark should always have a vertical datum associated with them for clarity, Mr. Rames responded by stating, "There's certainly a clarity component to a datum." (Rames depo., p. 57). He seems to agree that the supplier of geospatial data like benchmark elevations should provide relevant datum information, because as in this instance involving the Hovens' lake home, the difference can be as much as 10.98 inches depending on the datum used to give the elevation. (Rames depo., p. 60). Mr. Rames does not know why the Hovens

were not given any information regarding the vertical datum associated with the benchmark. (Rames depo., p. 59). The FIRM mandated that elevations be converted to NGVD 1929 for comparison to the BFE established in that datum, and the City had adopted the FIRM. (Mike Hoven Affidavit Ex. A; Johnson Affidavit Ex. A; Banner 038). Banner knew that the elevation benchmark provided to Hovens for their construction indicated an elevation that was .915 feet lower than it would be if the appropriate datum conversion to NGVD 1929 were completed so that it could be compared to BFE. Professional rules of conduct that govern mandated that Banner notify Hovens of the violation of the City's minimum elevation requirement. (A.R.S.D. §§ 20:38:36:01(21) and (22).

36. Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any potential issues they may have with any of the services provided by Banner. (Johnson Affid., ¶ 14; Nielson Affid., ¶ 6).

RESPONSE: Deny. Banner knew an elevation stated in NAVD 1988 would overstate the elevation by .915', and knew as early as February of 2009 that the Hovens' lake home did not meet the FIRM BFE of 1810' NGVD for this location. (Mike Hoven depo. Ex. 10). Banner knew any elevation it determined using NAVD 1988 would need to be converted to NGVD 1929 and lowered accordingly. Banner knew an elevation of 1810' NAVD 1988 as determined for the floor of the Hovens' lake home in 2010 did not meet the BFE published in the FIRM and adopted by the City for this location. Banner had a duty of fidelity that it owed to Hovens. A.R.S.D. § 20:38:36:01(4). Banner also

had a duty to notify Hovens of the violation of the minimum elevation requirement, adopted by the City of Waubay as a minimum requirement, having determined that inadequately elevated construction contributed to flood losses. (A.R.S.D. §§ 20:38:36:01(21) and (22); Mike Hoven Affidavit Ex. A)). Yet Banner said nothing.

37. The Summons was served in this matter in July 2019. The Complaint was not filed until July 26, 2019.

RESPONSE: Admit.

Dated April 6, 2022.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 6, 2022, I caused the following document:

- **PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30004

MICHAEL HOVEN AND MADELYNN HOVEN,

Plaintiffs / Appellees,

v.

BANNER ASSOCIATES, INC.,

Defendant / Appellant.

Appeal from the Circuit Court,
Fifth Judicial Circuit
Day County, South Dakota
The Honorable Jon S. Flemmer, Presiding

BRIEF OF APPELLEES

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER DATED JUNE 17, 2022

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JURISDICTIONAL STATEMENT

Plaintiffs/Appellees Michael Hoven and Madelynn Hoven ("Hovens") references its Jurisdictional Statement in the related Appeal No. 3005 and do not disagree with the Jurisdictional Statement offered by Defendant/Appellant Banner Associates, Inc. ("Banner") in this appeal.

STATEMENT OF THE ISSUES

1. **Whether Banner was entitled to summary judgment based on SDCL 15-2A-3?**

   The Circuit Court properly determined that Banner is not entitled to summary judgment because issues of fact exist regarding whether substantial completion occurred within ten (10) years of the commencement of the Hovens' lawsuit.

   SDCL 15-2A-3
   SDCL 15-2A-7

2. **Whether Banner was entitled to summary judgment based on SDCL 15-2-13?**

   The Circuit Court properly denied Banner's motion for summary judgment under SDCL 15-2-13, even if that statute of limitations and SDCL 15-2A-3 are not mutually exclusive, because issues of material fact exist regarding when the Hovens' cause of action accrued and whether Banner fraudulently concealed from them the fact that their lake home is inadequately elevated.

   SDCL 15-2-13
   Yankton County v. McAllister, 2022 S.D. 37, 977 N.W.2d 327

STATEMENT OF THE CASE

Michael and Madelynn Hoven ("Hovens") brought this action against Banner Associates, Inc. ("Banner") alleging that it was negligent in providing an elevation benchmark for their construction of a lake home in a vertical datum

inappropriate for such purpose, and that Banner later fraudulently concealed from them that as a result, their home is inadequately elevated. Banner moved for summary judgment asserting that Hovens' claim is time-barred under SDCL 15-2A-3 or under one or more statutes of limitation and that no material issues of fact exist to support their claim of fraudulent concealment. In an Order dated May 13, 2022, the circuit court denied Banner's motion under SDCL 15-2A-3 and SDCL 15-2-13, but partially granted its motion on Hovens' claim of fraudulent concealment. This Honorable Court granted Banner's petition to file a discretionary appeal. This appeal followed.

STATEMENT OF FACTS

Mike and Madelynn Hoven (hereinafter "Hovens") previously submitted their statement of facts in Appellants' Brief in companion Appeal No. 3005. They incorporate by reference that statement and will attempt to confine their statement herein to those facts necessary to clarify the record in this appeal.

Banner begins its own statement noting that before doing anything for the Hovens, it had first performed professional services for Dennis and Carol Gregersons, from whom the Hovens purchased their lot. As part of that survey work, Banner had apparently set an iron pin on the Gregersons' property on or around June 9, 2006. (Banner Br. p. 3). Banner suggests this iron pin, designated as "CP-Lake Home," was later located and designated as the "Mike Hove[n] Bench Mark" in 2007. Banner states:

> In mid-2007, Mike Hoven contacted Steven Rames, a former employee of Banner, regarding the benchmark. (CR 85). Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (CR 85).

Banner omits the fact that the Hovens disputed this assertion. (CR 131).

Mike Hoven knew nothing about any existing benchmark on their property. Contrary to Banner's assertion, he did not "simply ask" Banner for the elevation of a pre-existing elevation benchmark. Instead, as Mike Hoven stated in his affidavit, he explained to former Banner land surveyor, Steven Rames, their need for an elevation benchmark to ensure that the home as constructed would meet or exceed the City's minimum floor elevation requirement at 1810', the Base Flood Elevation (BFE). In his affidavit, Mike Hoven stated specifically as follows:

> 8. I called Banner to request an elevation benchmark before the walls of our lake home were poured, spoke with Steven Rames, and explained our need for a surveyed elevation benchmark for the continued construction of our home. I discussed with him that the floor had to be at least 1810' to meet the BFE under City of Waubay and FEMA requirements. He voiced an understanding of the requirement and our need for an elevation benchmark. …
>
> 10. Mr. Rames said nothing about any existing elevation benchmark already on site, and I knew nothing about any elevation benchmark that may have already existed on site. If an elevation benchmark did already exist, I was unaware of it or its location.

(CR 151).

Mr. Rames admitted that the "Mike Hove[n] Bench Mark" is a survey of the elevation benchmark Banner set on Hovens' property. (CR 199). While Mr. Rames thought it may have been the same point previously designated as "CP-Lake Home" in connection with the Gregerson elevation survey in 2006, he does

not know this. Nothing in the record served to establish that the two points were in the same location. Further, Mr. Rames was not there when the "Mike Hove[n] Bench Mark" was set on the property. (CR 199). On August 23, 2007, Dennis Gregerson, who sold the Hovens the lot, sent them an email indicating Banner had "stopped by with their satellite equipment and [had] shot the lot." At that time, he further advised them that Banner would be in touch when it had put the information to paper. (CR 206). Mr. Rames conceded on pages 66 and 67 of his deposition that Mr. Gregerson (now deceased) may have been referring to "shooting the elevation of Lot 11" reflected in the "Mike Hove[n] Bench Mark" that he signed, sealed, dated, and sent to the Hovens in early September of 2007. (CR 206; 102).

Banner also seems to now suggest for the first time that the vertical datum for the "Mike Hove[n] Bench Mark" may have been written on a wooden lathe placed next to the elevation benchmark it provided for the Hovens' construction. Banner states:

> Banner sent a surveyor to mark the elevation of the iron pin in 2007. (CR 87-88; 95). The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (CR 87-88; 95).
> …
> The elevation of the pin that was noted on the lathe stake was 1806.96 NAVD88. (CR 87-88; 95).

(Banner Br. pp. 3-4). If Banner intended to make this suggestion, there is no evidence to support it. Steven Rames testified:

> Q. You're not aware of anyone ever telling Mike Hoven that the benchmark elevation was in the 88 datum as opposed to the 29 datum, do you – or are you?
>
> A. No.

(CR 206). Mike Hoven testified there was never any discussion with Banner about datums or the datum associated with the elevation benchmark Banner provided for their construction. (CR 88).

Banner asserts that it "was never officially retained by the Hovens in 2007, did not bill them for any work at that time, and [that] Hovens never paid for any services at that time." (Banner Br. p. 4). Again, Banner states that Mike Hoven simply asked for elevation of the benchmark and suggests that it had no idea why he asked for this as there were no improvements on the property at that time. (Banner Br. p. 3). Yet Banner was specifically advised why the Hovens needed the elevation benchmark, according to Mike Hoven. (CR 150-151). Banner already knew that the Gregersons were subdividing their property to sell lots and had already been involved in re-platting the enlarged lot that the Hovens had purchased for the site of their lake home. *Id.* When Banner set and/or monumented the "Mike Hove[n] Bench Mark," trenches around the perimeter of the home had already been dug and footing had already been poured, and the Hovens had mobilized construction equipment and materials to the site for the build. The construction on-site was open and obvious. (CR 152). Although Banner tries to now suggest that it did not know why Hovens needed the elevation benchmark, Mr. Rames also admitted that it was his responsibility as a

professional land surveyor to determine why his clients were requesting this professional land surveying service. (CR 203). Although Mr. Rames also suggests that the Hovens never "officially" retained Banner in 2007, he also acknowledged that it is the professional land surveyor's obligation to provide clients with a written contract, a professional service agreement, a memorandum, or a letter to confirm the services to be performed, as the Guidelines for the Professional Practice of Land Surveying in South Dakota suggest. (CR 203).

Mr. Rames provided the "Mike Hove[n] Bench Mark" survey stamped with his seal, signed and dated, as required when submitting such work to clients. SDCL 36-18A-45. At pages 49-50 of his deposition, Mr. Rames acknowledged that if the survey was preliminary or could not be used for construction, then he was required by law (SDCL 36-18A-45(2)) to note this on it. (CR 202).

Banner also suggests the "Mike Hove[n] Benchmark" was never actually used in the Hovens' construction of their lake home. (Banner Br. p. 4). Banner states, "Instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house." (Banner Br. p. 4). In fact, Mike Hoven discussed the need for the surveyed elevation benchmark not only with Mr. Rames, but also with their contractor, before the forms for the walls were ever set. The forms could not be set without the elevation benchmark, because the walls had to be a sufficient height in order to ensure that the floor elevation would meet or exceed the City's critical BFE requirement. (CR 181). Together, Mike and the contractor

had calculated the height of the plate that would sit on top of the foundation walls, the floor trusses, and the flooring material to be added. (CR 181-183). The only thing they needed before the walls were poured was a surveyed elevation benchmark that could be transferred to the project. Mike discussed this with the contractor as well as with Steven Rames before the benchmark was set. (CR 181). The evidence further shows the benchmark was used for the construction. The elevation of the "Mike Hove[n] Bench Mark" was provided in the inappropriate datum of NAVD88, which overstated the elevation by approximately .9 feet when compared to the BFE in the appropriate datum of NGVD 1929. As a result, the finished floor elevation of the Hovens' lake home is approximately .9 feet lower than the required minimum of the BFE in NGVD 1929. (Banner Br. p. 5). While Banner seems to suggest this is merely coincidental, the reason is clear.

Banner also asserts that Hovens built their lake home in a few months and completed it in 2007. (Banner Br. p. 4). The undisputed fact is that the Hovens built their lake home over the course of several years as time allowed. They did not substantially complete the home until sometime in 2013. (CR 150; 153).

Banner states that it was actually retained and paid for the first time in 2009, when Steven Rames returned and shot the floor elevation of the Hovens' lake home. (Banner Br. p. 5). Banner asserts that this somehow proves that the house was substantially completed at that time. *Id.* Again, Hovens refuted this assertion and produced documents reflecting that they did not even purchase a

kitchen countertop until the spring of 2012, when they purchased the countertop from Menards in Watertown, South Dakota. (CR 150; 15; 368).

At the Hovens' request, Mr. Rames did shoot the critical floor elevation of their lake home on February 2, 2009. However, he did not provide this critical elevation in writing until January of 2010. (CR 187-188; 279). When he did finally provide the floor elevation, he stated it as 1810.19 in the inappropriate datum of NAVD 88, which could not be compared directly to the BFE without the appropriate datum conversion to NGVD 1929 as the Flood Insurance Rate Map (FIRM) adopted by the City mandated. (CR 104). As a result, Hovens were left believing that Mr. Rames, who had provided the benchmark for the start of their construction, had confirmed that the critical floor elevation exceeded the minimum 1810' BFE requirement. (CR 150; 153; 181; 183-184; 188).

In May of 2010, Hovens requested that Banner prepare an Elevation Certificate for their home. Banner asserts that the Elevation Certificate listed all the various elevations in NAVD88 and NGVD29. (Banner Br. p. 5). It does not. Instead, it states the floor elevation in NAVD 88 and does not provide the appropriate datum conversion to NGVD 1929 for a direct comparison to the BFE. (CR 67-74).

While Banner asserts the Hovens should have known then that their home was inadequately elevated from information it provided with the Elevation Certificate, the Hovens thought Mr. Rames had already confirmed the proper elevation of their home. (CR 153). Mr. Rames even disputed the suggestion that

Banner would have known by the spring of 2010 that the home was too low. He testified on page 67 of his deposition as follows:

> Q. Showing you what's been marked as Hoven Exhibit Number 10, this is again your letter dated January 25, 2010 that we looked at earlier. I think you referenced again that "On February 2, 2009, Banner Associates shot the first floor of the house/structure located at 618 West Lakeshore Drive in Waubay, South Dakota. The floor elevation was 1810.19 in the datum of NAVD 88." Do you see that?
>
> A. Yes.
>
> Q. Then as we talked about, later that spring Kent Johnson signed the elevation certificate for the Hovens on the cabin, correct?
>
> A. Yes.
>
> Q. Banner Associates would have known by that time that this cabin had been built to an elevation that was less than the BFE at this location, correct?
>
> [objection omitted]
>
> A. I don't – I don't know. I don't know how they would have known that."

(CR 96).

Although Steven Rames tried to assert that Banner would not have known by the spring of 2010 that the Hovens' lake home was too low, Banner had already admitted in response to Requests for Admission as follows:

> "Banner admits that it knew by May 11, 2010 the elevation of the finished floor of the house at the subject property was below the Base Flood Elevation from FEMA."

(CR 329). Kent Johnson, who prepared the Hovens' Elevation Certificate, had previously prepared an Elevation Certificate for the Gregersons' cabin next door. However, he had also sent the Gregersons' Elevation Certificate to the City of

Waubay for recording the elevation as the City ordinance requires. (CR 342; CR 163) Along with their Elevation Certificate, he had also sent a cover letter copied to the Gregersons in which he had carefully explained to the City and to his clients the difference in the vertical datums and the corresponding need for "the appropriate datum conversion" to NGVD 1929. (CR 342). When he prepared the Hovens' Elevation Certificate, he apparently did not send it to the City and he offered no similar clarification. Despite having actual knowledge, he and Banner never told the Hovens they were finishing their lake home at an inadequate elevation that did not comply with the law in this area of special flood hazard. (CR 153). Again, the Hovens assumed Mr. Rames had already verified the proper critical floor elevation. (CR 153).

When Hovens applied for flood insurance the first time and submitted the Elevation Certificate, no one raised an issue. (CR 153). FEMA apparently did not discern from the Elevation Certificate that the lake home was too low. *Id.* A flood insurance policy was issued without issue. In 2019, however, when the Hovens applied for flood insurance for only the second time, FEMA realized that at the stated elevation in NAVD 88, when converted to the appropriate datum of NGVD 1929, it is too low. FEMA brought this to the Hovens' attention. When the Hovens realized their home had been constructed at an elevation too low to meet the minimum legal requirement, and further realized that Banner (which had provided the benchmark for the construction in the inappropriate datum) had

known this since 2009 or 2010, they promptly filed their lawsuit and asserted their claim of fraudulent concealment. (CR 154).

After limited discovery, Banner moved for summary judgment. The trial court denied Banner's motion in part, finding that material issues of fact exist regarding when substantial completion occurred that preclude summary judgment under SDCL 15-2A-3. The trial court further denied Banner's assertion that the statute of limitation in SDCL 15-2-13 applies to bar the Hovens' claim. However, the trial court granted partial summary judgment to Banner on the Hovens' their claim of fraudulent concealment. Banner and the Hovens each sought and obtained permission from this Honorable Court to pursue their discretionary cross-appeals. This appeal followed.

LEGAL ARGUMENT AND AUTHORITIES

A grant or denial of summary judgment is reviewed *de novo*. *Abata v. Pennington Cnty. Bd of Comm'rs.*, 2019 S.D. 39, ¶ 8, 931 N.W.2d 714, 718. The South Dakota Supreme Court reviews trial court rulings on motions for summary judgment *de novo*. On a motion for summary judgment, however, all facts and all reasonable inferences that may be drawn from the facts must be viewed in a light most favorable to the non-moving party. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. SDCL 15-6-56(c). On summary judgment involving questions of fraud, courts are not free "to weigh the evidence and determine the matters' truth." *Olson v. Berggren*, 2021 S.D. 58, ¶ 29, 965 N.W.2d 442, 452; quoting *Hanna v. Landsman*, 2020 S.D. S.D. 33, ¶ 37, 945 N.W.2d 534, 545

(citation omitted). "Questions of fraud and deceit are normally questions of fact and as such are to be determined by a jury." *Commercial Credit Equipment Corp. v. Johnson*, 209 N.W.2d 548, 551 (S.D. 1973). Finally, as the South Dakota Supreme Court has stated, "It is a matter of settled law that this court may affirm even where the circuit court reaches the correct result for the wrong reason." *Oldham-Ramona Sch. Dist. v. Jensen*, 503 N.W.2d 260, 264 (S.D. 1993).

A. The Trial Court Correctly Determined That Issues of Fact Precluded Summary Judgment In Banner's Favor Under SDCL § 15-2A-3

Banner ignores the settled standard that govern summary judgment. When the evidence is viewed under the correct standard, in a light most favorable to the Hovens, Banner failed to establish that Hovens' lake home was substantially completed more than ten (10) years before the commencement of their lawsuit and that their claims are barred as a matter of law under SDCL §15-2A-3. Banner continues to argue without any factual support that the Hovens' lake home was built in 2007 or substantially completed by 2009. The facts reflect that the home was not substantially completed for several more years.

Banner also ignores the plain text of SDCL 15-2A-3, which provides in relevant part as follows:

> The date of substantial completion ***shall*** *be determined by the date when construction is sufficiently complete so that the owner … can occupy or use the improvement for the use it was intended.*

[emphasis added]. The statute mandates that "substantial completion" be determined by when the improvement can be occupied or used as intended. In

2012, the Hovens were just purchasing kitchen countertops and bathroom fixtures for their home. (CR 364-369). They were still installing fixtures, wiring the home, and doing other work needed before they could occupy or use the home as such.

The South Dakota Supreme Court has stated, "In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166 (quoting *Expungement of Oliver*, 2012 S.D. 9, ¶ 6, 810 N.W.2d 350, 352). While Banner argues that "substantial completion" occurred by 2009, when Banner "shot" and verified the lake home's critical floor elevation, "substantial completion" is not tied to or determined by when the elevation of the improvement can be surveyed. The date of substantial completion is not tied to the completion of any particular phase of construction. Nor is the repose period triggered by the last culpable act or omission of a defendant.

As the South Dakota Supreme Court has recognized, SDCL 15-2A-3 "explicitly provides a different date from which to measure." *Brude v. Breen*, 2017 S.D. 46, ¶ 9, 900 N.W.2d 301, 305. The Legislature expressed its intent in SDCL 15-2A-1, stating, "Therefore, it is in the public interest to set a point in time following the substantial completion *of the project* after which no action may be brought[.]" *Id.*

Ignoring the plain language of the statute, Banner suggests that every real estate improvement has multiple dates of substantial completion, applicable to

each phase of the project. However, this argument finds no support in the statute and is not what the Legislature has said. Substantial completion of "the project" only occurs when a real estate improvement can be used or occupied for its intended purpose. This means of determining substantial completion is not a novel concept. "Substantial completion" is ordinarily understood to mean the date by which all material elements of the work are sufficiently complete so that the owner can use the work for its intended purpose. 5 Bruner & O'Connor *Construction Law* § 15:15.

Courts are not at liberty to rewrite statutes. As this Court has said, "The intent of a statute is determined from what the Legislature said, rather than what we think it should have said." *Engesser v. Young*, 2014 S.D. 81, ¶ 22 n.1, 856 N.W.2d 471, 478 n.1 (quoting *Esling v. Krambeck*, 2003 S.D. 59, ¶ 6, 663 N.W.2d 671, 676). The Circuit Court correctly determined that issues of material fact exist to preclude summary judgment in Banner's favor under SDCL 15-2A-3.

B. <u>The Circuit Court Correctly Denied Banner's Motion for Summary Judgment Under SDCL 15-2-13 Because, Even if This Statute May Otherwise Apply, Material Issues of Fact Exist Regarding When Hovens' Cause of Action Accrued and Support Their Claim of Fraudulently Concealment That Tolls the Statute of Limitations</u>

Banner asserts that the trial court erred in denying its motion for summary judgment under the six-year statute of limitations stated in one or more subsections of SDCL 15-2-13. Banner devotes a large portion of its brief to its argument that the Circuit Court erred in determining that the statute did not apply. (*See* Banner's Br. pp. 6, 8-11). Banner has cited cases that do seem to support its

position that these two statutes are not mutually exclusive. Yet the issue may not be as clear as Banner suggests. The Supreme Court has referred to SDCL §15-2A-3 as a statute of repose and has indicated that its application does not exclude the operation of the statute of limitations in SDCL 15-2-13. However, the South Dakota Supreme Court has also repeatedly referred to SDCL 15-2A-3 and its predecessor statute as a statute of limitations. With the exception of the time specified in SDCL 15-2A-3, its wording is nearly identical to its predecessor statute, SDCL 15-2-9 (repealed in 1985). *See, Clark County v. Sioux Equipment Corp.*, 2008 S.D. 60, 753 N.W.2d 406, ftnt. 4. In *Zacher v. Budd Co*., 396 N.W.2d 122, 130 (S.D. 1986), the Court referred to SDCL 15-2-9 as "the six year statute of limitations for deficiencies in construction of improvements to real property." In *Cleveland v. City of Lead*, 2003 S.D. 54, ¶ 35, 633 N.W.2d 212, 221, the Supreme Court referred to *Daugaard v. Baltic Cooperative Building Supply Assoc.,* 349 N.W.2d 419 (S.D. 1984), which declared SDCL § 15-2-9 unconstitutional, and indicated that the circuit court in that case had "dismissed the plaintiffs' complaints due to the six-year statutes of limitation proscribed in SDCL 15-2-9, which was SDCL 15-2A-3's predecessor." In the very first opportunity to address SDCL §15-2A-3, in *Klinker v. Beach*, 1996 S.D. 56, 547 N.W.2d 572, the Supreme Court noted the Legislature's intent in enacting SDCL Ch. 15 and stated, "The statute of limitations found in SDCL 15-2A-3 is in conformity with this stated intent." *Id*. at ¶ 11, 547 N.W.2d at 575. Furthermore, statutes of repose may not be avoided by claims of fraudulent concealment, estoppel or through

equitable tolling. *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, 878 N.W.2d 406 (discussing the distinction between a statute of limitations and a statute of repose). Yet SDCL §15-2A-7 explicitly operates to estop a party guilty of fraudulent concealment from asserting the time limit.

Regardless, the circuit court reached the correct result here and should be affirmed. *See, Oldham-Ramona Sch. Dist. v. Jensen*, 503 N.W.2d 260, 264 (S.D. 1993). Issues of fact exist regarding when the Hovens' cause of action accrued and support the Hovens' claim of fraudulent concealment against Banner. An action for relief on grounds of fraud shall not be deemed to have accrued until the aggrieved party discovers or has actual or constructive notice of the facts constituting the fraud. SDCL § 15-2A-3. While Banner asserts that the Hovens' claims are time barred under SDCL 15-2-13, it acknowledges as it must that "[f]raudulent concealment may [also] toll the statute of limitations." *Yankton County v. McAllister*, 2022 S.D. 37, ¶ 34, 977 N.W.2d 327, 339.

A claim of fraudulent concealment is premised on the following definition of deceit in SDCL 20-10-1:

> The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.

Schwartz v. Morgan, 2009 S.D. 110, ¶ 8, 776 N.W.2d 827, 829. Whether a duty to disclose existed is a question of law that the Supreme Court reviews *de novo*. *Id*. at ¶ 10, 776 N.W.2d at 830.

Banner argues that it had no duty to speak because there was no fiduciary relationship between it and the Hovens. Banner maintains that it was therefore at liberty to remain silent when the Hovens asked it to verify the proper critical floor elevation. Having provided the elevation benchmark at the start of construction of their construction in the inappropriate vertical datum, Banner maintains that it met its duty to the Hovens by providing them the accurate floor elevation again in the inappropriate datum and leaving them to do the appropriate datum conversion and figure out for themselves that it did not meet the BFE.

Mr. Rames returned in early 2009, at Hovens' request, and "shot" the floor elevation. He said nothing. Almost a year later, he sent the Hovens a letter stating the elevation in the inappropriate vertical datum, which could not be compared directly to the BFE as the FIRM mandates. This left the Hovens believing they had exceeded the minimum floor-elevation requirement. When Banner shot the critical floor elevation again in the spring of 2010, it knew the surveyed elevation was below the minimum legal requirement. Again, Banner said nothing and claims it had no duty to inform the Hovens of this fact. It asserts that they could and should have been able to figure this out for themselves from the information it provided. However, Steven Rames, unaware that Banner had already admitted that it knew by the spring of 2010 that their home was too low, disputed the Hovens' suggestion that Banner would have known this from its surveys.

Kent Johnson clearly did know. He also knew the difference between the vertical datum that Banner uses and the datum used for the BFE in the FIRM may

cause confusion for its clients and for public authorities. He had clarified this for the City and for the Gregersons back in 2006. Yet, despite knowing that the Hovens were constructing their lakeside home in this area of special flood hazard at an elevation that is too low, he opted not to tell them or anyone. The only reasonable inference to be drawn from these facts is that Banner did not want the Hovens to know this, after having set the elevation benchmark for their construction in a vertical datum inappropriate for such use. After Steven Rames had verified the critical floor elevation in 2009 and left the Hovens believing that they had exceeded the minimum requirement, Banner did nothing to clarify the fact and disabuse them from thinking they had met the minimum legal requirement.

Banner and its agents ignored and continue to ignore the mandatory rules of professional conduct that govern their profession and their conduct. These mandatory rules were established to safeguard life, health, safety, welfare, and property. These rules were binding on both Banner and its professional land surveyors. *See* ARSD 20:38:36:01. Under these mandatory rules, Banner and its agents owed a duty of fidelity to the Hovens. *See* ARSD 20:38:36:01(4). In conducting their work, they had a duty to take into account all state and municipal laws and ordinances. *See* ARSD 20:38:36:01(21). This would include the FIRM adopted by City of Waubay in its Ordinance, and the mandate that all elevations and all structures be compared to the BFE in the same vertical datum (NGVD

1929). Banner and its professional surveyors ignored this FIRM mandate throughout the course of their dealings with the Hovens.

When Banner verified the critical floor elevation midway through construction and knew the home stood in violation of this legal minimum requirement, Banner must have also realized that the deficiency equaled the "datum shift" between the datums at this location. Rather than disclosing the deficiency or the reason for it, however, Banner opted to keep the Hovens and the City of Waubay in the dark and let them continue construction.

Under the mandatory rules of professional conduct, beyond their duty of fidelity to their clients, Banner and its agents were obligated to be "completely objective and truthful" in all professional reports or statements and had a duty to "include all relevant and pertinent information." ARSD 20:38:36:01(25). Upon becoming "aware of an action taken by the[eir] client[s] which violate[d] applicable … municipal laws and regulations [] and which w[ould] … adversely affect the life, health, safety, welfare and property of the public," Banner and its agents had a duty to advise their clients and to notify the public authority if their clients persisted notwithstanding such advice. ARSD 20:38:36:01(22).

Banner claims it fulfilled its duties because the facts were "clearly shown and spelled out" in the Elevation Certificate. (Banner Br. p. 13). Again, Mr. Rames disputed this and tried to assert that even Banner would not have known that the home was too low at the time. Banner did know and now suggests that it

was perfectly clear from the information provided with the Elevation Certificate. Yet Mr. Johnson apparently felt that this may be confusing.

The Circuit Court also conceded that this may be confusing. The mandatory rules of professional conduct impose a duty to speak in this situation. Instead, Banner let Hovens continue working toward completion of the home despite its inadequate elevation.

Banner argues that by 2010, "the house was built, and the damage was done." (Banner Br. p. 17). In fact, the Hovens continued working on the home for several more years before it was completed. Much of the work completed after Banner's surveys in 2009 and 2010 will now have to be redone. The decks will have to come off. The interior walls of the finished garage will have to be torn out so the home can be raised. The utilities below the floor will all have to be disconnected, extended, and reconnected. If Banner had disclosed that their home was too low, construction would have ceased immediately, and the Hovens would have addressed the matter right then, and at much less expense and inconvenience.

Ignoring the mandatory rules of professional conduct that informed its duties, Banner argues that these parties were merely engaged in an arms-length business transaction and that it therefore had no duty to speak. It asserts that the Hovens must show "active concealment." (Banner Br. p. 16). In support of the assertion, Banner cites several cases, including *Yankton County v. McAllister*, 2022 S.D. 37, 977 N.W.2d 327; *Cleveland v. BDL Enters., Inc.* 2003 S.D. 54, 663 N.W.2d 212; and *Gades v. Meyer Modernizing Co., Inc*., 2015 S.D. 126, 866

N.W.2d 155. None of these cases addressed the mandatory rules that governed Banner's professional conduct. All of the cases Banner cites are factually inapposite.

Even if Banner could ignore the mandatory rules of professional conduct that informed its duty to its clients, a duty to disclose such pertinent and material information to its clients nevertheless arose under the common law. Under subsection 2 of the Restatement (Second) of Torts §551 (1977), even parties to an arm's length business transaction have a duty to disclose the following:

> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misled; and ….
>
> (e) facts basic to the transaction, if he knows that the other is about to enter it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably expect a disclosure of those facts.

The Hovens clearly put their trust and confidence in Banner and its professional land surveyors. Providing correct elevations in a vertical datum that is inappropriate for a client's purpose is not enough. A comment to the Restatement (Second) of Torts §551 addresses those "facts basic to the transaction" and states in relevant part as follows:

> "Facts basic to the transaction." A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as

> important and persuasive inducements to enter into the transaction, but no go to its essence.

The single object of these parties' relationship and transactions was ensuring that they got the elevation right for the construction in this area of special flood hazard. After providing the elevation benchmark in the inappropriate vertical datum, without the appropriate datum conversion mandated by law, when the Hovens asked Banner to verify the proper elevation, Banner was not free to remain silent and withhold such critical information from its clients. In *Schwartz v. Morgan*, the "absence of a special relationship between the parties and [the fact] that the driveway encroachment at issue was discoverable" prevented imposition of any duty to disclose, but the Supreme Court recognized that a duty can arise under the Restatement (Second) of Torts §551 (1977) in certain circumstances --even in an arms-length transaction. *Id.* at ¶¶ 12-14, 776 N.W.2d at 831. Banner conceded that the inadequate elevation of the Hovens' home was not obvious. Even if this were merely an arm's length business transaction and the mandatory rules of professional conduct could be ignored, the facts of this case present a circumstance where a duty to disclose also existed under the common law.

Banner attempts to justify its failure to disclose by suggesting the damage was already done by the spring of 2010. (Banner Br. p. 17). Yet Banner had to have known that the Hovens remained unaware and would therefore continue completing their construction if they were not advised of the fact that their home is too low. Banner opted to let them finish, in violation of a law enacted by the City

of Waubay after it had experienced tremendous losses due to flooding and a substantial loss of its tax base, to promote safety and protect health and property in this area of special flood hazard. When the evidence is viewed in a light most favorable to the Hovens, material issues of fact support their claim of fraudulent concealment against Banner and precluded summary judgment in Banner's favor, regardless of which time limit would otherwise apply.

CONCLUSION

For the foregoing reasons, the Hovens respectfully submit that the circuit court's denial of Banner's summary judgment motion was correct and should be affirmed. Even if the circuit court erred in suggesting that SDCL 15-2-13 cannot apply where SDCL 15-2A-3 does, the Supreme Court should affirm its denial of Banner's motion because result was correct. *Oldham-Ramona Sch. Dist. v. Jensen,* 503 N.W.2d 260, 264 (S.D. 1993). This matter should be remanded for a trial and a jury's proper resolution of all factual issues.

Respectfully submitted this 11th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellees' Brief contains 6,090 words as counted by Microsoft Word.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Steven J. Oberg
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CERTIFICATE OF SERVICE

Steven J. Oberg, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 11th day of October, 2022, he electronically filed the foregoing document with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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The undersigned further certifies that the original and two (2) copies of the foregoing in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Steven J. Oberg
Steven J. Oberg

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30004

MICHAEL HOVEN AND MADELYNN HOVEN,
Plaintiffs and Appellees

vs.

BANNER ASSOCIATES, INC.,
Defendant and Appellant.

APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Banner Associates, Inc. ("Banner") respectfully submits this Reply Brief, replying to the Appellees' Brief filed by Michael and Madelynn Hoven (the "Hovens") in this appeal.

RESPONSE TO THE HOVENS' STATEMENT OF FACTS

The Hovens take issue with some of the facts outlined by Banner. Banner has cited to the record for the facts that it has asserted but has also addressed some of the references made by the Hovens below. It is important to note, however, that the Hovens have, for the most part, taken issue with facts that have nothing to do with the running of the statute of limitations, the running of the statue of repose, or the facts showing that there was no fraudulent concealment on the part of Banner. The facts that are important to those issues are addressed in the Argument and Authorities section of this Brief.

The Hovens claim that Banner has asserted for the first time, that the elevation of the iron pin at issue came from the Gregerson survey. They claim that the statement is inaccurate. There are, however, numerous pages within the deposition of Steve Rames where Mr. Rames tried to explain that fact to the Hovens' counsel. That testimony was:

> A. I shot the control point lake home on at least 6/9/2006.
>
> Q. How --
>
> A. So it would have been there -- that point would have physically been in the ground there in order for me to shoot it.
>
> Q. But the Hovens hadn't even begun discussing buying it with the Gregersons until 2007. So why would you have been setting a benchmark on the Hovens' property that they were going to buy in 2006?
>
> A. I don't know what type of work was going on at the time, **but we would have set that point there somewhere prior to that timeframe.**
>
> . . . .
>
> Q. The elevation certificate for the Gregersons' property is dated and signed and stamped 7/24/2006. Does that help you tell whether these points were related to the Hoven property or the Gregerson property?

A. **It would have been the same point.**

Q. So when you set a benchmark, would you pound in rebar or what would you do?

A. Sometimes. **To the extent this is called a control point, I would say, yes, it was probably an 18-inch long, at ·least, piece of steel, steel bar, that would be driven into the ground.**

Q. **Okay.· And would you put some sort of lath by it then?**

A. **Yes.**

. . . .

Q. **All right.· And on the lath, would you have written the elevation?**

A. **We would have most likely written the elevation.**

(CR 203-204) (emphasis added). The testimony continued, with Mr. Rames saying:

A. I recall Mike contacting us, wanting us to -- what was ·the elevation for that point. **That point was there. We had established that point at some point in history; that year, 2006, whenever. Somewhere in that -- that pin was driven in the ground and that elevation was established for that point.· He knew that that point was there, and had contacted us to get the elevation of that point.**· And that's about as much as I recall.

. . . .

Q. **All right.· And so you think Ron Bergan would have been the guy under you that actually went out and located the benchmark and put a lath there so that people would know where it was and what the elevation there was?**

A. **Yes.**

(CR 205) (emphasis added). The elevation of the pin at issue came from the work performed for the Gregersons, just as stated by Banner. (See also CR 66 where elevation is noted in Gregerson Elevation Certificate).

The above exchange also shows that Mr. Hoven called up asking for the elevation of that iron pin. The Hovens refer to it as a "benchmark," which it was, but it was simply the elevation of the iron pin that had previously been set at that location. Mr. Hoven

confirmed that they used the iron rebar pin and a lath stake showing the elevation at that pin. (CR 185).

The Hovens also challenge the contention that the Hovens did not pay anything for the 2007 work. Mr. Hoven went back and forth on that but testified that: "I think I let Gregerson take care of it, if I remember right." (CR 184). They could never produce any proof of payment in 2007 and the affidavits from Banner confirm that there was no payment. (CR 55).

The Hovens claim that Banner suggested that the vertical datum was listed on the pin. Banner has never made that contention. Banner has said that the elevation of the iron pin was listed on the lath stake placed next to the iron pin, which as outlined above, came from the survey for the Gregersons, and was accurate. Moe's used the elevation on the pin and determined the height of the walls (CR 188). Mr. Hoven admitted that there was never any discussion about what datum was used or to be used. (CR 188)

The Hovens try to use the significance of the 2007 document Mr. Rames provided to them, which they call the "2007 survey," and also the 2010 letter from Mr. Rames to the Hovens. The record is clear, however, that the Hovens never relied on either document. They (or more accurately Moe's) used top of the iron pin to set the finished floor elevation for the house. (CR 189). The "2007 Survey" was never provided to Moe's or used in setting the elevations. (CR 189). The Hovens claimed that they never even saw the 2010 letter, stating: "I don't know if I ever seen this letter." (CR 192; CR 197 for Madelyn Hoven). Neither have any significance when determining whether the Hovens detrimentally relied upon the information provided by Banner, which is what they had to show to prove fraud.

The Hovens repeatedly refer generally throughout their Brief to "an inappropriate datum." There is absolutely no support for that contention or suggestion. The only competent or expert testimony (from Banner) in the case shows that that the datums are different, due to the time at which they were formed, but neither is "inappropriate." They are both recognized, but NAVD 88 is the newer, more accurate and widely used datum. There are conversions between the two datums for those who know what they are doing. Neither datum is "inappropriate." The Elevation Certificates contain conversions between the two for a reason. (CR 71; 78). Neither is right, or wrong. NAVD 88 is newer, more accurate and is currently used by almost everyone in the industry. The Hovens completely failed to prove that there was anything improper or a violation of the standard of care in any of the elevation or benchmark information provided by Banner. The fact that they may have believed that a certain datum was used does not make the use of another datum improper. The problem is that the Hovens did not know what they were doing with the information and refused to pay anyone to help them.

The Hovens dispute that the house was constructed, and the finished floor elevation was set, in the fall of 2007. The photographs and the testimony of Mr. Hoven show that they were set at that time. (CR 73-75). Banner has provided these citations, photographs, and evidence in the record and in its appellate briefs. It is immaterial that the Hovens may have added a kitchen countertop at a later time.

As mentioned, most of these facts have very little to do with the accrual of the statute of limitations or statute of repose, nor do any of them show any fraudulent concealment by Banner.

ARGUMENT AND AUTHORITIES

A. The Circuit Court erred in not properly applying the statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3 to the claims asserted against Banner.

Banner was entitled to summary judgment under SDCL 15-2-13 and 15-2A-3, and Banner did not fraudulently conceal from the Hovens the existence of their claims.

1. The Hovens have not really disputed the applicable law.

The Hovens raise very few issues with the statutory and case law referenced by Banner. The issues they have raised are addressed below.

There is a suggestion that SDCL 15-2A-3 operates as a statute of limitations and should be applied in place of the statute of limitations in SDCL 15-2-13. The Hovens have conceded that: "The Supreme Court has referred to SDCL 15-2A-3 as a statute of repose and has indicated that its application does not exclude the operation of the statute of limitations in SDCL 15-2-13." (Hoven Brief of Appellees, p. 15). The Hovens do not provide a cite, but Banner has provided the quote and the citations. "SDCL 15-2A-3 does not operate to extend the time for filing an action otherwise barred by the running of the applicable period of limitation." *Gades v. Meyer Modernizing Co., Inc.* 2015 S.D. 42, n. 6, 865 N.W.2d 155, 160,n. 6 (2015), referencing *Peterson v. Bruns*, 2001 S.D. 126, 635 N.W.2d 556, 570 (SD 2001), quoting *Zacher v. Budd Co.* 396 N.W.2d at 129, n. 5 (SD 1986).

Furthermore, as pointed out by Banner, the statute of limitations in SDCL 15-2-13 has been applied in other construction cases. See, *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, 852 N.W.2d 434 (2014); *Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, 650 N.W.2d 544 (S.D. 2002). (Cites). This Court did not rule that SDCL 15-2-13 was inapplicable because of the existence of SDCL 15-2A-3 in

any of those cases. Both can, and do, apply to limit the time within which the suit can be filed. As argued in Banner's prior briefs, the Hovens did not meet either statute.

The Hovens refer to statements made in regard to SDCL 15-2-9 that predated SDCL 15-2A-3 (SDCL 15-2-9 was unconstitutional), in cases referring to SDCL 15-2-9. They are not applicable to SDCL 15-2A-3.

SDCL 15-2A-3 and SDCL 15-2-13 are not mutually exclusive and both, or either, can apply to bar a claim. For a claim filed 15 years after completion of a project, SDCL 15-2A-3 would operate to bar the claim, even though the statute of limitations in SDCL 15-2-13 may not have run if the property damage occurred within six years of the filing of the lawsuit. Conversely, the statute of limitations could run before the statute of repose if the property damage occurs more than six years after the claim accrues, but before the ten-year statute of repose runs. There is no reason the two statutes cannot work together, and separately, depending on the timing of the claim and the filing of the lawsuit. The difference between the statutes is also significant when claims for contribution or indemnification come into play for crossclaims or third-party claims.

2. The relevant facts, rather than those argued by the Hovens, show that Banner was entitled to summary judgment.

The Hovens have made their arguments using inaccurate factual generalities, choosing to move between issues and timeframes as if they are the same. They talk about "providing the wrong" information. There is no proof that any information was "wrong." They talk very generally about "a duty to disclose" without identifying what was not disclosed and ignoring that all of the relevant information was provided to them at the latest nine years before they filed suit. They try to distort the facts to paint Banner in an

unfavorable light, while ignoring the actual chronology that is crucial to the issues in this case, and the application of those facts to the applicable legal standards.

The Hovens appear to argue that the elevation provided to them by Banner in 2007 was to con them into building their house lower than the base flood elevation. That is the only way their arguments work. They then try to show that Banner knew the elevations of the house between 2007 and 2010 and fraudulently concealed that fact from the Hovens. Neither argument is true, and as shown below, they do not change the fact that the claims related to the 2007 work accrued in 2007, or that the Hovens had the very information used to support their claims for more than nine years before they filed suit. There was no contact whatsoever between Banner and the Hovens over those nine years. Therefore, the undisputed facts, demonstrate that the claims were barred by the statute of limitations and the statute of repose and there was no fraud that would prevent either from barring the claims.

2007:

Banner 2007 Work:

In 2007, the Hovens asked Banner for the elevation of the pin on the property they purchased from the Gregersons. (CR 184-185). Mr. Hoven had talked to the City and others about the flood elevations and had tried to figure out himself what he needed to do to build his house at the right elevation. (CR 185; 187-188). Unfortunately, he did not know what he was doing. So, he asked for the elevation of the pin to be marked. As outlined earlier in this Brief, that was done using the elevation from the Gregerson Elevation Certificate. Banner provided that elevation on a lath stake.

The elevation provided to the Hovens was accurate and complied with the standard of care. There is no credible evidence in the record to show that what was provided was not accurate or did not comply with the standard of care. The Hovens apparently had access to, and knew that, the Gregerson Elevation Certificate had been filed with the City of Waubay. The Hovens simply did not know what they were doing.

In their briefs, the Hovens act as if, and even suggest, that Banner was setting the finished floor elevation or assisting them with that process. The record reflects only that Banner provided the Hovens with the elevation of the pin, and all of the mistakes made in the use of the pin were made without any involvement of Banner. Banner was never hired by the Hovens for the purpose of setting the finished floor elevation or any other elevation for the house. Banner, or a similar professional firm, should have been hired for that purpose, but the Hovens did not actually hire Banner, or a similar firm, for anything until 2010.

In their Briefs, the Hovens also make reference to a sketch provided to the Hovens in 2007, calling it a survey. As referenced above, the referenced document was not even used by the Hovens. They did not use it, look at it and any issues or arguments concerning it are inapposite.

The bottom line is that the Hovens did not hire or retain Banner for any purpose, but instead wanted free information that Banner had provided to the Gregersons. They got exactly the information that had been provided to the Gregersons. The Hovens then went on their merry way building their house without any involvement of Banner. Banner did not know what the Hovens actually did with the elevation, did not see the house until at least two years after it was constructed and had no obligation to look at the house,

survey the property or otherwise determine that the house was built too low until 2009 or 2010. The Hovens cannot prove that Banner knew anything about the finished floor elevation until at least two years after the elevation was provided.

Hoven Work in 2007:

The Hovens (or Moe's) took the elevation of the pin, did their own math and came up with an elevation for their house. The Hovens built their house in the fall of 2007. This is undisputed, shown in the photographs and admitted in the deposition testimony. The house was in place, constructed, closed in with a roof, siding, windows and doors, and most importantly, with a finished floor elevation, in the fall of 2007. Banner was nowhere near the Hoven property while that work was taking place and would not be near that property until at least 2009, long after the building and finished floor elevations were in place.

2007 Summary:

There was no contractual or other business relationship between the Hovens and Banner in 2007. Banner did a favor for the Hovens and the Hovens improperly used the information provided by Banner. There certainly was no fiduciary or confidential relationship between Banner and the Hovens in 2007. The damages claimed by the Hovens (having a house with a finished floor elevation below the base flood elevation) were set in place in 2007, when they completed the finished floor and the house. That was twelve years before the Hovens filed suit. Any issues from the 2007 elevation were barred by the six-year statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3. There was no fraud associated with providing the correct elevation for the pin.

2010:

The Hovens finally hired Banner to do work for them in May 2010. The Elevation Certificate was requested by the Hovens and provided to them by Banner in May 2010. Again, the information in the Elevation Certificate was accurate and complied with the standard of care.

The Elevation Certificate clearly shows the finished floor elevation and the base flood elevation in each of the two datums (CR 76), and contains the conversion used between the two datums (CR 71; 78). There is nice sketch showing the house and all of those elevations. (CR 76). It is easy to read and follow for anyone who looks at it. Again, that sketch was attached by the Hovens to their Complaint and used to form the bases for the Hovens' claims. They now want to run from it and claim that it did not mean anything to them. They thought they knew enough about the elevations, the base flood elevation and finished floor elevations in 2007 to determine those issues for themselves without hiring a professional such as Banner to explain the information to them. That is how they ended up with their problem. Yet, they claim that they were incapable of understanding the information provided to them in 2010. The reality is that they did not read it or pay any attention to it. They simply sent it to their insurance company and never thought anything of it.

The Hovens claim that they should have been told about the issues with the finished floor elevation being below the base flood elevation. They were told exactly that. All of the information was before them and clearly spelled out. They simply ignored it. They suggest that Mr. Johnson did something devious by not filing the Elevation Certificate with the City. Yet, they cannot show any obligation to do so. He gave to the

Hovens to decide what they wanted to do with it. If they thought it needed to be filed with the City, they could have filed it. Apparently, they knew that the Gregerson Elevation Certificate was filed with the City.

In their latest briefs the Hovens try to make something out of the 2009 elevation, provided in 2010. As pointed out, this is a non-issue because Mike Hoven testified that he never saw it. They also act as if the house was not complete in 2010. The photographs from the Elevation Certificate show a different story. The house was completed long before May 2010.

2010 Summary:

The Hovens actually hired Banner to perform work in May 2010. The work was performed properly and provided the Hovens with all of the information needed to determine the problems with the finished floor elevation that had been set in 2007. The transaction between the Hovens and Banner was a typical arm's-length business transaction. There was no fiduciary or confidential relationship.

Furthermore, Banner did not fraudulently, or otherwise, conceal anything from the Hovens. Banner provided the Hovens with exactly what they asked for, including all of the data that eventually was used to support their lawsuit. The Hovens were not prevented from determining the existence of their claims related to the 2007 work, the 2009 work, or the 2010 work. They were not prevented from discovering the information used to support the lawsuit they eventually filed. That information was provided directly to them.

After May 2010:

There was absolutely no contact between the Hovens and Banner between 2010 and 2019. Banner did not do anything during that nine-year period to prevent the Hovens from discovering the existence of their claims.

Overall Summary:

All of the work performed by Banner was performed properly and within the standard of care. Banner gave the Hovens the elevation for the iron pin on their property in 2007. The Hovens took it, ran with it, and built their house without any involvement of Banner. They used the elevation wrong and set the finished floor elevation below the base flood elevation. The house, including the final finished floor elevation were constructed and set in place in 2007. Banner had no involvement with the Hovens until 2009, and most of the subsequent involvement took place in 2010. The house had been constructed for at least two years by then.

There was never a fiduciary or confidential relationship between Banner and the Hovens. At most, there was an arm's-length business transaction. Banner did not owe a heightened standard or duty to the Hovens. The Hovens had to show that Banner fraudulently concealed from them the existence of their claims. That did not happen.

The May 2010 Elevation Certificate told the Hovens everything they needed to know about the elevation of the finished floor in their house, the base flood elevation, the conversions between the different datums and provided the Hovens with a nice sketch showing all of that information.

In May 2010, the Hovens had everything they needed to know about the claims they eventually filed in 2019. They missed the six-year statute of limitations in SDCL 15-

2-13 and the ten-year statute of repose in SCL 15-2A-3. There was no fraud, or fraudulent concealment on the part of Banner. There is no support for tolling the statute of limitations or avoiding the application of the statue of repose. The claims were barred by the statute of limitations in SDCL 15-2-13 and the statue of repose in SDCL 15-2A-3.

Other Arguments Made by the Hovens.

The arguments about the house needing to have all of the finishing touches to be "substantially complete" are inaccurate. First of all, the house, the finished floor elevation and the problems at issue were set in place in the fall of 2007 – 12 years before suit was filed. They were not changed after 2007. The kitchen countertop or interior fixtures, even if added later, had nothing to do with the finished floor elevation of the house. The work that was supposedly based on the 2007 information provided by Banner was substantially complete in 2007.

The Hovens claim that Banner's sole argument is that it had "no duty to disclose anything." That is not true. The argument, which has been proven, is that Banner disclosed everything to the Hovens. Everything was disclosed to the Hovens at least nine years before they filed suit against Banner. Nothing was fraudulently concealed from the Hovens. Everything was available for them to see with their own eyes.

Similarly, they refer to "Banner's motive for not speaking." Banner told the Hovens everything they needed to know about their claim in May 2010. Banner did not prevent the Hovens from looking at the Elevation Certificate. In fact, it was provided to them to for that purpose and use. There was no fraudulent concealment.

The Hovens make general references to the ordinance enacted by the City of Waubay, yet there is nothing in that ordinance that has any bearing on the case other than

the fact that the Hovens built their house with a finished floor elevation below the base flood elevation. In fact, the ordinance reveals that the Hovens may have violated the ordinance when they built their house. There were requirements under the ordinance to submit a variety of things to the City "before construction or development begins" for purposes of obtaining a development permit. Included in these requirements was the finished floor elevation, the base flood elevation, a certificate by a registered professional engineer or architect that the floodproofing methods meet the criteria in the ordinance. Had the Hovens hired Banner or another qualified entity to provide that information in 2007, they would likely not be in this predicament. It is undisputed that Banner was not hired to perform those services in 2007.

There are no requirements in the ordinance pertaining to the Elevation Certificate Banner provided to the Hovens three years after they began construction. There are no references in the ordinance to a particular datum that was to be used. There is nothing in the ordinance that places any duties or obligations on Banner at any time.

Finally, the Hovens refer to professional regulation standards for professional licensees under the Board for Technical Professions in an attempt to establish a heightened relationship or standard for Banner's services. They claim that these regulations gave rise to a "duty to disclose information" on the part of Banner. It is entirely unclear what Banner was supposed to disclose that wasn't disclosed when learned by Banner. Also, there is no context for the application of the standards to the current situation. There is not expert testimony presented by the Hovens that support any violation of the standards of professional conduct or how there was a violation under these circumstances.

The Hovens cite to the requirement that professionals be truthful in the preparation of reports, under A.R.S.D. 20:38:36:01 (25). There is no indication that there is anything wrong in the reports prepared by Banner. As mentioned, the Hovens rely upon the information in the Elevation Certificate in trying to prove their claims. They claim that Banner should have told them that they were constructing their home in violation of the law under A.R.S.D. 20:38:36:01 (22). The evidence shows, however, that Banner saw the property when it was empty, with nothing but an iron pin 2007. The house was, by the Hovens' own testimony, not built yet. The evidence then shows that Banner did not see the property again until at least 2009 – long after the house had been built in late 2007. Again, the Hovens' own testimony and their photographs show that the house was built by the end of 2007. Finally, the elevation certificate was accurate, met the standard of care, and told the Hovens everything they needed to know about their situation. All of the information provided was "truthful."

Finally, the Hovens cite to a lack of "fidelity" on the part of Banner, again with no context, no supporting expert evidence or anything showing what is required for professional land surveyors or professional engineers under the circumstances. Banner, on the other hand provided the sworn testimony of a registered land surveyor and a registered professional engineer that Banner complied with the professional standards of care applicable to those professions. Also, and at the risk of again repeating the obvious, in May 2010, Banner gave the Hovens everything they eventually used to assert their claims in 2019. There was no "lack of "fidelity" on the part of Banner.

The references to the professional rules of conduct do nothing to change the fact that there is no evidence to support any fraud, fraudulent concealment or similar claim

against Banner that would toll the statute of limitations, prevent the application of SDCL 15-2A-3 or that would support a fraud claim that is not barred by the statute of limitations. The fraudulent scheme alleged by the Hovens is a fallacy. If Banner was actually trying to cover up something, it did not do a very good job of it when it provided all of the information to the Hovens in the Elevation Certificate.

The statute of limitations in SDCL 15-2-13 applied, as did the statute of repose in SDCL 15-2A-3, and they barred the Hovens' claims. There was no fraud, fraudulent concealment, fraudulent misrepresentation, or any other misconduct on the part of Banner that would toll the statute of limitations in SDCL 15-2-13, or that would invoke SDCL 15-2A-7, or otherwise support a claim for fraud. Banner was entitled to summary judgment as to all of the Hovens' claims.

CONCLUSION

For the foregoing reasons, Banner respectfully requests that this Court rule that the Hovens' claims were barred by the statute of limitation sin SDCL 15-2-13 and the statue of repose in SDCL 15-2A-3. Banner also requests that this Court affirm the finding of the Circuit Court that there was no fraud or fraudulent concealment on the part of Banner and that Banner was entitled to summary judgment as to all of the claims.

Respectfully submitted this 2nd day of November 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 4,950 words as counted by Microsoft Word.

Gregory H. Wheeler

CERTIFICATE OF SERVICE

I, Gregory H. Wheeler, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 3rd day of November 2022, Appellant's Reply Brief and this Certificate of Service were electronically served upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30005

MICHAEL HOVEN AND MADELYNN HOVEN,

Plaintiffs / Appellants,

v.

BANNER ASSOCIATES, INC.,

Defendant / Appellee.

Appeal from the Circuit Court,
Fifth Judicial Circuit
Day County, South Dakota
The Honorable Jon S. Flemmer, Presiding

BRIEF OF APPELLANTS

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER DATED JUNE 17, 2022

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Jurisdictional Statement

Pursuant to SDCL §15-26A-13, the parties separately petitioned this Honorable Court to accept a Discretionary Appeal of the Order of the Circuit Court dated May 13, 2022, which denied in part and granted in part Banner Associates, Inc.'s Motion for Summary Judgment. The South Dakota Supreme Court entered an Order Granting this Petition for Allowance of Appeal from Intermediate Order #30005 on June 17, 2022.

LEGAL ISSUES

I. Does a professional land surveying firm that has provided a client an elevation benchmark for construction in a datum inappropriate for such use have any duty to later disclose that the resulting improvement is inadequately elevated?

The Circuit Court answered in the negative.

SDCL 36-18A-48
A.R.S.D. 20:38:36:01(25)
A.R.S.D. 20:38:36:01(22)

II. Did the trial court error in determining as a matter of law that Banner Associates, Inc. had not fraudulently concealed from Hovens the fact that their lake home is inadequately elevated.

The Circuit court determined as a matter of law that Banner Associates, Inc. had not fraudulently concealed the inadequate elevation of the home.

SDCL 15-2A-7
SDCL 20-10-2(3)
Olson v. Berggren, 2021 S.D. 58, 965 N.W.2d 442
Hanna v. Landsman, 2020 S.D. S.D. 33, 945 N.W.2d 534
Commercial Credit Equipment Corp. v. Johnson, 209 N.W.2d 548 (S.D. 1973)

STATEMENT OF THE CASE

Michael and Madelynn Hoven ("Hovens") brought this action against Banner Associates, Inc. ("Banner") alleging that it was negligent in providing them an elevation benchmark for the construction of their lake home, and that Banner had later fraudulently concealed the fact that their home is inadequately elevated. Banner moved for summary judgment asserting that Hovens' claim is time-barred under SDCL §15-2A-3 or under one or more statutes of limitation and that no material issues of fact exist to support their claim of fraudulent concealment. In an Order dated May 13, 2022, the circuit court granted partial summary judgment to Banner on Hovens' claim of fraudulent concealment. This appeal followed.

STATEMENT OF THE FACTS

In 2002, the City of Waubay ("City") enacted a Flood Damage Prevention Ordinance ("Ordinance") to address flooding concerns in Waubay. CR 156; App. 3-18. The City found that flood hazard areas subject to periodic inundation had resulted in a loss of life and property, public expenditures for flood protection, and impairment of the tax base, all of which adversely affect public health, safety and the general welfare. The City found these losses were caused in part by "inadequately elevated" structures. *Id.* To promote public health and safety and minimize public and private losses due to flooding in areas of special flood hazard identified by FEMA, the Ordinance prohibited construction of structures that did not fully comply with its provisions. CR 160-161. It established "minimum

requirements" and for all new residential construction, required that the lowest floor elevation must meet or exceed the base flood elevation (BFE). CR 169. The Ordinance also required that this critical elevation be recorded with the City. CR 163. FEMA's Flood Insurance Rate Map (FIRM) was designated as the source of the BFE. CR 161-162.

Banner was familiar with the Waubay area. Kent Johnson, a professional engineer and land surveyor at Banner, had been involved in modeling work to establish the BFE in the area. CR 197. Banner had also done engineering and surveying work for the City and for private property owners in Waubay. In 2006 and 2007, Banner platted lots for Dennis and Carol Gregerson on Blue Dog Lake in the City of Waubay. CR 150-151. Banner had prepared an Elevation Certificate for their cabin on one of the platted lots. CR 54. Kent Johnson had signed, sealed and dated this Elevation Certificate. CR 54. He had sent it to the City of Waubay on July 24, 2006, presumably for recording purposes as required by the Ordinance. CR 342. In his cover letter addressed to a City official and copied to the Gregersons, Mr. Johnson had taken care to point out that the vertical datum Banner had used in the survey differed from the datum reflected in the FIRM for the BFE, stating as follows:

> The Federal Emergency Management Agency (FEMA) Base Flood Elevation (BFE) was taken from the City's effective FEMA map (enclosed). Please note the survey datum and the FEMA BFE datum are different and *the appropriate datum conversion* is noted on the form.

Id. [emphasis supplied]. On the referenced form, "the appropriate datum conversion" was completed for a point designated "CP LAKE HOME." The form showed its elevation in the datum of NAVD 88 that Banner had used and the elevation when converted to the appropriate datum of NGVD 1929, as follows:

> Latitude: 45 20 36.1237
> Longitude: 97 18 58.66110
> NAVD 88 height: 1806.959 FT
> Datum shift (NAVD 88 minus NGVD 29): 0.915 feet
> Converted to NGVD 29 height: 1806.044 feet

CR 347. The elevation of CP Lake Home in NAVD 1988 was 1806.959 feet, but after "the appropriate datum conversion" to NGVD 1929 (the appropriate datum), its elevation was only 1806.044 feet. *Id*.

This "appropriate datum conversion" is required for *all* surveyed structures and ground elevations at this location. The FIRM mandates a comparison between the BFE and all elevations in the same datum, stating as follows:

> "These flood elevations **must** be compared to *structures **and** ground elevations* referenced to the same datum."

CR 345. [emphasis added]. The "datum shift" for any elevation in NAVD 1988 at this location is exactly .915 feet (or 10.8 inches) less when converted to NGVD 1929 for the mandatory comparison to the BFE. CR 198.

In the summer of 2007, Mike and Madelynn Hoven purchased a lot from the Gregersons to construct their home on Blue Dog Lake. They lived in Iowa where Madelynn managed an optical store and Mike worked as a construction foreman, often traveling away from home for his work. Whenever possible, they

traveled to Waubay to enjoy the excellent recreational fishing and hunting opportunities in the area. CR 177. When they learned that Gregersons may have lots for sale on Blue Dog Lake, they approached the Gregersons and discussed their purchase of a lot for the construction of a lake home. CR 177-178.

The Gregersons had already begun subdividing their property, utilizing Banner's professional land surveying services to plat the lots. CR 178. Hovens negotiated with Gregersons for purchase of a lot comprised of two or more of the original lots. *Id.* Banner re-platted the Hovens' lot and Mike Hoven believes he and Madelynn shared with Gregersons in the cost of Banner's re-surveying work. CR 180.

Hovens closed on their lot in late summer of 2007 and quickly began their construction. CR 178. They started by getting sewer and water lines trenched into the lot and having a temporary electric power pedestal installed for their construction. *Id.* Hovens then laid out the perimeter of their lake home on the lot, dug trenches around the home-site, and poured concrete footings to a depth below the frost-line. *Id.*

Before Hovens could proceed, however, they needed a professionally surveyed elevation benchmark. CR 179. Mike Hoven knew the City of Waubay required a minimum floor elevation of 1810' for all new residential construction. CR 180. Because the proper floor elevation would depend on the proper height of the foundation walls, Hovens and their cement contractor needed a surveyed elevation benchmark so that that the elevation could be transferred to forms used

to pour the walls to the correct height. CR 180-181. Mike Hoven and the cement contractor calculated the thickness of a plate that would sit atop the concrete walls, the added height of the floor trusses, and the added thickness of the flooring material. CR 182-183. The only thing needed before the walls were poured was a surveyed elevation benchmark. Construction could not proceed without it. CR 182.

Mike Hoven contacted Banner to request a surveyed elevation benchmark for the continued construction of their lake home. He was directed to Steven Rames, a professional engineer and land surveyor then employed by Banner. Mike explained to Mr. Rames their need for the surveyed elevation benchmark to ensure that the walls were poured high enough so that the floor, when constructed, would meet or exceed the City's 1810' minimum elevation requirement. CR 180-181. Mr. Rames expressed an understanding of their need for the elevation benchmark for their construction.

In response to Mike Hoven's request, Mr. Rames sent the Hovens a survey labeled "Mike Hove[n] Bench Mark," showing both the location and elevation of the benchmark. He signed, sealed, and dated the survey on September 5, 2007. CR 199; CR 274; App. 19.

Mr. Rames does not know if the "Mike Hove[n] Bench Mark" was actually set that day or not. CR 199. He believes it may have been the same point previously designated as "CP-Lake Home" in connection with the Gregersons' elevation survey in 2006. *Id.* Mike Hoven did not know if Banner had previously

set a pin anywhere on their lot. CR 185. If a benchmark previously existed, he was unaware. CR 150-151.

Mr. Rames did not actually set the "Mike Hove[n] Bench Mark." Instead, he sent Ron Bergen, a "field surveyor" then employed by Banner to locate and "monument" a benchmark on Hovens' property with a wooden lathe. CR 200. At the time, Hovens' ongoing construction activity on-site was obvious. The trenches with the poured footing were open and trailers with construction equipment or materials were parked on-site, reflecting ongoing construction activity to start the build. CR 152; CR 181-182.

Locating and setting an elevation benchmark is a function of professional land surveying. CR 201-202. Ron Bergen was not licensed to survey on his own nor qualified to sign or seal such documents. CR 201. Therefore, Steven Rames stamped, signed, and dated the "Mike Hove[n] Bench Mark" to certify that he had done the work or that it had been done under his responsible charge, in accordance with SDCL 36-18A-44. CR 202. A professional surveyor's seal, signature, and a date are required on any professional survey "submitted to a client or [to] any public or governmental agency." SDCL 36-18A-45.

Banner is routinely called upon to provide surveyed elevation benchmarks for construction. CR 325. Banner knew the importance of datums related to such benchmarks. In response to Requests for Admissions, Banner admitted as follows:

> [I]t was necessary for the owner of the property in question to obtain benchmark information, including information such as the datum upon which the benchmark was determined, base flood elevation and other

> pertinent information for use in establishing the finished floor elevation of any structure or property prior to constructing on that property or the owner of the structure on the property would potentially build the house at an elevation that could lead to increased risk for flooding, just as one or both of the plaintiffs did here.

CR 325. Yet Banner provided no datum information for the "Mike Hove[n] Benchmark." Banner never advised them that its stated elevation was in a datum that could not be compared to the BFE or used for their construction at this location without the appropriate datum conversion. CR 202. Hovens knew nothing about datums. CR 151.

Every surveyed elevation or benchmark has a datum plane associated with it. CR 204. When asked if a surveyed elevation benchmark should have the datum associated with it indicated, Mr. Rames stated, "There's certainly a clarity component to a datum." *Id*. When asked if the datum for the "Mike Hove[n] Bench Mark" should have been provided, he stated, "I would agree it would be helpful to be on there." CR 207. Mr. Rames further testified as follows:

> Q. Do you know why no vertical datum was indicated on this document that you signed and sealed?
>
> A. He was asking – no."

CR 204.

Banner knew the FIRM adopted by the City of Waubay states the BFE of 1810 feet in the datum NGVD 1929. CR 205. Yet Banner stated the "Mike Hove[n] Bench Mark" elevation in the datum NAVD 1988. *Id*. Banner knew that if "the appropriate datum conversion" were not done for the "Mike Hove[n] Bench

Mark," then it would overstate the elevation by .915 feet (10.98 inches) when compared to the BFE in NGVD 1929. CR 204. Rames knew the difference in elevations in the two datums is 10.98 inches. *Id*. Yet Banner did not do the appropriate datum conversion and never advised Hovens that the "Mike Hove[n] Bench Mark" was in a datum inappropriate for construction at this location. CR 152; CR 202. SDCL 36-18A-45(2) required a note or some explanation if a survey is preliminary or cannot be used for construction. CR 201-202. The survey of the "Mike Hove[n] Bench Mark" gave no such explanation or indication. CR 185; CR 274.

If as Banner suggested, the "Mike Hove[n] Bench Mark" was the same point previously designated as "CP Lake Home" in connection with the Gregerson elevation survey back in 2006, then Banner had already completed "the appropriate datum conversion" for it and knew its elevation was not actually 1806.96 feet in the appropriate datum, but only 1806.044 feet when converted to the appropriate datum NGVD 1929 for comparison to the BFE and the City's minimum elevation requirement. CR 63. Although the FIRM mandates the comparison in the same vertical datum, Banner never provided this information to the Hovens when it provided them the benchmark for their construction. CR 190.

Hovens' construction proceeded using the "Mike Hove[n] Bench Mark" without the appropriate datum conversion. The benchmark elevation was transferred directly to forms used to pour the foundation walls. CR 152. Mike Hoven directed the concrete contractor to add a couple of inches for safety to

ensure the floor when constructed would meet or exceed the City's critical 1810' minimum-elevation requirement. CR 153; CR 183.

Hovens documented their construction in 2007 in photographs. CR 208; CR 178-179. By the end of the year, the home had been "roughed-in" and was enclosed. The house was "wrapped" but it remained un-sided, uninsulated, and unheated. No interior walls had been framed. No wiring had been completed. No fixtures had been installed. *Id.* Hovens completed the lake home as time and money allowed, without outside financing, while both continued to reside in Iowa and work full-time. They did ninety percent (90%) of the work themselves, with some help from friends and family and with some hired help. CR 178.

Hovens knew the critical floor elevation had to be recorded with the City. Hovens hired Banner in 2009 to verify the proper floor elevation of their home while it was still under construction. CR 187-188. In January of 2010, Steven Rames confirmed in a letter that Banner had "shot the first floor of the house/structure" on February 2, 2009 at an elevation of "1810.19' in the Datum of NAV88." CR 187-188; CR 279; App. 20. This was Banner's first mention of a "datum" to the Hovens. Again, Mr. Rames did not do "the appropriate datum conversion" to NGVD 1929 for comparison of this critical floor elevation to the BFE and the City's requirement. Hovens assumed that at a surveyed elevation of 1810.19 feet, Mr. Rames had confirmed in writing that they had exceeded the City's minimum elevation requirement by more than a couple of inches. This also confirmed that the cement contractor had followed Mike Hoven's request that the

contractor add a couple of inches to the walls for safety. CR 181; CR 183-184; CR 188.

In 2010, Mike Hoven secured a "Home-Owner Wiring Permit" from the SD Electrical Commission to do electrical wiring in the home. He had secured an earlier permit, but it had expired before he could get the work done. CR 186. In March of 2010, Hovens hired Banner again to complete an Elevation Certificate so they could apply for flood insurance. Kent Johnson completed the Elevation Certificate, signed it, and sealed it. CR 280; App. 21-22. He certified the floor elevation at exactly 1810.0 feet in NAVD 1988. *Id*. He attached a "datum conversion" reflecting the appropriate datum conversion for a point other than the critical floor elevation. CR 74. Mr. Johnson apparently did not send the Hoven Elevation Certificate to the City as he had with the Gregerson Elevation Certificate for their cabin next door. Mr. Johnson did not explain anything to the Hovens about datums, as he had for the Gregersons with their Elevation Certificate. No one advised the Hovens or the City that they were completing the lake home at an inadequate elevation. CR 153.

Steven Rames attempted to deny that Banner knew from these elevation surveys that Hovens' lake home is inadequately elevated. He testified:

> Q. Banner Associates would have known by that time that this cabin had been built to an elevation that was less than the BFE at that location, correct?
> [objection omitted]
>
> A. I don't know – I don't know. I don't know how they would know that.
> …

> Unless somebody would have specifically pointed it out to us, we wouldn't know.

CR 206. Mr. Rames also testified as follows:

> Q. So being aware of the conversion at this location, the elevation reflected in your letter to Mike Hoven, Banner Associates could have easily determined that the cabin had been built to an elevation lower than the base flood elevation at that location, correct?
>
> A. I would say no.

CR 207. Notwithstanding his testimony, Banner had already admitted as follows:

> "Banner admits that it knew by May 11, 2010 the elevation of the finished floor of the house at the subject property was below the Base Flood Elevation from FEMA."

CR 329.

Hovens did not know. When they submitted the Elevation Certificate with an application for flood insurance in 2010, FEMA said nothing. CR 193-194. No one advised them that they were completing their lake home at an inadequate elevation that did not meet the BFE and the City's elevation requirement.

The Hovens continued working to complete the home. They ordered fixtures for the home in 2012, including a kitchen countertop and a bathroom vanity. Mike Hoven installed showers about that time. CR 189; CR 364-369. By that time, there was still interior wiring and follow-up sheetrock left to complete. CR 188-189. The house was not substantially completed or livable until around 2013. CR 178. A final electrical inspection was completed in 2015. CR 153. Mike Hoven added exterior decks to the home in 2015. *Id*.

In the spring of 2019, following heavy winter snows, lake levels began to rise again. Hovens applied for flood insurance for only the second time. CR 191; CR 194. Once again, they submitted the Elevation Certificate with their application. This time around, FEMA discerned that the stated floor elevation, when converted to the appropriate datum NGVD 1929, did not meet the BFE or the City's minimum elevation requirement. CR 191. As a result, FEMA advised Hovens that their flood insurance premium would be approximately twice the sum previously paid. *Id.*

When the Hovens learned that the home is inadequately elevated and that Banner had likely known this since 2009 or 2010, they promptly filed their lawsuit against Banner, asserting claims of both negligence and fraudulent concealment. CR 154. Following limited discovery, Banner moved for summary judgment, asserting that their lawsuit is untimely and that their claim of fraudulent concealment presents no material issue of fact. CR 154. Hovens submitted their responses to Banner's statement of undisputed fact. CR 131; App. 23-41.

The circuit court found that genuine issues of material fact exist regarding when substantial completion occurred and when their cause of action accrued but determined as a matter of law that Hovens failed to raise a genuine issue and that Banner is entitled to partial summary judgment as a matter of law on their claim of fraudulent concealment. CR 434-43.

STANDARD OF REVIEW

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … 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." SDCL §15-6-56(c).

The South Dakota Supreme Court reviews summary judgments *de novo*. *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 19, 969 N.W.2d 208, 213. The existence of a duty is a question of law also subject to a *de novo* review. *Id.* "[S]ummary judgment is not a substitute for trial; [and] a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated." *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). On summary judgment involving questions of fraud, a court is not free "to weigh the evidence and determine the matters' truth." *Olson v. Berggren*, 2021 S.D. 58, ¶ 29, 965 N.W.2d 442, 452; quoting *Hanna v. Landsman*, 2020 S.D. S.D. 33, ¶ 37, 945 N.W.2d 534, 545 (citation omitted). "Questions of fraud and deceit are normally questions of fact and as such are to be determined by a jury." *Commercial Credit Equipment Corp. v. Johnson*, 209 N.W.2d 548, 551 (S.D. 1973). All reasonable inferences that may be drawn from the facts must be viewed in the light most favorable to the non-moving party. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. SDCL 15-6-56(c). The South Dakota Supreme Court will affirm a summary judgment only when all legal questions have been decided correctly and there are

no genuine issues of material fact. *McGill v. American Life & Cas. Ins. Co.*, 200 S.D. 153, ¶ 7, 619 N.W.2d 874, 877.

ARGUMENT AND AUTHORITIES

The South Dakota Supreme Court has indicated that only when a defendant has presumptively established that an action has been brought beyond the statutory period does the burden then shift to the plaintiff to demonstrate the existence of material facts in avoidance of the defense. *See Clark County v. Sioux Equipment Corp.*, 2008 S.D. 60, ¶ 17, 753 N.W.2d 406, 412. Despite finding issues of fact regarding when substantial completion occurred and when Hovens' cause of action accrued, the trial court shifted the burden to them and determined as a matter of law that they had failed to raise a genuine issue of material fact to support their claim of fraudulent concealment. CR 422-423. Hovens respectfully submit that the trial court erred in failing to consider the mandatory professional duties that professional land surveyors and surveying firms owe their clients and in failing to view the evidence in a light most favorable to the Hovens as the non-moving parties.

A. The Trial Court Erred in Accepting Banner's Argument that it had No Duty to Disclose to Hovens that Their Lake Home is Inadequately Elevated after it had Verified the Fact Midway Through Their Construction

Banner argues it had no duty to disclose to Hovens that they were completing their home at an inadequate elevation in violation of the law. Banner argues it had no duty to disclose because it was not in a confidential relationship with the Hovens, it was not acting as their fiduciary, and because this was an

"arm's length transaction." Relying on *Cleveland v. BDL Enterprises, Inc.*, 2003 S.D. 54, 663 N.W.2d 212 and *Gades v. Meyer Modernizing Co., Inc.* 2015 S.D. 42, 865 N.W.2d 155, Banner argues that Hovens must therefore demonstrate "active concealment" on its part that prevented their discovery of the material fact. CR 37-40; CR 381; CR 398-400. The trial court erred in accepting this argument.

The facts in *Cleveland* and *Gades* are inapposite. The problems that arose with the properties in each of those cases were obvious and could not be concealed by the defendants. In contrast, here the inadequate elevation of the Hovens' home could not be readily detected or discerned. Banner admitted this in open court. *See* CR 399-400.

More importantly, the parties' relationship here differed markedly from the relationships in either of those cases. In *Cleveland*, there was no professional relationship between the homeowners and the engineering firm involved. In both *Cleveland* and *Gades,* there was no claim or any evidence to support a claim of a "relationship of trust or confidence" between the parties. *See Cleveland*, 2003 S.D. 54 at ¶¶ 20-21, 663 N.W.2d at 218; *see also, Gades*, 2015 S.D. 42 at ¶ 12, 865 N.W.2d at 160. In contrast, here the Hovens hired Banner to provide a surveyed elevation benchmark critical to construction at or above a minimum elevation required by law for this area of special flood hazard. After providing the requested elevation benchmark in an inappropriate datum that could not be used for this purpose without "the appropriate datum conversion," Hovens re-hired Banner and Mr. Rames to verify the correct floor elevation of their home midway

through its construction. They clearly put their trust and confidence in Banner and Mr. Rames and relied upon them to ensure that they started their construction at the proper elevation, and then to confirm that they had achieved the correct minimum elevation. Achieving and confirming the critical minimum elevation in this area of special flood hazard was the sole reason for and object of the parties' relationship with Banner.

Under these circumstances, the relationship between professional land surveyor and client cannot be reasonably equated to an arms-length transaction. Under the common law doctrine of *caveat emptor*, a seller of property had no duty to disclose to his buyer because they were deemed equal in relative bargaining power and fully able to protect themselves. *See Waggoner v. Midwestern Development, Inc*., 154 N.W.2d 803 (S.D. 1967). The Hovens knew they had to meet the City's minimum elevation requirement, but they were necessarily reliant on professional land surveyors to assist them in achieving and confirming the proper elevation of their improvement.

Even in an "arms-length transaction," a duty to disclose a material fact can arise. The South Dakota Supreme Court has stated as follows:

> [A]nyone, including those in an arms-length transactions, could have a duty to disclose under SDCL 20-10-2(3) "facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

Schwartz v. Morgan, 2009 S.D. 110, ¶ 12, 776 N.W.2d 827, 831; citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 913 (S.D. 1992) (quoting Restatement (Second) Torts §551(2)(e)(cmt. 1)). Under the objective circumstance presented here, Banner had a duty under to inform Hovens that they were completing their home at an inadequate elevation, when they asked Mr. Rames to verify the critical floor elevation midway through their construction. Steven Rames, who had provided the "Mike Hove[n] Bench Mark" for the start of their construction, clearly would have known that Hovens would expect him to tell them if their floor elevation did not meet the minimum legal requirement.

Under SDCL 36-18A-48, Banner is responsible for the conduct or actions of its agents in providing professional land surveying services. The duty of Banner and its agents to disclose under the objective circumstances is clear. Furthermore, their duty to disclose is mandated by Rules of Professional Conduct that govern their profession. The Rules of Professional Conduct apply to all licensed land surveyors and to all businesses that offer such services. *See*, A.R.S.D. 20:38:36:01. In Guidelines for the Professional Practice of Surveying in the State of South Dakota, the South Dakota Society of Professional Land Surveyors has expressly recognized that, by law, all professional land surveyors must adhere to these Rules of Professional Conduct. *See* CR 289; 292. Under these mandatory Rules, Banner and its professional land surveyors had a duty to maintain a high standard of integrity, skill and practice, and to safeguard the life, health, safety, welfare, and property of the public. They were also obligated to

know and to take into account all applicable state and municipal laws, ordinances and regulations, and to *not* knowingly execute any project in violation of them. A.R.S.D. 20:38:36:01(21).

Under these mandatory Rules, Banner and its professional surveyors also owed Hovens as clients their duty of fidelity. *See* A.R.S.D. 20:38:36:01(4). In addressing the duty of fidelity that attorneys owe clients, one court observed that "[t]he duty of loyalty, or sometimes, the duty of fidelity speaks to the fiduciary nature of the lawyer's duties to his client, of confidentiality and of candor and disclosure." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1215 (Miss. 1996). Webster's II New Riverside University Dictionary (1984) defines "fidelity" as:

> 1. Faithfulness to obligations, duties, or observances. 2. Exact correspondence with fact or a given quality, condition, or event; Accuracy.

Even if the duty of fidelity that a professional land surveyor owes a client does not equate to a fiduciary duty, it does seem to reflect the confidence that the client necessarily places in such professionals and the services they provide. Even if the duty of fidelity only requires accuracy and exactness, given the disparity in the datum Banner used for the benchmark and for verification of the critical floor elevation, Banner had a duty to convey the elevation information in a clear and meaningful manner. Providing confusing information regarding such critical information arguably does not satisfy the surveyor's mandatory duty of fidelity.

Furthermore, the mandatory Rules of Professional Conduct required that Banner and its professional surveyors be "completely objective and truthful in all professional reports [or] statements … and [that they] include all relevant and pertinent information in those reports [or] statements." A.R.S.D. 20:38:36:01(25). Even if the information that Banner and its agents provided was accurate, by omitting the fact that the home is inadequately elevated, they failed to provide "all relevant and pertinent information." Finally, Banner and its agents had a mandatory duty to disclose to the Hovens their inadvertent violation of the law. The mandatory Rules of Professional Conduct provide that if "in the course of work on a project, [the professional land surveyor] becomes aware of an action taken by the client against [his] advice, which violates applicable … municipal laws and regulations and which will … adversely affect the life, health, safety, welfare and property of the public," the client must be advised and if the client persists, the professional must terminate his services and notify the public authority. A.R.S.D. 20:38:36:01(22).

The mandatory Rules of Professional Conduct clearly required that Banner and its professional land surveyors disclose to Hovens that they were constructing their home in violation of the law. Banner and its agents chose to ignore their professional duties. The trial court erred in accepting Banner's argument and in ruling as a matter of law that Banner had not fraudulently concealed this material and pertinent fact.

B. In Determining as a Matter of Law that Banner had Not Fraudulently Concealed a Material Fact from the Hovens, the Trial Court Erred in Failing to View the Evidence in a Light Most Favorable to Them

In granting partial summary judgment on the claim of fraudulent concealment, the trial court indicated that while the information Banner provided the Hovens "may have been confusing due to the difference[s] in datum[s] used," there did not appear to be any evidence that Banner had intended to deceive the Hovens. CR 423. In making this determination, the trial court not only overlooked Banner's mandatory duties, but also failed to view the evidence in a light most favorable to the Hovens. When viewed under the correct standard, genuine issues of material fact clearly emerge in support of each element of their claim.

Fraudulent concealment is a form of deceit, defined in SDCL 20-10-2(3) as "[t]he suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact[.]" *Olson v. Berggren*, 2021 S.D. 58, 965 N.W.2d 442, n. 10. The elements are:

> (1) The defendant had a duty to disclose a material fact to the plaintiff;
>
> (2) The defendant [willfully concealed or suppressed the fact][willfully gave information of other facts which were likely to mislead because of the defendant's failure to communicate the material fact].
>
> (3) The defendant acted with the intent to induce the plaintiff to alter the plaintiff's position to the plaintiff's injury or risk.
>
> (4) The undisclosed information was something the plaintiff could not discover by acting with reasonable care.

(5) The plaintiff relied on the misrepresentation to the plaintiff's detriment.

(6) The plaintiff suffered damage as a result.

SDCPJI No. 20-110-25. Beyond the legal question of Banner's duty to disclose, there are issues of fact for a jury to resolve.

Regarding the second element, the evidence supports Hovens' claim that Banner and its professional land surveyors willfully concealed or suppressed the fact that their home is inadequately elevated or gave information of other facts likely to mislead them because of their failure to communicate the material fact. After Mr. Rames had provided the "Mike Hove[n] Bench Mark" to Hovens for the start of their construction, when Hovens hired him back to verify the critical floor elevation to ensure their compliance with the law midway through their construction, he must have known they would expect him to tell them if the floor elevation was too low. Mr. Rames verified the critical floor elevation but then stated its elevation in the inappropriate datum that could not be compared directly to the BFE. Naturally, this misled the Hovens into believing that he had confirmed that their floor elevation had not only met but had exceeded the minimum requirement.

On the third element, the Hovens must prove that Banner or its agents intended to induce them to alter their position to their injury or damage. Banner and Mr. Rames knew the "datum shift" at this location is .915 feet (10.98 inches). After providing the elevation benchmark at the start, Mr. Rames must have

realized the floor elevation he surveyed in 2009 was inadequate, by nearly the same amount as the "datum shift." He must have also realized that the Hovens were unaware, yet he said nothing and provided the critical floor elevation in the same inappropriate datum. Mr. Rames had to have known that the Hovens were unaware of the datum shift, or of the need for the appropriate datum conversion. He also had to have known that, unless he told them, they would continue their construction unaware of the fact that their home is inadequately elevated.

Even if a jury could accept Mr. Rames's claim that he did not realize that their home is inadequately elevated after he verified its critical floor elevation, Banner admitted it knew by May, 2010. Yet Banner did not disclose this material fact to the Hovens. In the Elevation Certificate, Mr. Johnson again stated the critical floor elevation in the inappropriate datum that could not be compared directly to the BFE and he did not send the Elevation Certificate to the City for recording as he done with the Gregerson Elevation Certificate. Recording this critical floor elevation is required. He did not explain the datum shift to the City or to the Hovens as he had with the Gregerson Elevation Certificate. He clearly knew that the Hovens' home was too low. He must have realized they were unaware and that unless they were told, they would continue construction of their home to completion at its inadequate elevation.

When viewed in a light most favorable to the Hovens, the evidence suggests that Banner and its professional surveyors knew but chose *not* to disclose the truth to the Hovens or to the City of Waubay. The reasonable inference to be

drawn from the evidence is that Banner and its professional surveyors knew the home was being completed at an inadequate elevation but did not wish to disclose this because doing so would expose its own error in providing the elevation benchmark for construction in the inappropriate datum. The evidence suggests that Banner did not wish to invite a lawsuit so it opted instead to let Hovens continue completing their inadequately elevated lake home. Banner and its professional surveyors not only induced Hovens to continue their construction, but also delayed their discovery of the truth. The evidence presents an issue of fact regarding the third element of their claim of fraudulent concealment.

In regard to the fourth element, Banner argues that Hovens could have readily determined that the home was inadequately elevated from information provided in the Elevation Certificate. However, the argument ignores the fact that by the time the Elevation Certificate was provided to the Hovens, they reasonably believed that Banner had already confirmed the proper elevation of their home. They simply requested the Elevation Certificate because it is necessary when applying for flood insurance. Although Banner provided some additional information regarding datums, the critical floor elevation was never stated in the appropriate datum and nothing was done to clarify the facts for the Hovens.

When Hovens submitted the Elevation Certificate with their application for flood insurance in 2010, FEMA did not catch the problem. FEMA said nothing. FEMA only discerned the problem when Hovens submitted the Elevation Certificate for a second time in 2019. FEMA then realized that the stated floor

elevation in NAVD 88, when converted to the appropriate datum, does not meet the BFE in NGVD 1929.

While Banner claims that Hovens should have realized their home was too low by 2010, Mr. Rames suggested that even he did not realize this and he attempted to suggest that Banner likely did not know. He disputed an assertion that Banner could have easily determined this from the elevation surveys completed in 2009 and 2010. While Mr. Rames's credibility is in question and Banner has now admitted it knew by May of 2010, his testimony supports Hovens' assertion that they could not reasonably be expected to discover the fact for themselves under the circumstances. At minimum, an issue of fact remains for a jury to resolve.

Finally, the evidence clearly supports the remaining two elements of their claim. The Hovens clearly relied on Banner to verify the proper floor elevation of their home and they reasonably believed that Mr. Rames had confirmed its proper elevation. If they had known the truth in 2010, as Banner admittedly did, they would have ceased construction immediately until the was addressed and resolved. They would have never installed fixtures, attached exterior decks, or completed the home had they known it needs to be raised. If FEMA had not brought this to their attention in 2019, Hovens would likely still be unaware. Only Banner would know the truth. Banner has known since at least 2010 that this home stands in violation of an Ordinance enacted by the City of Waubay to protect health, safety, and property. Banner has also known that the home is at an increased risk of

flooding. When viewed in a light most favorable to the Hovens, the evidence raises material issues of fact that support the claim. The trial court erred in granting a partial summary judgment to Banner.

CONCLUSION

Mike and Madelynn Hoven respectfully submit that the trial court erred in granting partial summary judgment on their claim of fraudulent concealment. After setting the benchmark, when Banner was asked to verify the proper floor elevation midway through construction, it had a duty to disclose that the home was inadequately elevated. Banner now admits it has known since May of 2010 that the home is too low. The evidence suggests that Banner also knew how this happened. While mistakes can and do happen, professional land surveyors have a duty of fidelity to their clients, a duty to be completely truthful and to provide their client with all pertinent and relevant information, and a duty to advise their clients of their violation of such laws. If Banner had disclosed the truth, this matter could have been addressed long ago. Because Banner chose to not disclose the truth, however, a jury should now determine not only its liability for providing the benchmark in the inappropriate datum, but also its liability for fraudulently concealing the truth from its clients. The Hovens respectfully request that this Honorable Court reverse the partial summary judgment and remand the claim of fraudulent concealment for trial by a jury.

Dated this 16th day of August, 2022.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Steven J. Oberg

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument on this matter.

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellants' Brief contains 6,746 words as counted by Microsoft Word.

/s/ Steven J. Oberg
Steven J. Oberg

CERTIFICATE OF SERVICE

Steven J. Oberg, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 16th day of August, 2022, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the Brief of Appellants in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Steven J. Oberg
Steven J. Oberg

APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF DAY) FIRST JUDICIAL CIRCUIT

MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, vs. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **ORDER DENYING IN PARTAND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Court on April 20, 2022, on Defendant Banner Associates, Inc.'s Motion for Summary Judgment; and Defendant Banner Associates, Inc., having appeared through a representative, Greg Jorgenson, and with its counsel, Gregory H. Wheeler, and Plaintiffs Michael Hoven and Madelynn Hoven having appeared personally and with their counsel, Steven J. Oberg, and; and the Court having read and considered the motion and all pleadings herein; and having heard and considered the arguments of counsel; and having reviewed the evidence in a light most favorable to Plaintiffs, and having determined that genuine issues of material fact exist regarding when substantial completion occurred and when the cause of action accrued; Now Therefore, it is HEREBY:

ORDERED that Defendant Banner Associates, Inc.'s Motion for Summary Judgment should be and is DENIED in part and GRANTED in part. The Court finds that material questions of fact remain as to whether the Plaintiffs' claims are barred by the statute of repose in SDCL 15-2A-3, and the Court, therefore, DENIES that part of Banner's Motion. The Court finds that there are no material issues of fact relating to the

Plaintiffs' claims of fraudulent concealment and the Court, therefore, GRANTS the motion for summary judgment on the issue of fraudulent concealment. Finally, the Court finds that the statute of limitations in SDCL 15-2-13 does not apply to the Plaintiffs' claims and the Court, therefore, DENIES the motion for summary judgment as it relates to the issues involving SDCL 15-2-13.

Dated May 13, 2022.

Honorable Jon S. Flemmer

Clerk

FLOOD DAMAGE PREVENTION ORDINANCE

SECTION 1.0
STATUTORY AUTHORIZATION, FINDINGS OF FACT, PURPOSE AND OBJECTIVES

1.1 STATUTORY AUTHORIZATION

The Legislature of the State of South Dakota has in SDCL 9-32-1 delegated the responsibility to local government units to adopt regulations designed to promote the public health, safety, and general welfare of its citizenry. Therefore, the City Council of Waubay does ordain Waubay, South Dakota as follows:

1.2 FINDINGS OF FACT

(1) The flood hazard areas of Waubay are subject to periodic inundation which results in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety and general welfare.

(2) These flood losses are caused by the cumulative effect or obstructions in areas of special flood hazard which increase flood heights and velocities, and when inadequately anchored, damage uses in other areas. Uses that are inadequately floodproofed, elevated or otherwise protected from flood damage also contribute to the flood loss.

1.3 STATEMENT OF PURPOSE

It is the purpose of this ordinance to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions to specific areas by provisions designed:

(1) To protect human life and health;

(2) To minimize expenditure of public money for costly flood control projects;

(3) To minimize the need for rescue and relief efforts associated with flooding and generally undertaken at the expense of the general public;

(4) To minimize prolonged business interruptions;

(5) To minimize damage to public facilities and utilities such as water and gas mains, electric, telephone and sewer lines, streets and bridges located in areas of special flood hazard;

(6) To help maintain a stable tax base by providing for the sound use and development of areas of special flood hazard so as to minimize future flood blight areas;

(7) To ensure that potential buyers are notified that property is in an area of special flood hazard; and,

(8) To ensure that those who occupy the areas of special flood hazard assume responsibility for their actions.

1.4 METHODS OF REDUCING FLOOD LOSSES

In order to accomplish its purposes, this ordinance includes methods and provisions for:

(1) Restricting or prohibiting uses which are dangerous to health, safety, and property due to water or erosion hazards, or which result in damaging increases in erosion or in flood heights or velocities;

(2) Requiring that uses vulnerable to floods, including facilities which serve such uses, be protected against flood damage at the time of initial construction;

(3) controlling the alteration of natural floodplain., stream channels, and natural protective barriers, which help accommodate or channel flood waters;

(4) Controlling filling, grading, dredging, and other development which may increase flood damage; and,

(5) Preventing or regulating the construction of flood barriers which will unnaturally divert flood waters or which may increase flood hazards in other areas.

SECTION 2.0
DEFINITIONS

Unless specifically defined below, words or phrases used in this ordinance shall be interpreted so as to give them the meaning they have in common usage and to give this ordinance its most reasonable application.

"Appeal" means a request for a review of the Floodplain Administrator's interpretation of any provisions of this ordinance or a request for a variance.

"Area of special flood hazard" means the land in the floodplain subject to a one percent or greater chance of flooding in any given year.

"Base flood" means the flood having a one percent chance of being equaled or exceeded in any given year.

"Development" means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of special flood hazard.

"Existing manufactured home park or subdivision" means a manufactured home park for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including, at a minimum, the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads) are completed before the effective date of this ordinance.

"Expansion to existing manufactured home park or subdivision" means the preparation of additional sites by the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads).

"Flood" or "flooding" means a general and temporary condition of partial or complete inundation of normally dry land areas from:

(1) The overflow of inland or tidal waters and/or
(2) The unusual and rapid accumulation or runoff of surface waters from any source.

"Flood Insurance Rate Map (FIRM)" means the official map on which the Federal Emergency Management Agency has delineated both the areas of special food hazards and the risk premium zones.

"Flood Insurance Study" means the official report provided by the Federal Emergency Management Agency that includes flood profiles, the Flood Boundary-Floodway Map, and the water surface elevation of the base flood.

"Lowest floor" means the lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage, in an area other than a basement area, is not considered a building's lowest floor, provided that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of this ordinance.

"Manufactured home" means a structure, transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when attached to the required utilities. The term "manufactured home" does not include a "recreational vehicle."

"New construction" means structures for which the "start of construction" commenced on or after the effective of the original ordinance, and includes any subsequent improvements to such structures.

"New manufactured home park or subdivision" means a manufactured home park or subdivision for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including at a minimum, the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads) is completed on or after the effective date of these floodplain management regulations.

"Recreational vehicle" means a vehicle which is (1) built on a single chassis; (2) 400 square feet or less when measured at the largest horizontal projections; (3) designed to be self-propelled or permanently movable by a light duty truck; and (4) designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

"Start of construction" includes substantial improvement, and means the date the building permit was issued, provided the actual start of construction, repair, reconstruction, placement, or other improvement was within 180 days at the permit date. The actual start means the first placement of permanent construction of a structure on a site, such as the pouring of slab or footings, the installation of piles, the construction of columns or any work beyond the stage of excavation or the placement of a manufactured home on a foundation. Permanent construction does not include land preparation, such as clearing, grading and filling nor does it include the installation of streets and/or walkways: nor does it include excavation for a basement, footing, piers, or foundations or the erection of temporary forms, nor does it include the installation on the property of accessory buildings, such as garages or sheds not occupied as dwelling units or not part of the main

structure. For a substantial improvement, the actual start of construction means the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the building.

"Structure" means a walled and roofed building or manufactured home that is principally above ground.

"Substantial damage" means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

"Substantial improvement" means any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of structure before the "start of construction" of the improvement. This term includes structures which have incurred "substantial damage," regardless of the actual repair work performed. The term does not, however, include either:

(1) Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions or

(2) Any alteration of a "historic structure," provided that the alteration will not preclude the structure' s continued designation as a "historic structure."

"Variance" means a grant of relief from the requirements of this ordinance which permits construction in a manner that would otherwise be prohibited by this ordinance.

SECTION 3.0
GENERAL PROVISIONS

3.1 LANDS TO WHICH THIS ORDINANCE APPLIES

This ordinance shall apply to all areas of special flood hazard within the jurisdiction of the City of Waubay.

3.2 BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD

The areas of special flood hazard identified by the Federal emergency Management Agency in a scientific and engineering report entitled, "The Flood Insurance Study for the City of Waubay" with an accompanying Flood Insurance Rate Map (FIRM) dated April 25, 2000, are hereby adopted by reference and

declared to be a part of this ordinance. The Flood Insurance Study and FIRM are on file at the Waubay City Office.

3.3 COMPLIANCE

No structure or land shall hereafter be constructed, located, extended, converted or altered without full compliance with the terms of this ordinance and other applicable regulations.

3.4 ABROGATION AND GREATER RESTRICTIONS

This ordinance is not intended to repeal, abrogate, or impair any existing easements, covenants, or deed restrictions. However, where this ordinance and or another ordinance, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restrictions shall prevail.

3.5 INTERPRETATION

In the interpretation and application of this ordinance, all provisions shall be:

(1) Considered as minimum requirements;

(2) Liberally construed in favor of the governing body; and,

(3) Deemed neither to limit nor repeal any other powers granted under State statutes.

3.6 WARNING AND DISCLAIMER OF LIABILITY

The degree of flood protection required by this ordinance is considered reasonable for regulatory purposes and is based on scientific and engineering considerations. Larger floods can and will occur on rare occasions. Flood heights may be increased by man-made or natural causes. This ordinance does not imply that land outside the areas of special flood hazard or uses permitted within such areas will be free from flooding or flood damages. This ordinance shall not create liability on the part of the City of Waubay, any officer or employee thereof, or the Federal Emergency Management Agency for any flood damages that result from reliance on this ordinance or any administrative decision lawfully made thereunder.

SECTION 4.0
ADMINISTRATION

4.1 ESTABLISHMENT OF DEVELOPMENT PERMIT

A development permit shall be obtained before construction or development begins within any area of special flood hazard established in Section 3.2.

Application for a development permit shall be made on forms furnished by the City of Waubay and may include, but not be limited to:

The applicant for a development permit shall submit a plan, in duplicate, drawn to scale showing the nature, location, dimensions, and elevations of the area in question; existing or proposed structures, fill, storage of materials, drainage facilities; and the location of the foregoing. Specifically, the following information is required:

(1) Elevation in relation to mean sea level of the lowest floor (including basement) of all structures;

(2) Elevation in relation to mean sea level to which any structure has been floodproofed;

(3) Certificate by a registered professional engineer or architect that the floodproofing methods for any non-residential structure meet the floodproofing criteria in Section 5.2-2; and

(4) Description of the extent to which any watercourse will be altered or relocated as a result of proposed development.

4.2 DESIGNATION OF THE FLOODPLAIN ADMINISTRATOR

The Floodplain Administrator (as appointed by the Waubay City Council), in conjunction with the Waubay City Finance Officer is hereby appointed to administer and implement this ordinance by granting or denying development permit applications in accordance with its provisions.

4.3 DUTIES AND RESPONSIBILITIES OF THE FLOODPLAIN ADMINISTRATOR

Duties of the Floodplain Administrator shall include, but not be limited to:

4.3-1 Permit Review

(1) Review all development permits, in conjunction with the City Finance Officer to determine that the permit requirements of this ordinance have been satisfied;

(2) Review all development permits, in conjunction with the City Finance Officer, to determine that all necessary permits have been obtained from Federal, State, or local governmental agencies from which prior approval is required.

(3) Review all development permits, in conjunction with the City Finance Officer, to determine if the proposed development adversely affects the flood-carrying capacity of the area of special flood hazard. For purposes of this ordinance, "adversely affects" means that the cumulative effect of the proposed development when combined with all other existing and anticipated development will not increase the water surface elevation of the base flood area more than one foot at any point.

4.3-2 Use of Other Base Flood Data

When base flood elevation data has not been provided in the accordance with Section 3.2, BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD, then the Floodplain Administrator shall obtain, review, and reasonably utilize any base flood elevation and floodway data available from any Federal State, or other source as criteria for requiring that new construction, substantial improvements, or other development in Zone A are administered in accordance with Section 5.2, SPECIFIC STANDARDS.

4.3-3 Information to be Obtained and Maintained

(1) Obtain and record the actual elevation (in relation to mean sea level) of the lowest floor (including basement) of all new or substantial improved structures, and whether or not the structure contains a basement.

(2) For all new or substantially improved floodproofed structures:

(i) Verify and record the actual elevation (in relation to mean sea level) to which the structure has been floodproofed.

(ii) Maintain the floodproofing certifications required in Section 4.1(3).

(3) Maintain for public inspection all records pertaining to the provisions of this ordinance.

4.3-4 Alteration of Watercourses

(1) Notify adjacent communities and the Division of Emergency Management prior to any alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Emergency Management Agency.

(2) Require that maintenance is provided within the altered or relocated portion of said watercourse so that the flood-carrying capacity is not diminished.

4.3-5 Interpretation of FIRM Boundaries

Make interpretations, where needed, as to the exact location of the boundaries of the areas of special flood hazard (for example, where there appears to be a conflict between a mapped boundary and actual field conditions). The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretation as provided in Section 4.4.

4.4 VARIANCE PROCEDURE

4.4-1 Appeal Board

(1) The Floodplain Appeal Board, as established by the City of Waubay shall hear and decide appeals and request for variances from the requirements of this ordinance.

(2) The Floodplain Appeal Board shall hear and decide appeals when it is alleged there is an error in any requirement, decision or determination made by the Floodplain Administrator in the enforcement or administration or this ordinance.

(3) Those aggrieved by the decision of the Floodplain Appeal Board, or any taxpayer, may appeal such decisions to the Circuit Court, as provided in SDCL 1-26-30.2.

(4) In passing upon such applications, the Floodplain Appeal Board shall consider all technical evaluations, all relevant factors, standards specified in other sections of this ordinance, and:

(i) the danger that materials may be swept onto other lands to the injury of others;

(ii) the danger to life and property due to flooding or erosion damage;

(iii) the susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owners;

(iv) the importance of the services provided by the proposed facility to the community;

(v) the necessity to the facility of a waterfront location, where applicable;

(vi) the availability of alternative locations for the proposed use which are not subject to flooding or erosion damage;

(vii) the compatibility of the proposed use with the existing and anticipated development;

(viii) the relationship of the proposed use to the comprehensive plan and floodplain management program for that area;

(ix) the safety of access to the property in times of flood for ordinary vehicles;

(x) the expected heights, velocity, duration, rate of rise and sediment transport of the flood waters and the effects of wave action, if applicable, expected at the site; and,

(xi) the costs of providing governmental services during and after flood conditions, including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, streets and bridges.

(5) After consideration of the factors of Section 4.4-1(4) and the purposes of this ordinance, the Floodplain Appeal Board may attach

such conditions to the granting of variances as it deems necessary to further the purposes of this ordinance.

(6) The Floodplain Administrator shall maintain the records of all appeal actions, including technical information, and report any variances to the Federal Emergency Management Agency.

4.4-2 Conditions for Variances

(1) Generally, variances may be issued for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, providing items (i-xi) in Section 4.4-1(4) have been fully considered. As the lot size increases beyond the one-half acre, the technical justifications required for issuing the variance increases.

(2) Variances may be issued for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places without regard to the procedures set forth in the remainder of this section.

(3) Variances shall not be issued within any designated floodway if any increase in flood levels during the base flood discharge would result.

(4) Variances shall only be issued upon a determination that the variance is the minimum action necessary, considering the flood hazard, to afford relief.

(5) Variances shall only be issued upon:

(i) a showing of good and sufficient cause;

(ii) a determination that failure to grant the variance would result in exceptional hardship to the applicant; and

(iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expenses, create nuisances, cause fraud on or victimization of the public as identified in Section 4.4-1(4) or conflict with existing local laws or ordinances.

(6) Any applicant to whom a variance is granted shall be given written notice that the structure will be permitted to be built with a lowest floor below the base flood elevation and that the cost of flood insurance will be commensurate with the increased risk from the reduced lowest floor elevation.

SECTION 5.0
PROVISIONS FOR FLOOD HAZARD REDUCTION

5.1 GENERAL STANDARDS

In all areas of special flood hazard, the following standards are required:

5.1-1 Anchoring

(1) All new construction and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure and capable of resisting the hydrostatic and hydrodynamic loads.

(2) All manufactured homes must be elevated and anchored to resist flotation, collapse or lateral movement and capable of resisting and hydrostatic and hydrodynamic loads. Methods of anchoring may include, but are not limited to use of over-the-top or frame ties to ground anchors. This requirement is in addition to applicable State and local anchoring requirements for resisting wind forces. Specific requirements may be:

(i) over-the-top ties be provided at each of the four corners of the manufactured home, with two additional ties per side at intermediate locations, with manufactured homes less than 50 feet long requiring one additional tie per side.

(ii) frame ties be provided at each corner of the home with five additional ties per side at intermediate points, with manufactured homes less than 50 feet long requiring four additional ties per side;

(iii) all components of the anchoring system be capable of carrying a force of 4,800 pounds; and

(iv) any additions to the manufactured home be similarly anchored.

5.1-2 Construction Materials and Methods

(1) All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.

(2) All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

(3) All new construction and substantial improvements shall be constructed with electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities that are designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

5.1-3 Utilities

(1) All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters into the system;

(2) New and replacement sanitary sewage systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharge from the systems into flood waters; and

(3) On-site waste disposal systems shall be located to avoid impairment to them or contamination from them during flooding.

5.1-4 Subdivision Proposals

(1) All subdivision proposals shall be consistent with the need to minimize flood damage;

(2) All subdivision proposals shall have public utilities and facilities such as sewer, gas, electrical, and water systems located and constructed to minimize flood damage;

(3) All subdivision proposals shall have adequate drainage provided to reduce exposure to flood damage; and

(4) Base flood elevation data shall be provided for subdivision proposals and other proposed development which contain at least 50 lots or 5

acres (whichever is less).

5.1-5 Encroachments

The cumulative effect of any proposed development, when combined with all other existing and anticipated development, shall not increase the water surface elevation of the base flood more than one foot at any point.

5.2 SPECIFIC STANDARDS

In all areas of special flood hazard where base flood elevation data has been provided as set forth in Section 3.2, BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD or Section 4.3-2, Use of Other Base Flood Data, the following provisions are required:

5.2-1 Residential Construction

(1) New construction and substantial improvement of any residential structure shall have the lowest floor (including basement) elevated to or above the base flood elevation.

5.2-2 Nonresidential Construction

New Construction and substantial improvement of any commercial, industrial or other nonresidential structure shall either have the lowest floor (including basement) elevated to the level of the base flood elevation; or, together with attendant utility and sanitary facilities, shall:

(1) be floodproofed so that below the base flood elevation the structure is watertight with walls substantially impermeable to the passage of water.

(2) have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and,

(3) be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting the provisions of this paragraph. Such certifications shall be provided to the official as set forth in Section 4.3-3(2).

5.2-3 Manufactured Homes

(1) Manufactured homes shall be anchored in accordance with Section 5.1-1(2).

(2) All manufactured homes or those to be substantially improved shall conform to the following requirements:

(a) Require that manufactured homes that are placed or substantially improved on a site (i) outside of a manufactured home park or subdivision, (ii) in a new manufactured home park or subdivision, (iii) in an expansion to an existing manufactured home park or subdivision, or (iv) in an existing manufactured home park or subdivision on which a manufactured home has incurred "substantial damage" as the result of a flood, be elevated on a permanent foundation such that the lowest floor of the manufactured home is elevated to or above the base flood elevation and be securely anchored to an adequately anchored foundation system to resist flotation, collapse and lateral movement.

(b) Require that manufactured homes to be placed or substantially improved on sites in existing manufactured home parks or subdivisions that are not subject to the provisions in (a) above be elevated so that either (i) the lowest floor of the manufactured home is at or above the base flood elevation, or (ii) the manufactured home chassis is supported by reinforced piers or other foundation elements that are no less than 36 inches in height above grade and be securely anchored to an adequately anchored foundation system to resist flotation, collapse, and lateral movement.

5.2-4 Recreational Vehicles

(1) Require that recreational vehicles either (i) be on the site for fewer than 180 consecutive days, (ii) be fully licensed and ready for highway use, or (iii) meet the permit requirements and elevation and anchoring requirements for resisting wind forces.

First Reading: January 7, 2002

Second Reading & Passage: February 4, 2002

Published: February 18, 2002

Effective: March 10, 2002

Signed: Kevin Jens
Kevin Jens, Mayor

Attest: Sheryl Town
Sheryl Town, City Finance Officer

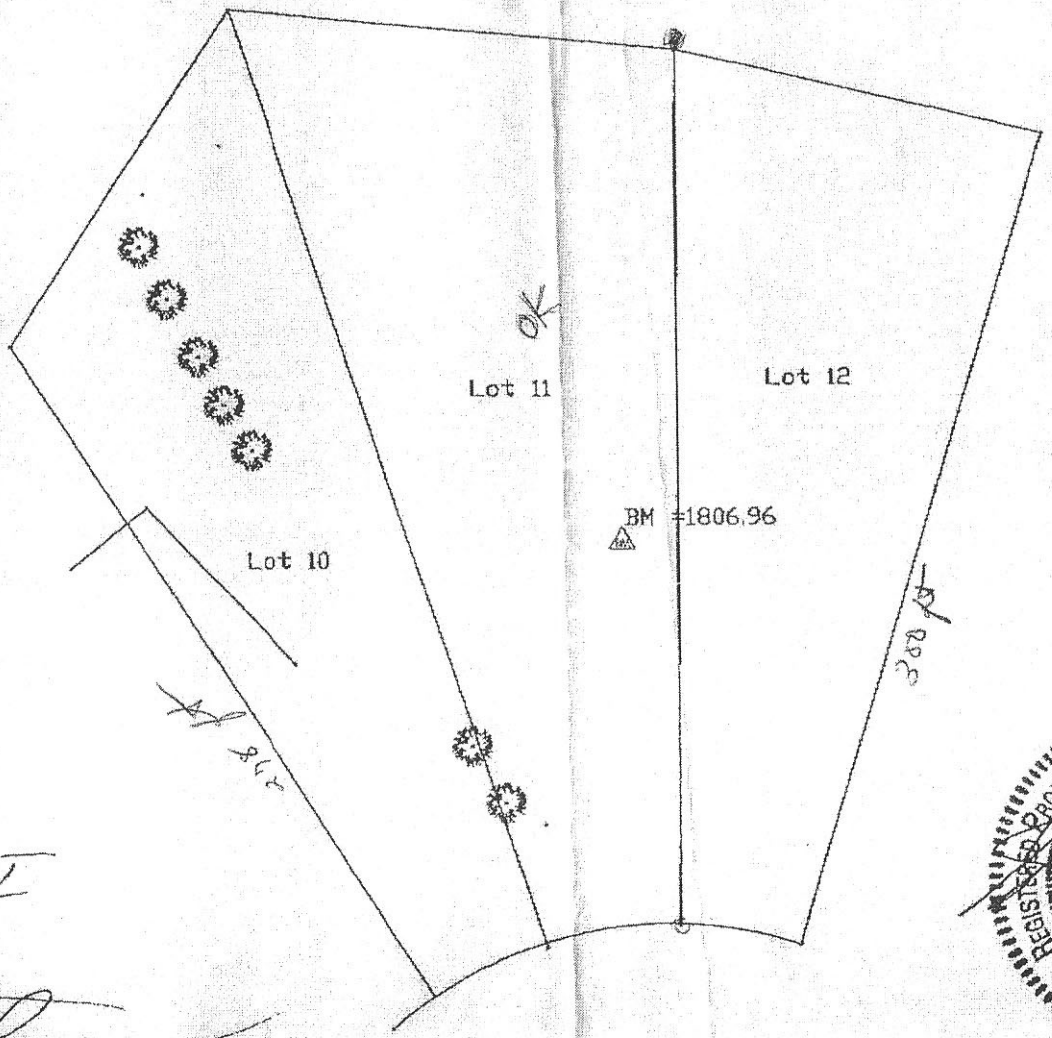
(SEAL)

Roll call vote as follows:

Helwig, Johnston, Lauseng, Engstrom, Zubke voted aye
Town voted nay

EXHIBIT
Hoven
2
2.9.21

Mike Hove Bench Mark



Mike,
This what I
have.

618 west LAke DRive

REGISTERED PROFESSIONAL ENGINEER AND LAND SURVEYOR
REG. NO.
5691
STEVEN D.
RAMES
1-5-07
SOUTH DAKOTA

BANNER
Engineering | Architecture | Surveying
Banner Associates, Inc. | 409 22nd Ave So | PO Box 298
Brookings, South Dakota 57006 | 605.692.6342
www.bannerassociates.com

January 25, 2010

Mike Hoven
618 W. Lakeshore Dr
Waubay, SD
205-702-4313

Re: Building Elevation
618 W. Lakeshore Dr

Dear Mr. Hoven,

On February 2, 2009, Banner Associates shot the first floor of the house/structure located at 618 W. Lakeshore Dr., in Waubay, South Dakota.

The floor elevation was 1810.19 in the Datum of NAVD88.

REGISTERED PROFESSIONAL ENGINEER AND LAND SURVEYOR
REG. NO. 5691
STEVEN D. RAMES
SOUTH DAKOTA
1/25/10

Sincerely,

Steven D. Rames, PE,LS
Banner Associates, Inc.

EXHIBIT
Hoven
10
2-9-21

Service Only: 10/7/2019 4:27 PM

U.S. DEPARTMENT OF HOMELAND SECURITY
Federal Emergency Management Agency
National Flood Insurance Program

ELEVATION CERTIFICATE

OMB No. 1660-0008
Expires March 31, 2012

Important: Read the instructions on pages 1-9.

SECTION A - PROPERTY INFORMATION

	For Insurance Company Use:
A1. Building Owner's Name Madelynn Hoven	Policy Number
A2. Building Street Address (including Apt., Unit, Suite, and/or Bldg. No.) or P.O. Route and Box No. 618 W Lakeshore Drive City Waubay State SD ZIP Code 57273	Company NAIC Number

A3. Property Description (Lot and Block Numbers, Tax Parcel Number, Legal Description, etc.)
Legal Description: Lot 11A PISCHKE'S 2nd Tax Parcel Number 77.39.0111

A4. Building Use (e.g., Residential, Non-Residential, Addition, Accessory, etc.) Residential
A5. Latitude/Longitude: Lat. 45.3435 Long. 97.3167 Horizontal Datum: ☐ NAD 1927 ☒ NAD 1983
A6. Attach at least 2 photographs of the building if the Certificate is being used to obtain flood insurance.
A7. Building Diagram Number 8
A8. For a building with a crawlspace or enclosure(s):
- a) Square footage of crawlspace or enclosure(s) 2244 sq ft
- b) No. of permanent flood openings in the crawlspace or enclosure(s) within 1.0 foot above adjacent grade 2
- c) Total net area of flood openings in A8.b 864 sq in
- d) Engineered flood openings? ☒ Yes ☐ No

A9. For a building with an attached garage:
- a) Square footage of attached garage 907 sq ft
- b) No. of permanent flood openings in the attached garage within 1.0 foot above adjacent grade ____
- c) Total net area of flood openings in A9.b ____ sq in
- d) Engineered flood openings? ☐ Yes ☐ No

SECTION B - FLOOD INSURANCE RATE MAP (FIRM) INFORMATION

B1. NFIP Community Name & Community Number	B2. County Name	B3. State
Day County, Unincorporated Areas, 460261	Day County	South Dakota

B4. Map/Panel Number	B5. Suffix	B6. FIRM Index Date	B7. FIRM Panel Effective/Revised Date	B8. Flood Zone(s)	B9. Base Flood Elevation(s) (Zone AO, use base flood depth)
46037C0500	A	December, 6, 2001	December, 6, 2001	AE	1810.0

B10. Indicate the source of the Base Flood Elevation (BFE) data or base flood depth entered in Item B9.
☐ FIS Profile ☒ FIRM ☐ Community Determined ☐ Other (Describe) ____

B11. Indicate elevation datum used for BFE in Item B9: ☒ NGVD 1929 ☐ NAVD 1988 ☐ Other (Describe) ____

B12. Is the building located in a Coastal Barrier Resources System (CBRS) area or Otherwise Protected Area (OPA)? ☐ Yes ☒ No
Designation Date ____ ☐ CBRS ☐ OPA

SECTION C - BUILDING ELEVATION INFORMATION (SURVEY REQUIRED)

C1. Building elevations are based on: ☐ Construction Drawings* ☐ Building Under Construction* ☒ Finished Construction
*A new Elevation Certificate will be required when construction of the building is complete.

C2. Elevations – Zones A1-A30, AE, AH, A (with BFE), VE, V1-V30, V (with BFE), AR, AR/A, AR/AE, AR/A1-A30, AR/AH, AR/AO. Complete Items C2.a-h below according to the building diagram specified in Item A7. Use the same datum as the BFE.
Benchmark Utilized USGS PID QQ0422 Vertical Datum NAVD 88
Conversion/Comments NAVD 1988 minus NGVD 1929 = +0.915 ft (Datum conversion is attached)

			Check the measurement used.
a)	Top of bottom floor (including basement, crawlspace, or enclosure floor)	1806.5	☒ feet ☐ meters (Puerto Rico only)
b)	Top of the next higher floor	1810.0	☒ feet ☐ meters (Puerto Rico only)
c)	Bottom of the lowest horizontal structural member (V Zones only)	____	☐ feet ☐ meters (Puerto Rico only)
d)	Attached garage (top of slab)	1810.0	☒ feet ☐ meters (Puerto Rico only)
e)	Lowest elevation of machinery or equipment servicing the building (Describe type of equipment and location in Comments)	1809.8	☒ feet ☐ meters (Puerto Rico only)
f)	Lowest adjacent (finished) grade next to building (LAG)	1807.1	☒ feet ☐ meters (Puerto Rico only)
g)	Highest adjacent (finished) grade next to building (HAG)	1809.3	☒ feet ☐ meters (Puerto Rico only)
h)	Lowest adjacent grade at lowest elevation of deck or stairs, including structural support	____	☐ feet ☐ meters (Puerto Rico only)

EXHIBIT
Hoven
11
2-9-21

SECTION D - SURVEYOR, ENGINEER, OR ARCHITECT CERTIFICATION

This certification is to be signed and sealed by a land surveyor, engineer, or architect authorized by law to certify elevation information. *I certify that the information on this Certificate represents my best efforts to interpret the data available. I understand that any false statement may be punishable by fine or imprisonment under 18 U.S. Code, Section 1001.* ☒
Check here if comments are provided on back of form. Were latitude and longitude in Section A provided by a licensed land surveyor? ☐ Yes ☒ No

REGISTERED PROFESSIONAL ENGINEER
REG. NO.
8160
KENT R.
JOHNSON
SOUTH DAKOTA
5-11-10

Certifier's Name Kent R. Johnson License Number SD 8160
Title Civil Engineer Company Name Banner Associates, Inc.
Address 409 22nd Ave S City Brookings State SD ZIP Code 57006
Signature Date Telephone 605-692-6342

FEMA Form 81-31, Mar 09 See reverse side for continuation. Replaces all previous editions

IMPORTANT: In these spaces, copy the corresponding information from Section A.	For Insurance Company Use:
Building Street Address (including Apt., Unit, Suite, and/or Bldg. No.) or P.O. Route and Box No 618 W Lakeshore Drive	Policy Number
City Waubay State SD ZIP Code 57273	Company NAIC Number

SECTION D - SURVEYOR, ENGINEER, OR ARCHITECT CERTIFICATION (CONTINUED)

Copy both sides of this Elevation Certificate for (1) community official, (2) insurance agent/company, and (3) building owner.

Comments Machinery in C2.e is an Air Conditionersupport structure

Signature 5-11-10 Date

☒ Check here if attachments

SECTION E - BUILDING ELEVATION INFORMATION (SURVEY NOT REQUIRED) FOR ZONE AO AND ZONE A (WITHOUT BFE)

For Zones AO and A (without BFE), complete Items E1-E5. If the Certificate is intended to support a LOMA or LOMR-F request, complete Sections A, B, and C. For items E1-E4, use natural grade, if available. Check the measurement used. In Puerto Rico only, enter meters.

E1. Provide elevation information for the following and check the appropriate boxes to show whether the elevation is above or below the highest adjacent grade (HAG) and the lowest adjacent grade (LAG).
a) Top of bottom floor (including basement, crawlspace, or enclosure) is _____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.
b) Top of bottom floor (including basement, crawlspace, or enclosure) is _____ ☐ feet ☐ meters ☐ above or ☐ below the LAG.

E2. For Building Diagrams 6-9 with permanent flood openings provided in Section A Items 8 and/or 9 (see pages 8-9 of Instructions), the next higher floor (elevation C2.b in the diagrams) of the building is _____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E3. Attached garage (top of slab) is _____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E4. Top of platform of machinery and/or equipment servicing the building is _____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E5. Zone AO only: If no flood depth number is available, is the top of the bottom floor elevated in accordance with the community's floodplain management ordinance? ☐ Yes ☐ No ☐ Unknown. The local official must certify this information in Section G.

SECTION F - PROPERTY OWNER (OR OWNER'S REPRESENTATIVE) CERTIFICATION

The property owner or owner's authorized representative who completes Sections A, B, and E for Zone A (without a FEMA-issued or community-issued BFE) or Zone AO must sign here. *The statements in Sections A, B, and E are correct to the best of my knowledge.*

Property Owner's or Owner's Authorized Representative's Name

Address City State ZIP Code

Signature Date Telephone

Comments

☐ Check here if attachments

SECTION G - COMMUNITY INFORMATION (OPTIONAL)

The local official who is authorized by law or ordinance to administer the community's floodplain management ordinance can complete Sections A, B, C (or E), and G of this Elevation Certificate. Complete the applicable item(s) and sign below. Check the measurement used in Items G8 and G9.

G1. ☐ The information in Section C was taken from other documentation that has been signed and sealed by a licensed surveyor, engineer, or architect who is authorized by law to certify elevation information. (Indicate the source and date of the elevation data in the Comments area below.)

G2. ☐ A community official completed Section E for a building located in Zone A (without a FEMA-issued or community-issued BFE) or Zone AO.

G3. ☐ The following information (Items G4-G9) is provided for community floodplain management purposes.

G4. Permit Number	G5. Date Permit Issued	G6. Date Certificate Of Compliance/Occupancy Issued

G7. This permit has been issued for: ☐ New Construction ☐ Substantial Improvement

G8. Elevation of as-built lowest floor (including basement) of the building: _____ ☐ feet ☐ meters (PR) Datum _____

G9 BFE or (in Zone AO) depth of flooding at the building site: _____ ☐ feet ☐ meters (PR) Datum _____

G10. Community's design flood elevation _____ ☐ feet ☐ meters (PR) Datum _____

Local Official's Name Title

Community Name Telephone

Signature Date

Comments

☐ Check here if attachments

STATE OF SOUTH DAKOTA) : SS COUNTY OF DAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, vs. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs, Michael Hoven and Madelynn Hoven ("Hovens"), pursuant to SDCL § 15-6-56(c)(2), hereby submit their Response to the Statement of Undisputed Material Facts by Defendant Banner Associates, Inc. ("Banner").

1. Dennis and Carol Gregerson ("Gregersons") retained Banner to perform surveying services in relation to their property in 2006. (Johnson Affid., ¶ 3).

RESPONSE: Admit.

2. The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to the Hovens in 2007. (Mike Hoven depo., p. 17).

RESPONSE: Admit.

3. One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (Johnson Affid., ¶¶ 4-5).

RESPONSE: Admit.

4. The elevation Certificate was prepared for the Gregersons in 2006.

(Johnson Affid., ¶ 5; Exhibit "A").

RESPONSE: Admit.

5. In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (Rames depo., pp. 39-41; Johnson Affid., ¶ 6).

RESPONSE: Unknown. Banner's records do reflect that a control point (CP) with a recorded elevation of 1806.959 was established on June 9, 2006, presumably to "shoot" elevations of the Gregerson cabin reflected in the Elevation Certificate dated July 24, 2006. (See Kent Johnson Affidavit Ex. A, Bates Nos. 020-021, and 028).

6. The location of the iron pin ended up being on the portion of the property that was subdivided and later sold to the Hovens (specifically Madelynn Hoven). (Mike Hoven depo., p. 29; Johnson Affid. ¶ 7)

RESPONSE: Unknown. Mike Hoven's cited testimony does not support this assertion nor does it establish as undisputed fact that an iron pin was set on June 9, 2006, or that "the iron pin" referenced was on the lot Hovens later purchased. (Michael Hoven depo., p. 29). If an elevation benchmark ("the iron pin") was set by Banner in 2006 was on the lot before Hovens purchased their lot, they were unaware. (Michael Hoven Affidavit ¶ 10). Hovens had never seen it or the Gregerson Elevation Certificate until Banner produced it to them in discovery in this lawsuit. Banner cites the Affidavit of Kent Johnson, who apparently assumes that the control point (CP Lake Home) set for Gregersons in 2006 was the benchmark (BM) that Banner later provided to Hovens for

their construction with a stated elevation of 1806.96. (Mike Hoven depo. Ex. 2). Banner's records reflect a control point (CP) with a recorded elevation of 1806.959 was set on June 9, 2006, presumably to "shoot" the elevations of Gregersons' cabin as reflected in the Elevation Certificate dated July 24, 2006. (See Johnson Affidavit Ex. A, Bates Nos. 020-021, and 028). Banner's records reflect the precise location of the "control point," but no such information was given for the "elevation benchmark" Banner provided to Hovens for the construction of their lake home. The fact that Banner recorded and provided benchmarks with nearly identical elevations for two different clients at two different times does not establish that "the iron pin" was in fact the same as the "CP Lake Home" used for Gregersons' elevation survey. If it was, Mike Hoven was not aware. (Mike Hoven Affidavit ¶ 10).

7. In mid-2007, Mike Hoven contacted Steve Rames, who was at the time an employee of Banner, regarding the benchmark. (Mike Hoven depo., p. 29).

RESPONSE: Deny. See Response Nos. 6 and 7. Banner suggests that Mike Hoven knew about an existing benchmark on the lot that Hovens purchased. There is no support for this assertion, and Mike Hoven was unaware of any existing benchmark. (Mike Hoven Affidavit ¶ 10). Mike Hoven contacted Banner and Steve Rames requesting a certified elevation benchmark for their construction. See Response No. 6. Mike Hoven did not know about any existing CP Lake Home that existed or may have existed on the lot they purchased, or its location. (Mike Hoven Affidavit ¶ 10). Mike Hoven never contacted Banner regarding "the benchmark" referenced in Response Nos. 5 and 6. Hovens admit Mike Hoven contacted Banner and its former professional land

surveyor, Steve Rames, to request an elevation benchmark for construction after pouring the footings, so forms could be set and walls poured to a sufficient height that the floor would meet and exceed the 1810' Base Flood Elevation (BFE) at the location. (Mike Hoven depo., pp. 27-32).

8. Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (Mike Hoven depo., p. 29).

RESPONSE: Deny. See Response Nos. 6 and 7. Mike Hoven spoke with Mr. Rames after the footings had been poured for the lake home below grade, about the Hovens' need for an elevation benchmark before proceeding further, to ensure the walls would be poured high enough so that the floor would meet or exceed 1810', established BFE set for the area and City building permit requirements. (Mike Hoven depo., pp. 27-28; 40-41).

9. Banner sent a surveyor to mark the elevation of the iron pin. (Rames depo., pp. 45-47; Mike Hoven depo., pp. 49-54).

RESPONSE: Admit in part and deny in part. For reasons set forth in the foregoing responses, Hovens deny and dispute that Banner sent a surveyor to mark "the elevation of the iron pin." If an iron pin had been set in connection with the Gregerson elevation survey in 2006, Hovens were not aware. (Mike Hoven Affidavit ¶ 10). Admit that Banner sent an employee to set or locate and monument an elevation benchmark on Hovens' lot for their construction. Steve Rames sent Ron Bergen, an unlicensed surveyor who was not qualified to work without supervision or to stamp and sign surveys. (Steven Rames depo., pp. 43-44, 47-48). Mr. Rames sealed and signed the survey depicting the

location of the benchmark and its elevation, as Mike Hoven had requested for the continued construction. The survey depicted an elevation of 1806.96 without any reference to any vertical datum. (Mike Hoven depo. Ex. 2).

10. The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (*Id.*).

RESPONSE: Admit.

11. The work referenced in paragraphs 7 through 10 above occurred in 2007. (*Id.*).

RESPONSE: Admit.

12. The elevation of the iron pin was noted as 1806.96 NAVD88 in the Elevation Certificate provided to the Gregersons and the lathe stake was marked using what had previously been determined for the Gregersons. (Rames depo., pp. 39-47; Johnson Affid., Exhibit "A" p.12).

RESPONSE: Deny. First, 1806.96 is not referenced anywhere in the Elevation Certificate. (See Johnson Affidavit Ex. A). The assertion than "the iron pin" was later used to provide Hovens an elevation benchmark for their construction has not been established. See Response Nos. 6 and 7. Further, deny any implication that the Elevation Certificate Banner or the information that Banner had conveyed to Gregersons or the City related thereto was ever provided to Hovens. A recorded elevation of 1806.959 is referenced in documents produced by Banner, as a "CP" (control point) and was apparently used to "shoot" elevations of Gregersons' cabin. Hovens specifically deny any implied assertion that the wooden lathe staked next to the elevation benchmark that

Banner provided had anything but "1806.96" written on it or had any written reference to any vertical datum on it. No vertical datum information was provided either on the lathe at the site or on the corresponding survey "Mike Hove[n] Bench Mark" that Banner prepared and sent to Mike Hoven. (Mike Hoven depo. Ex. 5). Banner and Mr. Rames are not aware that it ever provided any vertical datum information of any kind in providing Hovens with an elevation benchmark for their construction. (Mike Hoven Affidavit ¶¶ 9, 13; Rames depo. p. 65).

13. Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (See Exhibit 5 to Mike Hoven depo.).

RESPONSE: Admit that Mr. Rames sent Exhibit 5 to Mike Hoven.

14. No datum is referenced in the document and there were never any discussions between Banner and the plaintiffs about the datum used. (*Id.*; Mike Hoven depo., p. 56).

RESPONSE: Admit.

15. Mr. Hoven stated that he did not even ask any questions because he did not know there were different datum. (Mike Hoven depo., p. 47).

RESPONSE: Admit that Mike Hoven testified he didn't know there were different datums. However, he knew Banner had extensive experience in this flood-susceptible area and Banner knew the elevation benchmark was to be used for constructing a lakeside home. Banner was well aware of the discrepancy in elevations determined by NAVD 1988 versus elevations stated in the datum used by FEMA for the

BFE of 1810' and of the need for conversion to "the appropriate datum" NGVD 1929, as required by the FIRM adopted by the City of Waubay.

16. The document was never directly used by the Hovens in any way. (Mike Hoven depo., p. 47), but instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. *Id.*

RESPONSE: Deny. Hovens used the Mike Hove[] Bench Mark survey to convey information about its location and elevation to the concrete contractor. It is undisputed that the elevation benchmark Banner identified or set and conveyed to Mike Hoven for construction of their home was in fact used at Mike Hoven's direction by their concrete contractor to establish the correct height of the formed concrete walls to ensure that the floor of their home would meet or exceed the BFE 1810' at the site, and was in fact transferred from the benchmark to the construction site a short distance away for this purpose. (Mike Hoven Affidavit ¶¶ 14-17). Banner's later elevation survey reflected that the floor of the home was 1810.19, exactly 2.28 inches over the 1810' level, and confirmed that the contractor had used the benchmark and had added a few inches at Mike Hoven's direction to ensure the floor would meet or exceed the 1810' Base Flood Elevation. (Mike Hoven depo., pp. 30-31; Mike Hoven Affidavit ¶ 20; Mike Hoven depo. Ex. 10). Unfortunately, because the elevation benchmark was not converted into the appropriate datum NGVD 1929 as the FIRM adopted by Waubay City Ordinance required; and therefore, the home was built to meet an elevation of 1810 in the inappropriate datum of NAVD 1988.

17. Banner was never officially retained by the Hovens in 2006 or 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (Johnson Affid., ¶ 8).

RESPONSE: Deny in part and admit in part. Deny that Hovens did not "officially retain" Banner. It is undisputed that Hovens reached out to and requested Banner's professional land-surveying services to provide an elevation benchmark for construction to ensure the home would meet or exceed BFE published by FEMA in the FIRM and as required by the City of Waubay at this location. (Mike Hoven depo., pp. 27, 28, 38-39). Banner corresponded directly with the Hovens and provided a signed, sealed and dated survey to show the benchmark and its elevation. (Mike Hoven depo. Ex. 2). Admit that Banner apparently did not bill Hovens directly for this particular professional services. Mike Hoven believes that they paid Gregersons for part of the services billed to them related to surveying their lot. (Mike Hoven depo., p. 25).

18. Banner was not directly involved in the staking, layout or construction of the Hovens' house. (Johnson Affid., ¶ 9).

RESPONSE: Admit in part and deny in part. Admit Banner did not stake or lay out the structure of Hovens' home. Deny that Banner had no direct involvement in the construction. Banner's direct involvement included staking out Hovens' lot for replatting the lot they purchased for construction of their lake home. Banner's further direct involvement included setting the elevation benchmark for further the construction after the footings had been poured, so that this elevation could be transferred to the project for construction of the walls to the proper height so the floor of the home would meet or

exceed the 1810' BFE at the location, and without which, no construction could have proceeded. (Mike Hoven depo. pp. 27, 30, 31; Mike Hoven Affidavit ¶¶ 11-17).

19. Over the next few months in 2007, the Hovens built the house on the property. (Mike Hoven depo., pp. 18-209).

RESPONSE: Deny. The home was not "built" in 2007. In 2007, the structure was merely framed up, roofed, and sealed. (Mike Hoven depo. pp. 18-19) It remained uninsulated, unheated, and without permanent electrical service. The home was not substantially complete or "livable" for several more years. Receipts for countertops, vanities, sinks, and drawers later installed in the lake home bearing dates in 2012 were produced in written discovery. (Plaintiffs' discovery Exhibit C – Pages 000083, 000087). In 2010, Mike Hoven received a homeowner wiring permit for the structure, a copy of which was produced in written discovery. (Plaintiffs' discovery Exhibit C – Page 000063). Permanent electrical service was not established to the home until several years after construction began. (Mike Hoven depo., pp. 19-20). The home was not "livable" until 2013. (Mike Hoven depo., p. 19).

20. The house was constructed and enclosed by the end of 2007. (Mike Hoven depo., p. 20-21; Exhibit 1 to Mike Hoven Depo., Bates 150 to 152).

RESPONSE: Admit in part and deny in part. See Response No. 19. The home was not "constructed" by the end 2007. Admit that the house was fully enclosed by the end of 2007, but remained uninsulated, unheated, unsided, and without electrical services. See Response No. 19.

21. The Hovens admitted that it was built by the end of 2007 and the

photographs support that admission. (*Id.*).

RESPONSE: Deny. See Response Nos. 19 and 20.

22. All elevations of the house were set at that time. (*Id.*)

RESPONSE: Deny. The structure was merely a shell and the floor of the garage and finished floor inside had not been installed. See Response Nos. 19 and 20.

23. The first time Banner was actually retained and paid by the Hovens was in 2009. (Johnson Affid., ¶ 10).

RESPONSE: Deny in part and admit in part. Deny that Hovens first retained Banner in 2009. Mike Hoven personally retained Banner to locate and establish an elevation benchmark for construction of their lake home on a lot that Banner had surveyed before their purchase. See prior responses. Admit Banner may not have billed Hovens directly for any professional survey work before 2009. However, Mike Hoven believes that he and his wife split the survey costs for subdividing their lot with the Gregersons. (Mike Hoven depo., p. 25).

24. In 2009, Banner shot an elevation for the first floor of the Hoven house. (Rames depo., p. 67, Exhibit 10 (from Mike Hoven depo.); Johnson Affid., ¶ 10).

RESPONSE: Admit.

25. The house was obviously constructed at that time. The floor elevation was listed at 1810.19 NAVD88. (Hoven depo., Exhibit 10).

RESPONSE: Admit in part and deny in part. Deny that the house was "obviously constructed" by 2009. See Response Nos. 19-21. Admit that the floor elevation was determined to be 1810.19 in the vertical datum NAV88 when it was

surveyed in 2009. (Mike Hoven depo. Ex. 10).

26. The date of the service was February 2, 2009 and was documented in a letter dated January 25, 2010. (*Id.*).

RESPONSE: Admit.

27. Banner also provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (Johnson Affid., ¶ 11; Exhibit "B").

RESPONSE: Admit.

28. It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (*Id.*).

RESPONSE: Deny. The Elevation Certificate speaks for itself. It simply lists vertical elevations in feet and does not list them in both vertical datums. It only lists them in NAVD88. (Mike Hoven depo. Ex. 10).

29. There is no expert or other admissible evidence that there is anything wrong with the 2010 Elevation Certificate, that the elevations listed, and conversions shown, are inaccurate, or that the Elevation Certificate violates the applicable professional standard of care, and, in fact, the evidence is that it is accurate and complies with the professional standard of care. (Johnson Affid., ¶ 12).

RESPONSE: Deny. Although Hovens have not hired an expert at this point, the 2010 Elevation Certificate speaks for itself and it states an elevation for the main floor that differs from that set forth in Steven Rames's letter dated January 25, 2010, which he signed and sealed on Banner letterhead. (Compare Mike Hoven depo. Exhs. 10 and 11; See also, Defendant's Statement of Undisputed Fact No. 25 herein). Further, the

Elevation Certificate is confusing and does not indicate that the Hovens' lake home was built at an elevation below City requirements. It also does not provide the mandatory conversion to "the appropriate datum" as is required by the FIRM adopted by Waubay City Ordinance. (Compare Johnson Affidavit Ex. A and Ex. B; Banner 026).

30. The Hovens claim to have sent the Elevation Certificate to their insurance carrier so they could purchase flood insurance in 2010, which they did. (Mike Hoven depo., p.79-80; 88).

RESPONSE: Deny in part and admit in part. Admit that Hovens sent the Elevation Certificate to their insurance carrier to purchase flood insurance but deny that this was done in 2010. The cited portions of Mike Hoven's testimony do not establish that it was sent to their insurance carrier in 2010. Mike Hoven said it was sent in 2019. (Mike Hoven depo., p. 79). He further testified that they had purchased flood insurance once before, but he did not know when. (Mike Hoven depo. p., 88). Madelynn Hoven thought it was in 2010. (Madelynn Hoven depo., pp. 19-21). However, a FEMA representative wrote to Kent Johnson at Banner after the problem came to light and indicated that "the last policy that they had from the NFIP was in 2013." (Banner 038).

31. The Hovens did not even look at the Elevation Certificate at that time. (Mike Hoven depo., p. 83).

RESPONSE: Deny. Madelynn Hoven testified that they were required to get it in order to obtain flood insurance and that she called Banner to get an Elevation Certificate. (Madelynn Hoven depo., pp. 19-21). Obviously, Hovens would have had to "look at" it when they received it and when it was submitted in order to get flood

insurance.

Mike Hoven testified that he did not "really look at it." (Mike Hoven depo., p. 83). However, having just recently received Steve Rames's verification that the elevation was 1810.19', at least a couple of inches above the minimum 1810', there would have been little reason for Hovens to be concerned at the time. (Mike Hoven Affidavit ¶ 20; Mike Hoven depo. Ex. 10).

32. Nothing happened until 2019, when using the same 2010 Elevation Certificate, the insurance carrier for the Hovens noted that the finished floor elevation of the house was below the base flood elevation. (Mike Hoven depo., p. 79).

RESPONSE: Admit in part and deny in part. Admit that Hovens were first notified that the finished floor elevation was below BFE in the spring of 2019. Deny that "nothing happened until 2019." Between the time of the Hoven Elevation Certificate and 2019, Hovens continued working to complete the home, including wiring the home, sheetrocking, installing fixtures, decks, and other things before the lake home was livable. (See Responses to Nos. 19 and 20). Further, Hovens secured flood insurance once before 2019. (See Response No. 30).

33. The Hovens had not renewed the flood insurance in the years between 2010 and 2019 and asked again for the insurance in 2019, which is when the issue was noted, and the cost of flood insurance was quoted to be higher. (Mike Hoven Depo., p. 88).

RESPONSE: Deny in part and admit in part. Correspondence between FEMA and Banner suggests that Hovens purchased flood insurance only once before 2019, but that it may not have been in 2010. (Banner 038).

34. The finished floor elevation of the house is 1809.1 (NGVD29)/1810.0 (NAVD88). The Base Flood Elevation is 1810.0 (NGVD29)/1810.9 (NAVD88). The finished floor elevation of the house constructed in 2007 was at an elevation 0.9 feet below the Base Flood Elevation. (See exhibits to Johnson Affid.).

RESPONSE: Deny in part and admit in part. Banner's surveyed elevations for the first floor of the lake home differ. Steve Rames verified the elevation at 1810.19' NAVD88. (Mike Hoven depo. Ex. 10). Kent Johnson later surveyed the elevation at 1810' NAVD88. Admit that the BFE is 1810.0 (NGVD 29) but deny that this elevation equals 1810.0' (NAVD88). Instead, upon information and belief, it equals 1810.915' in vertical datum NAVD 1988. Admit that whatever elevation Banner provided (Rames's or Johnson's) in NAVD 1988 for the floor elevation, when the appropriate datum conversion was completed, equates to less than the 1810' BFE required under NGVD 1929. (Compare Mike Hoven depo. Ex. 10 and Johnson Affidavit Ex. B).

35. The professional services performed by Banner were performed in accordance with the professional standard of care. (Johnson Affid., ¶ 13; Nielson Affid., ¶ 5).

RESPONSE: Deny. Notwithstanding Banner's self-serving assertion that the professional standard of care for professional surveyors was met in this instance, the evidence reflects otherwise. The former Banner professional surveyor and engineer involved, Steve Rames, acknowledged that determining and depicting an elevation benchmark is a function of the professional practice of land surveying. (Rames depo., p. 48). In response to Mike Hoven's request for an elevation benchmark for their

construction, Mr. Rames directed an unlicensed former Banner employee to go to the site to identify and "monument" the benchmark. *Id.* Because the other Banner employee was not licensed, he could not seal and sign the documents as a professional land surveyor and could only act under Mr. Rames's supervision. *Id.* SDCL § 36-18A-45. This former Banner employee went to the site, located the vertical benchmark, and put a wooden lathe in the ground, to "monument" it so that Hovens would know where it was, what it was, and the elevation at its location. (Rames depo., pp. 47-48). A survey depicted the location of "Mike Hove[n] Bench Mark" as "BM" and its elevation as "1809.97" without reference to any vertical datum. (Mike Hoven depo. Ex. 2). Mr. Rames stamped the survey with his seal and signed and dated it "9-5-07." On it, he wrote a note to Mike Hoven: "Mike, This is what I have." (Rames depo., p. 47; Mike Hoven depo. Ex. 2).

Mr. Rames is familiar with the Guidelines for the Professional Practice of Land Surveying in South Dakota published by the South Dakota Society of Professional Land Surveyors, Inc. (Rames depo., p. 51; Rames depo. Ex. 5). He acknowledges that if a professional surveyor's work is "preliminary," then it should include a note that it is "not for construction, preliminary" or some other such explanation should be provided. The document depicting the "Mike Hove[n] Bench Mark" was not noted to be preliminary or unsuitable for construction. (Rames depo., pp. 49-50). Under professional guidelines, a professional surveyor is supposed to "to obtain sufficient information from the client so as to obtain an understanding of the client's needs and requirements [and] [i]f the required scope of services is not evidence based on the client's request and the expertise of the surveying professional, and it is necessary to obtain additional information not

supplied by the client, it is recommended that the land surveyor advise the client that such information should be furnished or obtained prior to determining the necessary services." (Rames depo., pp. 52-53). Mr. Rames acknowledges that is important for a professional surveyor to know why the client is requesting land surveying services. (Rames depo., p. 53).

Mr. Rames acknowledges that a benchmark is similar to a topographical survey in that it records a known positions in three dimensions. (Rames depo., p. 55). Professional guidelines recommend that a "vertical datum" be included on any topographical survey. (Rames depo., pp. 55-56). Mr. Rames, who now lives and practices in Nebraska, acknowledged that Nebraska's minimum standards adopted by the Professional Surveyors Association of Nebraska define a benchmark as "an identifiable stable point for which there is a known elevation referenced to an assumed local, state or national datum plane." (Rames depo., pp. 57-58). A vertical benchmark is a known point in reference to some datum plane. (Rames depo., p. 58). He acknowledges that under Nebraska standards, three-dimensional descriptions must contain elevations referenced to a defined datum. (Rames depo., p. 59). When asked whether vertical benchmark should always have a vertical datum associated with them for clarity, Mr. Rames responded by stating, "There's certainly a clarity component to a datum." (Rames depo., p. 57). He seems to agree that the supplier of geospatial data like benchmark elevations should provide relevant datum information, because as in this instance involving the Hovens' lake home, the difference can be as much as 10.98 inches depending on the datum used to give the elevation. (Rames depo., p. 60). Mr. Rames does not know why the Hovens

were not given any information regarding the vertical datum associated with the benchmark. (Rames depo., p. 59). The FIRM mandated that elevations be converted to NGVD 1929 for comparison to the BFE established in that datum, and the City had adopted the FIRM. (Mike Hoven Affidavit Ex. A; Johnson Affidavit Ex. A; Banner 038). Banner knew that the elevation benchmark provided to Hovens for their construction indicated an elevation that was .915 feet lower than it would be if the appropriate datum conversion to NGVD 1929 were completed so that it could be compared to BFE. Professional rules of conduct that govern mandated that Banner notify Hovens of the violation of the City's minimum elevation requirement. (A.R.S.D. §§ 20:38:36:01(21) and (22).

36. Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any potential issues they may have with any of the services provided by Banner. (Johnson Affid., ¶ 14; Nielson Affid., ¶ 6).

RESPONSE: Deny. Banner knew an elevation stated in NAVD 1988 would overstate the elevation by .915', and knew as early as February of 2009 that the Hovens' lake home did not meet the FIRM BFE of 1810' NGVD for this location. (Mike Hoven depo. Ex. 10). Banner knew any elevation it determined using NAVD 1988 would need to be converted to NGVD 1929 and lowered accordingly. Banner knew an elevation of 1810' NAVD 1988 as determined for the floor of the Hovens' lake home in 2010 did not meet the BFE published in the FIRM and adopted by the City for this location. Banner had a duty of fidelity that it owed to Hovens. A.R.S.D. § 20:38:36:01(4). Banner also

had a duty to notify Hovens of the violation of the minimum elevation requirement, adopted by the City of Waubay as a minimum requirement, having determined that inadequately elevated construction contributed to flood losses. (A.R.S.D. §§ 20:38:36:01(21) and (22); Mike Hoven Affidavit Ex. A)). Yet Banner said nothing.

37. The Summons was served in this matter in July 2019. The Complaint was not filed until July 26, 2019.

RESPONSE: Admit.

Dated April 6, 2022.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Steven J. Oberg
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 6, 2022, I caused the following document:

- **PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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Steven J. Oberg

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30005

MICHAEL HOVEN AND MADELYNN HOVEN,
Plaintiffs and Appellants

vs.

BANNER ASSOCIATES, INC.,
Defendant and Appellee.

APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

Defendant/Appellee Banner Associates, Inc. ("Banner") references its Jurisdictional Statement in the related appeal in Appeal No. 30004 and Banner also does not disagree with the Jurisdictional Statement offered by Plaintiffs/Appellants Michael and Madeline Hoven ("Hovens") in this appeal.

STATEMENT OF THE ISSUE

1. **Whether the Circuit Court properly granted summary judgment to Banner on the Hovens' fraudulent concealment claims.**

Summary judgment was properly granted to Banner because there was no fiduciary relationship between Banner and the Hovens, and the Hovens did not, and cannot, prove that Banner actively fraudulently concealed the existence of the claims they are now pursuing against Banner. The statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3 were not tolled and are applicable to bar the Hovens' claims for the reasons argued in related appeal, Appeal No. 30004.

SDCL 15-2-13
SDCL 15-2A-3
SDCL 15-2A-7
Yankton County v. McAllister, 2022 S.D. 37, 977 N.W.2d 327 (S.D. 22, 2022).
Gades v. Meyer Modernizing Co., Inc. 2015 S.D. 42, 865 N.W.2d 155, 160, (2015)
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Cleveland v. BDL Enters., Inc., 2003 S.D. 54, 663 N.W.2d 212 (2003)
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Wells Fargo Bank, N.A. v. Fonder, 868 N.W.2d 409, 2015 S.D. 66 (2015).

STATEMENT OF THE CASE

Banner filed a motion for summary judgment in the Circuit Court on March 16, 2022. (CR 28-104). The Hovens filed their responsive pleadings on April 6, 2022. (CR 105-373). A hearing was held before the Circuit Court on April 20, 2022. (CR 374-375). The Circuit Court entered an Order dated May 17, 2022, denying in part, and granting in

part, Banner's motion for summary judgment. The Order granted summary judgment to Banner on all of the Hovens' claims and allegations for fraudulent concealment. Notice of the Entry of the Order was filed on May 17, 2022. (CR 438-441). This Honorable Court granted the Petition for Discretionary Appeal on May 25, 2022, and this appeal has followed.

STATEMENT OF FACTS

The facts of this case arise out of certain services provided by Banner in relation to properties at Blue Dog Lake in Day County, South Dakota, near the city of Waubay. (CR 30). The services were performed at various times, but the plaintiffs' claims relate to surveying and engineering services provided by Banner for Dennis and Carol Gregerson ("Gregersons") in 2006 and 2007, and certain professional surveying and engineering services that were provided by Banner for the Hovens in 2009 and 2010. (CR 50-52; 75).

The Gregersons, who were not parties to this case, retained Banner to perform certain surveying services in relation to their property in 2006. (CR 50). The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to Madelynn Hoven in 2007. (CR 83). One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (CR 50; 54-66). The elevation Certificate was prepared for the Gregersons in 2006. (CR 50; 54-66).

In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (CR 51; 93-94). The location of the iron pin

ended up being on the portion of the property that was subdivided and later sold to Madelynn Hoven. (CR 51; 85).

In mid-2007, Mike Hoven contacted Steve Rames, a former employee of Banner, regarding the benchmark. (CR 85). Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (CR 85). Banner sent a surveyor to mark the elevation of the iron pin in early September 2007. (CR 87-88; 95). The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (CR 87-88; 95). There were no improvements on the Hoven property at that time – the house had not yet been constructed. (CR 85-86). The house was built by the end of 2007. (CR 83-84; 97-99). Banner performed no work on the Hoven or Gregerson properties until 2009. (CR 51; 96; 104).

The elevation of the pin that was noted on the lathe stake was 1806.96 NAVD88. (CR 87-88; 95). It matched the elevation from the Elevation Certificate provided to the Gregersons, and the lathe stake was marked using what had previously been determined for the Gregersons. (CR 54-66; 93-95). Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (CR 100-103). The document was never used by Michael Hoven and Madelynn Hoven ("Hovens") in any way. (CR 86). Instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. (CR 86). The testimony was:

> Q. Did you provide this document to Moe's, to the guys pouring the concrete?

A. I did not.

Q. Did you have someone provide it to them?

A. I did not. The benchmark was set for them, and they shot off of that and set the elevation of the form.

(CR 86).

Banner was never officially retained by the Hovens in 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (CR 51). The testimony was: "Q. Do you recall having a direct relationship with Banner at the time? A. I think I let Gregerson take care of that, if I remember right." (CR 51). Banner was not involved in the staking, layout, or construction of the Hovens' house. (CR 51).

Over the next few months, the Hovens built the house on the property. (CR 83). The house was constructed and enclosed by the end of 2007. (CR 83-84; 97-99). The Hovens admitted that it was built by the end of 2007 and the photographs support that admission. (CR 83-84; 97-99). All elevations of the house were set at that time, even though the plaintiffs claim that they continued to work on the inside of the house over a longer period of time. (CR 83-84; 97-99).

The first time Banner was actually retained and paid by the Hovens was in 2009. (CR 51). In 2009, Banner shot an elevation for the first floor of the Hoven house that was provided to the Hovens in early 2010. (CR 51; 96; 104). The house was obviously constructed at that time. (CR 104). The floor elevation was listed at 1810.19 NAVD88. (CR 104).

Also in 2010, Banner provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (CR 51; 67-74). It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (CR 51; 67-74). On the sixth page of the Elevation Certificate, there is a diagram showing all of the elevations at issue in each of the datum, it lists the conversion, and it clearly shows the Base Flood Elevation (BFE) at 1810.0 (NGVD29) = 1810.9 (NAVD88). (CR 17; 72). It also clearly shows the Finished Floor Elevation (FFE) at 1810 (NAVD88). (CR 17; 72). On its face, it shows that the FFE is 0.9 feet (10.8 inches) below the BFE. (CR 17; 72). This information was responsive to the request of the Hovens, it was open, obvious, and easy to understand on the drawing included in the Elevation Certificate. (CR 17; 72). The Hovens used that diagram, which showed those elevations and the conversion, to support their claims by attaching it as Exhibit "C" to their Complaint. These elevations and conversions are also included in the rest of the Elevation Certificate. (CR 67-74).

There is no expert or other evidence that there is anything wrong with the Elevation Certificate. (CR 51). The elevations and conversions are accurate. (CR 51). In fact, the plaintiffs rely upon those elevations being accurate in the pursuit of their claims. (CR 3-9; 17). The affidavits provided by Banner established that the professional services performed by Banner were performed in accordance with the professional standard of care. (CR 50-53; 75-77). There is no expert evidence to the contrary. (CR 51).

Banner provided no other services for, or in relation to, the Hovens or their house after May 11, 2010. (CR 50-51). Banner had no contact with the Hovens after May 11, 2010. (CR 89). Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any

potential claim they may have relating to any of the services provided by Banner. (CR 52; 76).

ARGUMENT

The Hovens argue two things in their appeal in this matter. First, they argue that the circuit court erred in finding that Banner did not have a duty to disclose certain unidentified information to the Hovens. It is not entirely clear what it is that Banner failed to disclose. The second argument made by the Hovens in their brief is that the circuit court erred in finding that Banner did not fraudulently conceal certain information. Again, it is not entirely clear what Banner fraudulently concealed. Banner contends that the circuit court properly ruled that the Hovens' fraudulent concealment arguments, and claims against Banner were barred as matter of law, and that Banner was entitled to summary judgment as to those claims and issues.

The fraudulent concealment issues are really only relevant for a couple of reasons. It was pled to get around the application and running of the statute of repose in SDCL 15-2A-3. Under SDCL 15-2A-7, a party guilty of active fraudulent concealment cannot take advantage of SDCL 15-2A-3. If the Hovens could prove that Banner actively and fraudulently concealed from the Hovens the existence of their claims, the statute of limitations in SDCL 15-2-13 would also be tolled. They did not, and cannot, show fraud on the part of Banner and the Hovens claims are barred by the statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3.

The analysis applied by this Court for those various issues is essentially the same. To toll the statute of limitations in SDCL 15-2-13, absent a fiduciary relationship between the parties, active fraudulent concealment of the existence of the claim has to be

shown,. Fraud must also be shown for SDCL 15-2A-7 to prevent the running of the statute of repose in SDCL 15-2A-3. It, too, involves first determining if there is a confidential or fiduciary relationship between the plaintiffs and the defendant. If there is no fiduciary relationship, the plaintiffs must prove that they were actively prevented from determining the existence of their claim by the active fraudulent concealment by the defendant. The defendant must conceal form the plaintiffs the existence of their claim. If there is a fiduciary relationship, the plaintiffs must still show that there was fraudulent concealment on the part of the defendant, but it does not have to be active concealment. The fraud needed to toll the statute of limitations, or prevent the statute of repose from being applied, are addressed below together.

I. The Applicable Standards and the Requirement of a Fiduciary Relationship Between the Parties.

"Fraudulent concealment may toll the statute of limitations." *Yankton County v. McAllister*, 2022 S.D. 37, 977 N.W.2d 327, 339 (S.D. 2022). *McAllister* involved a notice requirement under a different statute, but still involved the issue of the tolling of the statute due to fraud. There, this Court held that: "In the absence of some trust or confidential relationship between the parties there must be some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence, in the absence of a duty to speak, is not ordinarily sufficient.... [I]f a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the one under that duty constitutes fraudulent concealment." *Id.* Generally, in such a relationship, the "property, interest or authority of the other is placed in charge of the fiduciary." *Id.* "Normally, in a fiduciary

relationship, one of the parties has a superior power over the other." *Id.* "In the absence of a fiduciary relationship, fraudulent concealment does not exist simply because a cause of action remains undiscovered, but only when the defendant affirmatively prevents discovery." *Id.* "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Id.*

This analysis has been applied in the context of the statute of limitations in SDCL 15-2-13 and the statute of repose in SDCL 15-2A-3 in cases involving construction claims and claims against construction professionals, including registered professional engineers.

First, in *Gades v. Meyer Modernizing Co., Inc.* 2015 S.D. 42, 865 N.W.2d 155, 160, (2015), the plaintiffs asserted construction defect and water infiltration claims against a subcontractor who installed siding, soffits and gutters on their home. They claimed that the fraud on the part of the subcontractor prevented the running of the statute of limitations in SDCL 15-2-13 (1) that barred their claims.

In evaluating those issues, this Court stated: "*In the absence of "a confidential or fiduciary relationship," a plaintiff alleging fraudulent concealment must allege "some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action.*" *Id.* (quoting *Koenig v. Lambert,* 527 N.W.2d 903, 905–06 (S.D.1995), *overruled on other grounds, Stratmeyer v. Stratmeyer,* 1997 S.D. 97, 567 N.W.2d 220) (internal quotation marks omitted) (emphasis added). This Court held that: "Here, the Gadeses do not claim, and the record does not suggest, a relationship of trust or confidence between the Gadeses and Meyer. *Fiduciary duties ... are not inherent in normal arm's-length business relationship[s] and arise only*

when one undertakes to act primarily for another's benefit." *Cleveland v. BDL Enters., Inc.*, 2003 S.D. 54, ¶ 18, 663 N.W.2d 212, 218 (quoting *Schwaiger v. Mitchell Radiology*, 2002 S.D. 97, ¶ 19, 652 N.W.2d 372, 380) (internal quotation marks omitted) (emphasis added). "Therefore, the *Gadeses are required to prove some affirmative act on Meyer's part, that Meyer designed such act to prevent the Gadeses to prevent the Gadeses from detecting their cause of action and that they were actually prevented from discovering their cause of action*." *Gades*, 865 N.W.2d at 160 (emphasis added).

Similarly, *Cleveland v. BDL Enters., Inc.*, 2003 S.D. 54, ¶ 18, 663 N.W.2d 212 (2003), involved the statute of repose in SDCL 15-2A-3 and reports made by an engineering firm. The plaintiffs in Cleveland were a group of homeowners who asserted claims against a developer, BDL, and an engineering firm, FMG. Importantly, BDL also asserted crossclaims against FMG. That is important because FMG was hired directly by BDL to perform the engineering services. This Court upheld summary judgment to FMG on all of the claims asserted against FMG by the homeowners and by BDL, holding that all of the claims were barred by the statue of repose in SDCL 15-2A-3.

The plaintiffs and third-party plaintiffs in *Cleveland* claimed that SDCL 15-2A-3 was inapplicable because of fraud under SDCL 15-2A-7. This Court looked at whether there was the type of relationship between the parties that led to a fiduciary duty on the part of the engineering firm (FMG) to the homeowners. This Court held that: "[A]t no time did FMG hold itself out as being in charge of the Homeowners' property rights or in some manner representing their interests." *Id.* at 219. "We find that no confidential or fiduciary relationship existed between FMG and the Homeowners. FMG was employed by BDL to conduct soil engineering work. FMG stood in the shoes of BDL and had an

arms-length relationship with the Homeowners. *See Trouten v. Heritage Mut. Ins. Co.*, 2001 SD 106, ¶ 32, 632 N.W.2d 856, 864." *Cleveland,* 663 N.W.2d at 219. "Having determined that no confidential relationship existed between FMG and the Homeowners, *we next turn to whether FMG took affirmative steps to conceal the facts that supported Homeowners' causes of action.*" *Cleveland*, 663 N.W.2d at 219 (emphasis added). See also, *Klinker v. Beach*, 1996 S.D. 56, 547 N.W.2d 572 (S.D. 1996). The Court also held that summary judgment was properly granted to FMG on the claims asserted by BDL, the party with whom FMG had a contractual and business relationship.

This Court has evaluated the fiduciary or confidential relationship issue in these and several other cases. "Unlike professional negligence, breach of a fiduciary duty requires a fiduciary relationship between the parties and not merely a foreseeable injury." *Wells Fargo Bank, N.A. v. Fonder*, 868 N.W.2d 409, 2015 S.D. 66 (2015). As noted in *Fonder*, "The Fonders cannot show that WFFS was acting as their fiduciary when it made the flood determination for the Bank because there was no fiduciary relationship." *Id.* "Fiduciary duties, which often produce the duty to disclose, 'are not inherent in normal arm's-length business relationship, and arise only when one undertakes to act primarily for another's benefit.'" *Schwaiger v. Mitchell Radiology*, 2002 SD 97, ¶ 19, 652 N.W.2d 372, 380 (citing *Dinsmore v. Piper Jaffray*, 1999 SD 56, ¶ 20, 593 N.W.2d 41, 47). Fiduciary duties typically arise in trust relationships, attorney-client relationships and arise out of the defendant's representation of the plaintiff with respect to transactions for, and on behalf of, the plaintiff. They do not arise out of this type of situation.

II. There Was No Fiduciary Relationship Between the Hovens and Banner.

Here, at no point was Banner acting as a fiduciary for the Hovens, acting on behalf of the Hovens, or representing them in some way, which would have given rise to a fiduciary relationship. Instead, at most, this was not an arm's-length transaction. In fact, there was no real "transaction" at all for the 2007 work.

For purposes of addressing this issue, it is important to focus on the timeline reflected in the record. These facts are contained above, but for sake of simplicity and clarity, these are the essential facts relating to the two issues raised by the Hovens in this appeal.

Around September 5, 2007 – Michael Hoven asked Banner to provide the elevation of an iron pin on the property the Hovens just purchased from the Gregersons. Banner sent a surveyor to the property to mark the elevation previously provided for the Gregersons on a lathe stake next to the iron pin.

After September 5, 2007 and before the end of 2007 -- The Hoven house was fully constructed and closed in with windows, doors a roof and other envelope essentials. The finished floor elevation, final elevations of the house were all set by the construction. Banner was not involved with the construction and did not see the house as it was built until at least 2009.

From September 5, 2007 until 2009 or 2010 -- Banner had no involvement with the Hoven property until at least February of 2009. Banner provided the Hovens with reports in 2010.

May 11, 2010 -- Banner provided the Hovens with an Elevation Certificate containing, along with other detailed, pertinent data, a sketch showing and stating the elevation of the finished floor elevation and the base flood elevation in both datum, as well as the applicable datum conversion. The sketch shows the FFE as 1810.0 (NAVD88) and the BFE as 1810.9 (NAVD88). The sketch shows the FFE is .9 feet below the BFE. The Certificate itself contains the same information, but the sketch was what was referenced in, relied upon, and attached to the Complaint to show the problem.

After May 11, 2010 -- Banner had no other involvement with the Hoven house, property or the Hovens between May 2010 and 2019.

As it relates to the work performed in 2007, there was no formal relationship, at all. There was no contract between Banner and the Hovens for the 2007 work. Banner's 2007 contract was with the Gregersons, and the marking of the elevation of the iron pin for the Hovens was essentially done as a favor for the Hovens for no payment. The work still had to be performed properly (which it was by all of the expert evidence submitted in the case), but it certainly cannot be argued that there was a fiduciary relationship between Banner and the Hovens for that work.

The damage claimed by the Hovens resulted when they built their house in the fall of 2007. At that point, the elevations of their house were set and could not be changed. Banner was not at all a part of that work. There was no fiduciary relationship applicable to the construction of the house.

Again, in 2010, the relationship between the Hovens and Banner was pursuant to a typical verbal professional services agreement. They take place all the time between design professionals and the people who hire them (as in *Cleveland* between BDL and FMG). Banner was not representing the Hovens' interests in some special fashion. Instead, it was a typical arms-length transaction.

Equally as important, there is nothing wrong with the information provided to the Hovens in the 2010 Elevation Certificate. It was one-hundred percent accurate. It told the Hovens that they had built their house with a finished floor elevation that was lower than the base flood elevation. There was a diagram that expressly laid out that issue. All of the elevations were clearly shown in both datum and the conversions were included. That very information is what supported the Hovens' claims when they were filed in 2019 and the very diagram that shows all of the issues was included as Exhibit "C" to the Hovens' Complaint. There is no fraud, active or otherwise.

The situation here is analogous to the situation in *Cleveland*, where the Court stated: "We find that no confidential or fiduciary relationship existed between FMG and the Homeowners. FMG was employed by BDL to conduct soil engineering work. FMG stood in the shoes of BDL and had an arms-length relationship to the Homeowners." *Cleveland*, 663 N.W.2d at 218-219; See *Trouten v. Heritage Mut. Ins. Co.*, 2001 SD 106, ¶ 32, 632 N.W.2d 856, 864. "Moreover, at no time did FMG hold itself out as being in charge of the Homeowners' property rights or in some manner representing their interests." *Id.* at 219.

The Hovens try to distinguish *Cleveland* from the current situation by saying that the homeowners in *Cleveland* had no relationship to the engineering firm (FMG) did not

hold itself out as representing the homeowners' interests. Here, there was no relationship between the Hovens and Banner for the work that is really at issue – the elevation for the iron pin given in 2007. The Hovens did not contract, pay for, or otherwise hire Banner to perform that work. That work was pursuant to a contract Banner had with the Gregersons. The determination of the elevation at issue was pursuant to the contract with the Gregersons, for which the Gregersons made payment to Banner. Any relationship with the plaintiffs was, at most, an arm's-length transaction, and not a fiduciary relationship.

There was a contractual relationship between Banner and the Hovens in 2010, but Banner was not representing the Hovens' interests to outside persons or entities. Additionally, as noted above, there was absolutely nothing wrong with the work performed at that time (the Elevation Certificate). The Hovens contend that the elevations found at that time are accurate and, as mentioned, the elevation certificate spelled out exactly the issues that are the subject of the Hovens' Complaint.

There was never a fiduciary relationship between the Hovens and Banner.

III. Because There Was No Fiduciary Relationship, The Hovens Had to Show Active Fraudulent Concealment of the Existence of their Claims by Banner to Toll the Statute of Limitations in SDCL 15-2-13.

As noted in *Gades*, and other cases addressing fraud that will toll the limitation period in SDCL 15-2-13, the Hovens were required to show an affirmative act on the part of Banner that was designed by Banner to prevent the Hovens from detecting their cause of action, and that the Hovens actually were prevented from discovering their cause of action. *Gades*, 865 N.W.2d at 160. Furthermore, "Fraudulent concealment will not toll the statute of limitations, no matter the nature of the concealment, if a plaintiff is already

on notice of a cause of action.." *Id.* "[E]stablishing fraudulent concealment will not toll the period of limitation beyond the moment 'the claim is discovered or might have been discovered with reasonable diligence.'" *Id.*

Here, there was no concealment of anything, and particularly not the existence of the Hovens' cause of action. It is not clear what was allegedly concealed. If it is anything related to the 2007 work, it would have become apparent to the Hovens, or to reasonable people, at the latest in 2010 – nine years before the claims were filed. In May 2010, the Hovens had everything they eventually used to assert their claims against Banner. Everything was spelled out and diagramed in the Elevation Certificate provided to them.

The claims relate to the finished floor elevation being below the base flood elevation. The Elevation Certificate provided by Banner to the Hovens in May 2010 told the Hovens exactly that fact. The Certificate has all of the elevations, the conversion between the different datum and a diagram that shows the house, the Base Flood Elevation (BFE) at "1810.0 (NGVD29) = 1810.9 (NAVD88)" and the Finished Floor Elevation (FFE) at "1810 (NAVD88)." On its face, it shows that the FFE is 0.9 feet (10.8 inches) below the BFE. The Elevation Certificate fully, openly and overtly told the Hovens everything they needed to know to pursue the claims they are now pursuing. In fact, the information in that Elevation Certificate is what the Hovens rely upon in making the allegations in this case that the finished floor elevation of the house is 0.9 feet below the base flood.

The fact that they did not look at the elevation certificate, and their insurer apparently did not look at it, is inconsequential. Again, it is the very information that was used to support their claims once they finally looked at it. Certainly, in May 2010, if not

earlier, the Hovens were on notice, or reasonable people would have been on notice, of the existence of their cause of action. Banner did nothing after that point whatsoever, so it cannot be alleged or argued that Banner prevented the Hovens from determining that they had the claims they are now pursuing.

Even if it was not necessary to show "active" fraudulent concealment, the above analysis demonstrates that there was no fraud on the part of Banner that was designed to prevent the Hovens from discovering their claims. "In order to be actionable fraud must be based upon the misrepresentation of a *material fact*." *Gades*, 663 N.W.2d at 219. (emphasis in original). "Fraud has been defined as 'a representation . . . made as a statement of fact, which was untrue and known to be untrue by the party making it." *Id.* at 291 to 220. It must be "made with intent to deceive and for the purpose of inducing the other party to act upon it. *Id.* at 220. What misrepresentation of a material fact was made by Banner? There was none. The information provided was all true. Banner did not knowingly provide false information to the Hovens. Banner did not induce the Hovens to act. What possible purpose would Banner have had for inducing the Hovens to do what they did? There is no support for the idea that Banner committed fraud. Banner laid out everything that eventually led to the Hovens' claims and presented it directly to them. How can that possibly be considered fraud?

The same analysis would apply to the issues involving the application of the statute of repose in SDCL 15-2A-3. Under *Cleveland*, the issues and questions are the same. There is no fiduciary relationship between the Hovens and Banner, and the Hovens needed to show active fraudulent concealment. Banner did not, at any point, conceal anything from the Hovens. The information that is the subject of the complaint was

plainly, openly and clearly spelled out for the Hovens. The fact that they ignored it is inconsequential. There is no fraud to prevent the application of the SDCL 15-2A-3.

Finally, even if the Hovens are asserting an independent fraudulent concealment claim, it would also have the same defects. There is no fraudulent misrepresentation. There was no knowing inducement to make the Hovens act in some way. Nothing was concealed from the Hovens -- everything was patently apparent. Banner did not prevent the plaintiffs form learning that they had built their house with a finished floor elevation below the base flood elevation. It was Banner that pointed it out to the Hovens and they chose to ignore it.

For the above reasons, there is no fraud that would toll the statute of limitations. Even if there was (which is denied), the plaintiffs had all of the information they needed to pursue their claims in May 2010 – nine years before they filed suit. Additionally, there is no fraud that would warrant the application of SDCL 15-2A-7, which would prevent the statute of repose in SDCL 15-2A-3 from running and applying to the claims. Finally, any independent fraudulent concealment claim would fail because the Hovens did not, and cannot, prove the essential elements of such a claim. Additionally, that claim would also be barred by the statute of limitations in SDCL 15-2-13. It would have accrued at the latest in May 2010 when the Hovens had all of the information to support their current claims.

IV. The Other Issues Raised by the Hovens are Not Relevant or Applicable.

The Hovens refer to professional regulation standards for professional licensees under the Board for Technical Professions in an attempt to establish a heightened

relationship or standard for Banner's services. They claim that these regulations gave rise to a "duty to disclose information" on the part of Banner. It is entirely unclear what Banner was supposed to disclose that wasn't disclosed when learned by Banner. Also, there is no context for the application of the standards to the current situation. There is not expert testimony presented by the Hovens that support any violation of the standards of professional conduct or how there was a violation under these circumstances.

The Hovens cite to the requirement that professionals be truthful in the preparation of reports, under A.R.S.D. 20:38:36:01 (25). There is no indication that there is anything wrong in the reports prepared by Banner. As mentioned, the Hovens rely upon the information in the Elevation Certificate in trying to prove their claims. They claim that Banner should have told the Hovens that they were constructing their home in violation of the law under A.R.S.D. 20:38:36:01 (22). The evidence shows, however, that Banner saw the property when it was empty, with nothing but an iron pin 2007. The house was, by the Hovens' own testimony, not built yet. The evidence then shows that Banner did not see the property again until at least 2009 – long after the house had been built in late 2007. Again, the Hovens' own testimony and their photographs show that the house was built by the end of 2007. Finally, the elevation certificate was accurate, met the standard of care, and told the Hovens everything they needed to know about their situation. The information was "truthful."

Finally, the Hovens cite to a lack of "fidelity" on the part of Banner, again with no context, no supporting expert evidence or anything showing what is required for professional land surveyors or professional engineers under the circumstances. Banner, on the other hand provided the sworn testimony of a registered land surveyor and a

registered professional engineer that Banner complied with the professional standards of care applicable to those professions. Also, and at the risk of again repeating the obvious, Banner gave the Hovens everything they eventually used to assert their claim back in May 2010. They had nine years to assert the claim before they finally filed the Complaint based on the actions in 2007 and what was provided to them in 2010. There was no "lack of "fidelity."

The citations to the professional rules of conduct do nothing to change the fact that there is no evidence to support any fraud, fraudulent concealment or similar claim against Banner that would toll the statute of limitations, prevent the application of SDCL 15-2A-3 or that would support a fraud claim that is not barred by the statute of limitations.

Under the above reasoning and the holdings in the cases cited by Banner, there is no fraud, fraudulent concealment or fraudulent misrepresentation or any other conduct on the part of Banner that would toll the statute of limitations in SDCL 15-2-13, that would invoke SDCL 15-2A-7, or support a claim for fraud. The statute of limitations applies and bars the Hovens' claims (for the reasons cited in Banner's Appellant's Brief in Appeal No. 30004) as does the statute of repose in SDCL 15-2A-3. Banner was entitled to summary judgment as to all of the Hovens' claims.

CONCLUSION

For the foregoing reasons, Banner respectfully requests that this Court affirm the finding of the Circuit Court that there was no fraud or fraudulent concealment on the part of Banner and that Banner was intitled to summary judgment as to all of those claims.

Respectfully submitted this 27th day of September 2022.

Gregory H. Wheeler
BOYCE LAW FIRM, L.L.P.
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(605) 336-2424
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Attorneys for Appellee Banner Associates, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 5,521 words as counted by Microsoft Word.

Gregory H. Wheeler

CERTIFICATE OF SERVICE

I, Gregory H. Wheeler, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 29th day of September 2022, Appellee's Brief and this Certificate of Service were electronically served upon the following:

Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Avenue, Suite 400
Sioux Falls, SD 57104

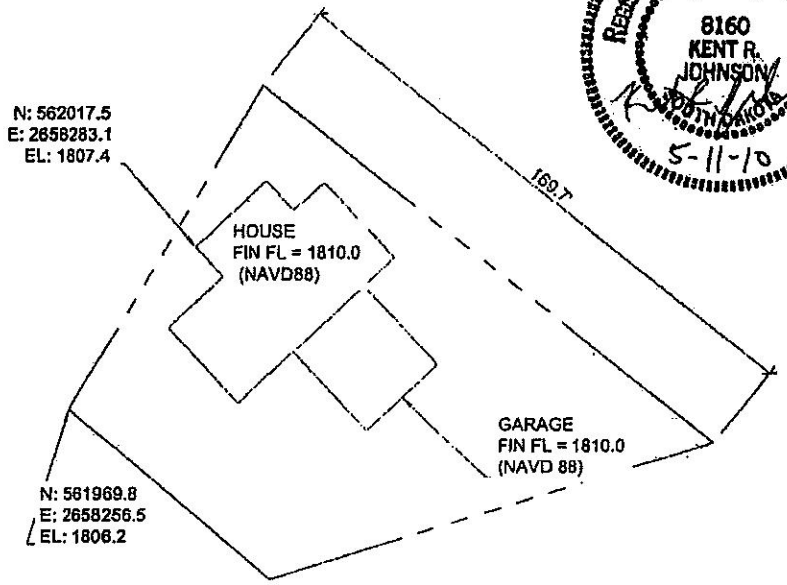
Attorneys for Michael Hoven and Madelynn Hoven

Gregory H. Wheeler

APPENDIX-TABLE OF CONTENTS

FLOODING SOURCE: BLUE DOG LAKE
ZONE AE = BFE 1810.0 (NGVD29) = 1810.9 (NAVD88)

REGISTERED PROFESSIONAL ENGINEER
REG. NO.
8160
KENT R.
JOHNSON
SOUTH DAKOTA
5-11-10



HORIZONTAL DATUM:
- NAD 83
- COORD. SYSTEM: U.S. STATE PLANE 1983
- ZONE: SOUTH DAKOTA NORTH (4001)

VERTICAL DATUM:
- NAVD 88
- GEOID 03

ALL DIMENSIONS SHOWN ARE IN TERMS OF U.S. SURVEY FEET

SURVEY DATE: 5-7-2010

OWNER:
MADELYNN HOVEN
618 W LAKESHORE DRIVE
WAUBAY, SD. 57273

N

0 40' 80'

F:\21195-00\Design Phase\CAD\DWG\Hoven-topo.dwg 5/11/2010 9:26 AM

BANNER
Consulting Engineers & Architects
409 22nd Ave. S P.O. Box 288
Brookings, South Dakota 57006
605-692-5342
www.bannerassociates.com

PROJECT TITLE:
HOVEN ELEVATION CERTIFICATE

PROJECT LOCATION:
WAUBAY, SOUTH DAKOTA

SUPPLEMENTAL INSTRUCTIONS NO:
n/a

SHEET TITLE:
SURVEY MAP

DRAWN BY: KRJ
DESIGNED BY: KRJ
CHECKED BY: KRJ
JOB NO: 21195.00
DATE: 5-11-10

SHEET NO:
2

STATE OF SOUTH DAKOTA COUNTY OF DAY	) : SS)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

MICHAEL HOVEN and MADELYNN HOVEN, Plaintiffs, vs. BANNER ASSOCIATES, INC., Defendant.	18CIV19-000037 **COMPLAINT**

COMES NOW Plaintiffs, Michael Hoven and Madelynn Hoven (collectively referred to herein as "Plaintiffs"), and for their Complaint against Defendant, Banner Associates, Inc. (hereinafter referred to as "Defendant"), state and allege as follows:

1. Plaintiffs are husband and wife.

2. Michael Hoven is a resident of South Dakota and resides in Waubay, Day County, South Dakota. His wife, Madelynn Hoven, is a resident of Iowa and maintains a residence in Matlock, Iowa.

3. Defendant is a South Dakota Corporation with its principal place of business in Brookings, South Dakota.

4. This action involves claims against Defendant that arise out of professional engineering and/or surveying services that it provided to Plaintiffs in regard to the construction of their lake home located in Waubay, Day County, South Dakota, and damages they have suffered resulting from Defendant's negligence.

5. Venue in this Court is therefore appropriate pursuant to S.D.C.L. §15-5-1(1) and

S.D.C.L. §15-5-8.

6. In 2007, Plaintiffs began construction of a lake home on Blue Dog Lake in Waubay, South Dakota.

7. Before beginning construction of their lake home, Plaintiffs hired Defendant to establish and "set" a benchmark for the construction of their lake home, to ensure that their lake home would be constructed at an elevation high enough to be safe from flooding and in full compliance with all applicable building codes and FEMA requirements for flood insurance purposes.

8. Defendant, through its agents or employees, set a benchmark for construction of Plaintiffs' lake home. See Exhibit A.

9. The benchmark for construction, established by Defendant, its agents or employees, was set and established on their property at 1806.96. No vertical datum was referenced in the document provided by Defendant.

10. In reliance thereon, Plaintiffs began the construction of their lake home, using the benchmark set and established by Defendant, its agents or employees, adding more-than-sufficient additional elevation to ensure that the elevation of their lake home would meet or exceed 1810 feet, which Defendant advised was the minimum elevation required.

11. At the time, Michael Hoven was employed as a foreman at a large commercial contracting firm, with projects both domestic and abroad, and he often traveled out of state and/or out of country for extended periods of time in connection with his work.

12. Due to Michael Hoven's work schedule, construction of the lake home necessarily proceeded intermittently over the course of several years, as time permitted.

13. As their lake home was nearing completion in 2010, Plaintiffs again hired

Defendant to survey their lake home, for the purpose of completing an Elevation Certificate to comply with local building authority requirements and FEMA flood insurance requirements.

14. Defendant, its employees or agents, surveyed the property and determined that the floor elevation of the lake home was 1810.19 "in the Datum of NAVD88." See Exhibit B.

15. Defendant, its agents or employees, completed an Elevation Certificate for Plaintiffs' lake home in May, 2010. See Exhibit C.

16. Plaintiffs' lake home was substantially completed in 2011.

17. Plaintiffs have since used their lake home over the past several years, without significant problems or issues.

18. In the spring of 2019, Plaintiffs were advised by FEMA that their flood insurance premiums would be raised significantly after FEMA had discovered that the elevation of their lake home had been established based upon a benchmark that mistakenly utilized and misapplied an incorrect or inappropriate vertical datum, the "Datum of NAVD88," instead of the correct and appropriate vertical datum, "NGVD 1929."

19. Plaintiffs learned in the spring of 2019 that this inaccurate, erroneous, and inappropriate vertical datum, "NAVD88," is approximately .9 feet (almost 11 inches) lower than the vertical datum recognized and accepted by FEMA, "NGVD 1929," which is used for flood insurance purposes and flood maps published by FEMA.

20. As a result of the erroneous, inaccurate, and inappropriate benchmark established, set and provided by Defendant based on its use of an erroneous, incorrect, improper or inappropriate vertical datum, not recognized or followed by FEMA, the grade set and established for Plaintiffs' lake home is nearly one foot (1') lower than it should have been, and otherwise would have been, if Defendant, its agents or employees had used the correct, accurate, and

appropriate vertical datum recognized and accepted by FEMA.

21. Defendant, its agents and employees, referred to both "NAVD88" and NGVD 1929" in the Elevation Certificate that they prepared for Plaintiffs in 2010.

22. Upon information and belief, Defendant, its agents and employees, knew by that time that it had been using an inaccurate, inappropriate, or erroneous vertical datum not recognized by FEMA or other authorities for the area, and that it had used the wrong vertical datum in establishing the benchmark for construction of Plaintiffs' lake home.

23. Despite the knowledge of Defendant, its agents or employees, the fact of this mistake, and of their misuse and misapplication of an erroneous, incorrect, and/or inappropriate vertical datum to establish the benchmark for construction of Plaintiffs' lake home, this fact was withheld from Plaintiffs.

24. Defendant, its agents or employees, held themselves out to Plaintiffs as experts in the field of professional surveying.

25. Defendant, its agents and employees, knew that Plaintiffs were relying upon them to establish an accurate, correct, and appropriate benchmark for the construction of their lake home, and that they intended to and did rely upon that benchmark to establish a correct, accurate, and appropriate minimum elevation level for the construction of their lake home in compliance with applicable building codes and/or FEMA flood insurance requirements.

26. Upon information and belief, Defendant, its agents and employees, deliberately withheld the fact of its error and its misapplication of the erroneous, incorrect or inappropriate vertical datum in establishing a benchmark for construction of Plaintiffs' lake home.

27. In failing to observe and utilize the correct, accurate, and appropriate vertical datum to establish the benchmark for construction of Plaintiffs' lake home, Defendant, its agents

and employees, failed to observe and exercise the degree of care that reasonable engineers and surveyors would use in providing such professional assistance and service to homeowners in the construction of a lake home, or in preparing an Elevation Certificate for submission to FEMA for flood insurance purposes.

28. By their actions and/or omissions, Defendant and its agents and employees were negligent.

29. As a legal and proximate result of such negligence, Plaintiffs have suffered and sustained damage to their property, including a loss of use and a loss of substantial value in their lake home.

30. As a legal and proximate result of such negligence, Plaintiffs have and will continue to incur additional flood insurance premiums until the home is raised to an acceptable minimum elevation level.

31. As a legal and proximate result of such negligence, Plaintiffs have expended significant time, money, and labor trying to protect their home.

32. As a legal and proximate result of such negligence, Plaintiffs will incur significant expense associated with raising their home and the surrounding landscaping to an appropriate and acceptable minimum elevation based upon the correct, appropriate, and accurate vertical datum.

33. As a legal and proximate result of such negligence, Plaintiffs have experienced inconvenience, stress, worry, and have and will continue to experience a loss of enjoyment of their property.

34. Upon information and belief, Defendant knew that it had been using an erroneous, inaccurate, incorrect and inappropriate vertical datum, or a vertical datum not recognized or

accepted by FEMA and/or other authorities, as early as 2010, before Plaintiffs' lake home was completed.

35. Upon information and belief, Defendant, its agents and employees withheld information regarding its error, mistake, misapplication, and misuse of the 1988 NAVD from Plaintiffs and from others.

36. Plaintiffs became aware of Defendant's error and of its misapplication of the 1988 NAVD in establishing the benchmark for construction of their lake home, in the spring of 2019, through direct communications with FEMA, when FEMA officials notified them of Defendant's error, and advised Plaintiffs that, as a consequence, Plaintiffs' flood insurance premiums for their lake home would be raised significantly to reflect the resulting increased risk of and exposure to flooding.

37. Defendant, through its agents or employees has acknowledged its error to and in the presence of Michael Hoven, and, upon information and belief, has also admitted its mistake to and in the presence of other interested parties and authorities.

WHEREFORE, Plaintiffs pray for relief as follows:

1. For judgment against Defendant in an amount to fully compensate Plaintiffs for their damage, including but not limited to the loss of use of their lake home, inconvenience, the loss of value to their lake home, increased costs of flood insurance, and the cost of raising their lake home and surrounding property to a proper elevation to meet or exceed minimum standards.
2. For an award of prejudgment interest.
3. For an award of costs and disbursements provided by law; and
4. For such other a nd further relief as is deemed just, warranted and authorized by law.

Dated July 26, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Steven J. Oberg
Steven J. Oberg
110 N. Minnesota Ave., Ste. 400
Sioux Falls, SD 57104
Telephone: (605) 332-5999
E-Mail: soberg@lynnjackson.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies on July 26, 2019, I caused the following document:

- **COMPLAINT**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

Gregory H. Wheeler
Boyce Law Firm, L.L.P.
300 S. Main Avenue
PO Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424
E-mail: ghwheeler@boycelaw.com
Attorney for Defendant

/s/ Steven J. Oberg
Steven J. Oberg

U.S. DEPARTMENT OF HOMELAND SECURITY
Federal Emergency Management Agency
National Flood Insurance Program

ELEVATION CERTIFICATE

OMB No. 1660-0008
Expires March 31, 2012

Important: Read the instructions on pages 1-9.

SECTION A - PROPERTY INFORMATION

For Insurance Company Use:

A1. Building Owner's Name Madelynn Hoven — Policy Number

A2. Building Street Address (Including Apt., Unit, Suite, and/or Bldg No.) or P O Route and Box No
618 W Lakeshore Drive — Company NAIC Number

City Waubay State SD ZIP Code 57273

A3. Property Description (Lot and Block Numbers, Tax Parcel Number, Legal Description, etc.)
Legal Description: Lot 11A PISCHKE'S 2nd Tax Parcel Number 77.39.0111

A4. Building Use (e g , Residential, Non-Residential, Addition, Accessory, etc) Residential
A5. Latitude/Longitude: Lat. 45.3435 Long. 97.3167 Horizontal Datum: ☐ NAD 1927 ☒ NAD 1983
A6. Attach at least 2 photographs of the building if the Certificate is being used to obtain flood insurance.
A7. Building Diagram Number 8
A8. For a building with a crawlspace or enclosure(s):
a) Square footage of crawlspace or enclosure(s) 2244 sq ft
b) No. of permanent flood openings in the crawlspace or enclosure(s) within 1.0 foot above adjacent grade 2
c) Total net area of flood openings in A8.b 864 sq in
d) Engineered flood openings? ☒ Yes ☐ No

A9 For a building with an attached garage:
a) Square footage of attached garage 907 sq ft
b) No. of permanent flood openings in the attached garage within 1.0 foot above adjacent grade ____
c) Total net area of flood openings in A9.b ____ sq in
d) Engineered flood openings? ☐ Yes ☐ No

SECTION B - FLOOD INSURANCE RATE MAP (FIRM) INFORMATION

B1. NFIP Community Name & Community Number	B2. County Name	B3. State
Day County, Unincorporated Areas, 460261	Day County	South Dakota

B4. Map/Panel Number	B5. Suffix	B6. FIRM Index Date	B7. FIRM Panel Effective/Revised Date	B8. Flood Zone(s)	B9. Base Flood Elevation(s) (Zone AO, use base flood depth)
46037C0500	A	December, 6, 2001	December, 6, 2001	AE	1810.0

B10. Indicate the source of the Base Flood Elevation (BFE) data or base flood depth entered in Item B9.
☐ FIS Profile ☒ FIRM ☐ Community Determined ☐ Other (Describe) ____

B11. Indicate elevation datum used for BFE in Item B9: ☒ NGVD 1929 ☐ NAVD 1988 ☐ Other (Describe) ____

B12. Is the building located in a Coastal Barrier Resources System (CBRS) area or Otherwise Protected Area (OPA)? ☐ Yes ☒ No
Designation Date ____ ☐ CBRS ☐ OPA

SECTION C - BUILDING ELEVATION INFORMATION (SURVEY REQUIRED)

C1. Building elevations are based on: ☐ Construction Drawings* ☐ Building Under Construction* ☒ Finished Construction
*A new Elevation Certificate will be required when construction of the building is complete.

C2. Elevations – Zones A1-A30, AE, AH, A (with BFE), VE, V1-V30, V (with BFE), AR, AR/A, AR/AE, AR/A1-A30, AR/AH, AR/AO Complete Items C2.a-h below according to the building diagram specified in Item A7. Use the same datum as the BFE.

Benchmark Utilized USGS PID QQ0422 Vertical Datum NAVD 88

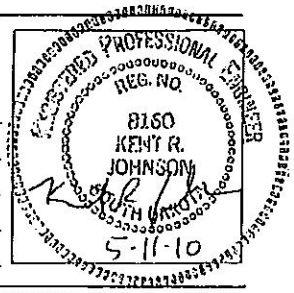
Conversion/Comments NAVD 1988 minus NGVD 1929 = +0.915 ft (Datum conversion is attached)

			Check the measurement used.
a)	Top of bottom floor (including basement, crawlspace, or enclosure floor)	1808.5	☒ feet ☐ meters (Puerto Rico only)
b)	Top of the next higher floor	1810.0	☒ feet ☐ meters (Puerto Rico only)
c)	Bottom of the lowest horizontal structural member (V Zones only)	____.	☐ feet ☐ meters (Puerto Rico only)
d)	Attached garage (top of slab)	1810.0	☒ feet ☐ meters (Puerto Rico only)
e)	Lowest elevation of machinery or equipment servicing the building (Describe type of equipment and location in Comments)	1809.8	☒ feet ☐ meters (Puerto Rico only)
f)	Lowest adjacent (finished) grade next to building (LAG)	1807.1	☒ feet ☐ meters (Puerto Rico only)
g)	Highest adjacent (finished) grade next to building (HAG)	1809.3	☒ feet ☐ meters (Puerto Rico only)
h)	Lowest adjacent grade at lowest elevation of deck or stairs, including structural support	____.	☐ feet ☐ meters (Puerto Rico only)

SECTION D - SURVEYOR, ENGINEER, OR ARCHITECT CERTIFICATION

This certification is to be signed and sealed by a land surveyor, engineer, or architect authorized by law to certify elevation information. *I certify that the information on this Certificate represents my best efforts to interpret the data available. I understand that any false statement may be punishable by fine or imprisonment under 18 U S Code, Section 1001.* ☒

Check here if comments are provided on back of form. Were latitude and longitude in Section A provided by a licensed land surveyor? ☐ Yes ☒ No



Certifier's Name Kent R Johnson — License Number SD 8160

Title Civil Engineer — Company Name Banner Associates, Inc.

Address 409 22nd Ave S — City Brookings — State SD — ZIP Code 57006

Signature — Date — Telephone 605-692-6342

FEMA Form 81-31, Mar 09 — See reverse side for continuation. — Replaces all previous editions

IMPORTANT: In these spaces, copy the corresponding information from Section A.	For Insurance Company Use:
Building Street Address (including Apt., Unit, Suite, and/or Bldg. No.) or P.O. Route and Box No. 618 W Lakeshore Drive	Policy Number
City Waubay State SD ZIP Code 57273	Company NAIC Number

SECTION D - SURVEYOR, ENGINEER, OR ARCHITECT CERTIFICATION (CONTINUED)

Copy both sides of this Elevation Certificate for (1) community official, (2) insurance agent/company, and (3) building owner.

Comments Machinery in C2.e is an Air Conditionersupport structure

Signature 5-11-10 Date

☒ Check here if attachments

SECTION E - BUILDING ELEVATION INFORMATION (SURVEY NOT REQUIRED) FOR ZONE AO AND ZONE A (WITHOUT BFE)

For Zones AO and A (without BFE), complete Items E1-E5. If the Certificate is intended to support a LOMA or LOMR-F request, complete Sections A, B, and C. For items E1-E4, use natural grade, if available. Check the measurement used. In Puerto Rico only, enter meters.

E1. Provide elevation information for the following and check the appropriate boxes to show whether the elevation is above or below the highest adjacent grade (HAG) and the lowest adjacent grade (LAG).
a) Top of bottom floor (including basement, crawlspace, or enclosure) is ____.____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.
b) Top of bottom floor (including basement, crawlspace, or enclosure) is ____.____ ☐ feet ☐ meters ☐ above or ☐ below the LAG.

E2. For Building Diagrams 6-9 with permanent flood openings provided in Section A Items 8 and/or 9 (see pages 8-9 of Instructions), the next higher floor (elevation C2.b in the diagrams) of the building is ____.____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E3. Attached garage (top of slab) is ____.____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E4 Top of platform of machinery and/or equipment servicing the building is ____.____ ☐ feet ☐ meters ☐ above or ☐ below the HAG.

E5. Zone AO only: If no flood depth number is available, is the top of the bottom floor elevated in accordance with the community's floodplain management ordinance? ☐ Yes ☐ No ☐ Unknown. The local official must certify this information in Section G.

SECTION F - PROPERTY OWNER (OR OWNER'S REPRESENTATIVE) CERTIFICATION

The property owner or owner's authorized representative who completes Sections A, B, and E for Zone A (without a FEMA-issued or community-issued BFE) or Zone AO must sign here. *The statements in Sections A, B, and E are correct to the best of my knowledge.*

Property Owner's or Owner's Authorized Representative's Name

Address City State ZIP Code

Signature Date Telephone

Comments

☐ Check here if attachments

SECTION G - COMMUNITY INFORMATION (OPTIONAL)

The local official who is authorized by law or ordinance to administer the community's floodplain management ordinance can complete Sections A, B, C (or E), and G of this Elevation Certificate. Complete the applicable item(s) and sign below. Check the measurement used in Items G8 and G9.

G1. ☐ The information in Section C was taken from other documentation that has been signed and sealed by a licensed surveyor, engineer, or architect who is authorized by law to certify elevation information. (Indicate the source and date of the elevation data in the Comments area below.)

G2. ☐ A community official completed Section E for a building located in Zone A (without a FEMA-issued or community-issued BFE) or Zone AO.

G3. ☐ The following information (Items G4-G9) is provided for community floodplain management purposes.

G4. Permit Number	G5. Date Permit Issued	G6. Date Certificate Of Compliance/Occupancy Issued

G7. This permit has been issued for: ☐ New Construction ☐ Substantial Improvement

G8. Elevation of as-built lowest floor (including basement) of the building. ____.____ ☐ feet ☐ meters (PR) Datum ____

G9 BFE or (in Zone AO) depth of flooding at the building site: ____.____ ☐ feet ☐ meters (PR) Datum ____

G10. Community's design flood elevation ____.____ ☐ feet ☐ meters (PR) Datum ____

Local Official's Name Title

Community Name Telephone

Signature Date

Comments

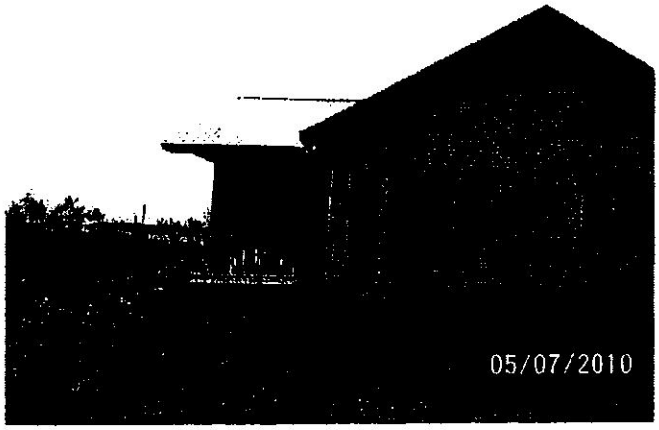
☐ Check here if attachments

Building Photographs

See Instructions for Item A6.

	For Insurance Company Use:
Building Street Address (including Apt., Unit, Suite, and/or Bldg. No.) or P.O. Route and Box No. 518 W Lakeshore Drive	Policy Number
City Waubay State SD ZIP Code 57273	Company NAIC Number

If using the Elevation Certificate to obtain NFIP flood insurance, affix at least two building photographs below according to the Instructions for Item A6. Identify all photographs with: date taken; "Front View" and "Rear View"; and, if required, "Right Side View" and "Left Side View." If submitting more photographs than will fit on this page, use the Continuation Page, following.



Front View (showing NE side)

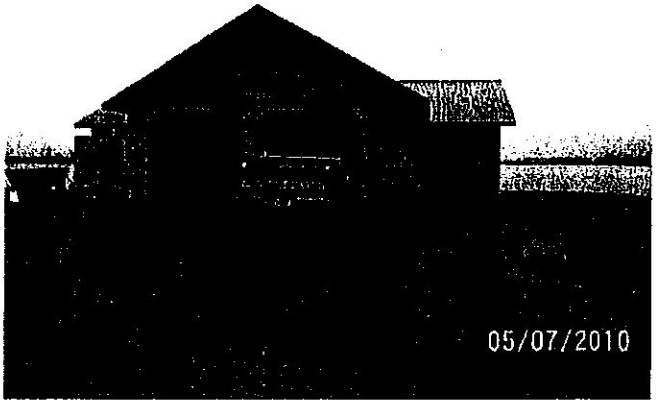
Front View (showing SE side)

Building Photographs

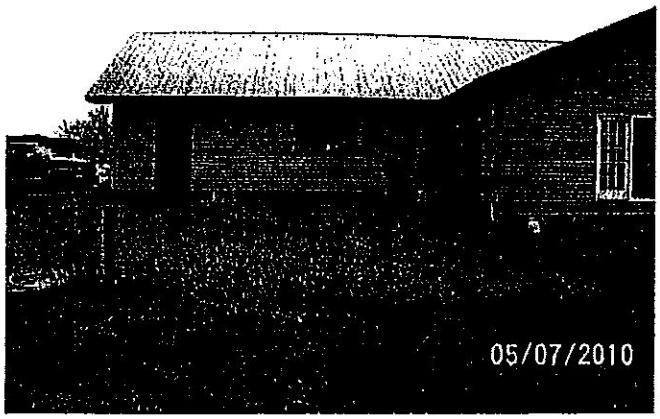
Continuation Page

	For Insurance Company Use:
Building Street Address (including Apt., Unit, Suite, and/or Bldg. No.) or P.O. Route and Box No. 618 W Lakeshore Drive	Policy Number
City Waubay State SD ZIP Code 57273	Company NAIC Number

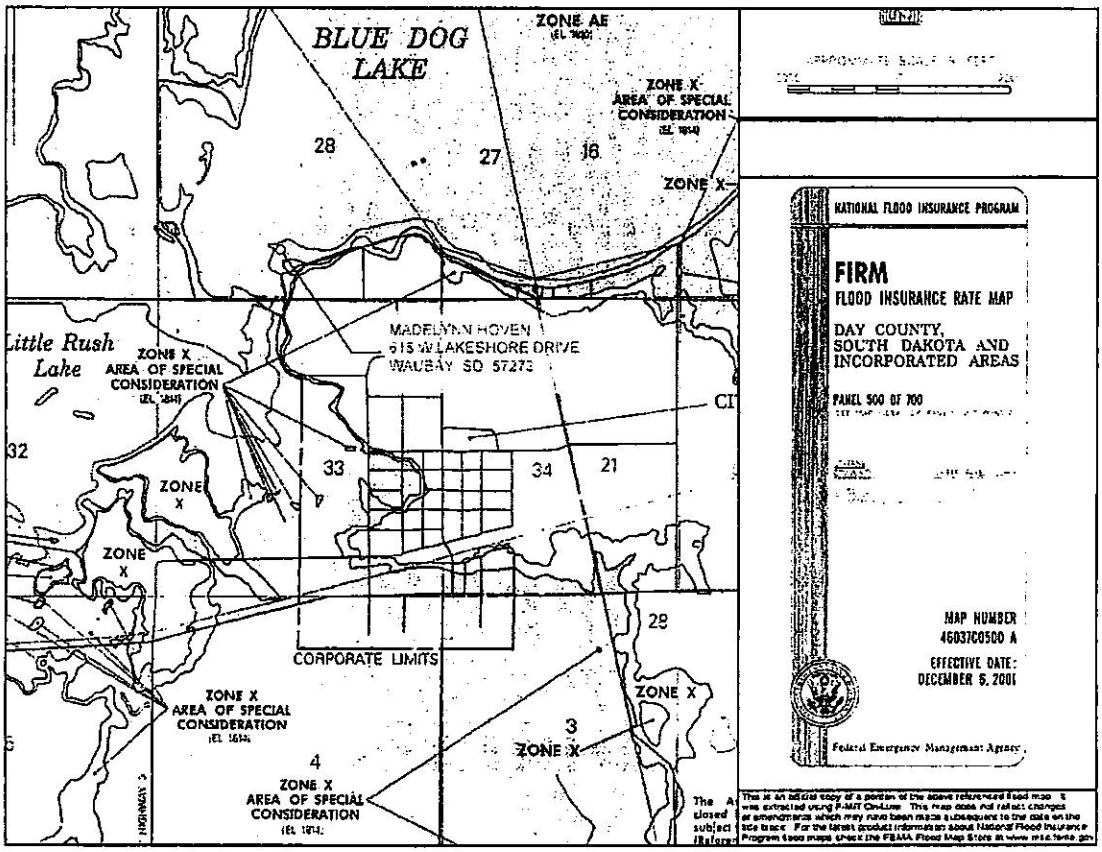
If submitting more photographs than will fit on the preceding page, affix the additional photographs below. Identify all photographs with: date taken; "Front View" and "Rear View"; and, if required, "Right Side View" and "Left Side View."



Rear View (showing garage)

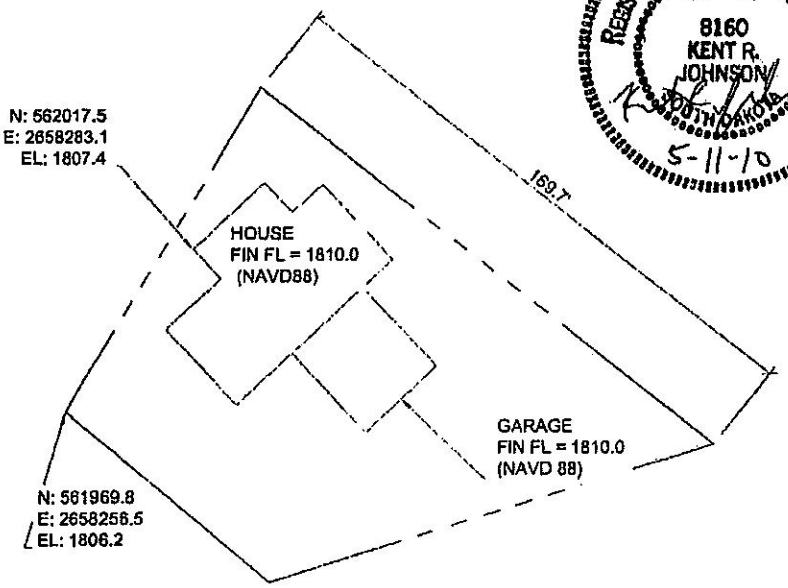


Left Side View (looking SW)


BLUE DOG LAKE
ZONE AE
ZONE X
AREA OF SPECIAL CONSIDERATION
ZONE X
28
27
16
MADELYNN HOVEN
915 W LAKESHORE DRIVE
WAUBAY SD 57273
Little Rush Lake
ZONE X
AREA OF SPECIAL CONSIDERATION
32
33
34
21
ZONE X
ZONE X
CORPORATE LIMITS
28
ZONE X
AREA OF SPECIAL CONSIDERATION
3
ZONE X
4
ZONE X
AREA OF SPECIAL CONSIDERATION
NATIONAL FLOOD INSURANCE PROGRAM
FIRM
FLOOD INSURANCE RATE MAP
DAY COUNTY, SOUTH DAKOTA AND INCORPORATED AREAS
PANEL 500 OF 700
MAP NUMBER
46037C0500 A
EFFECTIVE DATE:
DECEMBER 5, 2001
Federal Emergency Management Agency

FLOODING SOURCE: BLUE DOG LAKE
ZONE AE = BFE 1810.0 (NGVD29) = 1810.9 (NAVD88)

REGISTERED PROFESSIONAL ENGINEER
REG. NO.
8160
KENT R.
JOHNSON
SOUTH DAKOTA
5-11-10



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- ZONE: SOUTH DAKOTA NORTH (4001)

VERTICAL DATUM:
- NAVD 88
- GEOID 03

ALL DIMENSIONS SHOWN ARE IN TERMS OF U.S. SURVEY FEET

SURVEY DATE: 5-7-2010

OWNER:
MADELYNN HOVEN
618 W LAKESHORE DRIVE
WAUBAY, SD. 57273

N

0 40' 80'

F:\21160-00\Design Phase\Cvr 3.DWG\Gibson-topo.dwg 5/11/2010 9:28 AM

BANNER
Consulting Engineers & Architects
409 22nd Ave. S P.O. Box 298
Brookings, South Dakota 57006
605-692-6342
www.bannerassociates.com

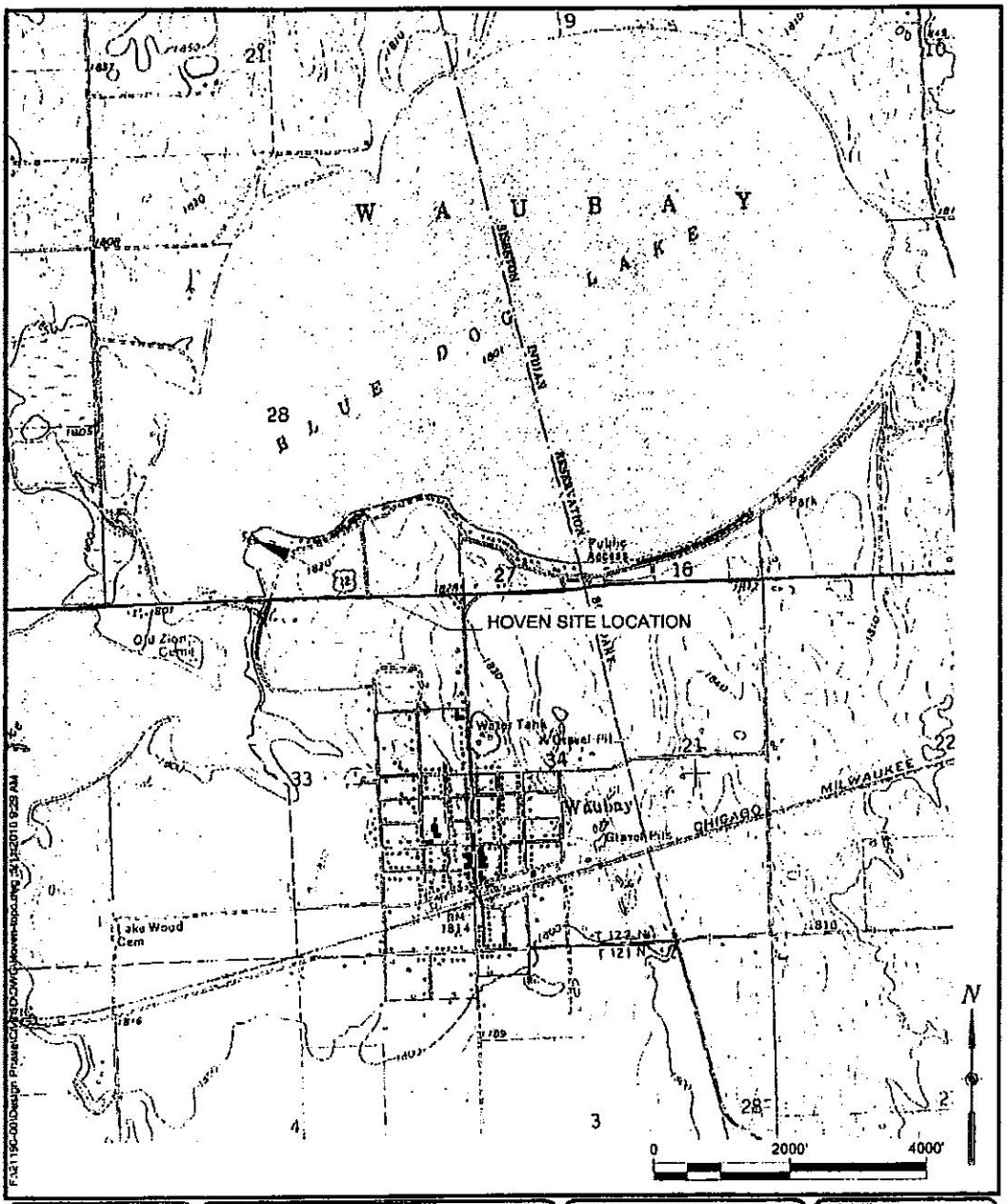
PROJECT TITLE:
HOVEN ELEVATION CERTIFICATE

PROJECT LOCATION:
WAUBAY, SOUTH DAKOTA

n/a

SHEET TITLE:
SURVEY MAP

FIGURE NO:
2



BANNER
Civil • Land Development • Architecture
409 22nd Ave. S. P.O. Box 298
Brookings, South Dakota 57006
605-692-6342
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PROJECT TITLE
HOVEN ELEVATION CERTIFICATE

PROJECT LOCATION
WAUBAY, SOUTH DAKOTA

SUPPLEMENTAL INSTRUCTIONS NO.:
n/a

SHEET TITLE
SURVEY LOCATION MAP

DRAWN BY: KRJ
DESIGNED BY: KRJ
CHECKED BY: KRJ
JOB NO.: 21190.00
DATE: 5-11-10

FIGURE NO.: 1

STATE OF SOUTH DAKOTA :SS COUNTY OF DAY	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
MICHAEL HOVEN AND MADELYNN HOVEN, Plaintiffs, v. BANNER ASSOCIATES, INC., Defendant.		18CIV19-000037 **BANNER ASSOCIATES, INC. STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Defendant, Banner Associates, Inc. ("Banner"), and pursuant to SDCL 15-6-56 (c), submits this statement of undisputed material facts in support of its motion for summary judgment. The citations below refer to Affidavits of Kent Johnson, Nathan Nielson and Gregory Wheeler and the Exhibits to those Affidavits, including the deposition transcript testimony attached to the Affidavit of Gregory Wheeler. The following facts are not in dispute and support the motion for summary judgment:

1. Dennis and Carol Gregerson ("Gregersons") retained Banner to perform surveying services in relation to their property in 2006. (Johnson Affid., ¶ 3).

2. The Gregersons were planning to subdivide their property and sell portions of it, one piece of which was sold to the Hovens in 2007. (Mike Hoven depo., p. 17).

3. One of the services performed by Banner for the Gregersons was the preparation of an Elevation Certificate for the house they built on a portion of their property. (Johnson Affid., ¶¶ 4-5).

4. The elevation Certificate was prepared for the Gregersons in 2006. (Johnson Affid., ¶ 5; Exhibit "A").

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5. In performing the professional services for the Gregersons, Banner determined a benchmark on the Gregerson property and set an iron pin at the location of the benchmark on, or around, June 9, 2006. (Rames depo., pp. 39-41; Johnson Affid., ¶ 6).

6. The location of the iron pin ended up being on the portion of the property that was subdivided and later sold to the Hovens (specifically Madelynn Hoven). (Mike Hoven depo., p. 29; Johnson Affid., ¶ 7)

7. In mid-2007, Mike Hoven contacted Steve Rames, who was at the time an employee of Banner, regarding the benchmark. (Mike Hoven depo., p. 29).

8. Mr. Hoven simply asked Mr. Rames for the elevation of the benchmark. (Mike Hoven depo., p. 29).

9. Banner sent a surveyor to mark the elevation of the iron pin. (Rames depo., pp. 45-47; Mike Hoven depo., pp. 49-54).

10. The elevation of 1806.96 was marked on a lathe stake that was placed next to the iron pin. (*Id.*).

11. The work referenced in paragraphs 7 through 10 above occurred in 2007. (*Id.*).

12. The elevation of the iron pin was noted as 1806.96 NAVD88 in the Elevation Certificate provided to the Gregersons and the lathe stake was marked using what had previously been determined for the Gregersons. (Rames depo., pp. 39-47; Johnson Affid., Exhibit "A" p.12).

13. Mr. Rames also sent a document to Mr. Hoven showing the property lines for the subdivided Gregerson property and showing the benchmark at 1806.96. (See Exhibit 5 to Mike Hoven depo.).

14. No datum is referenced in the document and there were never any discussions between Banner and the plaintiffs about the datum used. (*Id.*; Mike Hoven depo., p. 56).

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15. Mr. Hoven stated that he did not even ask any questions because he did not know there were different datum. (Mike Hoven depo., p. 47).

16. The document was never directly used by the Hovens in any way. (Mike Hoven depo., p. 47), but instead, they claim that they believe that their concrete contractor, Moe's Concrete, used the elevation noted on the lathe stake next to the iron pin in setting the foundation for the house. *Id.*

17. Banner was never officially retained by the Hovens in 2006 or 2007, did not bill the Hovens for any work at that time, and the Hovens never paid for any services at that time. (Johnson Affid., ¶ 8).

18. Banner was not directly involved in the staking, layout or construction of the Hovens' house. (Johnson Affid., ¶ 9).

19. Over the next few months in 2007, the Hovens built the house on the property. (Mike Hoven depo., pp. 18-19).

20. The house was constructed and enclosed by the end of 2007. (Mike Hoven depo., p. 20-21; Exhibit 1 to Mike Hoven Depo., Bates 150 to 152).

21. The Hovens admitted that it was built by the end of 2007 and the photographs support that admission. (*Id.*).

22. All elevations of the house were set at that time. (*Id.*)

23. The first time Banner was actually retained and paid by the Hovens was in 2009. (Johnson Affid., ¶ 10).

24. In 2009, Banner shot an elevation for the first floor of the Hoven house. (Rames depo., p. 67, Exhibit 10 (from Mike Hoven depo.); Johnson Affid., ¶ 10).

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25. The house was obviously constructed at that time. The floor elevation was listed at 1810.19 NAVD88. (Hoven depo., Exhibit 10).

26. The date of the service was February 2, 2009 and was documented in a letter dated January 25, 2010. (*Id.*).

27. Banner also provided the Hovens (Madelynn Hoven) with an Elevation Certificate dated May 11, 2010. (Johnson Affid., ¶ 11; Exhibit "B").

28. It lists the various elevations of the house, both in NAVD88 and NGVD29 datum. (*Id.*).

29. There is no expert or other admissible evidence that there is anything wrong with the 2010 Elevation Certificate, that the elevations listed, and conversions shown, are inaccurate, or that the Elevation Certificate violates the applicable professional standard of care, and, in fact, the evidence is that it is accurate and complies with the professional standard of care. (Johnson Affid., ¶ 12).

30. The Hovens claim to have sent the Elevation Certificate to their insurance carrier so they could purchase flood insurance in 2010, which they did. (Mike Hoven depo., p.79-80; 88).

31. The Hovens did not even look at the Elevation Certificate at that time. (Mike Hoven depo., p. 83).

32. Nothing happened until 2019, when using the same 2010 Elevation Certificate, the insurance carrier for the Hovens noted that the finished floor elevation of the house was below the base flood elevation. (Mike Hoven depo., p. 79).

33. The Hovens had not renewed the flood insurance in the years between 2010 and 2019 and asked again for the insurance in 2019, which is when the issue was noted, and the cost of flood insurance was quoted to be higher. (Mike Hoven Depo., p. 88).

34. The finished floor elevation of the house is 1809.1 (NGVD29)/1810.0 (NAVD88). The Base Flood Elevation is 1810.0 (NGVD29)/1810.9 (NAVD88). The finished floor elevation of the house constructed in 2007 was at an elevation 0.9 feet below the Base Flood Elevation. (See exhibits to Johnson Affid.).

35. The professional services performed by Banner were performed in accordance with the professional standard of care. (Johnson Affid., ¶ 13; Nielson Affid., ¶ 5).

36. Banner did not actively (or passively) conceal or withhold any information from the plaintiffs and did not try to prevent them from knowing about any potential issues they may have with any of the services provided by Banner. (Johnson Affid., ¶ 14; Nielson Affid., ¶ 6).

37. The Summons was served in this matter in July 2019. The Complaint was not filed until July 26, 2019.

Dated this 16th day of March 2022.

/s/ Gregory H. Wheeler

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CERTIFICATE OF SERVICE

I, Gregory H. Wheeler, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 16th day of March 2022, a true and correct copy of the foregoing was filed and served through Odyssey upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30005

MICHAEL HOVEN AND MADELYNN HOVEN,

Plaintiffs / Appellants,

v.

BANNER ASSOCIATES, INC.,

Defendant / Appellee.

Appeal from the Circuit Court,
Fifth Judicial Circuit
Day County, South Dakota
The Honorable Jon S. Flemmer, Presiding

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ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER DATED JUNE 17, 2022

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Michael and Madelynn Hoven ("Hovens") respectfully submit this Reply Brief.

RESPONSE TO BANNER'S STATEMENT OF FACTS

In Appellee's Brief, Banner again suggests that it had no relationship with the Hovens before 2009. It asserts the Hovens never hired it to provide them with the elevation benchmark for their construction. (Banner Br. p. 4). Banner even suggests that Mike Hoven testified that they had no relationship with Banner in regard to the elevation benchmark. Banner cites "CR51" of the settled record as support for this assertion. (Banner Br. p. 4). However, nothing in the settled record supports Banner's assertion. Mike Hoven stated under oath that he requested an elevation benchmark from Banner and explained to Steven Rames that they needed a benchmark before the walls were poured to ensure that their home was built high enough to meet the 1810' BFE requirement for the floor elevation. (CR 150-151; 179-180).

The undisputed fact remains that Banner did provide the Hovens with the benchmark for their construction, and provided them a survey entitled "Mike Hove[n] Bench Mark" to show its location on the lot and its elevation, along with a note that Steven Rames wrote on it to Mike. (CR 102; 206). However, Banner did not provide any datum for the benchmark, or do the appropriate datum conversion for it so that it could be compared to the BFE as the FIRM mandated and did not tell the Hovens that it could not be used for construction. There was

no indication on the survey that it was preliminary or that it could not be used for construction, as required by SDCL § 36-18A-45(2). (CR 152; 85; 202; 274).

Banner acknowledges that in 2009, it came back again and surveyed the critical floor elevation, at 1810.19 feet. Again, it did so in the inappropriate vertical datum of NAVD88 which could not be compared to the BFE at this location without conversion to the appropriate datum of NGVD 1929. (Banner Br. p. 4). While this elevation could not be compared to the BFE, it remains undisputed that Banner did not tell the Hovens this. The Hovens, therefore, believed that their floor elevation exceeded the BFE, and their construction continued after Banner had confirmed the critical floor elevation.

Banner asserts that it later provided the Hovens with the Elevation Certificate in the spring of 2010 and that provided all the information they needed to discern for themselves that their lake home was too low. (Banner Brief p. 5). Banner has suggested that by that time, the damage was already done so telling them would have made no difference. However, the Hovens were still a long way from reaching substantial completion of their home.

Banner fails to address the fact that after providing Hovens with the benchmark for the start of construction in the inappropriate datum that could not be compared to the BFE or properly used for construction, and after verifying the critical floor elevation midway through the construction, Banner had already left the Hovens thinking they had met or exceeded the minimum floor elevation required.

Banner asserts that the inadequate floor elevation below the BFE was "open, obvious, and easy to understand." *Id*. Yet by the time Banner provided the Elevation Certificate, the Hovens reasonably believed that Steven Rames at Banner had already confirmed the proper floor elevation. Kent Johnson, who prepared the Elevation Certificate, had carefully explained the discrepancy in datums to the Gregersons and to the City, when he sent their Elevation Certificate to the City for the required recording of the elevation of their lake cabin. (CR 342). Yet, Mr. Johnson apparently never sent the Hovens' Elevation Certificate to the City for recording and never sent a similar letter to clarify the discrepancy in the datums to the City or to the Hovens. He did not tell the Hovens they were completing their home in this area of special flood hazard at an inadequate elevation. Although Banner claims that the Hovens should have known their home was too low from the information provided in the Elevation Certificate, former Banner professional land surveyor Steven Rames denied any suggestion that Banner itself would have known or could have easily determined this from the surveys it completed in 2009 and 2010. (CR 206-207). Yet Banner admittedly did know. (CR 329).

Based on the information that Banner provided after surveying the critical floor elevation in 2009, the Hovens reasonably believed their lake home had met or exceeded the minimum BFE requirement and that Banner had confirmed this, long before they requested the Elevation Certificate to apply for flood insurance. Banner asserts that attachment of the Certificate to the Hovens' unverified

complaint somehow proves that they knew or should have known the truth. (Banner Br. p. 5). Attachment of the Elevation Certificate to the Hovens' Complaint does nothing to establish their knowledge at the time. After Steven Rames provided the benchmark and then confirmed the critical floor elevation at over 1810', the Hovens reasonably believed that Banner had already confirmed the proper elevation of their home. They did not understand the difference in the datums, the "datum shift," or the necessity of doing "the appropriate datum conversion." They only learned that their home was too low in the spring of 2019, after submitting a second application for flood insurance, when FEMA completed what Kent Johnson had referred to as "the appropriate datum conversion" to NGVD 1929 for the FIRM mandated comparison to the BFE. (CR 191).

ARGUMENT AND AUTHORITIES

A. After Providing the Elevation Benchmark for The Hovens' Construction and After Verifying The Critical Floor Elevation, Banner Had A Duty to Tell Them That Their Home Is Inadequately Elevated.

Banner's entire defense hinges on its argument that it had no duty to disclose anything to the Hovens because it was not their fiduciary or acting in a position of trust or confidence. In support of this assertion, Banner cites *Gades v. Meyer Modernizing Co., Inc*. 2015 S.D. 42, 865 N.W.2d 155, 160. In *Gades*, however, the problem with the constructed improvement was obvious and actually known to the plaintiff homeowners. Water began infiltrating their home soon after construction and persisted over the course of several years, before they filed their lawsuit. The Gades needed no one to tell them there was a problem. They had no

reason to think that the defendant was looking out for their interests, to ensure that their home was watertight.

In contrast, here Banner acknowledges that the inadequate elevation of the Hovens' lakeside home could not be discerned simply by looking at it, without a professional elevation survey. (CR 399-400). The Circuit Court acknowledged that the difference in datums may be confusing. (CR 423). Kent Johnson at Banner apparently felt the datum discrepancy is confusing, as he deemed it necessary to point this out and explain the difference in the datums for others, and the necessity of completing what he called "the appropriate datum conversion" for comparison to the BFE. Yet he did not do the appropriate datum conversion for the Hovens or do anything to disabuse them of the notion that their home exceeded the minimum elevation requirement.

In further support of its argument that it had no duty to speak, Banner also cites *Cleveland v. BDL Enters., Inc*., 2003 S.D. 54, 663 N.W.2d 212. In *Cleveland*, however, the homeowners did not hire the engineering firm involved. *Id.* at ¶ 19, 663 N.W.2d at 218. That firm was hired by the mall developer that cut the "toe" from the bottom of the hillside for the mall project development. As the Supreme Court noted, the engineering firm could not reasonably be expected or required to serve and answer to two masters at once. *Id.* at ¶ 21, 663 N.W.2d at 218. Furthermore, as in *Gades*, the problem created by movement of the hillside was apparent and persistent, notwithstanding an opinion offered by the engineering firm that cutting the "toe" at the base of the hill was not the cause.

The Hovens' sole purpose for engaging Banner was to ensure that their home would be built at the proper minimum elevation and to later confirm that it had in fact met the minimum elevation requirement. This was the sole object of their relationship. Banner asserts the parties' relationship did not involve "confidence" or "trust." (Banner Br. p. 7). Yet Hovens clearly trusted Banner to provide a professionally-surveyed elevation benchmark to ensure that they met the 1810' minimum elevation requirement in this area of special flood hazard. Banner knew that the datum information must be provided and understood or the result may be disastrous. Banner admitted as follows:

> [I]t was necessary for the owner of the property in question to obtain benchmark information, including information such as the datum upon which the benchmark was determined, base flood elevation and other pertinent information for use in establishing the finished floor elevation of any structure or property prior to constructing on that property or the owner of the structure on the property would potentially build the house at an elevation that could lead to increased risk for flooding, just as one or both of the plaintiffs did here.

CR 325. Banner clearly knew that the Hovens needed datum information critical to their construction. The Hovens also trusted Banner to confirm that the critical floor elevation requirement had been met. Just as construction could not begin without Banner's professional assistance at the start, construction would never have continued without Banner's confirmation of the critical floor elevation at or in excess of the City's minimum requirement.

By the spring of 2010, Banner admittedly knew that the Hovens' home did not meet the minimum elevation requirement. Yet Banner said nothing. Banner

claims it had no duty to tell them. The Hovens respectfully submit that Banner had a duty to speak and provide all pertinent information. Yet Banner failed to compare the surveyed floor elevation to the BFE in the appropriate datum, as the FIRM mandates. Banner never provided the critical floor elevation in the inappropriate datum. Instead, Banner let the Hovens continue working under the mistaken belief that their home exceeded the minimum requirement.

Banner failed to meet its duty of fidelity to the Hovens, failed to provide them with all pertinent and material information, and failed to advise them of their inadvertent violation of the law. *See* A.R.S.D. 20:38:36:01. Banner argues that these mandatory rules of professional conduct are irrelevant and do not apply. (Banner's Br. pp. 17-18). To the contrary, these mandatory rules of professional conduct apply to both Banner and its professional land surveyors. *See* A.R.S.D. 20:38:36:01.

B. <u>The Trial Court Erred In Determining As a Matter of Law That Banner Had Not Fraudulently Concealed The Fact That The Home Is Inadequately Elevated and Failed to View The Evidence in a Light Most Favorable to the Hovens.</u>

The Circuit Court failed to construe the evidence in a light most favorable to the Hovens and erred in granting partial summary judgment in Banner's favor on the Hovens' claim of fraudulent concealment. On this summary judgment motion involving a question of fraud, the Circuit Court was not free "to weigh the evidence and determine the matters' truth." *Olson v. Berggren*, 2021 S.D. 58, ¶ 29, 965 N.W.2d 442, 452; quoting *Hanna v. Landsman*, 2020 S.D. S.D. 33, ¶ 37,

945 N.W.2d 534, 545 (citation omitted). Instead, SDCL § 15-6-56(c) required that all reasonable inferences that may be drawn from the evidence be viewed in the light most favorable to the Hovens. SDCL § 15-6-56(c).

Although Banner claims that it had no duty to tell the Hovens their home was inadequately elevated, Banner simultaneously asserts that it told them. Banner claims "[i]t is not entirely clear what it is that Banner failed to disclose." (Banner Br. p. 6). Banner also argues, "It is entirely unclear what Banner was supposed to disclose that wasn't disclosed when learned by Banner." (Banner Br. p. 18). Banner clearly failed to disclose to the Hovens that their home is inadequately elevated despite having been asked to verify its proper elevation.

The evidence supports the Hovens' claim that Banner fraudulently concealed the fact mid-way through construction and led them to believe the minimum elevation requirement was met. Why would Banner do this? The answer seems obvious. One reasonable inference is that after having provided the elevation benchmark in a datum inappropriate at the start of construction, when the Hovens asked it to verify the critical floor elevation, Banner realized that the elevation deficiency equaled "the datum shift" and what had happened. When Banner confirmed the floor elevation, it realized that the home is too low in the same amount.

Banner claims there was nothing wrong with its reports. Yet the man who provided the benchmark in the appropriate datum, Steven Rames, when asked to confirm the resulting surveyed floor elevation, again provided the surveyed

elevation without "the appropriate datum conversion" for comparison to the BFE. While Banner was clearly aware of a need for the appropriate datum conversion, it opted to not do it and let the Hovens continue believing that at a surveyed elevation of 1810.19 feet, their floor had exceeded the minimum BFE requirement.

Banner asserts that the Hovens offered no expert testimony to provide context to their claim that it violated the mandatory rules of professional conduct. Even if these mandatory rules of professional conduct were not plain enough without expert testimony, when asked to confirm the proper floor elevation and undertaking that task, Banner had a common law duty to the Hovens the truth. Furthermore, Banner moved for summary judgment before any expert deadlines had even been set. The FIRM adopted by the City of Waubay mandated a comparison to the BFE in the same vertical datum and Banner clearly recognized that the datum discrepancy can cause confusion and that unless this discrepancy is known and considered, a real estate improvement can be built too low. A reasonable inference to be drawn from this evidence is that Banner knew this is precisely what happened. The Circuit Court failed to recognize that when Banner confirmed the surveyed floor elevation at over 1810 feet, it knew the truth and knew that the Hovens were unaware. The Circuit Court failed to recognize that anyone in the Hovens shoes would have reasonably expected Banner to advise them if their home did not meet the minimum legal requirement.

Banner asserts that these mandatory rules of professional conduct do nothing to support the Hovens' claim of fraud or fraudulent concealment. (Banner

Br. p. 19). The self-serving affidavit of Mr. Johnson and another Banner employee lend little to no support to Banner's motion or the Circuit Court's decision. They simply offer the conclusion that they did nothing wrong and that Banner concealed nothing.

Banner's motive for *not* speaking becomes apparent when the evidence is viewed in a light most favorable to the Hovens. Banner knew what had happened and why. Banner had to know that the Hovens would expect to be told if their home was too low. Long ago, the South Dakota Supreme Court recognized that fraudulent concealment may toll a statute of limitations, stating as follows:

> [F]raudulent concealment of a cause of action should be recognized as an implied exception to our statute of limitations. In its application fraudulent concealment cannot be assumed. The burden is upon the plaintiff to prove (1) the defendant fraudulently concealed the cause of action from [76 S.D. 525] the plaintiff and (2) the plaintiff exercised diligence to discover the cause of action. In the absence of some trust or confidential relationship between the parties there must be some affirmative act or conduct on the part of the defendant designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence, in the absence of a duty to speak, is not ordinarily sufficient. Where, however, a trust or other confidential relationship does exist between the parties, silence on the part of one having the duty to disclose, constitutes fraudulent concealment in the absence of any affirmative act. *See* Annotations, 173 A.L.R. 576.

Hinkle v. Hargens, 76 S.D. 520, 524-525, 81 N.W.2d 888, 891 (1957).

Mere silence is enough under these circumstances to support the Hovens' claim of fraudulent concealment. At minimum, a jury issue is presented. Trust or confidence existed between the parties, by necessity. Even if mere silence were not enough, by giving apparent assurance that the home met or exceeded the minimum elevation requirement, Banner affirmatively acted in a manner that

made it unlikely that the Hovens would discover the truth and realize they had a cause of action against Banner. After Banner had provided the benchmark for construction and had then apparently confirmed the proper elevation of their home, the Hovens should not be charged with constructive notice through Banner's later inclusion of confusing information about the datum shift later with the Elevation Certificate. The Elevation Certificate never stated the floor elevation in the appropriate datum for a proper comparison to the BFE. Even FEMA did not initially discern the fact from the information Banner provided.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's partial summary judgment and its determination as a matter of law that Banner did not fraudulently conceal this material fact. When viewed in a light most favorable to the Hovens, the evidence and reasonable inference suggest that Banner led the Hovens to believe that their home met or exceeded the legal minimum elevation requirement. Banner had a duty to speak, when asked, under both common law and mandatory rules of professional conduct. The South Dakota Supreme Court should therefore reverse the partial summary judgment and remand the case in its entirety for trial by a jury on all issues.

Dated this 26th day of October, 2022.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Steven J. Oberg

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument on this matter.

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellants' Brief contains 3,005 words as counted by Microsoft Word.

/s/ Steven J. Oberg

Steven J. Oberg

CERTIFICATE OF SERVICE

Steven J. Oberg, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 26th day of October, 2022, he electronically filed the foregoing document with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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The undersigned further certifies that the original Reply Brief of Appellants in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Steven J. Oberg
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