The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF SIDNEY JONES, PETITIONER

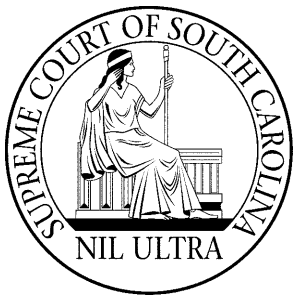
Petitioner was disbarred from the practice of law. *In the Matter of Sidney Jones*, 405 S.C. 617, 749 S.E.2d (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
January 16, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 16, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Daryl T. Snow, Petitioner.

Appellate Case No. 2017-001033

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Steven H. John, Circuit Court Judge

Opinion No. 27858
Heard November 29, 2018 – Filed January 16, 2019

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

JUSTICE FEW: Daryl Snow appeals his commitment as a sexually violent predator under the Sexually Violent Predator Act. He argues his diagnosis of Other Specified Personality Disorder is legally insufficient to meet the constitutional and statutory requirements for commitment under the Act, and thus the trial court erred

when it denied his motions for a directed verdict and judgment notwithstanding the verdict (JNOV). The court of appeals affirmed his commitment in an unpublished opinion. *In re Snow*, Op. No. 2017-UP-009 (S.C. Ct. App. filed Jan. 11, 2017). We affirm the court of appeals.

I. Facts and Procedural History

In 1996, Snow was convicted of assault with intent to commit criminal sexual conduct.[1] In 2006, Snow was convicted of lewd act upon a child[2] and sentenced to fifteen years in prison. Prior to his release, the State filed a petition for civil commitment pursuant to the Sexually Violent Predator Act. S.C. Code Ann. §§ 44-48-10 to -170 (2018).

The State's expert was Marie Gehle, Psy.D., the chief psychologist at the South Carolina Department of Mental Health. At the time of trial, Dr. Gehle had conducted approximately ninety sexually violent predator commitment evaluations. Dr. Gehle evaluated Snow to determine whether he met the criteria for commitment under the Act. Her evaluation included a thorough review of his background, criminal history, and prison records. Dr. Gehle's specific diagnosis was "Other Specified Personality Disorder, current evidence of conduct disorder is insufficient." At trial, she explained "Other Specified Personality Disorder" (OSPD) is listed as a personality disorder in the *Diagnostic and Statistical Manual of Mental Disorders*, commonly referred to as the DSM-5. The DSM-5 describes OSPD as follows,

> This category applies to presentations in which symptoms characteristic of a personality disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do

[1] S.C. Code Ann. § 16-3-656 (2015).

[2] The crime occurred in 2005. At that time, the crime of lewd act upon a child was codified at section 16-15-140 of the South Carolina Code (2003) (repealed 2012). The same conduct is now classified as criminal sexual conduct with a minor in the third degree. S.C. Code Ann. § 16-3-655(C) (2015). Lewd act upon a minor child is a sexually violent offense under subsections 44-48-30(2)(f) and (o) (2018).

> not meet the full criteria for any of the disorders in the personality disorders diagnostic class. The other specified personality disorder category is used in situations in which the clinician chooses to communicate the specific reason that the presentation does not meet the criteria for any specific personality disorder. This is done by recording "other specified personality disorder" followed by the specific reason (e.g., "mixed personality features").

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 684 (5th ed. 2013).

Snow made a motion for a directed verdict, which he renewed at the conclusion of all evidence. The jury found Snow was a sexually violent predator as defined by the Act. The trial court denied Snow's motion for JNOV. After the court of appeals affirmed, we granted Snow's petition for a writ of certiorari.

II. Issue Preservation

The State contends part of Snow's argument—the OSPD diagnosis is legally insufficient to satisfy the "mental abnormality or personality disorder" element required for civil commitment under the Act—is not preserved for appellate review. The State contends the only issue Snow argued to the trial court is the sufficiency of the State's proof.

We have previously stated the Act "contains a two-pronged test to determine whether a person is a sexually violent predator." *In re Chandler*, 382 S.C. 250, 256, 676 S.E.2d 676, 679 (2009). The "two-pronged" description comes from the Act, which defines sexually violent predator in two parts,

> "Sexually violent predator" means a person who:
> (a) has been convicted of a sexually violent offense; and
> (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

S.C. Code Ann. § 44-48-30(1)(a)-(b) (2018). Although the elements are set forth in two subsections, the Act actually requires proof of three separate but related elements. The State must prove (1) the person has been convicted of a sexually violent offense, (2) the person suffers from a mental abnormality or personality disorder, and (3) the mental abnormality or personality disorder makes the person likely to engage in acts of sexual violence if not confined, such that "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." *Id.*; § 44-48-30(9); *see In re Thomas S.*, 402 S.C. 373, 375-76, 741 S.E.2d 27, 28 (2013) (separating the definition of sexually violent predator under subsection 44-48-30(1) into three separate elements); *see also Kansas v. Crane*, 534 U.S. 407, 409-10, 122 S. Ct. 867, 869, 151 L. Ed. 2d 856, 860 (2002) (requiring "a finding of 'dangerousness . . . to others'" that is "'coupled . . . with the proof of some additional factor, such as a "mental illness" or "mental abnormality"'" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 2080, 138 L. Ed. 2d 501, 512-13 (1997))).

The State concedes Snow preserved his challenge to the sufficiency of the evidence under the third element, but it maintains Snow never challenged the constitutionality or legality of using the OSPD diagnosis to satisfy the second element. We disagree. The second and third elements come from the same subsection of the Act and are closely intertwined. As a practical matter, the diagnosis required to meet the second element is often the primary evidence used by the State to satisfy the third element. At trial, Snow's counsel argued Snow's "catch-all" OSPD diagnosis was insufficient to qualify as a personality disorder, and also argued the State failed to prove a causal connection between the OSPD diagnosis and Snow's likelihood to commit future sexually violent offenses. We find Snow's arguments as to both the second and third elements are preserved for our review.

III. Analysis

We review the denial of a directed verdict or JNOV motion in a sexually violent predator trial under an any evidence standard, and we may reverse "only . . . if there is no evidence to support the trial court's ruling." *In re Matthews*, 345 S.C. 638, 646, 550 S.E.2d 311, 315 (2001).

A. The Second Element

Snow argues the OSPD diagnosis is insufficient as a matter of law to satisfy the second element of the definition of a sexually violent predator under the Act. The second element comes from subsection 44-48-30(1)(b), which requires the State prove the person "suffers from a mental abnormality or personality disorder." The Act does not define personality disorder, nor limit the State by restricting which personality disorders it may use to satisfy the second element.

The obvious intent in not defining the term was to leave to medical professionals the task of determining what is—and what is not—a personality disorder. Dr. Gehle testified OSPD "is a personality disorder." OSPD is a diagnosable personality disorder recognized in the DSM-5. *See* American Psychiatric Association, *supra*, at 684. Snow argues "Dr. Gehle . . . could not diagnose [Snow] with any paraphilia, such as pedophilia or biastophilia." The Act, however, does not require that; it requires a "personality disorder." *See Crane*, 534 U.S. at 412, 122 S. Ct. at 870, 151 L. Ed. 2d at 862 (finding "[t]he presence of what the 'psychiatric profession itself classifie[d] . . . as a serious mental disorder' helped to make [the necessary] distinction [of sexually violent predators from other dangerous people] in *Hendricks*" (quoting *Hendricks*, 521 U.S. at 360, 117 S. Ct. at 2081, 138 L. Ed. 2d at 514)).

Therefore, we find Dr. Gehle's diagnosis of Snow with OSPD qualifies as a predicate personality disorder under subsection 44-48-30(1)(b) of the Act.

B. The Third Element

Snow challenges the sufficiency of the State's evidence on two separate grounds. First, Snow argues the State's evidence was insufficient to prove the third element of the Act—the requirement that Snow's OSPD diagnosis makes him "likely to engage in acts of sexual violence" unless committed. In essence, Snow maintains the State failed to link Snow's OSPD diagnosis to his risk of reoffending sexually. Second, Snow argues the State's evidence was insufficient to satisfy substantive due process because the State did not establish a causal connection between Snow's OSPD and his inability to control his behavior. *See Crane*, 534 U.S. at 413, 122 S. Ct. at 870, 151 L. Ed. 2d at 862 (finding substantive due process requires "there must be proof of serious difficulty in controlling behavior"); *In re Luckabaugh*, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002) ("Inherent within the mental abnormality prong of the Act is a lack of control determination, i.e. the individual can only be

committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility. . . .").

We find the evidence was sufficient to satisfy the third element. Dr. Gehle testified she was "certain" Snow's OSPD "makes him likely to commit acts of sexual violence." Dr. Gehle testified she completed a Static-99R risk assessment on Snow, which she described as the most commonly used assessment for estimating sexual recidivism. Dr. Gehle explained Snow's score on the Static-99R assessment placed Snow in the high-risk category for reoffending and was higher than 94.9% of the sex offenders included in the research sample. She concluded Snow's likelihood for reoffending within five years was 30.6%, while his likelihood for reoffending within ten years was 39.7%.

Dr. Gehle testified Snow also has many dynamic risk factors, which were not calculated in the Static-99R assessment and which are strongly associated with sexual reoffending. She testified Snow has an extreme hostility towards women and a long history of sexualized violence.[3] She also testified Snow lacks intimate relationships with adults without hostility or violence, surrounds himself with negative social influences, resorts to violence as a method for solving problems, and demonstrates a strong resistance to rules and supervision.[4]

According to Dr. Gehle, Snow has a "very anti-social personality, and a very anti-social world view . . . marked by . . . a consistent pervasive history of violating and

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[3] Snow has an extensive criminal history, including convictions for disorderly conduct, reckless driving, hindering an officer, simple assault, pointing a firearm, malicious injury to property, burglary, kidnapping, ill treatment of a child, criminal domestic violence, and criminal domestic violence of a high and aggravated nature. Snow's record also includes his qualifying convictions under subsection 44-48-30(1)(a) of the Act, a 1996 conviction for assault with intent to commit criminal sexual conduct and a 2006 conviction for lewd act upon a minor.

[4] Snow had thirteen recorded disciplinary infractions while in prison. He was disciplined twice for sexually related offenses, which included one infraction for masturbating in the recreation yard and another for striking an employee after inappropriately grabbing a female staff member.

disregarding the rights of others." She testified her evaluation revealed Snow had the propensity to be dangerous, he had "serious difficulty" controlling his behavior, and his OSPD has manifested itself in sexual violence numerous times. She testified Snow's propensity to be dangerous was of such a degree that it poses a menace to the health and safety of others. She did not believe out-patient treatment for Snow at a mental health facility would be sufficient because she believed Snow presents a risk to "women . . . or girls of any age in the community."

We find the totality of the evidence presented at Snow's trial sufficiently demonstrated Snow's OSPD makes him "likely to engage in acts of sexual violence" and Snow has "serious difficulty controlling his behavior."

IV. Conclusion

A diagnosis of OSPD is a legally sufficient personality disorder to satisfy the second element of the Sexually Violent Predator Act definition. The State also presented sufficient evidence demonstrating Snow's OSPD makes him likely to engage in acts of sexual violence and that Snow has serious difficultly controlling his behavior. We **AFFIRM** Snow's commitment as a sexually violent predator under the Act.

KITTREDGE, Acting Chief Justice, JAMES, J. and Acting Justices Aphrodite K. Konduros and Stephanie P. McDonald, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jennifer Elizabeth Meehan, Respondent.

Appellate Case No. 2018-001463

Opinion No. 27859
Submitted November 26, 2018 – Filed January 16, 2019

DISBARRED

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard of Ballard & Watson, Attorneys at Law of West Columbia, for Respondent.

PER CURIAM: On July 2, 2015, respondent was placed on interim suspension based on an eight-count federal indictment for wire fraud, bank fraud, and engaging in monetary transactions in property derived from specified unlawful activity.[1] Due to respondent's conviction, the Commission on Lawyer Conduct (the Commission) authorized formal charges and scheduled an evidentiary hearing.

[1] Respondent was accused of defrauding a University of Alabama sorority out of approximately $234,000. At the time of her indictment, respondent was licensed to practice law in South Carolina, Tennessee, and Texas. In October 2016, respondent pled guilty to one count of bank fraud. She was sentenced to six months in prison, eighteen months of home confinement, and forty months of supervised probation. Respondent was also required to complete eight hours of community service per week while on home confinement and probation and ordered to pay a fine of $50,000.

However, while preparing for a pre-hearing conference, the Office of Disciplinary Counsel (ODC) learned through review of a transcript of a disciplinary proceeding against respondent in Tennessee that, in March 2017, respondent was allowed to resign from the Texas State Bar in lieu of discipline. Respondent failed to inform the Commission or ODC of her Texas resignation in lieu of discipline as required by Rule 29(a), RLDE, Rule 413, SCACR (requiring an attorney admitted to practice in this state who is disciplined or transferred to incapacity inactive status in another jurisdiction notify the Commission in writing of the discipline or transfer within fifteen days of being disciplined or transferred to incapacity inactive status).

ODC notified the Court of respondent's Texas resignation and sought clarification as to whether to proceed with the scheduled evidentiary hearing on respondent's formal charges in light of the discovery of the resignation. The Court ordered the parties to proceed with the hearing as scheduled and further notified respondent, pursuant to Rule 29(b), RLDE, Rule 413, SCACR, she had thirty days from the date of the order to inform the Court of any claim she may have that imposition of discipline identical to that imposed by the Texas Supreme Court should not be imposed in this state and the reason(s) for that claim. *In re Meehan*, S.C. Sup. Ct. Order dated Aug. 16, 2018.

In response, respondent argued she was not required to report her Texas resignation in lieu of discipline pursuant to Rule 29(a), RLDE, and, even if the rule applied to her resignation from the Texas State Bar, she should not face reciprocal discipline in South Carolina because the South Carolina resignation in lieu of discipline rule differs from the Texas rule.[2] Specifically, respondent argued

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[2] In South Carolina, a lawyer who does not wish to "contest or defend against allegations of misconduct in connection with a pending disciplinary investigation or formal proceedings may file a motion for permission to *permanently* resign in lieu of discipline . . . ." Rule 35(a), RLDE, Rule 413, SCACR (emphasis added). However, in Texas,

> [A] person who has resigned in lieu of discipline *may, at any time after the expiration of five years from . . . the date of Supreme Court order accepting resignation in lieu of discipline, petition the district court of the county of his or her residence for reinstatement*; provided,

requiring her to resign in lieu of discipline in South Carolina would result in a greater punishment in this state than she received in Texas because, while she may apply for reinstatement in Texas, she would be prevented from ever applying for reinstatement in South Carolina.

We find respondent's argument that she did not believe Rule 29(a), RLDE, notification was triggered by the Texas Supreme Court's order accepting her resignation in lieu of discipline is disingenuous. The Texas Rules of Disciplinary Procedure state any resignation in lieu of discipline in Texas "shall be treated as *disbarment* for all purposes, including client notification, discontinuation of practice, and reinstatement." Rule 10.05, Texas Rules of Disciplinary Procedure (emphasis added). The South Carolina Rules of Lawyer Disciplinary Enforcement identify "disbarment" as a sanction which may be imposed on an attorney who commits misconduct. Rule 7(b)(1), RLDE, Rule 413, SCACR. Although Rule 29(a), RLDE, specifically states an attorney must notify the Commission within fifteen days "of being *disciplined*"—not sanctioned—and although neither term is specifically defined in the South Carolina Rules for Lawyer Disciplinary Enforcement, this Court has previously held Rule 29(a), RLDE, requires notification of disbarment in another jurisdiction be made to the Commission. *See In re Walters*, 400 S.C. 625, 629–30, 735 S.E.2d 635, 637 (2011).

However, we find strictly imposing identical discipline upon respondent by requiring she resign in lieu of discipline in South Carolina would be inappropriate in this instance because the consequences of an attorney submitting her resignation in lieu of discipline differ greatly between Texas and South Carolina. *See* Rule 29(d), RLDE, Rule 413, SCACR (requiring identical discipline be imposed unless lawyer demonstrates, or the Court finds, imposition of identical discipline would result in grave injustice or the imposition of substantially different discipline). Additionally, because resigning in lieu of discipline in South Carolina must be a

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> however, that no person who has . . . resigned in lieu of discipline by reason of conviction of . . . an Intentional Crime or a Serious Crime, is eligible to apply for reinstatement until five years following the date of completion of sentence, including any period of probation and/or parole.

Rule 11.01, Texas Rule of Disciplinary Procedure (emphasis added).

voluntary action, we find ordering respondent to resign would violate the tenets of Rule 35, RLDE, Rule 413, SCACR, which require an attorney seeking to resign in lieu of discipline in South Carolina to provide "[a] statement that the permanent resignation in lieu of discipline is freely and voluntarily rendered and that the lawyer is not being subjected to coercion or duress."

With the above analysis in mind, we find disbarment is the appropriate sanction to impose as reciprocal discipline. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender her certificate of admission to the practice of law to the Clerk of the Supreme Court.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston Electrical Services, Inc., and Selective Insurance Company of South Carolina, as Subrogee of Charleston Electrical Services, Inc., Appellants,

v.

Wanda G. Rahall, Respondent.

Appellate Case No. 2016-001842

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5614
Heard December 5, 2018 – Filed January 16, 2019

AFFIRMED

Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, for Appellants.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton, both of Pritchard Law Group LLC, of Charleston, for Respondent.

LOCKEMY, C.J.: In this action for contribution, Charleston Electrical Services, Inc. (CES) and its insurance carrier, Selective Insurance Company of South Carolina (Selective), appeal the master-in-equity's order granting judgment in favor of Wanda Rahall. We affirm.

FACTS/PROCEDURAL BACKGROUND

On August 20, 2010, Elsie Rabon and her daughter, Wanda Rahall, visited Rahall's fiancé, George Kornahrens, at 60 Romney Street (the Property) in Charleston, South Carolina. The Property was owned by Kornahrens and leased to CES. During her visit, Rabon went into the yard looking for Kornahrens and was knocked to the ground by CES's "overly friendly" German shepherd guard dog, Gunner. Rabon was transported to the hospital and diagnosed with a broken hip.

Kornahrens was CES's business manager. Although Kornahrens owned the Property, he had no ownership interest in CES[1]. The Property, which is fenced in its entirety, consists of two buildings and a large yard used for storing CES's trucks and equipment. Kornahrens lived in an apartment (the Apartment) in one of the buildings on the Property. Gunner was owned by CES and kept in the yard. Rahall and Kornahrens were both aware that Gunner had previously jumped on visitors.

At the time of Rabon's injury, Rahall and Kornahrens had been involved in a romantic relationship for five years and had been engaged for four years. Rahall owned a home in Myrtle Beach and Rabon lived in a senior living apartment complex in Myrtle Beach. Rahall stayed in the Apartment when she was in Charleston, and Kornahrens stayed at Rahall's home when he was in Myrtle Beach. According to Rahall, she lived with Kornahrens "all the time" during 2010 and "70 percent of the time since 2008." Rahall had a key to the Apartment and kept personal items in the Apartment, but she did not pay rent or utilities. Rahall was not an agent or employee of CES and never had any ownership interest in CES or the Property. Kornahrens periodically invited Rabon to stay at the Apartment.

On December 31, 2010, Rabon filed suit against CES alleging negligence and strict liability. In turn, CES filed a third-party indemnification action against Rahall and Kornahrens. Rabon and CES settled the underlying action for $200,000 in exchange for which Rabon released CES, Rahall, and Kornahrens from liability. Thereafter, the action was dismissed with prejudice as to Rabon's claim and without prejudice as to CES's claims against Rahall and Kornahrens.

On July 3, 2013, CES and its insurance carrier, Selective, filed suit against Rahall seeking to recover half of the settlement proceeds paid to Rabon. The suit was referred to the master-in-equity for trial. On August 2, 2016, the master ruled

[1] CES was originally owned by Kornahrens until his stepson, John Oakley, purchased the company in 1994.

Rahall did not owe a duty of care to Rabon; thus, Rahall was not liable under either a premises liability theory or the special relationship exception. CES and Selective (collectively, Appellants) appeal.

STANDARD OF REVIEW

An action for contribution lies in equity. *RIM Assocs. v. Blackwell*, 359 S.C. 170, 178-79 n. 3, 597 S.E.2d 152, 157 n. 3 (Ct. App. 2004). In an action in equity, tried by a master without a jury, an appellate court may view the evidence to determine facts in accordance with its own view of the preponderance of the evidence. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). This broad scope of review does not require the appellate court to disregard the findings of the master, who saw and heard the witnesses and was in a better position to evaluate their credibility. *Id*.

LAW/ANALYSIS

Appellants argue the master erred in finding in favor of Rahall in their action for contribution.

Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *United States v. Atl. Research Corp.*, 551 U.S. 128, 138, 127 S.Ct. 2331, 2337-38 (2007) (citing *Black's Law Dictionary* 353 (8th ed. 2004)); S.C. Jur. Contribution § 5 (2015). To maintain an action for contribution, Appellants must show Rahall shares a "common liability" for the damages suffered by Rabon. *See* S.C. Code Ann. 15-38-40(D) (2005).

Appellants assert Rahall's liability is grounded in negligence. To establish negligence, a plaintiff must show: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Steinke v. SC Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "An essential element in a cause of action for negligence is the existence of a legal duty owed by the defendant to the plaintiff." *Huggins v. Citibank, NA.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). In the absence of a duty, there can be no negligence. *Id.* at 332, 585 S.E.2d at 277.

I. Premises Liability

Appellants contend the master erred in finding Rahall did not owe a duty to Rabon under a premises liability theory. We disagree.

"To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). "One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

Here, the parties agree Rabon was a social guest, or licensee, on the Property. "Under South Carolina jurisprudence, 'a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.'" *Singleton*, 377 S.C. at 201, 659 S.E.2d at 204 (quoting *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994)).

The master determined Appellants' position that Rahall was liable for Rabon's injuries under a premises liability theory was "patently meritless." The master found Rabon's injury occurred in the yard of the Property, which was in the exclusive possession and control of CES; thus, CES, as owner and possessor of the yard, was the only party who owed a duty to Rabon. The master held Rahall was a social guest with no legal right to possess or control the Property; therefore, she did not owe a duty to other guests on the Property.

On appeal, Appellants argue Rahall was a possessor of the Property and owed a duty to Rabon to warn her of any dangerous conditions. Appellants contend Rahall knew or should have known Gunner presented a risk of harm to Rabon and should have warned or protected Rabon.

We hold the master did not err in finding Rahall owed no duty to Rabon under a premises liability theory. Rahall, as a social guest in the Apartment, did not possess or control any portion of the Property. Rahall did not pay rent, taxes, or utilities related to the Apartment and maintained a separate residence in Myrtle Beach. Furthermore, although Rahall occupied the Apartment, the remainder of

the Property, including the yard where Rabon's injury occurred, were leased to CES and were in its exclusive possession and control.

II. Special Relationship Exception

Appellants argue the master erred in finding Rahall did not owe a duty to Rabon arising out of a special relationship. We disagree.

"Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). South Carolina law recognizes five exceptions to this rule: "(1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant." *Id.*

The master found the relationship between Rahall and Rabon did not fall under any of the five exceptions listed above. The master noted no South Carolina court had ever imposed upon a child of any age a general duty to protect his or her parent, regardless of age, from harm presented by the conduct of a third party or instrumentality not within the custody and control of the child. The master further found Rahall did not undertake a duty to protect her mother nor did she negligently or intentionally create the risk of Gunner jumping on Rabon. The master held Rahall could not warn Rabon of a danger that she did not know existed.

On appeal, Appellants argue that based upon their special relationship, Rahall owed a duty to warn and protect her elderly mother from the risk of harm posed by going into the yard where Gunner was located. Appellants assert Rahall knew Gunner was an overly friendly dog with a propensity to jump on visitors and could potentially injure her mother. Appellants contend Rahall had the ability to monitor, supervise, and control Rabon's actions on the Property and could have prevented her mother from entering the yard where Gunner was located.

We hold the master did not err in finding Rahall did not owe a duty to Rabon arising out of a special relationship. Our jurisprudence has not extended a legal duty to children to protect, warn, or supervise a parent. We further note the record contains no evidence Rabon was physically or mentally incompetent or unable to care for herself.

CONCLUSION

The decision of the master is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rent-A-Center East, Inc., and Rent Way, Inc.,
Appellants,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2016-001210

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Opinion No. 5615
Submitted October 2, 2018 – Filed January 16, 2019

AFFIRMED

John C. Von Lehe, Jr. and Bryson Moore Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellants.

Lauren Acquaviva and Sean Gordon Ryan, both of Columbia, for Respondent.

THOMAS, J.: Rent-A-Center East, Inc. and Rent Way, Inc. (collectively, Taxpayers) appeal the decision of the Administrative Law Court (ALC) finding the gross proceeds from Taxpayers' rental of tangible personal property included fees from the sale of "Optional Liability Waiver Provisions" (Waivers). On appeal, Taxpayers argue the ALC erred in (1) failing to apply the appropriate rules of

statutory construction to the applicable taxing statutes; (2) finding the Waivers were taxable when no imposition statute imposes a tax on waivers; (3) relying on the measure of tax statute when no imposition statute was invoked; (4) finding the Waiver proceeds were part of Taxpayers' gross proceeds of sale; (5) failing to determine whether the intangible Waivers were subject to sales tax; and (6) finding the "Consumer Rental-Purchase Agreements" (Rental Agreements) and Waivers constituted a single agreement or transaction. We affirm.

FACTS/PROCEDURAL HISTORY

Taxpayers operate retail stores in South Carolina from which customers can rent-to-own durable consumer goods such as televisions, computers, appliances, and furniture. A customer who rented goods from Taxpayers was required to enter into a Rental Agreement. Under the Rental Agreement, the customer chose a weekly, monthly, or semi-monthly rental term and made rental payments accordingly. A customer could acquire ownership of a rental item by making all term payments for a specified number of rental terms. The customer could also unilaterally terminate the Rental Agreement at any time by returning the rental property and paying any overdue fees. The Rental Agreement contained a "Risk of Loss and Damages" section which provided the customer was responsible for the fair market value of the rental property if it was lost, stolen, damaged, or destroyed.

Taxpayers also offered customers a Waiver. The Waiver gave the customer the option to pay an additional fee along with the rental term payment—weekly, monthly, or semi-monthly. If a customer chose to pay the Waiver fee, Taxpayers would waive the customer's liability for the value of the rental property in the event of certain enumerated conditions: lightning, fire, smoke, windstorm, theft, or flood. The Waiver provided Taxpayers would waive the customer's liability only if the customer "paid all periodic rental payments including the liability waiver fee through the date of loss and . . . complied with all other terms of [the] Rental Agreement . . . ." Either the customer or Taxpayers could terminate the Waiver at any time without notice; the termination became effective at the end of the rental term. The Waiver further stated it was "an additional part of the Rental Agreement."

The South Carolina Department of Revenue (the Department) audited Rent-A-Center East, Inc.'s sales tax returns for the period April 1, 2007 through October 31, 2010; the Department audited Rent Way, Inc. for the period April 1, 2007 through October 31, 2009.[1] The audits showed Taxpayers properly paid sales taxes on proceeds from the Rental Agreements. However, Taxpayers did not pay sales taxes on proceeds from the Waivers. The Department determined Rent-A-Center East, Inc. owed $521,694.93 plus interest; Rent Way, Inc. owed $192,158.64 plus interest. Taxpayers submitted payment in the amount of $919,585.55 for all taxes and interest owed and timely requested a contested hearing before the ALC.

After a hearing, the ALC found the Rental Agreements and Waivers were "fundamentally interconnected" because the Waivers were described as "provisions" of the Rental Agreements, the Waivers could not be entered into independently of the Rental Agreements, and the Waiver fees were calculated based on the term payment of the Rental Agreements. The ALC went on to find the true object of the transaction was "to obtain the use of an item while minimizing the financial risk of its damage, loss, or destruction." The ALC concluded the Waivers were subject to sales tax and ordered Taxpayers to remit payment of $851,622.31 plus accrued interest to the Department.[2] This appeal followed.

STANDARD OF REVIEW

This court's standard of review is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2018), which provides:

> The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court . . . may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive

[1] Rent Way, Inc. merged into Rent-A-Center East, Inc. on December 31, 2009.
[2] The audit report originally included penalties, but they were later dropped and are not at issue.

rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(c) affected by other error of law;

(d) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

APPLICATION OF TAXING STATUTES

Taxpayers argue the ALC failed to apply the appropriate rules of statutory construction to the tax statutes at issue. Taxpayers assert the ALC failed to apply the plain meaning rule because it failed to identify an imposition statute that imposes a tax on the Waivers and instead looked to the "gross proceeds" language in the measure of tax statute. We disagree.

"Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein." *Id.* "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

"[A]ny substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012); *see also Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509–510 (1936) ("[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor."). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

"A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this [s]tate in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (Supp. 2018).

> "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt.

S.C. Code Ann. § 12-36-60 (Supp. 2018).

"Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90 (Supp. 2018). Gross proceeds of sales includes proceeds from the sale of tangible personal property without deduction for certain costs, taxes, interest paid, and losses. *Id.*

We find the ALC did not err as a matter of law in its interpretation and application of sections 12-36-910(A) and 12-36-90. *See Duke Energy*, 415 S.C. at 355, 782

S.E.2d at 592 ("Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]."). Looking to the plain and ordinary meaning of the language in section 12-36-910(A), we believe the statute imposes a tax on all persons engaged in the business of selling tangible personal property at retail. *Id.* ("The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein."); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."). This court has previously stated the section levies a sales tax on persons; thus, we find Taxpayers' argument that the section applies instead to transactions and certain enumerated services unpersuasive. *See Meyers Arnold, Inc. v. S.C. Tax Comm'n*, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985) ("The sales tax is imposed under [s]ection [12-36-910][3] as a *tax levied on persons* engaged in selling tangible personal property at retail with the tax being a percentage of the gross proceeds of sales of the business." (emphasis added)). The Department also adopts this interpretation of section 12-36-910(A) and has previously applied the statute to impose sales taxes on the sale of collision damage waivers on car rentals and maintenance contracts. *See Dunton*, 291 S.C. at 223, 353 S.E.2d at 133 ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."). Section 12-36-910(A) therefore applies to Taxpayers, and the ALC did not err in its application of the plain meaning rule.

Taxpayers next argue the ALC erred in failing to construe section 12-36-910(A) in their favor and against the imposition of a sales tax. However, because the statute is unambiguous, the ALC was in no position to apply rules of statutory interpretation. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). Thus, there was no ambiguity in the statute to construe in Taxpayers' favor. *See Cooper River Bridge*, 182 S.C. at 76, 188 S.E. at 509–510 ("[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such

[3] Section 12-36-910 was previously codified as section 12-35-510 of the South Carolina Code (2014).

person, then the person will be excluded, any substantial doubt being resolved in his favor.").

Taxpayers further argue the ALC erred in relying on section 12-36-90, the measure of tax statute, because no imposition statute imposes a sales tax on the Waivers. As the parties agree, sections 12-36-910(A) and 12-36-90 must be read sequentially. Section 12-36-910(A) imposes a sales tax of five percent on the "gross proceeds" of all *persons* engaged in the business of selling tangible personal property at retail. Section 12-36-90 then defines "gross proceeds" as "the value proceeding or accruing from" the sale or lease of tangible personal property. Because we find Taxpayers' argument that section 12-36-910(A) imposes a sales tax on certain enumerated transaction types rather than persons unavailing, we also find the ALC did not err in reaching section 12-36-90 in determining whether the proceeds from Taxpayers' sale of Waivers constituted "gross proceeds" within the scope of section 12-36-910(A).

THE TRUE OBJECT TEST

Taxpayers argue the ALC erred in determining the Rental Agreement and Waiver constituted a single agreement under the true object test. We disagree.

In *Boggero v. S.C. Dep't of Revenue*, this court considered whether the gross proceeds of a business were taxable as the rental of portable toilets or non-taxable as the service of waste removal. 414 S.C. 277, 280–88, 777 S.E.2d 842, 842–47 (Ct. App. 2015). This court found the appeal of the ALC's application of the true object test was a mixed question of law and fact and therefore limited its analysis to whether substantial evidence supported the ALC's determination that the true object of the taxpayer's business was the rental of portable toilets. *Id.* at 284–86, 777 S.E.2d at 845–46. We similarly limit our review of the ALC's finding that the Waivers and Rental Agreements were "fundamentally interconnected" as a bundled transaction to the substantial evidence standard set forth in section 1-23-610(B).

"[T]he true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service." *Boggero*, 414 S.C. at 285, 777 S.E.2d at 846. "According to the 'true object test[,'] sales which are merely incidental to the transaction and not its true object are not exempt

from the retail sales tax." *Fraternal Order of Police v. S.C. Dep't of Revenue*, 332 S.C. 496, 501 n.2, 506 S.E.2d 495, 497 n.2 (1998).

In *Rent-A-Center East, Inc. v. Lincoln Parish Sales & Use Tax Comm'n*, a Louisiana appellate court addressed an identical issue to the case at bar. 60 So.3d 95, 96–99 (La. App. 2 Cir. 3/9/11). The pertinent language in the Louisiana sales tax statutes imposed a two percent tax on "the gross proceeds derived from the lease or rental of tangible personal property." *Id.* at 98 (quoting LSA–R.S. 47:302). The Louisiana appellate court applied the "real object" test and found the proceeds from the sale of waivers were subject to sales tax because the waivers were merely incidental to the lease of tangible personal property. *Id.* at 98–99.

Louisiana appellate courts have also addressed the analogous issue of whether liability damage waivers sold in connection with the rental of motor vehicles were sales taxable. *Enter. Leasing Co. of New Orleans v. Curtis*, 977 So.2d 975, 976–81 (La. App. 1 Cir. 11/2/07). Therein, the taxpayer was in the business of renting motor vehicles and offered an optional damage waiver which reduced a customer's liability for certain incidents. *Id.* at 976–78. On appeal, the taxpayer argued the waivers were not subject to sales tax because they were optional and separately stated on the face of the rental contract. *Id.* at 979. The Louisiana court applied the "real object" test and determined the "real object of the transaction [was] the lease of tangible personal property, a motor vehicle." *Id.* at 979–80. The court concluded the waivers were sales taxable because they were incidental to the rental contracts for the motor vehicles. *Id.* at 980–81.

We find these decisions instructive. Similar to the Louisiana statute imposing a sales tax on gross proceeds derived from sales or rentals, section 12-36-910(A) imposes a sales tax on "gross proceeds of sales" of tangible personal property. Moreover, both the "real object" test and our "true object" test focus on the customer's intent for entering a transaction with elements of both goods and services. *See Boggero*, 414 S.C. at 285, 777 S.E.2d at 846 ("[T]he true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service.").

The evidence before the ALC showed the fee for the Waiver and the fee for the Rental Agreement were paid together during each rental term. The Waiver could only be enforced if all payments under the Rental Agreement were made. The

Rental Agreement contained a line item for the Waiver fee. The Waiver fee was calculated as a fixed percentage of the term payment under the Rental Agreement. Customers could not purchase a Waiver without first entering a Rental Agreement, and Taxpayers did not offer Waivers for items sold by third parties. The Waiver also specifically stated it was "an additional part of the Rental Agreement"; although Taxpayers argued this language was included in the Waiver solely to reduce their liability under consumer protection laws, they failed to point to any specific law or policy of any state mandating the inclusion of such language. Therefore, substantial evidence in the record supported the finding that the sale of the Waiver was merely incidental to the Rental Agreement under the true object test. *See Fraternal Order of Police*, 332 S.C. at 501 n.2, 506 S.E.2d at 497 n.2 ("According to the 'true object test[,'] sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax.").

We acknowledge evidence could also support a finding that the Waivers were separate and distinct from the Rental Agreements. The Waivers were optional and could be cancelled at any time without cancelling a Rental Agreement. Taxpayers also separately listed the fee for the Rental Agreement and the fee for the Waiver on customers' receipts. Moreover, payment of the Waiver fee did not count toward the purchase of the rental property. Nonetheless, because this court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions on fact" and our review of the ALC's application of the true object test is limited to substantial evidence under *Boggero*, we affirm the ALC on this issue. *See* § 1-23-610(B) (providing an appellate court may not substitute its judgment for that of the ALC as to the weight of evidence on questions of fact).

GROSS PROCEEDS

Taxpayers argue even if the ALC properly reached the measure of tax statute, it erred in finding the Waiver proceeds were gross proceeds of the sale of the Rental Agreements. We disagree.

In our view, because substantial evidence supports the ALC's finding that the Waivers were merely incidental to the Rental Agreements, the Waivers must also be subject to the sales tax as gross proceeds of the Rental Agreements. *See* § 12-36-910(A) ("A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this [s]tate in the

business of selling tangible personal property at retail."); § 12-36-90 ("Gross proceeds of sales, or any similar term, means *the value proceeding or accruing from the sale*, lease, or rental of tangible personal property." (emphasis added)). Put differently, because the Waivers and Rental Agreements were inextricably linked, the value proceeding from the Rental Agreements included the value Taxpayers received from the Waivers, and the Waivers are not exempt from the sales tax. *See Fraternal Order of Police*, 332 S.C. at 501 n.2, 506 S.E.2d at, 497 n.2 ("According to the 'true object test[,'] sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax."); *see also Lincoln Parish*, 60 So.3d at 96–99 (finding identical waivers were subject to a sales tax statute imposing a tax on "the gross proceeds derived from the lease or rental of tangible personal property" because the waivers were inextricably linked to the rental agreements).

The ALC also addressed the holdings of *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) and *Meyers Arnold*, 285 S.C. 303, 328 S.E.2d 920 to determine whether the Waivers were subject to a sales tax as the gross proceeds of the Rental Agreements. Taxpayers assert these cases are inapposite and the ALC erred in relying on them because each involved mandatory fees for services, whereas the Waivers were optional. The Department argues the cases are controlling. We address them in turn.

In *Meyers Arnold*, this court considered whether fees associated with both lay away sales and the sale of wrapping paper were sales taxable. 285 S.C. at 304–08, 328 S.E.2d at 921–23. With respect to the wrapping paper, this court concluded the fee was charged in connection with the quality of wrapping paper a customer chose and thus was not for a service. *Id.* at 304–06, 328 S.E.2d at 921–22. Due to a specific exemption in the tax code for wrapping paper, the transaction was not sales taxable. *Id.* at 306–07, 325 S.E.2d at 922–23. The *Meyers Arnold* court also considered whether fixed, nonrefundable fees charged in connection with lay away sales were taxable as gross proceeds. *Id.* at 307, 325 S.E.2d at 923. In considering whether the lay away fees were gross proceeds of the sale of the tangible items, the court looked to the previous iteration of section 12-36-90 and defined gross proceeds of sales as "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost." *Id.* The court then stated that the taxpayer would not earn the lay away fees "but for" the sales and concluded the fees were sales taxable. *Id.*

In *Travelscape*, our supreme court considered a similar issue of service fees. 391 S.C. at 95–103, 705 S.E.2d at 31–35. The taxpayer charged a service fee in connection with the booking of hotel rooms. *Id.* at 95, 705 S.E.2d at 31. In determining whether the service fees were gross proceeds of the booking of hotel rooms, the supreme court specifically defined gross proceeds as the value obtained without deduction for the cost of services. *Id.* at 98, 705 S.E.2d at 33. The court then concluded the fees were subject to sales tax as a cost of service. *Id.*

The ALC considered the facts of these cases and relied on them in two respects. First, the ALC reasoned the holding in *Travelscape* and the lay away fees issue in *Meyers Arnold* show mandatory costs associated with the sale of tangible goods may be sales taxable. Second, the ALC considered the wrapping paper issue in *Meyers Arnold* and concluded that merely being optional does not prevent one part of a transaction from being subject to sales tax. While we agree with Taxpayers that these cases are not directly analogous to the instant appeal because they involve attempts to deduct service fees, we find no error in the ALC's consideration of them in its final order.

CONCLUSION

Accordingly, the decision of the ALC is

AFFIRMED.[4]

LOCKEMY, C.J., and GEATHERS, J., concur.

[4] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James C. Owens, Appellant,

v.

Bryan Crabtree, Kirkman Broadcasting, Inc. d/b/a WQSC Radio and ADC Engineering, Inc., Tyler Flesch, and Red Drum Capital Group, LLC, Defendants,

Of which ADC Engineering, Inc., is the Respondent.

Appellate Case No. 2016-001811

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5616
Heard October 10, 2018 – Filed January 16, 2019

AFFIRMED

John E. Parker and William Franklin Barnes, III, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, for Appellant.

Molly Hughes Cherry and Melissa Ashley Fried, of Nexsen Pruet, LLC, of Charleston, for Respondent.

LOCKEMY, C.J.: In this wrongful termination action, James Owens appeals a circuit court order granting summary judgment in favor of ADC Engineering, Inc.

Owens argues the circuit court erred in holding (1) that his discharge from ADC did not give rise to a cause of action under the public policy exception to the at-will employment doctrine and (2) that his opposition to the construction of a parking garage was not protected political speech under section 16-17-560 of the South Carolina Code (2015). We affirm.

FACTS/PROCEDURAL HISTORY

ADC is an engineering firm located in the Town of Mount Pleasant, SC (Town). The firm employs approximately sixty people and is divided into four engineering divisions—building envelope, civil, structural, and landscaping. In September 2004, ADC hired Owens as a construction administrator. In this capacity, Owens worked primarily in the civil engineering division, where he reviewed designs for commercial projects and ensured the construction complied with plans and specifications. Owens's job responsibilities required him to split time between the office and the field, which allowed some "flexibility" in how he spent his workday. ADC provided Owens with a cell phone and laptop computer for use on the job. According to company policy, employees were allowed "[b]rief or incidental use of office technology for personal, non-business purposes . . . as long as it [was] not excessive or inappropriate, and [did] not result in expense or loss to the company."

In 2011, Tyler Flesch, a local real estate developer, began planning the construction of a parking garage near Shem Creek—a popular waterfront dining and recreation area known for its picturesque views and historic charm. In early 2013, the Town council voted to approve construction of the garage and to enter into a parking license agreement with Flesch. Shortly thereafter, Stubbs Muldrow Herin, the architecture firm that Flesch had hired to draw plans for the proposed garage, hired ADC as the project's structural engineer. Because Owens worked primarily in the civil engineering division, he was not involved in the project through ADC.

After the project became public knowledge in the fall of 2013, it immediately drew the ire of local residents, many of whom were weary of commercial development around Shem Creek. Owens testified he learned of the project at a Town council meeting but was unaware of ADC's role as the structural engineer. Owens soon became a vocal opponent of the Shem Creek project. In the spring of 2014, Owens set up a Facebook page titled "Saving Shem Creek," which he devoted to raising awareness about the project, including writing posts targeted specifically at Flesch.

As the project progressed, so did Owens's efforts to oppose it; Owens attended Town council meetings, lobbied council members, circulated a petition asking the Town to rescind its approval of the project, made and distributed "Save Shem Creek" bumper stickers, created a "Save Shem Creek" corporation for which he was also a board member, and sent letters and emails to the Town's mayor. By the summer of 2014, the Shem Creek project had become a prominent, public issue in the Town.

In June 2014, Owens learned his name would appear in a Charleston *The Post and Courier* article highlighting local opposition to the project. According to Owens, he met with Chris Cook, the partner at ADC in charge of the civil engineering division, "out of courtesy" to tell him of his involvement in the opposition efforts. Owens indicated he was still unaware of ADC's role in the Shem Creek project at the time he spoke to Cook, but wanted to "make certain that they were aware of what [he] did as a private and public citizen." Cook testified he told Owens that ADC had no problem with him voicing his personal opinions as long as it did not harm or reflect negatively on ADC; however, Cook could not recall whether or not he told Owens that ADC was working on the project.

On September 15, 2014, Flesch received a tip informing him that Owens was employed at ADC. Although Flesch was familiar with Owens's efforts to oppose the Shem Creek project, he had not been aware of his affiliation with the engineering firm. After conducting an internet search, Flesch confirmed that Owens was indeed an ADC employee, and on September 16, 2014, Flesch asked Stubbs Muldrow Herin to arrange a meeting with Mark Dillon, the head of ADC's structural engineering division. Later that day, Flesch met with Dillon and informed him that ADC would be terminated from the Shem Creek project unless they fired Owens. Dillon described Flesch as being "very upset, very angry" about the situation, but Dillon declined to fire Owens without first meeting with the other ADC partners.

The next day, the ADC partners met and decided not to terminate Owens. ADC subsequently informed Stubbs Muldrow Herin of their decision. On September 18, 2014, Stubbs Muldrow Herin sent a letter to ADC terminating their contract for the Shem Creek project. That same day, attorneys for Stubbs Muldrow Herin sent an "Evidence Preservation Demand" letter to both ADC and Owens, ordering them to preserve any electronically-stored data, documents, or materials on Owens's ADC devices. Following the receipt of the letter, Owens met with Cook and another

partner, Greg Jones, to tell them that he may have used his work computer for matters associated with the Shem Creek project, possibly during work hours. Owens again told the partners that he had been unaware ADC was involved with the Shem Creek project and assured them that had he known, he "would have backed off."[1]

In compliance with the letter, ADC partners directed an IT specialist to search Owens's work computer and cell phone. The search revealed at least a dozen emails Owens had sent during work hours regarding matters related to the Shem Creek project, although most of these emails were sent to his personal email account. ADC also found documents and a power point presentation on Owens's work computer related to the Shem Creek project. Additionally, a review of Owens's cell phone log showed a large volume of text messages and calls he made during the day that ADC believed was related to the project. Finally, ADC learned Owens had recruited another ADC employee to help him prepare a presentation for a Town council meeting.

On September 19, 2014, ADC decided to terminate Owens. Dillon testified ADC fired Owens because it learned he had used company time, equipment, materials, and employees to engage in "an activity that ultimately harmed ADC." In October of 2015, Owens filed a lawsuit against ADC for wrongful termination.[2] Owens alleged that in firing him, ADC violated section 16-17-560 of the South Carolina Code (2015), which makes it unlawful "for a person to . . . discharge a citizen from employment or occupation . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of [South Carolina]." ADC answered and counterclaimed, asserting Owens violated both ADC's technology policy and a duty of loyalty to ADC in using company resources to actively oppose a project in which ADC was involved.

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[1] ADC does not directly dispute Owens's lack of knowledge regarding the company's involvement in the Shem Creek project; however, at least one partner testified there is an internal procedure whereby any employee may quickly search to see if ADC is working on a particular job.

[2] Owens also brought a defamation action against a local radio station and one of its hosts who reported on the Shem Creek project. That action is not a subject of this appeal.

On February 16, 2016, ADC moved for summary judgment on Owens's wrongful termination claim. ADC argued Owens could not maintain his cause of action because Owens was an at-will employee and ADC had a right to fire him for violating company policy—specifically, its policy regarding the use of company technology that results in expense or loss to the company. Following a hearing, the circuit court granted ADC's motion. The court found section 16-17-560 did not provide Owens a private cause of action against ADC and regardless, ADC did not violate the statute because Owens's activity did not rise to protected political speech. Owens filed a motion to alter or amend, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When the circuit court grants summary judgment on a question of law, we review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

PUBLIC POLICY EXCEPTION

"South Carolina has a strong policy favoring at-will employment." *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015). "In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment." *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). "[A]n at-will employee may be terminated for any reason or no reason at all." *Id*. However, "[w]here the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985).

Under the "public policy exception" to the at-will employment doctrine, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of

public policy. *Id*. at 225, 337 S.E.2d at 216. In *Ludwick,* our supreme court recognized a cause of action in tort for the discharge of an at-will employee when the discharge constituted a violation of public policy. 287 S.C. at 215, 337 S.E.2d at 216. Under the rule outlined in *Ludwick*, "the public policy exception is invoked when an employer requires an at-will employee, as a condition of retaining employment, to violate the law." *Moshtaghi v. The Citadel*, 314 S.C. 316, 323, 443 S.E.2d 915, 919 (Ct. App. 1994).
In *Culler v. Blue Ridge Elec. Co-op., Inc.*, our supreme court expanded the public policy exception elucidated in *Ludwick* to include instances when an employee's discharge is itself a violation of the law. 309 S.C. 243, 246, 422 S.E.2d 91, 92-93 (1992). In that case, Culler alleged he was discharged for refusing to donate to a political action fund that supported campaigns favorable to utility cooperatives. 309 S.C. at 246, 422 S.E.2d at 93. Although our supreme court found evidence that Culler was fired because of his "bad attitude," it held that under *Ludwick*, an employee could maintain a cause of action for wrongful termination against his employer if he could prove he was fired because of his political beliefs in violation of section 16-17-560, which is a legislatively defined "crime against public policy." *Id*.

Thus, the public policy exception clearly applies in cases in which either: (1) the employer requires the employee to violate the law; or (2) the reason for the employee's termination itself is a violation of criminal law. *Ludwick*, 287 S.C. at 215, 337 S.E.2d at 216; *Culler*, 309 S.C. at 246, 422 S.E.2d at 92-93. Although our supreme court has made clear the exception "is not limited to these situations," it has not explicitly recognized any others. *Barron*, 393 S.C. at 614, 713 S.E.2d at 637.

"The determination of what constitutes public policy is a question of law for the courts to decide." *Id*. at 617, 713 S.E.2d at 638. We have been cautioned to "exercise restraint when undertaking the amorphous inquiry of what constitutes public policy." *Taghivand*, 411 S.C. at 244, 768 S.E.2d at 387. "The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Id*. (citing *Citizens' Bank v. Heyward,* 135 S.C. 190, 204, 133 S.E. 709, 713 (1925)). This court has held that the General Assembly's use of the phrase "[t]he public policy of South Carolina is" constitutes a clear declaration of legislative intent to define the public policy of the State. *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 415-16, 778 S.E.2d 320, 331 (Ct. App. 2015), *aff'd*, 422 S.C.

264, 811 S.E.2d 744 (2018) (holding the termination of an employee for enforcing a building code under section 6-9-10 of the South Carolina Code (2004 & Supp. 2017) was a violation of a clear mandate of public policy).

VIOLATION OF PUBLIC POLICY

Section 16-17-560 provides in part:

> It is unlawful for a person to . . . discharge a citizen from employment or occupation . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.

In the circuit court's order dismissing Owens's wrongful termination claim, it wrote section 16-17-560 "did not give rise to a private cause of action by Owens against ADC, and Owens'[s] termination did not otherwise violate the statute." Owens contends this holding was error because pursuant to *Culler*, section 16-17-560 does provide a private cause of action against an employer for wrongful termination. Furthermore, Owens argues summary judgment was inappropriate because he raised a question of fact as to whether ADC terminated him for exercising his constitutional right to free speech, which would be a violation of a clear mandate of public policy under *Culler* and section 16-17-560.

While we agree with Owens that under limited circumstances a violation of section 16-17-560 supports a cause of action against an employer for wrongful termination, for the reasons below, we do not believe those considerations have been met in this case.

Viewing the evidence in the light most favorable to Owens, we believe he fails to raise a genuine issue of material fact as to whether he was discharged for exercising his constitutional rights in violation of a clear mandate of public policy as set forth in section 16-17-560. *See* Rule 56, SCRCP; *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. at 235, 692 S.E.2d at 505. It is undisputed both the Federal and South Carolina Constitutions provide for freedom of speech, of assembly, and the right to petition the government for redress of grievances. U.S. Const. amend. I; S.C. Const., art. I, § 2. Furthermore, it is not disputed that Owens's use of the

political process to actively oppose the Shem Creek project was within his rights as a private citizen. We do not believe, however, that Owens's decision to enjoy those rights was the reason for his termination; rather, the evidence shows Owens was discharged because he used company equipment, materials, and time to engage in an activity that was a violation of company policy and unquestionably detrimental to ADC.

ADC's technology policy allowed for "[b]rief or incidental use of office technology for personal, non-business purposes . . . as long as it [was] not excessive or inappropriate, *and [did] not result in expense or loss to the company*." (emphasis added). ADC had no issue with Owens exercising his right to engage in speech opposing the Shem Creek project—or other projects that ADC was working on—as long as he did not do it during work hours or with work equipment. Yet, the uncontroverted testimony was that Owens spent time at work actively opposing a project that ADC had a financial stake in and also disregarded a directive from ADC's management to keep ADC away from controversy. We believe ADC was within its rights to discharge an at-will employee for a violation of rules that brought economic harm to the company. *See Taghivand*, 411 S.C. at 243, 768 S.E.2d at 386 ("South Carolina has a strong policy favoring at-will employment."); *Barron*, 393 S.C. at 614, 713 S.E.2d at 636 ("[A]n at-will employee may be terminated for any reason or no reason at all."). Accordingly, we find Owens's termination violated neither section 16-17-560 nor a clear mandate of public policy.

CONCLUSION

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maria Allwin, Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P., and Shope Reno Warton, Defendents,

Of whom Russ Cooper Associates, Inc., and Shope Reno Warton are the Respondents.

Buffington Homes, L.P., Third-Party Plaintiff,

v.

Albrecht Environmental, Inc., All Points Construction, Inc., Patriots Drywall, Inc., Picquet Roofing, Inc., Sprayseal Foam Insulation, and Tischler Und Sohn (USA) Limited, Third-Party Defendants.

Appellate Case No. 2016-000471

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge,

Opinion No. 5617
Heard May 9, 2018 – Filed January 16, 2019

AFFIRMED

Robert T. Lyles, Jr., of Lyles & Associates, LLC, of Charleston, for Appellant.

Paul Eliot Sperry and Tyler Paul Winton, of Carlock Copeland & Stair, LLP, of Charleston for Respondent Shope Reno Warton; L. Dean Best and Jenny Costa Honeycutt, of Best Honeycutt, P.A., of Charleston, for Respondent Russ Cooper Associates, Inc.

MCDONALD, J.: In this construction defect litigation, Maria Allwin appeals the circuit court's grant of summary judgment in favor of Russ Cooper Associates, Inc. and Shope Reno Wharton (collectively, Respondents). As the circuit court properly found the statute of limitations bars Allwin's claims, we affirm.

Facts and Procedural History

In July 1992, architectural firm Shope Reno Wharton (Shope Reno) issued a set of plans to Connecticut residents Maria and Jim Allwin for the construction of a second home at 133 Flyway Drive on Kiawah Island. Shope Reno completed the final plans for the 11,000 square-foot beachfront home in August 1993. In May 1994, general contractor Russ Cooper Associates, Inc. (RCA) completed construction.

The Allwins were first informed of issues with the home by Robert Cowan, who lived there as the Allwins' guest in the late 1990s and early 2000s. Cowan observed and notified the Allwins of numerous problems with the roof, chimneys, exterior walls, windows, doors, patio, and basement. He also observed and reported interior water damage to hardwood floors, drywall, wallpaper, and subfloor framing, as well as mold, mildew, peeling paint, and water stains.

From 1999 to 2002, Cowan reported numerous and repeated leaks including: at least twelve leaking roof incidents; chimney and fireplace flue leakage; leaks at wall vents, louvers, or within exterior walls; leaking windows; leaks on the beachfront side of the house; and leaks in the basement where the patio connected. In March 2001, Cowan wrote to the Allwins, "Roof leaks and painting appear to be

the most important problems at this point." On September 4, 2001, Cowan prepared a moisture detection report noting unacceptable moisture meter readings.

In late 2001, the Allwins engaged Gamble Home Services (Gamble) to serve as the home's property manager. In 2001 and 2002, Gamble notified the Allwins of roof leaks at least twice. Between 2001 and 2008, Gamble reported leaks near windows and doors, air intrusion through unsealed penetrations in the building envelope, and a patio leak causing subflooring damage. Gamble also told the Allwins of numerous and repeated instances of interior water damage, including mold and mildew, caulking cracks at windows, drywall and wallpaper damage, trim cracks at windows, ceiling damage and stains, condensation in the basement, and warped hardwood flooring.[1]

In 2003, the Allwins hired Milton Morgan to oversee repair and maintenance work performed by Dan Buffington of Buffington Homes. Morgan notified the Allwins of roof defects on at least three occasions and proposed roof repairs ranging from $15,000 to $35,000. He also reported exterior trim rot, mold and mildew. Morgan retained architect Roy Davis Smith, who recommended water testing to determine the sources of the basement, window, and door leaks; Smith also suggested taking humidity readings throughout the house to address the mold.

In June 2003, Buffington hired Campbell, Schneider, and Associates, LLC (CSA) to survey the house and determine the source of "isolated areas of damage and fungal growth." CSA's August 2003 report noted water damage and mildew throughout the home and opined "[t]he damage to this home appears to be the direct result of numerous sources of unconditioned air infiltration, steep thermal gradients on finished interior surfaces, and ongoing water intrusion around windows, at roof valleys, and at several sub-grade locations." CSA recommended the source of the water leaks be investigated from the exterior, which would require the removal of certain windows and roof sections. CSA concluded "outside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressurizing the home. Isolated cases of water damage can be investigated and repaired on an individual basis."

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[1] In 2006, Gamble further suggested the Allwins should investigate the cause of the interior mold.

In July 2003, Buffington recommended a complete roof replacement. In addition to informing the Allwins of roof leaks and defects, Buffington reported exterior trim rot and damage to interior finishes caused by defective construction, including drywall damage, buckling and damaged hardwood floors, mold, mildew, and peeling paint. Regarding the patio and basement, Buffington recommended removing the patio tile, installing waterproofing where the patio connects to the house, and replacing the patio tile to slope away from the home.

On November 13, 2003, Morgan provided a written scope of repair that included instructions for Buffington to, among other things, "remove water damaged drywall from various bath and bedroom ceilings," "remove window and door casings[,] which display evidence of water intrusion on adjacent wall surfaces," "remove and replace window sash with broken air seals," "correct defects in roof valleys," and "explore and rework earth fill around foundation walls." Based on Morgan's advice, the Allwins proceeded with the more limited scope of repair as opposed to the complete roof replacement Buffington recommended.

In January 2004, however, Buffington again apprised the Allwins of problems with the roof and recommended a more aggressive repair plan than that suggested by Morgan. Buffington wrote:

> South Carolina has a 13-year statute of limitation[s] for water intrusion.[2] Your home is approaching that deadline. . . . [T]he roof was so poorly installed the only way to properly repair the roof is to replace it. When

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[2] Buffington was likely referring to the statute of repose which, prior to the 2005 amendment, required that construction defect actions be brought within thirteen years. *See* S.C. Code Ann. § 15-3-640 (Supp. 2018) ("No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement."); *see also Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 181, 708 S.E.2d 787, 792 (Ct. App. 2011) (explaining the previous version of the statute of repose required that an action be filed within thirteen years of any substantial improvement to real property).

> properly installed, your roof should last a lifetime. Even an asphalt shingle roof will last 15 to 20 years. I strongly urge you to contact the builder/roofer who installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel. Replacing the roof will necessitate removing and replacing much of the siding, thus, the cost for roof replacement will be over $500,000.

Buffington proposed further investigation into the basement leaks and air and water intrusion at the windows. He again advised the Allwins of damage to the drywall and hardwood floors, as well as the problems with mold, mildew, and peeling paint.[3] He further notified the Allwins of defects in the exterior walls of the home, including rotten studs and sheathing requiring replacement of exterior siding and trim. Ultimately, the Allwins paid Buffington $359,728.21 for the 2004–05 repairs. Following the completion of Buffington's repairs, Gamble invoiced the Allwins $979 for repair work in November 2005; this work included caulking the bottom of the exterior cladding at the rear patio to prevent leaks into the subfloor.

In March 2004, the Allwins submitted a property damage claim to AIG, their hazard insurance carrier, reporting active water intrusion through the roof, windows, and doors. AIG's engineer inspected the house, photographing open and obvious defects in the roof system, window leaks, leaks in the basement, and mold and water-damaged drywall in the interior. AIG subsequently denied the Allwins' claim, citing the longstanding construction defects noted in both CSA's August 2003 report and the report prepared by AIG's engineer.[4]

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[3] Albrecht Environmental, Inc. did a mold inspection of the home for Buffington in 2004. Albrecht recommended remediation by a certified mold contractor after finding mold in exterior walls.

[4] AIG's 2004 engineering report recognized the mold and moisture damage "resulted from long-term conditions of elevated moisture associated with the construction of the house."

In 2006, the Allwins hired realtor Cynthia Noble of Kiawah Island Real Estate, who obtained a home inspection from Complete Inspection Services (CIS) before listing the house. CIS's July 2006 report noted roof leaks, prior termite activity, damaged wood cladding, water infiltration at rear doors, water stains at rear basement walls, damaged hardwood flooring, water stains, mildew, and damaged drywall. CIS recommended repairs to the roof, investigation of termite activity, and inspection of the flashing and subflooring at the rear doors. Albrecht again inspected the home and issued a July 2006 report proposing $19,150 in mold remediation.

With the Allwins' consent, Noble requested and Buffington prepared a September 2006 estimate of repairs necessary to address the ongoing problems. Buffington proposed $282,850 in repairs to the roof, exterior walls, several windows and doors, the basement, and damaged flooring, as well as mold remediation. Noting the proposed roofing repairs were "only temporary," Buffington again recommended a complete roof replacement.

In 2008, Maria Allwin[5] hired consultant Victoria Stein of Atlantic Builders to evaluate the home. Stein's October 2008 report summarized her investigation of water intrusion issues and offered suggestions for future action.[6] Stein's report included a timeline chronicling the home's history of longstanding water intrusion and prior repairs, along with the findings of prior consultants. Although Stein opined the heating, ventilation, and air conditioning (HVAC) system was the primary cause of the mold and mildew, she expressly noted several existing defects were unrelated to the HVAC issue, including drywall damage under roof valleys, buckled hardwood flooring, and moisture in the basement area beneath the pool deck.[7] Stein suggested Allwin make repairs and seek legal counsel. Finally, she stated "[t]he list of items that could have been laid as the responsibility of the builder are numerous but bottom line is that the Statute of Limitations ran out in May 2007."

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[5] Jim Allwin died in 2007.

[6] From July to October 2008, Allwin paid Stein $6,978.14.

[7] Allwin concedes that HVAC problems are not RCA's responsibility.

In 2009, Allwin met with engineer Skip Lewis to discuss management of the ongoing maintenance and repair costs. Although Lewis was to perform a property condition assessment and develop a life cycle repair for maintenance of the house, this work was never completed.

Allwin retained legal representation in March 2009; counsel made arrangements for engineering firm H2L to survey the house for structural issues, including evaluating the roof and windows. On May 26, 2009, H2L presented a $45,000 proposal to conduct a building condition survey, including a visual inspection of the building envelope, windows, and cladding. Despite counsel's recommendation that Allwin move forward with the inspection, Allwin declined to conduct a forensic analysis of the home in 2009.

In a May 2010 CL-100 termite inspection report, a termite inspector noted evidence of termites, active wood-destroying fungi, and visibly damaged wood members. The termite inspector recommended a "complete and thorough evaluation by a qualified building expert to determine what repair if any is necessary to this property."

CIS performed a second home inspection in May 2010, again noting numerous construction deficiencies, including: roof leaks, deterioration of roofing components, signs of prior termite activity, damage to siding, water infiltration at windows, water infiltration and damaged flooring at windows and doors, leaks into the basement, cupped hardwood flooring, water stains, and mildew. CIS recommended checking the flashing and subfloor near the home's rear doors and having a contractor evaluate the water intrusion problem with the windows.

In 2011, Allwin hired Fuller Consulting Engineers (Fuller) to perform a thorough forensic analysis of the home. In his preliminary report, Fuller architect Ross Clements reported a number of construction deficiencies. Due to his concern about unknown conditions, Clements suggested a comprehensive scope of repair for the house, including the removal of the roof, a large concrete deck, and all exterior siding and interior drywall so that any potential latent defects could be located and repaired. Thereafter, Allwin met with a Shope Reno representative and agreed to go forward with Fuller's removal and repair recommendations.

On August 5, 2013, Allwin brought this construction and design defect action for negligence, gross negligence, and breach of warranty against RCA. Allwin added architectural firm Shope Reno as a defendant on October 8, 2014. Allwin alleged damages resulting from latent and previously undiscoverable design and construction deficiencies, decay, and rot.

According to Clements's September 9, 2015 affidavit, the removal of the home's exterior siding, interior drywall, roof, and concrete patio exposed defects that could not have been discovered without extensive deconstruction efforts.[8] Clements stated:

> Furthermore, it is my opinion that the level of destructive testing and deconstruction required at the subject residence to uncover latent defects was unprecedented in my experience as a forensic architect. It would be unreasonable for a homeowner to determine such a level of destructive testing or deconstruction was necessary based on the visual deficiencies observed. In my opinion, the root cause of many of the observed visual deficiencies could not have been explained without complete removal of the interior and exterior building components. Additionally, through the deconstruction of the current repair project, we uncovered many instances of previously unknown construction defects and defects that were more pervasive than what was observed during limited destructive testing.

Clements identified thirty-two defective conditions including defects in the installation of the roof underlayment, sheathing and framing; Tyvek weather-resistive barrier; building felt behind the stucco; windows and doors; waterproofing and flashing; and patios.

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[8] During his deposition, Russ Cooper agreed "it would be an extreme measure for an owner to remove all the siding on his house to determine the source of water infiltration." He also acknowledged that although the framing and Tyvek weather-resistive barrier are visible during construction, these components are no longer observable once they are covered by exterior cladding.

Shope Reno moved to dismiss, or in the alternative, for summary judgment, on three grounds, including the statute of limitations. RCA also moved for summary judgment based on the statute of limitations. The circuit court granted summary judgment and denied Allwin's subsequent Rule 59(e), SCRCP, motion to alter or amend.

Standard of Review

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014); *see Kreutner v. David*, 320 S.C. 283, 286–87, 465 S.E.2d 88, 90 (1995) (affirming the circuit court's order granting summary judgment because the statute of limitations had run).

Law and Analysis

Allwin argues the circuit court erred in granting Respondents' motions for summary judgment because conflicting evidence exists as to whether the statute of limitations bars her construction defect claims. Specifically, Allwin alleges the circuit court failed to view the evidence in the light most favorable to the nonmoving party, made impermissible findings of fact, relied on inapplicable law, and ignored evidence showing that she acted with due diligence.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.'" *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* "The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation." *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

The three-year statute of limitations applies to this case. *See* S.C. Code Ann. § 15-3-530(1) and (5) (2005) (providing a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied" and "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law"); *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371–72, 597 S.E.2d 27, 29 (Ct. App. 2004) (holding the three-year statute of limitations began to run on homeowner's negligence claim when he discovered his newly purchased modular home was damaged during delivery).

"Generally, a cause of action accrues under South Carolina law 'the moment the defendant breaches a duty owed to the plaintiff.'" *Barr v. City of Rock Hill*, 330 S.C. 640, 644, 500 S.E.2d 157, 159–60 (Ct. App. 1998) (quoting *Grooms v. Medical Soc'y of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989)). However, the "discovery rule," as discussed in *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), may toll the accrual of the statute of limitations:

> Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. This standard as to when the limitations period begins to run is *objective* rather than subjective. Therefore, the statutory period of limitations

> begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.

Id. at 525–26, 787 S.E.2d at 489–90 (citations and quotations omitted); *see also* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). Our supreme court has "interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness" when on notice of a potential claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996). "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id.* Nevertheless, when the parties present conflicting evidence, application of the discovery rule and the determination of the date the statute began to run in a particular case are questions of fact for the jury. *See Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (when testimony conflicts regarding time of discovery of a cause of action, it becomes an issue for the jury to decide); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury."); *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

Here, the circuit court found "[t]he statute of limitations bars [Allwin]'s claims against [Respondents] because the facts establish that [Allwin] was well aware of the alleged defects in both RCA's construction of and [Shope Reno]'s design of the residence more than three years before she asserted claims against them." The court further determined, "[Allwin] failed to act with 'reasonable diligence' in pursuing her claims against RCA and [Shope Reno]."

A. Evidence and Findings of Fact

Initially, Allwin argues the circuit court failed to view the evidence in the light most favorable to the nonmoving party and made impermissible findings of fact. We disagree.

Allwin's February 2011 letter to Shope Reno reported that Allwin retained legal counsel in connection with "significant deficiencies" at the home; an investigation uncovered deficiencies "relate[d] to the design/installation" of various building components including the "doors and windows, waterproofing and sealant, flashing installation and other deficiencies;" and the deficiencies "have led to significant damage" to the home. Allwin's counsel further wrote that "[a]s a result of these deficiencies and the damages to property resulting therefrom, Ms. Allwin faces a signification financial burden, including the cost to complete a thorough investigation of the home, as well as repair of the home, which will inevitably be very expensive."

The 2011 letter warned Shope Reno that if it refused to "investigate and correct the conditions at the project in a suitable manner," she would address the issues on her own and specifically "reserve[d] any and all legal rights and remedies she may have against [Shope Reno] as a result." Additionally, Allwin's Letter instructed Shope Reno to "forward this letter to [its] attorney and to [its] insurance agent/broker and any known liability insurance carriers." Thus, Allwin's letter notified Shope Reno of her potential claim against it for design deficiencies and the resulting damages. *See e.g.*, *Johnston*, 313 S.C. at 65, 437 S.E.2d at 47 (1993) (finding that even in viewing the facts in the light most favorable to the plaintiff, the only reasonable inference is that she knew or should have known that she had a possible claim against her physician no later than 1987, when she continued to have problems with her knees and sought legal advice regarding a claim against him). In fact, in her brief to this court, Allwin admits she had knowledge of her potential claims in 2011.[9] Because she failed to file this matter against Shope Reno until October 8, 2014, the circuit court correctly granted summary judgment.

The circuit court's grant of summary judgment to RCA was likewise proper. Allwin was on notice of her potential claims against RCA as early as February 1999. *See Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*,

[9] For reasons stated throughout this opinion, it is clear Allwin had notice of her potential claims many years before her counsel sent the 2011 letter.

332 S.C. 197, 207, 503 S.E.2d 761, 766 (Ct. App. 1998) ("The statute of limitations . . . runs from the date the injury is discoverable by the exercise of reasonable diligence."); *id.* at 208, 503 S.E.2d at 767 (finding the plaintiff "had sufficient information . . . to put it on inquiry notice, which, if developed, would have revealed the defects"). Between 1999 and 2002, Cowan observed and notified the Allwins of numerous defects in the roof, chimneys, exterior walls, windows, doors, patio, and basement. He further notified the Allwins of interior water damage to hardwood floors, drywall, wallpaper, and subfloor framing, as well as mold, mildew, peeling paint, and water stains. Between 1999 and 2011, the Allwins engaged numerous experts and professionals to investigate and remedy the various construction defects. Significantly, Allwin admitted Buffington's 2004–05 repairs were intended to remedy defects in RCA's original construction. In October 2008, Stein notified Allwin of defects in RCA's construction and the likelihood that her construction defect claims against RCA had expired. Allwin retained counsel in March 2009.

At the very latest, the statute of limitations applicable to Allwin's claims against RCA ran in March 2012. *See e.g.*, *Johnston*, 313 S.C. at 65, 437 S.E.2d at 47 (finding plaintiff knew or should have known that she had a possible claim against her physician when she continued to have problems with her knees and sought legal advice regarding a claim against him). Her claims against RCA are time-barred as a matter of law, and summary judgment was proper. *See Stokes-Craven Holding Corp.*, 416 S.C. at 526, 787 S.E.2d at 489–90 ("Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.").

B. Inapplicable Case Law

Allwin further contends the circuit court erroneously relied on *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996) and *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), because these cases did not involve latent defects.[10] We find no error.

[10] Latent defects have been defined as:

In *Dean*, the appellant purchased real property in downtown Charleston in September 1984, after a contractor had inspected it and determined it to be structurally sound. 321 S.C. at 362, 468 S.E.2d at 646. Two months later, the appellant observed a fine crack approximately three feet in length at the front right corner of the building and concluded it was attributable to a construction company's pile driving at a nearby construction site for Charleston Place. *Id.* The appellant immediately hired expert consultants to examine and repair the crack. *Id.* In August 1985, the appellant noticed the original crack had expanded and the facade was beginning to bulge and buckle. *Id.* at 362, 468 S.E.2d at 646–47. Further, she observed that a second crack had appeared at another location. *Id.* at 362, 468 S.E.2d at 647. After being informed the building was no longer structurally sound, the appellant brought suit against the construction company in 1991. *Id.* At trial, the circuit court directed a verdict against the appellant, finding as a matter of law that the statute of limitations had expired prior to the filing of her lawsuit. *Id.* at 363, 468 S.E.2d at 647.

This court reversed the circuit court, finding a question of fact existed as to whether the appellant was reasonably diligent in determining whether the construction company caused the damage to her building, thereby triggering the statute of limitations in 1984. *Id.* On appeal to our supreme court, the appellant argued the 1984 crack and the 1985 bulging of the bricks presented two distinct

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> Latent defects are hidden defects generally involving the material out of which the thing is constructed. Latent defects are those which a reasonably careful inspection will not reveal or those which could not have been discovered by such an inspection. A latent defect is [unknown] and, in the exercise of reasonable care, could not have [been] discovered.

Nunnery v. Brantley Const. Co., 289 S.C. 205, 213, 345 S.E.2d 740, 745 (Ct. App. 1986) (citations omitted); *see also Latent Defect*, *Black's Law Dictionary* (10th ed. 2014) ("*See* Hidden Defect."); *Hidden Defect* ("A product imperfection that is not discoverable by reasonable inspection and for which a seller or lessor is generally liable if the flaw causes harm.").

harms and, thus, two different dates of accrual existed for statute of limitations purposes. *Id.* at 364, 468 S.E.2d at 647. Our supreme court disagreed, holding the circuit court correctly directed a verdict for the construction company. *Id.* at 366, 468 S.E.2d at 648. Finding the statute of limitations began to run in November 1984—when appellant initially discovered the first crack—the court explained,

> Because Dean had *notice* in November 1984[,] that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date. Dean's subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved. Moreover, the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial.

Id. at 365–66, 468 S.E.2d at 648.

Like the appellant in *Dean*, Allwin discovered issues with her home which led her to investigate the problems and perform multiple repairs between 1999 and 2011. However, despite actual knowledge of her potential claims for this damage—and repeated repair recommendations—Allwin failed to pursue her claims in a timely manner. As Allwin was repeatedly put on notice of the home's design and construction defects, her failure to comprehend the magnitude of the water intrusion and other defective conditions is immaterial. *See id.*

In *Barr*, the appellants purchased a home from the Rock Hill Economic Development Corporation (RHEDC), which had purchased the house from the City of Rock Hill (the City) in February 1985. 330 S.C. at 642, 500 S.E.2d at 158. From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the appellants' home. *Id.* Termite inspectors suggested several repairs. *Id.* In March 1992, Mrs. Barr contacted the City and requested an inspection and report, which found several problems in the home's crawl space. *Id.* at 640, 500 S.E.2d at 159. In August 1992, the appellants received a structural engineering report disclosing numerous defects in the house, several of which were unrelated to the moisture problem. *Id.* at 643, 500 S.E.2d at 159. The appellants

filed suit in March 1994. *Id.* On appeal, this court affirmed the circuit court's grant of summary judgment in favor of the City and RHEDC based on the statute of limitations. *Id.* at 646, 500 S.E.2d at 160. Despite the fact Mrs. Barr did not realize "the magnitude of the problem" until August 1992, this court held the circuit court correctly ruled the termite inspection reports were sufficient notice to trigger the running of the statute of limitations. *Id.* at 645–46, 500 S.E.2d at 160.

Allwin contends *Barr* is inapplicable here because the appellants there failed to act upon information regarding moisture in the crawlspace, whereas Allwin took action over several years to investigate and repair the home. But Allwin's completion of some of the recommended repair work for her home does not alter the fact that, like the *Barr* appellants, she was on notice of her potential claims for some time and failed to timely file suit.

Santee Portland Cement Co. v. Daniel International Corp., which Allwin cites to support her summary judgment opposition, does not support a different result. 299 S.C. 269, 384 S.E.2d 693 (1989), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). There, a cement plant owner (Santee) brought suit against the general contractor (Daniel) responsible for the construction of the plant. Over a period of many years, the plant facility showed two cracks in its façade, which eventually collapsed, killing two people. *Id.* at 270–71, 384 S.E.2d at 693–94. The circuit court concluded Santee knew or should have known it had a cause of action against Daniel when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 271, 384 S.E.2d at 694. Our supreme court rejected the circuit court's conclusion, determining the following evidence went to the reasonableness of Santee's actions, which was an issue to be decided by the jury:

> Santee introduced expert testimony that the defects in the silos were latent; the defective placement of the steel reinforcements was not detectable because the rods were inside the concrete walls. Although Santee did experience cracks in Bin # 12 prior to the 1980 collapse of Bin # 13, experts testified that small cracks are *common* in cement structures. Repairs of Bin # 12 totaled approximately $11,000 and were characterized as

> *relatively small* for the $2,000,000 project. Further testimony was introduced that Daniel's subcontractor characterized the repairs to # 12 as *permanent* and inspected the remaining silos and found them to be in good condition. Santee also introduced evidence that the silos were inspected visually by employees and periodically checked by the Mine Safety and Health Administration.

Id. at 274, 384 S.E.2d at 696 (emphasis added).

The record here establishes Allwin's longstanding knowledge of multiple construction defects. Cowan observed and repeatedly notified the Allwins of defects between 1999 and 2002. Between 1999 and 2011, the Allwins engaged experts and professionals to both investigate and remedy some of the defects. Not one of these professionals found these defects to be "common" or "relatively small." In fact, in January 2004, Buffington informed the Allwins "the only way to properly repair the roof is to replace it. . . . [, which] will necessitate removing and replacing much of the siding, thus, the cost for roof replacement will be over $500,000." In September 2006, Buffington prepared a $282,850 estimate for mold remediation and repairs necessary to address other ongoing problems with the home, including repairs to the roof, certain exterior walls, certain windows and doors, the basement, and damaged flooring. Buffington noted his 2006 proposed roofing repairs were "only temporary," and again recommended the complete replacement of the roof.

Allwin also complains the circuit court's order failed to address *Holly Woods Association of Residence Owners*, 392 S.C. 172, 708 S.E.2d 787, in which this court affirmed the circuit court's denial of the developers' directed verdict motion based on the statute of limitations. *Id.* at 185, 708 S.E.2d at 794. In *Holly Woods*, the minutes from HOA board meetings indicated the HOA was aware of certain problems with the development including a pool leak, drainage problems, and termite issues in 1991; additional problems appeared between 1998 and 2000. But the damages the HOA claimed in the 2005 lawsuit involved a different location within the neighborhood, unrelated to the previous defects. *Id*. By contrast, the record here establishes Allwin failed to present any evidence that the defects she

claims to have discovered in 2011 were unrelated to those she had notice of as early as February 1999.

Finally, Allwin complains the circuit court failed to address this court's holding in *McAlhany v. Carter*, which reversed the circuit court's granting of defendants' statute of limitations-based motions for summary judgment. 415 S.C. 54, 54, 781 S.E.2d 105, 107 (Ct. App. 2015). The circuit court granted summary judgment based on the plaintiff's deposition testimony that he discovered the mold within his residence in 2007. *Id.* at 59, 781 S.E.2d at 108. However, later during the same deposition, the plaintiff expressed confusion about when he discovered the mold and whether his discovery occurred at late as 2009. *Id.* at 61, 781 S.E.2d at 109. In the present case, Allwin has failed to present conflicting evidence with respect to the timing of her discovery of the various defects in the home. Indeed, the chronology of Allwin's defect discoveries is fully established in this record. Thus, *McAlhany* is unpersuasive.

C. Due Diligence

Finally, Allwin argues the circuit court ignored evidence that she acted with due diligence. We disagree.

Although the record reflects a lengthy history of maintenance and repairs, such does not negate the fact that Allwin was on notice of her potential claims as early as February 1999 but failed to bring suit against RCA and Shope Reno until August 5, 2013, and October 8, 2014, respectively. *See Dean*, 321 S.C. at 363–64, 468 S.E.2d at 647 (stating an injured party "must act with some promptness" when they are on notice of a potential claim); *id.* ("Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.").

Allwin asserts a jury could find she was "reasonable in pursuing a conservative but conscious course of action in response to conflicting opinions." But the question is not whether Allwin reasonably elected between conflicting professional recommendations as to the scope of necessary repairs. The issue here is when Allwin discovered her potential claims, thus triggering the statute of limitations. Cowan, Buffington, CSA, and Stein independently and repeatedly notified Allwin of original design and construction defects. Buffington and Stein went so far as to

inform Allwin of the possible expiration of her claims against RCA. Thus, the circuit court properly granted summary judgment.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.