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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas, Ninth Judicial Circuit
The Honorable J.C. Nicholson, Jr.

Circuit Court Case No. 2013-CP-10-04592
Appellate Case No. 2016-000471

Maria Allwin.....Petitioner,

v.

Russ Cooper Homes, Inc., Buffington Homes, L.P., and Shope Reno Wharton, ... Defendants,

Of Whom, Russ Cooper Associates, Inc. and Shope Reno Wharton are the..... Respondents.

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

v.

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

APPENDIX
VOLUME 4 OF 4

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February 23, 2011.

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Shope Reno Warton
18 Marshall Street, Ste. 114
South Norwalk, CT 06854

Re: 133 Flyway Drive, Kiawah Island, South Carolina

Gentlemen,

I have been retained by Maria Allwin and her family in connection with significant deficiencies at the residence known as 133 Flyway on Kiawah Island (The "Home"). You served as the architect for the Home. Ms. Allwin is contemplating putting the Home on the market. In the course of that process, a limited investigation has revealed numerous and significant deficiencies related to the Home. These deficiencies relate to the design/installation of doors and windows, waterproofing and sealant, flashing installation and other deficiencies which have lead to significant damage and which have prevented Ms. Allwin and her family from using the Home.

As a result of these deficiencies and the damages to property resulting therefrom, Ms. Allwin faces a significant financial burden, including the cost to complete a thorough investigation of the home, as well as repair of the home, which will inevitably be very expensive. Alternatively, Ms. Allwin may attempt to sell the Home in "as is" condition and take a substantial loss on the purchase price. She has not decided, at this point, which option she will choose.

Since you served as the design professional for the Home, Ms. Allwin hereby requests that you contact me and make arrangements to investigate the conditions at the Home and assist her with the evaluation and repair of those conditions.

If you refuse to investigate and correct the conditions at the project in a suitable manner, Ms. Allwin will be forced to deal with those issues on her own and reserves any and all legal rights and remedies she may have against you as a result. In that event, you are also notified of the conditions at the Home and should you choose to review and inspect these prior to repair, arrangements for a site visit must be made with my office as soon as possible.

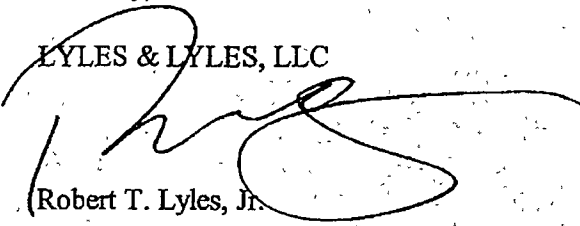
001469

Please forward this letter to your attorney and to your insurance agent/broker and any known liability insurance carriers. I also hereby request that you make your files relative to the Home available for my review.

If you have any questions or wish to discuss this further, please feel free to call me.

Sincerely,

LYLES & LYLES, LLC


(Robert T. Lyles, Jr.)

RTL:bl

cc: Maria Allwin
Christopher Allwin

001470

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Maria Allwin,

Plaintiff,

vs.

Russ Cooper Associates, Inc., and Buffington
Homes, L.P.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-4592

**ANSWER OF DEFENDANT RUSS
COOPER ASSOCIATES, INC.**

FILED
2013 DEC 12 PM 5:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Defendant Russ Cooper Associates, Inc, ("Russ Cooper"), by and through undersigned attorneys, hereby answering the Plaintiff's Complaint, states as follows:

1. Russ Cooper admits the allegations of Paragraphs 1, 2, and 3.
2. The allegations of Paragraph 4 set forth conclusions of law which require no response from Russ Cooper. To the extent any response is required, Russ Cooper denies the same and demands strict proof thereof.
3. Answering the allegations of Paragraph 5, Russ Cooper admits that it acted as the general contractor for the original construction of the Project and that Buffington performed certain repairs to the Project. Russ Cooper denies the remaining allegations of said Paragraph and demands strict proof thereof.
4. Russ Cooper denies the allegations of Paragraphs 6, 7, 8, and 9, and demands strict proof thereof.

**AS TO THE FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)**

5. Answering the allegations of Paragraph 10, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

001471

6. Russ Cooper denies the allegations of Paragraphs 11, 12, and 13 (including any and all subparts thereto), and demands strict proof thereof.

**AS TO THE SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Service)**

7. Answering the allegations of Paragraph 14, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

8. Russ Cooper denies the allegations of Paragraphs 15, and 16, and demands strict proof thereof.

9. Russ Cooper denies any and all allegations not specifically admitted hereinabove.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

11. That all claims asserted against Defendant are barred by the applicable statute of limitations and/or the applicable statute of repose.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

12. Plaintiff's claims, if any, are barred, or should be reduced, by Plaintiff's own comparative negligence and recklessness by Plaintiff's failure to properly maintain the property and to mitigate her damages.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

13. Plaintiff's claims, if any, are the result of acts and omissions of other entities over whom Defendant have no control, barring Plaintiff's claims against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

14. That all claims are barred by the doctrine of Laches.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

15. That the final completion and acceptance of the work undertaken by Defendant pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiff.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

16. That Plaintiff failed to give Defendant reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Defendant a reasonable opportunity to correct any such alleged defects.

17. That Plaintiff's failure to give Defendant notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

18. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

19. That the failure of Plaintiff within the warranty period from the date of the completion and acceptance of the project by the Plaintiff, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Defendant constitutes a complete defense to all claims asserted by Plaintiff.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

20. Plaintiff's Complaint is barred by payment and/or release.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

21. Plaintiff has waived and/or is estopped from asserting the claims set forth in her

Complaint.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

22. If Plaintiff sustained injuries and damages in the manner alleged in the Complaint, which injuries and damages are specifically denied by Defendant, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Defendant nor of anyone for whose conduct Defendant is any way responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiff, all of which will be shown at the trial of this case, and for which Plaintiff can have no recovery against Defendant or, in the alternative, for which Plaintiff's recovery should be appropriately reduced.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

23. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

24. Defendant has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiff, excluding liability for many claims the Plaintiff is making, barring Plaintiff's claims and/or Plaintiff's claimed damages, including Plaintiff's claim for consequential damages, in whole or in part, against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

25. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of the Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

26. Plaintiff's claims are barred by her own comparative negligence in failing to provide an adequate design for the structure.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

27. That by furnishing plans, specifications and drawings to Defendant, Plaintiff impliedly warranted that those plans, specifications and drawings were suitable and fit for use by Defendant in performing its work as called for in the contract documents.

28. That to the extent that the plans, specifications and drawings were defective, insufficient, conflicting and incomplete, Plaintiff has breached its implied warranty and all claims asserted by Plaintiff against Defendant are therefore barred.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

29. That the Plaintiff's claim for punitive damages violate the South Carolina State Constitution and like provisions of the United States Constitution and, therefore, pursuant to S.C.R.C.P. 12(b)(6), Defendants request the Plaintiff's claim for punitive damages be dismissed.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

30. Plaintiff's claims are barred by the doctrine of corporate immunity.

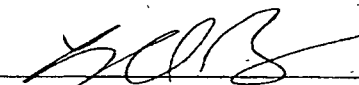
**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

31. Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, Defendant prays that Plaintiff's Complaint be dismissed with costs, and that it be given judgment against the Plaintiff to include attorney's fees, costs, and other expenses

incurred in defending this action, that this matter be tried before a jury, and for such further and other relief as this Court may deem just and proper.

BEST HONEYCUTT, P.A.

By: 

L. Dean Best

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***Attorneys for Defendant Russ Cooper
Associates, Inc.***

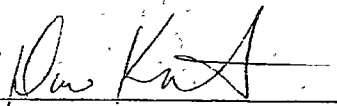
December 11, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, Dani Knecht, an employee of Best Honeycutt, P.A., do hereby certify that a true and correct copy of the foregoing has been provided by U.S. Mail, postage pre-paid, and/or via electronic mail to all other counsel of record, on this 11th day of December, 2013, to the following:

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Joshua P. Cantwell, Esquire
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Attorneys for Buffington Homes, L.P.



Dani Knecht

FILED
2013 DEC 12 PM 5:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

1478

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Maria Allwin,

Plaintiff,

vs.

Russ Cooper Associates, Inc., and Buffington
Homes, L.P.,

Defendants.

Buffington Homes, L.P.,

Third-Party Plaintiff,

vs.

Air Fasteners Of Carolina, Inc., Albrecht
Environmental, Inc., All Points
Construction, Inc., Berlin G. Myers Lumber
Corp., Builders FirstSource-Southeast
Group, LLC f/k/a Builders FirstSource
Southeast Group, Inc., Frank Leigh
Contractors, Inc., Patriots Drywall, Inc.,
Picquet Roofing, Inc., Plantation
Construction, Sprayseal Foam Insulation,
L&L Services, LLC, Loney Davis, Superior
Surfaces Of Charleston, Inc., & Tischler Und
Sohn (USA) Limited,

Third-Party Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-4592

**ANSWER OF DEFENDANT RUSS
COOPER ASSOCIATES, INC. TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

FILED
2014 NOV -6 PM 2:03
JULIE M. TAYLOR
CLERK OF COURT
BY _____

Defendant Russ Cooper Associates, Inc. ("Russ Cooper"), by and through its undersigned attorneys, hereby answering the Plaintiff's First Amended Complaint, states as follows:

1. Russ Cooper admits the allegations of Paragraphs 1, 2, and 3.
2. Answering the allegations of Paragraph 4, Russ Cooper admits that SRW is an

architectural firm located in South Norwalk, Connecticut that provided design services for the original construction of the subject residence. Russ Cooper denies the remaining allegations of said Paragraph and demands strict proof thereof.

3. The allegations of Paragraph 5 set forth conclusions of law which require no response from Russ Cooper. To the extent any response is required, Russ Cooper denies the same and demands strict proof thereof.

4. Answering the allegations of Paragraph 6, Russ Cooper admits that it acted as the general contractor for the original construction of the Project, that SRW provide design services for the Project, and that Buffington performed certain repairs to the Project. Russ Cooper denies the remaining allegations of said Paragraph and demands strict proof thereof.

5. Russ Cooper denies the allegations of Paragraphs 7 (and all its subparts), 8, 9, and 10, and demands strict proof thereof.

**AS TO THE FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)**

6. Answering the allegations of Paragraph 11, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

7. Russ Cooper denies the allegations of Paragraphs 12, 13 (and all its subparts), and 14, and demands strict proof thereof.

**AS TO THE SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Service)**

8. Answering the allegations of Paragraph 15, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

9. Russ Cooper denies the allegations of Paragraphs 16, and 17, and demands strict proof thereof.

**AS TO THE THIRD CAUSE OF ACTION
(Negligence as to SRW)**

10. Answering the allegations of Paragraph 18, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

11. The allegations of Paragraphs 19 (and all its subparts), and 20, set forth an action against parties other than Russ Copper and, therefore, require no response from Russ Cooper. To the extent any response is required, Russ Copper denies the same and demands strict proof thereof.

**AS TO THE FOURTH CAUSE OF ACTION
(Breach of Express and Implied Warranty as to SRW)**

12. Answering the allegations of Paragraph 21, Russ Cooper incorporates by reference its previous responses as if repeated herein verbatim.

12. The allegations of Paragraphs 22, 23, and 24, set forth an action against parties other than Russ Copper and, therefore, require no response from Russ Cooper. To the extent any response is required, Russ Copper denies the same and demands strict proof thereof.

13. Russ Cooper denies the relief sought in the WHEREFORE paragraph.

14. Russ Cooper denies any and all allegations not specifically admitted hereinabove.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

15. That all claims asserted against Defendant are barred by the applicable statute of limitations and/or the applicable statute of repose.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

16. Plaintiff's claims, if any, are barred, or should be reduced, by Plaintiff's own comparative negligence and recklessness by Plaintiff's failure to properly maintain the property and to mitigate her damages.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

17. Plaintiff's claims, if any, are the result of acts and omissions of other entities over whom Defendant have no control, barring Plaintiff's claims against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

18. That all claims are barred by the doctrine of Laches.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

19. That the final completion and acceptance of the work undertaken by Defendant pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiff.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

20. That Plaintiff failed to give Defendant reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Defendant a reasonable opportunity to correct any such alleged defects.

21. That Plaintiff's failure to give Defendant notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

22. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

23. That the failure of Plaintiff within the warranty period from the date of the completion and acceptance of the project by the Plaintiff, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Defendant constitutes a

complete defense to all claims asserted by Plaintiff.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

24. Plaintiff's Complaint is barred by payment and/or release.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

25. Plaintiff has waived and/or is estopped from asserting the claims set forth in her Complaint.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

26. If Plaintiff sustained injuries and damages in the manner alleged in the Complaint, which injuries and damages are specifically denied by Defendant, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Defendant nor of anyone for whose conduct Defendant is any way responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiff, all of which will be shown at the trial of this case, and for which Plaintiff can have no recovery against Defendant or, in the alternative, for which Plaintiff's recovery should be appropriately reduced.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

27. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

28. Defendant has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiff, excluding liability for many claims the Plaintiff is making, barring

Plaintiff's claims and/or Plaintiff's claimed damages, including Plaintiff's claim for consequential damages, in whole or in part, against Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

29. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of the Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

30. Plaintiff's claims are barred by her own comparative negligence in failing to provide an adequate design for the structure.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

31. That by furnishing plans, specifications and drawings to Defendant, Plaintiff impliedly warranted that those plans, specifications and drawings were suitable and fit for use by Defendant in performing its work as called for in the contract documents.

32. That to the extent that the plans, specifications and drawings were defective, insufficient, conflicting and incomplete, Plaintiff has breached its implied warranty and all claims asserted by Plaintiff against Defendant are therefore barred.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

33. That the Plaintiff's claim for punitive damages violate the South Carolina State Constitution and like provisions of the United States Constitution and, therefore, pursuant to S.C.R.C.P. 12(b)(6), Defendants request the Plaintiff's claim for punitive damages be dismissed.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**

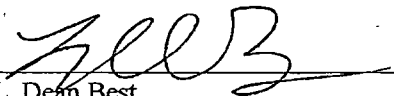
34. Plaintiff's claims are barred by the doctrine of corporate immunity.

RESERVATION AND NON-WAIVER

35. Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, Defendant prays that Plaintiff's Complaint be dismissed with costs, and that it be given judgment against the Plaintiff to include attorney's fees, costs, and other expenses incurred in defending this action, that this matter be tried before a jury, and for such further and other relief as this Court may deem just and proper.

BEST HONEYCUTT, P.A.

By: 
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November 5, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, Dani Knecht, an employee of Best Honeycutt, P.A., do hereby certify that a true and correct copy of the foregoing has been provided by U.S. Mail, postage pre-paid, and/or via electronic mail to all other counsel of record, on this 5th day of November, 2014, to the following:

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FILED
2014 NOV -6 PM 2:03
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CLERK OF COURT

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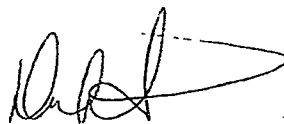
And

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Attorneys for Sprayseal Foam Insulation



Dani Knecht

THE MORGAN COMPANY OF CHARLESTON, INC.

Construction Program Management and Consulting

19 October 2003

Mr. and Mrs. James Allwin
133 Flyway Drive
Kiawah Island, SC 29455

Re: 133 Flyway Drive
Kiawah Island, South Carolina

Dear Mr. and Mrs. Allwin:

Just wanted to let you know that late this past week, I received some follow-up information from Dan Cartin of Aero Services as well as from Deveaux Picquet of Picquet Roofing. Dan had been in contact with the engineering firm in Columbia, SC, from whom he had requested the information mentioned in my previous correspondence. The engineer, who is also a consultant to the Medical University of South Carolina (MUSC), will be in town this Tuesday and we have arranged a meeting at 133 Flyway with him that afternoon. It is our intention to discuss the various options related to the air transfer in the attic area with him.

Deveaux supplied me with some estimated costs associated with repairing and refurbishing the roof as well as an estimated cost of replacement of the roof which he feels will be required at some time in the future. I am sorting through those numbers and will discuss them with him again before forwarding them to you.

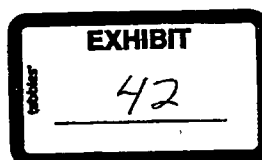
I will correspond with you later in the week after our Tuesday meeting at your home. Thank you for your consideration.

Respectfully,


Milt E. Morgan

MEM:mjm

Post Office Box 477, Charleston, South Carolina 29402
Telephone: 843/768-5446 Facsimile: 843/768-5448 E-mail Address: marcocpm@bellsouth.net



Allwin 01449

001488

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MARIA ALLWIN VOLUME 2

MARIA ALLWIN,

Plaintiff,

vs.

RUSS COOPER ASSOCIATES, INC.,
and BUFFINGTON HOMES, L.P.,

Defendants.

BUFFINGTON HOMES, L.P.,

Third-Party Plaintiff,

vs.

AIR FASTENERS OF CAROLINA, INC., ALBRECHT
ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION,
INC., BERLIN G. MYERS LUMBER CORP., BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC f/n/a BUILDERS
FIRSTSOURCE SOUTHEAST GROUP, INC., FRANK LEIGH
CONTRACTORS, INC., PATRIOTS DRYWALL, INC.,
PICQUET ROOFING, INC., PLANTATION CONSTRUCTION,
SPRAYSEAL FOAM INSULATION, L&L SERVICES, LLC,
LONEY DAVIS, SUPERIOR SURFACES OF CHARLESTON,
INC., and TISCHLER UND SOHN (USA) LIMITED,

Third-Party Defendants.

315 Madison Avenue
New York, New York

January 27, 2015
10:05 AM

MARIA ALLWIN, the Plaintiff herein, taken
by the Defendants, before a Notary Public of the
State of New York, pursuant to Order.

1 A p p e a r a n c e s:

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1 MARIA ALLWIN,
2 having been previously been duly sworn by a
3 Notary Public of the State of New York, was
4 examined and testified as follows:

5 EXAMINATION

6 BY MR. BEST:

7 Q. Ms. Allwin, you realize you're still
8 under oath?

9 A. Yes.

10 Q. Did you discuss the substance of your
11 testimony with anyone last night?

12 A. No.

13 Q. All right. Thank you.

14 (Exhibit No. 261 was marked for
15 identification.)

16 Q. I'm going to show you what's been marked
17 as Exhibit 261.

18 A. Okay.

19 Q. And ask if you've seen that document
20 before.

21 A. Yeah, I've seen this.

22 Q. And we'll look at some documents later
23 on where you made at least a few payments. If
24 you'll notice on the first page there is a
25 payment schedule?

1 A. Yeah.

2 Q. Did you make all of the payments under
3 this contract for \$185,480?

4 A. I don't recall that.

5 Q. You don't recall whether you did or
6 didn't?

7 A. I don't recall whether I did or did not
8 make all the payments.

9 Q. And I'm not suggesting you owe anybody
10 money, but I am asking do you know whether all of
11 the items in this contract to be performed by
12 Atlantic Builders were actually performed? Were
13 all these repairs made?

14 A. I don't recall that. I would have to
15 check the bills to see. I don't remember.

16 Q. You don't know one way or the other.

17 A. I do not.

18 Q. Can you tell me as you sit here today
19 what repairs Buffington made in 2004-2005?

20 A. Sure. My understanding is that
21 Buffington was responsible for the removing of
22 the stone at the deck level of the doors, and
23 fixing that water, whatever that -- fixing the
24 stone there, and then he took the shingle around --

25 Q. I'm sorry. Because of water intrusion

1 into the basement?

2 A. I would imagine so.

3 Went around the turret, took the shingle
4 off the turret, on the bottom, off the kitchen
5 window, and the shingle on the side by the
6 kitchen; removed that, over the driveway side. I
7 don't recall anything else he did.

8 Q. Do you recall him doing any work around
9 windows?

10 A. Not specifically, no. The kitchen
11 bottom. I don't recall the windows.

12 Q. The understanding you just described,
13 that was your understanding back in 2004-2005
14 also. You knew he was doing that work then.

15 A. That's what I recall.

16 (Exhibit No. 274 was marked for
17 identification.)

18 Q. Okay. I'm showing you what we've marked
19 as Exhibit 274. It's an e-mail exchange between
20 you and Tori Stein.

21 A. Uh-huh.

22 Q. Where you are forwarding her a copy of
23 the AIG claim denial letter that we looked at
24 yesterday.

25 A. Okay.

1 Q. Or at least that's what it appears to
2 be. And I just want to make sure, did you review
3 that claim denial letter when you sent this
4 e-mail in January 2009?

5 A. I might have just sent it to her to look
6 at it.

7 Q. Okay. Why did you send it to her to
8 look at?

9 A. To see what we could do, to get the
10 house -- see what she evaluated from it, if she
11 could evaluate it with me.

12 Q. Because of the problems set forth in
13 that letter?

14 A. Yes.

15 (Exhibit No. 275 was marked for
16 identification.)

17 Q. Exhibit 275 is an e-mail from Tori Stein
18 to you regarding an appointment with Jake Price,
19 an adjuster for AIG, and I believe this may have
20 related to -- I know you had a couple of
21 incidents. I think this may have been the
22 lightning strike? Do you recall what kind of
23 claim you made for AIG in 2009?

24 A. I did have a lightning strike claim,
25 yes. I don't recall the dates, but it's possible

1 that's what this was.

2 Q. Tori mentions in the last paragraph of
3 her e-mail, Mr. Price mentions a second claim
4 made of humidity and paint peeling.

5 Did you make a second claim?

6 A. No.

7 Q. Do you have any correspondence from AIG
8 in 2009 concerning an investigation and
9 inspection? Do you know if AIG made an
10 inspection?

11 A. I don't recall that.

12 (Exhibit No. 276 was marked for
13 identification.)

14 Q. Exhibit 276 is an invoice from Picquet
15 Roofing to Atlantic Builders for various roof
16 repairs. Do you know what roof repairs --

17 A. I do not.

18 Q. You have to let me finish my sentence.
19 Thank you. I know you know where I'm going. We
20 just need to have a clear record.

21 You don't know what roof repairs were
22 made in February 2009.

23 A. I do not know.

24 (Exhibit No. 278 was marked for
25 identification.)

1 Q. Exhibit 278 is an HVAC design analysis
2 that was prepared for Environmental Solutions and
3 Service. They go by ESS.

4 A. Uh-huh.

5 Q. It was prepared by GKA Consulting
6 Engineers. Have you seen this before?

7 A. No, I have not.

8 Q. Do you know why you were having another
9 HVAC analysis performed in 2009?

10 A. Yeah, I do. I do know why, although I'm
11 not sure of the dates, but the system kept
12 turning on and off, the new chiller system that
13 we had installed by Aero, and it was reaching a
14 point of desperation that we had to do something
15 else.

16 Q. Okay. Is it fair to say that you're not
17 looking to Russ Cooper or Russ Cooper Associates
18 for any type of recovery in this litigation due
19 to the HVAC system installed by Aero?

20 A. Yes, that's true.

21 Q. Okay.

22 A. I'm not looking to Russ Cooper for any
23 of that, or anybody else.

24 Q. What are you looking to Russ Cooper and
25 Russ Cooper Associates for in this litigation?

1 A. I am so glad you asked me that. You
2 went through 278 exhibits for the one question.
3 I'm looking to Russ Cooper for compensation and
4 for everything that I discovered subsequent to
5 this.

6 Q. I'm sorry. Subsequent to when?

7 A. Subsequent to when I realized that I had
8 a problem of magnitude that Tori identified as
9 the water coming in underneath the house, and at
10 that time I called upon forensic people to help
11 me figure out what indeed was going on there.

12 Q. That was Fuller Engineering?

13 A. Yes. Somebody independent who did not
14 have a history with the house, had not been there
15 before, was not conflicted, totally fresh eyes to
16 look at my problem with me and explain to me
17 exactly what was going on. And so he did. And
18 he went through the whole house, and he did this
19 destructive testing, which is a terrible thought
20 to think that I'm doing destructive testing on
21 the house, but nonetheless, I went through it
22 with him, and identified all these things that I
23 had no knowledge of.

24 I think in all these documents, 278
25 documents, nowhere did it say that someone said

1 to us, someone said to Jim, pay this, and Jim
2 said no. We did, as stewards of that house,
3 everything that was asked of us, thousands of
4 dollars, but Jim never said, hey, man, what are
5 you doing? Which I see in your faces would have
6 been the response, perhaps, you would have done,
7 but that wasn't his. He went there, he wanted it
8 fixed and he fixed it, to the best of the
9 knowledge he had with the information that was
10 given to him at the time. And now I'm acting
11 with the best of the knowledge of the information
12 that's been given to me at this time, and that's
13 this destructive testing and advice from other
14 people, and that's where I am.

15 What happened before, I can't -- you
16 know -- we -- everyone tried to do something. I
17 can't say you fucked up, but there are
18 fundamental problems with that house, with the
19 design and building of that house, that no one
20 could have expected, least of all the homeowner.

21 Q. I appreciate your answer, and if I'm
22 understanding what you're telling me, it's that
23 you didn't know that there were problems with the
24 house until you received the report from Ross
25 Clements at Fuller Engineering?

1 MR. LYLES: Object to the form of
2 the question.

3 A. That's not what I said.

4 Q. Okay.

5 A. I fixed all the problems of the house
6 that I was confronted with in 278 documents.

7 Q. We haven't looked at all of those, but I
8 see your point.

9 A. Okay. The ones you skipped over, I
10 assumed you skipped because there's nothing to
11 say, but I'm saying to you that in 278 documents,
12 nowhere do you see my husband saying, I'm not
13 doing this, so your question is did I -- were the
14 only problems the problems that I got from that
15 letter? No. Everything else we fixed, and
16 everything I fixed subsequent.

17 Q. Yes, ma'am. I'm not suggesting you
18 didn't make efforts or your husband didn't make
19 efforts to repair the house.

20 A. Okay.

21 Q. What I am suggesting is you knew about
22 these problems, and we've looked at some of the
23 278 documents we've been through, and they
24 establish you and/or your husband were made aware
25 of problems with the original construction years

1 before you filed this lawsuit.

2 MR. LYLES: Object to the form of
3 the question.

4 Q. Do you disagree with that?

5 A. I'm not answering -- I don't understand
6 what you're saying. I think we're playing
7 semantics. I don't know how to respond to that.
8 I'm sorry.

9 Q. We can come back to that.

10 A. Okay.

11 Q. You paid Dan Buffington, I believe it
12 was almost \$360,000. We looked at that
13 yesterday, correct?

14 A. Okay.

15 Q. And he was paid much of that money, if
16 not all of that money, to repair problems in the
17 home that stemmed from the original construction
18 done by Russ Cooper Associates, correct?

19 A. I don't recall what that was all for.

20 Q. Did you think it was maintenance?

21 A. Yeah. Yeah, I thought it was, you know,
22 we're on the beach, things get wet and you have
23 to fix it.

24 Q. You weren't aware that Russ Cooper
25 potentially or subcontractors who built the house

1 originally had done anything wrong.

2 A. I don't recall thinking that Russ Cooper
3 did anything wrong, no.

4 Q. When did you realize Russ Cooper
5 potentially had done anything wrong?

6 A. When he hung up the phone on me when I
7 called him to ask him his advice.

8 Q. And that was in response to what again?

9 A. That was in response to the call I
10 received from Tori that the doors were -- the
11 flashings were in or out.

12 (Exhibit No. 280 was marked for
13 identification.)

14 Q. Look at Exhibit 280. Have you seen that
15 before, please?

16 A. I see it, yes.

17 Q. Okay. The first page is the invoice, or
18 a proposal, actually, from Atlantic Builders.

19 A. Uh-huh.

20 Q. Excuse me. Gamble-Atlantic, certain
21 roofing repairs. Have you seen the two pages
22 behind it which are the proposal that Gamble
23 received from Picquet Roofing to do that work and
24 the last page being Gamble's calculation of the
25 fee they're going to charge you?

1 A. I did not see that. It's very
2 interesting, but I did not see that.

3 Q. It is interesting that they've marked up
4 his price almost 50 percent.

5 A. Yeah. That's very funny, isn't it? I
6 did not know that.

7 Q. Is that the source of some irritation
8 today?

9 A. No.

10 Q. No.

11 A. Everyone has to make money.

12 (Exhibit No. 282 was marked for
13 identification.)

14 Q. Exhibit 282 is an e-mail exchange
15 between you and Tori Stein regarding a meeting
16 with Robert. I'm assuming that's a meeting with
17 Robert Lyles?

18 A. Yes, it is.

19 Q. Why did you engage or why were you
20 meeting with Robert Lyles?

21 A. I needed help to decide action to take
22 once I realized the magnitude of what was going
23 on, and I didn't even know what was going on, and
24 I felt I needed someone professional to stand by
25 my side to help me navigate the building process

1 down in Kiawah, and it had to be someone from the
2 area who was respected in the community.

3 Q. And the purpose of hiring an attorney
4 that met those qualifications was to help you
5 identify your options and advise you with respect
6 to the history of problems you were having with
7 the home.

8 A. The purpose was to advise me as to how
9 to move forward with what I had to do and come up
10 with a strategy.

11 Q. And what was the goal? To do what?

12 A. To come up with a strategy, to decide
13 what to do.

14 Q. With respect to the home's repair?

15 A. Yes, with respect to the home's repair.

16 Q. Okay. Why hire a lawyer?

17 A. I needed somebody that I could trust who
18 would be on my payroll, so to speak, and somebody
19 who would be -- that I could say things and
20 bounce ideas off as opposed to someone who I felt
21 had a vested interest in what was going on.

22 Q. Was one of the options you were
23 considering at this time -- I'm assuming one of
24 the options you were considering at this time was
25 the potential for litigation and pursuing claims

1 against the people who had made repairs or built
2 your home.

3 A. No.

4 MR. LYLES: I'm going to object to
5 the question and just instruct Maria not to
6 disclose anything about what you and I talked
7 about. Dean's question is limited to what your
8 thoughts were prior to your mention of me, and
9 that's fine, but otherwise --

10 MR. BEST: That's fine.

11 THE WITNESS: Okay. Thank you.

12 What was your question?

13 Q. Sure. One of the options you were
14 considering was pursuing people who built your
15 home or had companies that built your home or had
16 made previous repairs. Is that why you hired a
17 lawyer?

18 A. No. I just told you why.

19 Q. And if I understand you correctly, you
20 were hiring a lawyer to help you find the people
21 or develop a plan with the people to make repairs
22 to your home.

23 A. Yes.

24 Q. But as of March 17th, 2009, you had a
25 clear appreciation that there were problems with

1 your home that needed repair. Is that a fair
2 statement?

3 A. Yes.

4 Q. You weren't concerned who might be
5 responsible for the problems with your home. Is
6 that what you're saying?

7 A. I always thought I was responsible as
8 the homeowner. I'm following the lead my husband
9 set. We're the homeowner, we're responsible,
10 what am I doing?

11 Q. Okay. Why not hire -- I'm just
12 concerned, or confused, really, about why hire a
13 lawyer to serve in that capacity when I would
14 imagine there are a host of general contractors,
15 engineers, architects who would be better suited
16 to develop a repair plan or maintenance plan for
17 your home. Why a lawyer?

18 A. You know, that's a good question. I
19 don't know. I think I feel more comfortable with
20 an attorney who has, as I said, no vested
21 interest in what I do but my well-being.

22 Q. So what was your plan, what was --
23 again, not getting into the communications that
24 you had with Robert, but what was he tasked with
25 assisting you with?

1 A. We found some outside service
2 contractors to help us look at the house. He
3 took whatever records I had. He -- I spoke to
4 him about it. I shared some of my thoughts on
5 what was going on, and he was tasked to helped me
6 find someone to fix it and someone to do the
7 additional -- though I dreaded it, additional,
8 you know, discovery of what else was -- could
9 possibly be wrong.

10 Q. The testing on your --

11 A. Yeah.

12 Q. -- testing on your home, even
13 destructive testing, if necessary.

14 A. Right.

15 Q. You were willing --

16 A. When I first heard that expression, yes,
17 destructive testing.

18 Q. And that was in 2009.

19 A. Whatever year that was.

20 Q. What problems were you having with the
21 home, as you recall, in 2009?

22 A. The problems of the air conditioning
23 always turning on and off, and I always felt like
24 that was one of the problems with the humidity in
25 the house. Could never get it balanced. There

1 were always service calls for them to come out
2 and fix it, them being Aero.

3 I felt that the roof leaking was never
4 perfect. The water -- well, that was roof. I
5 don't know. And then the windows just not
6 closing right.

7 Q. By closing right, you mean their
8 operation, or not being -- allowing air?

9 A. You couldn't close them, you couldn't
10 pull it closed and shut, lock them.

11 Q. How long had that been going on?

12 A. Maybe a year or two, and since then.

13 Q. You were still having mold problems in
14 2009, correct?

15 A. To the extent that there's mold, yeah,
16 around the fixtures.

17 Q. Around the --

18 A. The light fixtures and air vents.

19 Q. How about around windows?

20 A. I don't recall it around windows.

21 Q. We've got hardwood cupping and water
22 intrusion into the basement in 2009?

23 A. The basement was actually still -- the
24 basement was secured.

25 Q. Since when?

1 A. I don't recall, whatever that date is.
2 Tori put this cave thing in the basement.

3 Q. The plastic on the floor?

4 A. That plastic thing, and that, I think,
5 secured that whole area.

6 Q. It's my understanding the plastic was
7 put down on the dirt.

8 A. On the floor, yes. On the ground, dirt,
9 but also on the walls. There's some plastic on
10 either side, and in the wine cellar, the wine
11 cooler, they closed that up as well.

12 Q. Okay. I believe Tori, about this time,
13 maybe in 2010, installed some waterproofing on
14 that basement wall?

15 A. Right. I think we're talking about the
16 same thing.

17 Q. Okay.

18 A. And then on the basement wall itself, in
19 the basement, they -- she painted this water --
20 this thing, this paint, waterproof paint..

21 Q. Did you actually go down and look at
22 that at some point?

23 A. I'm sure I did. I don't recall it.
24 Yeah, yeah. I went down and looked at it, and I
25 saw the cave. I went into the cave.

1 Q. You mentioned the mold, the roof, the
2 windows. The basement had been a problem, but
3 you think it had been secured.

4 A. Yes.

5 Q. But you knew before 2009 that the water
6 intrusion was getting into the basement, and in
7 fact, Dan Buffington had worked on that in 2004
8 and 2005, correct?

9 A. Yes.

10 (Exhibit No. 283 was marked for
11 identification.)

12 Q. Look at Exhibit 283. Have you seen this
13 document before?

14 A. No.

15 Q. This is a document that Tori Stein
16 produced with -- Gamble Home Services produced.

17 A. Uh-huh.

18 Q. And I believe this to be Tori's notes
19 from your March 23, 2009 meeting with Robert
20 Lyles at the home.

21 A. Okay.

22 Q. Do you recall that meeting?

23 A. What was the date?

24 Q. March 23rd, 2009.

25 A. Yes, I do recall that meeting.

1 Q. Who was present at that meeting?

2 A. Robert, myself, maybe my son -- I don't
3 recall, he came down with me for the ride -- and
4 Tori.

5 Q. There's a reference to, I think, Jim met
6 at house with -- or maybe met Robert. Was there
7 a Jim present?

8 A. I don't recall anybody else. Who's Jim?

9 Q. That's what I'm asking you.

10 A. Oh, I don't know. I'm sorry.

11 Q. Do you know whose e-mail address that is
12 on the top right, dixiedug?

13 A. No, I do not.

14 Q. What was the purpose of that meeting in
15 March of 2009?

16 A. The purpose of the meeting was for us to
17 talk to Tori together, Robert and I, to see what
18 she understood of what she had found in the
19 house.

20 Q. And did she relay her knowledge about
21 the history or problems of the house?

22 A. I don't recall if she relayed her
23 history. I think she said what was wrong at the
24 current moment.

25 Q. There is a listing of sorts, you'll

1 note, in the middle, estimate to fix system,
2 contract to repair system and aesthetics. That
3 system, is she talking about the HVAC system or
4 do you know?

5 A. I do not know.

6 Q. What are the aesthetics?

7 A. I don't know.

8 Q. She has cost to repair. I believe
9 that's stains at windows, exhaust fans, painting,
10 WPR. Do you know what that stands for?

11 A. No, I do not.

12 Q. Wood floors and drywall. Was Tori
13 tasked with preparing a contract to repair these
14 aesthetic items that had been damaged due to
15 mold, water intrusion?

16 A. No. Tori took a lot of things on her
17 own idea to help me figure out what was going on.
18 I don't recall ever saying to her come up with a
19 contract to do all this.

20 Q. At the very top, under Allwin, there's a
21 note that says, Lyles, Tori to do aesthetics.

22 A. Yeah. What is aesthetics?

23 Q. Well, it's the visual appearance.

24 A. Yeah. I know. I get that. I don't
25 know what's her perception of aesthetics. I

1 don't know what that means.

2 Q. Did Mr. Lyles task Tori Stein with
3 coming up with a contract or setting a price to
4 make these aesthetic cosmetic repairs in the
5 house?

6 A. No.

7 Q. Within the circle down at the bottom
8 left there's a reference to Skip, ENG, which I
9 will suggest to you stands for engineer. It's a
10 reference to Skip Lewis, and that it is a
11 reference to Skip Lewis, roof and beam.

12 Was there a plan to get Skip Lewis
13 involved with the house?

14 A. Not that I know. I don't know who Skip
15 Lewis is.

16 Q. Have you ever spoken with Skip Lewis?

17 A. No.

18 Q. Does an engineering firm called H2L ring
19 a bell?

20 A. No.

21 Q. What were the problems with the roof and
22 the beam in March of 2009?

23 A. I don't know what the beam is that she's
24 referring to, and the roof is just my perception
25 or my lack of information about what was going

1 on, and was the roof still -- was there still a
2 leak, was there water, what was -- and what could
3 I do. I don't know what she means by beam and I
4 don't know who Skip is.

5 Q. Okay. What else was accomplished at
6 this meeting?

7 A. Not very much else, not very much.

8 Q. How long did that meeting last?

9 A. I don't recall. A few hours.

10 Q. I'm assuming you walked through the
11 house?

12 A. We walked through the house, yes.

13 Q. And Tori pointed out problems that she
14 knew about?

15 A. No. Tori pointed out what she had seen
16 now that we needed to look at again -- look at.

17 Q. So she pointed out problems that she
18 knew about.

19 A. That she knew about at the time, yes.

20 Q. And you were there with her as she
21 walked through the house.

22 A. Uh-huh.

23 Q. You have to say yes or no for me,
24 please.

25 A. Yes.

1 Q. Mr. Lyles was there with you as well
2 while she did that.

3 A. Yes.

4 (Exhibit No. 284 was marked for
5 identification.)

6 Q. Let's look at Exhibit 284, which is an
7 e-mail dated March 23rd, 2009. It's the same day
8 as your meeting with Mr. Lyles at the house.

9 A. Uh-huh, yes.

10 Q. An e-mail to John at Gamble Home
11 Services. Near the top, she -- and I believe Ms.
12 Stein is referring to you -- she loves the
13 kitchen floor. And apparently you stated, I
14 should have done this throughout the house.

15 I believe that was possibly a reference
16 to the icemaker leak that damaged some kitchen
17 floors that were replaced. Does that ring a
18 bell?

19 A. Yes.

20 Q. That icemaker leak is not part of this
21 lawsuit?

22 A. No.

23 Q. No, I'm correct?

24 A. Yes, you're correct.

25 Q. Ms. Stein stated you took pictures, at

1 least of the cave. She couldn't believe it, and
2 you couldn't believe it. Do you have those
3 photographs?

4 A. No. They were -- were there cell phone
5 photos then? I don't recall. Whatever it is, I
6 don't have them.

7 Q. She signed a contract to do some siding
8 repair at the pool deck.

9 A. Uh-huh.

10 Q. And then she has -- Tori has a list of
11 miscellaneous things to do.

12 A. Uh-huh.

13 Q. What were those things Tori was to do?

14 A. I don't recall.

15 Q. She notes the appointment with Robert
16 went well and that Mr. Lyles is asking Tori to
17 get a price to fix all of the aesthetic issues in
18 the house. Is that refreshing your recollection?

19 A. No.

20 Q. Ms. Stein states, I am groaning. You
21 probably have a good idea how long that will
22 take. I am depressed. This suggestion here,
23 obviously, is that there's a significant amount
24 of aesthetic repair that needs to be made.

25 What can you tell me that was going on

1 other than mold around fixtures? Were there
2 stains from water leaks that had not been
3 repaired?

4 A. I don't understand what Tori's aesthetic
5 issues are. In my mind, there were none. I
6 thought the house looked great.

7 Q. Was there any still hardwood cupping or
8 flooring damage in the house in 2009?

9 A. I don't recall any.

10 Q. Ms. Stein writes to John that a design
11 engineer will be contacting Maria to survey the
12 house for structural issues. What structural
13 issues were going on?

14 A. I don't know what that means. Who was
15 that, do you know?

16 Q. We're going to get to that. I do know.

17 A. Okay. Good.

18 Q. And again, Skip Lewis doesn't ring a
19 bell.

20 A. No.

21 Q. The engineer will also evaluate the roof
22 and windows. She's really excited about that.

23 A. Uh-huh.

24 Q. Again, roof leaks have been an ongoing
25 problem with the home.

1 A. Uh-huh.

2 Q. You need to say yes or no.

3 A. Yes.

4 Q. And the windows -- the problem you had
5 with the windows in 2009 was they would not
6 operate to your satisfaction. They wouldn't
7 close and --

8 A. Yes.

9 Q. Toward the middle of the next paragraph
10 she notes that you asked her to get a designer or
11 an architect to give you a price for some
12 drawings to add a floor in the great room to
13 create a media room, and then adding a screen
14 porch over the rear elevation deck and adding
15 stairs from the garage to the kitchen. And I
16 believe an architect was retained to perform that
17 work, correct?

18 A. Yes.

19 Q. Were plans actually drawn up? Do you
20 have drawings?

21 A. Yes.

22 Q. Could you provide those to Mr. Lyles,
23 please?

24 A. I don't know.

25 Q. Do you know where they are?

1 A. I do not.

2 Q. When Mr. Smith did his repair work, the
3 most recent repair work, did you go forward with
4 that plan and add the media room?

5 A. No, I did not.

6 Q. Did you do any of these things?

7 A. No, none of them.

8 Q. Did you add anything over the pool
9 cabana?

10 A. No, nothing.

11 Q. So I was there when repairs were
12 beginning, but the great room still exists --

13 A. Yes.

14 Q. -- it's still open to the second story.

15 A. Yes.

16 (Exhibit No. 287 was marked for
17 identification.)

18 Q. Please look at Exhibit 287.

19 A. Uh-huh.

20 Q. This is a document that was produced by
21 H2L, an engineering firm in the upstate of South
22 Carolina. And they are, I believe, phone notes
23 taken on March 30th by Skip Lewis in a conference
24 with your attorney. And you had retained Mr.
25 Lyles by March 30th, 2009? He was acting on your

1 behalf as your counsel?

2 A. Yes, he was.

3 Q. It looks like Mr. Lyles contacted Mr.
4 Lewis on March 30, 2009. Does that sound
5 consistent or just refreshing your recollection
6 at all?

7 A. It's not.

8 Q. The issue is a building condition
9 assessment request. You see that?

10 A. Where is that?

11 Q. Under issue, at the top.

12 A. Oh, issue, yes.

13 Q. A building condition assessment request?
14 Do you not recall any plan to hire an engineer to
15 come in to assess the condition of your
16 residence?

17 A. Yes. We did do that. We did want -- I
18 did want that.

19 Q. Okay.

20 A. I don't know who it ended up --

21 Q. So that was the plan in March of 2009,
22 because you wanted to know exactly what was wrong
23 with your home.

24 A. Right.

25 Q. If you drop down a few lines, you'll see

1 history of problems with water infiltration and
2 HVAC issues. That's consistent with the problems
3 you knew you were having with your home, correct?

4 A. Yes.

5 Q. Owner has spent dollar sign, dollar
6 sign, dollar sign over a number of years with
7 engineers and contractors in an effort to remedy
8 problems.

9 That's a true statement, correct?

10 A. Yes.

11 Q. Spent over, plus or minus, \$300,000 with
12 Buffington on window work.

13 That's a true statement, correct?

14 A. Yes.

15 Q. Spent \$700,000, plus or minus, to
16 replace the HVAC system. That was back in 2000.

17 That's a true statement, correct?

18 A. Yes.

19 Q. Appear to have, among other issues,
20 negative air problem. Do you understand what a
21 negative air --

22 A. No.

23 Q. Okay. Have you had any conversations
24 with anyone who suggested that, due to the
25 environmental dynamic and the way your HVAC

1 system functions, that there is a negative
2 pressure, meaning outside air is drawn into the
3 home versus inside air being pushed out into the
4 environment? Does that make sense?

5 A. It doesn't make sense, but I have heard
6 someone try to explain that to me.

7 Q. When did you first learn that your house
8 may have a negative pressure or negative air
9 problem?

10 A. I don't recall when.

11 Q. It appears that Mr. Lyles is reporting
12 this to Mr. Lewis, or maybe it's speculation on
13 Mr. Lewis' part, but you just don't recall when
14 you learned that.

15 A. No, I don't recall.

16 Q. Mr. Lewis notes a need for comprehensive
17 assessment and plan of attack. That's exactly
18 what you understand the engineer was going to be
19 asked to do, correct?

20 A. Yes.

21 Q. The current property manager is
22 compiling history of prior actions and reports.
23 Does that refresh your recollection as to what,
24 if anything, Ms. Tori Stein was asked to do
25 following the meeting with Mr. Lyles?

1 A. Sure. That makes sense. She would be
2 the one.

3 Q. Okay. And you recalled yesterday where
4 in the -- at least, at least the few months
5 before Ms. Stein spent, I think it was 7- or
6 \$8,000 poring over past reports, compiling
7 repairs, was her work -- does this now refresh
8 your recollection as to what she was doing in
9 those invoices?

10 A. Yeah, it does.

11 Q. So the invoices she sent you for 7- or
12 \$8,000 where she was reviewing documents, talking
13 with Roy Smith, talking with Bob Cowan, gathering
14 a history and reviewing historical documents, why
15 was she doing that?

16 A. I think, as I said before, she took a
17 lot of things on her own to do on my behalf, and
18 I'm -- I don't recall ever telling her to do any
19 of that, and she did it. She was always one step
20 ahead of what was, I think -- what she thought I
21 needed to do.

22 Q. But she billed you several thousand
23 dollars for that work.

24 A. Right, and I paid it.

25 Q. The last note in Mr. Lewis's record is

1 H2L requested to prepare a proposal. Have you
2 seen a proposal from H2L?

3 A. No, I have not.

4 Q. RTL -- I'm assuming that's Mr. Lyles --
5 will be sending information as quickly as can be
6 assembled. Do you know what information Mr.
7 Lyles ultimately, if anything, sent to Mr. Lewis?

8 A. I do not.

9 (Exhibit No. 288 was marked for
10 identification.)

11 Q. Exhibit 288 is a proposal from Altenbach
12 Design. This is the architect who designed the
13 -- enclosing the great room for the media room,
14 the screen porch. Have you seen that before?

15 A. I don't recall seeing it. I don't even
16 remember their name.

17 Q. You did receive design drawings --

18 A. I did.

19 Q. Do you have any idea where they might
20 be?

21 A. I think that they are with Ross, Ross
22 Clements. I gave him everything I had. I think
23 he might have -- or -- I don't know. I've got to
24 look.

25 Q. Would you mind looking?

1 A. I will. They were very nice drawings.
2 Or maybe Cynthia has them, the art -- the real
3 estate, because I thought -- I still think it's a
4 great idea to do.

5 Q. Okay. I'll check with her as well, but
6 if you run across them when you're looking, if
7 you could give those to Robert, please.

8 A. Okay.

9 (This page contains Requested
10 Information..)

11 (Exhibit No. 290 was marked for
12 identification.)

13 Q. Exhibit 290 is a letter from Mr. Lyles
14 to you. He's copied Tori Stein. He references
15 the meeting on March 23rd, 2009. Do you recall
16 seeing this letter before?

17 A. No. Yeah. I mean, I did get this
18 letter, yes.

19 Q. You'll see that Mr. Lyles reported to
20 you that he had reviewed the project with Skip
21 Lewis at H2L?

22 A. Uh-huh.

23 Q. And he had asked Skip to prepare a
24 proposal to do a property condition survey at
25 your home, and you understood that in April of

1 2009.

2 A. Yes.

3 Q. He also notes, I've copied and sent to
4 Skip the materials that Tori put together for Mr.
5 Lyles. You see that?

6 A. Yes.

7 Q. What did Tori put together for Mr.
8 Lyles?

9 A. I have no idea.

10 Q. Mr. Lyles was going to invite Mr. Lewis
11 to view your home on his next trip to Charleston.
12 Do you know if Mr. Lewis ever made it to your
13 home?

14 A. I do not.

15 (Exhibit No. 294 was marked for
16 identification.)

17 Q. Exhibit 294 is a proposal from H2L and
18 Mr. Lewis for -- in the rate section, it says,
19 HVAC and building envelope concerns. Have you
20 seen this document before?

21 A. I don't recall seeing this document.

22 Q. Mr. Lyles reported in April that the
23 plan is, I've spoken with Skip, he's going to get
24 you a proposal. Were you on the lookout? Were
25 you anticipating a proposal?

1 A. Yeah, I guess.

2 Q. Exhibit 294, are you confident you've
3 never seen it or you don't recall seeing it?

4 A. I don't recall seeing it.

5 Q. Was there any follow-up on your part --
6 well, let me ask this question. Was this
7 proposal ever accepted by you or on your behalf?

8 A. I don't recall this company at all.

9 Q. It's my understanding that H2L was not
10 retained to do the property assessment.

11 A. Oh, well. That's good. I don't recall
12 them.

13 Q. And then, at least with respect to
14 engineers, there does not appear to be any
15 involvement or request for engineers to be
16 involved for several years.

17 A. Several years?

18 Q. Yes. Do you know why there was a lapse
19 or a gap of involvement by an engineer or a
20 consultant?

21 A. No, I do not.

22 Q. Mr. Lewis's proposal was to come to your
23 home, perform visual, nonintrusive, nondestructive
24 testing, submit a report for your findings and
25 prepare a potential scope of work. And his fee

1 for that work was \$45,000. Was that something
2 you would have paid or would have considered
3 paying had you been presented with this, or ever
4 -- I'm assuming you hadn't been already presented
5 with it. I'm not suggesting you weren't, but is
6 that a fee you would have paid?

7 A. As I paid everything else that was
8 submitted to me, I'm sure I would have paid that
9 as well.

10 (Exhibit No. 303 was marked for
11 identification.)

12 Q. Exhibit 303 is an August 11, 2009
13 contract proposal from Gamble-Atlantic, and this
14 is for the renovation of the media room. Do you
15 recall that work?

16 A. Yes.

17 Q. The contract price was \$188,833 and some
18 change. What were you doing to the media room?

19 A. The media room had these huge cabinets,
20 and had -- well, when we built the house -- the
21 state-of-the-art media pull-down TV, but of
22 course now, you know, the house is dated. And so
23 I wanted to put in a new TV media system and
24 remove all that big bulky cabinetry and just put
25 one giant TV on the wall and then a little TV for

1 the games so you could do two things at once, and
2 then take out what I was thought was child
3 furniture and put in adult furniture. My kids
4 were growing, and I wanted it to look more user
5 friendly for them.

6 Q. I think you'll agree with me, almost
7 \$200,000 is a significant amount of money.

8 A. Uh-huh.

9 Q. You have to say yes or no, please.

10 A. Yes.

11 Q. Given the retention of Mr. Lyles in
12 March of 2009 and the search for an engineer to
13 do a property condition assessment to address
14 exterior wall concerns and roof concerns, my
15 question is simply this. Why focus on the media
16 room at almost \$200,000 when there are arguably
17 more pressing matters to be addressed?

18 MR. LYLES: Object to the form of
19 the question.

20 A. That's none of your business. It was
21 something I wanted to do.

22 Q. Unfortunately, it is my business because
23 we're in this lawsuit.

24 A. Okay. What's your question?

25 Q. My question is why did you spend

1 \$200,000 on a media room instead of signing up
2 Gamble-Atlantic or Ms. Stein or some other
3 contractor or engineer to investigate the
4 problems you were having with the house?

5 A. I don't know.

6 Q. And the media room work was done,
7 correct?

8 A. It -- yes. And they also did the kids'
9 rooms and took out bunkbeds, cabinetry, painted,
10 new carpeting. Removed all that baby stuff.

11 (Exhibit No. 310 was marked for
12 identification.)

13 Q. And that's the next exhibit, Exhibit
14 310, where you'll see in addition to the 188,000
15 for the original agreement amount for the media
16 room, there was an additional \$19,000, and that
17 was for the work you just mentioned, correct?

18 A. Yes.

19 (Exhibit No. 321 was marked for
20 identification.)

21 Q. Exhibit 321 is an e-mail exchange
22 between Tori and you and your daughter Katrina,
23 with a K.

24 A. Uh-huh.

25 Q. And the second paragraph, it says the

1 techs -- and I'm assuming that's Tischler, it is,
2 it's Tischler techs. The Tischler techs also
3 looked at the back doors, and most of them will
4 not open because they are painted shut.

5 Do you recall that?

6 A. No, I don't.

7 Q. Who painted those doors prior to
8 December 9, 2009?

9 A. I don't know.

10 (Exhibit No. 327 was marked for
11 identification.)

12 Q. Exhibit 327 is a one-time showing
13 agreement. Apparently Mr. Ryan Abbate,
14 A-b-b-a-t-e, was interested in looking at your
15 house and you signed that in April 2010, correct?

16 A. Yes.

17 Q. It's been almost a year now since the
18 meeting with Mr. Lyles at the house and Tori and
19 the contact Mr. Lyles had with Skip Lewis. Aside
20 from the media room work and the work you did in
21 updating the children's bedrooms, was there any
22 other repair work, investigation, work by
23 contractors, work by design professionals in an
24 effort to identify the water intrusion and other
25 envelope issues you were having with the house?

1 A. I don't recall.

2 (Exhibit No. 330 was marked for
3 identification.)

4 Q. All right. Exhibit 330, there are
5 several issues in here, but the one I'm focused
6 on at the moment is toward the bottom, almost the
7 last paragraph, Tori is writing an e-mail to you.
8 Do you recall this e-mail?

9 A. No, I don't, but can I read it?

10 Q. Sure. Take your time.

11 A. Okay.

12 Q. The last primary paragraph is, I'm in
13 the process of writing Cynthia Noble a letter of
14 the work we had done in the last few years at
15 your home so the potential buyer can understand
16 all that you have done to maintain the house and
17 keep it in good working order.

18 Did Tori write that letter?

19 A. I don't know. I -- I don't know.

20 (Exhibit No. 332 was marked for
21 identification.)

22 Q. Exhibit 332 is a May 4, 2010 e-mail from
23 Tori to you.

24 A. Uh-huh.

25 Q. Last full paragraph, Tori writes -- or

1 Tori is sending you a list dating back to the
2 extension of the boardwalk, and I'm not sure what
3 that date is, but did she send you a list of
4 repairs or a repair work history, as this
5 suggests?

6 A. I don't recall seeing that, no, but it
7 says that's what she's doing. I was being very
8 up front with any potential purchaser that was
9 coming through the door, unlike a lot of other
10 cases that I'm sure you're involved with, and I
11 had nothing to hide. And so I wanted everything
12 up front, unlike many of the cases I'm sure
13 you're involved with.

14 Q. I appreciate that. I'm sure the
15 potential purchasers appreciated that. I'm not
16 suggesting you would do anything otherwise.

17 A. Well, I'm sure that a lot of people do,
18 but I do not.

19 Q. And I'm not suggesting you did, let's be
20 clear, but what I am interested in is the
21 understanding that you and Ms. Stein had as to
22 the nature of the problems your house had
23 experienced over the years as of May 2010.

24 MR. LYLES: Object to the form of
25 the question. Go ahead.

1 A. I think the -- what I was hoping, what I
2 think should have been in that letter, what I was
3 asking her was to tell what we were doing right
4 now, what had to be done at that moment.

5 Q. What was to be done?

6 A. To be done at that moment.

7 Q. Was included in that list an expectation
8 that an engineer such as Skip Lewis come in
9 and -- let me finish my question -- come in and
10 perform a property condition assessment?

11 A. I don't know that.

12 (Exhibit No. 333 was marked for
13 identification.)

14 Q. Exhibit 333 is a May 4th, 2010 real
15 estate appraisal for your home. Have you seen
16 this document before?

17 A. Yes, I have.

18 Q. And why was this appraisal performed?

19 A. The appraisal was performed so that we
20 could get a good value for the house in the
21 current market and get some good comps for the
22 house.

23 Q. And due to the -- I think the last
24 appraisal we looked at was for 2006. It was in
25 excess of 17 million..

1 A. 17, right.

2 Q. And due to the market downturn, this was
3 now between 10 and 11 million.

4 A. It was also because of the work that had
5 to be done on the house.

6 Q. Okay.

7 A. We took a discount.

8 Q. All right. If you look at page 2?

9 A. This?

10 Q. Yes. Under the section called
11 Extraordinary Assumptions, the appraiser writes,
12 at the direction of the client, the subject
13 property has not been inspected. This appraisal
14 is based upon the assumption that the subject
15 property is in average physical condition and
16 upon the assumption that the physical
17 characteristics gathered from the data sources
18 below are accurate and reliable.

19 A. Hmm.

20 Q. That seems to be counter to what you
21 just said.

22 A. Yeah. Well, it's counter to what my
23 understanding was of what this was for.

24 Q. So it looks like, at the direction of
25 the client, and that -- did Ms. Noble procure

1 this for you?

2 A. Oh, yes.

3 Q. Okay. So potentially at Ms. Noble's
4 direction, the home was not inspected. So it
5 looks like the appraiser never actually went back
6 to your house, but he drew from his 2006
7 information regarding square footage, et cetera.
8 Do you know anything to the contrary?

9 A. I don't know anything either way.

10 Q. Did this value of 10 to 11 million
11 surprise you, disturb you?

12 A. Neither.

13 Q. You had the same response, it is what it
14 is.

15 A. (Indicating.)

16 Q. Again, I'm not trying to pry, but it
17 does matter in litigation such as this. Are
18 there any liens on the house?

19 A. No.

20 Q. No mortgages, nothing like that.

21 A. The house is free.

22 Q. Thank you.

23 MR. WINTON: Off the record.

24 (Off-the-record discussion.)

25 (Exhibit No. 336 was marked for

1 identification.)

2 Q. Exhibit 336 is a CL-100, what we call in
3 South Carolina a termite letter. By state law,
4 as I understand it, before the sale of every
5 residential structure, there has to be a termite
6 inspection where a licensed pest control guy goes
7 in and looks for termites. And apparently Mr.
8 Abbate made an offer on your home because he is
9 paying for a termite inspection.

10 Do you recall an offer from Mr. Abbate?

11 A. I do not recall an offer from him.

12 Q. And he may have had that done prior to
13 an offer.

14 Have you seen this termite letter before
15 that we got from Gamble Home Services?

16 A. No, I have not seen this. Can I read
17 it?

18 Q. Sure.

19 A. Well, it says he ordered it, here it is.

20 Q. Don't write on it, please, or let me
21 know you're writing on it.

22 A. I'm not. I'm just pointing, he wrote on
23 it here.

24 Q. Who's he?

25 A. Well, Abbate. It says bill to Ryan

1 Abbate.

2 Q. Right. Mr. Abbate requested this.

3 A. So I'm assuming he requested it, right?

4 Q. Right.

5 A. I didn't see it.

6 Q. And you'll note the Bates stamp at the
7 bottom, these documents were produced by Gamble
8 Home Services.

9 A. Oh, okay.

10 Q. Do you recall whether your property
11 manager sent you a copy of this?

12 A. I don't.

13 Q. Again, it's dated May 14, 2010. Under
14 the section Infestation, paragraph 1, there is
15 visible evidence of active subterranean termites,
16 and yes is checked.

17 A. Uh-huh.

18 Q. So you're telling me --

19 A. Yes, I see it here.

20 Q. You were not aware of an active termite
21 infestation in May of 2010.

22 A. No, I was not.

23 Q. If your property manager, who apparently
24 received a copy of this at some point, was aware
25 of an active termite infestation in May of 2010,

1 would you expect Gamble Home Services to have
2 informed you?

3 A. Yes.

4 Q. I think we said yesterday, you were
5 completely unaware of active termites at your
6 house --

7 A. Yes.

8 Q. -- at any time.

9 That same section, under Infestation, I
10 have a few questions for that. You may want to
11 keep it handy. Number 4, the question is, there
12 is evidence below the first main floor of the
13 presence of, A, active wood-destroying fungi or
14 moisture, wood moisture, content, 28 percent or
15 above. And there's -- and yes is checked. Your
16 property manager didn't inform you of this.

17 A. No, I don't recall that at all.

18 Q. Again, the next, B, wood-destroying
19 fungi is present but not active, less than 28
20 percent wood moisture content.

21 So apparently there was some of both,
22 because that is also checked yes. Do you see
23 that?

24 A. Uh-huh, I see it.

25 Q. You would have expected your property

1 manager to inform you of that condition as well,
2 correct?

3 A. Yes.

4 Q. Go down to Damage. It states, at the
5 time of this inspection, there was visibly
6 damaged wooden members. You would have expected
7 your property manager to inform you of that,
8 correct?

9 A. Yes.

10 Q. If you turn the page, what the inspector
11 does, whenever he answers yes to those questions,
12 he has to write a written comment. And you'll
13 see, about five or six lines down, 1A, signs of
14 active subterranean termite activity, front right
15 wall behind gutter downspout.

16 Is that refreshing your recollection,
17 that location, as to where there might have been
18 activity?

19 A. No.

20 Q. The last three lines of that line
21 section, under Damage, we -- being the termite
22 inspection company -- recommend a complete and
23 thorough evaluation by a qualified building
24 expert to determine what repair, if any, is
25 necessary to this property with respect to the

1 fungi and the termite activity, because that's
2 what he's there to inspect.

3 Did Ms. Stein or anybody at Gamble Home
4 Services inform you of the need to have your home
5 evaluated due to wood-damaging fungus or termite
6 activity?

7 A. No, I don't recall.

8 Q. You would have expected them to forward
9 this, all this information in this report, to
10 you, correct? Is that a yes? You would have
11 expected them to send this information and report
12 to you, correct?

13 A. No, not the report, but something.

14 (A recess was taken.)

15 (Exhibit No. 337 was marked for
16 identification.)

17 Q. Ms. Allwin, I'm showing you what we've
18 marked as Exhibit 337.

19 A. Uh-huh.

20 Q. This is a new home inspection report
21 prepared by Complete Inspection Services for Ryan
22 Abbate, and it's dated May 14th, 2010. Have you
23 seen this document before?

24 A. No, I have not.

25 Q. It was in Gamble Home Services' file,

1 and like the termite report we looked at, 336,
2 you would have expected Gamble to have notified
3 you or sent you a copy of this report due to the
4 problems found in it. If you need a moment to
5 look.

6 Let me do this. In May of 2010, was
7 your home an active listing with Cynthia Noble
8 and Kiawah Real Estate or was it a
9 permissive-type thing?

10 A. It was what they called pocket listing.

11 Q. Let's go back and look at 327, and feel
12 free to review the selections you made regarding
13 agency, but was Cynthia Noble acting as your
14 agent in these pocket listings?

15 A. Yes.

16 Q. And if Ms. Noble received the termite
17 report we just looked at, or any home inspection
18 report, you would expect her to relay, if not the
19 report, at least the information contained in the
20 report to you, correct?

21 A. Yes.

22 Q. Going back to 337. If you look on the
23 fourth page, I believe, under Structural?

24 A. Uh-huh.

25 Q. There's a reference to the CL-100

1 report, which is the termite inspection report,
2 and signs of prior termite activity?

3 A. Am I on the right page? Where are you?
4 Page 4?

5 Q. Go back one page, please.

6 A. Oh, page 3?

7 Q. Yes, ma'am. And you'll note in the
8 different -- under the different sections, the
9 inspector is looking at -- he has written
10 comments at the end, and that's what I'm going to
11 be asking you about.

12 A. Okay.

13 Q. You see the reference to termite
14 activity the home inspector found in May of 2010.

15 A. Yes, signs of prior termite activity.

16 Q. Right. And also below that, wet walls
17 at sides of house, indications of water
18 infiltration at windows, have evaluated by
19 contractor.

20 Were you aware of any of these problems
21 in May of 2010?

22 A. No.

23 Q. Going down to the bottom of the page,
24 the section on basement or lower level, the
25 inspector writes, rear basement walls are wet,

1 water infiltration at rear doors, check flashings
2 and subfloor in this area.

3 Were you aware of water intrusion into
4 the basement in May of 2010?

5 A. I don't know what rear doors are that
6 he's referring to. I don't know what this is. I
7 was not aware of it.

8 Q. I will suggest to you they're the rear
9 doors above the basement where you had water
10 intrusion previously.

11 A. Are you saying this is water
12 infiltration at rear doors of the house?

13 Q. Yes, ma'am.

14 A. Oh, I don't -- the back doors? Yeah.
15 You know, sometimes there was water there, yes.

16 Q. Okay. We looked a few exhibits ago, we
17 had the e-mail that Tori wrote to John at Gamble
18 about the March 2009 inspection with you and Mr.
19 Lyles, and Tori noted that you took photographs
20 of the cave and you couldn't believe it.

21 A. Right.

22 Q. Tori had already -- or Atlantic Builders
23 had already made repairs to the basement in that
24 area in March of 2009?

25 A. Okay, yeah.

1 Q. Did it ever concern you or did you ever
2 have a concern that any of the repairs performed
3 by Ms. Stein and Atlantic Builders were faulty or
4 ineffective?

5 A. No.

6 Q. The inspector, again on the bottom of
7 that page 3, he notes that it's humid under house
8 and there was a dehumidifier and sump pump
9 installed and operational.

10 Who installed the dehumidifiers in the
11 basement?

12 A. I don't recall who. There were several.
13 There were several dehumidifiers in the basement.

14 Q. And I think they were installed at
15 different times. Does that ring a bell?

16 A. Yes. And they're actually throughout
17 the house, too, we had others.

18 Q. Do you know what a sump is?

19 A. Yeah, the thing the water goes through
20 and it pumps out.

21 Q. Yes, ma'am.

22 A. Right.

23 Q. Do you know when that was installed?

24 A. I have no idea.

25 Q. At the bottom of page 4 there's a

1 recommendation that a commercial HVAC contractor
2 evaluation be performed prior to closing. That's
3 news to you, correct?

4 A. Yes.

5 Q. Go to page 7 of the report. In the
6 middle, under Remarks, cupped hardwood flooring
7 and office windows, ocean side windows and doors,
8 water infiltration noted. Water stains, mildew
9 noted in several closets and under circular room
10 windows, ceiling stains at circular rooms.

11 It goes on to state, this company did
12 not perform essentially a mold or mildew
13 assessment.

14 A. Uh-huh.

15 Q. Do you recall these problems being
16 apparent in your home or existing in your home in
17 May of 2010?

18 A. Yes.

19 Q. Did it cause you any concern that you
20 had any of these problems that we've looked at in
21 this report in May of 2010?

22 A. No.

23 Q. Do you think it's normal to have cupping
24 hardwood floors or --

25 A. Cupped. It doesn't say cupping. It

1 says cupped hardwood flooring, which means it had
2 been done before. I think I might have thought
3 it had happened before, and we fixed it, and we
4 just didn't fix the hardwood flooring. It
5 doesn't say cupping.

6 Q. Excuse me. Cupped hardwood floors.

7 A. Cupped implies to me it had happened
8 before and it was repaired. So I assumed
9 everything that was in 2010 was repaired.

10 Q. So the use of the word cupped instead of
11 cupping suggests to you that it had cupped in the
12 past and had been repaired, and in May of 2010,
13 at the time the inspector noted it, it was not in
14 a state of cupping.

15 A. Cupping.

16 Q. Do you know what cupped hardwood floors
17 are?

18 A. No, I don't, but --

19 Q. You have no idea what that means.

20 A. No. I mean, I know what I think it
21 means.

22 Q. What do you --

23 A. I think it means the wood's not -- the
24 hardwood floors are not flat and level. They
25 sort of buckle.

1 Q. That's close enough. I'll accept that
2 definition.

3 A. Thank you. I've learned a lot.

4 Q. But your floors had cupped prior to May
5 of 2010 and you were aware of that.

6 A. Yes.

7 Q. Did it not cause you any concern?

8 A. No.

9 Q. This report goes on to page 8 to talk
10 about roof leaks, other signs of water
11 infiltration around windows, wood damage to the
12 shakes, which are the exterior cladding, and wood
13 damage to your handrails. That's on page 9.

14 None of this information or this report
15 was sent to you by your real estate agent or by
16 your property manager; is that correct?

17 A. I don't recall seeing this report, no.

18 Q. You would have expected your real estate
19 agent and your property manager to have sent this
20 information to you as soon as they received it,
21 correct?

22 A. I don't expect anything anymore.

23 Q. Okay. You signed an agreement with
24 Gamble Home Services to be your property manager,
25 correct?

1 A. Did I? I don't recall signing it.

2 Q. Okay.

3 A. Or was it just an ongoing relationship?

4 I don't know.

5 Q. I believe you signed a contract, but I
6 don't have a copy of it with me.

7 A. Okay.

8 Q. Do you recall any obligations within any
9 written agreement you might have had with Gamble
10 about their duty to relay information to you?

11 A. No.

12 Q. Did you have an expectation that they
13 would relay significant information about
14 problems or damage to your home to you so that it
15 could be addressed and remedied?

16 A. Yes.

17 (Exhibit No. 338 was marked for
18 identification.)

19 Q. Exhibit 338 is a proposal from Tori
20 Stein at Gamble-Atlantic for \$31,000 and some
21 change to, as I understand it, paint your
22 kitchen, including the cabinets. Do you recall
23 this proposal?

24 A. Not really.

25 Q. Was this work done?

1 A. No.

2 Q. In light of the Complete Inspection
3 Services report we just looked at, Exhibit 337,
4 and again, going back to the meeting in March of
5 2009 when you have retained counsel to hire an
6 engineer to come in and do a building condition
7 assessment, again, much like the media room
8 repair, Ms. Stein is giving you an estimate to
9 paint your kitchen, and my question is why aren't
10 you getting an estimate from her to perform
11 repairs for the issues listed in the Complete
12 Inspection Services report?

13 MR. LYLES: Object to the form of
14 the question.

15 A. I don't know.

16 Q. Based on your comments and based on the
17 documents we've looked at, it appears to me --
18 and I'll just ask if you'll agree -- that Ms.
19 Stein had no reservation or hesitation in sending
20 you proposals for work to do at your house. Is
21 that a fair statement?

22 A. Yeah, that's fair.

23 (Exhibit No. 340 was marked for
24 identification.)

25 Q. Exhibit 340 is an e-mail exchange

1 between you and Tori Stein in June of 2010. Tori
2 writes that she met Bob, or actually met the
3 Cowans this morning, and then she and Bob spent
4 some time walking around the house talking about
5 past and future projects.

6 What was the purpose of Tori meeting the
7 Steins (sic) at the house in June of 2010?

8 A. I think that's when the Cowans were
9 going to stay over for a few days and Tori wanted
10 to meet them, and they took it upon themselves to
11 walk around and talk about the house.

12 Q. Do you know what they talked about?

13 A. I have no idea.

14 Q. Up above, there's a reference to
15 proposals. That in addition to the kitchen
16 painting, she sent a proposal to get some
17 extremely large flower pots. Do you recall that?

18 A. Yes.

19 Q. Do you know if those pots were
20 purchased?

21 A. I think they were, yes, for the front.
22 They had rotted.

23 Q. Right. But you don't recall Ms. Stein
24 sending you an estimate to perform the repairs
25 for the problems listed in Exhibit 337.

1 A. I do not.

2 (Exhibit No. 347 was marked for
3 identification.)

4 Q. Exhibit 347 is another e-mail exchange
5 between you and Tori Stein.

6 A. Uh-huh.

7 Q. The last full paragraph, Ms. Stein
8 states she met with the adjuster today.

9 Do you know why there was an adjuster at
10 your house in September of 2010?

11 A. I do not know who --

12 Q. Do the names Ed Ernst, E-r-n-s-t, or Bay
13 Ten Ventures meaning anything to you?

14 A. No.

15 Q. Do you know if Bay Ten or Mr. Ernst were
16 retained to perform any services at your house?

17 A. I don't know who they are.

18 (Exhibit No. 350 was marked for
19 identification.)

20 Q. Let me show you Exhibit 350. The first
21 page -- and I believe this was created September
22 29, 2010. That's the date on it.

23 A. Okay.

24 Q. For lack of a better term, this is a
25 file setup sheet, Applied Building Sciences,

1 which is a group of engineers in Charleston that
2 split off from Campbell, Schneider Associates.

3 Do you recall that report, and Mr. Elkin?

4 A. Uh-huh.

5 Q. Mr. Elkin, at this time, was with
6 Applied Building Sciences, and you'll see his
7 initials here, JLE, for J. Lawrence Elkin.
8 They're apparently being contacted by Bay Ten
9 Ventures and Mr. Ernst to perform a mold and
10 moisture inspection at your house in September
11 2010. Do you know anything about this?

12 A. I do not.

13 Q. Is this a follow-up to the March 2009
14 meeting with counsel where you're going to look
15 for engineers or some type of building consultant
16 to inspect your home?

17 A. I don't know what this is.

18 Q. You had no contact with Mr. Ernst
19 directly?

20 A. I don't recall any contact with him.

21 (Exhibit No. 351 was marked for
22 identification.)

23 Q. Exhibit 351 is a letter from Ed Ernst at
24 Bay Ten Ventures to Ms. Stein wherein he recounts
25 the scope of work he's been hired to do, which is

1 essentially perform a mold or mildew assessment.

2 You see this?

3 A. Yes.

4 Q. You don't know anything about that.

5 A. I don't recall it, no.

6 Q. You note, second to last full paragraph,
7 for this work, commissioned Maria Allwin or the
8 owner's agent agrees to reimburse Bay Ten
9 Ventures for all costs incurred.

10 Was Ms. Stein authorized to make this
11 obligation for you?

12 A. No.

13 Q. Do you know if you paid for Bay Ten
14 Ventures' work?

15 A. I don't know.

16 (Exhibit No. 479 was marked for
17 identification.)

18 Q. Exhibit 479 is an October 21, 2010 mold
19 report prepared by ABS and sent to Ed Ernst at
20 Bay Ten Ventures. Have you seen this document
21 before?

22 A. No, I haven't.

23 Q. Do you know if this was sent to Tori
24 Stein?

25 A. I don't know where this was sent.

1 Q. We're now into October of 2010. From
2 March of 2009, when you met with Robert Lyles and
3 Tori Stein at your house and developed this plan
4 to move forward with an investigation to identify
5 the problems with your home so they can be
6 remedied, has any building consultant, anyone
7 with construction expertise, been to your home
8 that you're aware of to look at the house, to
9 address those concerns other than the mold
10 assessment that was performed in October 2010?

11 A. I don't recall anybody.

12 (Exhibit No. 481 was marked for
13 identification.)

14 Q. Exhibit 481 are handwritten notes. Do
15 you recognize the handwriting or know who
16 prepared this document?

17 A. I do not.

18 Q. Have you ever seen this document before?

19 A. No, I have not.

20 Q. This document was produced by Gamble
21 Home services, your property manager. And you
22 still had an ongoing relationship with Gamble,
23 they were still your property manager, correct?

24 A. Yes.

25 Q. It appears that someone has walked

1 through your house and made notes of various
2 problems. Do you see that?

3 A. Yes.

4 Q. Did your property manager inform you or
5 share this information with you in late 2010?

6 A. I don't recall ever seeing this.

7 Q. There are some notes in the margin on
8 the left. For example --

9 A. Old?

10 Q. -- old and roof. Do you know whose
11 handwriting that is?

12 A. I do not.

13 Q. If you look at the first page, they're
14 numbering items, it starts with 8, 9, runs
15 through 15. You don't know what items 1 through
16 7 are.

17 A. I do not.

18 Q. Assuming they exist.

19 (Exhibit No. 484 was marked for
20 identification.)

21 Q. Exhibit 484 is an agreement that you
22 signed, you'll note on the last page, between you
23 and Gamble-Atlantic to perform roof painting and
24 related repairs for a cost of, based on some
25 options you selected, \$140,000 and some change.

1 A. Okay.

2 Q. Do you recall seeing this document and
3 signing it?

4 A. Yes, uh-huh.

5 Q. Again, you'll agree with me that
6 \$140,000 is not an insignificant amount of money.
7 Is that a fair statement?

8 A. No.

9 Q. It's not a fair statement?

10 A. No.

11 Q. \$140,000 is a lot of money. Would you
12 agree with that?

13 A. No.

14 Q. Okay. Do you know that it's far more
15 than the average person in Charleston County
16 makes in a year?

17 A. I have no idea about that. It's far
18 less than my taxes are, so I -- I don't know.

19 Q. My question to you is simply why is Ms.
20 Stein moving forward with repairs much like has
21 been done in the past without having this
22 building condition assessment performed, the
23 consultant you were desiring way back in 2009?

24 A. I don't know why I did that.

25 Q. Was this work performed?

1 A. Yes, some of it was.

2 Q. Did you follow up with anyone about the
3 lack of involvement by a building consultant to
4 investigate the problems with your home and come
5 up with a repair plan?

6 A. No.

7 (Exhibit No. 485 was marked for
8 identification.)

9 Q. Exhibit 485 is another agreement with
10 Tori Stein and Gamble-Atlantic that I believe you
11 signed on the same day as the exhibit we just
12 looked at, and it's for \$217,000-plus for
13 lightning strike repairs.

14 Do you recall seeing and signing this
15 document?

16 A. Yes, I do.

17 Q. What did the lightning strike damage?
18 It was my understanding it was primarily an
19 electrical problem, including the HVAC system, as
20 well as some other issues, but can you give me a
21 summary of what was damaged by the lightning
22 strike?

23 A. Sure. It was the garage doors. It was
24 the power draperies in the house. It was all the
25 interior audio equipment that we had just put in.

1 It was all the boxes in the house for the
2 interior audio. It was the HVAC communication
3 equipment. It was all the Internet connections,
4 it was the landscape sprinkler system. It was
5 the sump pump in the basement. It was whatever
6 was connected.

7 Q. Did you make an insurance claim for
8 that?

9 A. Yeah.

10 Q. Did the insurance company pay --

11 A. Yes.

12 Q. -- pay Gamble-Atlantic?

13 A. No. They paid me.

14 Q. How much did they pay you for that
15 repair?

16 A. I don't recall.

17 Q. Was it more or less than \$217,000?

18 A. I don't recall.

19 (Exhibit No. 494 was marked for
20 identification.)

21 Q. Exhibit 494 is a December 2, 2010
22 proposal from Tori Stein at Gamble-Atlantic to
23 you. And you recall a couple of exhibits ago we
24 just looked at a November 2010 agreement for the
25 roofing repair and some other items for \$140,000.

1 Now she's proposing almost an additional \$400,000
2 for additional repairs to include repairs to the
3 cabana and refinishing the floors, among other
4 things. Did you enter into this agreement --

5 A. No, I did not.

6 Q. Why did you not?

7 A. I didn't want to do it.

8 Q. Why did you not want to do it?

9 A. I had other things on my mind and I
10 didn't want to spend the money on this.

11 Q. Did you have any conversations with Tori
12 Stein about her perceived need for you to do
13 this?

14 A. I don't recall.

15 Q. Do you know why she sent you the
16 proposal? Did you ask for it?

17 A. No, I did not.

18 (Exhibit No. 495 was marked for
19 identification.)

20 Q. Exhibit 495 is a December 27, 2010
21 proposed addendum to that roof contract. And
22 this one, instead of the addendum costing almost
23 \$400,000, it's now just under \$100,000, and I'm
24 assuming -- well, I know the proposed scope of
25 work has been cut back drastically. Did you

1 enter into that agreement for the addendum at a
2 cost of an additional \$100,000?

3 A. Yes, I did this.

4 (Exhibit No. 496 was marked for
5 identification.)

6 Q. Exhibit 496 is where you paid a \$45,000
7 deposit on that addendum that you just looked at.

8 A. Okay.

9 Q. Do you agree or disagree?

10 A. It says paid, so I assume I paid it.

11 (Exhibit No. 498 was marked for
12 identification.)

13 Q. Exhibit 498 is another ABS, Applied
14 Building Sciences, setup sheet, and it's dated
15 January of 2011, and the project managers
16 involved are gentlemen by the names of Al
17 Schweickhardt and Richard Dixon.

18 Do either of those names mean anything
19 to you?

20 A. No.

21 Q. To the best of your recollection, you've
22 never spoken or had any communication with either
23 Mr. Schweickhardt or Mr. Dixon.

24 A. Yes, I have not.

25 Q. During the Buffington repairs in

1 2004-2005, Mr. Schweickhardt was called out to
2 your home to look at some drywall cracks. When
3 you walk in the front door, I recall there's some
4 fairly large columns; is that right?

5 A. Yes.

6 Q. There were some cracks in the sheetrock
7 in those columns, and Mr. Buffington had
8 structural concerns and called Mr. Schweickhardt
9 out to look at those. Do you recall or know
10 anything about that?

11 A. No, I do not.

12 Q. Have you seen -- I suspect you have not
13 seen page 2. I'm going to hand it to you. I'm
14 sorry. You have not seen page 2 of this
15 document, which is an e-mail exchange between
16 Richard Dixon and Mr. Schweickhardt, and in the
17 third full paragraph, Schweickhardt is telling
18 Dixon you will be looking at water-damaged
19 framing under doors.

20 My questions to you are this. Who
21 contacted ABS to get involved with your house,
22 and is this when you discovered the damaged
23 framing under the rear doors that Tori Stein had
24 pulled out?

25 A. I don't know who contacted him, and the

1 timing seems about right to be the time that she
2 took the frames off -- the doors off the frames.

3 Q. And she was taking the doors off the
4 frames as part of --

5 A. I have no idea.

6 Q. Okay.

7 A. I have no idea why she did that.

8 Q. Okay. The contracts that you signed
9 back in November and December 2010, just a month
10 or two before this document is dated, did that
11 include any repair to those rear doors?

12 A. Did it say that?

13 Q. I don't know. I'm asking your
14 recollection.

15 A. I don't recall that, no.

16 Q. The last paragraph on that second page
17 references your intent to sell the home in the
18 spring.

19 A. Yes.

20 Q. Was that your intent?

21 A. Yes.

22 Q. Has the home ever been listed, a
23 full-blown active listing?

24 A. I think for maybe two or three months it
25 was on the Kiawah Island web page as a listing.

1 Q. When was that?

2 A. I don't -- probably just before this.

3 Q. Do you recall what the asking price was?

4 A. No, I don't.

5 Q. You were not present when Mr. Dixon went
6 to your home, correct?

7 A. Yes, correct.

8 Q. Who shared with you the information that
9 we talked about yesterday with the negative pitch
10 or the improperly installed flashing under the
11 rear doors?

12 A. I don't recall.

13 Q. Were you at the house and did you see
14 the doors removed?

15 A. No, I did not.

16 Q. So you called Mr. Cooper in January of
17 -- in 2011 from Manhattan?

18 A. Yes.

19 Q. Did Ms. Stein or anyone send you
20 photographs of the removed door and the flashing
21 condition?

22 A. No.

23 Q. Have you seen photographs of the --

24 A. Subsequently, yes.

25 Q. Have you seen photographs of the

1 flashing condition at the rear doors? And your
2 answer was?

3 A. No. Oh, my answer was subsequent. What
4 was your question? That wasn't exactly right.

5 Q. Have at any time you seen photographs of
6 the flashing condition at the rear doors?

7 A. Yes.

8 Q. But you say it was subsequent to early
9 2011.

10 A. Yes.

11 Q. When did you see those photographs?

12 A. After that --

13 Q. Months? Years? Last week?

14 A. A few months later.

15 Q. Who sent you photographs?

16 A. I think Tori sent them.

17 Q. I have a series of photographs that
18 Richard Dixon took during his site visits in
19 January of 2011. Do you know whether the
20 photographs you saw were taken by the engineer
21 from ABS or Ms. Stein?

22 A. I have no idea who took the photos.

23 (Exhibit No. 410 was marked for
24 identification.)

25 (Exhibit No. 411 was marked for

1 identification.)

2 (Exhibit No. 412 was marked for
3 identification.)

4 (Exhibit No. 413 was marked for
5 identification.)

6 (Exhibit No. 414 was marked for
7 identification.)

8 Q. I'll show you Exhibit 410 and --

9 A. 410?

10 Q. 410, 411, 412, 413, 414. Do you believe
11 these are the photographs you saw?

12 A. Yes.

13 Q. Whoever sent those photographs to you,
14 were they just photographs of the flashing
15 condition at the rear door or did they send
16 additional photographs of problems with the home?

17 A. I don't recall any other photos.

18 Q. Do you still have those photographs?

19 A. No.

20 Q. Were they sent to you by mail or by
21 e-mail?

22 A. I don't know.

23 (Exhibit No. 470 was marked for
24 identification.)

25 Q. Have you seen a photograph like Exhibit

1 470? You mentioned a hole where you could see
2 the framing.

3 A. No. Where is that?

4 Q. I'm assuming that's -- I think that's
5 actually in the office.

6 A. Okay.

7 Q. But we'll have to ask Mr. Dixon exactly
8 where that is.

9 A. If he's the one that took the photos.

10 Q. He did.

11 A. Oh, okay.

12 (Exhibit No. 501 was marked for
13 identification.)

14 Q. Exhibit 501 are some handwritten notes.
15 Do you know who prepared these?

16 A. No, I don't.

17 Q. There's a reference at the top to Jerry
18 Huby with a Connecticut phone number and a
19 statement that he might be an architect. Who is
20 Jerry Huby?

21 A. Jerry Huby is the Shope Reno Wharton
22 architect on site, I think on Kiawah, the
23 Charleston architect representing SRW down there.

24 Q. Is he an employee or does he have some
25 adjunct relationship with SRW?

1 A. I have no idea his relationship.

2 Q. Does he have a sign in front of his
3 office that says Shope Reno Wharton?

4 A. I did not go see his office.

5 Q. What involvement has Jerry Huby had with
6 your house?

7 A. He has no involvement. He did not
8 design the house. He did not -- I don't think he
9 was involved with the building of the house. I
10 don't remember him involved with that.

11 Q. Has Mr. Huby been to your house?

12 A. I have no idea. Prior to this?

13 Q. Has Mr. Huby ever been to your house?

14 A. Yes, he has.

15 Q. When has Mr. Huby been to your house?

16 A. He came out to the house to meet me
17 there to talk about the house.

18 Q. Talk about problems with the house?

19 A. Talk about what I was thinking.

20 Q. Okay. Were you thinking, I want to make
21 design changes to my home, or are you thinking, I
22 have concerns about problems with my home that I
23 want addressed?

24 A. Yeah. I was thinking I had problems and
25 I needed help addressing.

1 Q. When did Mr. Huby meet you at your
2 house?

3 A. Is this the day he came?

4 Q. Ma'am, I don't know.

5 A. I don't recall when he came.

6 Q. Would it have been before or after
7 January of 2011?

8 A. It would have been after.

9 Q. Prior to January of 2011, or early 2011,
10 when you called Mr. Cooper -- let that be our
11 benchmark.

12 A. Yes.

13 Q. -- what involvement did Shope Reno
14 Wharton or any representative of Shope Reno
15 Wharton have with your house after its
16 completion?

17 A. I think very little involvement.

18 Q. We know the article was written after
19 the house was completed.

20 A. Yes.

21 Q. And we looked at that Exhibit 1. Do you
22 recall anyone contacting Shope Reno Wharton, or
23 are you aware of anyone contacting Shope Reno
24 Wharton on behalf of you or your husband
25 expressing any concern about the home's

1 construction or design prior to 2011?

2 A. I think over time people did try to get
3 drawings from Shope because we didn't have a good
4 set of drawings. So I'm sure along the way,
5 maybe Tori contacted them. Maybe Buffington
6 asked for it. Maybe people at Gamble wanted the
7 drawings, which I -- which we didn't have
8 available, and maybe to speak to them about the,
9 you know, concept of what the roof -- how the
10 roof sat on the house, since it is a big roof.

11 Q. And all of that contact, to the extent
12 it was made, was due to problems you were having
13 with the home and either active repairs or a
14 desire to repair those problems, correct?

15 MR. WINTON: Objection.

16 A. A desire to understand what we could do.

17 Q. Did you ever contact, or anyone on your
18 behalf or for your husband contact Shope Reno
19 Wharton about concerns with the construction
20 specifically of the home prior to 2011?

21 A. I don't know that.

22 Q. After 2011, or 2011 and after, what
23 involvement has Shope Reno Wharton had with your
24 home?

25 A. None.

1 Q. Well, Mr. Huby came to your house.

2 A. Right.

3 Q. What other involvement?

4 A. That was it.

5 Q. Why did Mr. Huby come to your house?

6 A. I asked him to come and look at the
7 house with me to see what it was and what -- the
8 doors were off, and what he thought could be
9 done. I was starting to formulate in my own head
10 what was going on with the house and how I could
11 address those issues that seemed to not be
12 addressed..

13 And so I spoke -- he was there, and we
14 spoke about things, the windows, Tischler
15 windows, you know, the repairing of those windows
16 two and three times for a lot of money,
17 repainting the roof, redoing the roof for a lot
18 of money, and did he have any idea -- and the
19 window, the shingles, you know, coming on, coming
20 off. New shingles. What did I need to do here?

21 And he didn't think I needed to do
22 anything. He didn't think I needed to do
23 anything with the shingles and I should not do
24 it, not do this destructive work that I needed --
25 that I had heard about, that I was considering.

1 Q. The destructive testing.

2 A. Yeah, yes.

3 Q. Can you pinpoint with any ballpark
4 accuracy when you met with Mr. Huby at the house?

5 A. I came down specifically for that
6 meeting, so -- and I was working at the time in
7 2011. So it would have had to be at a time when
8 I was not working. So on a day that I wasn't
9 working.

10 Q. You were working at the school then?

11 A. Yes. And I had just started work, so I
12 didn't want to take off. So it would have had to
13 be on a, you know, holiday --

14 Q. Or winter break or --

15 A. Or a long weekend or maybe a late
16 afternoon and I jetted down and back.

17 Q. Were the doors still --

18 A. Off?

19 Q. -- off when you went to the house?

20 A. Yeah, I don't recall. I believe they
21 were. They were off for a very long time.

22 Q. The photographs we looked at, 410
23 through 414 that showed the doors removed, do you
24 remember seeing that live and in person?

25 A. Yes.

1 (Exhibit No. 501 was marked for
2 identification.)

3 Q. Looking at 501, these notes. During the
4 Cowan residence, there were water stains on the
5 inside of the walls.

6 A. Do we know who wrote this?

7 Q. I don't know.

8 A. So then what am I reading? Something we
9 don't know who wrote it? I mean --

10 Q. Okay.

11 A. Whose handwriting is this?

12 Q. I have no idea.. Look at page 2.

13 A. Uh-huh.

14 Q. In the middle it says First step.

15 A. Uh-huh.

16 Q. Letter to Cooper with litany of
17 problems, laundry list. Either fix it or buy my
18 home.

19 Do you recall having a conversation
20 about a plan to write Mr. Cooper a letter such as
21 that?

22 A. No, I do not.

23 Q. Below that there's -- on the left you'll
24 see a demand letter with a 30-day timeline, 31st
25 day file lawsuit.

1 Were you considering litigation against
2 Russ Cooper Associates in January of 2011?

3 A. I wasn't. I don't know who wrote this.

4 Q. Well, it came from -- it was in the
5 notes from Gamble Home Services, so my assumption
6 it's possibly Tori Stein or someone on her
7 behalf. Did Ms. Stein encourage you to file a
8 lawsuit against Russ Cooper?

9 A. No.

10 Q. At the bottom of that second page it
11 says, fees, reduced hourly fee, \$150 an hour,
12 contingent fee, 20 percent, where it's typically
13 30 to 40 percent, and an associate fee, \$120 per
14 hour. Do you know what that's referring to?

15 A. I do not.

16 Q. Is it referring to the fees you were
17 paying in this lawsuit?

18 A. I don't know what this is.

19 Q. Do you know -- I don't mean this to
20 sound the way it's going to sound. Do you know
21 what your financial arrangement is with Mr.
22 Lyles?

23 A. Yes.

24 Q. He's being paid a fee. Do you know what
25 it is? I'm not telling you to tell me what it

1 is. Do you know what it is?

2 A. Yes.

3 Q. Again, the last page talks about a
4 lawsuit and the potential for recovery, or the
5 potential damages that might be recovered in the
6 lawsuit. Do you recall having a conversation
7 with anyone about these subjects outside your
8 attorney or his staff?

9 A. No, I do not.

10 Q. You never had conversations with Tori
11 Stein or anyone from Gamble Home Services about a
12 potential lawsuit and the damages that might be
13 recovered.

14 A. Yeah. I think -- I think I might have
15 had that conversation. I think it might have
16 been something that was on advice that I think
17 she might have given me.

18 Q. And what advice did she give you?

19 A. Just to consider it.

20 Q. And you would consider suing who?

21 A. A host of people.

22 Q. Such as?

23 A. I don't know. I meant that facetiously.
24 I don't know who. I did not think that far
25 ahead.

1 Q. Did you task Ms. Stein with exploring
2 that?

3 A. No, I did not.

4 Q. The last note on that exhibit, the last
5 page, it just says, thought, put house on market
6 for -- that's unintelligible -- but for some
7 price unfixed, sue for difference, or with
8 someone tearing house down for lots.

9 Do you remember a discussion like that?

10 A. Yes, that was a strategy.

11 Q. That was a discussion with Ms. Stein?

12 A. That was a strategy I discussed with
13 everybody, to get their opinion on what I should
14 do.

15 Q. So sell the house unrepaired --

16 A. With all the information included that
17 was wrong with it, unlike a lot of things other
18 people do, for a discounted price, take the house
19 down, and I have some estimates for that, what it
20 would cost to take it down and just sell the
21 lots. Or say the house sells for 10 and it's
22 appraised for 20. Then because it's falling
23 apart, it costs 10 to fix it, so get the 10.

24 Q. Okay.

25 A. A lot of different strategies. I talked

1 to a lot of people about this.

2 Q. And that's my question. Who did you
3 speak to?

4 A. Everybody. Every single person I know,
5 I asked, what do you think about this? Everyone.
6 Up here, teachers, my parents, everybody. I
7 needed advice.

8 Q. And what was the advice that you got?

9 A. Do what you think is best.

10 Q. And what did you think was best?

11 A. I thought it was best to fix the house
12 and bring it up to the original -- or bring it
13 up -- bring it back to original glory and sell it
14 for a good price.

15 Q. Do you know how much you paid Phillip
16 Smith for the repair?

17 A. It's ongoing.

18 Q. What stage are they in now?

19 A. They're framing the back wall.

20 Q. And there were some changes to the back
21 wall?

22 A. Yes.

23 Q. What changes were made?

24 A. Well, because the turret was not able --
25 we were unable to really resolve the issue of the

1 turret windows and the framing of those windows
2 and get new windows, because of course they don't
3 make windows that size anymore at Tischler. So I
4 said, take the turret down, although it is one of
5 the architectural features of the home, and just
6 say it's a new home now.

7 And so I started at square one with just
8 looking at the house free of the constraints of
9 the Shope Reno Wharton design. So we took the
10 turret down because it could not be repaired, and
11 are jumping the kitchen out to the pool deck.
12 And so because the deck could never be fixed and
13 the pool deck, the first level where the water
14 was always seeping into the turret, we now
15 secured that as a house instead of exterior.

16 And so, of course, because we're doing
17 all that, we have to rip up all the tile on the
18 terrace, which then showed us that -- which we
19 would have never done because it's in perfect
20 shape, it's just tile -- that there was no
21 waterproof membrane underneath the tile
22 originally installed. So that was why everything
23 was always wet below.

24 So I have to put a new tile down -- new
25 deck down for that. And then I thought, well,

1 since I'm doing all this, I might as well take a
2 look at other issues that had not been resolved
3 over time. And one of them was the study on the
4 side where the floor had cupped. And it was
5 discovered that that was because there's no
6 pitch. The pitch goes in on the concrete deck
7 instead of out. And so any time it rained, the
8 water went into the house and not out of the
9 house. So you can't fix that because that's the
10 frame of the house, it's concrete.

11 So I said, screw it, just take that
12 porch down. So we just stopped the terrace at
13 the end of the -- of the great room wall, and
14 that's just the gate. That will just be a fence.
15 And then we took out those, those windows, those
16 circular Tischler windows there that also were
17 never installed properly.

18 And so because we did it on that side,
19 we had to do the second floor, and so we have now
20 almost a flat somewhat bay window, but not
21 exterior sticking out. And the whole bottom of
22 the house now on that side is secured because
23 there's no water coming in; no means for water to
24 accumulate to go into the house.

25 Q. You mentioned a couple of items that

1 were newly discovered during the repairs, and one
2 was the lack of waterproofing underneath the --

3 A. Right.

4 Q. -- tile on the deck.

5 A. Yes.

6 Q. And another one was the what we call
7 negative slope on the deck, where it's pitched
8 toward the house as opposed to away from the
9 house so water can shed off. Wasn't that
10 negative slope issue at least partially addressed
11 or attempted to be addressed during the
12 Buffington repairs?

13 A. Yes, it was.

14 Q. So that's not entirely a new situation
15 then.

16 A. I guess so, yes, you're right.

17 Q. What other new items were discovered
18 during Phillip Smith's repair, if any?

19 A. Well, Phillip Smith's repair is
20 different than the destructive engineering. So
21 Phillip Smith's repair is not really what I'm
22 talking about. I'm talking about Ross Clements'
23 destructive engineering or destructive testing,
24 if you will.

25 Q. I appreciate that. Let me ask you a

1 more specific question.

2 A. Yeah.

3 Q. What defects or problems in the home
4 directly related to the work of Russ Cooper
5 Associates and its subcontractors has Phillip
6 Smith found during his work, that you're aware
7 of, that is new, that you did not know before?

8 MR. LYLES: Object to the form of
9 the question.

10 Q. If you understand the question, you can
11 answer it.

12 A. No, I don't. I --

13 Q. Has Phillip Smith's work at your house
14 over the past few years revealed any problems
15 with your home that you were not previously aware
16 of that you attribute to Russ Cooper and his
17 subcontractors?

18 MR. LYLES: Object to the form of
19 the question. Go ahead.

20 A. Yes.

21 Q. And I'm asking you to list those things.

22 A. Well, I think the doors.

23 Q. What doors?

24 A. The back doors, and the rotted
25 underneath from the --

1 Q. Okay. We knew about that in January of
2 2011, correct?

3 A. Yeah, but that's --

4 Q. Okay. I'm talking about Phillip Smith's
5 work.

6 A. That's the wrong question then. Phillip
7 Smith is the contractor doing the work, right?
8 He doesn't find things.

9 Q. Yes, ma'am. My question is simple. Has
10 Phillip Smith's work revealed, or during the
11 process of tearing down the turret to build
12 something new, and this destructive process
13 related -- necessary destructive process related
14 for his work, has he uncovered, exposed, revealed
15 and brought to your attention any problems with
16 the home that you weren't already aware of?

17 MR. LYLES: Object to the form of
18 the question.

19 Q. When he began his work.

20 A. Yeah.

21 Q. And those are?

22 A. The window seal that I mentioned, that
23 you can look through the windows, the Tischler
24 windows.

25 Q. There's a gap in between the window and

1 the --

2 A. And the frame.

3 Q. --- the frame of the house.

4 A. Right. The windows are not framed and
5 attached to the house.

6 Q. Okay.

7 A. And you can see through it. This
8 membrane that I mentioned.

9 Q. On the pool deck, right.

10 A. On the pool deck. The shingle, the
11 house was not -- when you take the shingle off,
12 there's no waterproofing underneath it.

13 Q. Do you know where that was located?

14 A. In various spots through the house, and
15 they have photographs. I don't know
16 specifically. Throughout the house, throughout
17 the exterior of the house, are these areas of no
18 waterproofing. I'd want to consult my notes.

19 Q. Do you have notes?

20 A. Well, I have Phillip Smith and Ross
21 Clements' reports. I need to consult that to be
22 clearer.

23 Q. I'm just asking about what you recall
24 today.

25 A. I recall those major things, but there

1 are a number of other things.

2 Q. The gaps between the windows, I think
3 you testified earlier you don't recall that Dan
4 Buffington made any repairs to the windows.

5 A. That's right.

6 Q. If I represent to you that Dan
7 Buffington in 2004-2005 was charged with sealing
8 around windows to previous air intrusion, is that
9 -- can you confirm, deny? You have no idea.

10 MR. CANTWELL: Objection.

11 A. I have no idea.

12 Q. The pool deck issue, you talked about a
13 lack of a waterproofing membrane. Is it your
14 understanding that that was required by code in
15 1994?

16 A. I have no idea what was code.

17 Q. So you don't know if it's a code
18 violation, a violation of any industry standards,
19 correct?

20 A. I understood it to be a violation of
21 industry standards.

22 Q. Industry standards today or when Mr.
23 Smith was doing his repairs or industry standards
24 in 1994?

25 A. It was unclear.

1 Q. Did Mr. Smith or anyone make a
2 representation that there should have been, in
3 1994, when the house was built, a waterproofing
4 membrane under that tile?

5 A. I drew that conclusion from the
6 comments, yes.

7 Q. But you can't speak to specific
8 requirements.

9 A. I don't know what it meant.

10 Q. While you did not appreciate, prior to
11 Mr. Smith's repair of your home, that there was a
12 lack of a waterproofing membrane underneath the
13 pool deck, you were well aware, and we've gone
14 over it in detail, that where the pool deck
15 joined your house, there were leaks into the
16 basement, correct?

17 A. Yes.

18 Q. The waterproofing behind the shingles,
19 you can't give me specific locations, correct?

20 A. Which, which exercise?

21 Q. Can you give me specific locations where
22 there were voids or -- in the waterproofing or
23 had --

24 A. Oh, oh, for this, for this -- the
25 destructive testing you mean?

1 Q. For anything.

2 A. Yeah. Okay. So the side of the house
3 where the master bedroom is, that side of the
4 house had no waterproofing, whatever should go
5 under the level that goes on top of the shingle.
6 The side of the house --

7 Q. And by the shingles you mean the shakes;
8 is that correct? On the side of the house?

9 A. Yeah. I understand that shingles,
10 shake, goes on, is the last -- is the final, the
11 final product. Underneath is this Tyvek stuff,
12 and underneath that is something else, and then
13 underneath that is this waterproofing thing.
14 That's my understanding that was not there..

15 Q. Okay. Are we talking about something
16 that is applied across the field of a wall
17 waterproofing or something that is localized at a
18 penetration such as a window or a door?

19 A. I understood it to be a big sheet, a big
20 thing, a swath of stuff.

21 Q. While that was brought to light, to your
22 attention, during Mr. Smith's repair, you were
23 well aware -- and we've looked at the history of
24 window leaks and mold around windows -- that had
25 been going on for years prior to Mr. Smith's

1 repair; is that correct?

2 A. Uh-huh, yes. But I repaired them all.

3 THE WITNESS: Can I get a drink?

4 MR. BEST: Absolutely.

5 (Luncheon recess.)

6 Q. Going back to 2011, where we mentioned
7 before the break Mr. Schweickhardt and Dixon come
8 into your house. Do you recall any further
9 investigation by those two gentlemen?

10 A. I don't recall their investigation --

11 Q. At all.

12 A. -- or any further.

13 Q. Okay. Do you recall an issue where they
14 were trying to be enlisted to assist in an
15 investigation of your home but an issue arose
16 where they informed Mr. Lyles of the potential
17 for conflict of interest because they had done
18 work for Buffington in the past?

19 A. No, I do not.

20 (Exhibit No. 508 was marked for
21 identification.)

22 Q. Exhibit 508 is an e-mail from Tori Stein
23 to you suggesting a meeting at the house in
24 January of '11. Did you meet with Tori on that
25 day?

1 A. That could be the day that I met with
2 her, yes.

3 (Exhibit No. 509 was marked for
4 identification.)

5 Q. Exhibit 509 is an e-mail exchange
6 between Tori Stein and Richard Dixon at ABS
7 regarding also meeting at your house on Sunday.
8 Do you recall meeting Mr. Dixon or an engineer at
9 your house on that day in January?

10 A. I don't recall that.

11 (Exhibit No. 510 was marked for
12 identification.)

13 Q. Exhibit 510 are notes taken by Richard
14 Dixon on January 27th, 2011, when he was at your
15 house.

16 A. Uh-huh.

17 Q. I'll at least represent to you he was at
18 your house on January 27th. You've not seen
19 these documents before.

20 A. No, I have not.

21 Q. You were not there that day.

22 A. I don't recall that I was.

23 Q. The third bullet, Robert Lyles on site.
24 Do you know why Mr. Lyles was there?

25 A. I do not.

1 Q. He, referring to Mr. Lyles, and Tori
2 discussed privately and told me no suit would be
3 filed due to SL, and I'll suggest to you that SL
4 stand for statute of limitations.

5 A. Uh-huh.

6 Q. Do you know anything about this
7 conference?

8 A. No, I do not.

9 Q. Did Tori or Richard Dixon tell you
10 anything about that conference?

11 A. No.

12 Q. Did Mr. Lyles tell you anything about
13 that conference?

14 MR. LYLES: Object to that. Don't
15 answer that question.

16 MR. BEST: Are you taking the
17 position that Tori Stein is Ms. --

18 MR. LYLES: You asked her --

19 MR. BEST: I asked her -- excuse
20 me.

21 Q. Did anybody, including Mr. Lyles, tell
22 you anything about what Mr. Lyles and Tori Stein
23 spoke about?

24 MR. LYLES: Object, and tell you
25 not to answer anything that relates to

1 conversations that you and I had.

2 THE WITNESS: Okay.

3 MR. BEST: All right. We'll come
4 back to it.

5 Q. Did you have any conversation with Tori
6 Stein or anyone other than your counsel about
7 filing or not filing a lawsuit in early 2011?

8 A. I don't know what Tori said. She's not
9 an attorney, so I'm sure if she said anything to
10 me, I discount that. I don't know what she said,
11 I don't recall, but even if she did, I discount
12 what she says on that.

13 Q. I appreciate it, but the question is do
14 you recall her telling you --

15 A. I don't recall her telling me anything
16 about it, but even if she did, I would discount
17 it.

18 Q. Well, for example, the issue of whether
19 to repair the house or tear it down, you spoke
20 with everybody in the world, anybody and
21 everybody.

22 A. Uh-huh, I did.

23 Q. Did you speak with anybody and everybody
24 or anybody about whether to file a lawsuit over
25 this house?

1 A. That was one of the options, yes.

2 Q. Who did you talk about --

3 A. Anybody and everybody. The man in the
4 street, people at school, my family, people on
5 Kiawah. I told everybody about this on Kiawah.

6 Q. Including --

7 A. In Charleston, everywhere.

8 Q. Including Tori Stein?

9 A. Yeah, including Tori Stein, including
10 everybody.

11 Q. You just don't recall the particulars of
12 the conversation you had with Tori Stein.

13 A. Right.

14 Q. Did you speak about it with Cynthia
15 Noble?

16 A. Yeah, I spoke to everybody. The
17 receptionist with the office at KRA. I told
18 everybody how bad it was.

19 Q. And what time period are we talking
20 about?

21 A. From this time period on.

22 Q. What did Cynthia Noble have to say about
23 it?

24 A. She said, you know, let's see what we
25 can do, let's see what you want to do, think

1 about it. No one told me what to do. I was just
2 venting to everybody I knew.

3 Q. Did you talk to the Cowans about it?

4 A. I'm sure I spoke to the Cowans about it,
5 yes. It was unnerving to think that I had to
6 take the house down, that that was a solution --
7 that would be an answer.

8 Q. Did any construction professional or
9 design professional recommend razing the house?

10 A. No. I did, in my infinite wisdom.

11 So what is this? Do we know who wrote
12 this?

13 Q. Yes, ma'am, Richard Dixon.

14 A. Richard Dixon. Okay.

15 Q. The last note on the first page is
16 moisture at windowsills, previous repairs. Do
17 you know what repairs, if any, have been made
18 prior to January 2011 to the windows themselves?

19 A. No, I don't.

20 Q. The next page, a few lines in, it says,
21 Maria, it's n-e-w, new, about 95 to 100 percent.

22 A. Uh-huh.

23 Q. Do you know what that's in reference to?

24 A. No, I don't.

25 Q. The next line is stuff she didn't know

1 about will be lawsuit. Do you know what this
2 refers to?

3 A. No.

4 Q. Had a decision been made as of January
5 27th, 2011, to file a lawsuit?

6 A. No.

7 Q. When did you make the decision to file
8 the lawsuit?

9 A. When we brought Ross on, Ross Clements,
10 to do that destructive testing, and I think that
11 was like in '12. I don't recall the date.

12 Q. The next page of that exhibit, there are
13 some names, and I'm assuming those are the folks
14 who were in attendance during Mr. Dixon's visit
15 to your home in January. Do you recognize the
16 first name?

17 A. No, I do not.

18 (Exhibit No. 511 was marked for
19 identification.)

20 Q. Exhibit 511, even though it's stamped
21 Draft, it is signed by Mr. Dixon and appears to
22 be a summary of his observations that he made in
23 January of 2011.

24 Have you seen that document before?

25 A. No, I haven't. I don't recall seeing

1 this.

2 Q. Mr. Dixon came back to your house in
3 February 12, 2011, but you don't know anything
4 about that. Is that a fair statement?

5 A. Yes.

6 (Exhibit No. 514 was marked for
7 identification.)

8 Q. Exhibit 514 is a letter from Mr. Lyles
9 to Dan Buffington putting him on notice of
10 various problems, deficiencies relating to
11 insulation of windows and doors, waterproofing
12 and sealant installation, flashing installation
13 and numerous other deficiencies, which have led
14 to significant property damage. Do you recall
15 seeing this document?

16 A. Yes.

17 Q. You were aware that this demand letter
18 was going to be sent to Mr. Buffington in
19 February of 2011.

20 A. Yes.

21 Q. I'll represent to you that a like letter
22 was sent to Russ Cooper & Associates and Russ
23 Cooper in October of 2011. We'll get to that,
24 and my question to you is, why was the letter not
25 sent to Russ Cooper in February of 2011?

1 A. I have no idea.

2 Q. At this time frame, were you holding Dan
3 Buffington and Buffington Homes more responsible
4 for the problems with your home than Russ Cooper
5 Associates?

6 MR. POWELL: Object to the form.

7 A. No.

8 Q. I'm just trying to figure out why --

9 A. I don't -- I wasn't holding him more
10 responsible, no.

11 Q. Who were you holding responsible for the
12 problems with your home?

13 A. I was holding everybody responsible.

14 Q. You just don't know why a similar letter
15 didn't go to Russ Cooper.

16 A. I don't know why, no.

17 (Exhibit No. 517 was marked for
18 identification.)

19 Q. Exhibit 517 is a March 15, 2011 proposal
20 that I'll have to presume was mailed to you. It
21 has your address.

22 A. Uh-huh.

23 Q. Where ABS is proposing to do further
24 investigations at your home for the price of
25 roughly \$7,000. Have you seen this before? And

1 that includes destructive testing.

2 A. Does it?

3 Q. Yes. In paragraph 2, the first
4 sentence.

5 A. Including destructive testing. I
6 represent to you that this was sent to me, I'm
7 sure I got it. I don't remember specifically
8 reading this, or -- I don't remember it
9 specifically but, yes, it did come to me and,
10 yes, I'm sure I saw it.

11 Q. Do you have any particular recollection
12 of this?

13 A. No, not specifically.

14 Q. How about remotely, do you have any
15 recollection of this?

16 A. Not even remotely.

17 Q. Thank you.

18 Do you know if this proposal was
19 accepted?

20 A. I'm sure it wasn't, since I don't
21 remember it.

22 Q. And I'll represent to you, due to the
23 potential for conflict, because ABS had done work
24 for Dan Buffington and may have been concurrently
25 doing work for Dan Buffington, the decision was

1 made it would be best if you found another
2 engineer so as to avoid that conflict between ABS
3 and Buffington, but you don't recall anything
4 about that.

5 A. No. So was this even sent, do you know,
6 or was it drafted and just not sent?

7 Q. It's in ABS's files and it's signed, so
8 beyond that --

9 A. So we have to assume it was sent, right?
10 Okay. I don't know.

11 (Exhibit No. 519 was marked for
12 identification.)

13 Q. Exhibit 519 is also -- this is actually
14 a scope of repair that ABS prepared for work to
15 be done at your home. You've never seen this
16 before.

17 A. No. But why are they still doing --
18 sending -- you know, doing things if they are
19 conflicted out?

20 Q. Well, because potentially they would
21 have to testify against Dan Buffington, and
22 that's what they were trying to avoid.

23 A. Okay.

24 (Exhibit No. 521 was marked for
25 identification.)

1 Q. Exhibit 521 is some exchanges between
2 Tori Stein and some other folks at Gamble.

3 A. Uh-huh.

4 Q. I'm referring to this comment in the
5 middle where Tori references that Chris Allwin
6 has pulled me back into this mess for now to see
7 if I can get some answers and light some fires.

8 What was Chris's involvement in all this
9 process?

10 A. He was not involved at all. And I
11 actually saw this e-mail in your stack and I had
12 no idea about that at all. He would -- he would
13 come down with me just to come and keep me
14 company, or he'd play golf and I'd be at the
15 house. I don't know. I find it very hard to
16 believe that he would contact her without me or
17 try to pull her in without me knowing it. It
18 implies that Christopher contacted her without me
19 knowing about it. The whole thing about this
20 e-mail is very hard for me to understand.

21 Q. Okay. Is it fair to say that your son
22 Christopher had little or no involvement in this
23 process of trying to identify problems and get
24 repairs made, or this lawsuit?

25 A. Yes. I was the decisionmaker.

1 Christopher was not. And I -- has pulled me back
2 into this mess, I don't know what that means.

3 Q. Okay. How about your other children --

4 A. No.

5 Q. -- Katrina and Michael, same --

6 A. Same thing.

7 Q. What is your children's opinion of the
8 house and the problems the house is experiencing,
9 to the best of your knowledge?

10 A. My kids love Kiawah, and they love what
11 Kiawah represents to them, which is our family
12 life down there, and their dad's life down there,
13 but they understand that they don't go there and
14 it's not feasible for us to keep it going anymore
15 and have fun down there when no one's there. And
16 so they're on board with everything I'm doing. I
17 tell them everything.

18 Q. You mentioned some estimates that you
19 had to raze the home, r-a-z-e, raze.

20 A. Uh-huh, take it down, yeah.

21 (Exhibit No. 522 was marked for
22 identification.)

23 Q. Exhibit 522 is an estimate from Atlantic
24 Coast Construction Management.

25 A. Yeah.

1 Q. Did you instruct Tori Stein to go get
2 those types of estimates?

3 A. I asked for that, yes.

4 Q. This was the only estimate I saw for
5 that type of work. Do you have others?

6 A. No, I'm sure she didn't get any others.
7 That's 522?

8 Q. Yes, ma'am.

9 (Exhibit No. 524 was marked for
10 identification.)

11 Q. This is the first reference to Fuller
12 Engineering, at least that I have on me, in this
13 Exhibit 524. It's from Buffington's document
14 production. Do you recall anyone from Buffington
15 coming to your house in the spring of 2011 to
16 meet with your representatives?

17 A. No, I do not.

18 Q. Under Present, it says, number 1, H.
19 Ross with Fuller Engineering.

20 Do you know who that is?

21 A. I do not, no.

22 Q. 2, it says original architect. Was this
23 possibly when Mr. Huby appeared or did someone
24 come down from SRW in New England?

25 A. I have no idea.

1 Q. You were not here for this meeting.

2 A. I was not here.

3 Q. Number 3, it says general contractor.

4 You don't know if that's referring to Buffington
5 Homes or Russ Cooper Associates..

6 A. I don't know who that refers to.

7 Q. Do you know who John Miller is, number
8 4?

9 A. Don't know John Miller.

10 Q. Is there anything at all you can tell me
11 about this document or a meeting of construction
12 folks at your house in April of 2011?

13 A. No, I don't.

14 (Exhibit No. 529 was marked for
15 identification.)

16 Q. Okay. Exhibit 529 is a May 10, 2011
17 Fuller, F-u-l-l-e-r, Engineering report to Mr.
18 Lyles. It's just a preliminary summary of their
19 observations and destructive testing. Have you
20 seen this document before?

21 A. Yes, I have.

22 Q. You mentioned Ross Clements' name
23 earlier. Have you ever spoken or met with Ross
24 Clements?

25 A. Yes.

1 Q. When did you first meet with Mr.
2 Clements?

3 A. Around that time, around that time, that
4 spring.

5 Q. You met him at the house?

6 A. Yes.

7 Q. Had he prepared this May 10, 2011
8 report?

9 A. Before meeting me at the house?

10 Q. Yes, ma'am.

11 A. I don't recall when he prepared this.

12 Q. After preparing this report, did he sit
13 down or did you have a telephone conversation to
14 review his findings?

15 A. Yes.

16 Q. Tell me about that.

17 A. He very methodically went through the
18 issues that he discovered and those issues that
19 we see here and thoughts he had on what I should
20 do next, and -- knowing my ultimate end game was
21 to sell the house.

22 Q. And he recommended various repairs,
23 correct?

24 A. He suggested a lot of different things.

25 Q. Including additional investigative work.

1 A. Yes. Most importantly was that
2 additional investigative work.

3 Q. And you retained Fuller Engineering to
4 do that.

5 A. Yes, I did.

6 (Exhibit No. 533 was marked for
7 identification.)

8 Q. Exhibit 533 is a -- actually, due to a
9 stapling error, this is actually several
10 documents, but the first few pages are a Tischler
11 und Sohn walk-through investigation?

12 MR. DUKES: What number is that?

13 MR. BEST: 533. Off the record.

14 (Off-the-record discussion.)

15 MR. BEST: 533, for the folks
16 playing at home, is Gamble Home Services, 2846
17 through 2855, and it's dated August 25, 2011.

18 Q. Have you seen that document before?

19 A. No, I have not.

20 Q. Do you know why Tischler was in your
21 house in the summer of 2011?

22 A. Tischler had a -- we had a problem with
23 all the windows, so Tischler -- I guess somebody
24 called them to come in and take a look at it and
25 they finally came down to look at it.

1 Q. Okay.

2 A. I don't know who, I don't know when.

3 Q. I'll represent to you that Tori Stein --

4 A. Okay.

5 Q. -- contacted Tischler and requested an

6 estimate for the replacement of certain

7 windows --

8 A. Okay.

9 Q. -- and presumably, even this inspection
10 by Tischler. Does that ring any bell at all?

11 A. That doesn't ring a bell, but it's very
12 logical.

13 (Exhibit No. 580 was marked for
14 identification.)

15 Q. I'm going out of order, but I'm marking
16 as Exhibit 580, it's Gamble Home Services 2872
17 through 2875, and is a September 15, 2011
18 proposal from Gamble-Atlantic to you to make
19 significant repairs to your home at a price in
20 excess of \$3.3 million.

21 A. Uh-huh.

22 Q. Do you recall seeing that document
23 before?

24 A. Yes, I do.

25 Q. You did not enter into that agreement

1 with --

2 A. No, I did not.

3 Q. -- Tori Stein's company.

4 A. No.

5 MR. BEST: Off the record.

6 (Off-the-record discussion.)

7 Q. If the goal at this time was to repair
8 the home, to restore it to its former glory so it
9 could be sold, why did you not enter into that
10 contract?

11 A. I wanted other offers, other bids. I
12 wanted to understand what else other people saw,
13 and I didn't -- I didn't want to just take it at
14 face value.

15 Q. Okay. Other agreements, contracts you
16 had with Tori Stein's company, you did not get
17 competing bids or second opinions.

18 A. Competing bids, right.

19 Q. But at 3.3 million, are we now into the
20 realm of a significant amount of money?

21 A. No.

22 Q. Why then not just let Tori, given her
23 history with the home, her knowledge of the home,
24 let her do the work?

25 A. For that very reason.

1 Q. Because her prior repairs had been
2 ineffective?

3 A. No, because I wanted fresh eyes to look
4 at it and I wanted somebody else's opinion about
5 what had to be done.

6 Q. Well, I thought Mr. Clements from Fuller
7 Engineering was giving you that decisive opinion.

8 A. He was. He did not give it -- I don't
9 know that he communicated with Tori, I don't know
10 what they had to say to each other, and I was
11 waiting to hear what that was. I think this was
12 a one-off of the whole experience.

13 Q. I'm sorry. What do you mean by a
14 one-off?

15 A. I think it was -- she knew I wanted to
16 do something and that I was eager to fix the
17 house. I understood I had things I had to do,
18 and I think she, in looking to help me, went
19 ahead to do this, as she always did.

20 Q. Are you saying you did not ask Ms. Stein
21 to prepare this proposal?

22 A. I might have asked her to, yeah. It's
23 reasonable that I would have said to her, why
24 don't you see what you can come up with. That
25 sounds like something I would say, but never

1 under the assumption that it was a given that
2 they would do it.

3 Q. Did she ever call you and say, Maria,
4 I'm sending you a multimillion-dollar proposal so
5 just be prepared; I don't want you to be shocked
6 by the figure?

7 A. No, I don't recall that.

8 Q. Did you have any concerns about the
9 quality of Gamble-Atlantic's or Ms. Stein's prior
10 work or concerns about their ability to complete
11 the Fuller scope of work? Did that factor into
12 your decision not to sign this proposal?

13 A. I don't know that she saw the Fuller
14 scope of work. I can't attest to that, and I
15 never questioned her ability, no. On previous
16 work, no.

17 Q. How was Phillip Smith chosen to do the
18 work at the house ultimately?

19 A. Phillip Smith was identified by a --
20 with a few other people, a few other contractors
21 who came out to the house. I met them. We
22 walked through, talked about what I thought I
23 wanted to do. They had Ross Clements' report
24 handy so that they knew what the scoop was, and
25 the scope, so to speak, and could comment and --

1 could comment effectively on that.

2 Q. Do you recall who -- I'm sorry. I
3 didn't mean to cut you off.

4 A. I do not.

5 Q. You don't recall who the other builders
6 were.

7 A. I do not.

8 Q. Do you remember how many there were?

9 A. I think there were three people.

10 Q. Why did you choose Phillip Smith?

11 A. I did a background check on him. I
12 called references on him. I went to see other
13 projects that he did. His price was reasonable,
14 and he struck me as a reasonable person.

15 Q. The proposal from Ms. Stein that we
16 marked 580, that's been previously marked as 538
17 but we're leaving 580.

18 (Exhibit No. 537 was marked for
19 identification.)

20 Q. 537 is the transmittal letter where Tori
21 sent you a copy of this proposal.

22 A. Yes.

23 Q. And she specifically references that she
24 is covering the 15 points of recommended repairs
25 in the Fuller report.

1 A. Good. That's good to know. Thank you.

2 Q. Do you recall conferences or discussions
3 with Ms. Stein about the repairs called for in
4 the Fuller report, or any complexities or
5 problems she anticipated in effecting those
6 repairs?

7 A. No.

8 Q. Any concerns she had.

9 A. She had no concerns.

10 Q. She had no thoughts, no comments,
11 nothing to make about the proposed Fuller
12 repairs.

13 A. No. I think she thought they were
14 logical and she could do it.

15 (Exhibit No. 539 was marked for
16 identification.)

17 Q. 539 is the estimate I'd mentioned a few
18 minutes ago prepared by Tischler und Sohn and
19 forwarded to Tori Stein for \$166,000 in window
20 replacements. Have you ever seen this before?

21 A. No, I haven't.

22 Q. And you don't recall whether you
23 requested that Ms. Stein specifically obtain that
24 estimate from Tischler.

25 A. That's correct.

1 (Exhibit No. 541 was marked for
2 identification.)

3 Q. 541 is an e-mail from Tori Stein to you
4 dated November 15th, 2011. Do you recall seeing
5 this?

6 A. No.

7 Q. I'm interested in this last full
8 paragraph where she's talking about the temporary
9 board-up performed earlier in the year to cover
10 door openings.

11 My question to you is this. The
12 photographs we looked at earlier where the rear
13 doors were removed in January 2011?

14 A. Yes.

15 Q. In November of 2011, are those rough
16 openings still empty? Is there not a door there?

17 A. I believe that's correct.

18 Q. Why weren't those doors replaced prior
19 to November of 2011?

20 A. Well, people were coming out to look at
21 it, I think. You couldn't get the doors back up,
22 the bottom piece, because she took the doors off,
23 didn't -- you couldn't get the door back in. I
24 think they jimmy-rigged something to put the
25 doors back up. That's my understanding.

1 (Exhibit No. 542 was marked for
2 identification.)

3 Q. Exhibit 542 appears to be -- have you
4 seen this before?

5 A. No.

6 Q. It appears to be an agreement, albeit
7 after the fact, I think, where Ms. Stein is
8 charging you for destructive testing assistance
9 she gave to your experts from January to
10 November, and then time for apparently a
11 temporary boarding-up of the voids where the
12 doors had been removed.

13 Did you pay this? Did you agree to it?

14 A. I'm pretty sure I paid this.

15 (Exhibit No. 545 was marked for
16 identification.)

17 Q. Exhibit 545 is a December 29, 2011
18 report prepared by Fuller Engineering and sent to
19 Mr. Lyles. Is this a report that Fuller
20 Engineering prepared following its additional
21 investigation?

22 A. Yes, it is.

23 Q. Have you seen this document before?

24 A. Yes, I have.

25 Q. Have you had any conversations with

1 Fuller Engineering personnel about that
2 particular report?

3 A. They just explained it to me, yes.

4 Q. Was this a face-to-face meeting or a
5 telephone call?

6 A. What's the date? I don't think it was
7 face-to-face. It must have been a phone call.

8 Q. How many times have you met Fuller
9 Engineering personnel face-to-face?

10 A. I don't know. Maybe eight times, ten
11 times.

12 Q. And that was always at your house?

13 A. Yes.

14 Q. And those have been eight to ten
15 separate days.

16 A. As opposed to what, one day? No. Yes,
17 eight, eight to ten separate days.

18 Q. How many conversations on the telephone
19 have you had with Fuller Engineering personnel?

20 A. Countless.

21 Q. How about before Phillip Smith began his
22 repairs? How many conversations with Fuller
23 Engineering personnel?

24 A. Countless.

25 (Exhibit No. 549 was marked for

1 identification.)

2 Q. Exhibit 549 is the very first portion,
3 the text portion, of essentially a scope of
4 repair, Fuller's instructions to bidding
5 contractors on what it wants performed at the
6 house.

7 A. Uh-huh.

8 Q. Have you seen that document before?

9 A. Yes, I have.

10 Q. Does that document contain all of the
11 work, to your understanding, that needs to be
12 performed at the house?

13 A. As of this date, I would assume so.

14 I --

15 Q. And the only thing new that you are
16 aware of, since that document was created, was
17 the void around the windows where you could see
18 daylight, the waterproofing membrane under the
19 deck. And then there was one other one, but we
20 talked about it earlier.

21 A. The shingle --

22 Q. The Tyvek under the shakes.

23 A. No, not the Tyvek. The thing that goes
24 under the Tyvek.

25 Q. Waterproofing under the shakes.

1 A. Yeah.

2 Q. Anything else after the date of this --

3 A. I really think there are other things.
4 I need to really get my own check and see, or ask
5 him.

6 Q. And by him, you mean Mr. Clements.

7 A. Yes.

8 (Exhibit No. 551 was marked for
9 identification.)

10 Q. Exhibit 551 is an estimate that Tori
11 Stein provided to Mr. Lyles, and she's
12 essentially putting a price on the Fuller
13 engineer's scope of work, but instead of it being
14 3.3 million, it is now 2.9 million. Do you know
15 what the change was?

16 A. I do not.

17 Q. Have you seen this document before?

18 A. I don't recall this document, no.

19 Q. Do you know whether you or Mr. Lyles
20 requested this document from Tori Stein?

21 A. I don't think I did. I don't know what
22 he did, no.

23 Q. Do you know if there was ever a
24 discussion by you or by anyone on your behalf
25 with Tori Stein wherein there was a request made

1 for her to review her numbers and see if some
2 reductions could be found?

3 A. I don't know that.

4 Q. You don't know whether this document was
5 prepared as a meaningful bid on the repair or
6 whether it was prepared for purposes of potential
7 litigation.

8 A. I don't know what it was prepared for.

9 Q. On the second page of Exhibit 551
10 there's some handwriting. Do you recognize the
11 handwriting?

12 A. No, I don't.

13 Q. These documents bear the Allwin Bates
14 stamp, so I'm assuming they came from your files.
15 Is this your handwriting?

16 A. No, it is not.

17 Q. Do you recognize it as any of your
18 children's handwriting?

19 A. Nope.

20 (Exhibit No. 553 was marked for
21 identification.)

22 Q. Exhibit 553 is a proposal from Tori
23 Stein in June of 2012 to reinstall the two doors,
24 two rear doors, in the great room that were
25 removed in January of 2011. I'm just trying to

1 confirm, those doors had been removed and the
2 openings boarded up for a year and a half now.

3 A. No. I think they were done prior to
4 this. I don't think it was a year and a half. I
5 think she just billed me then.

6 Q. Do you know when those doors were
7 reinstalled?

8 A. I do not, no.

9 Q. If you look down at the bottom, it says,
10 -- toward the bottom, agreement amount.

11 A. Uh-huh.

12 Q. Almost \$6,000. Deposit, \$2,500, balance
13 due upon completion.

14 A. Yes.

15 Q. And then in handwriting, up at the top
16 corner, do you know whose handwriting this is?

17 A. I do not.

18 Q. It says, deposit paid, which suggests to
19 me the work has not yet been performed, otherwise
20 you would pay it in its entirety. Deposit paid
21 June 18th, 2012. Do you have any reason to
22 dispute that information?

23 A. No, I do not.

24 Q. Is it possible that as of June 2012,
25 those doors had not been reinstalled, or do you

1 contest that?

2 A. It's possible.

3 (Exhibit No. 554 was marked for
4 identification.)

5 Q. Exhibit 554 is a June 11, 2012 property
6 appraisal, again, by Joseph Guerri, G-u-e-r-r-y.
7 The value this time is 11,900,000.

8 A. Uh-huh.

9 Q. Do you recall why this appraisal was
10 requested?

11 A. Well, I wanted to put the house on the
12 market again, test what the market was -- how the
13 market was down there.

14 Q. The next page, second page, in the cover
15 letter addressed to you, first sentence, at your
16 request, I have physically inspected the
17 above-referenced property.

18 Do you know that Mr. Guerri actually
19 went back to the property?

20 A. I do not.

21 Q. Do you know if this appraisal is based
22 on the property's as-is condition or whether it
23 assumes that there are no problems with the home?

24 A. Well, if you look here, it says the
25 property owner has informed the appraiser that

1 the subject property suffers from structural
2 deficiencies, blah, blah, blah. So I would
3 assume that it represents that it -- that he has
4 knowledge of the things I need to do with the
5 house.

6 Q. Okay.

7 A. This appraisal is based upon the subject
8 property as if the structural deficiencies do not
9 exist. Oh, do not exist. So it should be noted
10 that this assumption -- oh, okay.

11 Q. And you're looking --

12 A. So I didn't finish reading it.

13 Q. And you're looking at the document Bates
14 stamped KIRE42?

15 A. Right.

16 Q. Under hypothetical condition

17 A. Right.

18 Q. So you informed Mr. Guerry that the
19 house has problems?

20 A. Right.

21 Q. But his estimate assumes it does not
22 have problems.

23 A. Right. That's what it says. Okay.

24 Q. How was that going to help you in
25 setting the sales price?

1 A. It's irrelevant to me.

2 Q. Okay. You wanted this appraisal so you
3 would know what the market would bear.

4 A. Right.

5 Q. Okay? Were you going to use the
6 appraisal figure, deduct the cost of repairs from
7 a bid you got from a contractor and sell the
8 house for the difference?

9 A. That was part of my plan, yes.

10 Q. Were you using Ms. Stein's estimates,
11 the two that we've looked at, 3.3 million or 2.9,
12 to set the sales price?

13 A. No.

14 Q. Whose estimates were you going to use?

15 A. I think whoever I decided to go with. I
16 don't think at that time I was going with
17 Gamble's bid.

18 Q. Okay. Is the focus in the middle of
19 2012 to make the repairs and sell it or to get
20 information about hypothetical values and the
21 cost of repairs and sell it at a discounted
22 price?

23 A. Those were the two options. I hadn't
24 decided what I was doing.

25 Q. Or was it helping you to determine

1 whether making repairs was even worthwhile or
2 cost effective?

3 A. I mean, I suppose.

4 Q. Can you give me any specific
5 information?

6 A. I mean, if the repairs are \$3 million
7 and the house is worth 11,9, that means I need to
8 get 14 to sell it. And is that, you know, a
9 number that the market supports on Kiawah Island
10 in 2012-13. I don't know. It's kind of how I
11 was looking at it. Or anyone else's bid that
12 came through.

13 Q. Are you still working with Ms. Noble
14 presently about selling your home?

15 A. The house is under construction, as I'm
16 sure you know. I'm doing all these terrific
17 things to it. I asked her to go by and see it,
18 and she was very enthusiastic.

19 Q. Has any potential buyer looked at the
20 home while it was under construction by Mr.
21 Smith?

22 A. No, not that I know of, but you know
23 Kiawah, people walk through.

24 Q. As you sit here today, your plan is to
25 complete the repairs and then list the home for

1 sale?

2 A. Yes.

3 Q. What are you going to list the home for?

4 A. I have no idea.

5 (Exhibit No. 557 was marked for
6 identification.)

7 Q. Exhibit 557 is a South Carolina
8 Residential Property Condition Disclosure
9 Statement. Do you recall completing and signing
10 this document?

11 A. Yep, I do.

12 Q. The document asks you, as the owner, if
13 there are any problems with the home in certain
14 categories.

15 A. Uh-huh.

16 Q. And you indicated yes under siding and
17 structural components and roof. Excuse me. The
18 first section is foundation, slab, fireplaces,
19 floors, windows, and also goes into siding. You
20 answered yes to roof as well as yes to water
21 seepage. You see where I'm referring to?

22 A. Yes.

23 Q. Then on page 3, in the comments section,
24 you'll note the instruction, if you answered yes
25 to any of the above questions, please use the

1 following space for your explanation.

2 Is that your handwriting?

3 A. Yes.

4 Q. Will send engineer report when reviewed.

5 A. Yes.

6 Q. What engineering report are you talking
7 about?

8 A. I'm referring to the report that Ross
9 prepared. The binder that's -- no, bigger than
10 that (indicating).

11 Q. Yes, ma'am. But it's the one that has
12 all the drawings, everything that the --

13 A. Everything, everything.

14 Q. All right. Had you not reviewed that as
15 of June 2012?

16 A. I don't think I mean when I review it.

17 Q. When who reviews it?

18 A. I think will send engineer report -- oh,
19 I don't know what I mean there, but I don't think
20 I mean when I review it. I think I'm saying
21 we'll send engineer report when they review --
22 when, you know, a person comes to see the house,
23 they'll get an engineer report. They signed a
24 confidentiality agreement to receive that report.

25 (Exhibit No. 559 was marked for

1 identification.)

2 Q. Do you recall seeing Exhibit 559 and
3 signing that?

4 A. Yes.

5 Q. You listed the house in July of 2012 for
6 9 and a half million dollars?

7 A. Yes.

8 Q. Why did you list the house at this time?

9 A. It was a turning point in the process.
10 We had the binder from Ross with all the drawings
11 and understanding of the work that was -- the
12 magnitude of the destructive testing was revealed
13 to me, and I felt I had to make a decision,
14 either cut -- you know, cut bait or go. And so I
15 put the house on the market to see what would
16 happen when potential purchasers came through and
17 received this binder of daunting information that
18 had to be done to the house, and how this number
19 would float in the community at large at this
20 time of the year in this time of the, you know,
21 cyclical cycle of financial markets on Kiawah
22 Island.

23 Q. And I appreciate that, and the price,
24 I'm assuming, the price of 9.5 million, going
25 back to the Exhibit 554, your estimate, you got

1 an \$11.9 million appraisal. The delta between
2 11.9 and 9.5 is 2.4 million. So you had -- did
3 you use the repair bids that Ms. Stein prepared,
4 the 3.3 million and the 2.9 million, to determine
5 the deduction in value that --

6 A. It wasn't just her bid. It was several
7 other people as well had come through. I don't
8 recall who they are. And I thought, given what
9 it is and what I rounded it around, and I said
10 9.5. Also how it would be perceived in the
11 market in Kiawah.

12 Q. You said other people came through.

13 A. Yes. There were other -- I mentioned
14 that before. There were other contractors. I
15 don't know who they are.

16 Q. Mr. Smith is not involved yet, we're not
17 even close to Mr. Smith yet.

18 Prior to this listing in July of 2012,
19 what contractors other than Tori Stein had been
20 through your house with the thought of bidding --

21 A. Oh, this is prior to that? Oh, then I'm
22 totally incorrect. Thank you for pointing that
23 out.

24 Q. Well, let me clarify.

25 A. Please do, because I'm totally -- I

1 got -- I'm wrong then.

2 Q. Well, I might have confused both of us
3 and I apologize if I have.

4 (Exhibit No. 549 was marked for
5 identification.)

6 Q. Exhibit Number 549 is Mr. Clements'
7 instructions to the builder, this is his scope of
8 work, this is the work he wants done.

9 A. Okay.

10 Q. And it's dated March of 2012.

11 A. Right.

12 Q. When did Phillip Smith and these other
13 builders come through your house to provide
14 estimates?

15 A. Let me find that.

16 Q. I'm sorry. I didn't mean to cover it up
17 if you need to look at it.

18 A. Yeah, I do.

19 I think we got this in 2012, and after
20 this, we gave this to potential contractors to
21 come through and see the house, using his book.
22 Yes, that's right. So what's the date of this?

23 Q. The property listing is July of 2012.

24 A. So it would seem that all of this
25 happened at the same time, in the same time

1 frame.

2 Q. And my question to you is -- and I
3 apologize if I confused you.

4 A. You did.

5 Q. My question to you is simply did you
6 have the benefit of the input, including any cost
7 estimates, bids, from these other general
8 contractors other than Tori Stein when you
9 decided to list the house for sale with Cynthia
10 Noble in July of 2012?

11 A. No, I don't think I did.

12 Q. You think those general contractors,
13 other than Tori Stein, came after you listed the
14 house for sale?

15 A. Yes.

16 Q. Did you get any offers while the house
17 was listed?

18 A. Yes.

19 Q. How many offers did you get?

20 A. One or two.

21 Q. Do you recall what the offer prices
22 were?

23 A. Yes.

24 Q. What were they?

25 A. One was for the listing price, and

1 somebody else came in after that a little bit
2 more.

3 Q. \$100,000 more.

4 A. No, \$500,000 more.

5 Q. Somebody offered you 10 million for the
6 house.

7 A. Yes.

8 Q. Why was the decision made not to sell
9 the house for \$10 million?

10 A. I didn't want to. I wasn't giving it
11 away. I felt that was a giveaway.

12 Q. That statement begs the question then
13 why in the world would you consider listing the
14 house for 9.5 million?

15 A. You know, you're looking for a rational
16 thought here. I understand that. That's how you
17 think. I was not in a rational thought moment.
18 I wanted to see what would happen. I saw what
19 happened and I pulled my -- I changed my mind.

20 Q. Did you make a counteroffer or
21 counterdemand in response to the \$10 million
22 offer?

23 A. Well, apparently in South Carolina you
24 don't do that. If you get the offer, you --
25 you're not allowed, it's not precedent to say,

1 oh, by the way, I changed my price. They were
2 jumping for joy at 10 million.

3 Q. Did you consider, after you declined
4 that offer, changing the sales price?

5 A. No. It told me the price was too low,
6 and that I should do the work -- the lots go for
7 5 million each, so basically that's saying the
8 lots are for 10 million and the value of the
9 house is zero. I have two lots, and two
10 oceanfront lots are nonexistent right now.

11 Q. Had you decided to tear the house down,
12 could you have subdivided your lots?

13 A. Yes.

14 Q. Did you explore that possibility?

15 A. No.

16 Q. So you're assuming you could have
17 subdivided the lots is what you're telling me.

18 A. Well, they're two independent lots.

19 Q. Do they have a single tax map number for
20 tax purposes?

21 A. No. They're 133, 134. So I assume
22 those are two different lots.

23 Q. It's a single street address, correct?
24 For both properties?

25 A. I made Kiawah do that single street

1 address just because it was confusing to people,
2 seeing 133, 134.

3 Q. The point I'm making is, you spoke with
4 no one, particularly at Kiawah Island, about the
5 possibility of subdividing your two lots.

6 A. No.

7 Q. I'm correct?

8 A. Yes.

9 (Exhibit No. 560 was marked for
10 identification.)

11 Q. Exhibit 560 is a second disclosure
12 statement dated a month later, July 2012.

13 A. Uh-huh.

14 Q. Do you recall signing that?

15 A. Yes.

16 Q. I'm assuming the first one we looked at
17 in June, Exhibit 557, may have been one of those
18 pocket showings, and then you completed this
19 after actually listing the house with Cynthia
20 Noble. Is that your recollection?

21 A. It could be. I don't know.

22 (Exhibit No. 565 was marked for
23 identification.)

24 Q. Do you recall seeing Exhibit 565, which
25 is a sales brochure for the house?

1 A. Yes.

2 Q. Was that in a magazine or is that a
3 free -- was this available to purchasers in the
4 home?

5 A. I think it was a freestanding thing.

6 Q. Right.

7 A. A freestanding brochure.

8 Q. Right. Did you review that before its
9 completion?

10 A. Yes.

11 Q. And so you approved its content.

12 A. Yes.

13 Q. Were all these photographs taken in 2012
14 or were they old photographs?

15 A. I don't know.

16 (Exhibit No. 566 was marked for
17 identification.)

18 Q. Exhibit 566 is the disclosure and
19 confidentiality agreement that potential
20 purchasers would sign and then receive a copy of
21 the Fuller Engineering report.

22 A. Uh-huh.

23 Q. And just to be clear, the documents that
24 were produced to potential purchasers were not --
25 excuse me. The big book prepared by Fuller, that

1 was to be made available to them --

2 A. Yes.

3 Q. -- as well as Ms. Stein's April 27th,
4 2012 estimate, correct?

5 A. That's what it says here.

6 Q. Was that the 2.9 or the 3.3?

7 A. I don't know.

8 (Exhibit No. 551 was marked for
9 identification.)

10 Q. I'm showing you Exhibit 551. That would
11 have been the \$2.9 million estimate.

12 A. Okay.

13 Q. I'm asking you, is that the one --

14 A. I don't know. I don't know. I'm sorry.
15 I don't remember. Well, it says April 27th and
16 this is April 27th, so yes, it is the 2.9 number.

17 Q. That's what I'm asking you.

18 Is this refreshing your recollection at
19 all as to any differences in the 2.9 estimate she
20 gave to Mr. Lyles and the \$3.3 million estimate
21 she gave to you?

22 A. No, it's not.

23 MR. LYLES: Take a couple of
24 minutes, Dean?

25 MR. BEST: Yes, that would be

1 great.

2 (A recess was taken.)

3 (Exhibit No. 572 was marked for
4 identification.)

5 Q. Exhibit 572 is an offer from Mr.
6 Nicholas Howley for \$9,120,000, which is
7 obviously less than the listing price but it's a
8 cash offer. Do you recall that?

9 A. Yes, I do.

10 Q. And that's the one that was obviously
11 not in excess of the offer. You think there was
12 another written offer for 10 million?

13 A. Yes, I believe there was.

14 Q. Soon hereafter you took the house off
15 the market?

16 A. Yes.

17 Q. Why did you take the house off the
18 market?

19 A. I thought we went through that.

20 Q. If you could remind me, please.

21 A. My understanding of the Kiawah Island
22 real estate is that the lots are worth 5 million
23 each, and so two lots, \$10 million.

24 Q. Did you get any new information about
25 the value of the lots or were you assuming just

1 based on the offers you got that that was for
2 land value only because the house was in such
3 shape that it was worthless?

4 A. No, no. That was never -- no. My
5 understanding is that there was a transaction
6 just prior to this on Kiawah for one oceanfront
7 lot that was much narrower than mine and it was
8 \$5 million. And so I'm thinking, okay, that's 5,
9 it's not a good lot. I have two beautiful lots,
10 that's 10, and this guy's offering me 9? I don't
11 think so.

12 Q. Okay. So the new information based on
13 the sale of the less attractive lot factored into
14 your decision --

15 A. Yes.

16 Q. -- to remove it from the active listing.

17 A. Thank you for making me sound so
18 logical.

19 Q. Did your children's thoughts or concerns
20 about the home factor into the decision to
21 discontinue the active listing?

22 A. No.

23 Q. Were you using the house at all in 2011,
24 2012, 2013?

25 A. No.

1 Q. Was there a particular reason why you
2 were not using it? Just a change in lifestyles,
3 you didn't have --

4 A. Yes.

5 Q. The kids were gone again so you simply
6 just were not going to the beach.

7 A. Exactly.

8 Q. Was anyone, aside from Vice President
9 Biden, using the house with any degree of
10 regularity in 2011, 2012, 2013?

11 A. No, nobody.

12 Q. Do you know, as you sit here today -- I
13 think the Cowans did stay in it briefly --

14 A. Yes.

15 Q. -- maybe in that period. Anyone else
16 you can think of who was in that house to stay
17 and use it?

18 A. No, nobody.

19 Q. Do you think your kids went down there
20 at all during those three years?

21 A. No, they did not.

22 Q. You went down during that time frame to
23 meet with Mr. Clements and other Fuller
24 Engineering folks?

25 A. Yes.

1 Q. Would you stay in the house?

2 A. No.

3 Q. Where would you stay?

4 A. I stayed with a friend or at The
5 Sanctuary.

6 Q. Who's the friend you stayed with?

7 A. My neighbors, people on Kiawah that I
8 know.

9 Q. Yes, ma'am. I'm -- can you tell me who
10 they are?

11 A. Oh, my neighbor Kathy Leonard. She
12 lives behind me.

13 Q. Across the street?

14 A. No. The back -- you know, the back, in
15 back of me, on Kiawah.

16 Q. Between you and the street.

17 A. Right. And then I mostly stayed at The
18 Sanctuary.

19 (Exhibit No. 573 was marked for
20 identification.)

21 Q. Exhibit 573 is an e-mail that Mr. Nick
22 Howley wrote you --

23 A. Yeah.

24 Q. -- which I think is becoming more and
25 more common. You make an offer on a house and

1 then you --

2 A. Oh, is it?

3 Q. Well, do you remember seeing this?

4 A. Oh, yes, I saw it. This was his death
5 sentence.

6 Q. Yes.

7 A. He wrote, I look forward to have
8 grandchildren and want to establish a beautiful
9 long family beach haven.

10 I'm thinking, so do I. Why would I sell
11 the house at 9.1 to you? It was handwritten, by
12 the way, the note that I received.

13 Q. Do you know who typed this up?

14 A. I do not.

15 Q. Do you know who Ellen Walkley is?

16 A. No, I do not.

17 (Exhibit No. 576 was marked for
18 identification.)

19 Q. Exhibit 576, dated April 4th, 2013, is
20 what I believe to be Mr. Phillip Smith's
21 preliminary cost estimate.

22 A. Uh-huh.

23 Q. Have you seen this document before?

24 A. Yes, I have.

25 Q. And his preliminary cost total is just

1 short of \$2.3 million.

2 A. Uh-huh. Okay.

3 Q. How are we doing on the budget? How
4 much has been spent to date in repairing your
5 home?

6 A. Maybe 1.8, 1.9.

7 Q. Do you know that because you've been
8 tracking your payments to Mr. Smith or do you --

9 A. Yes.

10 Q. Okay. So is he on budget?

11 A. Yes.

12 Q. Do you think the project is going to
13 come in underneath this budget?

14 A. No.

15 Q. What additional costs do you expect will
16 cause the budget to go over?

17 A. As I mentioned to you, we are doing
18 additional work at the house.

19 Q. Okay. And we don't need to rehash all
20 that.

21 A. Okay.

22 Q. Do you have an idea of how much that
23 additional work is going to cost you?

24 A. About 1.5.

25 Q. In addition to the 2.9 here, or 2.3.

1 A. Whatever.

2 Q. Whatever it is. So we're looking at a
3 total repair cost when Mr. Smith is finished of
4 roughly 3.7 million?

5 A. Roughly, yes.

6 Q. How often do you communicate with Mr.
7 Smith?

8 A. Every week, every ten days.

9 Q. Is that in the form of a telephone call,
10 e-mail --

11 A. Yes, both, calls, e-mails. I'll shoot
12 an e-mail down there. I hear from him, he hears
13 from me.

14 Q. Do you get photographic updates or
15 reports about the status of the work?

16 A. Yes, I get photos. Whenever anything
17 interesting comes along, they'll send me a
18 photograph. And then I'm -- I always get a
19 monthly -- or I get an every two-week, biweekly
20 report from them.

21 Q. Is any of the work Mr. Smith is
22 performing or is to perform at your house an
23 elective? And by elective I mean, for example,
24 the kitchen could -- and I don't know if he's
25 doing this, in fact I think he's not updating the.

1 kitchen, but if you chose to update the kitchen,
2 new appliances, new whatever, that's nothing
3 that's caused by any defect that -- or presumably
4 nothing you'd be asking for in a lawsuit. It's
5 just something you have chosen to do electively.
6 You understand the difference?

7 A. Yes, I do.

8 Q. Is any of the 3.7 that is to be spent on
9 repairing your home for elective renovations that
10 you have chosen to do?

11 A. Well, 2.2 minus 3.7 is the elective work
12 I'm doing.

13 Q. Okay. So in this lawsuit, you're
14 looking for 2.2 million of the 3.7 or whatever
15 will be paid to be attributed to construction
16 defects that you would seek recovery for in this
17 lawsuit.

18 A. Yes.

19 Q. What else are you seeking to recover in
20 this lawsuit?

21 A. Well, what else do you have? I --

22 Q. Well, before the Fuller report, your
23 family wasn't using the house, correct?

24 A. Correct.

25 Q. So you're not going to claim loss of use

1 for a house that you weren't using. Is that a
2 fair statement?

3 A. I defer to Robert on that.

4 Q. Okay.

5 I think you've claimed attorney's fees
6 in this lawsuit. What's your fee arrangement
7 with Mr. Lyles, or do you know how much you have
8 incurred in legal fees?

9 A. I defer to Robert on that.

10 Q. Okay.

11 As you sit here today, do you know of
12 anything else you are asking for in your lawsuit?

13 A. I would defer to Robert on that as well.

14 Q. Okay.

15 Your artwork and furniture, were they
16 moved on site or were they moved to a different
17 location?

18 A. Yes. All the valuable art in Kiawah was
19 moved to the house in Connecticut. All the
20 sculptures, exterior sculptures were moved to the
21 house in Connecticut. The outdoor furniture was
22 moved to the house in Connecticut. All the
23 little, you know, decorative pieces were moved to
24 the house in Connecticut. In Kiawah right now
25 there's -- furniture is in storage, draperies, et

1 cetera, are in storage, and then the smaller
2 pieces of furniture are in a guest bedroom on the
3 first floor.

4 Q. Do you know how much your moving and
5 storage fees are?

6 A. Moving and storage fees are --

7 Q. And you're referring to the budget?

8 A. I am referring to what he's charging me
9 for it.

10 Q. Let me ask you a different question. Do
11 you know what Mr. Smith has charged you, not the
12 preliminary budget, what he's actually charged
13 you to date for those moving and storage fees?

14 A. I don't think he's charged me yet for
15 it.

16 Q. Do you know if those fees are in excess
17 of what he has pointed out or designated in his
18 preliminary budget?

19 A. Well, he didn't charge me yet. I don't
20 know what they are.

21 (Exhibit No. 29 was marked for
22 identification.)

23 Q. Let me show you Exhibit 29, backing way
24 up.

25 A. 29?

1 Q. Yes, ma'am, the number 29. In prior
2 questioning, I mistakenly represented to you that
3 your attorney did not write a demand letter to
4 Russ Cooper Associates in February of 2011 like
5 he did to --

6 A. Buffington.

7 Q. -- Dan Buffington. It turns out he has,
8 in fact. In this Exhibit 29, the October letter
9 to Russ Cooper's counsel, he references prior
10 letter, and he also wrote a demand letter to
11 Shope Reno Wharton in February 2011. Have you
12 seen this exhibit before?

13 A. Yes, I have.

14 Q. In Exhibit 29, Mr. Lyles points out some
15 work --

16 A. Uh-huh.

17 Q. -- some work that Mr. Cooper performed
18 in 1999, 2000 and 2001.

19 A. Uh-huh.

20 Q. Do you agree with those statements
21 regarding the scope of any repair work Russ
22 Cooper made?

23 A. This sound correct, yes. Sounds
24 correct, yes.

25 Q. In the next paragraph, Mr. Lyles points

1 out repair work that was done by Mr. Cooper in I
2 think 2000 or 2001 that you have most recently,
3 in 2011, once those doors were removed, you
4 discovered new problems, and that's specifically
5 the negative slope on the flashing that we talked
6 about earlier. Is that your understanding?

7 A. Yes, it is.

8 Q. Who worked on those doors or on the
9 waterproofing where the deck ties into your house
10 since 2000 and 2001?

11 A. I don't think anybody.

12 Q. I thought we had established --

13 A. Oh, maybe Gamble did some work?

14 Q. Well, Gamble did do some work because
15 you took photographs of the cave.

16 A. Right.

17 Q. And Buffington also did some work as
18 well, didn't it?

19 A. Yes.

20 Q. Did anybody else do work in that area?

21 A. No.

22 Q. And the Buffington repairs would have
23 been the 2004-2005 time frame.

24 A. Yes.

25 Q. So since Russ Cooper completed its work

1 in this area where the pool deck ties into the
2 main house, where those rear doors are, at least
3 Buffington and Gamble and its subcontractors
4 would have performed work in those areas,
5 correct?

6 A. Correct.

7 Q. Since 2001, I think we've established
8 Russ Cooper has not been to your house for any
9 reason that you're aware of, correct?

10 A. Correct.

11 Q. At no time did Russ Cooper ever
12 represent to you that he was going to make any
13 type of repair; is that correct?

14 A. Yes, that's correct.

15 Q. Russ Cooper never made any
16 representation or took any action that led you to
17 believe a lawsuit wouldn't be necessary because
18 he was going to come back and take care of these
19 problems. Is that a fair statement?

20 A. Yeah.

21 MR. BEST: Ms. Allwin, it was a
22 pleasure meeting you. I hate it was under these
23 circumstances; but I'm going to pass you and let
24 these other folks have a few moments with you.

25 THE WITNESS: Okay.

1 EXAMINATION

2 BY MR. CANTWELL:

3 Q. Ms. Allwin, are you okay to move forward
4 this afternoon?

5 A. Sure.

6 Q. All right. Great.

7 We met yesterday. My name is Josh
8 Cantwell, and I represent Buffington Homes in
9 this case. Dean has been very thorough over the
10 last two days, but there are some specific areas
11 that I'd like to talk with you about the limited
12 scope of my client.

13 MR. CANTWELL: If we can mark this
14 as the next exhibit, please.

15 (Contract for Renovation of
16 Residence was marked Exhibit 581 for
17 Identification.)

18 (Exhibit No. 581 ^ was marked for
19 identification.)

20 Q. Now, we talked a lot about this
21 yesterday, but in 2004, you hired Mr. Buffington
22 to come in and do certain repairs to your home;
23 is that correct?

24 A. Yes.

25 Q. Take a minute, if you would, and is this

1 the contract for renovation of your residence
2 from the 2004 time frame?

3 A. It looks it, yes.

4 MS. McINTOSH: Josh, real quick,
5 could you give us the Bates numbers?

6 MR. CANTWELL: Absolutely.
7 Buffington 305, and then it goes on --

8 THE WITNESS: Well, there's a
9 break, 312, and then 347 to 3 -- 347, 348, 349.

10 MS. McINTOSH: Okay. So 305 to
11 312? I'm sorry.

12 THE WITNESS: Yes, and then 347 to
13 349, and then 319 and 320.

14 MS. McINTOSH: Okay. Thank you.

15 THE WITNESS: Sure.

16 Q. This contract was between Buffington
17 Homes and you and your husband; is that correct?

18 A. Yes.

19 Q. Is that your signature down at the -- or
20 your initials down at the bottom of the first
21 page?

22 A. Yes.

23 Q. And are those your initials on all the
24 subsequent pages?

25 A. Yes.

1 Q. Under the notation for owner?

2 A. Yes.

3 Q. Tell me, what was your understanding of
4 Mr. Buffington's scope of work on the residence?

5 A. He had -- he was going to address the
6 issues that were identified. He was going to --
7 yeah, the foundation walls were something he
8 was -- he had identified, and he actually --
9 that's actually the one thing that remains in
10 perfect condition.

11 Q. Okay. Great. We spoke a little bit
12 about this at first, but how did you come across
13 Mr. Buffington?

14 A. He has a great reputation down there,
15 and we asked a few people to give us references,
16 and his name came up several times. We saw one
17 or two of his homes that he had done, and I don't
18 recall where they were. And we did, you know,
19 sort of a credit check. Jim, my husband, did
20 some kind of credit check at the time, and my
21 husband -- we met him and my husband was
22 impressed with him and so we went with him.

23 Q. During the construction, were you
24 involved in the daily process at all or did your
25 husband handle it?

1 A. Neither my husband nor I were involved
2 in the daily process.

3 Q. Okay. Is that because you were kind of
4 deferring to Milt Morgan to oversee the
5 renovation?

6 A. Yes.

7 Q. How did you meet Milt Morgan?

8 A. I think someplace in here we saw a
9 document that said it was an introductory letter
10 from a friend of ours who said Milt Morgan is
11 your guy, and my husband called him and engaged
12 his services.

13 Q. And what type of services exactly was he
14 supposed to provide for the Buffington
15 renovation?

16 A. Just to be a liaison, someone my husband
17 could talk to in between the project.

18 Q. Do you know if Mr. Morgan created the
19 actual scope for the renovation?

20 A. I do not know that.

21 Q. As we sit here today, what items do you
22 believe are the responsibility of Buffington
23 Homes, if any?

24 A. I defer to Robert on that, I'm not -- I
25 can't answer that.

1 Q. Okay. If you don't mind, can you turn
2 to Buffington 311, which is Exhibit A to the
3 contract.

4 A. Uh-huh.

5 Q. Now, this sets forth the actual scope of
6 work for the renovation; is that correct?

7 A. Yes.

8 Q. Is it fair to state that the items on
9 here would only be the potential items that could
10 be items associated with Buffington Homes; is
11 that correct?

12 A. Yes.

13 Q. I believe yesterday you testified that
14 during the renovations performed by Buffington,
15 you were actually down in Kiawah at some point in
16 time; is that correct?

17 A. Yes, I was.

18 Q. Was that the summer of 2004?

19 A. It must have been, yes.

20 Q. Tell me about that time.

21 A. Well, there were all these people
22 running around the house, and anxious to get the
23 job done. The house was hot. We had to bring
24 in, you know, outside air conditioners, you know,
25 like robot-sized things to bring in, and they

1 tried very hard to get it done.

2 Q. Did you ever have any problems with Mr.
3 Buffington or any of his crews during the
4 renovation process?

5 A. No.

6 Q. Were there ever any complaints from
7 either the Cowans or anybody like that that was
8 in town during the renovations?

9 A. No. Were there any? No, no. There
10 weren't any. They were fine.

11 Q. When was the last time that you spoke
12 with Mr. Buffington?

13 A. When was this over? 2004, 2005?

14 Q. I can represent to you that the initial
15 renovation was done by 2005.

16 A. Then that was the last time.

17 Q. Okay. You never contacted him at any
18 point in time, you specifically, stating that he
19 needed to come fix any problems with your house;
20 is that correct?

21 A. I don't recall ever calling him, no.

22 Q. There was never any telephone
23 conversation like the one you referenced with
24 Russ Cooper or anything like that?

25 A. No.

1 Q. Okay. Great. Do you recall ever
2 talking with anyone else at Buffington Homes
3 besides Dan Buffington? Robbie (ph) Diamond is
4 another person that used to work with him. Do
5 you recall her?

6 A. Vaguely recall her. I don't think I
7 spoke to anybody else.

8 Q. When was the last time that you were
9 down in Kiawah?

10 A. I think I was down in October.

11 Q. October 2014?

12 A. Yes.

13 Q. At what level was the construction at
14 that time? By Phillip Smith.

15 A. Right. It was, it was a construction
16 site, and it was all -- the shingles were off. I
17 think we were talking about the mechanical
18 stands. So there was a lot of -- for the new AC
19 going in, there was a lot of activity over by the
20 side. I think the -- those huge units were out,
21 the AC units that are no longer in use. That's
22 it. It was a construction site.

23 Q. You mentioned with Dean that you weren't
24 down at the house between 2011 and 2013; is that
25 correct?

1 A. Did I?

2 Q. Just a minute ago you briefly said that
3 you didn't go down to the house during that time
4 frame.

5 A. (Indicating.)

6 Q. How about prior to that, 2010 and 2009?
7 Do you recall going down to Kiawah during those
8 years?

9 A. We never -- I never went down to stay.
10 I went down for a party or a golf outing. It was
11 always a day trip back and forth. I never --

12 Q. Do you remember any specific instances
13 where you went down to Kiawah during the 2009 or
14 '10 time frame? Even just a day trip, a party or
15 a golf --

16 A. You know, I would have to check my
17 schedule. Thank you for pointing that out. I
18 don't remember.

19 Q. Okay, fair enough. Did you ever make
20 any sort of claim or file a lawsuit or anything
21 like that against Aero Corporation, the HVAC
22 company?

23 A. No.

24 Q. Did you ever consider doing so?

25 A. No.

1 Q. Did you ever have any contact with
2 them -- after they had budgeted over \$700,000 for
3 repairs for the HVAC system, did you ever have
4 any contact with them after that to come out and
5 fix these problems?

6 A. I personally did not, no.

7 Q. Do you have Exhibit Number 228 in front
8 of you in that stack?

9 A. Yeah, here it is.

10 Q. This was a July 29th, 2007 letter from
11 AIG, correct?

12 A. Uh-huh.

13 Q. Do you recall receiving this letter?

14 A. Yes, I do.

15 Q. The letter indicates that an AIG
16 representative has done an investigation of the
17 house and there's evidence of high levels of
18 moisture and moisture present around the lower
19 edges and sides of many of the ocean-facing
20 windows; is that correct? In the second
21 paragraph of the letter.

22 A. Yes, that's what it says.

23 Q. And it actually has photos taken --

24 A. Uh-huh.

25 Q. -- photos that were taken by the AIG

1 representative during that investigation,
2 correct?

3 A. It does have photographs, yes.

4 Q. It also indicates that there were high
5 levels of water found in the upstairs bedrooms
6 and a pitched ceiling finish?

7 A. Yes..

8 Q. Do you recall that?

9 A. I see it here.

10 Q. Did you do anything at this time in
11 order to repair those conditions?

12 A. No.

13 Q. In the third paragraph it states, water
14 inundation into a home, slow or fast, can cause
15 substantial damage to a home, including
16 structural and trim wood to rot, and may also
17 lead to the generation of mold; is that correct?

18 A. That's what it says.

19 Q. After receiving that letter, did you
20 ever forward that information to Mr. Buffington?

21 A. I don't think I did, no.

22 Q. Yesterday there was mention of -- there
23 was an e-mail from you and I believe to Ms.
24 Stein, talking about a report -- an AIG report
25 had been sent to Mr. Buffington and he was,

1 quote, pissed.

2 A. Uh-huh.

3 Q. Do you recall that conversation?

4 A. I do. Is that this report?

5 Q. That's what I'm asking, exactly if
6 that's what --

7 A. I don't know.

8 Q. Do you recall that conversation with Mr.
9 Buffington?

10 A. I do not.

11 Q. But that was your e-mail to --

12 A. That was my e-mail.

13 Q. -- Ms. Stein?

14 A. Probably didn't impress me that much.
15 Probably wasn't that pissed.

16 Q. Did Mr. Buffington come out and do any
17 subsequent repairs at that point?

18 A. I don't know. I'm sorry.

19 MR. BEST: Off the record.

20 (Off-the-record discussion.)

21 (Exhibit No. 230 was marked for
22 identification.)

23 Q. Here's a copy of Exhibit Number 230, and
24 that's a monthly inspection report from Gamble
25 Home Services; is that correct?

1 A. Yes.

2 Q. Do you recall how often you had received
3 these reports from Gamble?

4 A. No.

5 Q. It indicates monthly inspection but we
6 haven't really seen --

7 A. Uh-huh.

8 Q. -- one for each month, but in this
9 Exhibit 230, it states that floor in the front
10 guest room, dining room side, seems to be
11 warping. I detect uneven floorboards when
12 walking around; is that correct?

13 A. That's what it says, yes.

14 Q. Do you know if Tori was completing these
15 or who from Gamble would have done these
16 inspections?

17 A. I don't know.

18 Q. Do you know if they were e-mailed to you
19 or if you received them in the mail?

20 A. I don't think e-mail was going then. I
21 don't -- I don't remember.

22 Q. There's a number of these exhibits. I'm
23 not going to go through each one, but there's a
24 notation on some of them which says that we're
25 including this basically with our invoice for

1 services for whatever amount of time.

2 Does that refresh your recollection
3 about when you would receive any of these?

4 A. Yeah, that's how they would do it, yes.

5 Q. And then presumably you would pay them
6 for whatever they did --

7 A. Uh-huh.

8 Q. -- and then go from there. Okay.

9 What exactly did you expect for Gamble
10 Home Services to do for you?

11 A. Check the alarm, check the security,
12 make sure the fire alarm was always on and
13 stored, take care of my cars that were there,
14 walk through, make sure the house was still in
15 order.

16 Q. If there was a notation in any of these
17 inspection reports about maintenance, repairs or
18 issues that would come up like this one in April
19 of 2008, how would you handle that?

20 A. Maybe they would call me. We would see
21 what had to be done, you know, come up with a
22 project idea, is it just this, is it something
23 else? I don't know.

24 (Exhibit No. 235 was marked for
25 identification.)

1 Q. Exhibit No. 235. This is the e-mail
2 that we mentioned --

3 A. Uh-huh.

4 Q. -- in June of 2008. It states, Maria
5 Allwin called Buffington this morning. He is
6 pissed. Allwin is sending him a copy of the AIG
7 report.

8 A. Uh-huh.

9 Q. Do you recall any of --

10 A. I do not, no, I don't.

11 (Exhibit No. 236 was marked for
12 identification.)

13 Q. And then 236 --

14 A. 236?

15 Q. It should be in this --

16 MR. LYLES: (Handing.)

17 Q. Is actually your e-mail to Tori. In
18 this e-mail, there's reference to Mr. Buffington
19 talking to Aero to see if dehumidifiers can be
20 used. Do you recall that conversation?

21 A. I do not, no.

22 Q. You don't know if there was any
23 follow-up in regards to the installation of any
24 dehumidifiers at that point in time?

25 A. I know we had dehumidifiers in the

1 house. I do not know -- actually, all over the
2 house. I do not know how that -- who or what
3 triggered that.

4 Q. Do you believe that there was any more
5 communication from you to Mr. Buffington after
6 this June 20th, 2008 e-mail?

7 A. I don't think so.

8 (Exhibit No. 237 was marked for
9 identification.)

10 Q. Do you have Exhibit Number 237 in front
11 of you?

12 MR. LYLES: Off the record.

13 (Off-the-record discussion.)

14 Q. Exhibit 237 is an e-mail conversation
15 between you and Tori Martindale in June of 2008,
16 and it references the Tischler windows on the
17 second floor.

18 A. Uh-huh.

19 Q. Do you recall this conversation?

20 A. No, I don't.

21 Q. On the bottom portion of it, in your
22 message to Tori, it states, I just thought of
23 something. Did Tischler install the new windows
24 yet? John ordered the windows. Could the poor
25 window performance contribute to the current

1 mold?

2 Do you recall anything about that?

3 A. Isn't that so logical though?

4 Q. Sure.

5 A. I don't know.

6 Q. You don't remember what you were
7 thinking at that point in time?

8 A. Well, I think that the windows were
9 faulty, and if they weren't replaced yet. And
10 Tischler sent the wrong size in some previous
11 e-mail we saw, so we had to reorder it. They're
12 custom made. They had to take a very long time
13 to come. And so I guess I'm thinking, you know,
14 the current mold situation is building up because
15 the windows are faulty.

16 Q. So at that point in time, it's at least
17 a concern of yours regarding the performance of
18 the window and whether that's contributed to the
19 water intrusion and mold issues.

20 A. Yes. I think I'm reaching for straws of
21 something to answer.

22 MR. CANTWELL: Off the record.

23 (Off-the-record discussion.)

24 Q. At any point in time did you ever think
25 that Gamble wasn't giving you all of the

1 information about what was going on at your
2 residence?

3 A. No.

4 Q. You thought that they were providing you
5 with good input as to the conditions of the
6 residence throughout the whole time that they
7 were taking care of the property?

8 A. Yes.

9 Q. Was there any reason for you to believe
10 that the statements that they made in their
11 monthly reports weren't true?

12 A. No.

13 Q. Did you work with anyone else at Kiawah
14 Island aside from Cynthia Noble?

15 A. No. In the real estate office?

16 Q. Yes.

17 A. Yes. No, just Cynthia.

18 Q. When did you first decide to put the
19 house on the market?

20 A. Um --

21 Q. Yesterday, there were a series of home
22 inspection reports that were done --

23 A. Yeah.

24 Q. -- in the 2006 time frame. Do you
25 recall those?

1 A. 2006, yes.

2 Q. Does that make sense for --

3 A. Yes.

4 Q. -- why were you listing the house at
5 that point?

6 A. My children were grown and nobody was
7 going down.

8 Q. At that point in time, were you relying
9 on Ms. Noble to be kind of your eyes and ears of
10 the whole real estate market at that point?

11 A. Yes, of course.

12 Q. Did you make any trips during that
13 2006-2007 time frame to Kiawah?

14 A. I believe I did, yes.

15 Q. Do you recall when that was or --

16 A. No.

17 Q. -- would that be another instance where
18 you would need to check your --

19 A. I need to check on that.

20 Q. There were references yesterday to
21 proposals that were sent by Mr. Buffington's
22 office to do some additional work in 2006. Do
23 you recall any of those proposals for subsequent
24 work in 2006?

25 A. No, I don't.

1 Q. Do you have Exhibit No. 222 in front of
2 you?

3 A. 222?

4 Q. Yes.

5 A. Yes, it's right here.

6 Q. I think we briefly touched on this
7 yesterday, but Mr. Buffington's office had
8 provided you this scope, or actually two scopes
9 for additional work on your home in September of
10 2006, correct?

11 A. Well, he provided Cynthia.

12 Q. Right. And she was your real estate
13 agent at that time, correct?

14 A. Yes.

15 Q. And she was kind of your eyes and ears
16 concerning the sale of the property at that time,
17 correct?

18 A. Yes.

19 Q. Would it be logical that if she would
20 have received this bid, she would have provided
21 that to you to see if you wanted to do this work?

22 A. Not necessarily.

23 Q. Why not?

24 A. I think maybe she held it to see what,
25 what was going on or what I -- what else she

1 could do, who else she could speak to. I can't
2 speak for what she was thinking.

3 Q. At this point in time, scope one
4 suggests to remedy all the items noted in the
5 inspection report performed by Complete
6 Inspection Services of 7-11-2006. Do you see
7 where that is?

8 A. Uh-huh.

9 Q. For a price of \$282,000, correct?

10 A. 282, yes, I see that.

11 Q. And then in addition to that, there's
12 further recommendation by Buffington Homes for
13 scope number 2; correct?

14 A. Yes.

15 Q. When Mr. Buffington first did the
16 limited renovation on the house in 2004, he told
17 you that the roof repairs were not a complete
18 fix; is that correct?

19 A. Yes.

20 Q. And it would need additional work at
21 some point in time, correct?

22 A. Yes.

23 Q. This work was never performed by Mr.
24 Buffington; is that correct?

25 A. Correct.

1 Q. We talked about this a little bit
2 before, but you decided not to have Gamble do the
3 ultimate total repairs to the home. What exactly
4 was your reason for doing that after having such
5 a history with them over so many years?

6 A. I think, as I answered, I wanted a fresh
7 pair of eyes to look at the project and to not be
8 jaded with what they thought had been done or not
9 done, and I wanted to see what else someone else
10 would discover.

11 Q. But at that point in time, Ross Clements
12 of Fuller Consulting was generating the actual
13 scope of what work was going to be performed,
14 right?

15 A. You know, you make a valid point. I
16 still wanted somebody else.

17 Q. Was there something that happened at
18 some point to where you didn't want to work with
19 Gamble anymore?

20 A. No.

21 Q. Were you still using their services up
22 until the construction started?

23 A. Yes, I was.

24 (Exhibit No. 337 was marked for
25 identification.)

1 Q. Do you have Exhibit Number 337 in front
2 of you?

3 A. 337? Yes.

4 Q. Do you recall this document from
5 Complete Inspection Services?

6 A. No, I don't.

7 Q. This is from May of 2010. It was sent
8 to Kiawah Island Real Estate, but I'd assume Ms.
9 Noble would have also shared this information
10 with you.

11 A. You can assume it. I don't.

12 Q. Okay.

13 A. I don't know what she did with it.

14 Q. So you don't know whether you made any
15 repairs directly from the recommendations
16 included in this report; is that correct?

17 A. I don't recall seeing the report, so I
18 don't know that I made any repairs from the
19 report.

20 Q. Do you recall a company called Albrecht
21 Environmental?

22 A. I saw their paperwork in here somewhere.

23 Q. They did a number of different mold
24 assessments in the house, one of which was in
25 July of 2006. Do you recall that?

1 A. No, not specifically.

2 Q. I apologize. I'm just trying to find an
3 exhibit number. Exhibit Number 217.

4 A. Here it is, 217.

5 Q. Do you recall receiving this report from
6 Albrecht Environmental?

7 A. No, I don't.

8 Q. The report states that there was mold
9 found on the first floor during its field
10 investigation, correct?

11 A. It says that, yes.

12 Q. And there's also mold on the second
13 floor around windows, all over the bathroom
14 windows, things of that nature, correct?

15 A. It says that here, yes.

16 Q. And they do a number of swab samples
17 about conditions throughout the whole residence.
18 Is that a fair assessment?

19 A. That's what they say here.

20 Q. At the end they state that the -- in the
21 findings and recommendations section on page 3 --

22 A. Yes.

23 Q. -- all HVAC registers should be cleaned,
24 infected sheetrock should be removed, exposed
25 framing should be cleaned, the ceiling in the

1 closet of the bedrooms should be removed.

2 A. Uh-huh.

3 Q. It goes on and on and on, 1 through 7.

4 You don't recall ever receiving this report?

5 A. No, I don't.

6 Q. Do you know whether this report was ever
7 sent to Gamble Construction or to Ms. Noble?

8 A. I have no idea.

9 Q. But it is addressed to you on the first
10 page.

11 A. Uh-huh, I see that..

12 Q. Do you have Exhibit Number 218 in front
13 of you?

14 A. Yes.

15 Q. This is a handwritten note I believe to
16 be from Cynthia Noble, I believe, to Mr.
17 Buffington in August of 2006. Is that what it
18 indicates?

19 A. Yes.

20 Q. It mentions that you were going to call
21 him or you were going to call John directly? Do
22 you know anything about that?

23 A. No, I don't.

24 Q. You don't know who John is?

25 A. Don't you think that says, Maria will

1 call you directly?

2 Q. Okay. All right. Well, do you recall
3 ever calling Mr. Buffington?

4 A. No, I don't recall that, but I think
5 that's what it says.

6 Q. Okay. Got you.

7 Ms. Noble states, please do not call the
8 Allwins at this time.

9 A. Right.

10 Q. Do you know why she would have said
11 that?

12 A. My husband was going through his
13 treatments, and at this time we were going to
14 Germany for some other treatment.

15 Q. Got you. Okay.

16 A. And so I think she just said don't call
17 them.

18 Q. Got you. Did Mr. Buffington ever call
19 you at any point in time?

20 A. I don't recall.

21 Q. Do you recall there ever being issues in
22 regards to performance of the work during the
23 Buffington renovation?

24 A. No.

25 Q. Was there anything that Mr. Buffington

1 promised to do that he didn't do during that
2 renovation?

3 A. No.

4 Q. After reviewing the expert reports in
5 this case and meeting with your experts, do you
6 know of any specific criticism of the work that
7 was performed by Mr. Buffington?

8 A. I defer that language to Robert.

9 Q. Okay. Aside from construction issues
10 that would be specific for an engineer to talk
11 about --

12 A. Uh-huh.

13 Q. -- do you have any personal beliefs
14 about anything that Mr. Buffington did wrong?

15 A. No, I don't.

16 MR. CANTWELL: Fair enough.

17 What I'd like to do is just give the
18 other people an opportunity to ask you questions
19 about their specific clients and I may have some
20 follow-up, but thank you.

21 EXAMINATION

22 BY MR. POWELL:

23 Q. Ms. Allwin, Graham Powell. Good
24 afternoon. I represent Plantation Construction.

25 You did not file a lawsuit against

1 Plantation Construction. I assume you've seen
2 the lawsuit that you filed?

3 A. Yes.

4 Q. You filed suit against Russ Cooper, you
5 filed suit against Buffington Homes, and you
6 later amended your complaint and filed a suit
7 against Shope Reno Wharton.

8 A. Uh-huh.

9 Q. And Buffington elected to then file suit
10 against my client, so that's why we're here.

11 A. Uh-huh.

12 Q. I will represent to you that the scope
13 of work for Plantation Construction was obviously
14 associated with the Buffington repairs. And what
15 Plantation Construction did was to remove the
16 cedar shakes at the turret area --

17 A. Okay.

18 Q. -- pull off old waterproofing that was
19 there in order to see what damage was behind it,
20 and then they put the new waterproofing and new
21 shakes back up. They were also responsible for
22 building the new decorative pergola on top of the
23 pool house. Do you know what I'm talking about
24 when I refer to that?

25 A. Yes, I do, uh-huh.

1 Q. While I'm at it, have you ever had any
2 problems with that decorative pergola?

3 A. No. It's still there.

4 Q. As I understand it from your responses
5 to some of Mr. Best's questions regarding the
6 work that Mr. Smith is doing, you had an initial
7 budget of over \$2.2 million, and to date have
8 been charged approximately 1.8 of that, correct?

9 A. Yes.

10 Q. And then what Mr. Best referred to as
11 elective renovations, you anticipate those to
12 amount to \$1.5 million approximately, correct?

13 A. Yes.

14 Q. And as I understand it from your prior
15 testimony, those elective renovations get rid of
16 the rounded areas on the house that have the
17 curved Tischler windows, which would include, if
18 you're facing the house from the beach, those on
19 the left-hand side as well as those at the second
20 and first floor of the turret:

21 A. Exactly.

22 Q. That's correct?

23 A. Yes.

24 Q. Okay. And then you're going to -- the
25 turret as it exists now, or at the time that my

1 client was out there doing work, you have the
2 first floor, that's a breakfast room, and above
3 that is the master bedroom?

4 A. Yes.

5 Q. Okay. And when you say, I'm going to
6 extend the breakfast room, is it going to be in
7 the same area that it is in now where the turret
8 is or is some other room going to be extended and
9 become a kitchen?

10 A. Some other room is going to become the
11 kitchen.

12 Q. Okay. Is there an architect for what we
13 refer to as the elective renovations?

14 A. Ross Clements is the architect.

15 Q. And he's prepared plans for the
16 renovations, correct?

17 A. Yes.

18 Q. When did he do that?

19 A. Last year.

20 Q. Do you know about what time last year?

21 A. Maybe just before Easter of last year.

22 So April -- March, April of last year, 2014.

23 Q. And I know you discussed this some
24 earlier. I think you mentioned something had to
25 do with the ordering of Tischler windows and them

1 not making a certain type of window anymore? Is
2 that what led to your decision to do the elective
3 renovations?

4 A. No.

5 Q. Okay.

6 A. I felt like since I was taking the house
7 apart, I'd make my dream house come back, or
8 do -- make my dream house, and so I always -- I
9 didn't like the design of the turret kitchen
10 entrance. You walk into the kitchen from the
11 patio and there's no mud room, there's no down
12 space, you're in the kitchen. So I always wanted
13 to have a space between the two to walk in, like
14 a mud room kind of space.

15 And then I thought the kitchen with the
16 breakfast on the side was just out of the way.
17 So I wanted it to be -- enjoy the view of the
18 beach, but really what I wanted was a porch on
19 the second floor bedroom. So I knew if I created
20 something below, I could stick a porch on top and
21 that's my bedroom, and so that will be a porch.

22 Q. When did you make the decision that this
23 is what you wanted to do?

24 A. I don't recall. Around that -- I
25 discussed it with Ross, and told him I always

1 wanted to do something, and can you take a look
2 at this. It slowed the progress down because he
3 had to stop everything.

4 Q. He being Mr. Smith.

5 A. Yeah. And Ross, to stop everything and
6 reevaluate and look at the drawings.

7 Q. Mr. Smith had already begun his repairs
8 when you made the decision to make the elective
9 renovations and went to Ross to get plans to do
10 so, correct? Mr. Smith had already begun repairs
11 when you made the decision to make the elective
12 renovations and went to Mr. Clements to get plans
13 to do so --

14 A. Yeah.

15 Q. -- correct? So he had to stop the work
16 that was in progress so that those renovation
17 plans could be prepared and then implemented,
18 correct?

19 A. Yes.

20 Q. And has Mr. Smith now resumed repairs
21 and is he working on those renovations?

22 A. Yes.

23 Q. At the point that Mr. Smith stopped
24 making repairs, had repairs been made to the
25 turret area?

1 A. Yes.

2 Q. But the turret area is going to be
3 completely gone by the end of this project,
4 correct?

5 A. It's gone now.

6 Q. It's gone now. All right.

7 So did Mr. Smith charge you for repairs
8 that you made to the turret area even though you
9 decided to ultimately get rid of the turret?

10 A. I assume so.

11 Q. You said that the \$1.5 million is not
12 something you were seeking in the lawsuit,
13 correct?

14 A. Yes.

15 Q. But what was included in the Phillip
16 Smith estimate of approximately \$2.2
17 million-plus, those are things that you are
18 seeking in the lawsuit, correct?

19 A. I'm deferring that to Robert.

20 Q. All right. Are you seeking in the
21 lawsuit as damages anything associated with the
22 turret since you ultimately made the decision to
23 have the turret removed?

24 A. Yes.

25 Q. You would agree with me that had you

1 decided before Mr. Smith started the repair
2 process that what you were ultimately going to do
3 were to make these additional elective
4 renovations for which you'd gotten plans from Mr.
5 Clements, had you made that decision at the
6 beginning, then you would not have incurred any
7 costs associated with repairs to the turret, you
8 would just knock it down, correct?

9 A. I don't know what that means.

10 Q. Okay. If you made a decision in the
11 beginning that you were going to extend the
12 breakfast room and put a porch off the master
13 bedroom as is now the case, then you wouldn't
14 have had to incur any costs to repair the turret
15 area since you were going to knock it down
16 anyway. Do you understand that?

17 A. Very tricky.

18 Q. Do you understand that?

19 A. Yeah, I understand it.

20 Q. Okay. Do you agree with me that that is
21 the case?

22 A. No.

23 Q. Okay. Why not?

24 A. I don't -- I don't like the idea of
25 that. I'm not going to agree with that, just on

1 general principle.

2 Q. You don't agree with me that had you
3 made the decision to do the renovations that you
4 ultimately decided to do at the outset that you
5 would not have had to incur any separate cost to
6 repair the turret that you ultimately knocked
7 down. You don't agree with that.

8 A. I agree with that.

9 Q. You do agree with it.

10 A. Yeah, I agree. But it's my prerogative
11 to make a decision in the process.

12 Q. I understand. We were talking about a
13 conversation you had with Mr. Huby --

14 A. Yes.

15 Q. -- earlier today, and you mentioned a
16 number of problems in the context of that
17 conversation, and I wanted to ask you some
18 follow-ups on that. One was shingles falling off
19 of the house. And my client put shingles on the
20 turret area, and -- what you refer to as shingles
21 and then Dean refers -- we call them shakes.

22 A. Okay.

23 Q. And then on the rest of the house, those
24 would have been the original shakes installed by
25 Russ Cooper, correct?

1 A. Yes.

2 Q. Did you have a problem with any cedar
3 shakes falling off of your house that were
4 installed after Buffington did its repairs to the
5 turret?

6 A. No.

7 Q. You mentioned gaps in the waterproofing
8 material that was discovered when destructive
9 testing occurred, correct?

10 A. Yes.

11 Q. When my client, Plantation Construction,
12 went out and did repairs to the turret, I'll
13 represent to you that they told me that they
14 put -- they took down old waterproofing and put
15 new waterproofing up on the turret.

16 Were any of the gaps that you mentioned
17 earlier in waterproofing behind cedar shakes,
18 were any of those located on the turret area
19 after the Buffington repairs?

20 A. I don't recall that.

21 Q. Will you look at Exhibit 237? We just
22 looked at it not too long ago.

23 A. Yes.

24 Q. Mr. Cantwell was asking about your
25 e-mail to Tori. In the e-mail that preceded that

1 from Tori to you, if you'll look at the last
2 paragraph, the third of three paragraphs, it
3 says, if you think of anything else that may have
4 happened since the Buffington mediation, then
5 please forward it.

6 Do you see that?

7 A. Yes.

8 Q. What does she mean by the Buffington
9 mediation?

10 A. I don't know. I guess she means the
11 work that Buffington did in, you know, '06.

12 Q. You think she means if you think of
13 anything that may have happened since the
14 Buffington repairs?

15 A. Yes.

16 Q. That's what you think she means?

17 A. I can't speak for what she means though.

18 Q. Do you know what we're referring to when
19 we say mediation in the context of a lawsuit?

20 A. You mean like this, right? Mediation is
21 talk about it and coming up to a solution.

22 Q. Correct.

23 A. Mediate, yeah. I don't think that's
24 what this means, but --

25 Q. Have you had that kind of mediation with

1 Buffington?

2 A. No, no, not at all. Maybe she means
3 remediation?

4 Q. Right. Okay.

5 In the next sentence she says, I opened
6 a file for this. What is this?

7 A. I don't know.

8 Q. Since Buffington did its repairs to the
9 house and to the turret in 2004-2005, have you
10 ever had the cedar shakes -- or did you, since
11 they're no longer -- that turret's no longer
12 there -- did you ever have the cedar shakes
13 stained or painted?

14 A. No.

15 Q. In that Exhibit 237 from June of 2008,
16 you're talking with Tori about the Tischler
17 windows and you're talking about -- there's some
18 talk about mold, and you say, John ordered the
19 windows. Could the poor window performance
20 contribute to the current mold.

21 What poor window performance do you
22 mean?

23 A. I think, as we said, the windows were
24 leaking in the turret, and they ordered the
25 window. It came the wrong size, so we had to get

1 a different window, and that took time.

2 Q. Right. And we don't need to go back
3 through that, and I remember, and I think we went
4 into in some detail yesterday about a leak in a
5 window versus a leak around a window.

6 For either set of curved windows at the
7 turret, those on the master bedroom level and
8 those on the kitchen level, did you ever see any
9 water above the windows, any evidence of any
10 moisture damage above the windows?

11 A. Yeah.

12 Q. You did. On what floor?

13 A. The kitchen had moisture above the
14 windows.

15 Q. Did you ever see any evidence of
16 moisture damage above the windows at the master
17 bedroom?

18 A. I don't recall that.

19 Q. Do you know if there were ever any roof
20 leaks right above the master bedroom in the
21 turret?

22 A. Not that I recall.

23 Q. My client, Plantation Construction, also
24 repaired some of the trim at the turret where
25 there was damage in conjunction with the

1 Buffington repairs in 2004 and 2005. Did you
2 ever have any problem with the interior trim
3 itself that was not caused by damage from some --
4 from water somewhere else? Was there ever a
5 problem just with the trim job?

6 A. No.

7 Q. Do you know what Buffington did at the
8 base of the turret where the pool decking meets
9 the turret? You know what work they did there?

10 A. They took the shingles off, they put the
11 shingle back on, they took the trim around -- no,
12 I don't know -- they took the shingle off and
13 they put the shingle back on. I don't know
14 anything else.

15 Q. Did Buffington tell you that there was a
16 problem at that area that needed to be fixed?

17 A. I don't recall that.

18 (Exhibit No. 158 was marked for
19 identification.)

20 Q. Look at Exhibit 158 for me, please,
21 ma'am.

22 A. We don't have 158 here.

23 MR. BEST: It's the progress
24 report?

25 MR. POWELL: Yes.

1 MR. BEST: Here you go.

2 Q. If you'll look down to the fourth
3 paragraph that starts with, Plantation
4 Construction has stripped the interior trim.

5 You see that?

6 A. Yes.

7 Q. Go to the second to last sentence in
8 that paragraph. It says, also the
9 weatherproofing was on top of the stone and under
10 the siding, and it should be behind the stone so
11 that water cannot reach the wood that abuts the
12 stone.

13 Do you see that?

14 A. Yes.

15 Q. And did Buffington fix that location, or
16 do you know?

17 A. I do not know.

18 MR. POWELL: That's all I have.

19 Thank you.

20 EXAMINATION

21 BY MR. DUKES:

22 Q. Ms. Allwin, I'm Richard Dukes. I
23 represent Tischler und Sohn.

24 A. Oh, that's interesting.

25 Q. Why so?

1 A. No. Just -- just interesting.

2 I'm sorry. Richard? Yes.

3 Q. Why do you think Tischler is in this
4 lawsuit at all?

5 A. I think Tischler is in this lawsuit
6 because they did the initial construction and put
7 the windows in and did a bad job at it. And
8 subsequent repairs, which were requested on
9 behalf of all my representatives, were paid for
10 promptly by us and never solved the problem.

11 Q. Okay. On what do you base your
12 testimony --

13 A. My professional opinion.

14 Q. Okay. Do you have any background in the
15 construction industry?

16 A. No, I don't.

17 Q. Have you ever held a general
18 contractor's license?

19 A. No, I don't.

20 Q. Have you ever supervised the
21 installation of windows in any structure?

22 A. No.

23 Q. Have you ever built anything?

24 A. Nope.

25 Q. Do you have any education in the field

1 of structural engineering?

2 A. Nope.

3 Q. Have you ever worked for a general
4 contractor?

5 A. No.

6 Q. Have you ever been on a crew installing
7 windows in any structure?

8 A. No.

9 Q. And at what point in time did you first
10 notice what you believed was poor installation of
11 the Tischler und Sohn windows?

12 A. When we were doing the destructive
13 testing and the windows were taken down to the --
14 the house was taken down to the basic framing.

15 Q. Which set of renovations was that?

16 A. Right now, in 2000-whatever, '11, '12,
17 with Ross Clements.

18 Q. No. It was back I think during the
19 Buffington renovations that you said you noticed
20 a window that you could see --

21 A. No.

22 Q. -- the beach in a gap between the window
23 frame and the framing on the building structure.

24 A. No. That was not during the Buffington.

25 Q. Okay. Was it before that?

1 A. If I did, I misspoke. It was after
2 that.

3 Q. When was that?

4 A. As I said, it was with Ross Clements,
5 when he took the windows in his destructive
6 testing.

7 Q. You had your contractor put the Tischler
8 windows back in your house, right? Now, in this
9 renovation?

10 A. No.

11 Q. You've removed all the Tischler windows
12 from your house?

13 A. No. I don't understand your question.

14 Q. Well, you said --

15 A. We took the windows out and put them
16 back in, yes, the Tischler windows, but the new
17 windows are not Tischler windows.

18 Q. Who manufactured the new windows?

19 A. I don't recall.

20 Q. So the windows that got removed were
21 only from the turret?

22 A. No, throughout the house.

23 Q. You removed all the windows in the
24 house.

25 A. We took the windows out and put them

1 back in, yes, sir.

2 Q. Every one of them.

3 A. Just about, I think, yes.

4 Q. Who put the windows back in your house?

5 A. Phillip Smith, the contractor, who's
6 there now.

7 Q. Did Mr. Smith consult with Tischler at
8 all regarding the removal and reinstallation of
9 those windows?

10 A. I have no idea.

11 Q. Have you ever communicated with anyone
12 at Tischler yourself?

13 A. Yes.

14 Q. When was that?

15 A. Over the course of all these years.
16 They have an office in Connecticut, and I think I
17 even went to the office to speak to them.

18 Q. About what?

19 A. This project. We looked at the windows
20 that they had, and then for the second house we
21 were building.

22 Q. Did you buy Tischler windows for the
23 second house you built?

24 A. No, we did not.

25 Q. Why not?

1 A. I don't recall. I think it was just
2 they took too long and we were anxious to get
3 going.

4 Q. You said earlier that in the process of
5 deciding to tear down the turret, that one of the
6 reasons was that Tischler didn't make the size
7 window that was going to go in that space
8 anymore. Who told you that?

9 A. I don't recall. Somebody told me.

10 Q. Was it anybody from Tischler?

11 A. No.

12 Q. How often did you have Tischler come
13 down and maintain your windows from the time they
14 were first installed until today?

15 A. They came down once or twice.

16 Q. That's all? In the past 20 years, they
17 came down once or twice?

18 A. Yes, I believe so. To do the general
19 maintenance, yes, I believe so.

20 Q. You didn't contact Tischler to have them
21 come maintain your windows every year or every
22 other year?

23 A. No, I didn't.

24 Q. As we sit here today, do you have any
25 knowledge of the installation instructions for

1 Tischler windows? Whose job it is to prepare the
2 framing around the window space and whose job it
3 was to put the windows into that space.

4 A. My, as you pointed out, very
5 unprofessional knowledge of that is that the
6 contractor puts the space in, creates the space,
7 and Tischler is there to supervise how it goes
8 in.

9 Q. Were any of the windows removed during
10 any of the renovation projects prior to the
11 current one?

12 A. Well, when they had to be repaired and
13 replaced, yes.

14 Q. And who did those repairs and
15 replacements?

16 A. I understand Tischler was there to do
17 it.

18 Q. After Tischler repaired and replaced
19 those windows, did that solve the problem with
20 that particular window?

21 A. No.

22 Q. Did you notify Tischler of that?

23 A. I don't recall.

24 Q. How many times have you had to have a
25 particular window repaired and replaced?

1 A. Two, two times.

2 Q. And when were those repairs done?

3 A. I don't recall. We went through the
4 dates. I'm fogged up right now.

5 MR. DUKES: That's all I have for
6 you.

7 THE WITNESS: Okay.

8 (A recess was taken.)

9 EXAMINATION

10 BY MS. McINTOSH:

11 Q. Are you familiar with Superior Surfaces
12 outside of this lawsuit?

13 A. No.

14 Q. Superior Surfaces is another third-party
15 defendant in this lawsuit, and I take it you're
16 not familiar with their scope of work at your
17 home.

18 A. No.

19 Q. Well, Superior Surfaces, I'll represent
20 to you, replaced various stone pavers in the pool
21 deck area that were either broken or pulled up
22 during the 2004 renovations by Buffington Homes.

23 Were you ever at the home during these
24 renovations and recall any communication with the
25 workmen replacing the stone pavers in your pool

1 deck area?

2 A. No.

3 Q. Would anybody in your family have been
4 having conversations with them or did they deal
5 directly with Buffington Homes?

6 A. We dealt with Buffington Homes.

7 Q. Are you familiar with a fellow named Tim
8 Crump?

9 A. No.

10 Q. I know we've talked about issues you've
11 had with your pool deck area as a whole, but what
12 I'm going to ask you is have you had any problems
13 with the stone pavers themselves?

14 A. No.

15 Q. What sort of routine maintenance do you
16 perform in the pool deck area, if any?

17 A. Yeah. We power wash it all the time, to
18 the code of whatever -- it's coquina stone, so
19 it's whatever it needs, that's what we do.

20 Q. You said you power wash it all the time.
21 Once a year, four times a year?

22 A. Whatever the -- whatever it calls for,
23 that's what we do, but certainly at least once a
24 year.

25 Q. When you say, whatever it calls for, is

1 there some, I don't know, guidelines?

2 A. There's some guideline for it.

3 Q. For coquina stone?

4 A. I don't know what it is, but I do
5 remember somebody telling me that, and doing some
6 maintenance to it.

7 Q. Do you know who coordinates that
8 maintenance? Is that done through Gamble?

9 A. Yes.

10 MS. McINTOSH: All right. That's
11 all I've got. Thank you.

12 THE WITNESS: That's it?

13 MS. McINTOSH: Uh-huh.

14 THE WITNESS: Okay.

15 EXAMINATION

16 BY MR. WINTON:

17 Q. Good afternoon, Mrs. Allwin. For the
18 benefit of the record, my name is Tyler Winton,
19 and as you know, I'm here today on behalf of the
20 architect, Shope Reno & Wharton. I'm just going
21 to say SRW for short.

22 A. Thanks.

23 Q. How did you and your husband come to
24 hire SRW?

25 A. We had heard about them from friends in

1 Connecticut. They built -- they designed our
2 friend's home. They also have a very big
3 presence in Connecticut -- in the northeast, and
4 we like their work. They are, you know, renowned
5 in their field, and we always see their things
6 and like it.

7 Q. Okay. Very good. What was the name of
8 your friend's home, if you don't mind me asking?

9 A. You know, I don't really remember.

10 Q. Okay. Fair enough.

11 A. It was a long time ago. I don't
12 remember.

13 Q. You understood them to have a good
14 reputation.

15 A. Yes.

16 Q. Both up here and on Kiawah, correct?

17 A. I don't know about Kiawah. Certainly I
18 know up here.

19 Q. Fair enough. Did you enjoy the process
20 of designing the home with SRW?

21 A. Yes.

22 Q. What was your role in that process, in
23 that design process?

24 A. I put the wish list up all the time of
25 what I wanted.

1 Q. Do you still have that wish list?

2 A. No.

3 Q. Where did it come out of?

4 A. My head.

5 Q. Okay. All right. Fair enough. I'll
6 look forward to talking to you more at some other
7 time about that wish list.

8 I guess big picture, did my clients help
9 you to take into account things on your wish
10 list, bring them into fruition and design a
11 structure that embodied the things that you
12 wished for?

13 A. Yes.

14 Q. Is it fair to say that you felt SRW to
15 be professional and knowledgeable in their field
16 during the time in which you were working with
17 them to design the home?

18 A. Yes.

19 Q. Were you involved in the negotiation of
20 the contract with SRW?

21 A. No.

22 Q. Do you have any recollection or
23 understanding of the terms of the contract?

24 A. No.

25 Q. Generally speaking, what's your

1 understanding of my client's role in the project,
2 the designing of your home?

3 A. In the design of my home?

4 Q. Yes, ma'am.

5 A. Or in the --

6 Q. Altogether, what did you think my client
7 was going to do for you?

8 A. Right. So he took this wish list, we
9 went and we met with them. They created this
10 beautiful home based on things that we had told
11 him that we wanted. They came to visit us in the
12 Chappaqua house, to see how we lived with our
13 children. We visited the site with them, and
14 they translated all that into the design of that
15 beautiful house.

16 They made a three-dimensional model of
17 the house, and they were very proud of it, as
18 were we.

19 Q. Are you aware of any contract
20 administration responsibilities that my client
21 had?

22 A. What is a contract --

23 Q. Sure, sure. A lot of times you'll hear
24 it referred to as CA. Sometimes an architect
25 will go to a project during construction to

1 observe the construction taking place. I believe
2 earlier there may have been testimony that you
3 were aware that they would have come down to the
4 site while Mr. Cooper was building the home.

5 A. Right. So my understanding is that
6 Allan Shope went down very frequently, and he
7 signed the payment bill, the front page of
8 every -- what seems to be a standard document,
9 AIA document, that says, I warrant that this is
10 correct and okay to pay.

11 Q. Okay.

12 A. And it came from the office. Dorothy,
13 the young lady that's there, would send it or
14 Allan would send it, somebody would send it, I
15 don't know how, and we a paid it.

16 Q. You said very frequently. Is it your
17 understanding that a representative of SRW came
18 down approximately once a month?

19 A. Yes, at least once a month.

20 Q. You said that they would sign a
21 document -- we call them pay apps a lot of the
22 time -- and that you believed, in signing that
23 document, he was warranting that it was okay to
24 pay. Is that --

25 A. Well, it said okay to pay, so, yes.

1 Q. What was your understanding of what that
2 meant, okay to pay? Did you think that he was
3 guaranteeing the work of Mr. Cooper?

4 A. Yes.

5 Q. That was your understanding of it.

6 A. Yes.

7 Q. Would you expect my clients to be able
8 to observe, or whoever went down on site, work
9 that was taking place when they weren't there?

10 A. Yes.

11 Q. How would they do that, ma'am?

12 A. They should know what's going on.

13 They're the professional.

14 Q. In 2011, it's my understanding that you
15 called Russ Cooper.

16 A. Yes.

17 Q. And that you noted an issue with the pan
18 flashing as it relates to the rear doors. I
19 think it's been referred to as negative slope; is
20 that correct?

21 A. Yes.

22 Q. And this appears, from your testimony,
23 to have been a rather unpleasant call.

24 A. (Indicating.)

25 Q. At that same time, did you have a call

1 or place a call to anyone at SRW?

2 A. I don't recall calling them.

3 Q. You don't recall ever calling SRW; is
4 that correct?

5 A. I don't recall calling them.

6 Q. Do you know if your husband or anyone on
7 your behalf ever called SRW after the
8 construction of the home?

9 A. I don't know that. You know they built
10 my second home, right?

11 Q. Yes, ma'am. I understand they built
12 your home in Connecticut.

13 A. Yes.

14 Q. And that was after the construction of
15 this residence.

16 A. Yes, because it was so much fun the
17 first time, we did it again the second.

18 Q. I understand that you utilized SRW but
19 that you utilized a different general contractor.

20 A. Well, yeah, Russ was in Kiawah and so we
21 did the bidding process again in Greenwich and
22 came up with somebody else.

23 Q. And you didn't have any problems --

24 A. No.

25 Q. -- with that home, did you, ma'am?

1 A. No, I did not.

2 Q. And how long did you live in that home?

3 A. I lived in that home 15 years.

4 Q. SRW had an office on Kiawah, didn't
5 they, in the mid-90s. Were you aware of that?

6 A. Yes.

7 Q. Consequently, if you had an issue with
8 your home, you could have gone to them and
9 discussed it with them, correct?

10 A. It never occurred to me.

11 Q. Yesterday Mr. Best discussed with you a
12 number of ongoing issues that had manifested
13 themselves well in advance of 2011, correct?

14 A. Yes.

15 Q. I have no interest in replotting that
16 same ground, and I certainly understand that your
17 testimony as in your position has been that, just
18 as your husband had done in the past, when you
19 noted an issue, you fixed it; is that correct?
20 Is that fair to say?

21 A. If I was presented with an invoice or a
22 suggestion to do something and someone told me
23 what it was, I did it, yes.

24 Q. I'm sorry if this is redundant, but just
25 to be clear..

1 A. It's okay.

2 Q. Prior to 2011, you, or no one on your
3 behalf, had reached out to SRW to address any of
4 the issues on your home; is that correct?

5 A. I don't recall that. I don't -- I don't
6 know.

7 Q. You don't recall reaching out to anyone.

8 A. I know I did not.

9 Q. You don't recall instructing anybody to
10 contact SRW, correct?

11 A. No.

12 Q. At any point in time prior to 2011, did
13 you believe that SRW was to blame for any
14 problems at your home?

15 A. No.

16 Q. After 2011, did you come to believe that
17 SRW was to blame for any issues at your home?

18 A. Yes.

19 Q. Tell me about what problems and when you
20 came to that understanding.

21 A. I think the -- in my unprofessional
22 construction knowledge, it would seem to me that
23 the installation of windows is a basic function
24 of the house, and that SRW and Russ together
25 should have known what they were doing with

1 Tischler there. And what was shown to me at that
2 time was a frame and looking through to the
3 beach, and to me, that's not right, in my
4 unprofessional opinion as a homemaker in
5 Greenwich, Connecticut.

6 Q. When did you come to that opinion, that
7 my client, SRW, was to blame for this window
8 installation issue?

9 A. As I reflected looking out the hole to
10 the beach, I thought, how did this happen? Who
11 was watching what was going on here? And
12 re-reflected long and hard on the process of
13 building a house, and an expectation of
14 professionalism, and the people we paid a fee
15 for, a presented fee.

16 Q. I'm just trying to determine --- and I
17 understand that it took some time for you to
18 reflect upon that and to develop this thought
19 that there was somebody to blame, but can you
20 help me learn what period in time you developed
21 that thinking, when you came to the understanding
22 that my client was to blame for the window
23 installation issue?

24 A. You know, a few months after that, as I
25 reflected on what I was confronted with, I

1 continued to think about the window installation
2 and the good faith that we showed over the years
3 replacing the windows and finding out that indeed
4 that had nothing to do with it, that it was that
5 the windows were not secured to the frame of the
6 house, as was represented to me and as I saw that
7 day.

8 Q. And when is that day? I'm sorry.

9 A. I don't -- you know, that was the day I
10 was down at Kiawah with Ross and -- I'll check
11 all those dates.

12 Q. It was certainly during destructive
13 testing, correct?

14 A. Yes, during destructive testing.

15 Q. Would it have been during the first
16 round of destructive testing?

17 A. No.

18 Q. And I can do some investigation on my
19 own to look back and see when the windows were
20 pulled, and we'll have an opportunity to depose
21 Russ, too, but you believe it was at the point in
22 time in which a window was removed. What window
23 was it in the home?

24 A. It was the infamous breakfast windows,
25 the curved breakfast window that's -- that opens

1 and closes that's not stationary.

2 Q. Certainly we know this is after 2011,
3 though, correct?

4 A. I believe so, yes.

5 Q. Okay. Fair enough. Are you aware of
6 any design professionals that have criticized SRW
7 for their work on your home?

8 A. You know, people always say things, yes.

9 Q. A design professional, though? Another
10 architect?

11 A. Yeah.

12 Q. And who was that, ma'am?

13 A. The person, I forgot who it was, who
14 came to tell me about closing in, you know, the
15 great room. I had somebody come -- the drawings
16 that I don't have -- to close the great room in
17 and make it a media room.

18 Q. Okay. That architect.

19 A. Whoever that was, he had some things to
20 say about the way the house looked.

21 Q. Aesthetically?

22 A. Aesthetically, yes. I didn't ask him
23 for his opinion.

24 Q. In terms of -- okay. I understand.

25 A. Is that what you meant?

1 Q. Well, I certainly asked too broad of a
2 question, and I got a correct answer from you.
3 So it was just an aesthetic criticism based on --

4 A. Right.

5 Q. Okay. I understand now.

6 (Exhibit No. 582 was marked for
7 identification.)

8 Q. I'm going to hand you a document --
9 let's go ahead and mark this as the next exhibit.

10 A. So 582.

11 MR. WINTON: I'm now marking
12 Exhibit 582. It's a February 23rd, 2011 letter
13 from Robert to my client. For those of you
14 watching at home, it's attached to our motion to
15 dismiss.

16 MR. LYLES: Is this something that
17 was provided in advance of the deposition as part
18 of Dean's --

19 MR. BEST: It was not included in
20 my packet, no.

21 MR. WINTON: Let me give you a copy
22 of it.

23 MR. LYLES: Sure.

24 Q. My only question really relates to the
25 last sentence of the first paragraph. I'll bring

1 it out for a couple of reasons. One is I think
2 it helps us form this timeline that Dean's done a
3 good job of creating as we've gone along.

4 And Ms. Allwin, I'll give you all the
5 time you'd like to take a look at the letter, but
6 again, my only question is about the last
7 sentence of that first paragraph. So after you
8 read that, let me know?

9 A. These deficiencies, is that what you --

10 Q. Yes, ma'am, that sentence.

11 A. Okay.

12 MR. WINTON: Pursuant to 30(j)(8),
13 if you want to talk to your client about it.

14 MR. LYLES: If she wants to.

15 You're free to answer the question. If
16 you'd like to talk to me about that exhibit, you
17 can, but if you don't want to, you don't have to.

18 Q. My only question is that when I read
19 this, I presume that by February 23rd, 2011, you
20 were aware that there were deficiencies relative
21 to the design of your home; is that correct?

22 A. Uh-huh, yes.

23 Q. And were the design deficiencies that
24 you're speaking of again the installation of
25 windows here?

1 MR. LYLES: Object to the form of
2 the question.

3 Q. Or were you aware of any other design
4 deficiencies at this point in time?

5 A. I had my own suspicions of other things.

6 Q. Okay.

7 A. But I don't know.

8 Q. All right. Well, not related to this
9 letter, what were those other suspicions? As I
10 talked to you before, it was my understanding
11 that you blamed my client, as well as others, for
12 issues related to the installation of the windows
13 on your home.

14 MR. LYLES: Object to the form of
15 the question.

16 Q. Are there other matters that you --

17 A. Well, in the design function of the
18 house, I think that designing a -- in an
19 unprofessional housewife from Greenwich,
20 Connecticut, with -- I'm not a professional
21 designer. I don't profess to be or pretend to
22 be, but were I to make an assessment, it would
23 seem to me that the way the great room is
24 designed, with being more than three stories
25 tall, two and a half stories, and sloping the

1 roof down like that (indicating), on the beach,
2 on Kiawah, in South Carolina, would be
3 problematic. With the load-bearing AC that was
4 initially designed, was no way that was going to
5 work. In my unprofessional opinion.

6 Q. Okay.

7 A. And I think that's a design flaw.

8 Q. Okay. And I'm just asking for your
9 opinion.

10 A. I know. I understand.

11 Q. That's all.

12 A. I appreciate the opportunity to tell you
13 what I think is a design flaw.

14 Q. Okay. Anything else at all that you
15 want to blame my client for? That's what I'm
16 here for. Lay it on me.

17 A. I also think the design of the attic
18 dormers, again, for being in South Carolina, I
19 think the heat rises and there was no way to get
20 the heat out of the building, and I think that's
21 a design flaw. I'm not claiming that here in
22 this case. I'm just claiming my personal
23 opinion.

24 Q. Well, then let's govern our conversation
25 a little bit more concisely to what you're

1 claiming here in this case and what you blame my
2 client for, so that I can have that as I move
3 forward.

4 A. Well, but in effect, because the roof
5 was -- because the great room was so big and the
6 load of the AC was so poorly designed, initially,
7 was the first round that we had to take the whole
8 thing apart and go through that \$500,000 Aero
9 expense.

10 Q. Yes, ma'am. I understand that.

11 A. So, yeah.

12 Q. Okay. Okay. And there are obviously
13 other trades involved in that and there are
14 mechanical contractors that do those load
15 calculations that may be outside the purview of
16 my client, but that's for Robert and I to fight
17 about some day, I suppose.

18 A. Okay. You can talk about that.

19 Q. Anything else as relates to what you're
20 seeking in this case --

21 A. No.

22 Q. -- that you blame my client for?

23 A. No.

24 Q. So I've just got the windows
25 installation.

1 A. And --

2 Q. And the great room.

3 A. The window installation and the
4 waterproofing underneath the shingle..

5 Q. Okay.

6 A. I think that's a fundamental..

7 Q. Okay. In --

8 A. Throughout the house, wherever those
9 gaps were, I think should be an SRW thing. Where
10 he wrote to me, okay to pay, what was I paying
11 for? Waterproofing that was not done? I don't
12 know that.

13 Q. You don't know that what? I'm sorry?

14 A. I don't know that I was paying for
15 waterproofing to be put up on the walls, the
16 exterior walls, if it's not there now.

17 Q. Anything else, ma'am?

18 A. You know, if I think about it, I'm sure
19 I'll think of something else, but right now, no.

20 Q. I'm sure we'll have another time to talk
21 and I'll be able to ask you a few more follow-ups
22 at that point in time.

23 Just a few last questions. You had
24 mentioned earlier that you had a meeting with
25 Jerry. It's my understanding that he came and

1 met with you in response to -- or after this
2 February 23rd, 2011 letter; is that --

3 A. Yes.

4 Q. That would be the timing in which it
5 happened?

6 A. Yes.

7 Q. Do you recall that that meeting happened
8 approximately during one of the rounds of
9 destructive testing at your residence?

10 A. The initial.

11 Q. The initial one.

12 A. Yes.

13 Q. Do you recall any conversation with
14 Jerry regarding the importance of maintaining
15 your home?

16 A. No.

17 Q. Don't recall any conversations or
18 representations that he made to you about the
19 importance of having your home painted, caulked
20 and sealants being maintained.

21 A. No.

22 Q. At any point in time did anyone from SRW
23 ever agree to assist you with the evaluation and
24 repair of the condition of your home?

25 A. He -- I asked him if he would be willing

1 to think about something to help me, and he said
2 he didn't think some of the things that were
3 going to occur in the upcoming weeks were
4 necessary. And then I asked him to sign a letter
5 to that effect, and he said no. So then I
6 figured maybe they are necessary anyway, and I
7 went ahead and did it.

8 Q. You asked Jerry to sign a letter saying
9 what?

10 A. Well, he said you don't need to take the
11 shakes down and I'm sure it's all good and
12 waterproofed and I don't think that's necessary.
13 The shingles, you know, the exterior shingles?
14 And I said, okay. Well, are you -- would you
15 give me a letter to that effect so that I can
16 give that to a potential purchaser, that this
17 does not need to be done? And he said no.

18 Q. Okay.

19 A. So then that made me conclude in my
20 unprofessional way that maybe I need to do that.

21 Q. Did you ask Jerry or anyone at SRW to do
22 anything else?

23 A. No.

24 Q. Did SRW say they were willing -- or
25 Jerry say they were willing to do anything

1 further to help you after that site visit?

2 A. Yes.

3 Q. Okay. What?

4 A. He offered me a sum of money for help.

5 Q. Is it your understanding that he offered
6 you money to assist with the repair efforts or --

7 A. Well, I guess. I don't know what he was
8 offering. Maybe it was -- I don't know what
9 he -- what he meant, but he did offer me a sum of
10 money, which I did not take.

11 Q. Did SRW say they would be willing to
12 help you moving forward if they were asked to do
13 so by you?

14 A. No.

15 Q. Do you recall telling Jerry that you
16 appreciated his willingness to meet with you?

17 A. Yes. I'm always polite. I didn't
18 appreciate the offer he gave me, but, you know.

19 Q. Do you recall telling Jerry that you had
20 no intention of suing SRW?

21 A. No.

22 MR. WINTON: Mrs. Allwin, we're
23 nearing the witching hour, so I appreciate your
24 time and your courtesy. I'm going to reserve my
25 right to ask you questions at a later date.

1 THE WITNESS: Okay. If you think
2 of anything, let me know.

3 MR. WINTON: Thank you, ma'am.

4 MR. BEST: For folks on the phone,
5 I think Ms. Allwin has some commitments she has
6 to get to, so we're actually going to stop right
7 now. The deposition will be terminated so that
8 Ms. Allwin can communicate with Robert and
9 maintain the privilege, but myself and I'm
10 assuming all reserve the right to re-notice Ms.
11 Allwin's deposition at a later date. And we'll
12 work with you on that, but appreciate your help.
13 We've gotten a lot of information.

14 THE WITNESS: Okay.

15 MR. BEST: And we appreciate you
16 and the City welcoming us so warmly. Thank you
17 so much.

18 (Time noted: 4:50 PM.)
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF NEW YORK)

) SS

COUNTY OF NEW YORK)

I, MICHAEL T. REHFELD, a Shorthand
Reporter and Notary Public within and for the
State of New York, do hereby certify:

That MARIA ALLWIN, the witness whose
examination was held on January 27, 2015, as
hereinbefore set forth, was duly sworn, and that
this transcript of such examination is a true
record of the testimony given by such witness.

I further certify that I am not
related to any of the parties to this action by
blood or marriage, and that I am in no way
interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my
hand this 2nd day of February, 2015.

Michael T. Rehfield

specifically admitted herein, each and every allegation of the Plaintiff's First Amended Complaint is expressly denied.

FOR A FIRST DEFENSE

The Plaintiff fails to state a cause of action upon which relief may be granted.

FOR A SECOND DEFENSE

Some or all of the Plaintiff's claims are or may be barred by the Statute of Limitations and/or Statute of Repose.

FOR A THIRD DEFENSE

Some or all of the Plaintiff's claims are or may be barred by the doctrines of waiver, laches, and/or estoppel.

FOR A FOURTH DEFENSE

Some or all of the Plaintiff's claims are or may be the result of the acts and/or omissions of some party or parties other than SRW, with a result that the Plaintiff cannot recover from SRW.

FOR A FIFTH DEFENSE

Some or all of the Plaintiff's claims are or may be barred by the Plaintiff's failure to mitigate any damages.

FOR A SIXTH DEFENSE

Any claims alleged by the Plaintiff for breach of warranty should be barred to the extent that the Plaintiff failed to give proper notice of any alleged breach of any warranty.

FOR A SEVENTH DEFENSE

The work and services provided by SRW were at all times applicable to the subject project in conformity with the industry standards for that time.

FOR AN EIGHTH DEFENSE

Any award of punitive damages for the Plaintiff would violate constitutional safeguards provided to SRW by the United States and South Carolina Constitutions.

FOR A NINTH DEFENSE

The Plaintiff may not have a contract or may not be in privity with SRW.

FOR A TENTH DEFENSE

The allegations of the First Amended Complaint fail to state a claim for which any prejudgment interest may be granted.

FOR AN ELEVENTH DEFENSE

Some or all of the Plaintiff's claims are or may be barred, or in the alternative, reduced to the extent of comparative negligence of the Plaintiff.

FOR A TWELFTH DEFENSE

SRW has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of the Plaintiff's allegations. SRW intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage to the Plaintiff as alleged in the First Amended Complaint, and gives notice of its intent to assert any further affirmative defense that its information-gathering process may indicate is supported by fact and law. SRW reserves the right to amend this Answer and assert such defenses.

FOR A THIRTEENTH DEFENSE

Some or all of Plaintiff's claims may fail for lack of standing.

FOR A FOURTEENTH DEFENSE

To the extent Plaintiff may seek to recover any claims based upon any allegation of professional negligence against this Defendant (any such claims are denied by this Defendant), those claims should be denied and the action dismissed for failure to serve an appropriate expert's affidavit with the First Amended Complaint in compliance with S.C. Code Ann. §15-36-100.

Each allegation of the Plaintiff's First Amended Complaint not specifically admitted is denied. This Defendant responds to the individually numbered paragraphs of the First Amended Complaint as follows:

PARTIES AND JURISDICTION

1. This Defendant lacks sufficient knowledge, information or belief to answer the allegations set forth in Paragraphs 1-3 and therefore denies the same.

2. In response to Paragraph 4, this Defendant admits only that it is an architectural firm located in South Norwalk, Connecticut. This Defendant denies all remaining allegations contained in Paragraph 4.

3. In response to Paragraph 5, this Paragraph contains statements of law to which no response is required. To the extent a response is required, this Defendant lacks information or knowledge sufficient to admit or deny the allegations contained in this Paragraph, and therefore, denies the same.

4. In response to Paragraph 6, this Defendant admits only that it provided design services pursuant to its agreement with the Plaintiff. Responding further, the remaining

allegations are directed to Defendants other than SRW, thus, no response is required. To the extent a response is required, SRW lacks sufficient information to form a belief as to those allegations in Paragraph 6, and therefore, denies the same.

5. This Defendant lacks sufficient knowledge, information or belief to answer the allegations set forth in Paragraph 7, including subparts a-d. Responding further, SRW lacks sufficient information to form a belief as to the allegations in Paragraph 7 directed to other Defendants, and therefore, denies the same.

6. In response to Paragraph 8, SRW denies those allegations directed to it and demands strict proof thereof. Responding further, SRW lacks sufficient information to form a belief as to the allegations in Paragraph 8 directed to other Defendants, and therefore, denies the same.

7. In response to Paragraph 9, SRW denies those allegations directed to it and demands strict proof thereof. Responding further, SRW lacks sufficient information to form a belief as to the allegations in Paragraph 9 directed to other Defendants, and therefore, denies the same.

8. This Defendant denies the allegations against it set forth in Paragraph 10 as stated. Responding further, SRW lacks sufficient information to form a belief as to the allegations in Paragraph 10 directed to other Defendants, and therefore, denies the same.

9. In response to Paragraph 11, SRW reasserts its answers to the previous paragraphs as if set forth verbatim herein.

10. As to the allegations contained in Paragraphs 12-14 and all subparts, those allegations are directed to Defendants other than this Defendant and, thus, no response is required. To the extent a response is required, this Defendant lacks sufficient information to form a belief as to the allegations in Paragraphs 12-14, and therefore, denies the same.

11. In response to Paragraph 15, SRW reasserts its answers to the previous paragraphs as if set forth verbatim herein.

12. As to the allegations contained in Paragraphs 16-17, those allegations are directed to Defendants other than this Defendant and, thus, no response is required. To the extent a response is required, this Defendant lacks sufficient information to form a belief as to the allegations in Paragraphs 16-17, and therefore, denies the same.

13. In response to Paragraph 18, SRW reasserts its answers to the previous paragraphs as if set forth verbatim herein.

14. This Defendant denies the allegations contained in Paragraph 19, including subparts a-e.

15. This Defendant denies the allegations contained in Paragraph 20.

16. In response to Paragraph 21, SRW reasserts its answers to the previous paragraphs as if set forth verbatim herein.

17. This Defendant denies the allegations contained in Paragraph 22.

18. This Defendant denies the allegations contained in Paragraph 23.

19. This Defendant denies the allegations contained in Paragraph 24.

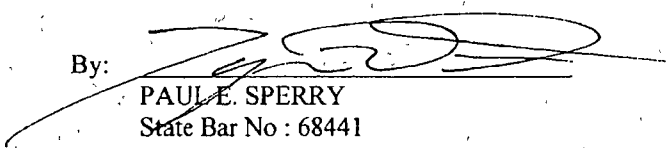
20. As to the last unnumbered paragraph, following Paragraph 24, beginning with "WHEREFORE", this paragraph contains a prayer for relief, which requires no response. However, to the extent a response is required, SRW denies the allegations directed to it and demands strict proof thereof.

WHEREFORE, having fully responded to the allegations of the Plaintiff's First Amended Complaint, SRW prays for judgment in favor of SRW, for costs associated with defending this action, and for any such further relief as this Court may find just and proper.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By:



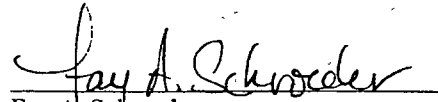
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TYLER P. WINTON
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Attorneys for Defendant Shope Reno Warton

This 19th day of November, 2014.



Fay A. Schroeder
Secretary to Tyler P. Winton

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NOV 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000471

MARIA ALLWIN APPELLANT,

v.

RUSS COOPER HOMES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WARTON DEFENDENTS,

OF WHOM RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO WARTON ARE THE
RESPONDENTS.

BUFFINGTON HOMES, L.P., THIRD-PARTY PLAINTIFF,

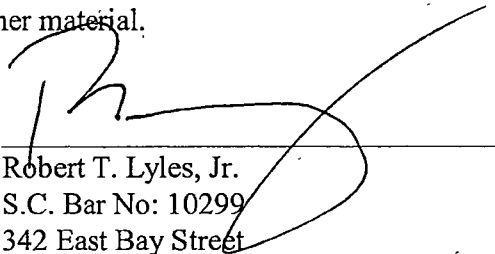
v.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED, ... THIRD-PARTY DEFENDANTS

CERTIFICATE OF COUNSEL

The undersigned hereby certified that the Record on Appeal contains all material proposed to be
included by any of the parties and not any other material.

November 16, 2016


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Attorney for Appellant

(6)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000471

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OCT 31 2016

SC Court of Appeals

MARIA ALLWIN.....APPELLANT,

v.

RUSS COOPER ASSOCIATES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WARTON,.....DEFENDANTS,

OF WHOM, RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO
WARTON ARE.....RESPONDENTS

BUFFINGTON HOMES, L.P.,.....THIRD-PARTY PLAINTIFF,

v.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED,.....THIRD-PARTY DEFENDANTS

PROOF OF SERVICE

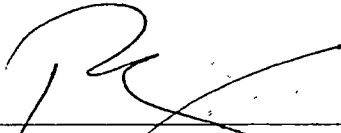
I certify that I have served Appellant's Record of Appeal by hand delivering, on October 26, 2016 to the counsel below:

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Best Honeycutt, P.A.
Post Office Box 13466
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Attorney for Respondent Russ Cooper Associates, Inc.

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October 26, 2016



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NOV 16 2016

SC Court of Appeals

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November 16, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Maria Allwin v. Russ Cooper Associates, Inc. and Shope Reno Wharton*
Appellate Case Number: 2016-000471

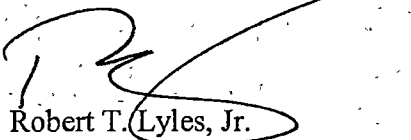
Honorable Kitchings:

Enclosed for filing please find 15 copies of the Record on Appeal.

Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & LYLES, LLC



Robert T. Lyles, Jr.

RTL/sw

Enclosure (as stated above)

cc: L. Dean Best
Jenny Costa Honeycutt
Paul Eliot Sperry

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NOV 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.

Appellate Case No. 2016-000471

MARIA ALLWIN.....APPELLANT,

v.

RUSS COOPER ASSOCIATES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WARTON,..... DEFENDANTS,

OF WHOM, RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO
WARTON ARE THE RESPONDENTS.

BUFFINGTON HOMES, L.P., ... THIRD-PARTY PLAINTIFF,

v.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED,..... THIRD-PARTY DEFENDANTS.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUE

1. Did the Trial Court Err in Granting Defendant Contractor and Architect's Motions for Summary Judgment on the Basis That the Statute of Limitations Barred Maria Allwin's Construction Defect Claims When Conflicting Evidence Existed as to Whether She Acted With Reasonable Diligence?

STATEMENT OF THE CASE

This appeal arises from the trial court's order granting summary judgment to the defendants based on the statute of limitations. On August 5, 2013, Maria Allwin, a homeowner, instituted this construction defect lawsuit against general contractor Russ Cooper Associates, Inc. ("Russ Cooper" or "Contractor") and on October 8, 2014, added architect Shope Reno Wharton ("Shope Reno" or "Architect") alleging negligence, gross negligence and breach of warranty causes of action resulting from the design and construction of Maria Allwin's 11,000 square foot oceanfront home located at 133 Flyway Drive, Kiawah Island, South Carolina (the "Home") (R. pp. 000042-000048). Maria Allwin sought damages for latent and previously undiscoverable deficiencies, decay and rot. (R. pp. 000043-000044).

Architect filed a motion to dismiss on three grounds, including the statute of limitations. Contractor filed a motion for summary judgment, based on the statute of limitations. Architect and Contractor each filed a supporting memorandum. (R. pp. 000056-000061; R. pp. 000062-000088; R. pp. 000089-000138). On September 15, 2015, the Honorable J.C. Nicholson, Jr. held a hearing on Contractor's and Architect's motions (R. pp. 000233-000274), which he granted by order dated December 16, 2015 (R. pp. 000007-000036). Upon receipt of the trial court's order, Maria Allwin filed a Rule 59(e) motion on December 29, 2015, citing as grounds: (1) the Order did not consider or apply *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708

S.E.2d 787 (Ct. App. 2011) and *McAlhany v Carter*, 415 S.C. 54, 57, 781 S.E.2d 105, 107 (Ct. App. 2015) (decided November 12, 2015, after oral arguments in this case); (2) the Order did not consider the Plaintiff's affidavit or her expert's affidavit, which taken in the light most favorable to Maria Allwin, created at least a question of fact as to what damages she knew or could have known through the exercise of reasonable diligence; (3) the Order did not consider the Contractor Russ Cooper's deposition testimony that complete decladding of the siding was extreme —not required by the exercise of reasonable diligence — and the fact the Architect told Maria Allwin that her experts' scope of repair, which uncovered many of the defects, was unnecessary, both of which created a disputed issue of material fact regarding what was required in the exercise of reasonable diligence; (4) The Order made improper factual conclusions that Maria Allwin was "well aware of the alleged defects" and "failed to act with reasonable diligence" when the record presented disputed facts and a dispute as to the conclusion to be drawn from those facts; and (5) the Order improperly granted summary judgment because the facts present at least a scintilla of evidence that some of the conditions and damages for which Maria Allwin sought recovery could not have been known through the exercise of reasonable diligence. (R. pp. 000195-000199). On January 28, 2016, Judge Nicholson denied the Motion to Alter or Amend without rehearing. (R. p. 000037). Plaintiff received notice of the Order denying her Motion to Reconsider on February 1, 2016.

This appeal follows. Allwin served Respondents with notice of the appeal on March 2, 2016. (R. p. 000200).

STATEMENT OF FACTS

Maria Allwin is a resident of Connecticut who has, since 1994, owned the Home that is the subject of this lawsuit. Maria Allwin originally built the home with her husband, Jim Allwin,

who was primarily responsible for dealing with the Home until he died in 2007. (R. p. 000177 ¶ 3). After Jim Allwin's death, Maria became primarily responsible for the Home, which is a large, complex structure occupying two adjoining lots on the front beach at Kiawah. (R. p. 000177 ¶ 2).

The Home faces the ocean and is exposed to the heat, wind, and rain coming off the water and as such has required significant upkeep, repair, and maintenance through the years. (R. p. 000177 ¶ 3,4). Jim, prior to his death, and subsequently Maria retained and paid contractors over the years to perform maintenance and repairs, which were generally assumed to be a consequence of owning a large home exposed to the ocean and the weather in a hot and humid climate. (R. p. 000177 ¶ 3,4).

Because the Home was not the Allwins' primary residence, in approximately late 2001, they hired Gamble Home Services as property manager to oversee and maintain the Home. In 2003, the Allwins hired Milton Morgan, a contractor, to oversee repair and maintenance work at the Home, which Buffington Homes performed. (R. p. 00070). Morgan prepared a scope of work, which provided for the repair of localized problem areas. (R. pp. 001187-001189)¹. Mr. Buffington of Buffington Homes, a contractor, priced the scope but expressed concern to the Allwins about whether, in some instances, more work was needed. (R. p. 000071; R. pp. 001194-001199). One concern was the roof. Although Buffington recommended a new roof, Picquet Roofing recommended a repair and repainting for an estimated cost of \$35,000. (R. p. 001186). Based upon the advice of Mr. Morgan, the Allwins proceeded with the more limited Morgan scope of repair. (R. pp. 001183-001186; R. pp. 001187-001189). In summary, although Buffington recommended — *in a few areas* — a more aggressive option, the Allwins chose the conservative course of action.

¹ All Exhibits Numbers refer to the Exhibits to Russ Cooper's Memorandum in Support of Motion for Summary Judgment, which are also referenced in the Order Granting Summary Judgment.

As part of its efforts, Buffington Homes hired an engineering firm, CSA, to survey the home. (R. pp. 001155-001171, R. p. 000017). CSA noted that the purpose of its survey was to determine the sources of "isolated areas of damage and fungal growth" in the Home. (R. p. 001156). CSA surveyed the Home on two days (June 30, 2003 and July 17, 2003) and in summary concluded: "In summary, outside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressuring the home. Isolated cases of water damage can be investigated and repaired on an individual basis." (R. p. 001164).

As the work proceeded, Buffington found areas of damage Mr. Morgan did not anticipate and performed additional work, which increased the cost of the work Mr. Buffington performed from \$238,504 to \$359,728.21. (R. p. 001200; R. pp. 001285-001292). The Allwins paid for the additional work. While the work was being performed, Plaintiff made a claim with AIG under the Allwins' homeowners' policy. AIG denied the claim. (R. pp. 001343-001353).

In subsequent years, the Allwins continued to make considerable efforts to investigate and maintain the Home. In 2008, Maria Allwin hired Victoria Stein with Atlantic Builders. Ms. Stein issued a report regarding the Home, which ended with the following conclusion: "It is my opinion that major contributing factor for the high humidity that is supporting the presents [sic] of fungus growth is the installation of the 40-ton chiller system." Thus, Ms. Stein concluded the major problem with the Home was the HVAC system installed in 2001, with which Russ Cooper was not involved. (R. pp. 001440-001449).

In 2009, two years after Jim Allwin's death, Ms. Allwin met with Skip Lewis, an engineer, with the goal of discussing management of ongoing maintenance and repair costs. (R. p. 000178 ¶7). Mr. Lewis was to perform a property condition assessment and develop a life cycle repair for maintenance of the Home. That work was never done. (R. p. 000178 ¶7).

In 2011, Ms. Allwin hired Fuller Consulting Engineers ("Fuller Engineers") to perform a thorough forensic investigation into the condition of the Home, the first time such an investigation had been requested. In its preliminary report, Ross Clements, an architect with Fuller Consulting reported on a number of construction deficiencies at the Home. (R. pp. 000182-000187). While some of the problems Fuller noted were in areas the Allwins had experienced prior concerns and which had been subsequently repaired, many were not. In addition to specific repairs, and because of concern about unknown conditions, Fuller suggested a comprehensive scope of repair of the Home, to include the removal of the roof and all of the exterior siding and interior drywall and the removal of a large concrete deck on the ocean side of the Home, so that Fuller Consulting could ensure that any unexposed and unknown defects could be repaired. (R. p. 000179 ¶ 11; R. pp. 001426-001436).

At this point, Maria Allwin sought the input of the Respondent Architect Shope Reno Wharton. (R. p. 000179 ¶ 12). Shope Reno's representative agreed to travel to South Carolina to meet with Maria Allwin and discuss Fuller's recommendations. At that meeting, with knowledge of the history of repairs to the Home, Shope Reno's representative, a South Carolina licensed architect, advised Maria that he did not see evidence of systemic, pervasive problems at the Home of the sort Fuller sought to correct. (R. p. 000179 ¶ 12). Rather, he suggested, like many before him, that Maria Allwin needed to make isolated repairs to the Home and to perform routine maintenance. *Id.*

After meeting with the Architect Shope Reno's representative, Maria Allwin agreed to go forward with the scope of work recommended by Fuller Engineers, and Fuller Engineers hired Phillip Smith to implement those repairs, which included the complete removal of all exterior

siding, interior drywall, the roof and the concrete deck on the ocean side of the Home. (R. pp. 000178-000179 ¶ 13.)

As reflected in the Affidavit of Ross Clements of Fuller Consulting Engineers, Inc. (R. pp. 000189-00194), the removal of those building components exposed, for the first time, extensive and pervasive original construction deficiencies that could not have been seen, and would not have been known, absent the wholesale deconstruction of the Home. (R. pp. 000191-000192 ¶ 15, 16). According to Clements, the latent construction defects, which are the subject of the present action, were, in his opinion, unprecedented:

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

(R. pp. 000192). (Emphasis Added). Mr. Clements identified at least 32 defective conditions including defects in the installation of the roof underlayment, sheathing and framing; the Tyvek weather-resistive barrier (WRB); building felt behind the stucco; windows and doors; waterproofing and flashing; and patios. (R. pp. 000192-000193). As noted in his affidavit, many of the defects *could not have been discovered* without complete removal of the exterior and interior building components. *Id.*

The Contractor Russ Cooper's deposition testimony also corroborates the testimony of Plaintiff's expert, Mr. Clements, regarding the latency of the defects and the extreme nature of the investigation. Russ Cooper acknowledges that although framing and WRB are observable

during construction, once they are covered by exterior cladding, these components are no longer observable:

Q But you would agree with me that if you are out on the site and you observe a deficiency, something that you do see and recognize as a deficiency, once that framing is covered up by drywall or exterior sheeting or siding, then you can no longer observe it?

A If you can't see it, you cannot observe it.

Q And are you comfortable that the same thing would be true with something like WRB? Is that right? It's installed on the wall by Mr. Carrigan or whoever else installed it, and it's observable by you, as the general contractor while it's installed on the walls. Is that right?

A WRB?

Q I'm sorry. Building wrap.

MR. BEST: Weather resistant barrier.

BY MR. LYLES:

Q Weather resistant barrier. Tyvek.

A Okay. Yes.

Q And then at some point that WRB or Tyvek is going to be covered up by exterior cladding, in this case I guess shingles of some sort?

A That is correct.

Q And installation defects in the WRB, once the shingles go up, are no longer observable?

A They are not.

Q Would you agree with me that if this Tyvek is covered by cedar siding, that the manner of installation of the Tyvek would not be readily observable by an owner of the house?

Q If you assume for a minute that the stucco that is shown to the left covered the balance of the chimney, would you agree with me that that flashing condition and the condition of the building felt was something that was concealed behind the stucco?

A Yes.

(R. p. 001049, line 4-p. 001050, line 5; R. p. 001067, line 7-12)

Cooper also testified as follows:

Q If we assume for a minute that this Tyvek installation is how it was installed during original construction, would you agree with me that there is no way that anybody could have observed that, absent the removal of the shingles?

A There is no way you could see through the shingles. And if I had seen that, it would never have stayed.

(R. p. 001077, lines 1-8).

Russ Cooper further testified as follows with regard to the removal of siding and interior drywall to investigate isolated water leaks:

Lyles: Would you agree with me that removal of all the siding on a house like that is an extreme measure?

Cooper: You're asking me if a 1992 system, in 2015, is an extreme measure to change what was built in 1992 to 2015, and my answer is no, it is not an extreme measure.

Lyles: I'm asking you if it would be an extreme measure for an owner to remove all the siding on his house to determine the source of water infiltration.

Cooper: That's an extreme measure.

(R. p. 001063, lines 1-24).

Clements' affidavit and Russ Cooper's deposition testimony establish that significant latent deficiencies existed at the Home, which were uncovered, for the first time, during the Fuller/Smith repair. The cost to repair the latent defects uncovered by the work of Ross Clements and Phillip Smith, incurred since 2011, is approximately \$3,000,000. That is the sum Ms. Allwin seeks to recover in this lawsuit, along with loss of use.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment applying the same well-established standard as the trial court pursuant to Rule 56, SCRCP. *See McAlhany v. Carter*, 415

S.C. 54, 62, 781 S.E.2d 105, 110 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). Summary judgment should only be granted when it is clear there is no dispute concerning either the facts *or* the inference to be drawn from those facts. *Id.* "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). In evaluating a motion for summary judgment, an appellate court is required "to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). Summary judgment is a "drastic remedy" that should be "cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009) (quoting *Carolina All. for Fair Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999)).

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment on the Grounds that the Statute of Limitations Barred Maria Allwin's Claims Because Conflicting Evidence Exists and a Jury Should Determine the Issue.

The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the evidence or the inference to be drawn from the evidence is conflicting, the fact finder at trial should decide the issue and not the court on summary judgment motion. The trial court's finding that the statute expired was based on its impermissible factual finding that Maria Allwin was on notice of the alleged defects in Russ Cooper's construction of her home such that the statute of limitations bars all claims for defects that she

has or could assert against Russ Cooper. (R. pp. 000007-000036). In addition, the trial court also found that Appellant failed to act with “reasonable diligence,” and in a “timely fashion in response to clearly observable and known problems.” (R. p. 000035). In reaching such conclusions, the trial court impermissibly weighed conflicting testimony and failed to view the evidence before it in the light most favorable to Maria Allwin as the non-moving party. Moreover, the trial court relied on cases that did not involve latent defects and were inapplicable to the facts of the instant case and also failed to explain why cases, clearly supporting the denial of summary judgment, either did not apply or were distinguishable. Based upon the record before the Court, a jury may well find that Allwin acted with reasonable diligence by investigating, making repairs, and following a conservative course and that in doing so, she would not and could not discover certain latent defects until her Home was completely deconstructed in 2011.

For these reasons, the trial court’s order granting summary judgment should be reversed.

A. The Trial Court Did Not View the Evidence Before It in the Light Most Favorable to Maria Allwin and Made Impermissible Findings of Fact.

The statute of limitations applicable to the instant case is three years. S.C. Code Ann. § 15-3-530. Under South Carolina law, it is well-settled that the statute of limitations begins to run from the time that the cause of action accrues; however, it is often difficult to determine when that time arrives. The test in determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. *McAlhany v. Carter*, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), reh’g denied (Jan. 28, 2016). “Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.” *Holly Woods Ass’n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal citation omitted). Application of the discovery rule contained in

S.C. Code Ann. § 15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence and to not only when the statute began to run but also as to which claims may be barred. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338; 534 S.E.2d 672, 681 (2000); *McAlhany v. Carter*, 415 S.C. at 64; *Hollywoods Ass'n*, 392 S.C. at 185 (holding that whether the damages the HOA claimed in the suit were different from those experienced in the past was a question of fact for the jury).

The trial court's order finds that the Respondents are entitled to summary judgment based on factual determinations. The Order states: "The statute of limitations bars Plaintiff's claims against these Defendants because the facts establish that Plaintiff was well aware of the alleged defects in both RCA's construction of and SRW's design of the residence more than three years before she asserted claims against them." (R. pp. 000011). The trial court further determined that Plaintiff failed to act with reasonable diligence. These factual conclusions are improper because at the summary judgment stage, the evidence and all inferences must be viewed in the light most favorable to Maria Allwin, as the non-moving party. The trial court's order refers to the evidence (or select portions of documents) that is the most *unfavorable* to the Plaintiff, which taken alone may support a finding that the claim is time-barred, but fails to include evidence that supports Plaintiff's argument that the statute did not expire, and certainly did not expire as to claims which were unknown and unknowable, through the exercise of reasonable diligence, until 2011 and after.

There are a number of instances in which the evidence is not viewed in the light most favorable to Maria. For example, as part of its efforts, Buffington Home hired an engineering firm, CSA, to survey the home. (R. p. 000017; R. pp. 001155-001171). Portions of the language

of CSA's report, which are unfavorable to Maria Allwin, are included in the Order, but its ultimate conclusion and portions of the report that are favorable to Allwin are excluded. (R. p. 000017). The Order does not include that CSA identified the purpose of its survey was to determine the sources of "isolated areas of damage and fungal growth" in the Home. (R. pp. 001156). The Order does not include that CSA notes "slight interior negative pressure," which it appears to attribute to the air conditioning system, but also notes that wind can cause building envelope pressure differences particularly at ocean front locations. (R. p. 001161). The final summary is also not included in the Order. CSA surveyed the Home on two days (June 30, 2003 and July 17, 2003) and in summary concluded:

In summary, outside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressuring the home. Isolated cases of water damage can be investigated and repaired on an individual basis.

(R. p. 001164).

As noted in the Order, Maria Allwin hired Victoria Stein. A detailed October 2008 report prepared by Ms. Stein after an extensive cataloging of the home's history noted that "it [was her] opinion that the major contributing factor for the high humidity that is contributing to fungal growth is the installation of the 40-ton chiller system." (R. pp. 001440-001449). While the Court's order notes that emails between Ms. Stein and Maria Allwin discussed "going down the legal road" at that time, Ms. Stein's report actually recommends in its "Considerations for the Future" that Ms. Allwin "seek legal council to recoup monetary past and future costs on chiller related issues." (R. p. 001444; R. p. 000028). Thus the reference is related to the HVAC issues, which did not involve Russ Cooper.

B. The Trial Court Relied on Case Law That Was Inapplicable to the Facts and Did Not Address Cases Favorable to Maria Allwin.

The Order granting summary judgment relied on cases that did not involve latent defects and were inapplicable to the facts of the instant case, and The Order also failed to explain why cases clearly supporting the denial of summary judgment either did not apply or were distinguishable.

In granting summary judgment, the trial court relied on *Dean v. Ruscon Corp.*, which was distinguished by this Court in *McAlhany v. Carter* and is easily distinguished from the case here principally because *Dean* is not a case that involves latent defects. (R. pp. 000033). See *McAlhany v. Carter*, 415 S.C. 54, 67, 781 S.E.2d 105, 113 (Ct. App. 2015), reh'g denied (Jan. 28, 2016); *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean v. Ruscon*, Dean purchased a building in September 1984 and an inspection found the building structurally sound. During October and November 1984, Ruscon Corporation performed pile driving activities at a construction site nearby. *Dean v. Ruscon*, 321 S.C. at 362. Shortly thereafter Dean observed a fine crack approximately three feet in length in the front right corner of the building and determined Ruscon's pile driving activities caused the crack. *Id.* In 1985, Ruscon resumed pile driving activities and Dean observed that the original crack had expanded and a new crack had formed on the other side of the building. *Id.* Dean was forced to close her business after inspectors found the building no longer structurally sound. The Supreme Court affirmed the trial court's order granting Ruscon's directed verdict motion on the ground that the six year statute of limitations barred Dean's claim. The Supreme Court specifically noted that the damage to Dean's building was **not latent**, and there was **no question** that Dean discovered the damage in 1984 and associated it with Ruscon's pile driving activities. *Id.* This complex case is easily

distinguished because the defects here are latent, and there are substantial questions regarding what reasonable diligence required.

In its order granting summary judgment, the trial court also relied on the decision in *Barr v. City of Rock Hill*; however, there is a significant difference between *Barr* and the instant case. (R. p. 000034, R. pp. 000233-000274). *Barr v. City of Rock Hill*, 330 SC 640, 500 S.E.2d 157 (1998). The Barrs bought a home through an urban renewal program run by the city. Starting in 1987, and for three more consecutive years, annual termite inspections noted moisture-related problems with the house. *Barr v. City of Rock Hill*, 330 SC 640 at 642. The Court noted specifically that in response, the Barrs neither investigated nor repaired. *Id.* When the Barrs attempted to refinance their mortgage, the lender refused the loan based on damage noted in those four inspection reports. *Id.* In 1992, the Barrs contacted the city and requested an inspection and report. *Id.* at 643. The city's report noted significant problems with the house, and suggested remedies. *Id.* The Barrs then filed suit against the city and the developer, both of whom raised the statute of limitations as a defense. The trial court agreed that the statute had run, and barred the claim. *Id.* The South Carolina Supreme Court upheld this ruling.

While the Barrs neither investigated nor repaired, the Allwins did both. The Barrs admittedly did nothing to address the issues raised by the four negative termite inspection reports. While the "termite inspection reports advised [plaintiffs] of water and other problems... [plaintiffs] failed to correct the problems or investigate further to determine the extent of the problems." *Id.* at 645. In the instant case, however, the Allwins went to significant lengths to address the issues as they were presented. Unfortunately, the defects were latent — hidden from even the various consulted experts and Shope Reno.

In her Memorandum to the trial court, Maria Allwin presented several cases that directly addressed the issue of the statute of limitation in latent defect cases. (R. p. 000144). One South Carolina Supreme Court case bearing directly on the issue of the statute of limitations in a case involving latent defects is *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), overruled on other grounds. In *Santee Portland*, the owner brought suit against the general contractor responsible for the construction of a cement plant, that subsequently showed two cracks in its facade over a period of many years, and eventually collapsed, killing two people. The trial court concluded that the owner knew or should have known that it had a cause of action against the contractor when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 695. The South Carolina Supreme Court rejected this conclusion, noting that the owner introduced expert testimony that the defects in the silos were latent because the rods were inside concrete walls. *Id.* at 696. There was evidence that repairs were performed. *Id.* The South Carolina Supreme Court concluded that the evidence introduced "went to the reasonableness of [the plaintiffs] actions, which was an issue to be decided by the jury." *Id.* (citing *Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962)).

Santee is analogous to the instant case in many ways. The owner sought out expert advice to repair a flawed structure, and years later, discovered the true nature of the structure's defects—defects that were not only unrecognizable to the owner (a lay person), but were also hidden from the consulted expert. Along similar lines, Appellant followed a reasonable course of action at the recommendation of multiple experts.

More recently, the *Santee* case is cited in support of *Centex Homes v. S. Carolina State Plastering, LLC*, No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010). In *Centex Homes*, Judge Wooten held that although the question was close, the record in the case contained

questions of material fact regarding when Centex should have known, through the exercise of reasonable diligence, that a cause of action existed against several of its subcontractors for alleged construction defects associated with a condominium complex. *Id.* Centex argued that there were factual issues as to the causes of the damage; the existence of latent defects prevented discovery; and that there was evidence it took reasonable steps to investigate. *Id.* at *7. The Court found that the determination of whether Centex, through the exercise of reasonable diligence, should have discovered alleged deficiencies was an issue properly resolved by the fact finder. *Id.* at *8.

Once again, *Centex* and the instant case are analogous: the plaintiff attempted to make repairs, on the advice of experts, to latent, unobservable defects that manifested problems over many years. In *Centex*, the district court properly viewed the circumstances in a light most favorable to the non-moving party, and found that the issue of whether the Centex acted reasonably was a question of fact for the jury.

The trial court's order also failed to address *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). In *Holly Woods*, a homeowners' association filed suit against a developer in 2005. A trial resulted in a jury verdict, and the defendant appealed the trial judge's decision not to grant a directed verdict on the statute of limitations because it argued that the HOA was aware of problems with the development prior to 2002. Specifically, the minutes from an annual meeting of the HOA's board in 1991 indicated that the HOA was aware of problems with the development including a pool leak, drainage problems and termite issues, and that additional problems were known between 1998 and 2000. There was also testimony that an engineer corrected drainage issues and that additional drainage issues later developed. The Court of Appeals found that whether the damages the Association

claimed in 2005 were different from those it experienced in the past was a question for the jury. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. at 185. Like the case in *Holly Woods*, in the instant case, a jury should also decide what type of defect claims, if any, may be barred, and whether the damages suffered in the past were the same as those presented. Similarly, if the Court determines that any portion of the Maria Allwin's damages may be barred by the statute of limitations, a jury should make this determination as well.

Finally, as Maria Allwin raised in her Motion to Alter or Amend, the Order did not address *McAlhany v. Carter*, 415 S.C. 54, 57, 781 S.E.2d 105, 107 (Ct. App. 2015), reh'g denied (Jan. 28, 2016) (decided November 12, 2015, after oral arguments in this case).

C. There is Evidence That Maria Allwin Acted With Reasonable Diligence.

Based on the full record, a jury may find that Allwin was reasonable in pursuing a conservative but conscious course of action in response to conflicting opinions; that she reasonably believed that the problems were primarily related to the maintenance of an oceanfront home, not a defect in initial construction; and that she reasonably chose not to completely de-clad her 10,000 plus square foot home before she did, in 2011.

The testimony of Clements, which is supported by the testimony of Russ Cooper himself, is that many defects which were discovered and repaired as part of the 2011 repair process could not have been known without a complete de-clad of the home. Thus, in order to prevail, the defendants must establish that, as a matter of law, at some point before August 2010, the exercise of reasonable diligence required the Allwins to completely deconstruct their 11,000 square foot home — including removing the entire roof, all 11,000 square feet of siding, the entire concrete deck — as Clements and Smith did starting in 2011. The difficulty in that position is that it ignores the fact that the Allwins received a great deal of expert advice over the years about what

to do in response to isolated problems, much of which was conflicting. The position also ignores the fact that Russ Cooper acknowledged that removal of the siding was extreme — not required by the exercise of reasonable diligence — and the fact that Shope Reno told Maria Allwin in 2011 that Ross Clements' scope of repair, which uncovered many of the defects, was unnecessary, both of which create an issue of material fact regarding what the exercise of reasonable diligence required. (R. p. 001063, line 1-24; R. pp. 000177-000188).

A jury could certainly decide that Maria Allwin acted reasonably (with reasonable diligence) in following a conservative course of action. Therefore, the issue of whether Allwin was on notice or should have been on notice of Russ Cooper's defective work and Shope Reno's defective design and whether her actions were reasonable is for a jury to decide.

For example in 2003, the Allwins retained Milt Morgan, a contractor, to assess the home and prepare a scope of repair, which provided for the repair of localized problem areas. (R. pp. 0001187-0001189). Mr. Buffington, a contractor, priced the scope but expressed concern to the Allwins about whether more work was needed. (R. pp. 001194-001199). Based upon the advice of Mr. Morgan, a jury may conclude the Allwins reasonably proceeded with the more limited Morgan scope of repair. (R. pp. 001183-001186, R. pp. 001187-001189). To prevail on this motion, the Respondents must persuade the Court that the reliance of the Allwins on Buffington and Morgan in 2004 was not, as a matter of law, the exercise of reasonable diligence. Reasonable diligence, Defendants must contend, required the Allwins to direct Mr. Buffington to remove all of the siding at the home, the ocean side deck and the interior drywall, even though neither Morgan or Buffington recommended that.

As another example, in subsequent years, Maria Allwin hired Victoria Stein who attributed mold at the Home to a problem with the HVAC (the HVAC in question was not

installed by Russ Cooper) and then noted several problems requiring localized, isolated repairs. Allwin agreed to those repairs done and paid for them. Again, Russ Cooper now contends that reasonable diligence required Maria Allwin to disregard the advice she was given and to direct the removal of all of the siding, interior drywall and the ocean side concrete deck in 2008 or 2009.

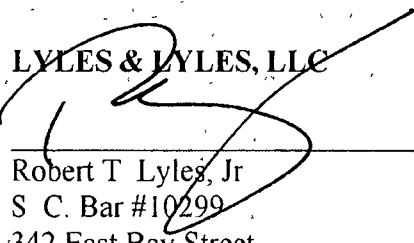
As set forth in Maria Allwin's affidavit, even as late as 2011, Architect Shope Reno's representative advised Allwin that the deconstruction Mr. Clements recommended was not necessary, instead advising that the Home only needed isolated repairs for known, isolated problems. (R. p. 000179). It is the height of irony for the lawyers for Architect Shope Reno and Contractor Russ Cooper to now argue that the law required Maria Allwin to do, in 2000, 2004, 2006, or 2009 what Shope Reno recommended that Maria Allwin *not* do in 2011.

Upon examination of the totality of the record, including South Carolina case law and the latency of the Home's defects and Appellant's history of trying to repair them, it is clear that there are questions of fact as to when the statute of limitations began to run and whether Appellant acted reasonably under the circumstances. If there is any evidence presenting such questions of fact, the Court must give the non-moving party the opportunity to present those facts to a jury.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the trial court's grant of summary judgment

Respectfully submitted,


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NOV 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000471

MARIA ALLWIN APPELLANT,

V.

RUSS COOPER HOMES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WARTON DEFENDENTS,

OF WHOM RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO WARTON ARE THE
RESPONDENTS.

BUFFINGTON HOMES, L.P., THIRD-PARTY PLAINTIFF,

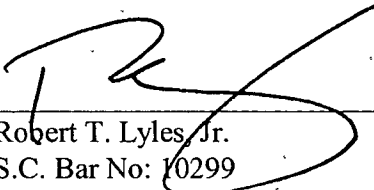
V.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED, ... THIRD-PARTY DEFENDANTS

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b),
SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Trial Court Case No. 2013CP1004592

Appellate Case No. 2016-000471

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NOV 16 2016

SC Court of Appeals

MARIA ALLWIN.....APPELLANT

v.

RUSS COOPER ASSOCIATES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WHARTON, DEFENDANTS

OF WHOM, RUSS COOPER ASSOCIATES, INC. AND SHOPE RENO
WARTON ARE.....RESPONDENTS

BUFFINGTON HOMES, L.P., ...THIRD-PARTY PLAINTIFF,

v.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED,.....THIRD-PARTY DEFENDANTS

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

Though the parties have addressed the issues on appeal in detail in their previous submissions, Appellant Maria Allwin submits this Reply Brief to briefly address arguments of Respondent Russ Cooper Associates, Inc. (Russ Cooper), the general contractor and Respondent Shope Reno Wharton (Shope Reno), the architect.

I. South Carolina's applicable statutes of limitation were not intended to provoke the premature commencement of claims.

Allwin, the appellant, has stated a claim against the general contractor, Russ Cooper, for negligent construction and breach of the implied warranty of workmanlike service. To establish negligent construction, the plaintiff must allege and prove four elements: 1) an undertaking to construct a building by the defendant; 2) negligence in the performance of that work, or, stated another way the failure to perform the work in a good workmanlike manner; 3) proximate cause of damages sustained by the plaintiff; and 4) resulting damage. § 11-1 BUILDER NEGLIGENCE - ELEMENTS OF NEGLIGENT CONSTRUCTION, Anderson, S.C. Requests to Charge - Civil, § 11-1 (2009).

Subsection 15-3-530(3) of the South Carolina Code (2005) provides for a three-year statute of limitations for "an action for trespass upon or damage to real property." The three-year limitation period begins to run at the time the cause of action accrues.

The fundamental test ... in determining whether a cause of action has accrued[] is whether the party asserting the claim can maintain an action to enforce it. Stated differently, [a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502, 532 S.E.2d 1, 3 (Ct.App.2000)
(citations and internal quotation marks omitted).

It is axiomatic that a plaintiff does not have a legal right to sue unless she can allege all elements of a claim. In fact, under Rule 11(a), a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, and the South Carolina Frivolous Civil Proceeding Sanction Act requires an attorney to reasonably believe that under the facts his claim is valid. An essential element of a claim for negligent construction is causation. S.C. Ann. § 15-36-10.

If Ms. Allwin had filed an action upon notice of the problems that Respondents argue gave her notice, her claim may well have been dismissed as frivolous. *See Grillo*, 340 S.C. at 506. A plaintiff is entitled to wait until the cause has been rationally identified; this is especially true in the case of latent defects. *See id.* To hold otherwise would promote the filing of premature or frivolous lawsuits to avoid potential loss of a claim based on the statute of limitations.

II. When the record is viewed in the light most favorable to Maria Allwin, the nonmovant, her claims are not barred.

An appellate court is required "to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that reasonably drawn therefrom." Maria Allwin's appellate brief sets forth several examples demonstrating issues of fact regarding when Ms. Allwin should have known, through the exercise of reasonable diligence, she had a cause of action.

A. There are issues of fact as to whether the defects are latent.

Russ Cooper argues the alleged construction defects are not latent¹; however, there are genuine issues about whether and what defects are latent that preclude summary adjudication. *See e.g. Bella Investments, Inc. v. Multi Family Servs., Inc.*, 97 So. 3d 787, 796-797 (Ala. Civ.

¹ Russ Cooper, in its brief, defines latent as "hidden; concealed; that does not appear upon the fact of a thing,

App. 2012) (holding that there was a genuine issue of material fact “as to when the claims regarding buckling floors and walls, improper installation of the fiber cement siding, and improper grading of the project site accrued.”). As Ross Clements states in his affidavit: “Complete removal of interior and exterior building envelope components was required in order to uncover latent construction defects and damages...” (R. p. 000192). This testimony, along with a variety of other evidence, creates at least an issue of fact as to whether the defects were latent and whether Ms. Allwin’s actions were reasonable.

III. The affidavits of Maria Allwin and Ross Clements are not sham and Russ Cooper cannot argue as such for the first time on appeal.

Russ Cooper cannot now argue, for the first time on appeal, that Maria Allwin’s affidavit and the affidavit of her expert architect Ross Clements are sham affidavits. Russ Cooper never argued that the affidavits were sham before the trial court and did not raise *McMaster v. Dewitt* in any of its briefing. (See R. pp. 233-274; R. pp. 000062-000088). For these reasons, this argument should not be considered.

Even if the argument is considered, it is without merit. Russ Cooper now asks us to disregard the affidavits of both Maria Allwin and her expert Ross Clements “according to the principles set forth in *McMaster*.” (Russ Cooper’s Appellate Brief, p. 34). An affidavit can be excluded as “sham” when it was submitted “to contradict that party’s own prior sworn statement” in “an attempt to create a sham issue of material fact.” *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014), reh’g denied (Jan. 27, 2015), cert. denied (July 2, 2015) (quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). Clements was disclosed as Maria Allwin’s expert, and the Respondents chose not to take Clements’ deposition. Thereafter, Appellant submitted his affidavit prior to a hearing on Respondent’s summary

judgment motion to set forth additional material facts related to the statute of limitations defense. Russ Cooper fails to demonstrate how Maria Allwin's affidavit contradicts her deposition testimony. It does not. Instead Ms. Allwin's affidavit was submitted to provide additional facts that were not brought forward during her deposition.

IV. Maria Allwin's arguments were preserved because those arguments were raised to the trial court and ruled on and have been presented to the Court of Appeals.

A. The evidence before this Court must be viewed in the light most favorable to Maria Allwin.

Shope Reno argues Maria Allwin failed to preserve her argument that the evidence and all reasonable inferences must be viewed in her favor as the non-moving party. This argument is a part of the record because it was raised, and ruled on by the trial court in its Order Granting Motion for Summary Judgment. (R. p. 000143; R. p. 000009). The standard for summary judgement was cited in Allwin's Memorandum and the Court's order. (R. p. 000143; R. p. 000009).

Further, on December 29, 2015, Maria Allwin filed a Motion to Alter or Amend. (R. pp. 000195-000199). In the motion, Allwin argued that based on the evidence before it, the trial court made improper factual conclusions including that Allwin was "well aware of the alleged defects" and "failed to act with reasonable diligence." She further argued that material facts were disputed as was the conclusion to be drawn from those facts and that the trial court failed to consider affidavits, which taken in the light most favorable to Maria Allwin, created at least a question of fact on the statute of limitations issue. (See R. pp. 000195-000199). On January 28, 2016, Judge Nicholson issued a Form 4 order denying the motion without a hearing or the opportunity to submit additional briefing. (R. pp. 000037).

Moreover, whether raised or not, the appellate court is required to liberally construe the record and give Ms. Allwin the benefit of all favorable inferences. In her Initial Brief, Maria Allwin argued the trial court impermissibly weighed conflicting evidence and that by failing to view the evidence in the light most favorable, it made impermissible factual findings. She cites, as an example, that the order references portions of reports that are not favorable to Ms. Allwin and fails to include portions that are favorable. (*See Appellant's Brief*, p. 12-13). In addition, as Ms. Allwin argues, the court failed to consider Maria Allwin's affidavit, architect Ross Clements' affidavit, and the testimony of Russ Cooper (*See Appellant's Brief*, p. 18-21), which if viewed in the light most favorable to Maria Allwin create an issue of fact that should be presented to a jury.

B. Shope Reno's argument regarding what it terms The Letter is misplaced.

Shope Reno states that the trial court specifically determined that The Letter sent from Appellant to Respondent Shope Reno entitled Shope Reno to summary judgment. (Shope Reno Brief, p. 7). This is simply not what the Order holds. (R. pp. 000007-000036). The Order includes a catalog of the documents or portions of documents argued in Russ Cooper's Motion for Summary Judgment and then summarily draws factual conclusions.

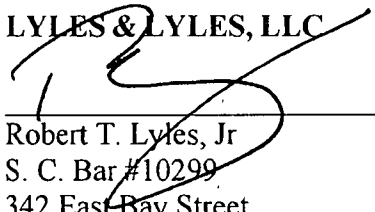
Appellant has clearly argued to the trial court and to the Court of Appeals that when viewed in the light most favorable to Maria Allwin, the evidence on the statute of limitations is conflicting and the trial court's conclusion that "[t]he clear and undisputed evidence before the Court establishes that [Appellant] was on notice of the alleged defects..." is in error. The Order does not state that one piece of evidence, specifically The Letter, was dispositive of its ruling. Moreover, the law does not require the Appellant to specifically dispute each and every

document identified by the movant or the Order to reserve its argument that the evidence is conflicting

CONCLUSION

For the reasons stated in Appellant's Brief and those stated above, Maria Allwin respectfully submits that the trial court's grant of summary judgment should be reversed

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November 16, 2016
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000471

MARIA ALLWIN APPELLANT,

v.

RUSS COOPER HOMES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WARTON DEFENDENTS,

OF WHOM RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO WARTON ARE THE
RESPONDENTS:

BUFFINGTON HOMES, L.P., THIRD-PARTY PLAINTIFF,

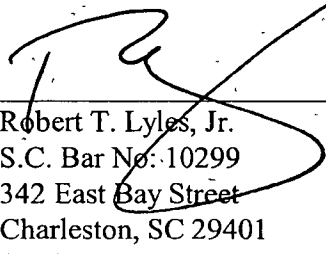
v.

ALBRECHT ENVIRONMENTAL, INC., ALL POINTS CONSTRUCTION, INC., PATRIOTS
DRYWALL, INC., PICQUET ROOFING, INC., SPRAYSEAL FOAM INSULATION, AND
TISCHLER UND SOHN (USA) LIMITED, ... THIRD-PARTY DEFENDANTS

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief complies with Rule
211(b), SCACR.

November 16, 2016


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NOV 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2013-CP-10-4592
Appellate Case No. 2016-000471

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NOV 16 2016

SC Court of Appeals

Maria Allwin, ...Appellant,

v.

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

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

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

v.

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

BRIEF OF RESPONDENT RUSS COOPER ASSOCIATES, INC.

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COUNTER-STATEMENT OF THE ISSUE ON APPEAL

1. Did the Circuit Court err in granting summary judgment to Respondent Russ Cooper Associates, Inc. based on the statute of limitations?

COUNTER-STATEMENT OF THE CASE¹

On August 5, 2013, Appellant Maria Allwin ("Owner") filed this construction defect action against Respondent Russ Cooper Associates, Inc. ("RCA"), the general contractor that built the house that is the subject of this lawsuit. (R. pp. 38-41). On December 12, 2013, RCA answered Owner's complaint and raised the statute of limitations as an affirmative defense. (R. p. 1472, ¶ 11).

Owner amended her complaint on October 8, 2014, to assert claims against Shope Reno Wharton ("SRW"), the architectural firm that provided design services for the original construction of the house. (R. pp. 42-48). On November 6, 2014, RCA answered the amended complaint and, again, raised the statute of limitations as an affirmative defense. (R. p. 1481, ¶ 15).

On April 27, 2015, RCA moved for summary judgment on the ground that Owner's claims are barred by the statute of limitations. (R. pp. 56-61). After briefing and oral arguments, on December 16, 2015, the Circuit Court entered its order granting RCA's motion for summary judgment ("Summary Judgment Order"). (R. pp. 7-36).

On December 29, 2015, Owner moved under Rule 59(e), SCRPC to alter or amend the Summary Judgment Order. (R. pp. 195-99). On January 28, 2016, the Circuit Court

¹ Respondent does not consent to be bound by the Statement of the Case and the Statement of the Facts contained in Appellant's brief, and, pursuant to Rule 208(b)(2), SCACR, submits its own Counter-Statement of the Case and Counter-Statement of the Facts.

entered an order denying Owner's motion. (R. p. 37). Owner filed her Notice of Appeal on March 4, 2016, appealing both the Summary Judgment Order and the January 28, 2016 order denying Owner's Rule 59(e) motion. (R. pp. 200-31).

COUNTER-STATEMENT OF THE FACTS

Owner is the absentee owner of an approximately 11,000 square-foot oceanfront home, located at 133 Flyway Drive, Kiawah Island, South Carolina (the "House"). (R. p. 38, ¶ 1; Appellant Br. at 3). RCA served as the general contractor for the original construction of the House pursuant to a contract with Owner and her late husband. (See R. p. 38, ¶ 5; p. 139; p. 177, ¶ 3). RCA completed construction of the House in May 1994. (R. p. 295, lines 8-11). It is undisputed that, during the following 19 years, Owner steadily accumulated both actual and constructive knowledge of defects in the House from numerous sources.

Owner's Knowledge of Defects in Roofs and Chimneys

Robert Cowan ("Guest") lived in the House as Owner's guest in the late 1990's and early 2000's. (R. p. 947, line 11 – p. 948, line 9). While living in the House, Guest observed numerous and continuous roof leaks, including leaks at roof valleys, in the master suite, and at chimneys. (R. p. 953, line 19 – p. 954, line 4; p. 955, lines 8-12). From 1999 to 2002, Guest repeatedly informed Owner of numerous roof leaks on at least 12 separate occasions, (R. p. 1086, ¶ 2; pp. 1088-89; pp. 1090-91; pp. 1096, 1099-1100; p. 1103; p. 1108-09; p. 1111; p. 1116; p. 1121; p. 1122; p. 1126; p. 1451. See also R. p. 1454), and of leaks at chimneys/fireplace flues at least twice. (R. p. 1109; p. 1112, ¶ 6.e). In March 2001, Guest informed Owner that roof leaks were one of "the most important problems" with the House. (R. p. 966, lines 4-10; p. 1100).

In 2001, Owner retained Gamble Home Services ("Property Manager") to serve as property manager for the House. (R. p. 369, lines 10-15). In 2001 and 2002, Property Manager notified Owner of roof leaks on at least two occasions. (R. p. 1128, ¶ 12; p. 1458).

In 2003, Owner hired Milton Morgan ("Repair Supervisor") to serve as project manager for repair work to address known defects in the House. (R. p. 404, lines 1-4; p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 6). In 2003, Repair Supervisor notified Owner of roof defects on at least three occasions, (R. pp. 1178, 1180-82; p. 1186, ¶ 11; p. 1189, ¶ 14. See also R. p. 1488), and proposed roof repairs at a cost of \$15,000-\$35,000. (R. p. 1186). To address the known defects in RCA's construction, on November 13, 2003, Repair Supervisor issued a written scope of repair that included instructions for the repair contractor to, among other things, "correct defects in roof valleys." (R. p. 1189, ¶ 14. See also R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 1).

Owner also requested the assistance of Defendant Buffington Homes, L.P. ("Repair Contractor") to diagnose and repair the defects in the House in 2003. (R. p. 399, line 22 – p. 400, line 3. See also R. pp. 1131-33). In July 2003, Repair Contractor informed Owner of a multitude of roof leaks and roof defects, (R. pp. 1134-35), and recommended the complete replacement of the roof. (R. p. 1135). In January 2004, Repair Contractor informed Owner of roof defects and recommended more aggressive roof repairs than those suggested by Repair Supervisor. (R. pp. 1195-96). Ultimately, Owner paid Repair Contractor \$359,728.21 for the 2004-05 repairs to address known defects in RCA's construction, including defects in the roof. (R. p. 1304. See also R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 1).

Owner's Knowledge of Defects in Exterior Walls

In 2001 and 2002, Guest informed Owner of numerous and repeated leaks at wall vents/louvers or within exterior walls on no less than six occasions. (R. pp. 1096, 1100; p. 1103, ¶¶ A.7., B.2.; p. 1107, ¶ J.2; p. 1008; p. 1116-17; p. 1126. See also R. p. 1088). Leaks in the exterior walls included water intrusion into the kitchen and breakfast room walls. (R. pp. 1108, 1126. See also R. p. 1088; p. 1112, ¶ 7.b.; p. 1116; p. 1452, ¶ 7.7.; p. 1454). On September 4, 2001, Guest prepared a moisture detection report for Owner and noted numerous unacceptable moisture meter readings. (R. p. 1116). Guest wrote, "If my test[s] are accurate, we could have a major problem inside the exterior walls, such as wood rot." (R. p. 1117, ¶ 3 (emphasis added)). At this time, Guest researched at least two local moisture intrusion consultants (engineer Robert Sisnroy and contractor Robert Hedgepath) due to the leaks into the House. (R. p. 1117, ¶ 3; pp. 1455-56).

Repair Contractor informed Owner of exterior trim rot in 2003. (R. p. 1135, ¶ 10.b.). In 2004, Repair Contractor informed Owner of defects in the exterior walls, including rotten studs and sheathing requiring the replacement of exterior siding and trim. (R. pp. 1275, 1285). In November 2005, following the completion of the \$359,728.21 repairs by Repair Contractor, Property Manager invoiced Owner \$979 for repair work, including caulking the bottom of the exterior cladding at the rear patio to prevent leaks into the subfloor. (R. p. 1303).

Owner's Knowledge of Defects in Windows and Doors

From 2000 to 2002, Guest informed Owner of window leaks on at least three occasions, (R. p. 1100, ¶ 3; p. 1116-17; p. 1126. See also R. p. 1454), and of leaks at the ocean-side doors no less than twice. (R. p. 1094; p. 1126). In July 2003, Repair Contractor informed

Owner of window leaks and recommended destructive testing to determine their source. (R. p. 1135, ¶¶ 3, 17, 20, 25). On November 13, 2003, Repair Supervisor gave Owner a proposed scope of repair to address the known defects in RCA's original construction, in which he instructed Repair Contractor to investigate and correct window and door leaks. (R. p. 1189, ¶¶ 10-11. See also R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 6). In January 2004, Repair Contractor proposed additional investigation of air/water intrusion at windows. (R. p. 1197, ¶¶ 6, 8).

Owner's Knowledge of Defects in the Oceanfront Patio/Basement

From 1999 to 2002, on at least seven occasions, Guest informed Owner of numerous and repeated leaks in the basement, particularly where the patio connects to the House. (R. p. 1086, ¶ 3; p. 1097, ¶ 3; p. 1098, ¶ 7.2.; p. 1103, ¶ B.; p. 1106, ¶ 2.c.; p. 1107, ¶ 2.j.1.; p. 1109; p. 1122, ¶ 1.; p. 1126. See also R. p. 957, lines 15-21; p. 958, line 10 – p. 959, line 12 (testifying as to R. pp. 1405-07)). In July 2003, Repair Contractor informed Owner of leaks into the basement caused by water intrusion at the patio above. (R. p. 1134, ¶ 4.b.). Repair Contractor recommended removing the patio tile, installing waterproofing where the patio connects to the House, and replacing the patio tile with a slope away from the structure. (R. p. 1136, ¶ 13). On November 13, 2003, Repair Supervisor proposed repairs to address the known defects in RCA's original construction and instructed Repair Contractor to investigate/correct patio leaks into the basement. (R. p. 1189, ¶ 16. See also R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 6). In January 2004, Repair Contractor recommended further investigation of basement leaks. (R. pp. 1196-97, ¶¶ 4, 5).

In addition to leaks from the patio above, in July 2004, Repair Contractor informed

Owner of water intrusion into the basement caused by storm water and proposed repairs to remedy the problem. (R. pp. 1296-97). In September 2004, Repair Supervisor notified Owner of leaks in the basement from storm water intrusion and informed her the repair would cost \$34,781. (R. pp. 1298-1302).

Owner's Knowledge of Interior Damage

From 1999 to 2002, on at least nine occasions, Guest informed Owner of numerous and repeated instances of interior water damage at multiple locations, including damage to hardwood floors, mold/mildew, peeling paint, water stains, drywall/wallpaper damage, and saturated subfloor framing. (R. pp. 1088-89; p. 1099, ¶ 12; pp. 1108-09; p. 1112, ¶¶ 6-7; pp. 1116-17; p. 1121; p. 1122; pp. 1125-26; pp. 1451-52; p. 1454).

In September and October 2003, Repair Supervisor twice notified Owner of mold/mildew within the House, (R. p. 1173; p. 1178), and recommended mold testing at a cost of \$2,500-\$5,000. (R. p. 1178). On November 13, 2003, Repair Supervisor issued a scope of repair to address defects in the RCA's original construction that instructed Repair Contractor to investigate and correct mold/mildew and water-damaged drywall. (R. p. 1188, ¶¶ 3-5). In 2003 and 2004, Repair Contractor informed Owner of damage to interior finishes as a result of construction defects, including drywall damage, buckling/damaged hardwood floors, mold/mildew, and peeling paint. (R. pp. 1134-35; p. 1197-98, ¶¶ 8, 10).

From 2001 to 2008, Property Manager notified Owner of numerous and repeated instances of interior water damage at multiple locations within the House, including mold/mildew, caulking/trim cracks at windows, drywall/wallpaper damage, ceiling damage/stains, condensation in the basement, and warped hardwood flooring. (R. pp. 1380-81; p. 1354; p. 1355; p. 1363; p. 1367; pp. 1457-58; p. 1459; p. 1460; p. 1461). In

2006, Property Manager also suggested to Owner that she have the cause of interior mold investigated by mold remediation experts. (R. pp. 1337-38).

Evidence of Defects Discovered By Owner's Experts/Realtor/Insurer

In August 2003, Repair Contractor retained the services of an engineering firm, Campbell, Schneider and Associates, LLC ("CSA"), to survey the house and determine the sources of moisture intrusion that had caused areas of damage and fungal growth. (R. pp. 1155-56). As stated in its August 15, 2003 report, CSA observed water damage/mildew throughout the House and opined that the damage was the direct result of, among other things, numerous sources of unconditioned air infiltration and active water intrusion at windows, roof valleys, and sub-grade locations. (R. pp. 1157-61). CSA also recommended that the source of water leaks be investigated from the exterior, to include the removal of certain windows and roof sections. (R. p. 1164).

In September 2003, Repair Supervisor retained architect Roy Davis Smith, who recommended water testing to determine the source of basement, window, and door leaks, and taking humidity readings throughout the House to address the presence of mold. (R. pp. 1173, 1175-76).

In March 2004, Owner submitted a property damage claim to her hazard insurance carrier ("AIG") and reported active water intrusion through the roof, windows, and doors. (R. p. 431, line 23 – p. 432, line 7; p. 1209). In April 2004, AIG's engineer inspected the House and photographed open and obvious defects in the roof system, (R. pp. 1223-24, 1252-57, 1258-65, 1268), window leaks, (R. pp. 1228-31, 1235-39), leaks in the basement, (R. pp. 1266-67), and mold growth/water-damaged drywall in the interior (R. pp. 1225-51). AIG's engineer ultimately opined that the mold and moisture damage in the House

“resulted from long-term conditions of elevated moisture associated with the construction of the [H]ouse.” (R. p. 1274 (emphasis added)). In June 2004, AIG declined Owner’s property damage claim, referring to the longstanding construction defects noted in both the August 2003 CSA report (R. pp. 1155-71) and the report prepared by AIG’s engineer (R. pp. 1269-74). (R. p. 1293).

In April 2004, Repair Contractor retained Albrecht Environmental to perform a mold inspection at the House. (See R. p. 1277). Albrecht Environmental discovered mold in exterior walls and recommended remediation by a certified mold contractor. (R. p. 1279).

In 2006, Plaintiff wanted to sell the House, (R. p. 448, lines 11-17; p. 481, line 24 – p. 482, line 4; p. 483, lines 8-12), and retained Cynthia Noble with Kiawah Island Real Estate (“Realtor”) as her real estate agent. (R. p. 443, lines 4-8; p. 485, lines 24-25). In advance of listing the House for sale, Realtor procured a home inspection report from Complete Inspection Services (“Home Inspector”). (R. p. 484, lines 9-24, p. 486, lines 3-7). In its July 11, 2006 report, Home Inspector noted numerous construction deficiencies, including roof leaks, prior termite activity, damaged wood cladding, water infiltration at rear doors, water stains at rear basement walls, damaged hardwood flooring, water stains, mildew, and damaged drywall. (R. pp. 1307-08, 1312-14). Home Inspector recommended roofing repairs, investigation of the termite activity, and inspection of the flashing and subflooring at the rear doors. (R. p. 1307).

At Realtor’s request, Albrecht Environmental inspected the House and issued a July 24, 2006 report proposing mold remediation at an estimated cost of \$19,150. (R. pp. 1315, 1317-18). On July 27, 2006, Owner wrote to Realtor and stated it was, “hard to believe that there is still moisture/humidity/mold after we spent so much \$\$\$” on the 2004-05

repairs performed by Repair Contractor. (R. p. 629, lines 6-11; p. 1438). Owner also authorized Realtor to obtain a proposal from Repair Contractor to address the construction defects listed in Home Inspector's July 2006 report. (R. p. 630, lines 7-12. See also R. pp. 1437, 1439).

At Realtor's request, Repair Contractor prepared a September 11, 2006 estimate for repairs necessary to address the ongoing problems with the House. (R. pp. 1339-42. See also R. p. 630, lines 7-12; pp. 1437, 1439). Repair Contractor's estimate totaled \$282,850 and proposed repairs to the roof, certain exterior walls; certain windows and doors, the basement, damaged flooring, and to remedy mold. (R. pp. 1339-40). Repair Contractor informed Realtor the proposed roofing repairs were merely temporary fixes and, again, recommended the complete replacement of the roof. (R. p. 1340). According to Repair Contractor, "The single most significant concern is the roof." (R. p. 1340).

In July 2007, after inspecting the House, AIG informed Owner of several indications of high moisture levels, and suspected window and roof leaks. (R. p. 1343). Further, AIG required Owner to, "have you (sic) home checked by a qualified water remediation engineer to investigate why water continues to enter these areas of your home. Once the cause is identified, the necessary repairs should be made." (R. p. 1343 (emphasis added). See also R. p. 1345). In June 2008, Owner forwarded the July 2007 AIG inspection report (R. pp. 1343-53) to Repair Contractor and expressed her frustration about ongoing problems after paying Repair Contractor \$359,728.21 to remedy these defects. (See R. pp. 1304, 1356-58). Owner also wrote to Victoria Stein with Atlantic Builders ("Consultant"), and stated:

I do not understand how the mold around fixtures, etc. escaped inspection until this point. [Repair Contractor] understood my – irritation??? – in 2004 and 05 we did a complete overhaul of the house – several hundred thousand \$\$ later and the problem is still there. Kiawah is an ongoing saga . . .

(R. p. 1358).²

Consultant first visited the House in the spring of 2008 at the request of Property Manager. (R. p. 702, line 7 – p. 703, line 20). During her initial visit, Consultant observed numerous telltale indications of construction defects and air/water intrusion, and pointed out these problems to Property Manager. (R. p. 691, line 11 – p. 693, line 3; p. 702, line 7 – p. 703, line 20; p. 758, line 9 – p. 759, line 14). From July to October 2008, Owner paid Consultant \$6,978.14 to investigate ongoing problems with the House. (R. pp. 1361-62, 1364-65. See also R. p. 677, line 21 – p. 678, line 2; p. 715, lines 3-6; p. 725, lines 8-12). The scope of Consultant's investigation included reviewing the long history of water intrusion and damage, prior repairs, and "anything that would be in those reports by [CSA and] Albrecht [Environmental]" (referring to R. pp. 1155-71, 1277-84, 1315-36). (R. p. 680, line 23 – p. 681, line 11; p. 718, line 14 – p. 719, line 9). Additionally, Owner gave Consultant a box of documents relating to past problems with the House and instructed Consultant to review them. (R. p. 693, lines 17-22).³ Consultant also spoke with

² Consultant testified there were many water intrusion issues in the House in June 2008. (R. p. 711, lines 8-11). Further, on June 23, 2008, Owner wrote to Consultant and inquired whether poor window performance could be contributing to the mold problems in the House. (R. p. 1359).

³ The documents Owner provided to Consultant included, but were not limited to, February 4, 1999 correspondence from Guest to Owner regarding continued roof and basement leaks (R. pp. 1085-87. See R. p. 672, line 21 – p. 673, line 12); May 3, 2000 Guest correspondence regarding leaks at rear/ocean-side doors (R. p. 1094. See R. p. 1466); March 21, 2001 Guest correspondence regarding multiple roof leaks, basement wall leaks, chiller room leaks, and structural settlement (see R. p. 1466); March 23, 2001 Guest

contractors and consultants regarding past problems with and repairs performed to the House.⁴

correspondence regarding roof leaks (R. pp. 1095-1102. See R. p. 1466); June 1, 2001 Guest letter to RCA regarding, among other things, ongoing roof leaks, leak at a fireplace flue, leaks at wall vents/louvers, moisture intrusion into the kitchen wall, and chiller room leaks (R. pp. 1108-10. See R. p. 1466); August 2001 Property Manager report regarding mildew, leaking windows, and water stains (R. pp. 1112-15. See R. p. 1466); September 4, 2001 Guest moisture detection report evidencing high moisture meter test readings (R. pp. 1116-17. See R. p. 1466); October 24, 2001 Guest correspondence regarding unresolved construction issues and warning about the statute of limitations (R. pp. 1119-20. See R. p. 1466); August 2002 Guest correspondence regarding roof leaks, basement leaks, moisture in exterior wall, leaking louvers, and rear door leaks (see R. p. 1467); August 15, 2003 CSA report regarding water intrusion, including roof leaks and leaks at sub-grade locations (R. pp. 1155-71. See R. p. 684, line 7 – p. 685, line 21; p. 1467); September 12, 2003 correspondence from Repair Architect to Repair Supervisor proposing testing to determine the source of water intrusion at various locations (R. pp. 1175-76. See R. p. 687, line 15 – p. 688, line 7); October 2003 Picquet Roofing roof inspection report and repair estimate (R. pp. 1177-82. See R. p. 1467); January 2004 Repair Contractor correspondence referencing expiration of the statute of limitations (R. pp. 1194-99. See R. p. 1467); Repair Supervisor correspondence concerning the 2004-05 repairs performed by Repair Contractor (R. p. 686, line 24 – p. 687, line 14; p. 716, lines 20-22); February 19, 2004 contract between Owner and Repair Contractor to repair defects in the House (R. pp. 1200-08. See R. p. 689, line 24 – p. 690, line 7; p. 1467); Repair Contractor's invoices for the 2004-05 repair work (R. p. 716, lines 13-15; pp. 1467-68); April 27, 2004 AIG engineer report outlining construction defects as the source of moisture intrusion (R. pp. 1269-74. See R. p. 693, lines 4-10; p. 1467); April 19, 2004 Albrecht Environmental report regarding mold growth and ground-level moisture (see R. p. 1467); May 7, 2004 Repair Contractor progress report regarding discovery of rotten studs and sheathing (R. pp. 1275-76. See R. p. 1467); May 10, 2004 Albrecht Environmental report noting elevated mold readings and recommending mold remediation (R. pp. 1277-84. See R. p. 693, lines 11-16); May 24, 2004 flood-relief design by Albrecht Environmental to address moisture in basement (see R. p. 1468); May 28, 2004 Repair Contractor correspondence regarding cost overruns due to discovery of wood rot and engineering report costs (R. pp. 1285-92. See R. p. 1468); June 7, 2004 AIG report referencing original construction defects (R. pp. 1293-95. See R. p. 694, lines 4-11; p. 706, line 23 – p. 707, line 20; p. 1468); July 24, 2006 Albrecht Environmental report noting elevated mold readings and recommending mold remediation (R. pp. 1315-36. See R. p. 696, lines 6-16; p. 1468); and July 29, 2007 AIG correspondence regarding suspected water intrusion and requiring water remediation testing. (R. pp. 1343-53. See R. p. 697, line 24 – p. 698, line 22; p. 714, line 11 – p. 715, line 2).

⁴ Consultant's contact with former inspectors and contractors included, at a minimum, a meeting at the House with engineer Larry Elkin of CSA (R. p. 715, lines 11-19; p. 715, line 24 – p. 716, line 4); a meeting with Aero Service (HVAC contractor) (R. p. 715, lines 20-

On October 13, 2008, Consultant prepared a report summarizing her investigation of water intrusion issues at the House and offering suggestions for future action. (R. p. 722, lines 15-17, p. 724, lines 12-22. See R. pp. 1364, 1440-49). Consultant's report also included a timeline that chronicled the history of longstanding water intrusion, prior attempts at repair, and the findings of prior consultants. (R. pp. 1466-68. See also R. p. 722, lines 4-11). Further, Consultant's report noted numerous existing defects in the House. (R. pp. 1443-44). Although Consultant opined that the HVAC system was the primary cause of mold/mildew,⁵ she expressly noted that several existing defects were unrelated to the HVAC issue, including drywall damage under roof valleys, buckled hardwood flooring, and moisture in the basement area under the pool deck. (R. pp. 1443-44). Consultant suggested Owner make repairs to the structure and seek the advice of legal counsel. (R. p. 1444). Moreover, Consultant provided a list of defects for which she believed RCA was responsible, including roof defects/leaks, moisture/leaks in the basement, and window and door defects/leaks – all of which “are numerous but bottom line is that the Statute of Limitations ran out in May 2007.” (R. p. 1449 (emphasis added)).

On October 17, 2008, Consultant and Owner discussed Owner's “frustrations and anger” and going down the “legal road,” (R. p. 1366). Consultant also informed Owner that she would be forwarding proposals for various repairs to address roof leaks, damaged

23); a conference with John Albrecht with Albrecht Environmental (R. p. 716, lines 5-12); a conference with Repair Contractor employee Robbie Diamond regarding the 2004-05 repairs (R. p. 682, line 6 – p. 683, line 1); and a conference with Repair Supervisor, during which the 2003 CSA report was discussed (R. p. 683, lines 14-25). Consultant also attempted to speak with architect Roy Davis Smith, who recommended water testing in 2003. (R. p. 716, line 17 – p. 717, line 13).

⁵ Owner concedes that HVAC problems are not RCA's responsibility. (R. p. 262, lines 22-23).

drywall, air/water infiltration at windows and doors, and moisture concerns in the basement. (R. p. 1366). On November 24, 2008, Consultant presented to Owner a \$185,480.62 proposal to repair two roof valleys to stem continuing leaks; to seal 345 outlets/switches/wall penetrations, 160 windows, and 8 exterior doors to prevent mold/mildew/condensation; and to repair ongoing moisture problems in the basement. (R. pp. 1368-76. See also R. p. 731, line 1 – p. 732, line 4; p. 733, line 21 – p. 735, line 15).⁶ At this time, the basement ceiling was leaking “all over the place.” (See R. p. 727, line 19 – p. 728, line 15). On February 27, 2009, Consultant presented Owner with a \$64,350.24 proposal for additional roof repairs. (R. p. 1378).⁷

In a May 14, 2010 CL-100 termite inspection report produced by Property Manager, the termite inspector noted evidence of termites, evidence of active wood-destroying fungi, and visibly damaged wood members. (R. pp. 1391-92). Further, the termite inspector

⁶ On March 24, 2009, Consultant submitted the final invoice for the \$185,480.62 worth of repairs outlined in the November 2008 proposal and reported that “[a]ll outlets/switches/baseboards/windows have been sealed.” (R. p. 1462).

⁷ In March 2009, Consultant again recommended that Owner consult with an attorney about the continued problems, damage, and water intrusion at the House despite previous repairs. (R. p. 746, lines 13-14; p. 748, line 4 – p. 749, line 20; p. 750, line 20 – p. 751, line 2; p. 1381. See also R. p. 1507, line 14 – p. 1508, line 15). Owner retained counsel, who made arrangements for an engineer to survey the House for structural issues, including evaluating the roof and windows. (R. p. 745, lines 16-18; p. 1523, line 20 – p. 1524, line 2; p. 1524, line 14 – p. 1525, line 4; p. 1526, lines 16-20. See also R. pp. 1381-84). According to Consultant, the purpose of the engineer’s inspection was to investigate the source of continued water intrusion despite the repairs performed by Repair Contractor in 2004-05. (R. p. 768, line 16 – p. 769, line 15). On May 26, 2009, engineering firm H2L presented, at the request of Owner’s counsel, a \$45,000 proposal to conduct a building condition survey, including a visual inspection of the building envelope, windows, and cladding. (R. pp. 1385-87). Despite her counsel’s recommendation for H2L to inspect the house, Owner failed to conduct a forensic analysis of the House until Ross Clements, Owner’s present expert, performed his 2011-12 investigation. (R. p. 787, line 1 – p. 788, line 1).

recommended a “complete and thorough evaluation by a qualified building expert to determine what repair if any is necessary to this property.” (R. p. 1392). Consultant saw the CL-100 report in 2010. (R. p. 781, line 22 - p. 782, line 4).

Also on May 14, 2010, Home Inspector inspected the House a second time and prepared a report. (R. pp. 1395-1404). Home Inspector again noted numerous construction deficiencies, including indications of roof leaks, deterioration of roofing components, signs of prior termite activity, damage to the siding, water infiltration at windows, water infiltration and damaged flooring at windows and doors, leaks into the basement, cupped hardwood flooring, and water stains/mildew at numerous locations. (R. pp. 1398, 1401-03). Home Inspector recommended checking the flashings and subfloor in the area of the rear doors, and having a contractor evaluate the water intrusion at windows. (R. p. 1398). In an email to Property Manager concerning Home Inspector’s 2010 report, Consultant wrote:

[I f]ound [the report] and will address possible issues in an email to [Owner]. As noted to [Owner] – the inspection report is incomplete mainly because the inspector only had 3 hours to walk the house before he had to get out. . . . We did not have enough time to do a thorough inspection so many items are not noted. But I will stick to the report and we’ll deal with the new one since [Owner] does not want “to know.” Perhaps I will drop a couple of the issues like the back doors on [Realtor] too although she’s another person who likes to stick her head in the sand.

(R. p. 1464).

Owner’s Admitted Knowledge of Defects

Owner has admitted that Repair Contractor’s 2004-05 repair efforts were intended to address defects in RCA’s original construction, including defects in the roof, windows and doors, and patio/basement leaks. (R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p.

440, line 6).⁸ Owner has also admitted she was aware of a long history of roof and basement leaks dating back to the 1990's (R. p. 317, lines 13-21; p. 330, lines 16-19; p. 331, lines 14-25); of numerous leaks in the roof, at a kitchen wall, in the chiller room, at vents/louvers, and at windows in 2001 (R. p. 342, lines 5-10; p. 350, lines 2-9; p. 355, lines 2-18; p. 360, lines 15-18; p. 361, lines 17-24; p. 363, lines 7-8; p. 367, line 25 – p. 368, line 5; p. 374, lines 17-21; p. 378, lines 12-16); of interior mildew problems in 2001 (R. p. 374, lines 17-21; p. 378, lines 12-16); that Repair Contractor retained the services of an engineering firm (CSA) in 2003 in an effort to identify and diagnose problems with the House (R. p. 412, line 25 – p. 413, line 12); of water infiltration at the rear doors; basement leaks from the pool deck, and cupped/discolored hardwood floors in 2006 (R. p. 444, lines 2-14; p. 445, lines 1-5); and of problems with the House that needed repair in 2009, including the roof, mold, and damaged/cupped hardwood floors. (See R. p. 1509, line 24 – p. 1510, line 3).

Owner's Knowledge of Claims Against RCA

After researching at least two local moisture intrusion consultants due to the leaks at the House, (R. p. 1117, ¶ 3; pp. 1455-56), on October 24, 2001, Guest informed Owner's late husband of numerous construction issues and warned "the 'Statute of Limitations' will end soon." (R. p. 1120 (emphasis added)).⁹ Guest made this warning because of the numerous leaks and problems with the House. (R. p. 980, lines 3-6).

In January 2004, Repair Contractor informed Owner that:

"South Carolina has a 13-year statute of limitation (sic) for water intrusion. Your home is approaching that deadline. . . . I strongly urge you

⁸ Again, Owner paid Repair Contractor \$359,728.21 for the 2004-05 repairs. (R. p. 1304).

⁹ Note that Owner gave this document to Consultant in July 2008. (See R. p. 1466).

to contact the builder/roofer who installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel."

(R. p. 1195, ¶1.c. (emphasis added)).¹⁰

As stated above, in October 2008, Consultant provided a list of defects for which she believed RCA was responsible and stated these defects, "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (R. p. 1449 (emphasis added)).

Defects Observed By Owner's Present Expert and Owner's Complaints

In 2011, Owner retained architect Ross Clements "to investigate the root cause of problems at the [House], some of which were similar to those previously identified and repaired" (R. p. 178, ¶ 8). In his March 16, 2012 investigative report, Clements identified numerous deficiencies in the House allegedly resulting from RCA's original construction, and grouped the defects into the following relevant categories: (1) Roof and Stucco at Chimneys, (2) Exterior Walls, (3) Windows and Doors, (4) Oceanfront Patio/Basement, and (5) Interiors. (R. pp. 1429-35).¹¹

Despite overwhelming evidence of longstanding defects in the House, and ignoring the advice and suggestions of several experts and consultants, Owner waited until August 5, 2013 (14 years after Guest first gave her written notice of the existence of roof leaks, basement leaks, and interior damage within the House (See R. pp. 1085-87), and nearly 5 years after Consultant informed Owner that her claims against RCA were time-barred (See

¹⁰ Note that Owner gave this document to Consultant in July 2008. (See R. p. 1467).

¹¹ Clements also issued preliminary reports on May 10, 2011, (R. pp. 1408-12), and on December 29, 2011. (R. pp. 1413-25).

R. p. 1449)), to file her complaint, alleging the discovery of, “latent and previously undiscoverable deficiencies, decay and rot.” (Appellant Br. at 1. See also R. p. 39, ¶ 6).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746 (Ct.App. 1998). “Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations.” *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct.App. 2014). Summary judgment should be granted when, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000) (quoting Rule 56(c), SCRCP). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Id.* “Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial.” *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App. 2004). 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 she had a claim becomes a matter of law to be decided by the trial court. *Johnston v. Bowen*, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim

because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim); *Knox v. Greenville Hospital System*, 362 S.C. 566, 571-72, 608 S.E.2d 459 (Ct.App. 2005) (holding trial court viewed evidence objectively and properly determined when plaintiff's claim should have been discovered).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED RCA'S MOTION FOR SUMMARY JUDGMENT.

A. The Statute of Limitations Has Run on Owner's Claims Against RCA.

The applicable statute of limitations for Owner's claims against RCA (negligence/gross negligence and breach of implied warranty of service) is three years. S.C. Code Ann. §§ 15-3-530, -535 (2005). Owner had actual and constructive knowledge of alleged defects in the House as early as February 1999, (See R. pp. 1085-87), yet did not file suit against RCA until August 5, 2013. (R. pp. 38-41). However, notwithstanding the undisputed fact that she was aware of these defects and their increasing severity for 14 years before she filed suit, Owner argues the statute of limitations on her claims did not begin to run until 2011-12, when Clements issued his investigative reports. (Appellant Br. at 14-17). Owner's argument is not only incredible given the facts in the Record, it flies in the face of settled South Carolina legal precedent.

As recognized by the South Carolina appellate courts, "[s]tatutes of limitations are . . . fundamental to our judicial system," *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548 (Ct.App. 2005) (internal quote and citation omitted), and, "promote justice by forcing parties to pursue a case in a timely manner." *State ex rel.*

Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000). "Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hauled into court to defend time-barred claims. . . . Moreover, limitations periods discourage plaintiffs from sitting on their rights." *Carolina Marine*, 363 S.C. at 176.

To determine when a cause of action arose, South Carolina courts employ the "discovery rule." See *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989). Under the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001). The applicable limitations period for a claim begins to run when a plaintiff "knew or by the exercise of reasonable diligence¹² should have known that [s]he had a cause of action." S.C. Code Ann. § 15-3-535 (2005). See *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C.254, 692 S.E.2d 510, 513 (2010); *Hedgepath*, 348 S.C. at 355-56, 559 S.E.2d at 336; *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App. 1999).

¹² "The exercise of reasonable diligence means simply that an injured party must act with some promptness when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of . . . has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). See also *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989).

For purposes of this case, it is important to note that the statute of limitations began to run from the point Owner had notice of an injury or claim. Indeed, a key element in the reasonable diligence test is "notice." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). See also *Hedgepath*, 348 S.C. at 356, 559 S.E.2d at 336; *Bayle*, 344 S.C. at 126, 542 S.E.2d at 741. A cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that she might have a remedy for a harm. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183 (Ct.App. 2004) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996)). It is immaterial that an injured party may not comprehend or appreciate fully the potential extent of the damage as the statute is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. *Snell*, 276 S.C. at 303, 278 S.E.2d at 334. This is an objective test governed by when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist, not an examination of whether a plaintiff knew with certainty that she had a claim or when she sought the advice of counsel, developed a full-blown theory, or identified the wrongdoer. See *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; *Wiggins*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); *Snell*, 276 S.C. at 303, 278 S.E.2d at 334; *Hedgepath*, 348 S.C. at 356, 559 S.E.2d at 336; *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App. 2000); *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799 (Ct.App. 1997); *Rumpf*, 357 S.C. at 395 (citing *Young*, 333 S.C. at 719, 511 S.E.2d at 416); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989). South Carolina courts have consistently held that once a reasonable person has reason to believe that a right has been invaded or that

she may have a claim against another, the requirement to investigate takes precedence over the person's inability to ascertain the extent of her damages or even the possibility that damages may be recoverable. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 680 S.E2d 778 (Ct.App. 2009) (holding reasonable person would direct an inquiry into cause of account shortfall); *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838 (Ct.App. 2002) (holding plaintiffs had responsibility to investigate their claim once they had information that would place a reasonable person on notice that they had a possible cause of action); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989) (noting that statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). Finally, once a person knows or should know that she has some claim against another, the statute of limitations begins to run for all claims against all parties based on that injury. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). See also *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27 (Ct.App. 2004).

Owner was put on notice of her claims against RCA as early as February 1999. Indeed, as the undisputed facts reveal, and in recognition of the known problems with the House, Owner engaged numerous experts and professionals to both investigate and remedy the defects in the structure. Yet, despite having knowledge of the defects which she had been unable to remedy over a 14-year period, Owner waited until August 2013 to bring this suit.

Owner had actual notice of problems with the House in February 1999, when Guest informed her of roof and basement leaks, (See R. p. 1086) – meaning the statute of limitations ran in February 2002. Owner admitted that Repair Contractor's 2004-05 efforts were intended to remedy defects in RCA's original construction (R. p. 438, line 21 – p.

439, line 10; p. 439, line 22 – p. 440, line 8) – meaning the statute of limitations ran in 2007 or 2008. At worst, Owner was put on notice in October 2008, when Consultant made her aware of both defects in RCA’s construction and the existence of expired claims against RCA (R. pp. 1440-49) – meaning the statute of limitations ran in October 2011. Even when construing the evidence in the light most favorable to Owner, the Record is replete with evidence establishing Owner’s knowledge of defects and claims against RCA. Therefore, Owner’s claims are time-barred as a matter of law and summary judgment was proper.

B. The Alleged Construction Defects Were Not Latent.

In an attempt to evade the limitations period, Owner argues that the alleged defects in the House were latent and, therefore, the statute of limitations did not begin to run until she and Clements discovered the exact cause of the alleged defects in 2011-12 – at least 12 years after she first had actual knowledge of the defects. (See Appellant Br. at 1, 5-9, 14-18). Not only does Owner misapprehend and misconstrue the meaning of the term “latent,”¹³ the facts reveal that the alleged defects were open, obvious, and known to Owner. Furthermore, Owner’s arguments are contrary to established South Carolina precedent on these issues.

South Carolina courts have held repeatedly that the statute of limitations can be triggered even if a plaintiff does not know the exact cause of her injury or has not developed a full-blown theory as to the cause of her injury. See, e.g., *Shell v. Columbia Gun Exch.*,

¹³ Throughout her brief, Owner attempts to redefine “latent defect” to mean something akin to a “defect not yet diagnosed with precision.” Owner’s definition is incorrect. “Latent” is more correctly defined as, “hidden; concealed; that does not appear upon the face of a thing.” *Black’s Law Dictionary*, (West 2nd Edition).

Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). All that is required to trigger the statute of limitations are “facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right of [hers] has been invaded or that some claim against another party might exist.” *Id.*

In her affidavit presented in opposition to RCA’s motion for summary judgment, Owner admits that she retained Clements as her causation expert in 2011, “to investigate the root cause of problems at the [House] . . .” (R. p. 178, ¶ 8 (emphasis added)). At most, Owner’s affidavit establishes only that the exact cause of the defects in and damage to the House was unknown to her at that time. Owner’s affidavit fails to establish that the defects and damager were anything other than open and obvious or that she did not have notice of the alleged defects and damage prior to 2011.

Similarly, in his affidavit presented in opposition to RCA’s motion for summary judgment, Clements testified, “In my opinion, the root cause of many of the observed visual deficiencies could not have been fully explained without complete removal of the interior and exterior building components.” (R. p. 192, ¶ 16 (emphasis added)). However, as he must, Clements acknowledged that only the root causes of the alleged defects were “latent” prior to his 2011 forensic investigation. Correctly, Clements expressly recognizes the existence of “observed visual deficiencies” prior to his 2011 forensic investigation. (R. p. 192, ¶ 16). Therefore, the testimony of both Owner and Clements fails to create a question of fact with regard to the argued latency of the defects/damage, or when Owner was put on notice of claims against RCA, or when the statute of limitations on those claims began to run. At most, these affidavits do no more than suggest that, until 2011, Owner was unaware of the “root cause” of the defects and damage she knew about since 1999.

Even if RCA were to concede that the root causes of the alleged defects were latent, Owner cannot refute the fact that the damage stemming from these root causes was patently obvious and known to her since 1999. As the Circuit Court found, the Record is replete with evidence of Owner's admitted knowledge of defects in the House and repeated instances from 1999 to 2008, when Guest and professionals¹⁴ informed Owner about defects in RCA's construction, damage to the House, the need to investigate the defects and damages, and the existence of claims against RCA.

Consider, for example, Owner's admission that she engaged Repair Contractor in 2004-05 for the purpose of addressing and correcting identified defects in RCA's original construction, including defects in the roof, leaks at windows and doors, and patio/basement leaks. (R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 6). There is absolutely no question that Owner knew of extensive defects in RCA's work in 2004-05 and paid Repair Contractor \$359,728.21 to repair these defects. (See R. p. 1304). These undisputed facts, standing alone, establish that the statute of limitations on Owner's claims began to run no later than 2004-05.

Also contrary to Owner's contention that the defects were latent are her admissions that she was aware of a long history of roof and basement leaks dating back to the 1990's (R. p. 317, lines 13-21; p. 330, lines 16-19; p. 331, lines 14-25); of numerous leaks in the roof, at a kitchen wall, in the chiller room, at vents/louvers, and at windows in 2001 (R. p. 342, lines 5-10; p. 350, lines 2-9; p. 355, lines 2-18; p. 360, lines 15-19; p. 361, lines 17-24; p. 363, lines 7-8; p. 367, line 25 – p. 368, line 5; p. 374, lines 17-21; p. 378, lines 12-16); of

¹⁴ Property Manager, Repair Contractor, Repair Supervisor, AIG, Realtor, and Consultant.

interior mildew problems in 2001 (R. p. 374, lines 17-21; p. 378, lines 12-16); that Repair Contractor retained the services of an engineering firm (CSA) in 2003 in an effort to identify and diagnose problems with the House (R. p. 412, line 25 – p. 413, line 12); of water infiltration at the rear doors; basement leaks from the pool deck, and cupped/discolored hardwood floors in 2006 (R. p. 444, lines 2-14; p. 445, lines 1-5); and of problems with the House that needed repair in 2009, including the roof, mold, and damaged/cupped hardwood floors. (See R. p. 1509, line 24 – p. 1510, line 3).

Additionally, the Record indicates the statute of limitations began to run as early as 1999, when Guest began to warn Owner of defects in House. (See R. pp. 1085-87). In March 2001, Guest informed Owner that roof leaks were one of “the most important problems” with the House. (R. p. 1100. See R. p. 966, lines 4-10). In September 2001, Guest informed Owner that he had researched at least two local moisture intrusion consultants due to the leaks at the House. (R. pp. 1117, 1455-56). Most notably, on October 24, 2001, Guest informed Owner’s late husband of numerous construction issues and warned him that “the ‘Statute of Limitations’ will end soon.” (R. p. 1120 (emphasis added)). Taking Guest’s warnings in sum, the statute of limitations on Owner’s claims began to run no later than 2002.¹⁵

¹⁵ From 1999 through 2002, Guest informed Owner of a multitude of open and obvious defects and damage in the House. Guest notified Owner of numerous and repeated leaks throughout the House, including leaks in the roof; at chimneys/fireplace flues; at wall vents/louvers; within exterior walls; at windows; at ocean-side doors; and in the basement where the pool deck/patio connects to the House. During this time period, Guest also informed Owner of numerous and repeated instances of interior water damage at multiple locations, including hardwood flooring separation, mold/mildew, peeling paint, water stains, drywall/wallpaper damage, saturated subfloor framing, water intrusion into a kitchen wall, at water intrusion in the breakfast room wall. (See R. pp. 1085-1112, 1116-17, 1121-22; 1125-26, 1405-07, 1450-52, 1454-56).

This is not the only warning Owner received about defects in the home and the running of the statute of limitations. In January 2004, Repair Contractor wrote to Owner recommending more aggressive repairs to the roof and the investigation of window and basement leaks. (R. pp. 1195-96). At this time, Repair Contractor informed Owner that “South Carolina has a 13-year statute of limitation (sic) for water intrusion. Your home is approaching that deadline. . . . I strongly urge you to contact the builder/roofer who installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel.” (R. p. 1195, ¶1.c. (emphasis added)).

On October 13, 2008, Consultant prepared a report summarizing her investigation of water intrusion issues at the House and offering suggestions for future action. (R. pp. 1440-49. See also R. p. 722, lines 15-17; p. 724, lines 12-22; p. 1364). Consultant’s report included a timeline that chronicled the history of longstanding water intrusion, prior attempts at repair, and the findings of prior consultants. (R. pp. 1466-68. See also R. p. 722, lines 4-11). Consultant’s report also noted numerous existing defects in the House. (R. pp. 1440-49). Consultant suggested Owner make repairs to the structure and seek the advice of legal counsel. (R. p. 1444) Moreover, Consultant provided a list of items for which she believed RCA was responsible, including roof defects/leaks, moisture/leaks in the basement, and window and door defects/leaks – all of which “are numerous but bottom line is that the Statute of Limitations ran out in May 2007.” (R. p. 1449 (emphasis added)).

Owner’s contention that the defects in the House were “latent” prior to 2011 is wholly unsupported by the facts and absolutely incorrect. From 1999 to 2008, Owner received

many more warnings of defects and damage.¹⁶ Owner's admissions, information relayed to Owner by her agents, and knowledge imputed to Owner through her agents establish, without question, that Owner has been aware of the alleged defects in RCA's work since at least 1999 – at the absolute latest, 2008. Yet, despite this, Owner did not bring this action until August 5, 2013, long after the statute of limitations had expired. Owner's repeated reference to these known defects as "latent" is not only incorrect, it is a patent attempt to avoid the application of established precedent to the facts of this case. Therefore, the Circuit Court was correct in ruling that Owner's claims are time-barred.

¹⁶ For example, from 2001 through 2008, Property Manager notified Owner of numerous, repeated, and worsening problems, including roof leaks (See R. p. 1128, ¶ 12; p. 1457-58), leaks at windows (R. p. 1114; p. 1128, ¶ 12), leaks at doors (R. p. 1114), air intrusion through unsealed penetrations in the building envelope (R. p. 1118), and a patio leak causing subfloor damage. (R. p. 1303). Property Manager also informed Owner of numerous and repeated instances of interior water damage at multiple locations within the House, including mold/mildew, caulking cracks at windows, drywall/wallpaper damage, trim cracks at windows, ceiling damage/stains, condensation in the basement, and warped hardwood flooring. (See R. pp. 1113-14, 1354, 1355, 1360, 1363, 1367, 1457-61). In 2006, Property Manager also suggested to Owner that she have the cause of interior mold investigated. (R. pp. 1337-38). From 2003 through 2005, Repair Contractor informed Owner of a multitude of open and obvious defects, including roof leaks and roof defects (R. pp. 1134-35); rotten studs and sheathing within exterior walls requiring the replacement of exterior siding and trim (R. pp. 1275-76. See also R. pp. 1285-86); exterior trim rot (R. p. 1135, ¶ 10.b.); leaks into the basement caused by water intrusion at the patio above and by storm water (R. p. 1134, ¶¶ 3, 4; p. 1136, ¶ 13; pp. 1296-97); and damage to interior finishes. (R. p. 1134, ¶¶ 5-6, 8-10; p. 1135, ¶¶ 10-15, 17-23, 25; p. 1195; p. 1197, ¶ 6; p. 1198, ¶¶ 10-11. See also CSA's August 2003 observations and recommendations (R. pp. 1155-71); Albrecht Envtl. May 2004 Recommendations (R. pp. 1277-84)). To address known defects in RCA's original construction work, in July 2003 Repair Contractor recommended the complete replacement of the roof, destructive testing to determine the source of window leaks, removing the patio tile and installing waterproofing where the patio connects to the House, and replacing the patio tile with a slope away from the structure. (R. pp. 1134-36). See also Repair Supervisor Recommendations (R. pp. 1177-89, 1298-1302).

C. The Record Is Devoid of Conflicting Evidence.

The Circuit Court found that the statute of limitations began to run more than three years before Owner initiated the present action. (R. pp. 11, 35-36). Owner contends the Circuit Court failed to address conflicting evidence that supports her position that the statute of limitations did not begin to run until 2011. (Appellant Br. at 10-14, 18-21). Although she has attempted to create conflicts in the evidence as to irrelevant matters, Owner has failed to present any conflicting evidence as to when she discovered her damages or when the statute of limitations began to run.

In order to defeat a motion for summary judgment based on the statute of limitations, a plaintiff must establish the existence of a question of fact through the introduction of conflicting evidence. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (“When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide.”); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct.App. 2010) (“If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.”). 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 she had a claim is a matter of law to be decided by the trial court. *Cf. Johnston v. Bowen*, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because, even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim); *Knox v. Greenville Hosp. System*, 362 S.C. 566, 571-72, 608

S.E.2d 459 (Ct.App. 2005) (holding trial court viewed evidence objectively and properly determined when plaintiff's claim should have been discovered).

1. Owner Attempts to Create Conflicts in Immaterial Facts.

Owner contends the Circuit Court failed to consider excerpts from the 2003 CSA report (R. pp. 1155-71) and the 2008 Consultant report (R. p. 1440-49) that suggest certain problems with the House are the responsibility of someone or something other than RCA and its construction. (Appellant Br. at 12-14). In her brief, Owner complains that the Circuit Court's Order (1) did not state the purpose of CSA's survey was to determine the sources of isolated areas of damage and fungal growth, (2) did not include CSA's suspicion that the HVAC system and environmental forces may be contributing to the air/water intrusion, and (3) did not include CSA's summary stating, "[O]utside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressuring the home. Isolated cases of water damage can be investigated and repaired on an individual basis." *Id.* at 12-13.

Owner fails to recognize, however, that the purported "conflicts" in this evidence do not relate to the key issue in this case, which is, "When was Owner on notice of the existence of a claim against RCA?" While RCA acknowledges that the CSA report does refer to concerns with the HVAC system (which is not RCA's responsibility), the fact remains that the CSA report also put Owner on notice of defects in the House that a reasonable person would objectively attribute to RCA. For example, the CSA reported references "ongoing water intrusion around windows, at roof valleys, and at several sub-grade locations" and recommends the removal of certain windows and roof sections to investigate the source of water leaks. (R. pp. 1157-61, 1164). These problems clearly are

attributable to RCA. This evidence was sufficient to put Owner on notice of defects in the House in 2003.

Even assuming, for the sake of argument, that Owner was not aware of a claim against RCA when CSA issued its August 2003 report, Owner's admission that Repair Contractor's 2004-05 repair efforts were intended to address defects in RCA's original construction work, including defects in the roof, exterior walls, windows and doors, and patio/basement leaks, belies all of Owner's contentions that she did not know she had claims against RCA or that the defects were latent. (R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 6).

Owner also complains that the Circuit Court failed to consider excerpts from Consultant's October 2008 report in which Consultant opined that the major contributor to mold was the HVAC system (which is not RCA's responsibility) and recommended that Owner pursue legal action related to problems with the HVAC system, but not claims for defects in RCA's work. (Appellant Br. at 13-14). This is, however, irrelevant. Owner cannot refute the portions of the 2008 Consultant report that give Owner a list of defects for which RCA was responsible and stated those defects, "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (R. p. 1449 (emphasis added)).

Owner also asserts that her election between "conflicting" advice as to the scope of necessary repairs creates a question of fact for the jury. (Appellant Br. at 18-21). However, Owner's election between conflicting advice from her professionals regarding the scope of repairs is irrelevant to the issue in this case. The issue is when Owner was put on notice of a claim against RCA such as to trigger the running of the statute of limitations. Both CSA and Consultant (and others) informed Owner that there were original construction

defects. Consultant (and Repair Contractor) went beyond that and informed Owner that she had claims against RCA; although, Consultant informed Owner that the statute of limitations had already expired as to those causes of action.

In order to establish the evidentiary conflict necessary to create an issue of fact for the jury under these circumstances, Owner must, at a minimum, present evidence that her advisors informed her that construction defects did not exist and that she did not have claims against RCA. This evidence does not exist. The only evidence in the Record regarding the running of the statute of limitations is that numerous persons repeatedly notified Owner of the existence of construction defects and of claims against RCA. In the face of these repeated notifications, Owner elected to take no action and the statute of limitations expired years before she chose to file this lawsuit. Therefore, the Circuit Court's grant of summary judgment to RCA based on the statute of limitations was proper.

2. Owner Fails to Create a Question of Fact as to the Need to "Deconstruct" the House and the Nature of the Damage.

Owner's failure to timely file suit was not reasonable under the circumstances and does not give rise to a jury question. Owner contends a jury question exists with respect to whether she acted reasonably under the circumstances. (Appellant Br. at 18-21). Specifically, Owner contends a jury question exists as to (1) whether she acted reasonably given the fact that it was only in 2011 when someone recommended that she "deconstruct" the House to assess defects and (2) whether she reasonably believed the damage suffered by the House was merely routine maintenance items, rather than construction defects. *Id.*

As discussed herein, South Carolina applies an objective standard when determining when a plaintiff is on notice of a claim. See, e.g., *Joubert v. South Carolina Dep't of Soc.*

Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct.App. 2000). Aside from her self-serving claim that she acted reasonably under the circumstances, Owner has failed to present any conflicting evidence giving rise to a question of material fact for the jury. If the Court were to accept Owner's bald statement that she acted reasonably under the circumstances here, the objective standard requirement would be abrogated and summary judgment would never be available on the issue of the statute of limitations. Owner must present a question of material fact to defeat summary judgment, and she has failed to do so.

Owner also argues that a jury question exists as to whether she acted reasonably in choosing not to "deconstruct" her home prior to the "unprecedented" forensic deconstruction by Clements in 2011. Owner's argument appears to suggest that this State's statute of limitations jurisprudence does not apply if complying with South Carolina law proves burdensome. Again, the law imposes an object standard under which a reasonable person in Owner's situation would or should have known of claims against RCA as early as 1999. If the statute of limitations was not triggered in 1999, it surely began to run in 2004-05 when Owner admitted she knew that Repair Contractor's efforts were intended to remedy known defects in RCA's construction.

In support of her argument, Owner relies upon the testimony of Russ Cooper. (Appellant Br. at 7-9, 20). In his deposition, Mr. Cooper agreed that once a defect is covered by another building component (for example, exterior siding) it cannot be seen by the human eye (see R. p. 1049, line 4 – p. 1050, line 5; p. 1067, lines 7-12), and that removing all the siding to determine the source of water intrusion is an extreme measure. (R. p. 1063, lines 1-24). First, this testimony is wholly irrelevant to the issue of when Owner was put on notice of claims against RCA or when the statute of limitations began

to run; therefore, it is immaterial and of no consequence. Second, Russ Cooper gave this testimony on August 26, 2015 – years after that statute of limitations had run. Therefore, any claim that Owner somehow relied upon these statements so as to toll the running of the statute of limitations is meaningless.

Similarly, Owner contends that Respondent SRW advised her in 2011 that she should not deconstruct the House and should perform isolated repairs only. (Appellant Br. at 20). Again, this evidence is irrelevant to the issue of when the statute of limitations began to run. Further, the alleged advice from SRW was given in 2011 – years after the statute of limitations had run. Moreover, Owner did not follow SRW's alleged 2011 advice.

The issue at hand is not what Owner believed or knew or thought to be reasonable. The law imposes an objective standard upon her actions and the evidence proves that, in the light of repeated warnings and her admitted knowledge of construction defects, Owner failed to act with reasonable diligence with respect to pursuing claims against RCA. She elected to wait until 2011 to identify the “root cause” of the defects in the House and, in the meantime, the statute of limitations on Owner's claims expired.

3. The Affidavits Relied Upon by Owner Do Not Create a Question of Material Fact and Should Be Disregarded.

In *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct.App. 2014), this Court held that a plaintiff “cannot manufacture a genuine issue of material fact ... by submitting conflicting statements of fact ... either by affidavit or within one's own deposition testimony.” *Id.* at 141, 767 S.E.2d at 452. *McMaster* involved a medical malpractice claim brought against a doctor for overprescribing the drug Adderall to the plaintiff. The trial court granted summary judgment to the doctor, finding the statute of limitations barred

plaintiff's claims. *Id.* On appeal, the plaintiff argued summary judgment was improper because, although the plaintiff's deposition testimony indicated he failed to file his action within the limitations period, the trial court erred in not considering his affidavit, which contained evidence that contradicted his deposition testimony. *Id.* at 148–49, 767 S.E.2d at 456. This Court concluded the trial court did not abuse its discretion in excluding the plaintiff's affidavit as a “sham affidavit.” *Id.* at 149–51, 767 S.E.2d at 456–58. Specifically, the *McMaster* court noted the statements in the affidavit differed greatly from the plaintiff's deposition testimony, the plaintiff failed to explain his contradictory statements, and “[t]he last-minute submission of the affidavit indicate[d] [he] was attempting to create an issue of fact for purposes of summary judgment.” *Id.*

In the present case, the affidavit of Clements was executed on September 9, 2015, and Owner's affidavit was executed on September 10, 2015 – six and five days, respectively, before the hearing on RCA's motion for summary judgment. (See R. pp. 8, 177-194). Owner's affidavit differs greatly from her deposition testimony (in which she admitted knowledge of numerous defects and that she was aware of defects in RCA's construction work in 2004-05) and from the undisputed facts in the Record. As shown above, the evidence overwhelmingly supports the conclusion that Owner's claims against RCA were time-barred for years before she filed this action. Owner has failed to explain her contradictory statements that she believed the defects and damage she observed, or was informed of, prior to 2011 were simple maintenance issues. Aside from the fact that neither

the affidavit of Owner nor Clements creates a question of material fact,¹⁷ both affidavits should be disregarded according to the principles set forth in *McMaster*.

D. The Circuit Court's Grant of Summary Judgment to RCA Is Consistent With Established Jurisprudence.

Owner incorrectly contends the Circuit Court should have denied RCA's motion for summary judgment based on the holdings in *Santee Portland Cement Co. v. Daniel International Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), *Holly Woods Association of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011), *Centex Homes v. South Carolina State Plastering, LLC*, No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010); and *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct.App. 2015).

In *Santee*, our Supreme Court reversed the grant of summary judgment based on the statute of limitations because the plaintiff in that case presented evidence that the defects in the structures were latent. 299 S.C. at 274, 384 S.E.2d at 696. Specifically, the allegedly defective metal reinforcing rods were located within concrete walls and were not readily observable. *Id.* Owner's reliance on *Santee* is misplaced because, as shown above, the alleged defects in the House were not latent; rather, Owner was aware of the defects as early as 1999. (See R. pp. 1085-87). Even if the Circuit Court agreed that the exact cause of the alleged defects could not have been discovered until Clements' destructive testing in 2011, the mountain of evidence presented by RCA establishes that the defects were not

¹⁷ A careful reading of the affidavits of both Owner and Clements establish that Clements' 2011-12 investigation was intended to determine the "root cause" of defects in the House that Owner had been aware of for years. Neither affidavit creates a question of fact as to when Owner was put on notice of claims against RCA or as to when the statute of limitations began to run.

latent and Owner had longstanding knowledge of them since 1999. Therefore, *Santee* is inapplicable to the facts of the present case.

In *Holly Woods*, this Court affirmed the trial court's refusal to grant the defendants' directed verdict motion based on the statute of limitations because the plaintiff presented evidence that the drainage problems identified in 2002, which formed the basis of their suit, were different from drainage problems that occurred in 1991, 1998, and 2000 at other areas within a neighborhood. 392 S.C. at 185, 708 S.E.2d at 794. In contrast, Owner has failed to present any evidence that the defects she claims to have discovered in 2011 are different from the host of defects suffered by the House and known to her since 1999. Therefore, the holding in *Holly Woods* is inapplicable to the evidence presented in this case.

In *Centex Homes*, a general contractor discovered water intrusion in Building 1 in 2006 and, after making repairs, brought suit against its stucco applicator in 2008. The stucco applicator asserted that the general contractor knew or should have known that it had a claim against stucco applicator in 2002, when the general contractor discovered water damage in Building 3. Notably, however, the general contractor used a different subcontractor to install the stucco on Building 3. The general contractor presented evidence that it had experts inspect Building 1 in 2002 and, based on their findings, concluded that corrective action was not warranted. Based on these facts, the federal district court denied the stucco applicator's motion for summary judgment because the general contractor presented conflicting evidence that created a question of fact for the jury to decide. However, *Centex Homes* does not apply in the present case because Owner has

failed to present conflicting evidence as to when she was put on notice of defects in RCA's construction work. Therefore, Owner's reliance upon *Centex Homes* is misplaced.

Finally, Owner complains that the Circuit Court failed to address this Court's holding in *McAlhany*. In that case, the trial court granted the defendants' motions for summary judgment based on the statute of limitations. 415 S.C. at 54, 781 S.E.2d at 107. The defense motion was based on plaintiff's deposition testimony that he discovered mold within his residence in 2007. *Id.* at 59, 781 S.E.2d at 108. However, the plaintiff later testified in his deposition that he discovered the mold in 2008, and then stated he did not discover the mold until 2009. *Id.* at 61, 781 S.E.2d at 109. This Court reversed the grant of summary judgment because plaintiff's testimony was conflicting with regard to when he discovered mold in his house; thus, a jury could find the plaintiff was confused about the dates he discovered the mold, rather than intentionally contradicting his earlier testimony. 415 S.C. at 64, 781 S.E.2d at 111. In the present case, again, Owner has failed to present conflicting evidence with respect to when she discovered the defects in the House.¹⁸ Therefore, *McAlhany* has no application to the facts of this case.

Owner contends the Circuit Court's grant of summary judgment was improperly based upon inapplicable case law. The Circuit Court relied heavily on *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996), and *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), both of which are applicable to the facts of the present case and support the Circuit Court's grant of summary judgment.

¹⁸ Again, the affidavits of Owner and Clements establish only that the "root cause" of known defects was discovered in 2011-12.

In *Dean*, Dean purchased a building in September 1984 after a contractor inspected and deemed it structurally sound. 321 S.C. at 362, 468 S.E.2d at 645. Two months later, Dean noticed a fine crack in the building façade, which she thought might be related to nearby pile driving performed by Ruscon. *Id.* Dean immediately hired expert consultants to examine the crack. *Id.* Several months later, Dean noticed that the original crack had expanded and the façade was beginning to bulge and buckle at that location. Further, a second crack had appeared at another location. *Id.*, 468 S.E.2d at 646-47. After being informed that the building was no longer structurally sound, Dean brought suit against Ruscon in 1991. *Id.*, 468 S.E.2d at 647. At trial, the court directed a verdict against Dean, finding as a matter of law that the statute of limitations had expired prior to the filing of her lawsuit. *Id.* at 363.

On appeal, our Supreme Court affirmed, holding that the statute of limitations began to run in November 1984 when Dean initially discovered the first crack. *Id.* at 364-65, 468 S.E.2d at 648. The court held, "Because Dean had notice in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date." *Id.* at 366, 468 S.E.2d at 647. Further, the court stated, "Dean's subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved." *Id.* Moreover, the "fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial." *Id.*

In *Barr*, the Barrs purchased a house in February 1985. 330 S.C. at 642. From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the Barr's house. *Id.* The termite inspectors also suggested repairs to alleviate the moisture

problem. *Id.* In August 1992, the Barrs received a structural engineering report that disclosed numerous defects in the house, several of which were unrelated to the moisture problem. *Id.* at 643. The Barrs filed suit in March 1994. *Id.* This Court upheld summary judgment for the defendant based on the statute of limitations. *Id.* at 645-46. The court held a termite inspection report noting moisture in the crawl space of the Plaintiffs' house was sufficient notice of water damage to trigger the running of the statute of limitations. *Id.* at 645.

Owner contends the holdings in *Dean* and *Barr* are inapplicable to the present action because *Dean* and *Barr* did not involve latent defects. As pointed out above, the present case does not involve latent defects either. Again, the overwhelming evidence, including Owner's admissions, provides no question that Owner was well aware of defects in the House prior to August 2010 – three years before she brought this suit. Therefore, Owner's attempt to distinguish *Dean* and *Barr* through the purported existence of latent defects must fail.

Owner also contends that *Barr* is inapplicable because the plaintiffs in that case neither investigated nor repaired their house upon receiving notice of defects, while Owner did both. Owner's attempt to distinguish *Barr* from the facts of this case provides nothing more than a distinction without a difference. The obvious and relevant similarity between Owner and the *Barr* and *Dean* plaintiffs is that they all had knowledge an injury sufficient to put them on notice of possible causes of action, and all of them failed to prosecute their claims with "reasonable [and timely] diligence." The fact that Owner investigated defects (that she claims were latent and unknowable) and attempted repairs through Repair Contractor, Repair Supervisor, and Consultant is of no consequence given the undisputed

fact that she took no action to preserve or prosecute her claims until filing this lawsuit on August 5, 2013— years after the statute of limitations had already expired.

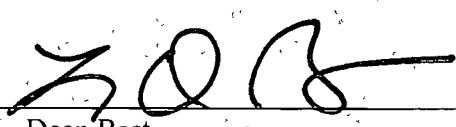
II. AFFIRMANCE IS PROPER ON ANY GROUND(S) APPEARING IN THE RECORD.

In accordance with Rules 208(b)(2) and 220(c), SCACR, RCA requests that this Court affirm the Circuit Court's decision on any grounds appearing in the Record.

CONCLUSION

For the foregoing reasons, RCA respectfully submits that the Circuit Court's grant of summary judgment should be affirmed.

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November 15, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

NOV 16 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2013-CP-10-4592
Appellate Case No. 2016-000471

Maria Allwin, ... Appellant,

v.

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

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

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

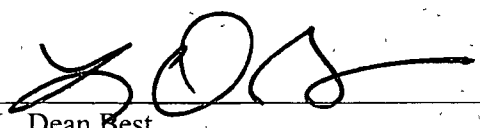
v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000471

Maria Allwin.....Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P., and Shope Reno
Wharton.....Defendants,

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

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

v.

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

FINAL BRIEF OF RESPONDENT SHOPE RENO WHARTON

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NOV 16 2016

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT'S DETERMINATION THAT APPELLANT'S CLAIMS AGAINST RESPONDENT ARE TIME-BARRED IS THE LAW OF THE CASE AND DISPOSITIVE OF THIS APPEAL.
- II. THE TRIAL COURT DID NOT ERR IN GRANTING SRW'S MOTION FOR SUMMARY JUDGMENT.
 - A. APPELLANT FAILED TO PURSUE CLAIMS AGAINST RESPONDENT SRW WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.
 - B. THE TRIAL COURT APPLIED THE CORRECT STANDARD OF REVIEW.
 - C. THE TRIAL COURT RELIED ON WELL-FOUNDED CASE LAW.
 - D. THE TRIAL COURT DID NOT ERR IN FINDING APPELLANT CHOSE NOT TO ACT WITH REASONABLE DILIGENCE.

STATEMENT OF THE CASE

Over 23 years ago, Defendant Shope Reno Wharton (hereinafter “SRW” or “Respondent”) served as the architect of record for the original construction of the Appellant’s beach house located at 133 Flyway Drive, Kiawah Island, South Carolina (hereinafter “beach house”) (R. p. 38). SRW worked with Appellant to design the beach house and issued a set of plans for construction on July 21, 1992, which were later revised in final form on August 10, 1993. (R. p. 90). Construction of the beach house was completed on or about May 18, 1994. (R. p. 295, lines 8-11). However, Appellant did not bring her claim against SRW until over twenty (20) years after the last involvement by SRW on the beach house and more than twenty (20) years after construction of the beach house was entirely complete. (R. pp. 38-41).

The record in this case is replete with evidence and written documentation demonstrating that since at least 1999 Appellant has received a plethora of reports detailing deficiencies in her beach house, including, but not limited to, water intrusion into or through the exterior walls and roof, air and water intrusion at windows and doors, water intrusion into the basement, presence of mold/mildew, and resulting damage to the interior. (Resp. RCA Final Brief, pp. 1-16). Moreover, since 2004, Appellant has hired numerous design professionals and contractors to investigate, and at times repair aspects of the reported and known deficiencies with the beach house. (Id.).

SRW had no knowledge of the issues Appellant was having with her beach house, and had no involvement after original construction whatsoever with the beach house, until SRW received a letter from Appellant’s attorney on February 23, 2011 contending design deficiencies in SRW’s work on the beach house. (R. pp. 1469-1470, “The Letter”).

The Letter alleged that design and construction deficiencies led to damages at the beach house and alleged that SRW was responsible for the same. Notwithstanding the fact that SRW had an office on Kiawah from 1993 to 1996, or that SRW worked with the Allwins from 1995 until 2001 on the design of a series of additional projects in Connecticut, the Allwins never reported to SRW any issue with the construction or design of the beach house until The Letter was sent to SRW from Appellant's counsel early in 2011. The Letter states that an investigation of the beach house "has revealed numerous and significant deficiencies" and that "[t]hese deficiencies relate to the design/installation of doors and windows, waterproofing and sealant, flashing installation and other deficiencies which have led to significant damage and which have prevented Ms. Allwin and her family from using the Home." (Id.).

The Letter was a clear expression by Appellant of design deficiencies that she alleged caused damages to the beach house. The Letter's dispositive impact on this Appeal, through the application of the applicable statute of limitations, is further discussed in the analysis section below. After receiving The Letter, SRW retained undersigned counsel and made a site visit to the beach house with counsel, but did not assist Appellant in the evaluation and repair of her home or make any representation to Appellant that SRW would assist her in performing any repairs. (R. pp. 1720-1728).

PROCEDURAL POSTURE

Appellant first filed her claim against Respondent SRW on October 8, 2014, and alleged, in part, deficiencies in the original design and construction of the beach house. (R. pp. 38-41). Respondent's Answer asserted the statute of limitations as an affirmative

defense. (R. p. 1721). In conjunction with its Answer, on November 20, 2014, SRW filed a dispositive motion based on the following three (3) primary grounds and attached The Letter to the motion as the sole exhibit: 1) Appellant is barred from any recovery against SRW pursuant to the applicable three (3) year statute of limitations (S.C. Code Ann. § 15-3-530), the applicable statute of repose (S.C. Code Ann. § 15-3-640) and relevant case law; 2) Appellant's Complaint fails to state facts sufficient to constitute a cause of action for which relief may be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCF; and, 3) Appellant failed to file an expert affidavit alleging professional negligence simultaneously with the Complaint as required by S.C. Code Ann. §15-36-100, *et seq.* (R. pp. 49-53).

SRW filed a memorandum in support of Motion for Summary Judgment on September 15, 2015. (R. pp. 89-138). The Trial Court heard oral arguments on SRW's Motion for Summary Judgment and a similar motion for summary judgment, also based on the statute of limitations, filed and argued by counsel for Respondent Russ Cooper Associates, Inc. ("RCA"), on September 15, 2015. (R. pp. 56-61). Thereafter, on December 16, 2015, the Trial Court entered its Order Granting Defendants RCA's and SRW's Motions for Summary Judgment ("Order of Summary Judgment" or "Order"). (R. pp. 7-36). In response to the Trial Court's Order of Summary Judgment, on December 29, 2015, Appellant moved pursuant to Rule 59(e), SCRCF to alter or amend the Trial Court's Order. (R. pp. 195-198). The Trial Court then entered an order denying Appellant's motion on January 28, 2016. (R. p. 37). On March 4, 2016, Appellant filed her Notice of Appeal, appealing the Order of Summary Judgment and the denial of her Rule 59(e) motion. (R. pp. 200-201).

STATEMENT OF THE FACTS

The facts of this case are undisputed. They remain the same facts, including evidence and testimony, as set forth and adopted by the Trial Court in its Order of Summary Judgment. (R. pp. 7-36). While some aspects of that Order are being challenged, the facts are uncontroverted. The facts of this case have been impeccably set forth by Respondent RCA in its Initial Brief, and any attempt to recast them herein would do little more than force the Court to review a regurgitation of the bounteous support for the Trial Court's Order and denial of this Appeal. Consequently, SRW incorporates by reference, as if set forth fully herein, the Statement of Facts as contained in Respondent RCA's Final Brief. (Resp. RCA Final Brief, pp. 1-16).

In addition to the Statement of Facts as set forth by Respondent RCA, it is crucial that SRW further identify the single most important fact distinguishing SRW's position in this case - The Letter. The importance of The Letter cannot be overstated. On its own, with consideration of no other facts, The Letter entitles SRW to affirmance of the Trial Court's Order Granting Summary Judgment, as detailed in the analysis sections below. The Letter is unchallenged and uncontroverted written evidence that supports the granting of summary judgment by the Trial Court.

The Letter is fact and the facts of the letter are as follows. The Letter, addressed and directed only to SRW, is dated February 23, 2011. (R. p. 1469). Appellant filed her first claim against SRW on October 8, 2014. (R. pp. 38-41). The Trial Court determined The Letter from Appellant to SRW was sent over three years prior to filing suit against SRW and entitled SRW to summary judgment. (R. p. 8).

The Letter was sent on behalf of Appellant through her counsel at the time, being the same counsel that has remained her attorney and has filed the current appeal. (R. pp. 1469-1470). The Letter details, in its first line, that counsel had been retained by Appellant in connection with “significant deficiencies” at the beach house. (R. pp. 1469). The Letter states that the deficiencies uncovered “relate to the design/installation” of various components of the beach house including the “doors and windows, waterproofing and sealant, flashing installation and other deficiencies”. (Id.). The Letter goes on to state that at the time of the letter those deficiencies had already “lead to significant damage” to the beach house. (Id.). The Letter demonstrates a clear understanding of the causal relationship between the design deficiencies and significant damage. The Letter also contemplates additional investigation into the condition of the home in stating that “[a]s a result of these deficiencies and the damages to property resulting therefrom, Ms. Allwin faces a significant financial burden, including the cost to complete a thorough investigation of the home.” (Id.).

The Letter warns that if SRW refuses to “investigate **and correct** the conditions at the project in a suitable manner” that Appellant will deal with the issues on her own and specifically “reserves any and all legal rights and remedies she may have against [SRW] as a result.” (Id.) (emphasis added). The Letter next unequivocally instructs Respondent to “forward this letter to your attorney and to your insurance agent/broker and any known liability insurance carriers.” (R. p. 1470). As such, the Letter places SRW on notice of a potential claim against it by Appellant and in so doing also obviously demonstrates Appellant’s notice of a potential claim it has against SRW for the design deficiencies and resulting damages – as articulated in The Letter by her attorney.

In addition to the notice of a claim against SRW for design deficiencies, more than three (3) years before actually bringing a claim, Appellant was provided evidence of defects in the beach house as best detailed in Respondent RCA's Initial Brief section "Statement of the Case." Time and time again, Appellant ignored the clear counsel, advice and recommendations of several experts and consultants, waiting for over 15 years after receiving her first written notice of the existence of roof leaks, interior damage, and basement leaks within the beach house, to file her Complaint, alleging the discovery of "latent defects" in the design and construction of her beach house. (See Resp. RCA Final Brief, pp. 1-16 and R. pp. 38-41).

I. THE TRIAL COURT'S DETERMINATION THAT APPELLANT'S CLAIMS AGAINST RESPONDENT ARE TIME-BARRED IS THE LAW OF THE CASE AND DISPOSITIVE OF THIS APPEAL.

As discussed hereinabove, the Trial Court determined that The Letter sent from Appellant to Respondent SRW over three years prior to filing suit against SRW entitled Respondent to summary judgment. (R. pp. 7-36). The Letter, dated February 23, 2011, was sent on behalf of Appellant through counsel and detailed that: 1) counsel had been retained by Appellant in connection with "significant deficiencies" at the beach house; 2) deficiencies, uncovered by an investigation "relate to the design/installation" of various building components; and 3) deficiencies "have led to significant damage" to the beach house. The Letter was intended to place Respondent on notice of a potential claim and instructed Respondent to "forward this letter to your attorney and to your insurance agent/broker and any known liability insurance carriers." (R. pp. 1469-1470).

As noted in the Order and hereinafter, Appellant named Respondent as a defendant on October 8, 2014. (R. p. 33). The Trial Court concluded The Letter notified

respondent “of a potential claim against it, due to design and construction deficiencies” and “was sent more than three years and seven months before the lawsuit was filed against [Respondent] in October of 2014.” *Id.* In consideration of The Letter, the Trial Court concluded that “[t]he clear and undisputed evidence before the Court establishes that [Appellant] was on notice of the alleged defects[. . .] in the design work performed by [Respondent] for more than three years prior to filing this lawsuit.” *Id.*

Despite taking issue with several specific points within the Order, Appellant has failed to challenge the Trial Court’s ruling that The Letter confirmed Appellant’s knowledge of claims against SRW and established that prosecution of those claims was made outside the relevant statute of limitations period. It is well-settled, that “an unappealed ruling is the law of the case and requires affirmance.” Shirley’s Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). “Thus, should the appealing party fail to raise all of the grounds upon which a lower court’s decision was based, those unappealed findings—whether correct or not—become the law of the case.” Dreher v. S.C. Dep’t of Health & Envtl. Control, 412 S.C. 244, 249-50, 772 S.E.2d 505, 508 (2015); See also Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (“Under the law-of-the-case doctrine, a party is precluded from relitigating . . . , [*inter alia*,] matters that were not raised on appeal, but should have been”). Further, “[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.” Atl. Coast Builders & Contrs., LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

Although Appellant challenges several of the Trial Court's rulings, Appellant has failed to appeal this ruling. The failure to do so renders the Trial Court's conclusion, that The Letter is "clear and undisputed evidence" that Appellant had actual knowledge of the alleged defects more than three years prior to filing suit against Respondent SRW, the law of the case. See Shirley Iron Works. Moreover, because this issue establishes that Appellant's claims were made outside the statute of limitations period, this issue is dispositive of the instant appeal as it relates to Respondent SRW.¹ Accordingly, the Trial Court's Order should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SRW'S MOTION FOR SUMMARY JUDGMENT.

A. Appellant failed to pursue claims against Respondent SRW within the applicable statute of limitations period.

The statute of limitations period for a construction defect case is three years. S.C. Code Ann. § 15-3-530. Appellant had actual and constructive knowledge of defects with her beach house as early as 1999 and was provided with further notice continuously thereafter from a myriad of sources, yet did not pursue her claim against Respondent until October 8, 2014. (See Resp. RCA Final Brief, pp. 2-16). Appellant's assertion that the statute of limitations did not expire prior to the filing of this action is wholly without merit as will be detailed herein.²

¹ Without waiving its argument that the failure to appeal the Trial Court's ruling concerning The Letter is dispositive of this appeal, Respondent will also respond to Appellant's arguments.

² With the primary distinction between Respondent RCA and Respondent SRW being The Letter addressed only to SRW and the timing of the litigation against each by Appellant, the arguments and analysis in opposition to this appeal, as set forth in Respondent RCA's Initial Brief, are equally applicable to SRW in its nearly identical position. Accordingly, SRW fully incorporates the arguments and analysis contained in Respondent RCA's Initial Brief as if set forth herein

Statutes of limitations are not simply technicalities. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008). "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "One purpose of a statute of limitations is "to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights." Id. The Statute of limitations also works "to protect potential defendants from protracted fear of litigation." Id. (internal citation omitted). "Statutes of limitations are, indeed, fundamental to our judicial system." Id. (internal citation omitted).

Under the "Discovery rule," the statute of limitations period begins to run on a cause of action when it "reasonably ought to have been discovered." Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). "Under this rule, a cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that he *might* have a remedy for a harm. Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004), *citing* Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). The statute runs from the date the injured party "either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Rumpf, 357 S.C. at 394, 593 S.E.2d at 187. Put another way, the statute of limitations commences not simply due to knowledge, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause

of action against another. Grillo v. Speedrite Prods., Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000).

The commencement of the statute of limitations is not triggered by seeking the advice of counsel, once a full-blown theory of recovery is developed, or even when a person obtains actual knowledge of a potential claim or the facts giving rise thereto; rather, the statute of limitations commences when the party knows or should know of a claim under an objective analysis. Grillo, 340 at 503, 532 S.E.2d at 3; Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989). Moreover, "the fact that the injured party may not comprehend the full extent of the damage is immaterial." Dean, 321 S.C. at 364, 468 S.E.2d at 647 (1996).

In the case at hand, the Trial Court was presented with uncontested facts that Appellant had both actual and constructive knowledge of persistent and pervasive damage to her beach home beginning as early as 1999. (See Resp. RCA Final Brief, pp. 2-16). These known defects led Appellant to retain several experts and contractors to inspect and implement partial repairs on the beach home; however, despite having actual and constructive knowledge of said defects, Appellant did the very thing the statute of limitations seeks to guard against—she sat on her rights. Now, at this late date, Appellant is seeking to overturn the Trial Court's well-reasoned Order so that she may resurrect her claims that she was aware of for over a decade before filing suit.

B. The Trial Court applied the correct standard of review.

Appellant contends the Trial Court erred by failing to view the evidence in the light most favorable to her as the non-moving party. (App. Brief, pp. 11-14). Appellant

further argues the Trial Court selected “unfavorable” evidence for inclusion in the Order for Summary Judgment in lieu of citing evidence that was seemingly more in favor of Appellant’s position. (App. Brief, pp. 11-14). Appellant cites two instances of “unfavorable” evidence in her brief and contends that inclusion of that evidence serves as proof the trial court did not apply the correct summary judgment standard, and thus, warrants reversal of the Trial Court’s Order. (App. Brief, pp. 12-14). However, Appellant did not challenge the inclusion of that evidence in the Order for Summary Judgment before the Trial Court in her Rule 59 Motion. Instead, Appellant has raised this argument for the first time in her initial brief. See Prince v. Beaufort Mem. Hosp., 392 S.C. 599, 611, 709 S.E.2d 122, 128 (Ct. App. 2011) (stating it is “axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”). Accordingly, Appellant’s argument was not preserved for appellate review and should not be considered by this Court.

In addition to the failure to preserve this argument for appellate review, Appellant has not challenged the accuracy of the two instances of “unfavorable” evidence; rather, Appellant simply contends that the evidence is not favorable to her position. In fact, Appellant has not challenged any of the evidence included in the Trial Court’s detailed, twenty page findings of fact, which firmly establishes Appellant had knowledge of the alleged defects in her beach house as early as 1999 (R. p. 11-33). The mountain of evidence, discussed exhaustively in the Trial Court’s Order, details Appellant’s knowledge of water intrusion and other issues reported to her repeatedly by houseguests, a property manager, contractors, engineers, and experts from 1999 until initiation of this

lawsuit. Appellant has not challenged that she was informed by these individuals of the issues with her beach house and has not presented any conflicting evidence. See Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (stating “[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.”); See Ellis v. Davidson, 358 S.C. 509, 518-19, 595 S.E.2d 817, 822 (Ct. App. 2004) (stating to defeat summary judgment the nonmoving party must come forward with specific facts showing there is a genuine issue for trial). Accordingly, the facts, as set forth in the Order are not at issue in this appeal. Rather, Appellant’s argument is nothing more than a challenge of the Trial Court’s reliance on uncontested evidence that Appellant believes is “unfavorable.” However, Appellant has not challenged the veracity of the evidence nor has she presented conflicting evidence to create a question of fact. Instead, Appellant is seeking the reversal of the Trial Court’s decision because the Order cites “unfavorable” evidence.

Appellant’s squabble with the Trial Court’s Order of Summary Judgment is simply a by-product of a case devoid of favorable facts that leaves no question for jury determination. The Trial Court’s consideration and inclusion of facts that Appellant deems “unfavorable” is not indicative of the Trial Court’s disregard for the proper summary judgment standard of viewing facts in the light most favorable to the non-moving party. Rather, the Trial Court was presented with an abundance of uncontested evidence that, even when viewed in the light most favorable to appellant, failed to create a reasonable inference necessary to survive summary judgment. Moreover, viewing evidence in the light most favorable to the nonmoving party does not require a trial court

to turn a blind eye to unchallenged evidence, simply because it may not benefit the party opposing the motion. A trial court "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000).

Accordingly, Appellant's disagreement with the facts relied upon and cited by the Trial Court does not equate to an instance of the Trial Court disregarding the appropriate standard of review for a summary judgment motion. The Trial Court evaluated this case under the proper standard and correctly determined that no question of fact for a jury existed. Accordingly, this Court should affirm the Trial Court's Order for Summary Judgment.

C. The Trial Court relied on well-founded case law.

Appellant challenges the trial court's reliance on Dean and Barr³, and contends the trial court erred in failing to consider and apply the Santee⁴, Centex Homes⁵, McAlhany⁶, and Holly Woods⁷ cases. The Trial Court committed no error in the case law it relied upon to form the basis of the Order of Summary Judgment.

As an initial matter, Appellant has not fully preserved the arguments in Appellant's Section B for appellate review. As discussed in more detail below, the Trial Court included a discussion of the Dean and Barr opinions in its Order. Appellant did not

³ Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998).

⁴ Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989)

⁵ Centex Homes v. S. Carolina State Plastering, LLC, 2010 WL 2998519

⁶ McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

⁷ Holly Woods Assoc. of Residence Owners v. Hiller, 385 S.C. 344, 682 S.E.2d 818 (Ct. App. 2009)

challenge the inclusion of those opinions in the Order for Summary Judgment via its Rule 59 Motion. Accordingly, any argument regarding the inclusion or reliance upon Dean and Barr is a new argument and not preserved for appellate review. See Regions, 354 S.C. at 662, 582 S.E.2d at 439 (Ct. App. 2003) (stating it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Moreover, although Appellant challenges the Trial Court's perceived failure to consider or apply the Holly Woods and McAlhany opinions in her Rule 59 Motion, Appellant failed to raise a similar argument concerning the Santee and Centex opinions. Accordingly, Appellant's arguments regarding Santee and Centex are not preserved for appellate review. Id.

Additionally, Appellant's argument that Dean and Barr are inapplicable to the case at hand because they do not involve latent defects is meritless. Appellant premises her arguments on the assertion that the defects in her beach house were latent, and thus, undiscoverable until the beach house was decladded. Yet, Appellant has not presented any evidence that the alleged defects were in fact latent. Rather, Appellant has merely set forth bits of evidence that indicate the defects complained of were not fully appreciable until the beach house was decladded. This is a key distinction. As discussed more fully above, the statute of limitations begins to run once a person has notice that she *might* have a remedy for a harm. See Rumpf, 357 S.C. at 394, 593 S.E.2d at 187. The uncontested evidence leaves no room for contrary interpretation: Appellant had knowledge of construction defects in her beach house for more than three years prior to the initiation of this lawsuit. While Appellant may not have fully appreciated the extent of the damage, the cause of the damage, or even who was responsible for the damage,

under the discovery rule, those considerations are meaningless. The uncontested facts demonstrate that Appellant had knowledge of defects and was continuously informed of defects from 1999 until 2011, and her contention that the defects were latent or undiscoverable is simply not supported by any evidence.

Moreover, even assuming that said defects were indeed latent, the fact remains that Appellant had notice of those latent defects as far back as 1999. That is to say, regardless of whether the alleged defects were latent, Appellant had *actual knowledge* of possible claims for damage from water intrusion for nearly a decade before she asserted claims against Respondent, as evidenced by Appellant's own testimony and the testimony of others. Dozens of records provided to Appellant, from as far back as 1999, document Appellant's knowledge of chronic and continuous water intrusion at the roof, through and into exterior walls, at windows and doors, and into the basement, as well as extensive damage to interior finishes resulting from these longstanding leaks. Therefore, the mere fact the Dean and Barr cases, cited by the Trial Court, do not involve latent defects does not render those cases inapplicable.

In the Dean matter, Dean noticed a crack in the facade of her structure that manifested following pile driving taking place nearby in 1984. Dean, 321 S.C. at 362, 486, S.E.2d at 646-47. Dean had the building inspected and was admittedly aware that the crack was a result of the pile driving by defendant Ruscon. Id. In 1985, further pile driving occurred and the crack grew to the extent that the structure was deemed structurally unsound. Id. The trial court determined and the Supreme Court agreed that the statute of limitations began to run when Dean initially discovered the *first* crack. The Court held, "Because Dean had *notice* in November 1984 that she *may* have a cause of

action against Ruscon, there is no need to toll the statute of limitations beyond that date.”

Dean, 321 S.C. at 365, 486, S.E.2d at 647. (emphasis added). Further, the court held, “the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial.” Dean, 321 S.C. at 366, 486, S.E.2d at 647.

While there are factual distinctions unique to Dean and the case at hand, the Dean opinion presents an analogous situation and an applicable analysis. In both cases, the owner of a building discovered damage which led them to investigate the problem; however, despite actual knowledge of damage and a corresponding claim, neither owner pursued their claim in a timely manner. There is no question Appellant was aware of water intrusion problems with her home for over a decade before initiating the present litigation. See Resp. RCA Final Brief pp.2-16. Simply because Appellant did not comprehend that the water intrusion was a symptom of a larger problem, despite warnings to her about the same, is immaterial. As in Dean, Appellant had notice of the problems with her beach home, and despite investigating, and further learning about those problems, Appellant did not initiate the lawsuit until well after expiration of the statute of limitations.

Appellant contends that the McAlhaney opinion, which was decided after issuance of the Trial Court Order, distinguishes Dean and further renders it inapplicable to the case at hand. Appellant is mistaken in this regard. In McAlhaney, plaintiff filed suit for property damage and a personal injury claim relating to mold found in his residence. Id., 415 S.C. at 57-62, 781 S.E.2d at 107-110. This Court overturned the trial court’s granting of summary judgment finding a question of fact concerning Plaintiff’s

notice of an alleged defect was created by Plaintiff's inconsistent testimony. Id., 415 S.C. at 63-66, 781 S.E.2d at 110-112. In discussing Plaintiff's personal injury claim, the Court discussed Dean and determined that the personal injury claim created enough of a factual difference to distinguish Dean. Id., 415 S.C. at 66-69, 781 S.E.2d at 112-114. The McAlhaney opinion does not discredit the analysis in Dean. Moreover, the same factual distinctions in McAlhaney and Dean also renders McAlhaney inapplicable to the present case. Accordingly, the Trial Court did not err in its reliance on Dean and did not err in refusing to alter or amend its judgment to include analysis of the McAlhaney opinion.

In Barr, this Court affirmed the granting of summary judgment for a defendant based on the statute of limitations. The Court determined several termite inspection reports noting moisture in the crawl space of plaintiffs' residence was sufficient notice of water damage to trigger the running of the statute of limitations. Barr, 330 S.C. at 645-46 640 S.E.2d at 160. Appellant contends Barr is inapplicable to the case at hand because the plaintiffs did not act upon information regarding moisture in the crawlspace whereas Appellant took action to investigate and make certain repairs to her residence. Appellant overlooks the key factual element that links Barr and the case at hand. In both Barr and the instant case, home owners were presented with information that triggered the running of the statute of limitations and both failed to timely file suit. The Trial Court did not err in its application of Barr. Accordingly, the Trial Court's Order should be affirmed.

In addition to her claim that the Trial Court relied on inapplicable case law in rendering its decision, Appellant contends the Trial Court should have relied upon the Santee and Centex Homes decisions. The Santee Cement factory was equipped with

several concrete pocket bins one of which exhibited two minor cracks in its concrete exterior. Santee, 299 S.C. at 270-74 384 S.E.2d at 693-96. The cement factory contacted the original contractor who implemented "permanent" repairs to the cracks and performed inspections of the remaining bins. Id. The contractor certified that the remaining bins were safe and that the cracks were minor and common in such structures. Id. Subsequently, a different bin collapsed killing two individuals. Id. The Court responded to arguments that the statute of limitations began running on the date the crack was discovered in the aforementioned bin. Id. However, it was determined that the collapse of the bin was a result of defective placement of steel imbedded within the concrete walls of the bin. Santee, 299 S.C. at 270-74 384 S.E.2d at 693-96. The Santee Court determined that because the issue with the steel was undetectable, a jury question existed with respect to the reasonableness of Santee's actions following discovery of the cracks. Id.

Appellant tries to paint a picture in which her situation is analogous to that of Santee. However, the facts do not comport with such a tortured comparison. Santee presents a scenario wherein the Court was asked to start the clock on the statute of limitations after the discovery of a "minor" and "common" crack in the exterior of a concrete bin, even though a different bin collapsed as the result of a latent defect within its walls. Here, Appellant was presented with instances of chronic and extensive water intrusion into her beach home for over a decade. The Santee Court determined the defect in the Concrete bin was undetectable. In this matter, the damage to Appellant's beach home was apparent to not only Appellant, but to beach house guests, property managers, contractors, engineers, and others. In Santee, the Court had to determine whether a

common and minor crack was notice of a defect that led to an unthinkable and catastrophic result. In direct contrast to Santee, the matter before this Court presents the all too predictable scenario in which a homeowner who has experienced wide-spread and pervasive water intrusion in their home has alleged construction and design defects against those responsible for designing and constructing the house. The present case simply fails to draw any parallel to the Santee case, thus, the Trial Court did not err in its treatment of the Santee decision.

Appellant also relies on a Federal District Court Order in Centex Homes to bolster her argument that her claim is not time barred. In Centex Homes, Judge Wooten denied a motion for summary judgment premised upon the statute of limitations. Centex Homes, 2010 WL 2998519. Centex discovered and repaired water intrusion damage in building 3 of a multifamily project in 2002. Id. In 2006, Building 1, constructed around the same time as Building 3, began to exhibit signs of water intrusion damage. Id. In 2008, Centex initiated litigation against its subcontractors, in part for the damage to Building 1. Id. Several subcontractors argued that since building 1 was constructed by many of the same subcontractors, and in a substantially similar method, Centex should have been on notice of a claim regarding Building 1 when the problems with building 3 were discovered in 2002. Id. The Court noted that, although it was a close question, a question of fact existed for the jury. Id.

Appellant once again seeks to bootstrap the ruling in an inapplicable case to the facts at hand. In Centex Homes, the subcontractors sought to impute Centex with knowledge of *unknown* defects in one building because a similar building had experienced problems several years prior. In direct contrast, Appellant had *direct*

knowledge of problems with her beach home for over a decade before filing suit. The Centex Homes decision has no direct correlation to the Appellant's situation as there is no question or dispute that Appellant had *actual knowledge* of defects that had clearly manifested themselves continuously and conspicuously for over a decade. Appellant's reliance on Centex Homes is a vain attempt to create a question of fact in a matter where no such question exists. The trial court did not err in its refusal to apply the reasoning of the Centex Homes Order.

Appellant further contends the Holly Woods case applies to the matter at hand and supports her contention that the Trial Court erred in its analysis. However, in Holly Woods, this Court considered evidence presented by Plaintiffs that drainage problems in a neighborhood were different than problems that were addressed several years prior. Holly Woods, 385 S.C. at 178-85, 682 S.E.2d at 791-94. In the case at hand, Appellant has not presented any evidence that the defects alleged in her Complaint differ from any of the issues known to her since well before the expiration of the statute of limitations. Accordingly, the Holly Woods case is inapplicable to the case at hand, thus the Trial Court did not err in its refusal to rely on its holding in reaching its decision.

D. The Trial Court did not err in finding Appellant chose not to act with reasonable diligence.

Appellant contends a question of fact exists with respect to the determination of whether she acted with reasonable diligence concerning the defects in her beach house. However, as an initial matter, it is important to recall that Appellant, through counsel, sent correspondence to Respondent more than three years prior to filing suit, which put Respondent on notice of a claim, and directed Respondent to place its insurance carrier

on notice of said claim. This fact, which was relied on by the Trial Court, and has been ignored by Appellant, is dispositive of this appeal and renders Appellant's arguments regarding reasonable diligence moot.

Moreover, with respect to Appellant's reasonable diligence arguments, Appellant fails to consider well-founded South Carolina concerning the exercise of reasonable diligence and are further unsupported by citations to statutory or case authority. See Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (stating issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal). Moreover, the factual considerations noted by Appellant fail to create a question of fact.

In Dean, the Supreme Court stated:

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Dean 321 S.C. at 363-64, 468 S.E.2d at 647 (emphasis in original) (citations omitted).

The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Hedgepath v. AT&T, 348 S.C. 340, 356, 559 S.E.2d 327, 336 (Ct. App. 2001).

Reasonable diligence is intrinsically tied to the issue of notice. Id. This Court has explained: "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000) (quoting Dean, 321 S.C. at 364, 468 S.E.2d at 647). Furthermore, the statute of limitations is "not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

Adapted to suit Appellant's current needs and in hopes of bettering her chances to seek reversal of the Trial Court's Order, Appellant claims she received "conflicting" advice, sought to investigate the issues, and believed the problems related to maintenance, and, as such, based on that story, the statute of limitations did not begin to run until 2011. Such a version of events completely misconstrues and disregards the precedent concerning the discovery rule and reasonable diligence. The statute of limitations is not triggered when Appellant knew she had a claim against a particular party, when Appellant received un-contradicted advice, or when Appellant discovered the cause and extent of the damage. Instead, the law is abundantly clear that the determination of when the statute of limitations is tied to when a cause of action reasonably *ought* to have been discovered; not when it was discovered. See Dean, 321 S.C. at 363-64, 468 S.E.2d at 647. Further, discovery of the cause of action is accomplished through the exercise of reasonable diligence, which requires an injured

party to act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party *might* exist. See Young v. S.C. Dep't of Corrs., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) (Stating, "[i]n other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.").

In the case at hand, Appellant was unquestionably presented with notice of a claim over three years prior to filing suit against Respondent, as evidenced by the mountain of evidence considered by the Court, and especially given The Letter from Appellant putting Respondent SRW on notice of the present claim. In addition to the unchallenged fact that Appellant sent a letter to Respondent putting it on notice of her claim over three years prior to adding Respondent to the lawsuit, for over a decade, Appellant was presented with instance after instance of explicit notice that her beach home had major problems. Appellant's arguments that she was not on notice of her claim until the home was decladded is a bold request to this Court to disregard uncontested evidence of more than a decade of actual and constructive knowledge of pervasive water intrusion issues because Appellant received contradicting advice or because she may have believed the issues were related to maintenance. Such a conclusion would be in contravention of well-settled law. The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Maher, 331

S.C. at 377, 500 S.E.2d at 207. Accordingly, Appellant's subjective mental impressions as to what she attributed the decade of damage to her beach house is immaterial.

Appellant also asserts a jury question exists as to the reasonableness of her actions because she decided not to take "unprecedented" measures "to deconstruct" her beach house until 2011. Appellant argues that despite uncontested evidence of repeated notice that her beach house had significant problems, the statute of limitations was not triggered until she determined the root cause of the problems, over a decade after first receiving notice of the alleged defects. Simply put, Appellant is arguing that the statute of limitations should not begin to run until such time as a plaintiff discovers the specific cause and full extent of the damage complained of. This is not the law. Rather, the Courts are charged with the determination of when a reasonable person ought or might have knowledge of a *potential claim*; not when a full blown theory of recovery is developed. See Barr, 330 S.C. at 645, 500 S.E.2d at 160 (stating failure of the injured party to comprehend the full extent of damages, however, is immaterial). Appellant's argument does not comport with the law on this issue and should not be the basis for reversal of the Trial Court's order.

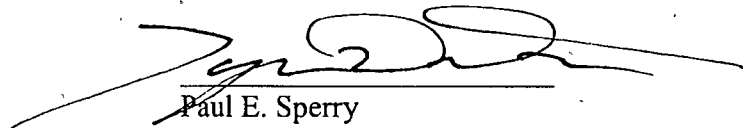
Furthermore, Appellant indicates that it is Respondents' position that the "law required" Appellant to "deconstruct" her beach house in order to exercise reasonable diligence. Such a contention is in error. Rather, Respondent contends Appellant was placed on notice of construction defects in her beach house beginning in 1999, and continuously thereafter, which would put any reasonable person on notice that a claim against the entities responsible for designing and constructing her beach house might exist. See Joubert, 341 S.C. at 190, 534 S.E.2d, p. 8 (stating the exercise of reasonable

diligence means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist). Such is the standard defining the discovery rule, a standard that Appellant failed to meet. While decladding the beach house may have been necessary to discovery the full extent of the damage, that information is irrelevant to this statute of limitations determination. See Dean 321 S.C. at 363-64, 468 S.E.2d at 647.

CONCLUSION

Therefore, for the reasons discussed herein, through all facts and arguments incorporated from the Initial Brief of Respondent RCA, and under any ground appearing in the Record the Court deems just and proper to consider, Respondent SRW submits that the Trial Court's Order should be affirmed.

Respectfully,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

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Appellate Case No. 2016-000471

SC Court of Appeals

Maria Allwin.....Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P., and Shope Reno Wharton.....Defendants,

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

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

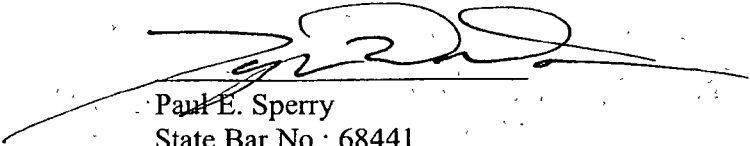
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondent Shope Reno Wharton's Final Brief complies with South Carolina Rule of Appellant Procedure 211(b).

[signature block to follow]



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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Maria Allwin, Appellant,

v.

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

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

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

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Albrecht Environmental, Inc., All Points Construction,
Inc., Patriots Drywall, Inc., Picquet Roofing, Inc.,
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(USA) Limited, Third-Party Defendants.

Appellate Case No. 2016-000471

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

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

AFFIRMED

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

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

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

Facts and Procedural History

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

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

From 1999 to 2002, Cowan reported numerous and repeated leaks including: at least twelve leaking roof incidents; chimney and fireplace flue leakage; leaks at wall vents, louvers, or within exterior walls; leaking windows; leaks on the beachfront side of the house; and leaks in the basement where the patio connected. In March 2001, Cowan wrote to the Allwins, "Roof leaks and painting appear to be the most important problems at this point." On September 4, 2001, Cowan prepared a moisture detection report noting unacceptable moisture meter readings.

In late 2001, the Allwins engaged Gamble Home Services (Gamble) to serve as the home's property manager. In 2001 and 2002, Gamble notified the Allwins of roof leaks at least twice. Between 2001 and 2008, Gamble reported leaks near windows and doors, air intrusion through unsealed penetrations in the building envelope, and

a patio leak causing subflooring damage. Gamble also told the Allwins of numerous and repeated instances of interior water damage, including mold and mildew, caulking cracks at windows, drywall and wallpaper damage, trim cracks at windows, ceiling damage and stains, condensation in the basement, and warped hardwood flooring.¹

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

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

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

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

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

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

South Carolina has a 13-year statute of limitation[s] for water intrusion.^[2] Your home is approaching that deadline. . . . [T]he roof was so poorly installed the only way to properly repair the roof is to replace it. When properly installed, your roof should last a lifetime. Even an asphalt shingle roof will last 15 to 20 years. I strongly urge you to contact the builder/roofer who installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel. Replacing the roof will necessitate removing and replacing much of the siding, thus, the cost for roof replacement will be over \$500,000.

Buffington proposed further investigation into the basement leaks and air and water intrusion at the windows. He again advised the Allwins of damage to the drywall and hardwood floors, as well as the problems with mold, mildew, and

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

peeling paint.³ He further notified the Allwins of defects in the exterior walls of the home, including rotten studs and sheathing requiring replacement of exterior siding and trim. Ultimately, the Allwins paid Buffington \$359,728.21 for the 2004-05 repairs. Following the completion of Buffington's repairs, Gamble invoiced the Allwins \$979 for repair work in November 2005; this work included caulking the bottom of the exterior cladding at the rear patio to prevent leaks into the subfloor.

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

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

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

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

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

In 2008, Maria Allwin⁵ hired consultant Victoria Stein of Atlantic Builders to evaluate the home. Stein's October 2008 report summarized her investigation of water intrusion issues and offered suggestions for future action.⁶ Stein's report included a timeline chronicling the home's history of longstanding water intrusion and prior repairs, along with the findings of prior consultants. Although Stein opined the heating, ventilation, and air conditioning (HVAC) system was the primary cause of the mold and mildew, she expressly noted several existing defects were unrelated to the HVAC issue, including drywall damage under roof valleys, buckled hardwood flooring, and moisture in the basement area beneath the pool deck.⁷ Stein suggested Allwin make repairs and seek legal counsel. Finally, she stated "[t]he list of items that could have been laid as the responsibility of the builder are numerous but bottom line is that the Statute of Limitations ran out in May 2007."

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

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

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

⁵ Jim Allwin died in 2007.

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

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

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

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

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

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

Furthermore, it is my opinion that the level of destructive testing and deconstruction required at the subject residence to uncover latent defects was unprecedented in my experience as a forensic architect. It would be unreasonable for a homeowner to determine such a level of destructive testing or deconstruction was necessary

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

based on the visual deficiencies observed. In my opinion, the root cause of many of the observed visual deficiencies could not have been explained without complete removal of the interior and exterior building components. Additionally, through the deconstruction of the current repair project, we uncovered many instances of previously unknown construction defects and defects that were more pervasive than what was observed during limited destructive testing.

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

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

Standard of Review

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

circuit court's order granting summary judgment because the statute of limitations had run).

Law and Analysis

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

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

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

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

Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. This standard as to when the limitations period begins to run is *objective* rather than subjective. Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.

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

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

A. Evidence and Findings of Fact

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

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

The 2011 letter warned Shope Reno that if it refused to "investigate and correct the conditions at the project in a suitable manner," she would address the issues on her own and specifically "reserve[d] any and all legal rights and remedies she may have against [Shope Reno] as a result." Additionally, Allwin's Letter instructed Shope Reno to "forward this letter to [its] attorney and to [its] insurance agent/broker and any known liability insurance carriers." Thus, Allwin's letter notified Shope Reno of her potential claim against it for design deficiencies and the resulting damages. *See e.g., Johnston*, 313 S.C. at 65, 437 S.E.2d at 47 (1993) (finding that even in viewing the facts in the light most favorable to the plaintiff, the only reasonable inference is that she knew or should have known that she had a possible claim against her physician no later than 1987, when she continued to have problems with her knees and sought legal advice regarding a claim against him). In fact, in her brief to this court, Allwin admits she had knowledge of her potential claims in 2011.⁹ Because she failed to file this matter against Shope Reno until October 8, 2014, the circuit court correctly granted summary judgment.

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

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

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

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

B. Inapplicable Case Law

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

¹⁰ Latent defects have been defined as:

Latent defects are hidden defects generally involving the material out of which the thing is constructed. Latent defects are those which a reasonably careful inspection

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

This court reversed the circuit court, finding a question of fact existed as to whether the appellant was reasonably diligent in determining whether the construction company caused the damage to her building, thereby triggering the statute of limitations in 1984. *Id.* On appeal to our supreme court, the appellant argued the 1984 crack and the 1985 bulging of the bricks presented two distinct harms and, thus, two different dates of accrual existed for statute of limitations purposes. *Id.* at 364, 468 S.E.2d at 647. Our supreme court disagreed, holding the circuit court correctly directed a verdict for the construction company. *Id.* at 366, 468 S.E.2d at 648. Finding the statute of limitations began to run in November 1984—when appellant initially discovered the first crack—the court explained,

will not reveal or those which could not have been discovered by such an inspection. A latent defect is [unknown] and, in the exercise of reasonable care, could not have [been] discovered.

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

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

Id. at 365–66, 468 S.E.2d at 648.

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

In *Barr*, the appellants purchased a home from the Rock Hill Economic Development Corporation (RHEDC), which had purchased the house from the City of Rock Hill (the City) in February 1985. 330 S.C. at 642, 500 S.E.2d at 158. From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the appellants' home. *Id.* Termite inspectors suggested several repairs. *Id.* In March 1992, Mrs. Barr contacted the City and requested an inspection and report, which found several problems in the home's crawl space. *Id.* at 640, 500 S.E.2d at 159. In August 1992, the appellants received a structural engineering report disclosing numerous defects in the house, several of which were unrelated to the moisture problem. *Id.* at 643, 500 S.E.2d at 159. The appellants filed suit in March 1994. *Id.* On appeal, this court affirmed the circuit court's grant of summary judgment in favor of the City and RHEDC based on the statute of limitations. *Id.* at 646, 500 S.E.2d at 160. Despite the fact Mrs. Barr did not realize "the magnitude of the problem" until August 1992, this court held the circuit court correctly ruled the termite inspection reports were sufficient notice to trigger the running of the statute of limitations. *Id.* at 645–46, 500 S.E.2d at 160.

Allwin contends *Barr* is inapplicable here because the appellants there failed to act upon information regarding moisture in the crawlspace, whereas Allwin took

action over several years to investigate and repair the home. But Allwin's completion of some of the recommended repair work for her home does not alter the fact that, like the *Barr* appellants, she was on notice of her potential claims for some time and failed to timely file suit.

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

Santee introduced expert testimony that the defects in the silos were latent; the defective placement of the steel reinforcements was not detectable because the rods were inside the concrete walls. Although Santee did experience cracks in Bin # 12 prior to the 1980 collapse of Bin # 13, experts testified that small cracks are *common* in cement structures. Repairs of Bin # 12 totaled approximately \$11,000 and were characterized as *relatively small* for the \$2,000,000 project. Further testimony was introduced that Daniel's subcontractor characterized the repairs to # 12 as *permanent* and inspected the remaining silos and found them to be in good condition. Santee also introduced evidence that the silos were inspected visually by employees and periodically checked by the Mine Safety and Health Administration.

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

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

Allwin also complains the circuit court's order failed to address *Holly Woods Association of Residence Owners*, 392 S.C. 172, 708 S.E.2d 787, in which this court affirmed the circuit court's denial of the developers' directed verdict motion based on the statute of limitations. *Id.* at 185, 708 S.E.2d at 794. In *Holly Woods*, the minutes from HOA board meetings indicated the HOA was aware of certain problems with the development including a pool leak, drainage problems, and termite issues in 1991; additional problems appeared between 1998 and 2000. But the damages the HOA claimed in the 2005 lawsuit involved a different location within the neighborhood, unrelated to the previous defects. *Id.* By contrast, the record here establishes Allwin failed to present any evidence that the defects she claims to have discovered in 2011 were unrelated to those she had notice of as early as February 1999.

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

C. Due Diligence

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

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

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

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Maria Allwin, Appellant,

v.

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

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

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

v.

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

Appellate Case No. 2016-000471

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

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant hereby files this Petition for Rehearing.

Maria Allwin respectfully requests a rehearing of Opinion 5617 (filed January 16, 2019) and/or the issuance of a new opinion on the issues outlined herein.

Argument

I. The Court does not acknowledge that Allwin is not seeking the recovery of money she spent prior to 2011, and only seeks the recovery of money she spent as part of the Ross Clements/Phillip Smith work which began in 2011.

A critically important fact about this case is that Allwin is not seeking to recover sums she spent before 2011, which total some \$2,000,000 (R. pp. 000177-000181). Even though that fact was a central focus of Allwin's Affidavit and argument before the Court, is not referenced anywhere in the Court's opinion and it is dispositive of the statute of limitations issue.

The Court's application of the statute of limitations is persuasive if Allwin was seeking to recover the costs of work that she did in 2001, 2002, or any time before 2011, but she is not. Her claim is strictly limited to the recovery of repair costs she incurred as part of the Ross Clements/Phillip Smith work, which did not begin until 2011. The only way the claim for those funds can be barred by the statute of limitations is if she knew or should have known, as a matter of law, of all of the defects discovered by Clements and repaired by Smith before 2011. Given that Allwin has said she did not know of all of the defects Clements found and Smith repaired prior to 2011, and given that Clements has testified that she could not have known of all of those problems absent a complete declad of the home, and given that Clements and Cooper have both said a complete declad of the home is an extraordinary scope of work, outside of the exercise of reasonable diligence, there is a question of fact as to whether the statute of limitations bars Allwin's

claim. *Holly Woods Assc. of Residence Owners v. Hiller*, 385 S.C. 344, 682 S.E.2d 818 (Ct. App. 2009) and *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

II. The Court relies on *Dean* and *Barr*, which are inapposite with significant legal and factual differences to this case. *Holly Woods* and *McAlhany* are controlling and compel a reversal of the trial judge's ruling.

In its order the Court relies upon *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 105 (1996) and *Barr v. City of Rock Hill*, 330 S.C. 640, S.E.2d 157 (1998) to establish the law of the statute of limitations. As noted in Allwin's brief and at the lower court, those cases are factually distinguishable and are inapposite. The issue presented here is whether a claim for damages to correct conditions the owner claims she never knew of is barred by the statute of limitations. When the factual scenario involves other conditions that the owner admits she knew of, the question of whether the owner knew or could have known of the new conditions, through the exercise of reasonable diligence, is a question of fact for the jury. This Court has decided two cases that are both factually similar and both apply the correct law and analysis relative to the application of the statute of limitations. In both *Holly Woods* and *McAlhany* the Court correctly concluded that whether the claims being asserted were or should have been known was a question of fact for the jury. In *Holly Woods* the HOA was aware of and spent money to correct prior problems that related to, or may have been related to those they were suing over and this Court held that that was a question for the jury to decide. In *McAlhany*, the Court was faced with issues that the Plaintiff admitted to knowing in 2007. However, since the Plaintiff later recanted that and testified by affidavit, they were not known until 2009, this Court reversed the trial court, holding that it was up to the jury, not the court, to decide which testimony of the Plaintiffs was more believable.

In this case, both Allwin and Clements testified that after 2011, Clements' investigation revealed conditions that were unknown and could not have been known absent a complete de-clad

of the home. As admitted by Cooper himself, a complete de-clad was not customary or ordinary and was "extreme", meaning that Allwin's failure the de-clad before 2011 was not unreasonable. As noted in the brief, even when faced with Clements' concerns in 2011 the architect of record, Shope Reno, even then recommended that Allwin not de-clad the home as recommended by Clements. (R. p. 001063, line 1-24; R. pp. 000177-000188)

Holly Woods and *McAlhany* are controlling and both cases compel a decision reversing the lower court here and remanding this action for a trial and a jury decision about what, if any, of Allwin's current claim were or should have been known to her through the exercise of reasonable diligence.

III. **In applying the law of *Holly Woods* and *McAlhany*, the Court has ignored the evidence presented by Allwin and Clements which establishes that Clements' work revealed deficiencies the could not have been discovered without a complete de-clad of the home, which Clements and Cooper both said was not required of Allwin in the exercise of reasonable diligence.**

The Court has ignored two aspects of the evidence in this case which, under *Holly Woods* and *McAnally*, compel reversal of the lower court and a remand for trial. First, with respect to *Holly Woods*, the Court incorrectly held that, "By contrast, the record here establishes that Allwin failed to present any evidence that the defects she claims to have discovered in 2011 were unrelated to those she had notice of as early as February, 1999." The affidavits of Clements and Allwin both constitute the evidence the Court says is lacking. Allwin's affidavit states:

9. In 2011, Fuller issued a preliminary report (attached) in which it identified pervasive and systemic original construction deficiencies, meaning defects in the work done by Cooper.

10. The nature and pervasiveness of the defects identified by Fuller had never been identified by any of the numerous repair contractors who had worked on our home previously; had they been, we would have repaired them.

13. Notwithstanding SRW's advise and recommendation, I elected to follow the Fuller repair recommendation. In doing so I hired Phillip Smith to act as general contractor for the repair of the home. That work commenced after April 23, 2013, and during that time, the roof and siding were removed as were extensive portions of interior drywall. The removal of those components revealed evidence of extensive and pervasive defects in the original construction of the home, which were unknown to me or, to my knowledge, Jim. Over the years of our ownership of the home, despite paying more that \$2,000,000 for repairs and maintenance, no contractor had ever suggested to us that our home had the defects uncovered by the work of Phillip Smith.

14. The defects uncovered by Smith, which were unobservable to any one prior to the removal of the roof, siding and interior drywall, included evidence of improperly installed flashing, improperly installed building wrap, improperly installed windows and the omission of components such as insulation around windows. Again, there was no way I or anyone else could have observed those deficiencies hidden in the walls and under the roof absent removal of the roof, siding and interior drywall.

(R. pp. 000177-000181)

Clements' Affidavit states:

15. While the construction defects FCE observed would have been open and obvious to SRW, as construction was ongoing, it is my professional opinion that as original construction continued and ultimately concluded, the defects could not have been known to the Plaintiff, absent extensive deconstruction efforts.

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

17. Complete removal of interior and exterior building envelope components was required in order to uncover latent construction defects and damages, including but not limited to the following:

1. Reverse-lapped roof underlayment;
2. Improper roof terminations;
3. Water damaged roof sheathing and framing;
4. Unsealed roof-to-wall intersections allowing air intrusion/condensation;
5. Incomplete spray foam insulation in attic and sloped roof areas;
6. Incomplete/missing Tyvek weather-resistive barrier (hereinafter WRB);
7. Reverse-lapped WRB;
8. Improper integration of WRB with window and door flashing;
9. Improper integration of WRB with roof-to-wall flashings;
10. Improper integration of window and door opening head flashings with flexible flashing and/or WRB;
11. Improperly installed wall/cornice flashing;
12. Water damaged wall sheathing, framing, termites;
13. Incomplete asphalt-saturated building felt (WRB) behind stucco;
14. Incomplete perimeter air seal at windows resulting in air intrusion/condensation;
15. Incomplete perimeter seal at windows resulting in bulk water intrusion;
16. Improper integration of window rough opening flashing with pan flashings and WRB;
17. Improper installation of sill pan flashing at windows;
18. Improper installation of WRB at window openings;
19. Improper structural attachment of windows – fasteners missing;
20. Fungal growth/mildew behind window trim;
21. Incomplete perimeter air seal at doors resulting in air intrusion/condensation;
22. Incomplete perimeter seal at doors resulting in bulk water intrusion;
23. Improper integration of door rough opening flashing with pan flashings and WRB;
24. Improper installation of sill pan flashing at doors;
25. Wood sub-flooring improperly installed over flattened back leg of sill pan flashings;
26. Improper installation of WRB at door openings;
27. Fungal grown/mildew behind door trim;

28. Inadequate patio deck-to-wall waterproofing and flashing;
29. Inadequate repairs attempted at patio deck-to-wall waterproofing and flashing;
30. Water damaged wood framing at deck-to-wall intersections;
31. Improper slope of patio at elevated concrete slab (below tile surface); and
32. Insulation missing between Study turret floor and elevated concrete slab.

(R. pp. 000189-000194)

A comparison of the Court's factual analysis in *Holly Wood's* is striking. In *Holly Wood's* this Court reasoned as follows:

Specifically, the minutes from an annual meeting of the Association's board meeting from 1991 reveal the Association knew of certain problems in 1991, including a pool leak, drainage around building five, and termite bonding. However, witnesses testified the damages that formed the basis of the Association's 2005 lawsuit stem from different problems than those that existed in 1991.

Mary Louise Reeves, secretary of the Association's Board, testified the Association was only seeking damages that occurred from 2002 to 2005. Reeves testified problems have always existed within the development and some are the same problems, but some are different problems. Richard H. Roubard, a member of the Association's Board since 1998, testified the damage around building five that existed in 1991 was corrected. Roubard testified Gray Engineering came up with a design for a culvert that went over the existing road and a head wall and drainage to pick up the run off. According to Roubard, the culvert repair resolved the 1991 drainage issues. Additionally, Roubard explained new problems with drainage arose between 1998 and 2000; however, he claimed the Association also addressed and corrected those problems. Roubard testified the Association learned of the most current drainage problems in September 2002 after a rainstorm.

Steven John Geiger, the Association's expert, also testified as to the damages the Association claimed could have been discovered in 2002 or later. Geiger categorized the condition *185 of *Holly Woods* into three distinct occurrences contributing to the problems: (1) the general random nature that storm water flows across the site, (2) the presence of poor loose compressible soil, and in some cases

soil that contains organic matter underlying the construction; and (3) the open excavation around the eastern and southern perimeters of building five. Geiger testified he knew about the 1991 report, but he testified the 1991 report did not affect the content of his damage report and had nothing to do with his research. Further, he testified that the majority of the damages on **Holly Woods** could be attributable to conditions since 2002.

We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellants' directed verdict motion based on the statute of limitations.

Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172 (2011) 708 S.E.2d 787

The *Holly Woods* case, read with the Allwin and Clements Affidavits, simply cannot be reconciled with the Court's ruling in this case. For the same reasons there was a question of fact in *Holly Woods* regarding application of the statute of limitations, there is a question of fact in this case.

Second, with regard to *McAlhany*, the Court held, "Allwin failed to present conflicting evidence with respect to the timing of her discovery of the various defects in the home. Indeed, the chronology of Allwin's defect discoveries is fully established in this record." Again, the Affidavits of Allwin and Clements are evidence that the defects she now seeks recovery for were *not discovered* and *could not have been discovered* prior to 2011. The record which the Court refers to is a history of Allwin's knowledge about defects that existed prior to 2011 for which she seeks no recovery. The Court's error in this analysis is exemplified by its finding that, "Cowan, Buffington, CSA and Stein independently and repeatedly notified Allwin of original design and construction defects. Buffington and Stein went so far as to inform Allwin of the possible expiration of her claims against RCA." The evidence referred to by the Court relates to defects

Cowan, Buffington and Stein knew of, which are not the defects Allwin is seeking recovery for now. Cowan, Stein and Buffington could not warn Allwin of claims that were unknown at the time of their involvement and they could express concerns to Allwin about the expiration of claims for money that she would not spend until years later.

IV. **Whether Allwin knew or Should have Known of the Claims she now asserts prior to 2011 is a Question of Fact for the Jury.**

The issue before the court is whether the claims Allwin is bringing now, for damages she sustained after 2011, is time-barred by the statute of limitations as a matter of law. Allwin cited *McAnally* for the discovery rule, which provides that, "Under the discovery rule, the three (3) year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct." This the question before the Court was, when did Allwin know, or when, through the exercise of reasonable diligence, should she have known, of the conditions which give rise to the claim she asserts now (as opposed to those she may have asserted much earlier)? The evidence establishes that 1) she did not know of all of the conditions discovered in 2011 (Allwin Affidavit); 2) many if not most of those conditions could not have been discovered without the extensive deconstruction of the building that began to occur in 2011 (Clements Affidavit); and 3) "reasonable diligence" did not require her to deconstruct the building before 2011 (Clements Affidavit, Cooper testimony, Allwin Affidavit regarding what SRW told her in 2011).

V. **The Court's ruling that the statute of limitations ran, at the latest, in 2012, establishes that the Court improperly applied the law of the statute of limitations.**

The Court's ruling "At the very latest, the statute of limitations applicable to Allwin's claims against RCA ran in March of 2012." is erroneous. That ruling is based on the bare fact that Allwin retained counsel in 2009. There is literally no evidence at all about counsel's involvement

for Allwin in 2009, other than Allwin's affidavit which is conclusive on that point. That affidavit, at paragraph 7, states:

In 2009, two years after Jim's death, I contacted attorney Robert Lyles to discuss the ongoing maintenance and repair costs and how to try and manage them. From that meeting, we met with Skip Lewis, an engineer recommended by Mr. Lyles, to do a property condition assessment and to develop a life cycle repair for maintenance of our home. The plan was to budget for the ongoing costs to maintain the home. That was never done.

There is no evidence that there was ever any discussion between Allwin and counsel about pursuit of claims against RCA or SRW at that time or about the recovery of the sums Allwin had already paid to maintain and repair the home. She was trying to manage maintenance costs and received a recommendation concerning an expert on a maintenance and repair plan for the home, which she never got. Those facts alone cannot establish that the statute of limitations began to run as a matter of law. If they do, building owners must be reluctant to hire counsel for issues involving maintenance and repair of their home for fear that hiring counsel starts the statute of limitations running on any claim the owner may have, whether known or not.

VI. Like the Lower Court, this Court Failed to Consider the Evidence in the Light Most Favorable to Allwin.

Like the lower court, this court has taken selective evidence that was presented and held that, "...the chronology of Allwin's defect discoveries is fully established in this record." In doing so, the Court has either ignored or disregarded the Allwin and Clements Affidavits but also ignored other evidence that supports Allwin with respect to what she knew and when she knew it.

There are a number of instances in which the evidence is not viewed in the light most favorable to Maria. For example, as part of its efforts, Buffington Home hired an engineering firm, CSA, to survey the home. (R. pp. 000017; R. pp. 001155-001171). Portions of the language of

CSA's report, which are unfavorable to Maria Allwin, are included in the Order, but its ultimate conclusion and portions of the report that are favorable to Allwin are excluded. (R. pp. 000017). The Order does not include that CSA identified the purpose of its survey was to determine the sources of "isolated areas of damage and fungal growth" in the Home. (R. pp. 001156). The Order does not include that CSA notes "slight interior negative pressure" which it appears to attribute to the air conditioning system, but also notes that wind can cause building envelope pressure differences particularly at ocean front locations. (R. pp. 001155-001171, Allwin 00945). The final summary is also not included in the Order. CSA surveyed the Home on two days (June 30, 2003 and July 17, 2003) and in summary concluded: "In summary, outside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressuring the home. Isolated cases of water damage can be investigated and repaired on an individual basis." (R. pp. 001164, Allwin 00948).

As noted in the Order, Maria Allwin hired Victoria Stein. A detailed October 2008 report prepared by Ms. Stein after an extensive cataloging of the home's history noted that "it [was her] opinion that the major contributing factor for the high humidity that is contributing to fungal growth is the installation of the 40-ton chiller system." (R. pp. 001440-001449). While the Court's order notes that emails between Ms. Stein and Maria Allwin discussed "going down the legal road" at that time, Ms. Stein's report actually recommends in its "Considerations for the Future" that Ms. Allwin "seek legal council to recoup monetary past and future costs on chiller related issues." (R. pp. 000028, R. pp. 001440-001449; R. pp. 001366). Thus, the reference is related to the HVAC issues, which did not involve Russ Cooper.

CONCLUSION

For the reasons set forth above, Appellant respectfully request that this Court reconsider its opinion and reverse the trial court's grant of summary judgment and remand this matter for a trial on the merits.

Respectfully Submitted:

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March 4, 2019

The South Carolina Court of Appeals

Maria Allwin, Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P.,
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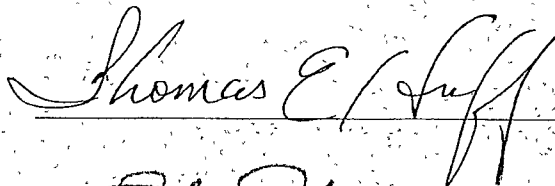
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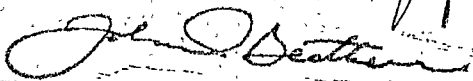
Appellate Case No. 2016-000471

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.

Stephen P. McDaniel J.

Columbia, South Carolina

FILED

cc:

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Julie J. Armstrong

April 19, 2019