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.

APPELLANTS' FINAL REPLY BRIEF

Stephanie A. Douglas (admitted pro hac vice)
Jeffrey A. Turner (admitted pro hac vice)
Bush Seyferth PLLC
100 W. Big Beaver Road, Suite 400
Troy, MI, 48084
(248) 822-7800
douglas@bsplaw.com
turner@bsplaw.com

Thomas C. Hildebrand, Jr.
William G. DesChamps, IV
Paul Nicholas Nybo
Parker Poe Adams & Bernstein LLP
850 Morrison Drive, Suite 400
Charleston, SC, 29403
(843) 727-2650
tomhildebrand@parkerpoe.com
willdeschamps@parkerpoe.com
nicknybo@parkerpoe.com

Katon E. Dawson, Jr. (SC Bar #101167)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC, 29201
(803) 255-8000
katondawson@parkerpoe.com

Attorneys for Appellants

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Barr v. City of Rock Hill[1] resolves this case in Centex's favor. Wedgewood does not dispute that: it never mentions *Barr* at all. Nor does Wedgewood mention *Allwin v. Russ Cooper Associates*, *Dillon County v. Lewis Sheet Metal Works*, or *Dorman v. Campbell*, all binding precedents that barred construction defect claims because the statute of limitations started to run years before the plaintiffs sued.[2] These authorities, among others, conclusively establish that the statute of limitations started to run on Wedgewood's claims by 2006, when its property manager told Wedgewood's board of directors that repeated window issues may be Centex's responsibility and Wedgewood should hire an expert to confirm. Wedgewood ignored its property manager for a decade. The statute of limitations bars its claims.

Wedgewood's avoidance approach to controlling authorities continues with the statute of repose. Here too, Wedgewood overlooks the authority establishing that deviations from building codes and industry standards cannot alone establish gross negligence, as required for Wedgewood to circumvent the statute of repose. Instead, Wedgewood merely restates how it proved building code and industry standard violations at trial—violations that alone are insufficient as a matter of law.

Given the wealth of authority barring Wedgewood's claims as a matter of law, Wedgewood devotes much of its brief to ill-developed arguments surrounding issue forfeiture. Ironically, it is Wedgewood, not Centex, that waived its arguments. Wedgewood never mentioned issue forfeiture in post-trial briefing, as required to preserve Wedgewood's claims that Centex raised an

[1] 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998).
[2] *See Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019); *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (Ct. App. 1998); *Dillon County School District No. 2 v. Lewis Sheet Metal Works*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985).

insufficient directed verdict motion. More than that, Wedgewood agreed with the trial court when it found that Centex made the arguments Wedgewood now asserts were missing.

The result does not change if the Court considers Wedgewood's waived preservation arguments. Centex preserved its arguments through two directed verdict motions renewed through a Rule 50(b) motion—exactly the procedure the rules define. The record defies Wedgewood's position that Centex did not mention the statute of limitations in the second directed verdict motion. And Wedgewood's contention that the trial court needed to expressly deny Centex's directed verdict motion is wrong as a matter of law.

Binding South Carolina precedent and basic principles of finality prevent construction plaintiffs from doing what Wedgewood did here: sitting on its hands for 17 years after the buildings were completed and 12 years after being told it may have a claim. The trial court was presented with these arguments but reached the wrong conclusion. The Court should reverse.

ARGUMENTS

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

A. Wedgewood's claims are barred by the statute of limitations.

The law is clear and the material facts undisputed. The statute of limitations on Wedgewood's claims is three years. S.C. Code Ann. § 15-3-530(3) (2005).[3] It begins running when the plaintiff "knows of facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right ... has been invaded or that some claim against another party *might exist.*" *Barr v. City of Rock Hill*, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998) (emphasis in original). There is no dispute that, in October 2006, Wedgewood's

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

property manager "recommended having an engineering expert look at these windows to try and determine if this is a Centex problem," and the Wedgewood board of directors "recommended notifying Centex that an expert would be looking at the windows." (R. 2752 (Vol. VI)).

The question on this appeal, therefore, is whether the property manager's undisputed statement that a claim against Centex may exist put Wedgewood's board on notice that a "claim against another party might exist." Logic and legions of South Carolina authorities answer that question in the affirmative. *See, e.g.*, *Barr*, 330 S.C. at 645–46; *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 15–17, 825 S.E.2d 707, 713 (Ct. App. 2019); *Dorman v. Campbell*, 331 S.C. 179, 185–86, 500 S.E.2d 786, 790 (Ct. App. 1998); *Dillon County School District No. 2 v. Lewis Sheet Metal Works*, 286 S.C. 207, 215–16, 332 S.E.2d 555 (Ct. App. 1985). Those cases resolve this case in Centex's favor.

Instead of explaining how this case fits into the framework developed by *Barr*, *Dillon County*, *Allwin*, and others, Wedgewood invokes general principles that are not relevant here. For instance, the statute of limitations presents a jury question only if there is conflicting evidence about whether the plaintiff should have known about a claim "by the exercise of reasonable diligence," evidence that was absent here. Appellant's Brief ("App. Br.") at 18–19; *Barr*, 330 S.C. at 644. Wedgewood acknowledges this point of law. *See* Respondent's Brief ("Resp. Br.") at 24.[4] But Wedgewood's attempt to identify conflicting evidence goes astray by conflating inquiry notice with actual notice. The statute of limitations begins to run when a party is on inquiry notice—that

[4] Centex also already explained how *Stoneledge*, a case Wedgewood discusses at length, fits comfortably within this conflicting-evidence framework, App. Br. at 18; *see Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. 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). And in *Walbeck v. I'On Company*, as in *Stoneledge*, "the jury was presented with a host of conflicting evidence as to when Homeowners should have, by the exercise of reasonable diligence, discovered the facts giving rise to their claims." 439 S.C. 568, 581, 889 S.E.2d 537, 544 (2023).

is, when a 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). But Wedgewood argues about evidence that, at most, could raise a question of its actual notice:

- "[T]he first time he and the board ***knew*** of the original construction defects was in 2016." Resp. Br. at 24;
- "Spencer stated, 'the first time I ***knew*** of construction defects was in 2016." *Id*. at 9;
- "[T]he board did not ***know*** of any construction defects in 2007, 2011, 2013 or 2014[.]" *Id*.

This argument misses the mark. "[T]he statutory period of limitations begins to run when a person could or ***should have known*** . . . that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Dorman*, 331 S.C. at 184. Because Wedgewood (at minimum) "should have known" it had a claim in 2006, when its property manager told it to hire an expert and its board recommended notifying Centex, its insistence that it lacked actual knowledge for another decade is irrelevant.

Wedgewood fares no better when it highlights its expert witness's testimony that the 2006 issues were "not representative of all of the issues" at trial. Resp. Br. at 24–25; *see* (R. 1090, line 3–R. 1091, line 13 (Vol. III)). Yet again, settled South Carolina law explains that "the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dorman*, 331 S.C. at 185.

In fact, Wedgewood's attempts to save its position are nearly identical to the arguments the Court rejected in *Allwin*. There, the plaintiff presented expert testimony from Ross Clements, the same expert Wedgewood used here. Mr. Clements's opinion in *Allwin* was ***nearly identical*** to the one he offered here: he testified about "latent defects" that required an "unprecedented" level of "destructive testing and deconstruction" to uncover. *Allwin*, 426 S.C. at 10. Clements further claimed "[i]t would be unreasonable for a homeowner to determine such a level of destructive testing or deconstruction was necessary based on the visual deficiencies observed." *Id*.; *cf*. (R.

1091, lines 8–13 ("I don't see any evidence that that is something that would have been correlated into a full investigation like I was asked to do in this case.")). But the *Allwin* Court deemed Mr. Clements's protestations "immaterial" because the plaintiff was "repeatedly put on notice" of certain defects; those defects necessitated further inspection. 426 S.C. at 17. The statute of limitations barred the claim. *Id*.

Mr. Clements's opinions in this case about latent defects and a broader scope of damage are similarly "immaterial." *See id*. Some of the same alleged defects identified by Mr. Clements in 2018 were issues for which Wedgewood's property manager told the board of directors to hire an expert to examine in 2006. (R. 952, line 24–R. 953, line 1 ("We found gaps in the flashing, and these areas point to locations where there are holes in between the flashing and the window frame.")). Wedgewood's inquiry notice bars its claim.

B. Judicial estoppel does not apply here.

The Court should likewise reject Wedgewood's unpreserved last (and odd) argument to avoid the statute of limitations—judicial estoppel. Wedgewood argues that Centex should be estopped from enforcing the statute of limitations against Wedgewood because a federal court once found, in a case between Centex and a subcontractor, that there was conflicting evidence about when Centex was on inquiry notice of that claim. *See Centex Homes v. S.C. State Plastering, LLC*, No. 4:08-cv-2495, 2010 WL 2998519 (D.S.C. July 28, 2010). Judicial estoppel is irrelevant here; it "applies only to inconsistent statements of fact" and "does not apply to conclusions of law or assertions of legal theories." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In any event, Centex's position here is consistent with its position in *S.C. State Plastering*. There, a consultant Centex had hired in 2002 to examine windows "did not discover any defects with the flashing." *S.C. State Plastering*, 2010 WL 2998519, at *5. That no-defect

opinion created conflicting testimony about the timing of Centex's inquiry notice of construction defects. *Id*. But that fact pattern—a person with expertise expressing ***no*** concerns about potential defects—is the opposite of this case. It would be like if the inspection company in *Barr*, the architect in *Dillon County*, or the property manager here told the plaintiffs that there were no issues. Just as the inquiry notice in those cases started their statute of limitations, Wedgewood's undisputed inquiry notice in 2006 started its statute of limitations, making Wedgewood's claims untimely.

II. Wedgewood lacks evidence of gross negligence to sidestep the statute of repose.

On the statute of repose, the evidence again is largely undisputed. The buildings were completed in 2002 and Wedgewood did not sue until 2018, well after the 13-year statute of repose. *See* S.C. Code Ann. § 15-3-640 (Supp. 2022). Wedgewood thus needed to prove gross negligence to avoid application of the statute of repose. S.C. Code Ann. § 15-3-670(A) (Supp. 2022). Wedgewood attempted to prove gross negligence through evidence of building code violations and industry standard deviations; nothing further. With these undisputed facts, Centex's opening brief stepped through a straight line of authority, both from South Carolina and around the country, establishing that code violations and industry standard deviations cannot alone establish the finding necessary for gross negligence. *See* App. Br. at 19–23. This warrants judgment for Centex.

Wedgewood offers only a few rebuttals, none persuasive. First, it asserts there was "voluminous testimony" that established gross negligence. Resp. Br. at 28; *see also id.* at 5–13 (providing a lengthy recitation of this evidence). But Wedgewood never even attempts to link this testimony to South Carolina's gross negligence standard, because no testimony at trial reached the key issue: whether the building code violations and industry standard deviations that Wedgewood

introduced were accompanied by a lack of slight care. Without this evidence, Wedgewood could not succeed in proving gross negligence.[5]

Second, Wedgewood suggests that its evidence was not limited to building codes—it also had evidence of deviations from industry standards and "manufacturers' instructions." Resp. Br. at 29. If anything, these deviations are even less persuasive evidence of gross negligence because, unlike code violations, the "standards" and "instructions" are not promulgated or enforced by any government entity. They are guidelines for developers to follow. *See, e.g.*, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989). Courts routinely find industry standard violations insufficient to establish gross negligence. *See, e.g.*, *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999).

Lastly, Wedgewood picks at certain of Centex's peripheral citations by stripping away the context. For instance, Centex cited *Kincaid v. Landing Development Corp.* only because the South Carolina legislature later codified it in § 15-3-570(B). App. Br. at 25; *see* 289 S.C. 89, 93, 344 S.E.2d 869, 872 (Ct. App. 1986). Centex did not rely on the factual circumstances Wedgewood attempts to distinguish. And Wedgewood's few case rebuttals don't respond to Centex's binding precedents—*Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 677 S.E.2d 892 (Ct. App. 2009) and *Pack v. Associated Marine Institute*, 362 S.C. 239, 608 S.E.2d 134 (Ct. App. 2004)—

[5] At various points, Wedgewood also discusses evidence the trial court excluded from trial about alleged defects at other properties. *See, e.g.*, Resp. Br. at 6. The Court should not consider this evidence on appeal, as it was not evidence considered by the jury and Wedgewood has not appealed its exclusion. Regardless, however, the evidence would not help establish gross negligence. The trial court excluded the alleged defects because there were no liability findings in those cases and "[j]ust because someone filed a lawsuit doesn't mean anything." (R. 757, lines 13–14 (Vol. II)). The only thing Wedgewood's excluded evidence shows is that other plaintiffs' lawyers have asserted similar claims against Centex—it did not establish any other defects.

or the persuasive out-of-state authorities establishing that code violations alone are insufficient to establish gross negligence.

Evidence that the construction of Wedgewood did not comply with certain written standards is not sufficient evidence for a jury to find gross negligence or recklessness, but it is the only evidence Wedgewood offered. The statute of repose precludes Wedgewood's claims.

III. Centex's arguments are preserved.

With little to say to rebut the merits of Centex's appeal, Wedgewood's core tactic is to seize on snippets from a disjointed post-evidentiary directed verdict motion—with a judge focused on jury instructions—to argue Centex somehow failed to preserve its appellate arguments. Wedgewood brings this argument even though it agreed with the trial court that Centex made the necessary arguments; Wedgewood even complained that Centex had argued the statute of limitations "a[d] nauseum." Wedgewood's concessions back then were correct: Centex preserved all issues it now raises. That some issues were raised seriatim in the second directed verdict motion—with ruling deferred—does not change the result. Wedgewood's preservation arguments are little more than a waived distraction from its deficient merits arguments. This Court should reject them.

A. Wedgewood waived any preservation challenge to Centex's arguments by failing to raise preservation in the motion for judgment notwithstanding the verdict.

At the outset, Wedgewood waived any challenge to the adequacy of Centex's directed verdict motion when, in the motion for judgment notwithstanding the verdict hearing, it urged the trial court not to revisit its statute of limitations rulings because Centex had argued it "over and over." More than that, when the court stated that it heard the statute of limitations at the second directed verdict stage, Wedgewood agreed. With those concessions, and by failing to argue to the

trial court that Centex failed to make an adequate post-evidentiary directed verdict motion, Wedgewood, not Centex, is the party that failed to preserve its arguments below.

In general, a party must take two steps to preserve a sufficiency of evidence challenge: it must (1) move for directed verdict at the close of evidence and (2) renew the motion through a post-trial motion for judgment notwithstanding the verdict. Rule 50, SCRCP. Where, as here, the opposing party challenges the adequacy of the moving party's directed verdict motion (the first step), the opposing party must argue preservation as a basis for the court to deny the motion for judgment notwithstanding the verdict (the second step). *See, e.g.*, *Williams v. Runyon*, 130 F.3d 568, 571–72 (3d Cir. 1997); *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996). This rule, widely followed among federal courts applying the analogous federal rule[6], reflects the need for parties to "raise dispositive issues earlier in the proceeding rather than later, so that the district court can resolve the issues correctly and without delay." *See Williams*, 130 F.3d at 572 (collecting cases). As the Fifth Circuit stated in adopting the rule, "[t]his is a wise rule that allows the district court to hear the waiver allegation and report whether the party that failed to make the motion had a legitimate excuse (where, for example, the court instructed the litigant not to make the rule 50(a) motion)." *Thompson & Wallace*, 100 F.3d at 435.

In the trial court, Centex challenged the statute of limitations and statute of repose four separate times: (1) at summary judgment, (2) a directed verdict motion at the close of

[6] Where, as here, there is no on-point South Carolina authority, courts often look to caselaw interpreting the federal Rule 50 standard for guidance. *See Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 196, 781 S.E.2d 534, 541 (2015). Before a 2006 amendment to FRCP 50 got rid of the requirement to raise a post-evidentiary directed verdict motion altogether, *see* Fed. R. Civ. P. 50 adv. comm. notes (stating that the change to Rule 50 was done to further a "functional approach" to Rule 50 motion practice), the federal rule closely mirrored South Carolina's current rule. Centex relies on pre-2006 federal caselaw where applicable.

Wedgewood's case, (3) a directed verdict motion at the close of all evidence, and (4) a post-trial motion for judgment notwithstanding the verdict. Wedgewood now claims that Centex's arguments were deficient the third time: the close-of-evidence directed verdict motion. Resp. Br. at 19–21. To make that claim, however, Wedgewood needed to raise those alleged deficiencies the fourth time Centex made the arguments: the motion for judgment notwithstanding the verdict. *See Williams*, 130 F.3d at 572. Wedgewood did not. It argued that the court should deny Centex's statute of limitations arguments on the merits because the statute of limitations did not start running until 2016. (R. 1778, line 14–R. 1789, line 20 (Vol. IV)). At no point did Wedgewood claim the court should deny the motion because Centex did not preserve its argument. The failure to raise that argument means Wedgewood's issue-preservation arguments are unpreserved. *See Thompson & Wallace*, 100 F.3d at 435.

More than that, though, Wedgewood ***affirmatively disclaimed*** any arguments about deficient preservation several times during the hearing on Centex's motion for judgment notwithstanding the verdict. For instance, when arguing the statute of limitations was not basis for judgment, Wedgewood stated:

- "[W]e already argued this at [sic] nauseam." (R. 1787, lines 5–6);
- "[T]hese were problems all the way through." (R. 1789, lines 7–8);
- "Your Honor has heard it over and over." (*Id*. at lines 19–20).

And when the trial court interrupted Wedgewood's argument to opine about how she heard the same statute of limitations argument "at the ***second directed verdict stage***," (R. 1787, lines 10–11), ***Wedgewood agreed***, stating "You've heard it so many times." (*Id*. at line 16). These repeated statements are "inconsistent with the continued assertion of a right," and thus constitute "the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v.*

Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) ("Waiver is the voluntary and intentional relinquishment of a known right."). Wedgewood waived its argument.

Wedgewood's failure to raise its lack-of-preservation argument in the trial court is no excusable failure. Rather, it implicates the core reasons why courts require parties to raise alleged directed verdict deficiencies in post-trial briefing. *See generally Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) ("[I]ssue preservation rules prevent a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card . . . ."). Centex's second directed verdict motion (the one Wedgewood now challenges as deficient) was a piecemeal argument that took several detours. (R. 1563, line 19–R. 1604, line 5 (Vol. IV)). The trial court had already denied Centex's directed verdict arguments once, at the close of Wedgewood's case. The hearing, therefore, was interspersed with lengthy discussions about jury instructions, which were being finalized at that time. Given the nature of the hearing, if Wedgewood believed Centex's motion was deficient, the right path was to allow the "court to hear the waiver allegation" and determine whether Centex failed to make the motion or "had a legitimate excuse." *Thompson & Wallace*, 100 F.3d at 435. By failing to do so, and first crying foul in this Court, Wedgewood asks this Court to find waiver on issues the trial court not only said Centex had preserved, but also was never asked to find otherwise.

B. Centex preserved both the statute of limitations and statute of repose arguments.

If the Court reaches the merits of Wedgewood's preservation arguments, it should reject them. Wedgewood's cross-cutting argument—that Centex needed to obtain an on-the-record ruling on its second directed verdict motion—is legally wrong. Its alternative argument—that Centex never mentioned statute of limitations in its second directed verdict motion—is factually wrong.

i. The trial court need not rule on a directed verdict motion later renewed by a motion for judgment notwithstanding the verdict.

It is legally insignificant that the trial court did not expressly deny Centex's second directed verdict motion. South Carolina practice requires only that a trial court rule on an issue ***at some point*** to preserve the issue for appellate review. *Herron*, 395 S.C. at 465. Here, the trial court did so when it denied Centex's motion for judgment notwithstanding the verdict, in which it ruled on both the statute of limitations and statute of repose. (R. 0014–0019 (Vol. I); R. 1859, line 13–R. 1863, line 8 (Vol. IV)). Centex appeals from that ruling. That is the ruling "raised to and ruled upon by the trial judge," which preserves Centex's right to appeal. *See Herron*, 395 S.C. at 465.

Contrary to Wedgewood's position, there is no additional requirement that a trial court have previously ruled on a directed verdict motion. Rule 50 allows trial courts to defer ruling on directed verdict motions and courts often do so in practice. *See Goldstein v. Nat'l R.R. Passenger Corp.*, 850 F.2d 689, *1–2 (4th Cir. 1988) (table) (recognizing, under the then-equivalent federal rule, that Rule 50 "allows a court to reserve ruling on a directed verdict motion until after the jury reaches a verdict, and many trial courts routinely defer ruling on . . . directed verdict motions"). The plain text of Rule 50, in fact, expressly contemplates that a trial judge may defer ruling: "Whenever a motion for a directed verdict made at the close of all the evidence . . . *for any reason is not granted*, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Rule 50(b), SCRCP. Thus, Rule 50 both contemplates that trial judges will not rule on directed verdict motions ("for any reason is not granted") and explains the procedure when the judges do not do so (action is "submitted" to the jury). It is "wise[]" for a trial court to take this path because it "avoids the need for a second trial if an appellate court should hold, contrary to the view of the trial court, that the evidence was sufficient to raise a jury issue." *Goldstein*, 850 F.2d 689, *2; *see also Colonial Lincoln-Mercury,*

Inc. v. Musgrave, 749 F.2d 1092, 1098 n.3 (4th Cir. 1984) ("[T]rial judges are ***formally encouraged*** for cogent reasons of judicial economy ordinarily to submit all but the plainest cases for jury verdict subject to the reserved ruling").

The trial court here deferred ruling in the exact way that Rule 50 permits. Centex moved for directed verdict, the motion was "not granted," and thus the court "submitted the action to the jury," subject to later legal determination. *See* Rule 50(b), SCRCP. That later determination occurred in Centex's motion for judgment notwithstanding the verdict, where the court denied Centex's motion on all issues. *See* (R. 0014–0019; R. 1859, line 13–R. 1863, line 8 (Vol. IV)).

None of Wedgewood's authorities are to the contrary. Wedgewood cites *Sierra v. Skelton* for the premise that a trial court must deny a directed verdict motion on the record, but that case does not deal with trial court rulings at all: it involved a party that "did not *object* to the failure of the trial judge to charge the elements of the cause of action." 307 S.C. 217, 224, 414 S.E.2d 169, 174 (Ct. App. 1991). *Vaughn v. City of Anderson*, another case Wedgewood cites, also dealt with a party's "failure to object." 300 S.C. 55, 59–60, 386 S.E.2d 297, 300 (Ct. App. 1989). And *State v. Fletcher*, 363 S.C. 221, 257, 609 S.E.2d 572, 591 (Ct. App. 2005) is doubly unhelpful for Wedgewood. It does not stand for what Wedgewood cited it for—it analyzed the required specificity of objection to witness testimony, not (as Wedgewood posits) the need to "repeatedly request a ruling." And the appellate decision was ***reversed*** by the South Carolina Supreme Court on that ***same issue-preservation point***. 379 S.C. 17, 24 n.1, 664 S.E.2d 480, 483 n.1 (2008).[7] Wedgewood's authorities do not require Centex to have obtained any more rulings than it obtained.

[7] The issues with Wedgewood's citations are not limited to those three examples. Wedgewood also claims *Creech v. S.C. Wildlife & Marine Res. Dep't* stands for the proposition that issues must be "ruled upon by the trial judge." Resp. Br. at 19. Centex agrees with this premise in general, but *Creech* does not stand for that: like Wedgewood's other citations, it analyzed a party that "did not raise [an] issue at trial." 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997). And it is unclear why

ii. Centex moved for a directed verdict on the statute of limitations.

Wedgewood's other issue-preservation argument appears to be that, because Centex's second directed verdict motion did not use the words "directed verdict" in the same breath as "statute of limitations," Centex did not preserve its statute-of-limitations defense. *See* Resp. Br. at 21. But issue preservation does not require magic words. It requires only that the party "fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010); *accord Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, . . . all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court."). Centex did so here.

First off, Centex's second directed verdict motion—the one Wedgewood claims was deficient—was the ***third time*** Centex argued the statute of limitations. Centex argued it at summary judgment, which the court denied. (R. 0036–0091 (Centex's motion); R. 0001–0007 (order denying summary judgment in part)). And Centex argued it in its first directed verdict motion, at the close of Wedgewood's proofs. That argument proceeded cleanly: Centex "move[d] to direct a verdict on all of the plaintiff's claims," (R. 1202, lines 19–25 (Vol. III)), Centex argued the statute of limitations barred the claims, (R. 1203, lines 1–6 ("I think it is barred by the Statute of Limitations.")), and the trial court denied the motion on the record, (R. 1211, line 16 ("At this time, I'm denying the motion.")); *see also* Rule 50, SCRCP at Note No. 2 ("The motion for directed verdict may be made at the close of plaintiff's evidence"). By the time Centex renewed its directed verdict motion at the close of all evidence—the trial court's third time hearing the arguments—the

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Wedgewood cited *Whaley v. CSX Transportation*, a thirty-page opinion to which Wedgewood pincited the title page; the only issue-preservation issue in that case was, yet again, a party's failure to object to witness testimony at trial. 362 S.C. 456, 482, 609 S.E.2d 286, 299–300 (2005).

court had turned its attention to jury instructions. Centex argued the statute of repose first. (R. 1563, lines 20–23 (Vol. IV) ("The defendant would move for directed verdict as to all of the causes of action on the basis of the Statute of Repose.")). But the court immediately pivoted to questioning about the jury instructions before Centex could move to other issues. (R. 1564, line 14–R. 1565, line 16 (asking about "the punitive damages charge and the gross negligence charge")). So Centex engaged with the court's questions before pivoting one of the court's questions back to the statute of limitations, stating: "[T]he Statute of Limitations. The plaintiffs . . . were told in 2006 by the homeowners association, look, there are issues with this building, and you need to hire an engineer to inspect them and determine if these are Centex's problems." (R. 1576, lines 2–9). Centex returned to this argument to explain its defense for why it did not proximately cause damages as a matter of law. (*Id*. at line 24–R. 1577, line 1). This argument, while interrupted, "fairly raise[d] the issue to the trial court, thereby giving it an opportunity to rule." *Brannon*, 388 S.C. at 502.

In fact, the trial court *twice* found Centex had preserved the statute of limitations. First, in the argument on Centex's motion for judgment notwithstanding the verdict, the court agreed with Wedgewood's contention that the statute of limitations had been argued "at [sic] nauseum": "I've heard it at the summary judgment motion stage. I heard it at the first directed verdict stage. ***I heard it at the second directed verdict stage***. So this is the fourth time." (R. 1787, lines 8–14). And in its oral ruling on the motion, the court reiterated the preservation finding:

> We've argued the statute of limitations issue, which arguably has been the biggest hurdle for the plaintiffs in this case. There's no question. I looked at the summary judgment stage. I looked at it at the first directed stage ***and the second directed verdict stage***.

(R. 1859, lines 16–21).

Lastly, the record shows that Centex presented its statute of limitations argument to the court nearly the same way at all stages of the proceeding:

First Directed Verdict Motion	*Second Directed Verdict Motion*	*Motion for Judgment Notwithstanding the Verdict*
"What we have here and what you heard were some homeowners in 2006 found out about some problems. If they made an investigation then, those problems would have been discovered and corrected very easily. So I think it is barred by the statute of limitations." (R. 1203, lines 1–6 (Vol. III)).	"One, the Statute of Limitations. The plaintiffs . . . were told in 2006 by the homeowners association, look, there are issues with this building, and you need to hire an engineer to inspect them and determine if these are Centex's problems. . . . So, basically, if they had done it in 2006, what they finally decided to do in 2016, all of those problems would have been discovered." (R. 1576, lines 3–9, 19–21 (Vol. IV)).	"[Y]ou're being told in 2006, . . . you might have a claim, you need to investigate it. And then failing to do that for—bringing the [case] 12 years later is—is—that's the statute of limitations defense." (R. 1757, lines 3–12 (Vol. IV)).

This is the same argument Centex presents on appeal. Centex preserved its statute of limitations argument.[8]

iii. Any preservation shortcomings are no basis for the Court to avoid the merits.

Lastly, even if Centex had somehow not sufficiently raised the statute of limitations in its second directed verdict motion, that still would not prevent review. "[I]ssue preservation is not a 'gotcha' game. Instead of being hyper-technical," the Court of Appeals "approach[es] preservation with a practical eye." *State v. Bowers*, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019). "The failure to raise specific grounds for an objection will not prevent the appellate court from

[8] In a single-sentence, uncited footnote, Wedgewood asserts that Centex waived its directed verdict motion through a statement to the trial court. Resp. Br. at 19 n.14. Not so. Centex made that statement after its directed verdict argument, in response to a question from the court in a jury instruction discussion, when the court asked both parties if they wanted a jury instruction on the statute of repose. *See* (R. 1603, lines 4–7 (Vol. IV)). Recognizing the statute of repose is a legal question for the court based on a gross negligence finding, Centex stated it "would object to the Statute of Repose being in the final charge." (R. 1606, lines 5–8). Wedgewood's argument is not only materially misleading about the context of the statement, it also does not provide an accurate depiction of Centex's position.

addressing an issue when the record indicates that the trial court and the State understood the basis for the objection." *Id*.

Here, there is no question that all parties—the trial court, Centex, and Wedgewood—understood Centex to be moving for directed verdict based on the statute of limitations. The trial court stated that twice during the later JNOV motion hearing. (R. 1787, lines 8–14 (Vol. IV); R. 1859, lines 16–21). Wedgewood did not dispute that in the trial court, stating that the court had heard statute of limitations arguments "over and over." (R. 1789, lines 19–20). If the Court does not dismiss Wedgewood's preservation arguments as waived, legally deficient, and factually incorrect, the Court should nonetheless reach the statute of limitations issue through a "practical" approach. It should not condone Wedgewood's last-ditch attempt to play a "gotcha" game to avoid review of dispositive issues it does not want to defend.

IV. The master deed is not relevant to the statute of limitations.

Failing elsewhere, Wedgewood proclaims that Centex never assigned to the Wedgewood board the right to sue third parties, so the statute of limitations never ran. Resp. Br. at 30–33.

This is a variation on a breach of contract claim Wedgewood tried (and failed) to add by amendment, *see* (R. 827, lines 7–25 (Vol. II)), and then tried (and abandoned) to assert at trial. *See* (R. 817, lines 10–21). The theory was that Centex's failure to assign meant Centex, not the homeowners, still controlled the property. (R. 818, line 16–R. 822, line 5). Ultimately, Wedgewood abandoned that argument, and rightly so: it would have meant the board "wouldn't have standing to bring the case." (R. 831, lines 1–5). Moreover, the argument had no factual basis, as a member of the Wedgewood board testified that Centex had no control over or involvement with the board since 2002. (R. 841, line 21–R. 850, line 8).

Even beyond standing and a lack of factual support, Wedgewood's argument is frivolous as a matter of contract interpretation. It relies on a nonexistent interrelationship between two unrelated clauses from the master deed: Centex's one-year limited warranty for common areas and the "written assignment" clause. (R. 2220 (Vol. V)).

First, section 3.6 of the master deed provides a one-year limited warranty for all common areas. (*Id*.). That one-year warranty began to run upon the later of "substantial completion under the construction contract" or "the date a certificate of occupancy is issued." (*Id*.). Construction was completed and certificates of occupancy issued in early 2001. (R. 2615–16 (Vol. VI)). Thus, by the plain language of the deed, the limited warranty expired in early 2002. *Id*. Centex has no liability under the master deed to repair or replace the common areas today.

Second, a different part of section 3.6 states that Centex "will assign to the Association in writing all of its rights, claims, causes of action, and demands" against third parties." (R. 2220 (Vol. V)). Contrary to Wedgewood's position, however, that clause is not a condition precedent for ending Centex's one-year limited warranty. *See Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994).

V. Deference to the jury verdict does not necessitate abdication of the judicial role.

Wedgewood's final heave is to cite general principles about deference to jury verdicts. Resp. Br. at 33–34. A jury's resolution of fact disputes unquestionably is entitled to deference, but that is not at issue here. This case presents legal, not factual, questions: whether there was "conflicting evidence" for a jury to resolve about the date Wedgewood should have known it may have a claim against Centex, *Allwin*, 426 S.C. at 11–12, and whether building code and industry standard violations alone can establish gross negligence to circumvent the statute of repose, *see* S.C. Code Ann. § 15-3-670(A). Neither of these questions impinge on the jury's role as factfinder,

and South Carolina courts resolve these issues on post-trial motions or summary judgment. *See, e.g.*, *Allwin*, 426 S.C. at 11–13; *Richland County*, 382 S.C. at 652–53. With the weight of authority decisively in Centex's favor, this Court should do the same.

CONCLUSION

Centex Homes requests that the Court remand to the trial court with instructions to dismiss all claims with prejudice because the action is barred by the statute of limitations or statute of repose, or, in the alternative, remand for a new trial based on jury instruction errors.

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Respectfully submitted,

/s/ Stephanie A. Douglas
Stephanie A. Douglas (admitted pro hac vice)
Jeffrey A. Turner (admitted pro hac vice)
Bush Seyferth PLLC
100 W. Big Beaver Road, Suite 400
Troy, MI, 48084
(248) 822-7800
douglas@bsplaw.com
turner@bsplaw.com

/s/ Thomas C. Hildebrand, Jr.
Thomas C. Hildebrand, Jr.
William G. DesChamps, IV
Paul Nicholas Nybo
Parker Poe Adams & Bernstein LLP
850 Morrison Drive, Suite 400
Charleston, SC, 29403
(843) 727-2650
tomhildebrand@parkerpoe.com
willdeschamps@parkerpoe.com
nicknybo@parkerpoe.com

Katon E. Dawson, Jr. (SC Bar #101167)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC, 29201
(803) 255-8000
katondawson@parkerpoe.com

Attorneys for Appellants