STATE OF SOUTH CAROLINA COUNTY OF HORRY WENDY O'NEILL, Plaintiff, vs. STRAND DEVELOPMENT COMPANY, LLC; STANLEY ACCESS TECHNOLOGIES LLC; and BEA, INC. Defendants.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-26-09402 **ORDER GRANTING STANLEY ACCESS TECHNOLOGIES LLC'S RENEWED MOTION FOR SUMMARY JUDGMENT**

The matter is before the Court on Stanley Access Technologies, LLC's ("Stanley") Renewed Motion for Summary Judgment. A hearing was held in the matter on September 2, 2014, James H. Elliott, Jr., appearing for Stanley and Daniel A. Hunnicutt, appearing for the Plaintiff Wendy O'Neill ("O'Neill"). For the reasons stated below the Court GRANTS Stanley's Renewed Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

PROCEDURAL POSTURE

O'Neill originally filed suit in 2010 naming Strand Development Company, LLC as the sole defendant. The case was dismissed pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. O'Neill refiled a Summons and Complaint on December 6, 2012 naming as Defendants Strand Development Company, LLC ("Strand"), Stanley and Bea; Inc. ("Bea"). Stanley filed a timely Answer to the Complaint. Further, Stanley filed a Motion for Summary Judgment on or about April 7, 2014. Discovery ended May 1, 2014. Prior to the end of the discovery period, O'Neill failed to produce an expert to testify concerning any alleged defect in a Stanley manufactured product. Stanley filed an initial Motion for Summary Judgment on or

about April 7, 2014 and a Memorandum in Support of the Motion on or about May 20, 2014. In response to the Motion O'Neill filed a motion to extend the scheduling order because the deadline to produce an expert had passed and she had been unable to gain final opinions from her expert by the scheduling order deadline. The Court granted O'Neill's Motion in order to allow O'Neill until June 19, 2014 to produce her expert's opinions and make the expert available for deposition. Stanley renewed its motion on the basis the Statute of Repose precludes O'Neill's action against Stanley and that O'Neill's expert has no admissible opinions upon which a reasonable jury could find in O'Neill's favor as to Stanley.

LEGAL STANDARD

Summary judgment is appropriate if the courts find that "there is no genuine issue as to any material fact . . . ." South Carolina Rules of Civil Procedure 56(c). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party." *Gilmer v. Martin*, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996), *cert. dismissed as improvidently granted*, 326 S.C. 267, 487 S.E.2d 854 (1997). "The purpose of summary judgment is to obviate delay where there is no material issue of fact involved." *Manley v. Manley*, 291 S.C. 325, 329, 353 S.E.2d 312, 314 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a

showing sufficient to establish the existence of an essential element of that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

STATEMENT OF FACTS

The undisputed facts are as follows:

Stanley manufactured automatic sliding doors that were installed by others at the Hampton Inn, located at 620 75th Ave. North, Myrtle Beach, South Carolina (hereinafter "the Hampton Inn") in 1996, some fourteen years before the accident in question. The Stanley manufactured door operating sensors originally installed were disabled and BEA manufactured "Wizard" sensors were installed on the doors in question in 2007. No Stanley manufactured equipment operated the opening and closing of the automatic sliding automatic doors in question at the time of O'Neill's accident. On or about May 27, 2010, O'Neill was a guest at the Hampton Inn. On the morning of May 27, 2010, O'Neill was in her hotel room at the Hampton Inn when she received a call from her fiancée who was in the parking lot of the Hampton Inn. He advised her that his motorcycle had been stolen. O'Neill went down to the lobby and at a pace she described as "not a full run, but not a walk" attempted to exit the automatic sliding doors. O'Neill alleges she was struck by the automatic sliding glass door on the interior of the vestibule at the entrance to the hotel as she tried to pass through. O'Neill further alleges the impact of the door caused her Achilles tendon to rupture.

O'Neill is not aware of the hotel having ever experienced any problems with their operation and there is no evidence of any previous or subsequent malfunction. O'Neill is not aware of any other person having any issues with the operation of the doors on the morning of the incident.

DISCUSSION

A. Statute of Repose

The Statute of Repose in South Carolina for improvements to real property for which certificates of occupancy are issued prior to July 1, 2005 is thirteen years[1]. Concerning such properties South Carolina Code Ann. § 15-3-640 provides:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (3) an action to recover damages for personal injury, death, or damage to property;
>
> ....
>
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This limitation may not be asserted as a defense by a person in actual possession or control or otherwise, of the improvement at the time the defective or unsafe condition constituted the proximate cause of the injury. S.C. Code Ann. § 15-3-670(A).

At oral argument counsel for O'Neill argued that the statute does not apply to a suit for personal injury. The plain language of the statute provides that it does apply in an action concerning a claim for personal injury. S.C. Code Ann. § 15-3-640(3). Further, clearly applies to manufacturers of components that are installed in the structure. S.C. Code Ann. § 15-3-640(9).

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[1] **2005 Act No. 27, § 16(2),** provides as follows:

"Section 2 [amending this section] takes effect on July 1, 2005, and applies to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible local building official after the effective date[.]"

The 2005 amendment substituted "eight years" for "thirteen years" in the first three undesignated paragraphs and made nonsubstantive language changes.

The limitation does not apply in cases of personal injury where by its nature the injury is not discoverable in the exercise of reasonable diligence at the time of its occurrence. (emphasis added) S.C. Code Ann. § 15-3-670(C)(1). O'Neill's claims are for a personal injury against a manufacturer of components and materials installed in the construction. Further, the injury was not the type that is not discoverable at the time of the occurrence; O'Neill was clearly aware of the injury at the time of the occurrence. The action was initiated in 2012, well after the 13 year statute of repose expired. Therefore, O'Neill's causes of actions against Stanley are barred by the Statute of Repose.

The dismissal of Stanley is supported by the cases *Snavely v. Perpetual Federal Savings Bank, et al.*, 306 S.C. 348, 412 S.E.2d 382 (1991); *Florence County School Dist. No. 2 v. Interkal, Inc.*, 348 S.C. 446, 559 S.E.2d 866 (Ct.App. 2002); and *Capco of Summerville, Inc. v. J.H. Construction Company, Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006).

Snavely concerned a personal injury action that occurred when the plaintiff fell on a grate at the entrance to the Perpetual Federal Savings Bank in Anderson, SC in November 1987. The building and entrance were designed by Fant and Fant Architects and substantial completion occurred in September 1974. *Snavely*, at 349, 412 S.E.2d at 383 (1991). Plaintiff brought the action against the building owner as well as Fant and Fant for negligence in designing the entryway. The trial court granted Fant and Fant summary judgment holding that Snavely's actions were barred by the Statute of Repose, as they were not commenced within thirteen years of the substantial completion of the construction. *Id.* The owner of the building settled with plaintiff. *Id.* In affirming the trial court ruling the South Carolina Supreme Court held that the statue does not violate equal protection and due process. *Snavely*, 306 S.C. at 351, 412 S.E.2d at 384. O'Neill argued that the statute violated equal protection or due process because section 5-3-670 provides the defense cannot be asserted by the owner of the property at the time the defect or

unsafe condition constitutes the proximate cause of the injury but is a valid defense to architects, contractors, manufacturers and suppliers. *Id.* The Supreme Court cited the preamble to the Act to explain why an owner in possession of the improvement is treated differently than those otherwise involved in an improvement to real property. The preamble provides:

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> Whereas, the *General Assembly finds it reasonable and necessary to distinguish between a person in actual possession or control of an improvement* to real property and those otherwise involved in an improvement to real property, for the following reasons: because acceptance of some future responsibility for the condition of the premises is implied in the acceptance of an improvement to real property; because possession or control of the premises is a reasonable and fair basis for imposing some additional liability; *because after the date of acceptance of the work by the owner, there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement; because owners and persons in control have the opportunity to avoid liability by taking care of the improvement and by regulating its use;....* (Emphasis supplied).

Snavely, at 351-352, 412 S.E.2d at 384-385.

The reason the owner cannot use the statute as a shield is that the owner or possessor of the property is in the best positon to maintain their property in a fashion that protects the public from injury, as opposed to a component manufacturer that sold a product to be integrated into the improvement many years before the incident. The bases for treating an owner of the improvement differently from a manufacturer of components are illustrated in this case. It is undisputed Stanley provided an owner's manual with the product explaining the importance of daily safety checks of the doors and annual inspections to the proper operation of the automatic sliding doors. (Stanley's 8-25-14 Memorandum in Support, p. 10 and Ex. H) The Hampton Inn as owner of the building and doors was in the best positon to make certain the maintenance requirements were followed. The Hampton Inn failed to perform daily safety check or to have

annual inspections. (*Id.* p. 10) O'Neill's own expert agrees that the Hampton Inn's failure to properly maintain the doors was a proximate cause of her accident. (*Id.)*

In *Snavel* the plaintiff also contended that the statute of repose violated due process because it does not allow a reasonable time to bring suit due to the fact that the injury did not even occur until after the statute of repose expired. *Id.* Snavely was injured more than 13 years after substantial completion. *Id.* 306 S.C. at 349, 412 S.E.2d at 383. The South Carolina Supreme Court rejected the argument simply citing to *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821(1989), wherein the same argument was rejected relative to the medical malpractice statute of repose. *Id.* 306 S.C. at 352, 412 S.E.2d at 385. The Court also held that the reason the statute does not violate due process in this regard is because such statutes do not abrogate vested rights of action, but merely prevent rights from accruing after a certain period. *Id.*

Florence County School Dist. No. 2 v. Interkal, Inc, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002) supports the dismissal of Stanley based on the S.C. Statute of Repose. In the case a bleacher collapsed in 1991 injuring an eleven-year-old boy. *Id.* The bleachers were installed in 1969 and 1971 respectively. The plaintiff sued the School District and the manufacturer of the bleachers. The School District settled the case and brought a contribution action against the manufacturer. The court held that the South Carolina Statute of Repose for actions involving defective or unsafe condition of improvements to real property applied to and barred the School District's action for contribution against the manufacturer of bleachers because the incident occurred more than 13 years after the bleachers were installed at school. At oral argument O'Neill's counsel argued that the *Florence County School Dist. No. 2* case was distinguishable because it involved a contribution action. This Court finds that distinction to be irrelevant to the validity of the application of the Statute of Repose to this case. The relevance of *Florence County School Dist. No. 2* is that the South Carolina Court of Appeals held that the Statute of

Repose applies to a manufacturer of a product that is installed as a part of the improvements to the real property. The Stanley automatic sliding doors, like the bleachers, are products separately manufactured and then installed as a part of the improvements to the real property.

Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 142 628 S.E.2d 38, 41 (2006) also supports the conclusion that the Statute of Repose applies to bar claims even before the injury occurs. The South Carolina Supreme Court, in holding the Statute of Repose applicable wrote:

> 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, 403–04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes,* 706 N.W.2d 49, 54, n. 6 (Minn.2005) *citing* W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30, p. 168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations.... [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum,* 234 Va. 32, 360 S.E.2d 325, 327–328 (1987).

Id.

For the above references, O'Neill's causes of action against Stanley are barred by the South Carolina Statute of Repose.

B. Plaintiff's expert opinions

O'Neill alleges that Stanley manufactured automatic sliding doors were in an unreasonably safe condition and reached Strand in the same condition in which it left Stanley's

possession. However, it is undisputed that this is not true inasmuch as the undisputed facts indicate the Stanley manufactured sensors were disabled and replaced with BEA Wizard sensors in 2007. O'Neill alleged the automatic sliding doors were negligently manufactured in such a manner that it was unreasonably dangerous; was negligently designed in such a way that it was unreasonably dangerous; and failed to place adequate warnings on said product that would have alerted the O'Neill to the unreasonably dangerous nature of the doors.

After reviewing the deposition transcripts and other evidence submitted by counsel for both parties it is apparent that the O'Neill provides no admissible evidence of how Stanley was negligent, how the doors were unreasonably dangerous, or what warnings were necessary in order to make the product safe. Further, O'Neill's counsel agreed that the doors are not in substantially the same condition as they were when they left Stanley's possession.

O'Neill relies solely on an expert to establish her case. O'Neill produced documents from Warren F. Davis, Ph.D. purporting to be an expert report and Davis was deposed on June 19, 2014. Davis produced no admissible opinions upon which a reasonable juror could find in O'Neill's favor because he used no scientific or other valid methods to arrive at his conclusions. As a result there exists no evidence upon which a reasonable juror could find that a Stanley product was unreasonably safe or contained a defect in its design, manufacture or warnings that resulted in harm to O'Neill. Moreover, O'Neill's counsel concedes that O'Neill was not conducting herself in such a fashion that a warning would have changed her conduct and allowed the accident to be avoided.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issues, a qualified expert may testify in the form of opinions on the issue. Rule 702, SCRE. The qualification of an expert witness and the admissibility or exclusion of the expert's testimony are matters within the trial court's sound

discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

"[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings [that] are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford Motor Co., 289 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). First, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Id. Second, "the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Third, "the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. Without satisfying the three requirements of qualifications, subject matter, and reliability, proffered expert testimony is not admissible. Id.

Trial judges act as gatekeepers to "ensure that any and all scientific testimony . . . is not only relevant, but reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993); *also see, Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 735 S.E.2d 650 (2012). "A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." (emphasis added) *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001), *quoting Oglesby v. General Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999); *also see, Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 735 S.E.2d 650 (2012). . If such testimony is found to be "scientific in nature," the Court must utilize the factors set forth in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), to determine its reliability. Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). Concerning scientific testimony, the Court must consider: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control

procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999).

All of Davis' opinions are simply his belief and speculation.

Davis' Criticisms

Davis has two criticisms of Stanley. (Stanley Memo. P. 8) One criticism was that Stanley did not place a full daily safety checklist on a sticker on the doors. The second criticism is that Stanley does not keep in touch with entities that buy its doors to make certain that they are properly maintaining the doors. *(Id.)*

Davis admits he cannot say that Stanley's supposed failures were the cause of the Plaintiff's injury; specifically, he testified as follows:

> Q. Can you say, to a reasonable degree of certainty, that the alleged inadequacy of Stanley's safety check decal was a proximate cause of Ms. O'Neill's alleged injury?
> A. No, I cannot say that.
> Q. Can you say, to a reasonable degree of certainty, that in your opinion, failure to contact end users of changes in regulations in the standards was a proximate cause of Mrs. O'Neill's alleged injury?
> A. I cannot say that it was a proximate cause, no.

(*Id.*) Dr. Davis testified that the proximate cause of the injury was the condition of the sensors on the automatic doors. (*Id.*) Davis admits the doors were not negligently manufactured or designed. (*Id.*)

O'Neill admits that Stanley provides with its automatic sliding glass door product an Owner's Manual. The manual instructs owners to perform a daily safety check described in the manual and advises the owner have the doors inspected annually by a qualified technician. The manual tells the owner that these efforts are necessary on their part to maintain a safe operating door. Stanley also ships with the doors a sticker to be placed on the doors by the installer that advises the owner to perform the daily safety check. (*Id. at pp. 8-9).*

Davis' criticisms lack any foundation as they are based on "belief" and speculation and they are irrelevant. The criticisms lack any support because he admits that there are no industry standard, code, regulation or law that requires Stanley do what Davis believes they should have done. *(Id., 9-10)* O'Neill's counsel admits Davis can point to no automatic door manufacturer, expert, article, study, book, treatise, paper or the like to support his opinions. *(Id., p. 11-12)* Davis has done nothing to test whether his ideas can or should be implemented or that they would make any difference. He simply holds his opinions because he thinks their good ideas. These are irrelevant "opinions" because he cannot say that the alleged failures were the proximate cause of the injury.

According to O'Neill's counsel, Davis testified that the doors lack some warning stickers required by ANSI 2005. The evidence establishes that Hampton Inn employees would not allow the services technician to place warning stickers suggested by the service technician to be placed on the doors. *(Id., pp. 13-14)* He also admits that he is not qualified to testify as to the impact of warnings on a human being as he is not a warnings expert or a human factors expert, so he cannot opine to a jury that any warnings failures was a proximate cause of this accident. *(Id.)* Davis admits that he cannot testify that, to a reasonable degree of certainty, if additional cautions stickers were on the doors that O'Neill's injury would not have occurred. *(Id., p. 13)* He also testified that it is not industry standard to place a sticker on the doors that says it is a dangerous product per ANSI Z535.4. *(Id., pp. 13-14)* Davis admits ANSI Z535.4 does not specifically apply to automatic sliding doors, he just thinks it should. *(Id.)* Finally, the ANSI 2005 requirements Davis discusses were implemented almost 10 years after the doors were installed.

Davis' Opinions even if reliable do not establish liability of Stanley

In any products liability action, a plaintiff must establish three things: (1) he was injured by the product; (2) the product was in essentially the same condition at the time of the accident

as it was when it left the hands of the defendant, and (3) the injury occurred because the product "was in a defective condition unreasonably dangerous to the user." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 735 S.E.2d 650 (2012) citing *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct.App.1985).

O'Neill admits that the automatic sliding doors were not in essentially the same condition at the time of O'Neill's accident as they were when the left Stanley's facility. Therefore, O'Neill cannot establish liability on the part of Stanley.

WHEREFORE, based on the forgoing, O'Neill's claims are barred by the Statute of Repose. Further, there was no Stanley product on the doors that operated them such that it could have malfunctioned and injured O'Neill. O'Neill has no admissible expert testimony that could assist the jury in determining that that Stanley breached the standard of care for a manufacturer of automatic sliding doors and sensors, or that a defect and unreasonably dangerous condition existed at the time of the accident. For these reasons, Stanley's Renewed Motion for Summary Judgment is GRANTED and the case against Stanley is hereby DISMISSED.

IT IS SO ORDERED.

The Honorable Larry B. Hyman

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