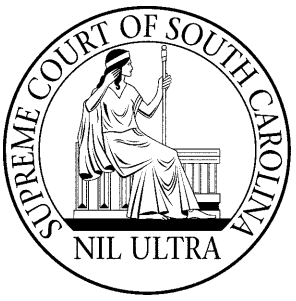

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 3, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Amendment to Rule 31 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR

Appellate Case No. 2014-002153

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) is amended to state:

(a) Employment. Commission counsel shall employ a member of the South Carolina Bar who has been admitted under Rule 402, SCACR, as a standing receiver. The receiver shall not otherwise engage in the practice of law, except to the extent a staff attorney would be authorized to do so under Rule 506, SCACR, or as explicitly authorized by these rules. The receiver shall not serve in a judicial capacity.

(b) Special Receiver. The Supreme Court may appoint a special receiver when the receiver has a conflict of interest or in other circumstances when the Court deems it appropriate. The special receiver shall have the same authority, duties and responsibilities as the receiver. Any reference in these rules to the receiver shall also include a special receiver.

(c) Petition. If a lawyer has been transferred to incapacity inactive status, has disappeared or died, or has been suspended or disbarred, and no partner, personal representative or other responsible party capable of conducting the lawyer's affairs is known to exist, disciplinary counsel shall petition the Supreme Court for an order of receivership appointing the receiver to inventory the files of the inactive, disappeared, deceased, suspended or disbarred lawyer and to take action as appropriate to protect the interests of the lawyer and the lawyer's clients. If the Supreme Court determines that a lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to

practice law but decides that a transfer to incapacity inactive status is not warranted, it may appoint the receiver to protect clients' interests. The order of receivership shall be public.

(d) Duties. The receiver shall:

(1) Take custody of the lawyer's active and closed files and trust, escrow, operating and any other law office accounts. The lawyer shall cooperate with the receiver and any attorney appointed to assist the receiver and shall comply with requests to take specific action regarding the client files and accounts. The chair or vice chair may issue such orders as may be necessary to assist the receiver in obtaining custody over such files and accounts, to include orders compelling the lawyer or a third party to take specific action regarding the files and accounts. The willful failure to comply with such an order may be punished as a contempt of the Supreme Court. A party who wishes to challenge such an order must immediately seek review of the order by petition to the Supreme Court;

(2) Notify each client in a pending matter, and in the discretion of the receiver, in any other matter, at the client's address shown in the file, by first class mail, of the client's right to obtain any papers, money or other property to which the client is entitled and the time and place at which the papers, money or other property may be obtained, calling attention to any urgency in obtaining the papers, money or other property;

(3) Publish, in a newspaper of general circulation in the county or counties in which the lawyer resided or engaged in any substantial practice of law, once a week for three consecutive weeks, notice of the discontinuance or interruption of the lawyer's law practice. The notice shall include the name and address of the lawyer whose practice has been discontinued or interrupted; the time, date and location where clients may pick up their files; and the name, address and telephone number of the receiver. The notice shall also be mailed, by first class mail, to any errors and omissions insurer or other entity having reason to be informed of the discontinuance or interruption of the law practice;

(4) Release to each client the papers, money or other property to which the client is entitled. Before releasing the property, the receiver shall obtain a receipt from the client for the property;

(5) With the consent of the client, file notices, motions or pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained; and

(6) Perform any other acts directed in the order of receivership.

(e) Term of Order. The term of an order of receivership shall be for a period of no longer than 9 months. Upon application by the receiver, the Supreme Court may extend the term of the order as necessary.

(f) Representation of Clients. Clients should be encouraged to engage other counsel as soon as possible.

(g) Termination of Receivership. When the provisions of (d) above and the order of receivership have been complied with, the receiver shall apply to the Supreme Court for termination of the receivership. The application shall contain the written releases of clients to whom files and other property were returned, information regarding the efforts made to contact the lawyer's remaining clients, an inventory of the files and other property remaining in the receiver's possession, an itemized account of the expenses incurred in carrying out the order of receivership, and documentation of time spent by the receiver and the receiver's staff in carrying out the order of receivership. The Supreme Court may order the lawyer to reimburse the receiver for expenses incurred and time spent in carrying out the order of receivership. Expenses and fees for the receiver and the receiver's staff time which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts.[1] If no such funds exist, payment shall be made from the Lawyers' Fund for Client Protection. If the receiver's expenses or fees are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that

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[1]For purposes of this rule, the following rates are currently established for reimbursement of fees, expenses, and the cost of copies but are subject to change at the discretion of the Court.

Receiver and Attorneys to Assist the Receiver Fees	$50.00 per hour
Receiver Staff and Other Support Staff	$10.00 per hour
Copies	$0.15 per page

Fund. Upon approval of the application by the Supreme Court, all files and property remaining in the receiver's possession shall be retained by the Commission. Unless otherwise ordered by the Supreme Court, the files shall be retained by the Commission for a period of 3 years at which time they shall be destroyed in a manner which protects their confidentiality. Other client property remaining in the possession of the Commission after 3 years shall be disposed of in a manner as ordered by the Supreme Court.

(h) Appointment of Attorneys to Assist the Receiver. Upon petition of the receiver, the Supreme Court may appoint members of the South Carolina Bar as needed to assist the receiver in performing duties under this rule. With the exception of reasonable and necessary expenses, such as postage, telephone bills, copies, supplies and the cost of publishing legal notice in the newspaper, an appointed attorney shall serve without compensation as a service to the legal profession. However, the Supreme Court may order that the appointed attorney be reimbursed a reasonable amount for other expenses, such as the appointed attorney's time or the time of support staff, when it determines that extraordinary time and services were necessary for the completion of the required duties or when the appointment has worked a substantial hardship on the appointed attorney's practice. The Supreme Court shall determine the reasonableness of necessary expenses and other expenses. Expenses which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If no such funds exist, payment shall be made from the Lawyers' Fund for Client Protection under Rule 411, SCACR. If the appointed attorney's expenses are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

(i) Protection of Client Information. Neither the receiver nor an attorney appointed to assist the receiver shall be permitted to disclose any information contained in the files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of receivership or order of appointment.

(j) Order Appointing Successor Lawyer. Where a lawyer has died or become disabled from practicing law, and the lawyer has named a successor lawyer in accordance with Rule 1.19, RPC, Rule 407, SCACR, the successor lawyer may petition the receiver to request an order of succession appointing the successor lawyer to inventory the files of the disabled or deceased lawyer and to take

action as appropriate to protect the interests of the lawyer and the lawyer's clients.

(k) Succession Education. The receiver shall have primary responsibility for conducting educational efforts on the need to protect clients through planning for succession in practice.

These amendments shall take effect immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 3, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Greens of Rock Hill, LLC and GRH 2011, LLC, Respondents,

v.

Rizon Commercial Contracting, Inc. and Road Machinery and Supplies Co., Defendants,

of whom Rizon Commercial Contracting, Inc. is the Appellant.

Appellate Case No. 2012-213563

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge,

Opinion No. 5281
Heard September 10, 2014 – Filed December 3, 2014

REVERSED AND REMANDED

Daniel Dominic D'Agostino, D'Agostino Law Firm, of York, for Appellant.

Herbert W. Hamilton and Walter Keith Martens, Hamilton Martens Ballou & Carroll, LLC, of Rock Hill; and Tracy Thompson Vann, Nexsen Pruet, LLC, of Charlotte, NC, all for Respondents.

FEW, C.J.: Rizon Commercial Contracting, Inc. appeals the circuit court's order vacating its mechanic's liens and dismissing its counterclaim for foreclosure. We find the circuit court erred in determining as a matter of law that Rizon was not a "laborer" that performed work "for the improvement of real estate" under subsection 29-5-20(A) of the South Carolina Code (2007). We reverse and remand for foreclosure proceedings.

I. Facts and Procedural History

In 2010, the Greens of Rock Hill, LLC and GRH 2011, LLC (collectively the "owners") initiated the "Riverwalk development project," which involved developing several pieces of property on the Catawba River in Rock Hill into a large, mixed-use community. The owners hired Celriver Services, LLC to serve as the general contractor for portions of the development project, which included demolishing an abandoned manufacturing facility on the property, grading the land, and installing roads and infrastructure.

Following the demolition of the manufacturing facility, large pieces of "scrap concrete" remained on the property. Celriver hired Rizon to crush this concrete into usable material. Specifically, the contract[1] between the parties provided,

> The Work to be performed by the Subcontractor [Rizon] includes mobilization of all labor, equipment, materials

[1] The owners included with their petition to vacate the mechanic's liens a written contract between Celriver and Rizon dated 2010. Rizon's owner claimed in an affidavit, however, that "the contract from 2010 was not the contract under which [Rizon was] working." At oral argument, Rizon told the court Celriver initially hired Rizon in 2010 to crush the scrap concrete, and the 2010 contract covered the work performed by Rizon for that year. Rizon explained, however, that there was no written contract covering the work performed in 2011, which is the work relevant to this litigation. Notwithstanding this, Rizon admitted that the terms of the oral contract established in 2011 were "substantially the same" as those provided in the 2010 written contract. This is supported by the affidavit of Dave Williams, Vice President of Celriver, which used the same language contained in the 2010 contract to describe the work to be performed by Rizon under the 2011 contract.

> and other items required to crush and screen 30,000 tons of concrete stockpiled [on the property]. The concrete material is to be crushed and screened, as required, to meet the South Carolina Department of Transportation specifications for Graded Aggregate Base . . . .

Rizon paid for the rental equipment used to crush the concrete and for all expenses incurred in completing the contract, including labor and operating costs. Upon completion of the work, Celriver moved the crushed concrete to "various sites" on the property, where it was used as a paving base for roads, sidewalks, and parking lots.

Rizon subsequently filed mechanic's liens against the Riverwalk property pursuant to section 29-5-20, claiming it was owed $295,591 for the work it performed. The owners filed a petition to vacate the liens, claiming Rizon "did not provide labor, material, or supplies for the improvement of real property" and was thus "not entitled to a mechanic's lien." Rizon filed an answer and counterclaim seeking foreclosure.

The trial court issued an order vacating Rizon's mechanic's liens and dismissing its foreclosure claim. The court found Rizon was not a laborer because it "did not . . . do anything to improve the real estate." Although the court acknowledged that "crushing the concrete may have been a benefit to Celriver," it determined this work, by itself, "did not improve the real property." Based on this finding, the circuit court ruled as a matter of law Rizon did not meet the requirements for a mechanic's lien under section 29-5-20.

II. Rizon's Entitlement to Mechanic's Liens

Mechanic's liens "are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340, 762 S.E.2d 561, 565 (2014). According to subsection 29-5-20(A), "[e]very laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate . . . has a lien thereon . . . to the value of the labor or material so furnished." The purpose of subsection 29-5-20(A) "is to protect a party who provides labor or materials for the improvement of property but does not have

a contractual relationship with the property owner." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008).

The circuit court vacated Rizon's mechanic's liens based on the procedure approved by the supreme court in *Sea Pines Co. v. Kiawah Island Co.*, 268 S.C. 153, 157, 232 S.E.2d 501, 502 (1977), which allows the circuit court to consider the propriety of a mechanic's lien under a standard that "may be . . . likened to the [court]'s authority to grant a summary judgment if there is no genuine issue of material fact to be determined." We hold the circuit court erred by vacating the liens. Viewing the evidence in the light most favorable to Rizon, we find Rizon was a "laborer" that performed work "for the improvement of real estate," which entitles it to a mechanic's lien under subsection 29-5-20(A). *See Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013) (stating that when considering a motion for summary judgment, "the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party").

The owners admit the concrete crushed by Rizon "was used to improve the property," but contend the sole task for which Rizon contracted did not, by itself, improve the real estate. We disagree. Celriver hired Rizon to accomplish two tasks: (1) rid the property of the demolition debris so construction could continue; and (2) convert concrete blocks into fragments that could be used in paving the roadways on the property. Rizon rented equipment and provided all the labor, fuel, and supervision necessary to remove the scrap concrete from the property—a component of the work necessary for the development project to continue—by crushing it into a material that went directly back into the project. We find these facts, when viewed in the light most favorable to Rizon, demonstrate that Rizon was a laborer under section 29-5-20 because the work it performed was necessary to the development project and generated a product that was used to improve the property. *See A.V.A. Constr. Corp. v. Santee Wando Constr.*, 303 S.C. 333, 336, 400 S.E.2d 498, 500 (Ct. App. 1990) ("We think the [mechanic's lien] statute sufficiently broad to encompass labor . . . absolutely essential to the owner's development of his properties.").

We find further support for our holding in certain sections of the mechanic's lien statute. As this court stated in *A.V.A.*, "There has been over the years a tendency of the General Assembly to liberalize the mechanic's lien statute, making available each time a lien to additional providers of labor and materials." 303 S.C. at 335,

400 S.E.2d at 500. The legislature has expanded the scope of the mechanic's lien statute to cover persons performing a component of the labor necessary to complete construction and development projects, even though "the labor performed [did not] go into something which has attached to and become a part of the real estate." *George A.Z. Johnson, Jr., Inc. v. Barnhill*, 279 S.C. 242, 245, 306 S.E.2d 216, 218 (1983). For example, a person "who provides a landscape service," which includes "land clearing, grading, filling, plant removal, natural obstruction removal, or other preparation of land," is entitled to a mechanic's lien under section 29-5-20. S.C. Code Ann. § 29-5-26 (Supp. 2013). Additionally, South Carolina Code section 29-5-27 (2007) states, "Any person providing construction and demolition debris disposal services, . . . including, but not limited to, final disposal services . . . is a laborer within the meaning of Section[] 29-5-20."

We need not determine whether Rizon's work is covered by these specific statutes because we find it is entitled to a lien under section 29-5-20. Nevertheless, we find these sections of the mechanic's lien statute helpful to our analysis. They demonstrate the legislative intent that a person who performs a component of the work involved in development and construction projects should be considered a "laborer" that performed work "for the improvement of real estate." § 29-5-20(A). Accordingly, we conclude Rizon was entitled to a mechanic's lien under section 29-5-20.[2]

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[2] The circuit court also found (1) Rizon did not furnish the material that was used to improve the property because "Rizon's sole task was simply to change the form of the scrap concrete supplied by others into stone usable in the construction of roads"; and (2) "Rizon was not a subcontractor as it relates to the improvement of the subject real estate" because "there is no indication that Celriver's contract with the Owners required crushing of the concrete in order that it could be used in building roads and sidewalks." We decline to address these findings because our conclusion that Rizon is a laborer under subsection 29-5-20(A) is sufficient to support our holding. *See* § 29-5-20(A) (providing a mechanic's lien to "[e]very laborer, mechanic, subcontractor, *or* person furnishing material" (emphasis added)). We also do not address Rizon's argument that the circuit court erred in ruling on the owners' petition without allowing discovery because our holding is dispositive of this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address other issues raised by appellant because resolution of a prior issue was dispositive).

III. Conclusion

We hold the circuit court erred in vacating Rizon's mechanic's liens and dismissing its foreclosure action as a matter of law. Therefore, the order of the circuit court is **REVERSED** and the case **REMANDED** for the court to hold foreclosure proceedings consistent with this decision.

LOCKEMY, J., concurs.

THOMAS, J., dissenting: I respectfully dissent, as I would hold that the work performed by Rizon does not entitle it to mechanic's liens under section 29-5-20 of the South Carolina Code (2007). *See Clo-Car Trucking Co. v. Clifflure Estates of S.C., Inc.*, 282 S.C. 573, 576, 320 S.E.2d 51, 53 (Ct. App. 1984) ("[A] claim may not be sustained when that can be done only by a forced and unnatural interpretation of the language of the statute . . . . [We will] not . . . apply the rule of liberal construction to create a lien where none exists or was intended by the legislature." (second, third, and fourth alterations in original) (quoting 53 Am. Jur. 2d *Mechanics' Liens* § 18 at 535 (1970)); *id.* ("Statutory liens, then, will not be extended by us to permit a claim not specified by the statute."); *id.* ("He who sets up such a lien must bring himself fairly within the expressed intention of the lawmakers." (quoting *Williamson v. Hotel Melrose*, 110 S.C. 1, 34, 96 S.E. 407, 415 (1918)) (internal quotation marks omitted)).

"[S]ection 29-5-20(A) . . . provides in relevant part: 'Every laborer, mechanic, subcontractor, *or person furnishing material* for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished . . . .'" *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 340-41, 762 S.E.2d 561, 566 (2014) (third alteration in original) (quoting S.C. Code Ann. § 29-5-20(A) (2007)). All of the evidence in the record reveals that Rizon was hired for the task of crushing concrete stockpiled at the former Celanese Acetate Plant. While it is undisputed that some of this crushed concrete was used by Celriver to improve the property, there is no evidence that the work performed by Rizon improved the real estate upon which its mechanic's liens were placed. I disagree with the majority as to the work performed by Rizon in that I find the evidence in the record reveals Rizon's

only task was to crush concrete that it neither owned nor used to improve the real estate.[3]

While Rizon did pay for the labor, services, and material used in crushing the stockpiled concrete, these activities do not amount to furnishing material for the improvement of real estate within the meaning of section 29-5-20, as these materials were not actually used in the improvement of the real estate. *See* S.C. Code Ann. § 29-5-22 (2007) ("A person who supplies tools, appliances, machinery, or equipment used *as provided in Section 29-5-10(a)* is considered to have furnished material for the improvement of real estate within the meaning of Sections 29-5-20 . . . ." (emphasis added)); S.C. Code Ann. § 29-5-10(a) (2007) ("A person to whom a debt is due for labor performed or furnished or for materials furnished *and actually used in the erection, alteration, or repair of a building or structure upon real estate* . . . shall have a lien upon the building or structure . . . ."); *id.* ("As used in this section, materials furnished and actually used include tools, appliances, machinery, or equipment *supplied for use on the building or structure* to the extent of their reasonable rental value during their actual use.").

Moreover, Rizon did not dispose of discarded solid wastes and therefore does not fall within the ambit of "construction and debris disposal services" under section 29-5-27. *See* S.C. Code Ann. § 29-5-27 (2007) ("Any person providing construction and demolition debris disposal services, as defined in Section 44-96-40(6), including, but not limited to, final disposal services provided by a construction and demolition landfill, is a laborer within the meaning of Sections 29-5-20 . . . ."); S.C. Code Ann. § 44-96-40(6) (2002) ("'Construction and demolition debris' means discarded solid wastes resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing.").

Based on the foregoing, I would affirm the order of the circuit court.

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[3] I have found no evidence in the record to support the majority's statement that one reason Celriver hired Rizon was to rid the property of demolition debris so construction could continue. At oral argument, Rizon admitted that the terms of the oral contract in 2011 were "substantially the same" as the terms of the 2010 contract provided in the record, and that contract simply states that Rizon was hired for the purpose of crushing stockpiled concrete.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph D. McMaster, Appellant,

v.

John H. Dewitt, M.D. and Carolina Psychiatric Services, P.A., Respondents.

Appellate Case No. 2013-000717

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5282
Heard October 8, 2014 – Filed December 3, 2014

AFFIRMED

Charles L. Henshaw, Jr., Furr & Henshaw, of Columbia, for Appellant.

Carmelo Barone Sammataro and Robert Gerald Chambers, Jr., Turner Padget Graham & Laney, P.A., both of Columbia, for Respondent Carolina Psychiatric Services, P.A.; James Edward Bradley, John Calvin Bradley, Jr., and Margaret Amelia Hazel, Moore Taylor Law Firm, P.A., all of West Columbia, for Respondent John H. Dewitt.

FEW, C.J.: Joseph D. McMaster brought a medical malpractice claim against John H. Dewitt, M.D. and Carolina Psychiatric Services, P.A. based on Dr. Dewitt's alleged negligence in overprescribing McMaster the drug Adderall. The circuit court granted summary judgment for both defendants, finding the statute of limitations barred McMaster's claim. We affirm.

I. Fact and Procedural History

Dr. Dewitt treated McMaster for Adult Attention Deficit Disorder and prescribed him Adderall. On May 13, 2008, McMaster was involuntarily committed to Palmetto Health Baptist "in a delusional and paranoid state." Following his discharge on May 28, Dr. Dewitt stopped prescribing Adderall to McMaster. On June 25, 2008, McMaster was once again admitted to the hospital "in a paranoid and psychotic state."

On June 16, 2011, McMaster commenced a medical malpractice action against Dr. Dewitt and Carolina Psychiatric. He alleged Dr. Dewitt negligently overprescribed him Adderall, which led to his psychosis and subsequent hospitalization. The complaint mentioned only his June 2008 hospitalization.

During a deposition, McMaster testified Dr. Dewitt told him in May the cause of his psychosis. Specifically, McMaster stated, "[Dr. Dewitt] called it Adderall induced psychosis when I talked to [him]." When asked what Dr. Dewitt did "wrong," McMaster stated, "[H]e just gave me too much medicine. . . . I mean, it was just way too much and I didn't know it until it was too late."

Dr. Dewitt and Carolina Psychiatric moved for summary judgment. They argued McMaster's claims were barred by the statute of limitations because it began to run when McMaster was hospitalized in May 2008. *See* S.C. Code Ann. § 15-3-545(A) (2005). *See id.* (stating a medical malpractice claim "must be commenced within three years from the date of the treatment . . . giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered").

Two days before the summary judgment hearing, McMaster filed an affidavit in which he claimed he was not aware of Dr. Dewitt's negligence until June 2008. McMaster explained in his affidavit that when he was hospitalized in May, "Neither [Dr. Dewitt] nor anyone else at that time suggested that Adderall . . . had

caused me to have paranoid psychosis . . . or that the amounts of Adderall . . . prescribed to me by Dr. Dewitt had caused me any harm." Instead, he claimed it was not until he learned of his diagnosis in June that he "began to question whether amphetamines such as Adderall had been overprescribed to [him]." Although he "recalled that Dr. Dewitt's partner, Dr. Larry Nelson, had told [him] in May 2008 that Dewitt had a tendency to overprescribe amphetamines,"[1] he stated, "Dr. Nelson did not tell me that [Dr.] Dewitt had overprescribed amphetamines to me or that Adderall had caused me any injury."

The circuit granted summary judgment, finding that when McMaster filed his lawsuit in June 2011, it had been "more than three years after he discovered that he was hospitalized due to the Adderall prescribed by Dr. Dewitt." The court based this finding on McMaster's deposition testimony, in which he stated Dr. Dewitt told him in May he had suffered an Adderall induced psychosis. The circuit court refused to consider the affidavit submitted by McMaster, finding it "should be disregarded" as a "sham affidavit" under *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004).

II. Standard of Review

Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations. *See Kreutner v. David*, 320 S.C. 283, 286-87, 465 S.E.2d 88, 90 (1995) (affirming "the grant[ing] of summary judgment because the statute of limitations has expired"). In reviewing a decision to grant summary judgment, we apply the same standard as the circuit court. *Vaughan v. Town of Lyman*, 370 S.C. 436, 440, 635 S.E.2d 631, 633 (2006). Under this standard, summary judgment is appropriate when "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. "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. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

[1] The record reflects that Adderall is an amphetamine.

While South Carolina courts have not established the standard for reviewing the circuit court's decision to exclude a sham affidavit, federal appellate courts use an abuse of discretion standard.[2] *See Cothran*, 357 S.C. at 218, 592 S.E.2d at 633 ("find[ing] persuasive the reasoning of federal case law" in adopting the rule that a circuit court may exclude a sham affidavit). We adopt this standard and accordingly, must determine whether the circuit court acted within its discretion in refusing to consider McMaster's affidavit.

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[2] *See Nguyen v. Biondo*, 508 F. App'x 932 (11th Cir. 2013) (stating "[t]he district court also did not abuse its discretion when it struck [the] affidavit" because it "was entitled to disregard [the] affidavit as a 'transparent sham'"); *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 270-71 (3d Cir. 2010) (reviewing district court's decision to exclude an errata sheet that contradicted prior testimony and applying the "sham affidavit" rule to find district court "did not abuse its discretion in refusing to consider . . . [the] contradictory errata sheet"); *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 867 (8th Cir. 2010) (addressing district court's decision to exclude contradictory affidavits and stating "[w]e review this holding for abuse of discretion"); *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1381-82 (Fed. Cir. 2010) (holding appellant "fail[ed] to demonstrate that the district court abused its discretion in excluding" evidence that contradicted prior sworn testimony); *Wolfe v. Jarnigan*, 357 F. App'x 621, 623 (6th Cir. 2009) (addressing whether district court improperly considered a sham affidavit and stating "[w]e review the district court's decision to entertain or reject affidavits on this ground for abuse of discretion"); *Scottsdale Ins. Co. v. Moreno*, 133 F. App'x 415, 417 (9th Cir. 2005) (finding district court "abused its discretion by striking portions of [the] affidavits as shams"); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 973 (10th Cir. 2001) ("[I]t is not an abuse of discretion to conclude—as the district court did—that these subsequent affidavits . . . fall within the ambit of creating a "*sham fact issue*."); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1055 (7th Cir. 2000) ("We review a district court's decision to strike or disregard parts of an affidavit in opposition to a motion for summary judgment for an abuse of discretion."); *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 20-21 (1st Cir. 2000) (finding "no abuse of discretion" regarding "district court's decision to strike the affidavits" because they were contradictory to prior testimony and provided no explanation for the contradictions).

III. Statute of Limitations

McMaster argues the circuit court erred in granting summary judgment for two reasons: (1) a genuine issue of material fact exists regarding when he was put on notice that Dr. Dewitt acted negligently in prescribing him Adderall; and (2) the affidavit he submitted two days before the summary judgment hearing was improperly excluded as a "sham." We find the circuit court properly granted summary judgment.

A. Notice Under the Discovery Rule

Subsection 15-3-545(A) provides that a plaintiff must bring a medical malpractice claim "within three years from the date of the treatment . . . giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered." We apply the discovery rule to determine when an action accrues. *Dunbar v. Carlson*, 341 S.C. 261, 266, 533 S.E.2d 913, 915-16 (Ct. App. 2000). Under the discovery rule, the statute begins to run when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 570, 608 S.E.2d 459, 462 (Ct. App. 2005); *see also Dunbar*, 341 S.C. at 266, 533 S.E.2d at 916.

Here, the evidence demonstrates McMaster suffered an injury in May 2008, the circumstances of which put him on notice to inquire into whether this injury gave rise to a claim against Dr. Dewitt. Dr. Dewitt prescribed McMaster Adderall to treat his attention deficit disorder, and in his deposition, McMaster testified three times he was aware in May that he was hospitalized for Adderall induced psychosis. The following is an excerpt from this deposition:

> Q: [Y]ou knew that then, when you went in [to the hospital] that [Adderall] was the problem or when you got out?
>
> A: No. I didn't know it when I went in [the hospital]. I didn't know that was the problem when I went in.

Q: But you knew it when you got out? When you talked to your boss?

A: When I talked to--talked to the doctors on the floor.

Q: Okay.

A: I mean, [Dr.] John [Dewitt] called it Adderall induced psychosis when I talked to [him].

Q: And that was in May of 2008?

A: Correct.

When asked what Dr. Dewitt did "wrong," McMaster stated, "[H]e just gave me too much medicine. . . . I mean, it was just way too much and I didn't know it until it was too late." The following exchange then took place:

Q: And that would've been when you went into the hospital in May--

A: Yeah.

Q: --of 2008?

A: Right.

. . . .

Q: And you were discharged at the end of May 2008 from the hospital?

A: May 2008. The first time, yeah.

Q: All right. And when you were discharged, did you know what was wrong with you?

A: From what I was told, it was Adderall induced psychosis.

This testimony indicates McMaster was aware in May he suffered an Adderall induced psychosis due to the medicine prescribed by Dr. Dewitt. As we will discuss, the record contains no admissible, material facts to the contrary. Thus, we find the circuit court properly granted summary judgment because the statute of limitations began to run in May 2008.

McMaster argues a question of material fact exists as to when his cause of action accrued because the discharge summary from his May hospitalization stated he was diagnosed with "[p]aranoid psychosis of unclear etiology," but the discharge summary from June contained the diagnosis: "Medication or drug induced psychosis." He contends that because the May discharge summary did not mention medication as the cause of his psychosis, there is a question of fact as to whether he was put on notice of a claim against Dr. Dewitt.

We find any conflict between the discharge summaries immaterial in light of McMaster's deposition testimony. Specifically, McMaster testified Dr. Dewitt told him in May he had "Adderall induced psychosis." McMaster certainly knew Dr. Dewitt was the one who prescribed him Adderall. This information, regardless of the diagnoses in the discharge summaries, "would put a person of common knowledge and experience on notice . . . that some claim against [Dr. Dewitt] might exist." *Knox*, 362 S.C. at 570, 608 S.E.2d at 462.

McMaster also argues summary judgment was improper because there is evidence indicating Dr. Dewitt did not know in May that Adderall caused his hospitalization. According to McMaster, the May discharge summary, which he claims does not link his psychosis to any medication, demonstrates Dr. Dewitt did not know the cause of McMaster's injury at that time. Instead, he argues it was not until June that Dr. Dewitt determined Adderall was the cause of his psychosis, as evidenced by the diagnosis in the June discharge summary. Therefore, McMaster asserts it was not possible for him to know in May that he had suffered an Adderall induced psychosis because not even Dr. Dewitt knew the cause of his May hospitalization.

We reject this argument. First, the record does not support the assertion that Dr. Dewitt did not know the cause of McMaster's May hospitalization. McMaster testified in his deposition that Dr. Dewitt *told him* he suffered an Adderall induced psychosis in May. In addition to this testimony, medical records from McMaster's May hospitalization indicate his illness was "likely substance induced from [prescription] pills" and due to "overutilization of Adderall." Furthermore, the May discharge summary—written by Dr. Dewitt—stated, "It was felt that the patient had been overusing his Adderall . . . [and] that might have precipitated this delusional condition."

Second, even assuming McMaster's allegation regarding Dr. Dewitt's knowledge to be true, this would not give rise to a genuine issue of *material* fact. *See Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166 ("[I]t is not sufficient for a party to create . . . an issue of fact that is not genuine."). Dr. Dewitt's knowledge is immaterial to our determination of when the statute of limitations began to run. Instead, under the discovery rule, the focus is on what McMaster knew and when he knew it—not how and from whom he learned it—and the record demonstrates McMaster knew the cause of his injury in May.

McMaster's argument also confuses the event that triggers the running of the statute of limitations under the discovery rule. McMaster claims the statute of limitations did not begin to run until he discovered that Dr. Dewitt's negligent conduct caused his injury. Under the discovery rule, however, the event that commences the running of the statute of limitations is the injury, *if* the facts and circumstances are such that a reasonable person would inquire into whether the injury gives rise to a claim against the defendant. *See Knox*, 362 S.C. at 570, 608 S.E.2d at 462; *see also Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (rejecting appellant's contention that "the time of discovery is the time when the treating physician's actual negligence becomes known"). Here, the "injury" is the May hospitalization.[3] Thus, the question before us is whether "the facts and

[3] McMaster expressly stated at the summary judgment hearing that his May and June hospitalizations constituted the same injury:

> [I]t's no question that this is an entire psychotic event that is occurring . . . from May 13th all the way up until he is discharged from the second hospitalization on July 10. The fact that he was dismissed and then had to come

circumstances of [the May hospitalization] would put a person of common knowledge and experience on notice . . . that some claim against [Dr. Dewitt] might exist." *Id.* (citation omitted). We find as a matter of law McMaster's May hospitalization, coupled with his knowledge that it was induced by Adderall, put him on notice of a claim against Dr. Dewitt and commenced the running of the statute of limitations.

B. Sham Affidavit

McMaster also argues the circuit court erred in granting summary judgment because it refused to consider his affidavit, which contained evidence that he did not know in May he suffered a medication induced psychosis. We find the circuit court acted within its discretion.

A trial court may exclude an affidavit when it was submitted "to contradict that party's own prior sworn statement" in "an attempt to create a sham issue of material fact." *Cothran*, 357 S.C. at 218, 592 S.E.2d at 633. Our supreme court delineated the following considerations for "distinguishing between a sham affidavit and a correcting or clarifying affidavit":

> (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the

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> back shortly thereafter does not mean that they are not connected and that he was not continuing to be under that disability during that entire period of time.

Under McMaster's own theory of the case, the June hospitalization was a continuation of the May injury. Thus, his May hospitalization is the relevant injury for determining when the statute of limitations began to run. *Cf. Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 523-24, 443 S.E.2d 537, 538-39 (1994) (holding that when injuries constitute two separate and distinct harms, the statute of limitations begins to run at different times for each injury).

> later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

Id.

The circuit court listed these six considerations in its order and made findings to support its ruling. First, the court found McMaster "has not offered an explanation for his contradictory statements." We agree and find this consideration weighs in favor of excluding the affidavit. A deponent "cannot create a conflict and resist summary judgment with an affidavit that . . . does not give a satisfactory explanation of why the testimony is changed." *Torres v. E.I. De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. 2000) (citation omitted). Explanations that may be satisfactory include the need to correct misstatements made during the deposition, *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705 (3d Cir. 1988), to "elaborate[] upon or clarif[y] information already submitted," *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 867 (8th Cir. 2010), and to alter testimony based on the discovery of new evidence, *Ralston v. Smith & Newphew Richards, Inc.*, 275 F.3d 965, 973 (10th Cir. 2001). McMaster's affidavit contains no justification. In fact, the affidavit makes no reference to his deposition testimony at all. *See Torres*, 219 F.3d at 20-21 (affirming decision to strike contradictory affidavit because it provided no explanation and made "no reference to the contrary statements in [the] deposition at all").

McMaster contended in his Rule 59(e), SCRCP, motion and argues on appeal the circuit court erred in finding he offered no explanation because Dr. Dewitt "could not have told him a diagnosis of 'drug induced psychosis' until at least June 25, 2008" based on the diagnoses in the May and June discharge summaries. This assertion, with no accompanying allegation that his prior testimony was in error, does not explain why McMaster's testimony was contradictory. Because McMaster has provided no explanation for his contrary statements, we find the record supports the circuit court's finding as to this consideration.

The second *Cothran* consideration requires the circuit court to take into account "the importance to the litigation of the fact about which there is a contradiction." 357 S.C. at 218, 592 S.E.2d at 633. Under this consideration, the more important the fact contradicted by the affidavit is to the outcome of litigation, the more likely

a circuit court will be justified in refusing to consider the affidavit. *See Ralston*, 275 F.3d at 973 (finding affidavit was a sham when it contradicted deposition testimony that was "detrimental to [plaintiff]'s sole remaining cause of action"); *Martin*, 851 F.2d at 705-06 (disregarding affidavit because the contradictory fact contained in the affidavit was "of considerable importance" to the litigation). The circuit court found "the date on which [McMaster] had notice of his claim is a central issue in this case." We agree. The statements in the affidavit claiming McMaster did not know in May that he suffered a medication induced psychosis directly contradict his prior testimony on a fact that is pivotal to whether the statute of limitations bars his claim. This consideration weighs in favor of excluding the affidavit.

Regarding the third *Cothran* consideration—"whether the nonmovant had access to this fact prior to the previous sworn testimony," 357 S.C. at 218, 592 S.E.2d at 633—the circuit court did not make a specific finding. However, it is obvious McMaster "had access" to this information because it was within his own personal knowledge. Thus, this consideration weighs in favor of excluding the affidavit.

As to the fourth consideration—"the frequency and degree of variation between" the deposition testimony and the statements in the affidavit, *id.*—the court found the "testimony in his prior deposition varies greatly from the statements in his affidavit." The record supports this finding. McMaster testified three times he knew in May that he was hospitalized for Adderall induced psychosis, and he never expressed doubt during the deposition as to when he learned this. Because his statement in the affidavit—"Neither [Dr. Dewitt] nor anyone else at that time [in May] suggested that Adderall or other medications had caused me to have paranoid psychosis"—directly contradicts his deposition testimony, this consideration weighs in favor of excluding the affidavit.

Regarding the court's finding as to the fifth consideration—"[t]here has been no indication that [he] was confused during his deposition"—McMaster asserts that on several occasions during his deposition, he stated his "memory was faulty," which he argues is adequate to show he was confused at the time. We decline to address this argument because McMaster did not assert to the circuit court that this portion of his deposition indicated he was confused. *See Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (stating "a matter may not be raised for the first time on appeal"). Additionally, the record on appeal does not include the portions of McMaster's deposition testimony in which he

supposedly made these statements. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

Finally, McMaster submitted the affidavit containing this new information "two days before [the motion for summary judgment] was scheduled to be heard." The last-minute submission of the affidavit indicates McMaster was attempting to create an issue of fact for purposes of summary judgment. *See City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 476 (8th Cir. 2006) ("The timing of the affidavit . . . indicate[s] that the [plaintiff] engaged in a last-minute effort to create a genuine issue of material fact to prevent the . . . entry of summary judgment in [the defendant]'s favor."). This consideration weighs in favor of excluding the affidavit.

We find the circuit court acted within its discretion in refusing to consider the affidavit. The evidence in the record supports the circuit court's findings as to each applicable consideration, and those findings support the court's conclusion that the affidavit was submitted in "an attempt to create a sham issue of material fact." *Cothran*, 357 S.C. at 218, 592 S.E.2d at 633.

IV. Conclusion

We find the circuit court properly granted summary judgment because there was no genuine issue of material fact regarding whether McMaster's claims were untimely under the applicable statute of limitations.[4] Thus, the order of the circuit court is **AFFIRMED**.

THOMAS and LOCKEMY, JJ., concur.

[4] We decline to address McMaster's argument that summary judgment was inappropriate as to Carolina Psychiatric due to its failure to plead the statute of limitations as an affirmative defense. McMaster did not raise this argument to the trial court. *See Hill*, 389 S.C. at 21, 698 S.E.2d at 623.