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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY COMMON PLEAS COURT
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2023-001132
Trial Court Case No. 2018-CP-26-00307

Wedgewood Condominium Association, Respondent,

v.

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as Successor by Merger to Centex Construction Company, Inc., and Centex Construction, LLC; Crescent Engineering, Inc., Defendants,

Of which Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as Successor by Merger to Centex Construction Company, Inc., and Centex Construction, LLC, are the Appellants.

and

Centex Homes, a Nevada General Partnership, Third Party Plaintiff,

v.

Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; Frank Harris d/b/a Frank Harris Construction a/k/a/ F. Harris Construction a/k/a Harris Drywall; Builders First Source- South East Group, LLC; Stock Building Supply, LLC f/k/a Stock Building Supply, Inc. f/k/a Carolina Builders Corporation; Michael D. Brownlee d/b/a Carolina Drywall & Interiors; Carolina Drywall & Interior, Inc., a/k/a Carolina Drywall & Interiors, Inc. a/k/a Carolina Drywall Contractors, Inc.; Roof Doctor of the Carolinas, Inc.; John D. Frazier d/b/a and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas, Inc.; Steven Bosch d/b/a The Roofer Man; Tri- City Insulation and Building Products of Myrtle Beach, Inc.; Martin Mata d/b/a Martin Masonry, Inc.; Martin Masonry, Inc.; BR Brick & Masonry, Inc.; BR Brick & Masonry, LP f/k/a BR Brick & Masonry, Inc.; Unicon Concrete, LLC; Seno's Cleaning Services; Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., Floors, Inc. Successor By Merger to Rice Planter Carpets, Inc.; Carpets by Kendall, Inc.; Reliable Floor Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants, Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third-Party Defendants.

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STATEMENT OF THE ISSUES ON APPEAL

I. Does S.C. Code Ann. § 15-3-530's three-year statute of limitations, which begins to run when a reasonable person would be on notice that a claim against another party may exist, bar a lawsuit brought by a homeowners' association twelve years after the association's property manager notified the board of directors that it may have a claim against the developer, such that the trial court erred when it denied Centex's motion for judgment notwithstanding the verdict?

II. Does a finding of gross negligence under S.C. Code Ann. § 15-3-670, a finding required to circumvent the finality provided by § 15-3-640's statute of repose, require a party to introduce evidence apart from violations of building codes and industry standards, such that the trial court erred when it denied Centex's motion for judgment notwithstanding the verdict?

III. Did the trial court reversibly err when it denied Centex's request for a jury instruction on S.C. Code Ann. § 40-11-270(E), which establishes that South Carolina law does not require subcontractors to possess licenses if supervised by the general contractor, after the plaintiff turned the alleged lack of licenses into a major trial theme?

INTRODUCTION

Wedgewood knew.

It knew it may have a claim against Centex Homes in 2005, when condominiums in the complex reported water intrusion issues from leaking windows. And it certainly knew it may have a claim by 2006, when the issues had become so repetitive that the property manager informed Wedgewood's board of directors it believed the leaking windows were a design flaw. The property manager "recommended hiring an engineering expert to determine if" the problem originated with Centex, the general contractor and developer.

Wedgewood knew, but it did not act. It did not act on the property manager's recommendation: the board promised to "notify[] Centex that an expert would be looking at the windows" (R. 2752 (Vol. VI)), but the board never notified Centex and never hired an expert. And it did not act in the years that followed: awash in red ink, the board repeatedly addressed issues in the cheapest way possible. It was not until 2016 that a new property manager approached the board with a similar request: the board should hire an attorney to investigate potential defects. This time, the board followed the recommendation. Wedgewood sued Centex in 2018.

The statute of limitations bars Wedgewood's decade-long delay in acting on its property manager's recommendation. The statute, three years on construction defect claims like this, begins to run when a reasonable person would be on notice that "a claim against another party might exist." This case hardly requires the Court to parse constructive knowledge—the undisputed evidence is that the board (who acts on behalf of the condominium owners) *actually knew* it may have a claim against Centex in 2006 because its *property manager told it so*.

Even if the statute of limitations did not bar this case, the statute of repose would. The statute of repose at the time barred any action related to improvements of real property—regardless

of manifestation—13 years after completion. That 13 years came and went long before the lawsuit: Centex completed construction in 2001, Wedgewood sued in 2018. At trial, Wedgewood argued the gross-negligence exception permitted it to unmoor the finality limitations provided by the statute of repose, but it never introduced evidence permitting a jury to make that gross-negligence finding. The undisputed evidence cut in the other direction. Centex exercised significant care in its development: it had internal and external audits, its field managers performed quality checks throughout the building process, and it worked with subcontractors to ensure commitment to quality. Wedgewood rebutted none of this. Instead, it argued a statute providing that building-code violations may be admissible evidence of gross negligence permitted Wedgewood to prove its case based on code violations alone. This approach finds no support in South Carolina law, and the trial court erred when it accepted it and denied Centex's motion for judgment notwithstanding the verdict.

Finally, while this case never should have been before the jury, once it was, the court clearly erred through its treatment of subcontractors. Despite lacking definitive proof that any subcontractors lacked licenses, Wedgewood latched onto circumstantial evidence and made it a major trial theme. Yet when Centex sought a jury instruction setting the record straight (South Carolina does not require subcontractors to obtain a license)—the Court refused it. This error meant the jury received a skewed perception about the role of contractor licenses in South Carolina.

This lawsuit was brought 17 years after the complex was completed and 11 years after Wedgewood knew it may have a claim. Both the statute of limitations and statute of repose guard against years-untimely claims such as this. The Court should reverse.

STATEMENT OF THE CASE

Centex is a homebuilding company.[1] Around the turn of the century, it developed and served as the general contractor for the Wedgewood Condominium Complex, a nine-building condominium development in North Myrtle Beach. Centex started developing Wedgewood in the late 1990's; construction was substantially finished and certificates of occupancy issued in early 2001. (R. 2615–16 (Vol. VI)). As the general contractor for the Wedgewood Community, Centex did not actually perform the homebuilding work itself. (R. 1236, line 24–R. 1237, line 1 (Vol. III)). Rather, Centex performed all the management-level work—buying the property, obtaining the permits, interfacing with the municipality, and supervising construction—and hired subcontractors to perform the actual homebuilding work. *See id*.

When construction at Wedgewood finished, Centex turned over management of the community to the Wedgewood Condominium Association. The Association operates through a board of directors: five homeowners who meet quarterly to handle the business for the complex, such as paying the bills and making decisions about repairs to the common areas. (R. 803, lines 23–25 (Vol. II)).

While the board of directors manages the overall affairs of the complex, the day-to-day work falls to a property management company. Unlike the board of directors, the property management company are "professionals" in the industry who perform all daily work for the complex, including repairs and maintenance. The property manager guides the board through its quarterly meeting: the manager sets the agenda for the meetings and "recommend . . . to do the repairs, maintenance that needs to be done." (R. 806, lines 9–15 (Vol. II)). Thus, the property

[1] For simplicity, the three appellants—Centex Homes, Balfour Beatty Construction, LLC, and Centex Construction, LLC—refer to themselves collectively as "Centex" throughout.

management company is an "extremely important part of the board's role," and the board "depend[s] on them" for expertise. (R. 836, lines 2–5 (Vol. II)).

Not long after Wedgewood was completed, the Association encountered financial difficulties. In 2007, for instance, the Association had a $53,995 deficit that ran its operating fund to a five-figure negative balance—it had to dip into its reserve account to cover the difference. (R. 2782–83 (Vol. VI)). To cover for the financial difficulties, Wedgewood's board cut some corners on maintenance. For example, a reserve study around that time explained that the Association would need to replace both the outdoor carpets and the waterproofing membrane underneath it because the carpet was glued to the membrane. (R. 2792–93 (Vol. VI)). The board, however, chose not to replace the waterproofing membrane when it replaced the outdoor carpets. (R. 869, lines 14–23 (Vol. II)). In fact, the board still has not replaced the waterproofing membrane to this day. (R. 898, lines 4–16 (Vol. II)). The board also requested that certain items be excluded as line items from its reserve account funding, including recaulking the windows and repainting the buildings' exterior. (R. 864, lines 3–9 (Vol. II); R. 2796–99 (Vol. VI)). The result of these exclusions was that the board did not have to pay as much money into the reserve account. (R. 866, lines 18–21 (Vol. II)).

Another issue the board ignored was leaking water. In April 2005, a member of the Wedgewood board stated[2] at a quarterly meeting that "the caulking around the windows is going

[2] Because it was so long ago, the parties understandably had a hazy recollection regarding the years immediately after Wedgewood's completion. For instance, in response to a question at trial about the reserve study, a member of the Wedgewood board stated that "This was in 2007. What is that, sixteen years ago? I do not recall all of the specifics of this." (R. 865, lines 6–8 (Vol. II)). Given this, both parties agreed the board's meeting minutes were "the best way to recall" the specifics from that time. (R. 866, lines 3–7 (Vol. II)). The meeting minutes summarize the discussion topics from the quarterly board meetings, and a Wedgewood witness stated that the meeting minutes are an accurate summary of those topics. (R. 247, lines 12–20 (Vol. II)).

bad, causing leaks." (R. 2749 (Vol. VI)). Nine months later, an owner "reported that the master bedroom window is still leaking after being caulked." (R. 2794 (Vol. VI)). This finally culminated in October 2006, in a report from the building's property manager, Chuck Gornick, related to repairs in three buildings:

> Mr. Gornick stated that it appears that in windows that are double and triple hung, there is a gap at the top of the strip between the windows. It is believed that this is where the leaking is occurring. Mr. Gornick ***recommended having an engineering expert look at these windows to try and determine if this is a Centex problem***. The Board recommended notifying Centex that an expert would be looking at the windows.

(R. 2752 (Vol. VI)).[3] While the Wedgewood board typically listened to its property manager, the board did not do so here. A member of the Wedgewood board, Randall Spencer, "d[id] not recall that anything further was done about" the property manager's recommendation to hire an expert. (R. 904, lines 17–22 (Vol. II)). The same windows remain in place today. (*Id*. at line 23–R. 905, line 2).

A decade later, the board had hired a new property manager and four of five board members had turned over. Just as Mr. Gornick had done a decade earlier, the new property manager approached the board about "construction issues that are not the normal maintenance" issues. (R. 838, line 23–R. 839, line 7 (Vol. II)). The property manager recommended that the board speak to an attorney. *Id*. This time, the board listened. It asked the property manager to assist with retaining an attorney, which the property manager did. (R. 839, lines 8–14 (Vol. II)). The attorney, Wedgewood's counsel in this appeal, retained an expert witness to examine the property. The expert identified several alleged construction defects, including "gaps in the flashing" of the

[3] Throughout, unless otherwise noted, all emphasis is added and all internal quotations and citing references are omitted.

windows. (R. 952, line 24–R. 953, line 1 (Vol. II)). Relying on that report, Wedgewood sued Centex on January 18, 2018.

Before trial, Centex moved for summary judgment, arguing the statute of limitations barred all Wedgewood's claims. (R. 0036–0091 (Vol. I)). Centex supported its motion with the 2006 board minutes about hiring an expert, along with several other pieces of evidence. Centex cited ***dozens*** of homeowner complaints, from as early as 2004, reporting "water leak[s]" in various units. (R. 0041 (Vol. I)). It cited evidence that, in 2005, other homeowner association presidents requested that Wedgewood "speak with Centex about many of the associations needing the windows fixed." (R. 0043 (Vol. I)). And it cited evidence that, in 2008, the property manager stated he had notified Centex about water-sealant issues. (R. 0052 (Vol. I)).

The trial court granted Centex's motion for summary judgment only in part. It dismissed all Wedgewood's claims related to plumbing and curb ramps as barred by the statute of limitations. In doing so, it relied on the board's meeting minutes from 2012, which stated that plumbing issues may be "due to poor installation on the builder's part." (R. 0001–0007 (Vol. I)). It rejected Centex's motion for the other claims without explanation.

The case proceeded to trial.[4] Wedgewood called only three witnesses: Mr. Spencer—the longtime member of the Wedgewood board of directors; the expert who opined on the construction defects, and a damages expert. (R. 661, lines 9–17 (Vol. II)) (listing the three witnesses). Because the statute of repose ran years before Wedgewood sued, Wedgewood needed to prove Centex was grossly negligent in construction of the property. Wedgewood attempted to discharge its burden of proving gross negligence solely through evidence of building code violations, along with lesser evidence of industry standards. It claimed its code-violations-only approach sufficed because of a

[4] The jury trial took place from May 22–26, 2023.

South Carolina evidentiary rule providing that building code violations may be admissible as evidence of gross negligence. S.C. Code Ann. § 15-3-670(B) (Supp. 2022) ("the violation of a building code . . . does not constitute per se fraud, gross negligence, or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness."). As Wedgewood stated in closing arguments, it believed the statute of repose was no object because "you can bring a lawsuit after . . . 13 years if—***if you can prove violations of building codes***, and that is what we've done here." (R. 1660, line 23–R. 1661, line 2 (Vol. IV)).

That lined up with its evidence. Wedgewood's expert opined repeatedly about asserted building code violations from Centex, (R. 1049, lines 1–15 (Vol. III)), but Wedgewood never introduced any evidence about Centex's practices, supervision, or other evidence indicative of gross negligence. It called no Centex witnesses. It called no witnesses from subcontractors. And it called no witnesses from the city, county, or any other individual who supervised the Wedgewood project.

Comparatively, the jury heard substantial evidence about the care Centex put into the Wedgewood project. The undisputed trial testimony was that Centex had several quality-control steps in place to identify and correct safety issues. Its field managers—on-site leaders at Centex projects—were required to be in *every* room of *every* house *every* day that the home was under construction, a requirement so ingrained in Centex culture that it had its own acronym: EEE. (R. 1234, lines 11–21 (Vol. III)). The field managers also performed "inline inspections" of each home: detailed examinations at each stage of home development to ensure the home was built as promised. (R. 1233, line 10–R. 1234, line 10 (Vol. III)). If the field managers fell down on the job, Centex backstopped their performance through a yearly, weeklong unannounced internal audit of construction operations. (R. 1234, line 22–R. 1236, line 17 (Vol. III)). And just before closing,

Centex hired a third-party quality inspector to examine all aspects of the home. (R. 1243, lines 7–16).

It was also undisputed that Centex had several training programs in place to rectify any safety issues identified. Centex performed monthly technical training with field managers, where it would review construction-related topics including code requirements, industry standard requirements, and product requirements. (R. 1229, line 25–R. 1230, line 17 (Vol. III)). It executed "toolbox talks," weekly training programs incorporated into production meetings that would discuss issues identified in the field, including safety issues. (R. 1231, line 10–R. 1232, line 5). And it held "tailgate meetings," biweekly discussions with subcontractors about topics ranging from field concerns to scheduling and safety violations. (R. 1232, lines 9–24).

Despite this multi-layered quality-control process, it was undisputed that there were certain construction deviations at Wedgewood. For instance, Centex's expert agreed that windows within the complex needed to be repaired. (R. 1319, lines 11–18 (Vol. III)). He also noted, however, that there were real costs to the board's inaction:

> Q. What is the impact of not taking action of a leaking window in 2006 when you are looking at it now 17 years later?
> A. I doubt very seriously that this would be an issue today if the recommendation from the property manager had been followed. . . . [I]n the real world, things happen, but it's not going to happen to the magnitude that it is happening here if it is properly maintained.

(R. 1352, line 18–R. 1353, line 2 (Vol. III)).

Centex also introduced some of the same evidence it cited at summary judgment. In particular, it cross examined Mr. Spencer (Wedgewood's only fact witness) about the 2006 meeting minutes where the property manager "recommended having an ***engineering expert*** look at these windows to ***try and determine if this is a Centex problem***." (R. 2752 (Vol. VI)). Mr. Spencer

agreed the property manager told the board about it, *see* (R. 904, lines 5–16 (Vol. II)), and he did not recall the board doing anything in response, (*id*., lines 17–22).

Centex also introduced evidence about issues that put Wedgewood on notice for the years that followed. The board spent nearly $90,000 to replace exterior trim in 2010 (R. 2755–2765 (Vol. VI)); at trial, Wedgewood's expert claimed the exterior trim had prematurely deteriorated, (R. 949, line 22–R. 950, line 16 (Vol. II)). Later in 2010, the board spent $2,300 to make water intrusion repairs at the front entrances, (R. 2775–76 (Vol. VI))—Wedgewood's expert later asserted that was a defect, too, (R. 1026, lines 13–15 (Vol. III); R. 1028, line 23–R. 1029, line 6). Across 2013 and 2014, Wedgewood spent more than $12,000 to repair rotted flooring at the front walkways. (R. 1366, line 14–R. 1367, line 11 (Vol. III); R. 2777–78 (Vol. VI)). And in early 2012, the board spent $12,595 to replace damaged drywall at the exterior walkways, (R. 2766–69 (Vol. VI)), which, sure enough, is something Wedgewood's expert faulted Centex for. (R. 947, lines 2–5 (Vol. II)).

At the close of Wedgewood's case, Centex moved for a directed verdict. It argued both the statute of limitations and statute of repose barred Wedgewood's claims. (R. 1203, line 1–R. 1204, line 6 (Vol. III)). In response, Wedgewood conceded it had a statute of repose problem, but claimed its "expert testified extensively that there were building code violations, manufacturers' specification violations, and standard industry violations. All of which is what I would call the ***escape valve*** in the statute of repose." (R. 1209, line 21–R. 1210, line 1). The judge denied Centex's motion. (R. 1211, lines 16–18).

In closing arguments, Wedgewood reiterated the building-code-focused view of the case. It mentioned "building code" no less than twenty-three times in its closing and rebuttal argument. It led its evidentiary argument by stating "It is overwhelming that the defendant built a building in ***violation of the building codes***." (R. 1616, lines 6–8 (Vol. IV)). And it used building codes as the

sole basis to circumvent the statute of repose, arguing the statute of repose was inapplicable because "you can bring a lawsuit after a certain period of time after 13 years if—if you can prove ***violations of building codes***, and that is what we've done here." (R. 1660, line 24–R. 1661, line 2; *see* R. 1625, lines 12–14 ("The law allows that when you ***violate building codes***, there is no limitation on that.").

Throughout the case, Wedgewood also sought to make subcontractor licenses a major trial theme. Wedgewood claimed, though it never introduced evidence, that two of Centex's subcontractors did not possess state licenses. Centex sought to exclude this evidence in a motion in limine, (R. 745, lines 6–22 (Vol. II)), a motion the trial court initially granted but later walked back. It ultimately stated that Centex had opened the door to questioning about contractors without state licenses because Centex introduced testimony about its procedures and due care. (R. 1259, line 16–R. 1260, line 2 (Vol. III)). The Court hedged that ruling by stating that "we all know it is not a violation of any law or requirement at the time, but I think he can use it." *Id*. With the door open, Wedgewood used this evidence repeatedly, with Centex's fact witnesses and experts, and also argued about unlicensed contractors in closing argument. (R. 1278, line 15–R. 1281, line 20; R. 1289, line 25–R. 1290, line 3; R. 1414, line 25–R. 1416, line 10; R. 1619, lines 13–21 (Vol. IV); R. 1661, lines 19–22). This evidence was important, Wedgewood claimed, because it was evidence of industry standard violations. (R. 1127, lines 5–14 (Vol. III)).

At the charge conference, Centex sought a jury instruction that clarified the law around contractor licenses. It sought to charge the following language: "S.C. Code § 40–11–270 provides that a licensed contractor "may utilize the services of unlicensed subcontractors to perform work … ; provided, the licensee provides supervision." (R. 1956 (Vol. IV)). But the trial judge again walked back her earlier assessments. The judge stated that the instruction "is commenting way too

close on the facts of the case" and that Centex "ha[d] a lot of dots [ellipses] in the middle of this [instruction]." The judge refused the charge. (R. 1602, lines 10–16).

The final verdict form had the jury answer just one question: the claim of gross negligence. (R. 0020 (Vol. I)). The jury returned a $6.75 million verdict for Wedgewood. (*Id*.; *see also* R. 0008–0014).

Both the trial court and Wedgewood recognized the case had some appellate holes. (*See* R. 1694, lines 12–14 (Vol. IV) (trial judge stating that "if anything is reversible in this case, it is on the Statute of Repose and Statute of Limitations"); R. 1604, lines 3–5 (Wedgewood's counsel stating that "there is a lot in this case to be reversed on, on both sides.")). Yet the trial judge denied Centex's post-trial Motion for Judgment Notwithstanding the Verdict or a New Trial. Centex's motion recited the same arguments about the statute of limitations and statute of repose it raised in its motion for directed verdict, while also moving for a new trial on several evidentiary points. (R. 298–333 (Vol. I)). In the JNOV hearing, when asked for "any basis for finding that the defendants were grossly negligent o[th]er than the building code violations," Wedgewood pointed back only to the manufacturer's specifications and industry standards. (R. 1856, line 12–R. 1857, line 5). The court nonetheless denied Centex's motion. (R. 0014–15). Centex, by way of notice of appeal served July 13, 2023, appeals from the trial court's denial of this motion. (R. 2800).

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV," the Court of Appeals "applies the same standard as the trial court." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009). It views all evidence and inferences in the light most favorable to the non-moving party. *Id*. Reversal is warranted "when there is no evidence to support

the ruling or when the ruling is controlled by an error of law." *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007).

Comparatively, the Court reviews evidentiary determinations and jury instructions for abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark*, 339 S.C. at 389.

ARGUMENT

I. The statute of limitations bars Wedgewood's claims against Centex.

The Court already decided the core issue in this case. In *Barr v. City of Rock Hill*, this Court held—under extremely similar facts—that a homeowner's receipt of information about issues with their home is notice that the homeowner may have a claim, triggering the statute of limitations. 330 S.C. 640, 643, 500 S.E.2d 157, 159 (Ct. App. 1998). *Barr* also held that a homeowner's years-later decision to hire an expert that identifies all damage is immaterial when the homeowner is already on notice of the claim. *Id*. Those holdings, demonstrative of many others from the Court, resolve the issue: Wedgewood was on notice of a potential claim against Centex by 2006, when its property manager told the board to "hav[e] an engineering expert look at the windows to determine if this is a Centex problem." That the Wedgewood board ignored its property manager for a decade does not absolve it. This Court should reverse.

A. The three-year statute of limitations begins running when a reasonable person should have discovered they have a claim.

The statute of limitations in construction defect cases is three years. S.C. Code Ann. § 15-3-530(3) (2005). Under the "discovery rule," the statute of limitations begins to run when the cause of action "reasonably ought to have been discovered." *Dean v. Ruscon Corp*., 321 S.C. 360,

363; 468 S.E.2d 645, 647 (1996). This is an objective test. *Dorman v. Campbell*, 331 S.C. 179, 184; 500 S.E.2d 786, 789 (Ct. App. 1998). Actual knowledge is not required, and it is "immaterial" that a party "may not comprehend the full extent of the damage." *Id*. Rather, the statute starts running when "the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists." *Graham v. Welch, Roberts, & Amburn LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (quoting *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997)). Reasonable diligence means only that "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." *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019).

"When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court." *Gibson*, 383 S.C. at 406–07. Only if there are disputed facts does the question become one for the jury. *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.*, 435 S.C. 176, 177; 866 S.E.2d 577, 578 (2021).

B. A reasonable person would have known—and Wedgewood actually did know—it may have a claim against Centex in 2006.

Barr resolves this case. There, home purchasers sued the seller (in 1994) after a structural engineering report (in 1992) "revealed numerous problems with the house." 330 S.C. at 643. The unearthed problems included improper installation of floor joists, excessive moisture in the joists, improper support for the floor sills, and standing water beneath the home. *Id*. Five years before, however (in 1987), the purchasers began receiving annual termite inspections that "revealed excessive moisture under the Barrs' home." *Id*. at 642. Those termite inspections rendered the

purchasers' claim time-barred.[5] *Id*. at 645–46. The "dispositive question," the Court stated, was "whether the inspection reports provided notice of the defects to the Barrs." *Id*. at 644. Answering in the affirmative, the Court held that the report was sufficient to "advise[] the Barrs of water and other problems under their house[.]" *Id*. at 645. This triggered the statute of limitations. *Id*. That the Barrs did not "investigate further to determine the extent of the problems" did not change the result—the standard is objective, not subjective, and "[i]f the Barrs had exercised reasonable diligence and investigated the problems . . . they could have realized the magnitude of the problem and brought suit before the statute of limitations ran." *Id*. at 645–46.

Barr stands in good company. Time and again, the Court has reiterated that construction-defect plaintiffs cannot, consistent with the statute of limitations, ignore information identifying potential construction flaws until they develop a full-blown theory of recovery.

For instance, in *Dillon County School District No. 2 v. Lewis Sheet Metal Works*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *overruled on other grounds by Atlas Food Sys. & Servs. v. Crane Nat'l Vendors Division*, 319 S.C. 556, 462 S.E.2d 858 (1995), a school noticed roof leaks beginning in 1970. By 1972 the architect referred to it as a "continual problem." *Dillon County*, 286 S.C. at 210. Yet the school did not sue until 1981, one year after hiring a roofing expert that identified several flaws in the design. *Id*. at 213–14. Affirming dismissal, the Court held the action barred by the statute of limitations because the school "reasonably should have known its problem with the roof was a serious one" in 1972, when the architect called it a "continual problem." *Id*. at 216. The school's protestations about its years-later expert report were "immaterial" because

[5] Barr arose on appeal from a grant of summary judgment. The standard is the same as applies here. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219 n.4, 578 S.E.2d 329, 334 n.4 (2003) ("The standard for summary judgment mirrors the standard for a directed verdict under Rule 50(a).").

constructive knowledge, not actual knowledge of the "full extent of the damage," is the standard. *Id*. at 215.

The federal court did the same in *Ashley River Indus., Inc. v. Mobil Oil Corp*., 135 F. Supp. 2d 733 (D.S.C. 2000), *aff'd*, 245 F.3d 849 (4th Cir. 2001). There, plaintiffs alleging environmental contamination received a letter (in 1985) from an agency, warning "about the 'potential for hazardous wastes in soil on your site.'" *Ashley River*, 135 F. Supp. 2d at 742. The letter went "so far as to give ***suggestions of what the plaintiffs should do*** in order to verify whether contamination actually existed on the property." *Id*. As the court stated, "it is difficult to imagine more plain, direct language giving rise to at least a reasonable suspicion that a cause of action might exist[.]" *Id*. The court rejected the plaintiffs' argument that the letter discussed only "potential" contamination because "the discovery rule does not require . . . knowledge of the full extent of the damage," and the "plaintiffs' efforts at discovering a problem were wholly insufficient." *Id*.

Barr, *Dillon County*, and *Ashley River* are but a few that follow the same well-worn path:

- Homebuyers were on notice of complained-of condition—flood elevation problems and an unpermitted addition—when they received a flood elevation certification identifying the discrepancy and a letter "indicating a potential problem with the addition"; claim barred. *Dorman*, 331 S.C. at 185–86.
- Plaintiff's discovery of crack in building, and attribution of crack to neighbor's pile-driving, started the clock for statute of limitations; claim barred. *Dean*, 321 S.C. at 363–66.
- A homeowner's guest's notification about "numerous problems" with various parts of the house, including "interior water damage," put homeowner on notice of claim; claim barred.

Allwin v. Russ Cooper Assocs., Inc., 426 S.C. 1, 4–5, 15, 825 S.E.2d 707, 709, 714 (Ct. App. 2019) (McDonald, J.).

This is yet another case down the same path. The statute of limitations here began running no later than October 2006. That is when the property manager told Wedgewood's board of directors that he was concerned about a "gap at the top of the strip between the windows." (R. 2752 (Vol. VI)). He "recommended having an engineering expert look at these windows to try and determine if this is a Centex problem." *Id*. This notice from the property manager tracks the architect's comments about a "continual problem" in *Dillon County*, the termite inspections in *Barr*, and the letter in *Ashley River*—it put a reasonable party in Wedgewood's position on notice "that some claim against another party *might exist*." *Barr*, 330 S.C. at 645 (emphasis in original). And the property manager here, like the letter in *Ashley River*, even went "so far as to give suggestions of what the plaintiffs should do" to determine if defects existed: hire an expert. *See* 135 F. Supp. 2d at 742. Given the property manager's words—recommending an expert to "*determine* if this is a Centex problem"—"it is difficult to imagine more plain, direct language giving rise to at least a reasonable suspicion that a cause of action might exist[.]" *See id*.

Moreover, the property manager's role here mirrors the architect's role in *Dillon County* and the inspection company's role in *Barr*: it was the party with expertise. Wedgewood's board of directors is a volunteer group of homeowners that meets quarterly to "fix what needs to be fixed and pay the bills." (R. 804, lines 11–12 (Vol. II)). The property management company, comparatively, are "professionals" who set the meeting agenda and recommend necessary maintenance and repairs. (R. 806, lines 9–15). Thus, the property management company is an "extremely important part of the board's role," and the board "depend[s] on them for all of our agenda" and expertise. (R. 836, lines 2–5). Given the property manager's superior knowledge, the

board "either knew or reasonably should have known its problem with the [windows] was a serious one" when the property manager informed the board. *Dillon County*, 286 S.C. at 216.

Further, the fact that the board later hired an expert (through its attorney) to perform a detailed inspection is irrelevant for the statute of limitations. The school district in *Dillon County* did that, too; it claimed its lawsuit was timely because of that expert's work. 286 S.C. at 213–14. So did the *Allwin* plaintiff—in fact, that plaintiff hired the ***same expert*** as Wedgewood did here: Ross Clements. *Allwin*, 426 S.C. at 9–10. And the *Barr* plaintiffs hired an expert years later, too—that expert wrote a structural engineering report that detailed all damage. *Barr*, 330 S.C. at 643. But in all those cases, the decision to wait until an expert identified the full "magnitude of the problem" was not relevant. *Id*. at 646. The plaintiffs "could have realized the magnitude of the problem" if they investigated the original notice. *Id.* So too here. The board was on notice by 2006 that a claim against Centex "might exist." *Dorman*, 330 S.C. at 185; *see* (R. 2752 (Vol. VI)). That the board waited over a decade to investigate that claim does not rectify its statute of limitations problems.

It is also "immaterial" that Wedgewood did not comprehend the entire extent of damage in 2006. *Dean*, 321 S.C. at 364. The key statute of limitations question is when a party is on notice that "*some claim* against another might exist." *Dorman*, 330 S.C. at 185. "The statute of limitations begins to run at this point, and not when advice of counsel is sought or a full-blown theory of recovery is developed." *Id*. Thus, it does not matter for the statute of limitations that Wedgewood's expert's full-fledged examination uncovered *more* issues in 2016 than the property manager did in 2006. The issues the property manager brought to the board's attention in 2006 were some of the ***same issues*** the expert later testified about at trial. *See, e.g*., (R. 952, line 24–R. 953, line 1 (Vol. II)) ("We found gaps in the flashing, and these areas point to locations where there are holes in

between the flashing and the window frame."). If Wedgewood's board had followed through on their assertions in 2006 and had an expert look at the windows, the remaining problems likely would have been uncovered. This is all the truer because of the repeated issues Wedgewood had with many other parts of the building from 2010 through 2013, well outside the three-year statute of limitations period. (R. 2755–78 (Vol. VI)).

The point here, as in *Barr*, is that the property manager's assessment (a) put the plaintiffs on notice of potential construction problems and (b) gave them reason to investigate further. *See* 330 S.C. at 645. Had they promptly done so here, "they could have realized the magnitude of the problem." *See id.* at 645–46. Not only that, had they addressed the issues in a timely fashion, the issues would not have reached the same magnitude. (R. 1352, line 18–R. 1353, line 2 (Vol. III)). Wedgewood's failure to timely investigate the property manager's concerns bars Wedgewood's claims. *See, e.g.*, *Ashley River*, 135 F. Supp. 2d at 742 ("[T]he crux of the inquiry . . . is when the plaintiffs had enough information such that it should have acted promptly to determine whether a cause of action might exist against the defendants for the injuries claimed in this case.").

Wedgewood will surely rely on general principles to argue the statute of limitations is a question for the jury. Not so here. The statute of limitations creates a jury question only if there's conflicting evidence for the jury to resolve. *Gibson*, 383 S.C. at 406–07. Conflicting factual evidence drove the result in *McAlhany v. Carter*, which determined there was a jury question because the plaintiff's "testimony was conflicting as to when he first discovered mold within the home." 415 S.C. 54, 63–64, 781 S.E.2d 105, 110–11 (Ct. App. 2015). So too in *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Development Co.*, 425 S.C. 268, 275, 821 S.E.2d 504, 508 (Ct. App. 2018), *aff'd in part, rev'd in part*, 435 S.C. 176, 866 S.E.2d 577 (2021). That case involved a conflicting record about when enough *individual homeowners* experienced issues to impute

knowledge to the association writ large. The record indicated that some homeowners experienced water-related issues in 2003, but others "only discovered issues with their construction when the rains returned in 2008 and 2009." *Id*. at 275. Resolving that conflict, and thus when the *association* should have known, was a jury question. *Id*. at 275–76.

There is no conflicting evidence here. The board acts on behalf of the condominium owners, so its knowledge is imputed to the owners as a collective. *See Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."); *Dorman*, 331 S.C. at 185 (attorney's knowledge of information in letter imputed to clients). No one disputes that the property manager told the condominium's board in 2006 that window leaks were a repeated issue. (R. 904, lines 4–8 (Vol. II)) (Mr. Spencer agreeing). No one disputes that the property manager "recommended having an engineering expert look at these windows to try and determine if this is a Centex problem." (*Id*. at lines 11–13) ("Q. And he recommended that the board hire an engineering expert to look at that, correct? A. Yes."). And no one disputes the board agreed to "notify Centex that an expert would be looking at the windows." (R. 2752 (Vol. VI)). The only remaining question is whether these undisputed facts provided the board with the necessary notice that it may have a claim against Centex. *Barr*, *Dorman*, and *Dillon County* answer that question in the affirmative. The Court should hold that the statute of limitations bars Wedgewood's claims.

II. The statute of repose bars Wedgewood's claims against Centex.

The statute of limitations is not Wedgewood's only timeliness problem. Wedgewood sued Centex more than 16 years after the certificates of occupancy issued for the complex. The statute of repose—enacted to establish finality in construction actions—indisputably barred this action unless Wedgewood could prove Centex was liable for gross negligence. But Wedgewood made no

attempt to prove gross negligence. Wedgewood introduced no evidence about Centex's awareness of deficient building performance. And Wedgewood introduced no evidence about Centex's lack of care in the project. In fact, Wedgewood introduced no testimony from anyone associated with the project at all. Instead, Wedgewood was clear: it intended to prove gross negligence solely based on building code violations. That approach flunks South Carolina law. Evidence of building code violations alone is not sufficient to establish a jury question on gross negligence, because code violations do not indicate whether they were the result of a mistake (insufficient) or conscious wrongdoing (sufficient). And S.C. Code § 15-3-670(B) does not relieve Wedgewood of its burden of proof—instead, it merely reiterates how Wedgewood's proofs fell short.

At bottom, this dispute distills to a simple question: does bare evidence of building code violations (and lesser industry standard violations), in the face of uncontroverted testimony about Centex's care, suffice to establish gross negligence under South Carolina law? It does not.

A. The gross negligence exception to the statute of repose.

All parties agree that South Carolina's statute of repose applies in this case. S.C. Code Ann. § 15-3-640 (Supp. 2022); (R. 1114, lines 2–13 (Vol. III)) (Wedgewood agreeing that it has "a Statute of Repose issue"). "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 404; 438 S.E.2d 242, 243 (1993) (quotation omitted). The statute of repose contained in § 15-3-640 bars actions for damages brought more than eight years[6] after substantial completion of an improvement to real property unless a party is "guilty of fraud, gross negligence, or recklessness." S.C. Code Ann. § 15-3-670(A) (Supp. 2022). Because Wedgewood made no argument that Centex

[6] The prior version of the statute, which provided a 13-year statute of repose, applied when Wedgewood was completed. Under either version, Wedgewood's claims were barred unless the gross-negligence exception applied.

committed fraud or acted with recklessness, Wedgewood could succeed only if it prove Centex acted with gross negligence in building the complex.

"Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). Unlike negligence, which involves the failure to exercise ordinary care, "gross negligence is the failure to exercise slight care." *Clyburn v. Sumter Cnty. Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). When the evidence supports only one reasonable inference, gross negligence is a "matter of law for the court." *Id*.

B. Evidence of code violations alone does not meet the gross negligence standard.

Finding a defendant grossly negligent requires an inquiry into the level of awareness accompanying a deficient act. It is well-established that a mistake is not sufficient for a jury to find gross negligence. *Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 653, 677 S.E.2d 892, 902 (Ct. App. 2009), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011); *see also Pilot Indus. v. S. Bell Tel. & Tel. Co.*, 495 F. Supp. 356, 362 (D.S.C. 1979) ("Proof of error or mistake alone has been held to be insufficient to make out a case of gross negligence."). Nor can gross negligence be maintained if the defendant lacked "direct knowledge or notice" of the likelihood of risk. *Etheredge*, 341 S.C. at 311–12. And the fact that more might have been done does not establish gross negligence if the defendant exercised at least slight care. *Pack v. Assoc. Marine Inst., Inc*., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004).

Two examples illustrate this point.[7] First, in *Richland County*, the plaintiff's "only evidence demonstrating [Richland] County failed to exercise slight care" in a zoning case was an employee's "mistaken zoning designation of the property at issue." 382 S.C. at 653. That mistake, however, was "not sufficient evidence to conclude County failed to exercise slight care." *Id*. Second, in *Pack*, a decedent's estate sued state contractors for failing to monitor a juvenile detainee who, while on work release, became intoxicated from huffing gasoline and killed the supervisor. 362 S.C. at 242. The Court affirmed the trial court's decision that the contractors "exercised at least slight care in their supervision and control" of the juvenile, noting the juvenile had received counseling for his known issues with huffing gasoline, even though he was suspected of huffing gasoline the day before. *Id*. at 242, 246. "The fact that more might have been done," the court stated, "does not negate a finding that RMI employees exercised at least slight care." *Id*. at 246.

Wedgewood's attempt to turn building code violations into a litmus test for gross negligence is inconsistent with these authorities. Building code violations could exist for many reasons inconsistent with gross negligence. For instance, as in *Richland County*, the building code violations could reflect a "mistake" by Centex. *See* 382 S.C. at 653. Or as in *Pack*, the violations could reflect actions taken by others despite Centex's steps to ensure building-code compliance. 362 S.C. at 246. In that case, "the fact that more might have been done does not negate a finding that [Centex] employees exercised at least slight care." *Id*. In either of these situations, South Carolina law does not permit a finding that Centex was grossly negligent. The problem for Wedgewood is, it never even attempted to show the code violations were attributable to a lack of "at least slight care."

[7] Centex is aware of no published authority interpreting the gross-negligence exception in § 15-3-640(A). Therefore, Centex relies on authorities interpreting gross negligence under other provisions of South Carolina law.

Wedgewood's bare attempt to prove code violations, but not a lack of care, was even more deficient because of the amount of undisputed evidence establishing that Centex *did* exercise care in developing the complex. Centex introduced significant evidence about all the steps it took to ensure proper building practices: it held monthly technical training for field managers and weekly training programs discussing field issues and potential safety issues. (R. 1230, line 2–R. 1231, line 25 (Vol. III)). And it did inline inspections of all components that went into a home. (R. 1233, lines 10–25). Again, Wedgewood introduced no evidence to contradict this. It provided no testimony from anyone associated with construction of the complex. Its only evidence was that there were building-code violations. There is no basis for a jury to find gross negligence on those facts.

This conclusion—that building-code violations and industry standard violations alone are insufficient to establish gross negligence—is not unique to South Carolina: its peer courts along the Atlantic Coast have reached the same result. In North Carolina, "more than a violation of the building code is required to reach the somewhat elevated level of gross negligence." *Bashford v. N. Carolina Licensing Bd. for Gen. Contractors*, 420 S.E.2d 466, 469 (N.C. App. 1992). So too in Virginia, where the Virginia Supreme Court held that a venue's "violation of its building code for failure to have barriers in place" did not present a jury question on gross negligence. *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (Va. 1987).[8] And courts across the country agree. *Conway v. Hi-Tech Eng'g, Inc.*, 381 S.W.3d 56, 65 (Ark. 2011) (testimony that engineers did not consult industry standards did not create a fact question on gross negligence); *Rakowski v. Sarb*, 713 N.W.2d 787, 798 (Mich. App. 2006) (evidence of construction deficiencies was insufficient to survive summary judgment on gross negligence claim against inspector); *Hackathorn v. Preisse*,

[8] Notably, Virginia applies the same "scant care" standard for gross negligence as South Carolina. *See Chapman v. City of Virginia Beach*, 475 S.E.2d 798, 801 (Va. 1996).

663 N.E.2d 384, 387 (Ohio App. 1995) (testimony that plaintiff "failed to comply with applicable building codes" did not create issue of fact on recklessness).

C. S.C. Code § 15-3-670(B) does not create a code-violation exception to the gross negligence standard.

Below, Wedgewood made little effort to argue its proofs satisfied the gross negligence standard expressed by South Carolina courts. Rather, it claimed the South Carolina legislature excused it from meeting that standard through a statutory provision, S.C. Code Ann. § 15-3-670(B) (Supp. 2022). In Wedgewood's view, this provision is "the escape valve in the Statute of Repose," and it lets plaintiffs "bring a lawsuit after . . . 13 years if—if you can prove violations of building codes." (R. 1209, line 21–R. 1210, line 1 (Vol. III); R. 1660, line 23–R. 1661, line 2 (Vol. IV)). Wedgewood was mistaken.[9]

> Section 15-3-670(B) states that:
>
> > the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.

S.C. Code Ann. § 15-3-670(B) (Supp. 2022). Several parts of this provision establish that, contrary to Wedgewood's position, evidence of violations alone does not replace the need to prove gross negligence.

First, § 15-3-670(B) is explicit that "violation of a building code . . . ***does not constitute*** per se . . . gross negligence." *Id*. Were building code violations sufficient to sustain a gross negligence verdict alone, the legislature would have said so. *See State v. Landis*, 362 S.C. 97, 102,

[9] The Court reviews this question of statutory interpretation de novo. *State v. Sweat*, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008).

606 S.E.2d 503, 505 (Ct. App. 2004) ("This Court must apply clear and unambiguous terms of a statute according to their literal meaning.").

Second, the final clause—stating that "this type of violation may be admissible"—demonstrates that this provision is an evidentiary rule, not an attempt to replace the gross negligence standard. The South Carolina Code is littered with explicit evidentiary determinations by the legislature. *See, e.g.*, S.C. Code Ann. § 34-26-250(3) ("Reproduction of any credit union records *shall be admissible as evidence* of transactions with the credit union"); S.C. Code Ann. § 63-17-810 ("If the issue of paternity is referred to the Family Court, the expert's completed and certified report . . . *is admissible as evidence* without additional testing or testimony."); S.C. Code Ann. § 49-28-70(B) ("Certifications of the director under the seal of the commission as to the text or amended text of a joint ordinance and of the date or dates of submission to the Secretary of State *is admissible as evidence* in any court."); S.C. Code Ann. § 23-31-415(C) ("The results of any test administered pursuant to this section . . . *is not admissible as evidence* in a criminal prosecution for the possession of a controlled substance."). These statutes, like the provision here, are legislative determinations about *admissibility* of evidence; not anything to do with the *sufficiency* of evidence. When the legislature passes on the sufficiency of evidence, it says so. *See, e.g.*, S.C. Code Ann. § 36-3-505(a) ("The following are admissible as evidence *and* create a presumption of dishonor . . ."). Moreover, § 15-3-670(B) does not even contain a decisive evidentiary determination: the statute only expresses that building codes "***may*** be admissible," unlike the many statutes stipulating that evidence "shall be admissible," "is admissible," or the like. In short, § 15-3-670(B) merely expresses that building code evidence "may be admissible"—it does not subvert the caselaw establishing the necessary evidence for gross negligence.

Lastly, the history of this statute confirms this view. *See Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Section 15-3-670(B) was enacted as part of the Fairness in Civil Justice Act of 2011. 2011 S.C. Laws Act 52. More than two decades earlier, this Court had approved a trial judge's instruction that said nearly the exact same thing as the statute: "violation of the alleged building code was not recklessness, willfulness, or wantonness per se and could only be considered in connection with all of the other facts." *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 93, 344 S.E.2d 869, 872 (Ct. App. 1986). Best read, § 15-3-670(B) merely codifies the rule from *Kincaid*: building code violations are not per se reckless (or grossly negligent), and courts should consider building code violations only along with other facts (i.e., "may be admissible as evidence").

Read properly, the statute creates no conflict with the standard for gross negligence: evidence of building code violations "may be admissible" as evidence of gross negligence, but code-violation evidence alone cannot satisfy the burden. Rather, to establish gross negligence in construction, code-violation evidence must be paired with evidence of the absence of slight care—evidence that's wholly absent from Wedgewood's proofs.

The fact that code-violation evidence is relevant but insufficient alone is not unique to this section. Several other areas of South Carolina law have similar determinations. Most relevantly, in fraud cases, "evidence of mere nonperformance of a promise is ***not sufficient*** to establish either fraud or a lack of intent to perform." *Turner v. Milliman*, 392 S.C. 116, 123–24, 708 S.E.2d 766, 770 (2011) (quotation omitted). "An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is ***coupled with other evidence***." *Id*. Additional evidence is required because "otherwise any breach of a contract would amount to fraud." 37 C.J.S. Fraud

§ 111; *see also Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985) (relying on the C.J.S. to establish the rule in South Carolina); *see also K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 259 (2009) ("The discontinuance of a highway may be evidence of abandonment. However, mere discontinuance is not sufficient to prove abandonment."); *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236, 243, 540 S.E.2d 94, 97 (2000) ("the proximity in time between the work-related injury and the termination is not sufficient evidence to carry the employee's burden of proving a causal connection.").

Here too, an inference of gross negligence can only be made when code-violation evidence "is coupled with other evidence." *See Turner*, 392 S.C. at 123–24. The building-code evidence here, like nonperformance-of-promise evidence in *Turner*, might be relevant, but it does not itself permit an inference of a culpable mental state. *See id.* Were building-code evidence enough by itself, "any [building code violations] would amount to" gross negligence, 37 C.J.S. Fraud § 111, and thus would gut the statute of repose and leave all developers responsible for any building code violations in perpetuity. That is not the law. *See generally Shealy v. Doe*, 370 S.C. 194, 200–01, 634 S.E.2d 45, 48–49 (Ct. App. 2006) (refusing to adopt an argument that would "circumvent" the purpose of a statute and "render that section meaningless"). Instead, evidence of code violations must be "coupled with other evidence" to support Wedgewood's desired inference of gross negligence. *See Turner*, 392 S.C. at 123–24. Alone, the evidence is not sufficient. The statute of repose should bar these claims.

III. The trial court prejudicially erred in denying Centex's request for a jury instruction for subcontractor license requirements.

Lastly, once the case was before the jury, the trial court erred in denying Centex's request for a jury instruction on subcontractor licenses.

"The trial judge is required to charge the current and correct law." *Koutsogiannis v. BB & T*, 365 S.C. 145, 149; 616 S.E.2d 425, 427–28 (2005). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." *Id*. "To warrant reversal for refusal to give a requested instruction," the trial court's refusal must have been erroneous and prejudicial. *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995); *see Strange v. S.C. Dep't of Highways & Pub. Transp.*, 307 S.C. 161, 165, 414 S.E.2d 138, 140 (1992) ("A court must charge the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues.").

Below, Wedgewood took advantage of the trial judge's mid-trial reversal about evidence of subcontractor licenses and made it a major trial theme. Wedgewood asked Centex witnesses repeatedly about contractor licenses, including questioning such as "You think that it is okay for a quality home to have unlicensed subcontractors, correct?" (R. 1281, lines 7–8 (Vol. III)). And Wedgewood argued in closing that the jury should not credit Centex's claims about quality control because "[t]hey didn't really have it because you had unlicensed contractors on the job." (R. 1661, lines 21–22 (Vol. IV)).

Given that, Centex made a timely request to charge S.C. Code Ann. § 40-11-270(E), which states:

> Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision.

S.C. Code Ann. § 40-11-270(E) (Supp. 2021). All parties agreed this statute is "current and correct law," *see Koutsogiannis*, 365 S.C. at 149—for instance, the trial court stated that "we all know [unlicensed contractors] is not a violation of any law or requirement." (R. 1259, line 16–R. 1260,

line 2 (Vol. III)); *see Teseniar v. Pro. Plastering & Stucco, Inc.*, 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014) ("we find Professional was not required to have a license under the applicable statutory chapter"). And when the trial court denied the request, it said nothing about the legal accuracy. Rather, it claimed the request was "too close" to the facts of the case and faulted Centex for "hav[ing] a lot of dots in the middle of" the instruction (Centex had used ellipses to append the clause beginning with "within the limitations," a clause not at issue). (R. 1602, lines 10–16 (Vol. IV)). The trial court's refusal to instruct the jury on accurate, at-issue law was erroneous. *McCourt*, 318 S.C. at 306.

The refusal to instruct also was prejudicial because it denied Centex the ability to rebut a key portion of Wedgewood's case. *See McCourt*, 318 S.C. at 306. Wedgewood made subcontractor licenses into a major trial theme. (R. 1278, line 15–R. 1281, line 20; R. 1289, line 25–R. 1290, line 3; R. 1414, line 25–R. 1416, line 10; R. 1619, lines 13–21 (Vol. IV); R. 1661, lines 19–22). Centex had little ability to rebut the misleading references to subcontractor licenses: it tried to ask its expert witness whether South Carolina law required subcontractors to have licenses, but he did not know the answer. (R. 1491, lines 9–13 (Vol. IV)). Centex's only ability to set the record straight was through a jury instruction, but the trial court denied it.

The trial court's error here tracks that in *Strange*, 307 S.C. at 165. There, the Supreme Court reversed a jury verdict partly on the trial court's refusal to instruct the jury regarding an assumption of risk defense. *Id*. The evidence, the Court stated, supported that instruction and "a court must charge the jury on the law framed by the issues as made by . . . the facts developed by the evidence." *Id*. Here too, the evidence and argument supported an instruction on subcontractor licenses. The "law framed by the issues" in the case turned it into a major theme. *See id*. Accordingly, the trial court erred when it denied that instruction, warranting reversal.

CONCLUSION

For the reasons set forth above, Centex Homes requests that the Court remand to the trial court with instructions to dismiss all claims with prejudice because the claims are barred by the statute of limitations or statute of repose. Alternatively, Centex Homes requests that the Court remand for a new trial based on prejudicial errors in jury instructions.

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Respectfully submitted,

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