IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28064

SUZANNE BRUDE,

Plaintiff and Appellant,

vs.

SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING,

Defendant, Third-Party Plaintiff, and Appellee,

vs.

GREGORY AND ELIZABETH JAMISON,

Third-Party Defendants.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS, CIRCUIT JUDGE

BRIEF OF APPELLANT

ATTORNEYS FOR APPELLANT:

Steven M. Johnson
Ronald A. Parsons, Jr.
Kimberly J. Lanham
JOHNSON JANKLOW ABDALLAH
REITER & PARSONS LLP
P.O. Box 2348
Sioux Falls SD 57101-2348
(605) 338-4304

ATTORNEYS FOR APPELLEE:

Melanie L. Carpenter
WOODS FULLER SHULTZ & SMITH P.C.
300 S. Phillips Avenue #300
Sioux Falls, SD 57117
(605) 336-3890

Notice of Appeal filed on December 7, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

United States Supreme Court Cases:

South Dakota Supreme Court Cases:

Other Cases:

TABLE OF AUTHORITIES (CONT.)

Statutes:

PRELIMINARY STATEMENT

References to the pages of the settled record as reflected in the clerk's index are designated as "R." In addition, references to the appendix to this brief are designated as "App."

STATEMENT OF JURISDICTION

Plaintiff Suzanne Brude respectfully appeals from the Order Granting Defendant/Third Party Plaintiff's Motion for Summary Judgment entered by the Minnehaha County Circuit Court on December 5, 2016. (R. 361) (App. 1). Brude further appeals from the Order on Plaintiff's Objections to Defendant/Third Party Plaintiff's Proposed Order Granting Defendant's Motion for Summary Judgment filed on October 13, 2016. (R. 345) (App. 2). Notice of entry of the order granting summary judgment was served by the Defendant on the Plaintiff on December 8, 2016, one day after the notice of appeal was filed on December 7, 2016. (R. 362, 374). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3(1) & (2).

REQUEST FOR ORAL ARGUMENT

Suzanne Brude respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUE

I. When a retaining wall is torn down, redesigned, and rebuilt to different specifications, does that new construction work constitute an "improvement to real property" under South Dakota's statute of repose for claims based on negligent construction?

The trial court appears to have held that it does not because it granted the contractor's motion for summary judgment based upon the statute of repose.

- SDCL 15-2A-3
- *Clark County v. Sioux Equipment Corporation*, 2008 S.D. 60, 753 N.W.2d 406
- *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406
- *Horosz v. Alps Estates, Inc.,* 642 A.2d 384 (N.J. 1994)

STATEMENT OF THE CASE

On November 6, 2015, Suzanne Brude filed a complaint (later amended) against Defendant Shane Breen d/b/a/ Yellow Jacket Irrigation and Landscaping ("Yellow Jacket"), a sole proprietor operating an architectural landscaping business, in Minnehaha County Circuit Court of the Second Judicial Circuit. (R. 2, 289).[1] Brude's amended complaint alleged, *inter alia*, that Yellow Jacket negligently rebuilt, remodeled, or repaired a retaining wall sometime between 2011 and 2013 and that, as a result of Yellow Jacket's negligence in doing so, Brude suffered a fall and was seriously injured on October 7, 2014. (R. 289).

On December 4, 2015, Yellow Jacket filed a third-party complaint against Gregory and Elizabeth Jamison, the owners of the home where the retaining wall was built and later replaced, contending that the Jamisons were responsible for any damages awarded to Brude as the result of her injuries. (R. 22).

On July 29, 2016, Yellow Jacket filed a motion for summary judgment contending that Brude's claims were barred by the ten-year statute of repose set forth in SDCL 15-2A-3. (R. 138). Brude's opposition to the motion included an affidavit from Kevin Godwin, an expert contractor, detailing his opinion that Yellow Jacket negligently redesigned and rebuilt the retaining wall in 2011 to 2013, causing a capstone at the top of the reconfigured wall to dislodge, and injuring Brude in her

[1] The circuit court entered its order correcting the defendant's name in the caption on January 20, 2016. (R. 68).

resulting fall. (R. 186-88).

A hearing on the motion was held before the Honorable John R. Pekas, Circuit Judge, on September 26, 2016. At the hearing, the lower court granted Yellow Jacket's motion for summary judgment, ruling as follows:

> In looking at that, along with the other facts, the court is struck with the fact that no money was paid allegedly between the parties, which is a major factor that was cited by the court in prior case law. And in this particular instance, it's clear, at least there is a question of fact as to whether or not that was sufficiently completed back when it was originally done in the year 2004 or 2005 by, I believe, Mr. Breen doing business as Yellow Jacket Irrigation and Landscaping.
>
> There is a question of whether or not there was compaction done at that time because of, obviously, the concern that Ms. Jamison had due to the fact that she was embarrassed by the condition of the bricks. That's undisputed at this point. And because of that, she wasn't really amiable to having any sort of guests go back in that area due to the fact that the condition had so deteriorated over time.
>
> So the court is struck by those facts primarily because the improvement was made, but it's obvious that the improvement was made in a negligent manner back when it was done back in 2004, 2005.
>
> Well, if they are coming back now in 2011 or 2013 to try to rebuild that wall, and compaction not being done again, then it's the same exact situation that we had before. And the fact remains that for whatever reason Yellow Jacket Irrigation and Landscaping and Mr. Breen showed up to do that work and not charge for it.
>
> That kind of begs the question that I think Mr. Breen and Yellow Jacket Irrigation and Landscaping knew that probably wasn't meeting the sufficient standards necessary.
>
> So in viewing the facts in the light most favorable to the nonmoving party, I do believe that at this point in time Mr. Breen and Yellow Jacket Irrigation and Landscaping – their motion is going to be granted at this time.

(App. 8-9) (R. 341-42). On October 12, 2016, the lower court entered its order

denying the plaintiff's proposed order and objections. (App. 2) (R. 345). On December 5, 2016, the lower court then entered its order granting the defendant's motion for summary judgment. (App. 1) (R. 361).

This appeal timely followed.

STATEMENT OF THE FACTS

Viewing the facts in the light most favorable to Suzanne Brude, the nonmoving party below, and granting her the benefit of all reasonable inferences as required, the material facts are as follows.

Yellow Jacket Irrigation and Landscaping is a South Dakota business owned by Shane Breen (collectively "Yellow Jacket") that "performs irrigation, landscaping, and snow removal for both commercial and residential properties." (R. 18, 44). In addition to Breen, Yellow Jacket has five employees. (R. 53).

2005: Original Construction

In 2005, Greg and Elizabeth Jamison built a new house in southern Sioux Falls. (R. 205). After construction on the house was completed, they hired Yellow Jacket to do the landscaping in the backyard, which included an elevated fire pit, a sunken patio below at the level of the back door to the house, and a three-foot high, U-shaped retaining wall between the two levels. (R. 8, 199, 205, 215-16, 221). The original construction was completed sometime in the late summer or fall of 2005, as the primary invoice for the patio and retaining walls from Yellow Jacket is dated September 28, 2005, and final invoice for the original construction is dated November 14, 2005. (R. 164, 205, 207, 216, 230).

Breen is confident that at the time of the original construction, the retaining wall was properly compacted and capstones (the stones on top of the wall) secured by his employees because, as he testified: "If I have one downfall, it's perfection, going over stuff with guys, making sure it's done over and over and over to make sure that things aren't done. And it annoys them. It annoys them a lot." (R. 207).

2007: Repair to Patio

In 2007, the Jamisons asked Yellow Jacket to come out and inspect its previous work because some of the stone pavers in the patio at the bottom of the wall to the west and in the walkway area by the garage were settling and had moved. (R. 199, 216-17). Yellow Jacket came out at that time and fixed the problem. (R. 199, 216-17, 232, 255). No work was done on the wall at that time. (R. 217).

2011 or 2013: Redesign and Rebuild of Retaining Wall

In 2011 or 2013, Jamisons asked Yellow Jacket to come out "to do a fairly significant fix due to settling and leaning of some of the landscaping stones." (R. 199, 216-17).[2] "At that time," as the Jamisons averred, "we also enlarged the fire pit in our backyard and some changes would have been made to the wall surrounding the fire pit." (R. 199, 208, 2016-17). In essence, the retaining wall was removed by Yellow Jacket and then rebuilt to different specifications. In Breen's own words:

[2] Breen believes that the redesign and rebuild of the fire pit and retaining wall took place in 2011, (R. 206, 208-09), rather than in 2013 as the Jamisons remember. (R. 199, 216). Yellow Jacket's records for the rebuild are missing, because Breen has moved "two times" since then and testified that his bank destroyed any records that might have existed. (R. 210) ("And my bank doesn't have records of anything anymore. They destroy that").

> We straightened it [the retaining wall] out. Matched it up the best we could. It was looking good. Everything was clean. I think that's when we – we took out that step, you know, the original three-inch step down. We took that out for one reason or another.
>
> . . . We would have had to fix – we would have tore out some of the pavers on the bottom. The rock in this corner, I would have tore out. The landscaping on top, we would have tore out. So all that would have had to be redone. Once the wall was in, we put the pavers back, and then after that we would have did the rock, edging, put any plants back in and stuff like that.

(R. 208-09). Here are two photographs (with different markings) of the remodeled project taken after the retaining wall was torn down and rebuilt in 2013:

(App. 11, 12) (R. 358, 360). In these photographs, the fire pit is filled with brush on top of the U-shaped retaining wall.[3]

As circled in the photograph on the left, the retaining wall was almost completely torn down and then rebuilt to different specifications in 2013. (R. 217) ("But in 2013 he came out and removed essentially this U-shape"). During that

[3] Suzanne Brude fell from the top of the wall right in front of the fire pit when the capstone dislodged. (R. 223, 234, 259-60).

process, the fire pit was redesigned and expanded. (R. 233, 218) ("the fireplace was enlarged from its original scope. Boulders were added at the perimeter of it"). As Greg Jamison explained his conversations with Breen in 2013:

> He said, "well, in order to fix it, we've got to tear out and rebuild the walls. And in order to do that it's a little bit of work," And we said, I think, at the time, "as long as you're tearing down these walls, let's make this fire pit a little bigger at the same time. And that was easy because it was all apart. And he seemed very amenable. And, like I say, I can't remember finding a bill, but I'm assuming there was probably – it was a lot of work.

(R. 218-19; *see also* 220, 221, 224, 233, 244-47, 250, 256).

Because he was on vacation, Breen himself was not present when most of the redesign and rebuild was done:

> Q: … So you were on vacation when your crew went out and did this repair?
>
> A: When they were working. They didn't do the whole thing when I was gone. I was just gone for I think Thursday through Sunday, so they were working there the couple of days I was gone.
>
> Q: So the majority of that repair work would have been done by your employees, either Kevin, Jordan, or a combination of those two and maybe a couple others?
>
> A: A good chunk of it, yeah. They would have tore it all out, laid the base block. And I think when I came back it was to the point where they were starting to get ready to lay the block back out. So kind of the end point I was there.

(R. 210). Greg Jamison confirmed that Yellow Jacket's paid employees, rather than Breen, did most of that work in 2013. (R. 223, 219) ("So Shane would show up and kind of, 'Yup, yup,, we got to do these things, yup.' And then it would be some other guys, employees of his that would show up and finish the work").

Even so, Breen testified that he believes that the retaining wall and capstones must have been properly compacted and adhered by his workers after the retaining wall was torn down and rebuilt in 2011 or 2013:

> Q: 2011, when you did the repair work that we just talked about, Shane, did the capstones have to be adhered again at that time?
>
> A: Yes, they did.
>
> Q: And tell me which capstones had to be re-adhered?
>
> A: Any capstone that we took off we would have re-glued.

(R. 209). According to Breen, Yellow Jacket did not charge the Jamisons for the redesign and rebuild in 2011 or 2013, because "[t]hat's the kind of person I am." (R. 209). The Jamisons think they *did* pay Yellow Jacket for the redesign and rebuild of their patio area, but do not specifically remember doing so and cannot find any bill. (R. 253, 219, 225, 230).

In any event, it is undisputed that whether or not Yellow Jacket was actually paid for its services in tearing down, redesigning, and rebuilding the retaining wall in 2013, the job entailed several days of labor with multiple Yellow Jacket workers on the site. (R. 210, 219).

<u>October 7, 2014</u>:
Suzanne Brude's Injury

On October 7, 2014, a year or so after the 2013 redesign and rebuild, Suzanne Brude stepped up onto the retaining wall in front of the fire pit to retrieve some branches to use for some fall decorations that she was helping to make at the Jamison residence. (R. 223, 234, 259). At least one of the capstones was very loose at that

time. (R. 235, 260). The capstone gave way, causing Brude to slip and fall down onto the patio below:

> I had grabbed several branches, gone up and down the wall at the fire pit several times, and then had decided I should go back up and get five, ten more so that if I ran short I would have them. On that last trip down the wall, I had all my weight on my right foot and was stepping down to the patio with my left foot when the stone came out from under me, just like someone had pulled a rug, and the next thing I knew I was on the ground.
>
> … I was actually on top of the stone, partially on top, and my right leg was twisted completely around backwards right up next to that loose capstone that I was now on top of. And then I – the pain was just astronomical, and visually you just can't see your limbs going the wrong direction.

(R. 259, 260). The Jamisons' daughter inside the house and their neighbor, who was outside walking her dog, both heard Brude screaming in pain, and rushed to her side to help. (R. 198). Brude's injuries require surgery the following morning. (R. 260).

After Brude's fall, Greg Jamison reported the problem to Breen, who then sent one of his Yellow Jacket employees out to glue the loose capstone. (R. 211).

Expert Testimony

This action was then commenced on November 6, 2015. (R. 1). In opposition to Yellow Jacket's motion for summary judgment, Brude submitted an affidavit and discovery responses by Kevin Godwin (AIA, NCARB), an expert contractor and the owner of Building Solutions, P.L.C. (R. 263). Godwin averred, among other things, that the tearing down and rebuilding of the retaining wall was not done in compliance with industry standards, causing the capstones to dislodge due to the movement of soils behind the walls. (R. 263-68).

STANDARD OF REVIEW

This Court reviews the lower court's order on summary judgment de novo. *See AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 6, 845 N.W.2d 918, 920 n.2, and will affirm "only where there are no genuine issues of material fact and the legal questions have been correctly decided." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761-62. "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Id.* "The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Id.*

This Court has consistently enforced the principle that "[s]ummary judgment is a drastic remedy, and should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." *Donald Bucklin Construction v. McCormick Construction Co.*, 2013 S.D. 57, ¶ 31, 835 N.W.2d 862, 869; *Berbos v. Krage*, 2008 S.D. 68, ¶ 15, 754 N.W.2d 432, 436; *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

The meaning of the phrase "improvement to real property" under SDCL 15-2A-3 is a question of law reviewed de novo. *See Clark County v. Sioux Equipment Corporation*, 2008 S.D. 60, ¶ 10, 753 N.W.2d 406, 410. The application of that definition "to determine whether [Yellow Jacket's] work involved an improvement to real property" under the statute is a mixed question of law and fact that also is reviewed de novo. *Id.* As a result, this Court's standards of review in this appeal do not grant any deference to the lower court's determinations in any way.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE GRANT OF SUMMARY JUDGMENT BECAUSE BRUDE'S CLAIMS ARE NOT BARRED BY THE STATUTE OF REPOSE.

This is a simple case. There is no question that the original construction of the sunken patio, fire pit, and retaining wall in the Jamisons' backyard in 2005 was an "improvement to real property" that triggered the ten-year statute of repose set forth in SDCL 15-2A-3. And there is no question that Suzanne Brude's claim against Yellow Jacket was commenced more than ten years after the original construction of that project in 2005.

Instead, the question is: when Yellow Jacket returned to the site in 2013 (or 2011), and tore out the retaining wall, redesigned the project by enlarging the fire pit and reconfiguring the layout, and then rebuilt the U-shaped wall to different specifications, did that new construction also constitute an "improvement to real property" under SDCL 15-2A-3 so as to trigger the statute anew for claims arising from the redesign and rebuild? If it did, then Brude's claim was timely commenced and the statute of repose does not bar this action.

Under both this Court's case law applying SDCL 15-2A-3 and the standards adopted by most courts in considering the application of similar statutes enacted in other jurisdictions, the tearing down, redesigning, and rebuilding of the retaining wall in 2013 (or 2011) should be considered an "improvement to real property."

As a result, the statute of repose for claims arising from that new construction work began to run at the time the improvement was done and stands as no bar to

Brude's claims in this case because she commenced this action, at most, within four years or so of the improvement. The lower court thus incorrectly granted Yellow Jacket's motion for summary judgment based on the statute of repose. That order should be reversed and the case remanded for trial.

A. Statutes of repose such as SDCL 15-2A-3 are measured – not from the date on which the claim accrues – but from the date of the last culpable act or omission of the defendant.

This Court has recently clarified the distinction between statutes of limitation and statutes of repose. *See Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 18, 878 N.W.2d 406, 413. A statute of limitations "creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *Id.* (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014)). A statute of repose, on the other hand, "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Pitt-Hart*, 2016 S.D. 33, ¶ 18, 878 N.W.2d at 413 (quoting *CTS Corp.*, 134 S.Ct. at 2182).

Yellow Jacket contends, and the lower court agreed, that Brude's claim is barred by the ten-year statute of repose contained in SDCL 15-2A-3. In relevant part, that statute provides that:

> No action to recover damages … for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, or construction, of an improvement to real property **…** may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction.

SDCL 15-2A-3.[4] As this Court has recognized, the South Dakota Legislature's findings adopted in support of SDCL 15-2A-3 indicate that the rationale for the protection it affords is based in part on the fact that "contractors have no control over how property is used once construction is complete; and they have no right or opportunity to be made aware of how the property is being used and to take any action concerning maintenance or repairs." *Cleveland v. BDL Enterprises, Inc.*, 2003 S.D. 54, ¶ 37, 663 N.W.2d 212, 223 (citing SDCL 15-2A-1); *see also Klinker*, 1996 S.D. 56, ¶ 10, 547 N.W.2d at 575.

B. The tearing down, redesign, expansion and rebuilding of the retaining wall and fire pit area according to different specifications was an "improvement to real property" under the law, not a mere ordinary repair.

Yellow Jacket argued below, and the lower court must have agreed, that the rebuild and redesign done in either 2011 or 2013 was not an "improvement to real property" so as to fall within SDCL 15-2A-3. That conclusion, reviewed by this Court de novo, was incorrect.

This Court has adopted the "common sense approach" for determining whether construction work qualifies as an "improvement to real property" under SDCL 15-2A-3. *See Clark County*, 2008 S.D. 60, ¶ 11, 753 N.W.2d at 410. Under that approach, an "improvement to real property" is defined as:

---

[4] SDCL Ch. 15-2A "replaced SDCL 15-2-9 through 15-2-12 which provided for a six-year statute of limitations and which were repealed by 1985 S.D. Sess. L., Ch. 156, § 10." *Klinker v. Beach*, 1996 S.D. 56, ¶ 10, 547 N.W.2d 572, 575 n. 1.

> A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Id. (quoting *Jarnagin v. Fisher Controls, Int'l, Inc.*, 573 N.W.2d 34, 36 (Iowa 1997)); *see also Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 642-44 & n.12 (Ind. 2012) (collecting cases); *State Farm Fire and Cas. v. Aquila Inc.*, 718 N.W.2d 879, 884 (Minn. 2006); *United States Fire Ins. Co. v. E.D. Wesley Co.*, 313 N.W.2d 833, 835 (Wis. 1982); *Delgadillo v. City of Socorro*, 723 P.2d 245, 247 (N.M. 1986); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 508 (8th Cir. 1983) (applying South Dakota law and predicting that this Court would adopt the "common sense" approach to deciding whether work is "improvement to real property" under statute of repose).

This Court has also rejected the suggestion that the removal and replacement of infrastructure (such as the tearing down, redesign, and rebuilding of the retaining wall here) cannot qualify as an improvement to real property under our statute of repose. *See Clark County*, 2008 S.D. 60, ¶ 15, 753 N.W.2d at 411-12 (citing *Delgadillo*, 723 P.2d 245 at 248) (explaining that "[w]hether there was a previously existing [utility] service is unimportant, so long as the additions improved the realty"); *see also Kirby v. Jean's Plumbing Heat & Air*, 222 P.2d 21, 26-27 (Okla. 2009) (holding that the replacement of a sewer pipeline was an "improvement to real property within meaning of ten-year statute of repose); *Merritt v. Mendel*, 690 N.W.2d 570, 572-73 (Minn. Ct. App. 2005) (holding that replacement of existing roof covering was improvement); *Taney v. Independent Sch. Dist. No. 624*, 673 N.W.2d 497, 504 (Minn. Ct. App. 2004) (holding that remodeling of school was improvement); *Rosenberg v. Town of*

North Bergen, 293 A.2d 662 (N.J. 1972) (finding improvement for the repaving of a road); *Yakima Fruit and Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 503 P.2d 108 (Wash. Ct. App. 1972) (finding improvement that involved reinstallation of pipe, coils, hangers, and rods for a previously existing refrigeration system); *Pinneo v. Stevens Pass, Inc.*, 545 P.2d 1207 (Wash. Ct. App. 1976) (finding improvement where company replaced certain portions of an existing ski lift).

In other words, as this Court has explained, "replacements are not, as a matter of law, disqualified from being considered an improvement to real property." *Clark County*, 2008 S.D. 60, ¶ 15, 753 N.W.2d at 412. Rather, "[u]nder the 'common sense' test previously discussed, the question is whether the addition is designed to make the property more useful or valuable as distinguished from *ordinary* repairs or replacements." *Id.*

In the present case, it is clear that the tearing down, redesign, enlargement, and rebuilding of the retaining wall where Suzanne Brude fell was not an ordinary repair or replacement, but rather was an improvement to real property like the replacement of the pipeline in *Clark County*. In opposition to Yellow Jacket's summary judgment motion, Brude set forth specific facts demonstrating that the condition of the sunken patio and surrounding wall had so deteriorated that the Jamisons no longer used it as originally intended. Elizabeth Jamison testified that she quit hosting neighborhood events and other parties in her backyard, as she had previously done, because she was so embarrassed by the condition and appearance of the retaining wall. (R. 255, 257). Brude also set forth specific facts demonstrating

that the 2013 (or 2011) repairs were so extensive that the U-shaped retaining wall surrounding the fire pit was torn down and entirely rebuilt. (R. 243, 244-45, 255, 262). In addition, the fire pit area was expanded from its original scope, thereby expanding the retaining wall around it. (R. 245, 256). Thus, as in the cases cited above, the redesign, rebuilding and expansion of the retaining wall and expansion of the fire pit made the property more useful and valuable, was far from routine maintenance, and more than merely an ordinary repair or replacement.

In its oral ruling, the lower court placed great significance on its factual finding that Yellow Jacket apparently did not charge the Jamisons for the demolition, redesign, and rebuilding of the fire pit and wall to different specifications in 2011 or 2013. (App. 8-9) (R. 341-42). That was a disputed factual issue improperly resolved against Brude. (R. 253, 219, 225, 230).

As this Court has explained, however, the relevant factor under the common sense approach is whether the work "involves the expenditure of labor or money." *Clark County*, 2008 S.D. 60, ¶ 11, 753 N.W.2d at 410 (emphasis supplied). It does not require both. One cannot defeat the classification of construction work, no matter how substantial, as an improvement to real property merely by "comping" the work.

Thus, even if one approves of the lower court's resolution of the disputed fact issue regarding payment against Brude, the nonmoving party, the test is nonetheless satisfied. Brude has presented specific facts establishing that tearing down the wall, redesigning and rebuilding it, and expanding the fire pit area certainly involved the

expenditure of several days of substantial labor by several of Yellow Jacket's paid employees. (R. 210, 219-20, 223, 224, 233, 244-47, 250, 256).

In sum, the tearing down, redesign, enlargement, and rebuilding of the retaining wall to different specifications in 2011 or 2013 enhanced the value and use of the Jamison property, was permanent, and involved the expenditure of substantial labor, including the payment of wages to Yellow Jacket's employees for that labor, whether or not Yellow Jacket actually charged the Jamisons for the rebuilding project. *See Kirby*, 222 P.2d at 26-27; *Van Den Hul*, 716 F.2d at 508; *Merritt*, 690 N.W.2d at 573 (explaining that "[c]ommon sense dictates that new roofing is an enhancement involving the expenditure of labor and money, integral to and incorporated into the structure, and designed to make the property more useful and more valuable").

Under the common sense approach adopted by this Court, the redesign and rebuilding of the wall was an improvement to real property within the meaning of SDCL 15-2A-3. That means that the statute of repose did not begin to run until 2011 at the earliest, and SDCL 15-2A-3 stands as no bar to Brude's claims in this case.

C. Yellow Jacket's negligent redesign and rebuild of the retaining wall that was torn down 2011 or 2013 – rather than the wall's original construction in 2005 – are the culpable acts that caused Brude's injuries and give rise to her claim.

It is also significant that Suzanne Brude's injuries were specifically caused by the negligent redesign and rebuilding of the retaining wall. (App. 13-15) (R. 186-88). As this Court has made clear, a statute of repose "is measured not from the date on which the claim accrues but instead *from the date of the last culpable act or omission of the defendant*." *Pitt-Hart*, 2016 S.D. 33, ¶ 18, 878 N.W.2d at 413 (quoting *CTS Corp.*, 134

S. Ct. at 2182) (emphasis supplied). Like all statutes of repose, SDCL 15-2A-3 thus is an occurrence rule, "which begins to run when the alleged negligent act occurs[.]" *Pitt-Hart*, 2016 S.D. 33, ¶ 19, 878 N.W.2d at 413 (quoting *Beckel v. Gerber*, 1998 S.D. 48, ¶ 9, 578 N.W.2d 574, 576).

It thus goes without saying that although a statute of repose certainly can, in many circumstances, bar a plaintiff's future claim arising from a defendant's *past* acts or omissions "before the plaintiff has suffered a resulting injury," *CTS Corp.*, 134 S. Ct. at 2182, such a statute can never prospectively absolve a defendant from liability for its *future* culpable acts. That is necessarily so because, again, a statute of repose does not begin to run "the alleged negligent act occurs[.]" *Pitt-Hart*, 2016 S.D. 33, ¶ 19, 878 N.W.2d at 413 (quoting *Beckel*, 1998 S.D. 48, ¶ 9, 578 N.W.2d at 576).

Here, as even the lower court appeared to partially recognize, the culpable acts or omissions of Yellow Jacket occurred after the retaining wall was torn down in 2011 or 2013, when it was rebuilt according to different specifications and Yellow Jacket allegedly failed to properly compact the new wall and properly secure or adhere the capstones. (App. 9) (lower court's oral ruling explaining that "if they are coming back now in 2011 or 2013 to try to rebuild that wall, *and compaction not being done again,* then it's the same situation that we had before").

It is undisputed that Brude fell on the U-shaped retaining wall surrounding the fire pit, the very wall that was torn out and negligently rebuilt by Yellow Jacket in 2011 or 2013. (R. 259-60, 223, 234). Brude's fall occurred when a capstone on top of the rebuilt wall came loose, causing her to tumble to the ground. Her expert has

averred that the capstone came loose because when the retaining wall was torn down and then rebuilt, the compaction and securing of the stones during the reconstruction was not done according to industry standards and movement of soil behind the walls caused the capstones to loosen. (R. 264-65). Thus, the mechanism of Brude's injury – the loosening of the capstones – was caused by the negligent rebuilding, not the original construction of the retaining wall. It defies logic and common sense to say that the *original* construction of a wall caused someone's injuries, when that person did not slip on a loose capstone in the wall until *after* the wall was demolished, taken apart stone by stone, altered in layout and design, and then rebuilt over the course of several days. But that, essentially, was the lower court's erroneous holding.

Horoscz v. Alps Estates, Inc.

In *Horoscz v. Alps Estates, Inc.*, 642 A.2d 384 (N.J. 1994), the New Jersey Supreme Court examined "whether the ten-year statute of repose bars a lawsuit brought ten years after the initial construction of the house, but within ten years of the builder-developer's subsequent repairs to the house." *Id.* at 386. The plaintiffs purchased a home built in 1977. *Id.* In 1981, they began to feel cold air coming through the house in the washroom in the right rear of the dwelling. *Id.* The defendant contractor began repair work in 1982 and discovered that the house had been constructed on fill, thereby causing the house to sink. *Id.* To prevent further sinking, the contractor inserted concrete and steel under that part of the house and replaced the foundation. *Id.* However, the contractor did *not* insert concrete and

steel under the entire house. *Id.* The repair work was completed by 1983 and the contractor did not charge plaintiffs for the work. *Id.*

In 1989, the plaintiffs once again felt cold air blowing through the house. *Id.* They noticed wind coming through a window that would not close because it was tilted, that the garage doors were not properly aligned, and two bedroom floors had begun to slant downward. *Id.* The plaintiffs contacted the contractor, who refused to do anything. *Id.* They then hired another contractor, who raised up the house and discovered that the sinkage was occurring from fill under the foundation, just a few feet from where the defendant contactor had ceased its repair work in 1983. *Id.*

The plaintiffs brought an action alleging that defendant had negligently repaired their home in 1983. The trial court dismissed the complaint based upon the 10-year statute of repose. *Id.* The appellate division reversed, concluding that "because the defect had arisen from the 1983 repair work and not from the original construction completed in 1977, the statute had started to run in 1983 at the conclusion of the defendant contractor's repairs. *Id.*

The New Jersey Supreme Court affirmed, finding that the 1983 repair work was "an improvement to real property." *Id.* at 387. The Court noted that the repairs were "substantial in nature" and were "essential to the continued habitability of the house." A second rationale for permitting the claim to go forward was that the damages claimed arose from the negligent repair, *not* from the original construction. *Id.* at 388. "Because the 1983 repairs independently implicate [the statute of repose], and in view of the [plaintiffs'] allegations that [defendant] negligently performed those

repairs, the statute of repose with respect to those repairs began to run on … the date that [defendant] completed all work related to the underpinning." Thus, the ten-year period had not run.

Schott v. Halloran Const. Co., Inc.

In the proceedings below, Yellow Jacket relied upon *Schott v. Halloran Const. Co., Inc.,* 982 N.E.2d 965 (Ill. App. Ct. 2013), in support of its argument that the statute of repose bars Brude's claim. Central to that decision, however, was the fact that the portion of the retaining wall from which plaintiff fell was not rebuilt in 1994, when the plaintiff contended that the statute of repose should begin to run, but rather in 1990 when the wall was originally constructed, "more than 10 years prior to the accident." *Id.* As the Court explained, "[w]e see no reason why an improvement to some portion of the property other than that on which plaintiffs were injured should extend or renew the statute of repose with respect to their injuries." *Id.*

But here, as discussed above, the negligent redesign and reconstruction of the wall was the cause of Suzanne Brude's injuries, not the original construction that was torn down several years before her fall. Thus, the *Schott* decision is distinguishable and its rationale can be read to support reversal of the lower court's order granting summary judgment. In any event, as the Minnesota courts have explained for purposes of that state's statute of repose, "the substantial remodeling of real property in the direct vicinity of an accident constitutes an improvement, nor a repair, to that property." *Taney*, 673 N.W.2d at 504.

CONCLUSION

The expansion of the fire pit and tearing down, redesign, and rebuilding of the surrounding retaining wall on the Jamisons' property in 2011 or 2013 was an "improvement to real property" within the meaning of SDCL 15-2A-3. Brude fell from the wall after it was redesigned and rebuilt and has presented expert testimony contending that her injuries are the result of the negligent construction work that was done at that time. Yellow Jacket's alleged negligence in redesigning and rebuilding the retaining wall are the culpable acts giving rise to Brude's claims and the statute of repose runs from the date of those acts, rather than from the date of the original construction. Because the statute of repose thus began to run in 2011, at the earliest, and this action was commenced in 2015, Brude's claims arising from the negligent redesign and rebuild are timely and not barred by that statute.

The lower court erred in concluding otherwise.

WHEREFORE, Appellant Suzanne Brude respectfully requests that this Honorable Court *reverse* the summary judgment order and remand this case for trial.

Dated this 7th day of February, 2017.

JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.* .

Steven M. Johnson
Ronald A. Parsons, Jr.
Kimberly J. Lanham
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
(605) 338-4304

Attorneys for Appellant Suzanne Brude

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via email upon the following:

Melanie L. Carpenter
WOODS FULLER SHULTZ
& SMITH P.C.
300 S. Phillips Avenue #300
Sioux Falls, SD 57117
Melanie.Carpenter@woodsfuller.com

Eric C. Schulte
DAVENPORT EVANS
206 W. 14th Street
Sioux Falls, SD 57101
eschulte@dehs.com

Dated this 7th day of February, 2017.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5,986 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 **ORDER GRANTING DEFENDANT/THIRD PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The above-entitled matter came before the Honorable John Pekas, Circuit Court Judge presiding, at the Minnehaha County Courthouse in Sioux Falls, SD, on the 26th day of September, 2016, for hearing on Defendant/Third Party Plaintiff's motion for summary judgment. The Plaintiff was personally present and represented by her attorneys of record, Kimberly J. Lanham and Delia M. Druley of Johnson, Janklow, Abdallah, Reiter & Parsons, L.L.P. The Defendant/Third Party Plaintiff was represented by his attorney of record, Melanie L. Carpenter of Woods, Fuller, Shultz & Smith, P.C. The Third Party Defendants were represented by their attorney of record, Eric C. Schulte. The Court, having reviewed the submissions of the parties and heard the arguments of counsel, and for the reasons expressed at the hearing, it is hereby

ORDERED, ADJUDGED AND DECREED:

(1) That Defendant/Third Party Plaintiff's motion for summary judgment is GRANTED.

Dated this 5 day of December, 2016.

BY THE COURT:

JOHN PEKAS
CIRCUIT COURT JUDGE

ATTEST:
Angelia M. Gries
Clerk
(SEAL)

FILED
DEC 05 2016
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 Order on Plaintiff's Objections to Defendant/Third Party Plaintiff's Proposed Order Granting Defendant's Motion for Summary Judgment and Proposed Summary Judgment

The above-entitled matter came before the Honorable John Pekas, Circuit Court Judge presiding, at the Minnehaha County Courthouse in Sioux Falls, South Dakota on the 26th day of September, 2016 for hearing on Defendant/Third Party Plaintiff's motion for summary judgment. The Plaintiff was personally present and represented by her attorneys of record, Kimberly J. Lanham and Delia M. Druley of Johnson, Janklow, Abdallah, Reiter & Parsons, L.L.P. The Defendant/Third Party Plaintiff was represented by his attorney of record, Melanie L. Carpenter of Woods, Fuller, Shultz & Smith, P.C. The Third Party Defendants were represented by their attorney of record, Eric C. Schulte. The Court, having reviewed and considered the Plaintiff's Objections to Defendant/Third Party Plaintiff's Proposed Order Granting Defendant's Motion for Summary Judgment and Proposed Summary Judgment overrules the objections.

IT IS HEREBY, ORDERED that the Plaintiff's Objections to Defendant/Third Party Plaintiff's Proposed Order Granting Defendant's Motion for Summary Judgment and Proposed Summary Judgment are overruled and denied.

Dated this 12 day of October, 2016.

BY THE COURT:

HONORABLE JOHN PEKAS
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk of Courts
By: _____, Deputy (SEAL)

FILED
OCT 13 2016
Minnehaha County, S.D.
Clerk Circuit Court

Lisa Carlson, Registered Professional Reporter

STATE OF SOUTH DAKOTA) :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

SUZANNE BRUDE,

Plaintiff,

-vs-

SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING,

Defendant/Third Party Plaintiff,

-vs-

GREGORY & ELIZABETH JAMISON,

Third Party Defendants.

CIV. 15-3072
MOTIONS HEARING

BEFORE: THE HONORABLE JUDGE JOHN PEKAS,
Circuit Judge, Second Judicial Circuit
Sioux Falls, South Dakota,
on September 26, 2016.

APPEARANCES: KIMBERLY LANHAM
DELIA DRULEY
Johnson, Janklow, Abdallah, Reiter & Parsons, LLP
P. O. Box 2348
Sioux Falls, South Dakota 57101-2348

For the Plaintiff;

MELANIE CARPENTER
Woods, Fuller, Shultz & Smith, PC
P. O. Box 5027
Sioux Falls, South Dakota 57117-5027

For the Defendant/Third Party Plaintiff;

ERIC SCHULTE
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030

For the Third Party Defendants.

* * * * * * * * * *

LISA CARLSON, RPR
Court Reporter
Sioux Falls, South Dakota

What happened there, they didn't go far enough. So they failed to take the necessary steps to complete that, and that's why the statute of repose was restarted in that instance.

And, again, that is not what we have here. We don't have an instance where, you know, they took down the wall and they put in a foundation or laid concrete in it or -- it was put back just the way it was.

For that reason, your Honor, it's not a substantial improvement under the law. And we believe the statute of repose applies, and we would ask the court to grant summary judgment on behalf of Shane Breen d/b/a Yellow Jacket.

THE COURT: Thank you.

All right. I have read both of your briefs and you both succinctly summarized the briefs and at least the arguments that were made within the briefs. And the standard is that -- when we are looking at a summary judgment motion -- we have to view it in the light most favorable to the nonmoving party. And the nonmoving party, of course, at this time would be Ms. Brude. So all of the facts have to be construed in the light most favorable to her position.

In looking at what has been presented, I am looking at both Exhibit 1 and 2 because I do believe they are helpful to the court in looking at what, for example, was completed at the time and what was allegedly improved and what was just merely repaired.

In viewing the facts most favorable to the nonmoving party -- that, of course, would be Ms. Brude -- the court has to weigh, of course, the law that was cited, of course, in the state of South Dakota. In looking at the law that was argued, when we are looking at that ten-year statute of repose, clearly, the idea behind that statute was, of course, to limit perpetual liability for construction that would take place. And the idea was that there would be a demarcation of when that liability would cease due to that type of construction or that type of improvement to that property.

And I also think that, although it wasn't argued by the parties, there was a saving portion of that statute. It also talked about in the last year of when that injury could take place or when the injury occurred, depending on when that injury was in the last year of when that statute of repose

could have been, obviously, used as a defense, you have that one year within the last date of injury, which was briefed by the parties, but neither party really discussed that in their argument.

In looking at that, along with the other facts, the court is struck with the fact that no money was paid allegedly between the parties, which is a major factor that was cited by the court in the prior case law. And in this particular instance, it's clear, at least there is a question of fact as to whether or not that was sufficiently completed back when it was originally done in the year 2004 or 2005 by, I believe, Mr. Breen doing business as Yellow Jacket Irrigation and Landscaping.

There is a question of whether or not there was compaction done at that time because of, obviously, the concern that Ms. Jamison had due to the fact that she was embarrassed by the condition of the bricks. That's undisputed at this point. And because of that, she wasn't really amiable to having any sort of guests go back in that area due to the fact that the condition had so deteriorated over time.

So the court is struck by those facts primarily because the improvement was made, but it's

obvious that the improvement was made in a negligent manner back when it was done back in 2004, 2005.

Well, if they are coming back now in 2011 or 2013 to try to rebuild that wall, and compaction not being done again, then it's the same exact situation that we had before. And the fact remains that for whatever reason Yellow Jacket Irrigation and Landscaping and Mr. Breen showed up to do that work and not charge for it.

That kind of begs the question that I think Mr. Breen and Yellow Jacket Irrigation and Landscaping knew that probably wasn't meeting the sufficient standards necessary.

So in viewing the facts in the light most favorable to the nonmoving party, I do believe that at this point in time Mr. Breen and Yellow Jacket Irrigation and Landscaping -- their motion for summary judgment is going to be granted at this time.

So I am going to go ahead and allow you to prepare -- obviously, you can prepare your order to that effect, and the parties are obviously -- please go ahead and turn that order over to Ms. Lanham to go ahead and review it. And then you can go ahead and send it to me if there's any dispute and,

obviously, send a copy to Mr. Schulte as well.

We'll stand in recess on this matter.

MS. CARPENTER: Thank you, your Honor.

THE COURT: Thank you.

(End of proceedings.)

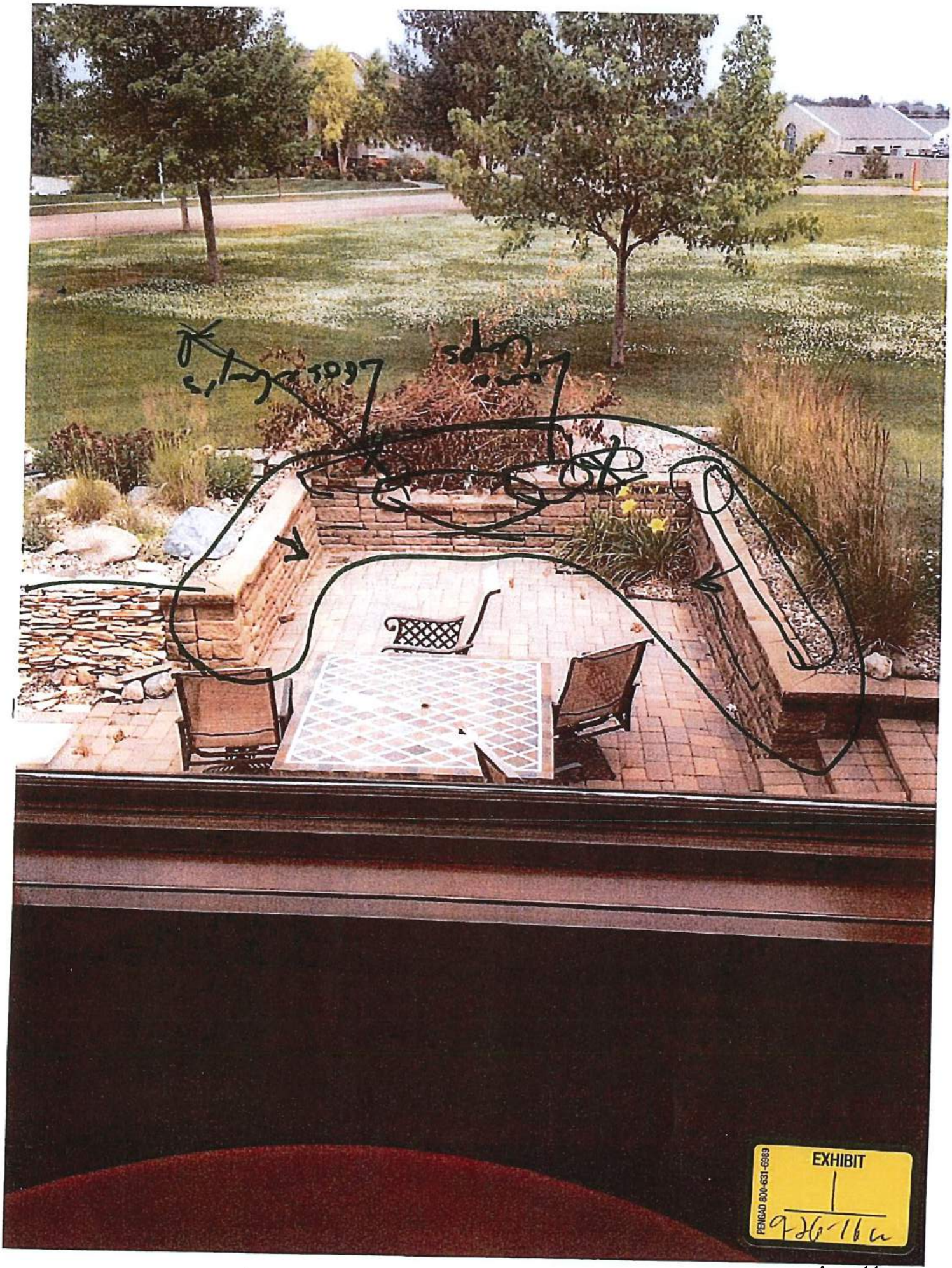
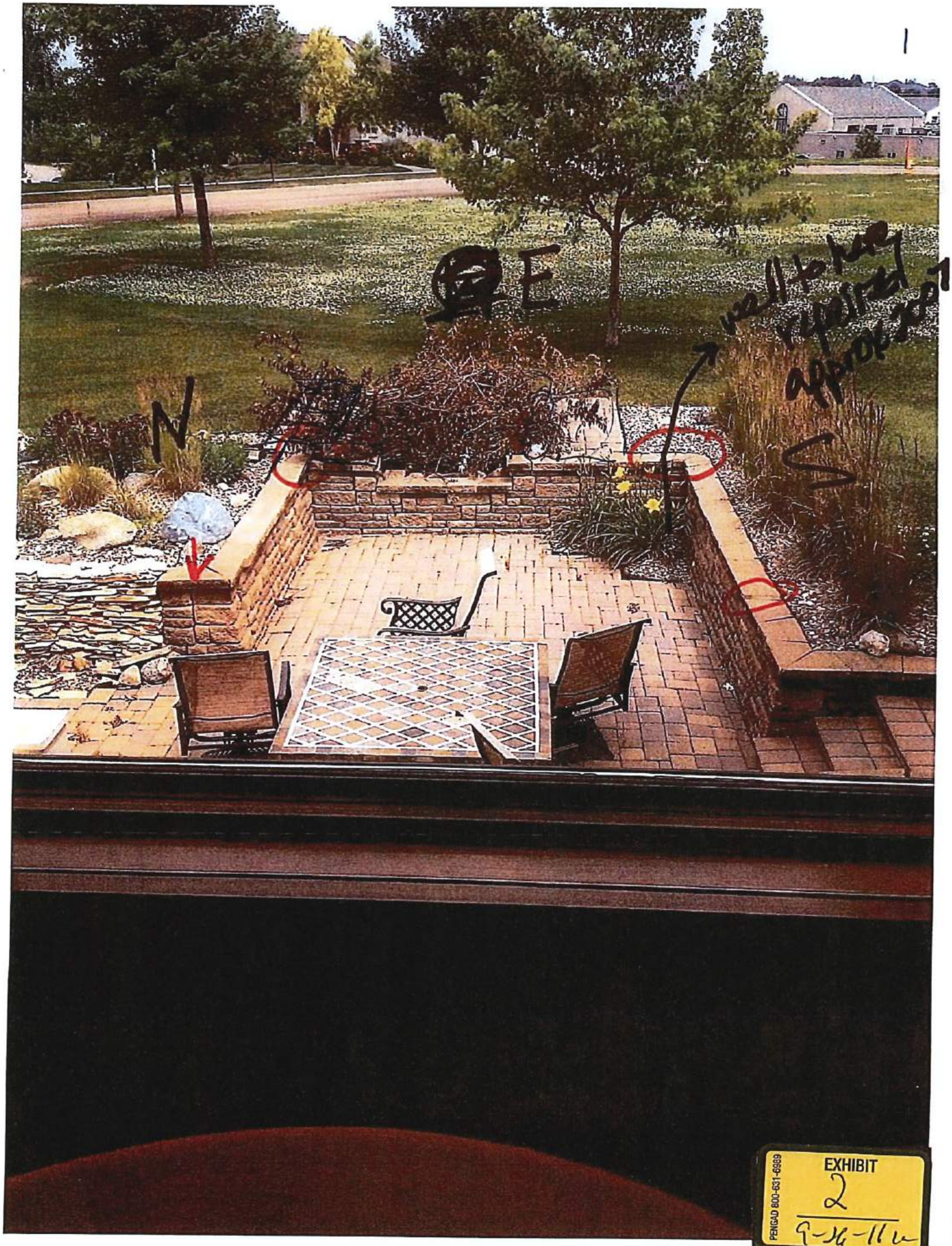


EXHIBIT
PENGAD 800-631-6989
9-26-16 cw


1
E
N
EXHIBIT
2
PENGAD 800-631-6989

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 **AFFIDAVIT OF KEVIN GODWIN, AIA, NCARB**

STATE OF IOWA)
:ss
COUNTY OF Woodbury)

Kevin Godwin, AIA, NCARB, being first duly sworn upon his oath, deposes and states:

1. I currently own Building Solutions, P.L.C. located in Sioux City, Iowa. I have been asked by the Plaintiff, Suzanne Brude, in this case to inspect the gravity retaining walls at 6300 South Grand Prairie, Sioux Falls, South Dakota, and to provide opinions with respect to its design, installation, and conformance with industry standards.

2. I am aware that, on October 7, 2014, Ms. Brude fell on the retaining wall in front of the fire pit in the back yard of 6300 South Grand Prairie and sustained injuries.

3. I am aware that the initial retaining walls at issue in this action at 6300 South Grand Prairie were constructed sometime in 2005. I am also aware that the retaining walls at issue were rebuilt/remodeled/repaired in 2007, 2011, and/or 2013, after the initial construction,

Filed: 9/12/2016 2:53:12 PM CST Minnehaha County, South Dakota 49CIV15-003072

but prior to Ms. Brude's fall.

4. In June 2016, I personally inspected the retaining walls located around the fire pit area in the back yard of 6300 South Grand Prairie and arrived at many conclusions.

5. In addition to the opinions that I intend to offer in this matter which were disclosed to the parties and counsel on June 30, 2016 in Plaintiff's Supplemental Answers to Defendant/Third Party Plaintiff's Interrogatories and Requests for Production of Documents (First Set), a true and correct copy of which is attached hereto as Exhibit 1, I plan to offer the additional opinions in this action:

A. The rebuild/remodel/repairs that Defendant/Third Party Plaintiff performed to the retaining walls at issue in this case at 6300 South Grand Prairie were not done in accordance with the industry standards.

B. When the rebuild/remodel/repairs were performed to the retaining walls at 6300 South Grand Prairie, the Defendant/Third Party Plaintiff failed to use any drainage fill (gravel) in the project.

C. From my observations, the current condition of the retaining walls at issue show that there was no compaction done behind the retaining walls at 6300 South Grand Prairie at the time of the rebuild/remodel/repair to prevent the soil from settling, liquefying, and thus creating lateral pressure upon the retaining walls, which is outside the industry standards.

D. The rebuild/remodel/repair of the retaining walls at issue at 6300 South Grand Prairie was also not performed correctly and, as a result, caused the cap stones to dislodge due to the movement of soil behind the walls.

E. The entire rebuild/remodel/repair of the retaining walls at issue at 6300

Filed: 9/12/2016 2:53:12 PM CST Minnehaha County, South Dakota 49CIV15-003072

South Grand Prairie was unstable and unable to be sustainable due to its failure to conform to the industry standards.

6. Further your affiant sayeth not.

Dated this 7 day of September, 2016.

KEVIN GODWIN, AIA, NCARB

Subscribed and sworn by me this 7 day of September, 2016.

Notary Public - State of Iowa
My Commission expires:
(SEAL)

MINDY D FOULK
Commission Number 770733
My Commission Expires
Dec. 1, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Affidavit of Kevin Godwin, AIA, NCARB** was served via electronic mail (via Odyssey File & Serve) upon the following individuals:

Attorneys for the Defendant/Third Party Plaintiff
Melanie Carpenter
Woods, Fuller, Shultz & Smith, P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027

Attorneys for Third Party Defendants
Eric Schulte
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101-1030

Dated this 12th day of September, 2016.

/s/ Kimberly J. Lanham
Kimberly J. Lanham

Filed: 9/12/2016 2:53:12 PM CST Minnehaha County, South Dakota 49CIV15-003072

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

SUZANNE BRUDE,		CIV. 15-3072
Plaintiff,		
vs.	:	
SHANE BREEN, d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING,	:	**YELLOW JACKET IRRIGATION AND LANDSCAPING'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Defendant/Third Party Plaintiff,	:	
vs.	:	
GREGORY AND ELIZABETH JAMISON,		
Third Party Defendants.		

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

Pursuant to SDCL § 15-6-56(c), Defendant Shane Breen d/b/a Yellow Jacket Irrigation and Landscaping ("Yellow Jacket") submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment.

1. In 2005, Greg and Elizabeth Jamison hired Yellow Jacket to construct a sunken patio in their backyard, which included a retaining wall, a fire pit, and a waterfall, as well as other landscaping services at their residence located at 6300 South Grand Prairie Drive, Sioux Falls, South Dakota. (Answer at ¶ 4; Elizabeth Jamison Depo.[1] at 18:1-7; Greg Jamison Depo.[2] at 8:15-23.)

[1] Excerpts from the Deposition of Elizabeth Jamison are attached to the Affidavit of Melanie Carpenter in Support of Motion for Summary Judgment as Exhibit A.

2. Yellow Jacket completed construction of the sunken patio and retaining wall in the back of the Jamisons' home by September 28, 2005. (Elizabeth Jamison Depo. at 18:1-14; Greg Jamison Depo. at 8:18-21, 9:19-20, 10:12-21, 56:3-10, and Ex. 2.)

3. The backyard patio project, including the retaining wall, cost the Jamisons approximately $17,500.00. (Greg Jamison Depo., Ex. 2.)

4. The initial quality of the project was described by Elizabeth Jamison as "beautiful" and "absolutely stunning," and the project was even featured on Home and Garden TV. (Elizabeth Jamison Depo. at 20:13-16; Greg Jamison Depo. at 56:25 to 57:1-2; Breen Depo.[3] at 84:3-8.)

5. The Jamisons used their backyard patio area to host guests at "parties" and "neighborhood events." (Greg Jamison Depo. at 36:6-25; Elizabeth Jamison Depo. at 33:2-7.)

6. Years after completion, at the request of the Jamisons, Yellow Jacket returned to perform some repairs to the retaining wall. (Breen Depo. at 56:13-18; 62:11-22; 69:8-13.)

7. The repairs were necessary due to movement in the wall resulting from natural shifting of the ground. (Breen Depo. at 64:1-8; 75:17-21.)

8. The parties have different recollections of when the repairs occurred. Shane Breen recalls that the repairs took place in 2011. (Breen Depo. at 56:13-18; 62:11-22; 69:8-13.)

[2] Excerpts from the Deposition of Greg Jamison are attached to the Affidavit of Melanie Carpenter in Support of Motion for Summary Judgment as Exhibit B.
[3] Excerpts from the Deposition of Shane Breen are attached to the Affidavit of Melanie Carpenter in Support of Motion for Summary Judgment as Exhibit C.

9. The Jamisons recall that the repairs took place in 2013, although they admitted they were not certain of the dates. (Greg Jamison Depo. at 15:1-6 and 62:17-25 to 63:1-10; Elizabeth Jamison Depo. at 26:17-18 and 44:18-23.)

10. Regardless of when the repairs were performed, the parties agree that Yellow Jacket deconstructed part of the retaining wall and reconstructed it. (Breen Depo. at 65:2-9; 94:17-21; Elizabeth Jamison Depo. at 31:4-6.)

11. During the reconstruction, Yellow Jacket reused the original materials it used to build the retaining wall in 2005. (Breen Depo. at 94:17-21; Greg Jamison Depo. at 18:20-24 and 66:6-9.)

12. Yellow Jacket did not charge the Jamisons for the repair work. (Breen Depo. at 65:13-23; Greg Jamison Depo. at 67:21-24 and 80:15-19.)

13. The Plaintiff fell from the retaining wall on October 7, 2014, when she was walking on the wall. (Complaint, at ¶ 5; Brude Depo.[4] at 26:21-23.)

14. The Plaintiff filed and served her Complaint against Yellow Jacket on November 6, 2015. (Complaint; Aff. of Melanie Carpenter, at ¶ 7 and Ex. E.)

[4] Excerpts from the Deposition of Suzanne Brude are attached to the Affidavit of Melanie Carpenter in Support of Motion for Summary Judgment as Exhibit D.

Dated this 29th day of July, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____
Melanie Carpenter
Jordan J. Feist
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email: melanie.carpenter@woodsfuller.com
Attorneys for Defendant/Third Party Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 29th day of July, 2016, I served a true and correct copy of the foregoing Yellow Jacket Irrigation and Landscaping's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment via Odyssey File & Serve on the following:

Steven M. Johnson
Kimberly J. Lanham
Johnson, Janklow, Abdallah, Reiter & Parsons, LLP
PO Box 2348
Sioux Falls, SD 57101-2348
steve@janklowabdallah.com
kim@janklowabdallah.com
Attorneys for Plaintiff

Eric C. Schulte
Davenport, Evans, Hurwitz & Smith, LLP
PO Box 1030
Sioux Falls, SD 57101-1030
eschulte@dehs.com
Attorneys for Gregory and Elizabeth Jamison

_____
One of the Attorneys for Defendant/Third Party Plaintiff

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 **PLAINTIFF'S RESPONSE TO YELLOW JACKET IRRIGATION AND LANDSCAPING'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff, Suzanne Brude, by and through her counsel of record, respectfully submits this Response to Yellow Jacket Irrigation and Landscaping's Statement of Undisputed Material Facts and Plaintiff's Statement of Undisputed Material Facts pursuant to SDCL 15-6-56(c).

RESPONSE TO YELLOW JACKET IRRIGATION AND LANDSCAPING'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. Paragraph 5 is admitted.
6. Paragraph 6 is admitted.
7. Paragraph 7 is denied. Plaintiff's expert, Kevin Godwin, AIA, NCARB, has stated that the repairs were necessary because the original construction was not done in accordance with industry standards. (*See* Exhibit F to Lanham Aff., Ex. 1). In particular, there was no

drainage fill used in the installation of the gravity retaining walls and no compaction done behind the walls, rendering the gravity retaining walls unstable and unsustainable. (*Id.*).

8. Paragraph 8 is admitted.
9. Paragraph 9 is admitted.
10. Paragraph 10 is admitted in part. Yellow Jacket tore down and completely rebuilt the retaining wall surrounding the fire pit and expanded the fire pit area as a part of the repair and rebuilding. *See* Exhibit A to Lanham Aff., Deposition of Greg Jamison at pp. 20-21; Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 27-29).
11. Paragraph 12 is disputed. Elizabeth Jamison testified that although she could not locate the invoices, she believed that she had paid Yellow Jacket for some work subsequent to the 2005 invoices and that "[i]t might have been whenever I had him come back to do some major work." (Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 18-19).
12. Paragraph 13 is admitted.
13. Paragraph 14 is admitted.

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff Suzanne Brude fell on the u-shaped retaining wall surrounding the fire pit. (See Ex. C to Lanham Aff., Deposition of Suzanne Brude at p. 29, pp. 42-44). When Suzanne stepped on the wall, which she had traversed multiple times that afternoon, a capstone came loose, causing her to fall to the ground. (*Id.*)
2. The retaining walls at 6300 South Grand Prairie Drive in Sioux Falls, SD are inherently to be used for sitting or standing on due to their design and install elevation. (*See* Ex. F to Lanham Aff., Ex. 1 to Godwin Aff.).
3. In 2007, Defendant did the first repair of its work. (*See* Ex. B to Lanham Aff., Deposition of Elizabeth Jamison at p. 24-25). In 2007, Yellow Jacket fixed the paver patio on the south

side of the fire pit and worked on the south retaining wall. (*Id.* at p. 25; *See* Ex. A to Lanham Aff., Deposition of Greg Jamison at pp. 63-64). (*See also* Lanham Aff. at ¶ 5, Ex. D (photograph of u-shaped retaining wall by fire pit with areas repaired in 2007 marked by Greg Jamison)). During the 2007 repair, the south retaining wall was partially taken down and then rebuilt. *(Id.*). The waterfall feature was also repaired because it was not draining properly. (*Id.* at p. 26).

4. The 2013 repair and rebuild of the retaining walls was necessary because their condition had so deteriorated that Elizabeth Jamison quit hosting events in her backyard because she was embarrassed by the condition and appearance of the retaining walls. (*See* Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 25-26, 33).
5. When the repair of the retaining wall was done, it was extensive enough to require tearing out and rebuilding the retaining walls around the fire pit. (*See* Exhibit A to Lanham Aff., Deposition of Greg Jamison at pp. 16, 20-21; Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 27-28). *See also* Lanham Aff. at ¶ 6, Exhibit E (photograph depicting the u-shaped retaining wall located by the fire pit with area rebuilt in 2013 circled by Greg Jamison).
6. In addition to tearing out and rebuilding the retaining walls, the fire pit area was expanded as a part of the same rebuilding process. (*See* Exhibit A to Lanham Aff., Greg Jamison Dep. at p. 21; Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at p. 29).
7. The parties differ about whether Defendant was paid for this work. Elizabeth Jamison testified that although she could not locate the invoices, she believed that she had paid Yellow Jacket for some work subsequent to the 2005 invoices and that "[i]t might have been whenever I had him come back to do some major work." (Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 18-19).

8. Although the retaining walls were rebuilt, the Jamisons noticed both aesthetic issues and settling problems with the rebuilt walls. (*See* Ex. A to Lanham Aff., Greg Jamison Dep. at pp. 26-27, 31-32, 65-66; Ex. B. to Lanham Aff. Elizabeth Jamison Dep. at p. 33).
9. The rebuild that Yellow Jacket performed to the retaining walls at issue was not done in accordance with industry standards. (*See* Ex. F to Lanham Aff., Godwin Aff. at ¶ 5.A).
10. In particular, Yellow Jacket failed to use any drainage fill (gravel) in the project. (*Id.* at ¶ 5.B).
11. The current condition of the retaining walls shows that there was no compaction done behind the retaining walls at the time of the rebuild to prevent the soil from settling, liquefying, and thus creating lateral pressure upon the retaining walls, which is outside the industry standards. (*Id.* at ¶ 5.C).
12. The rebuild was not done correctly and as a result, caused the capstones to dislodge due to movement of soil behind the walls. (*Id.* at ¶ 5.D).
13. The entire rebuild of the retaining walls at issue was unstable and unable to be sustainable due to its failure to conform to industry standards. (*Id.* at 5.E).

Dated this 19th day of September, 2016.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS, LLP

BY */s/ Kimberly J. Lanham*
Steven M. Johnson (steve@janklowabdallah.com)
Kimberly J. Lanham (kim@janklowabdallah.com)
Delia M. Druley (delia@janklowabdallah.com)
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Plaintiff's Response to Yellow Jacket Irrigation and Landscaping's Statement of Undisputed Material Facts and Plaintiff's Statement of Undisputed Material Facts** was served by electronic mail (via Odyssey File & Serve) upon the following individuals:

Attorneys for the Defendant/Third Party Plaintiff
Melanie Carpenter
Woods, Fuller, Shultz & Smith, P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027

Attorneys for Third Party Defendants
Eric Schulte
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101-1030

Dated this 19th day of September, 2016.

/s/ Kimberly J. Lanham
Kimberly J. Lanham

Filed: 9/19/2016 3:14:45 PM CST Minnehaha County, South Dakota 49CIV15-003072

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 **PLAINTIFF'S OBJECTIONS TO DEFENDANT/THIRD PARTY PLAINTIFF'S PROPOSED ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PROPOSED SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Suzanne Brude, by and through her counsel of record, and hereby respectfully submits these objections to Defendant/Third Party Plaintiff's proposed Order Granting Defendant's Motion for Summary Judgment and proposed Summary Judgment in this matter. Plaintiff specifically responds to each numbered paragraph in Defendant/Third Party Plaintiff's proposed Order Granting Defendant's Motion for Summary Judgment as set forth below:

1. Objection. Plaintiff objects to Defendant/Third Party Plaintiff's assertion that Plaintiff failed to present any genuine issues of material fact which would preclude summary judgment in this case. Plaintiff presented several genuine issues of material fact which would certainly preclude summary judgment in this case, including, but not limited to, the following:

   a. Plaintiff Suzanne Brude fell on the u-shaped retaining wall surrounding the fire pit. (See Ex. C to Lanham Aff., Deposition of Suzanne Brude at p. 29, pp. 42-44). When Suzanne stepped on the wall, which she had

Filed: 10/4/2016 10:20:41 AM CST Minnehaha County, South Dakota 49CIV15-003072

traversed multiple times that afternoon, a capstone came loose, causing her to fall to the ground. (*Id.*)

b. The retaining walls at 6300 South Grand Prairie Drive in Sioux Falls, SD are inherently to be used for sitting or standing on due to their design and install elevation. (*See* Ex. F to Lanham Aff., Ex. 1 to Godwin Aff.).

c. In 2007, Defendant did the first repair of its work. (*See* Ex. B to Lanham Aff., Deposition of Elizabeth Jamison at p. 24-25). In 2007, Yellow Jacket fixed the paver patio on the south side of the fire pit and worked on the south retaining wall. (*Id.* at p. 25; *See* Ex. A to Lanham Aff., Deposition of Greg Jamison at pp. 63-64). (*See also* Lanham Aff. at ¶ 5, Ex. D (photograph of u-shaped retaining wall by fire pit with areas repaired in 2007 marked by Greg Jamison)). During the 2007 repair, the south retaining wall was partially taken down and then rebuilt. (*Id.*). The waterfall feature was also repaired because it was not draining properly. (*Id.* at p. 26).

d. The 2013 repair and rebuild of the retaining walls was necessary because their condition had so deteriorated that Elizabeth Jamison quit hosting events in her backyard because she was embarrassed by the condition and appearance of the retaining walls. (*See* Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 25-26, 33).

e. When the rebuilding of the retaining wall was done in 2011 or 2013, it was extensive enough to require tearing out and rebuilding the retaining walls around the fire pit. (*See* Exhibit A to Lanham Aff., Deposition of Greg Jamison at pp. 16, 20-21; Exhibit B to Lanham Aff., Deposition of

Elizabeth Jamison at pp. 27-28). *See also* Lanham Aff. at ¶ 6, Exhibit E (photograph depicting the u-shaped retaining wall located by the fire pit with area rebuilt in 2013 circled by Greg Jamison).

f. In addition to tearing out and rebuilding the retaining walls, the fire pit area was expanded as a part of the same rebuilding process in 2011 or 2013. (*See* Exhibit A to Lanham Aff., Greg Jamison Dep. at p. 21; Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at p. 29).

g. The parties differ about whether Defendant was paid for this work in 2011 or 2013. Elizabeth Jamison testified that although she could not locate the invoices, she believed that she had paid Yellow Jacket for some work subsequent to the 2005 invoices and that "[i]t might have been whenever I had him come back to do some major work." (Exhibit B to Lanham Aff., Deposition of Elizabeth Jamison at pp. 18-19).

h. Although the retaining walls were rebuilt in 2011 or 2013, the Jamisons noticed both aesthetic issues and settling problems with the rebuilt walls. (*See* Ex. A to Lanham Aff., Greg Jamison Dep. at pp. 26-27, 31-32, 65-66; Ex. B. to Lanham Aff. Elizabeth Jamison Dep. at p. 33).

i. The rebuild that Yellow Jacket performed to the retaining walls in 2011 or 2013 at issue was not done in accordance with industry standards. (*See* Ex. F to Lanham Aff., Godwin Aff. at ¶ 5.A).

j. In particular, Yellow Jacket failed to use any drainage fill (gravel) in the project in 2011 or 2013. (*Id.* at ¶ 5.B).

k. The current condition of the retaining walls shows that there was no compaction done behind the retaining walls at the time of the rebuild in

2011 or 2013 to prevent the soil from settling, liquefying, and thus creating lateral pressure upon the retaining walls, which is outside the industry standards. (*Id.* at ¶ 5.C).

l. The rebuild was not done correctly in 2011 or 2013 and as a result, caused the capstones to dislodge due to movement of soil behind the walls. (*Id.* at ¶ 5.D).

m. The entire rebuild of the retaining walls in 2011 or 2013 was unstable and unable to be sustainable due to its failure to conform to industry standards. (*Id.* at 5.E).

Plaintiff further objects to Defendant/Third Party Plaintiff's assertion that the Court has viewed the facts in this case in a light most favorable to the Plaintiff. Rather, the facts appear to have been viewed in a light most favorable to the Defendant/Third Party Plaintiff – the moving party.

2. No objection.

3. Objection in part. Plaintiff agrees that Defendant/Third Party Plaintiff performed work on the retaining wall at issue in 2007 and then rebuilt the wall in either 2011 or 2013, but adds that Defendant/Third Party Plaintiff also performed the initial work on the retaining wall at issue in 2005.

4. No objection.

5. No objection.

6. Objection. Plaintiff agrees that the record indisputably established that work performed by Defendant/Third Party Plaintiff in 2011 or 2013 on the retaining wall involved taking down and rebuilding the entire U-shaped area of the retaining wall as well as the wholesale expansion of the fire pit area adjacent to the U-shaped area of the retaining wall.

Plaintiff agrees that Defendant/Third Party Plaintiff reconstructed the retaining wall in the same manner as before; however, Defendant/Third Party Plaintiff also enlarged and expanded the fire pit area at the time of the rebuild in 2011 or 2013. Plaintiff further objects to the assertion that all of the same stone materials were reused during the rebuild of the retaining wall in 2011 or 2013. This cannot be true when the fire pit was enlarged and expanded as new and additional stone material would have had to have been used for that portion of the rebuild/repair. In addition, if the Defendant/Third Party Plaintiff would have adhered the cap stones to the retaining wall in 2011 or 2013, new adhesive would have had to have been used.

7. Objection. The record indisputably established that reconstruction of the retaining wall and enlargement and enhancement to the fire pit area undoubtedly added value to the property and enhanced use of the property. The condition of the sunken patio had so deteriorated that the Third Party Defendants no longer used it as originally intended. Elizabeth Jamison testified that she quit hosting neighborhood events and other parties in her backyard, as she had previously done, because she was so embarrassed by the condition and appearance of the retaining walls. (Plaintiff's Statement of Facts at ¶ 4). The 2011 or 2013 rebuild was so extensive that the U-shaped retaining wall surrounding the fire pit was torn down and entirely rebuilt. (*Id.* at ¶ 5). In addition, the fire pit area was expanded from its original scope. (*Id.* at ¶ 6). Thus, the rebuilding of the U-shaped retaining walls and expansion of the fire pit made the property more useful and valuable than an ordinary repair would.

8. No objection.

9. Objection. As a matter of law, the work performed in 2011 or 2013 to the retaining wall constituted an "improvement to real property." Tearing down, rebuilding, and expanding the fire pit area certainly involved the expenditure of labor. And there is a fact question regarding whether the tear down, rebuild, and expansion of the fire pit area involved the

expenditure of money. Defendant/Third Party Plaintiff testified that he did not charge the Third Party Defendants for the rebuilding work. (*See* Yellow Jacket Irrigation and Landscaping's Statement of Facts at ¶ 12). Greg Jamison did not recall being charged. (*Id.*). But Elizabeth Jamison testified that she believed she had paid Yellow Jacket for work subsequent to the 2005 invoices and that Elizabeth Jamison testified that although she could not locate the invoices, she believed that she had paid Yellow Jacket for some work subsequent to the 2005 invoices and that "[i]t might have been whenever I had him come back to do some major work." (*See* Plaintiff's Response to Yellow Jacket Irrigation and Landscaping's Statement of Facts at ¶ 11; Plaintiff's Statement of Facts at ¶ 7). Because Plaintiff is the non-moving party, this question of fact must be construed in her favor.

10. Objection. The 2013 (or 2011) rebuild of the retaining walls and expansion of the fire pit area was not a mere ordinary repair, but was rather an "improvement to real property." As such, the statute of repose should begin to run in either 2011 or 2013, rendering Plaintiff's claim timely.

11. No objection; however, as mentioned above, since the 2011 or 2013 rebuild of the retaining walls and expansion of the fire pit area was not a mere ordinary repair, but was rather an "improvement to real property," the statute of repose should begin to run in either 2011 or 2013, rendering Plaintiff's claim timely.

12. Objection. Since the 2011 or 2013 rebuild of the retaining walls and expansion of the fire pit area was not a mere ordinary repair, but was rather an "improvement to real property," the statute of repose should begin to run in either 2011 or 2013, rendering Plaintiff's claim timely. As such, summary judgment is not appropriate in this matter.

Plaintiff also objects to Defendant/Third Party Plaintiff's proposed Summary Judgment in this matter for all of the reasons set forth herein.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant/Third Party Plaintiff's proposed Order Granting Defendant's Motion for Summary Judgment and enter Plaintiff's proposed Order Granting Defendant/Third Party Plaintiff's Motion for Summary Judgment in this matter.

Dated this 4th day of October, 2016.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS, LLP

BY */s/ Kimberly J. Lanham*
Steven M. Johnson (steve@janklowabdallah.com)
Kimberly J. Lanham (kim@janklowabdallah.com)
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Plaintiff's Objections to Defendant/Third Party Plaintiff's Proposed Order Granting Defendant's Motion for Summary Judgment and Proposed Summary Judgment** was served by electronic mail (via Odyssey File & Serve) upon the following individuals:

Attorneys for the Defendant/Third Party Plaintiff
Melanie Carpenter
Woods, Fuller, Shultz & Smith, P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027

Attorneys for Third Party Defendants
Eric Schulte
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101-1030

Dated this 4th day of October, 2016.

/s/ Kimberly J. Lanham
Kimberly J. Lanham

Filed: 10/4/2016 10:20:41 AM CST Minnehaha County, South Dakota 49CIV15-003072

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
SUZANNE BRUDE, Plaintiff, vs. SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING, Defendant/Third Party Plaintiff, vs. GREGORY & ELIZABETH JAMISON, Third Party Defendants.	CIV. #15-3072 **AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff, and for her Amended Complaint against the above-named Defendant/Third Party Plaintiff, states and alleges as follows:

PARTIES

1.

Plaintiff Suzanne Brude is a resident of Sioux Falls, Minnehaha County, South Dakota.

2.

Defendant/Third Party Plaintiff Shane Breen d/b/a Yellow Jacket Irrigation and Landscaping, based on information and belief, is a resident of Sioux Falls, Minnehaha County, South Dakota. Defendant/Third Party Plaintiff does business in the name of Yellow Jacket Irrigation and Landscaping and employs others to work for him in conducting that business.

JURISDICTION AND VENUE

3.

This Honorable Court has jurisdiction over this action pursuant to S.D. Const. Art. § 5 and SDCL 16-6-9.

4.

Venue is proper within the indicated judicial circuit under SDCL 15-5-6.

FACTS

5.

On or about October 7, 2014, Plaintiff was an invitee on the residential premises of 6300 South Grand Prairie Drive in Sioux Falls, South Dakota.

6.

In 2005, the Defendant/Third Party Plaintiff built a brick retaining wall located on the residential premises of 6300 South Grand Prairie Drive in Sioux Falls, South Dakota.

7.

In or around 2007, 2011, and/or 2013, after the initial construction of the retaining wall located on the residential premises of 6300 South Grand Prairie Drive in Sioux Falls, South Dakota, the Defendant/Third Party Plaintiff, doing business as Yellow Jacket Irrigation and Landscaping, rebuilt, remodeled and/or repaired said retaining wall.

8.

On October 7, 2014, as the Plaintiff stepped on the top ledge of the retaining wall near the fireplace, the bricks tumbled and the Plaintiff fell to the ground, resulting in severe injuries to her right ankle and foot.

Filed: 9/26/2016 3:46:21 PM CST Minnehaha County, South Dakota 49CIV15-003072

9.

As a direct and proximate result of the fall, the Plaintiff sustained injuries and trauma, including, but not limited to, personal injuries which required medical treatment. Additionally, she has experienced pain and suffering, permanent impairment, disability, disfigurement, loss of enjoyment of the capacity of life, emotional distress, loss of past and future earned wages, past and future medical costs and expenses, and other general and special damages.

COUNT I
Negligence

10.

Plaintiff hereby realleges paragraphs 1-9 of this Amended Complaint and hereby incorporates them as if fully set forth herein.

11.

Defendant/Third Party Plaintiff owed a duty of care to homeowners and patrons in the proper construction of the retaining wall located at 6300 South Grand Prairie Drive in Sioux Falls, South Dakota.

12.

The retaining wall built and subsequently rebuilt, remodeled, and/or repaired by the Defendant/Third Party Plaintiff was dangerous and not reasonably fit for its intended purpose.

13.

At all times relevant hereto, the employees/agents of Defendant/Third Party Plaintiff were acting within the scope of their actual, express, apparent, and/or implied authority, as well as acting within the scope of their employment duties for Defendant/Third Party Plaintiff.

14.

The conduct of the employees/agents of Defendant/Third Party Plaintiff that resulted in injuries to the Plaintiff was within the scope of their employment and reasonably foreseeable, and therefore, imputable to Defendant/Third Party Plaintiff under the doctrine of Respondeat Superior.

15.

Pursuant to the doctrine of Respondeat Superior, Defendant/Third Party Plaintiff is responsible for the negligence of its employees and/or agents.

16.

At the time of the incident, the Defendant/Third Party Plaintiff negligently and carelessly departed from the proper standard of care which contributed to the Plaintiff's fall. The Defendant/Third Party Plaintiff breached its duties owed to the Plaintiff by negligently designing, constructing, and/or repairing/rebuilding/remodeling said retaining wall located at 6300 Grand Prairie Drive in Sioux Falls, South Dakota, in several respects, including, but not limited to:

(a) Failing to properly adhere the top ledge of the retaining wall to the structure;

(b) Failing to use drainage fill (gravel) during the installation and/or rebuild/remodel/repair of the retaining wall;

(c) Failing to apply compaction behind the retaining wall during the installation and/or rebuild/remodel/repair of the retaining wall to prevent the soil from settling, liquefying, and thus creating lateral pressure upon the retaining wall; and/or

Filed: 9/26/2016 3:46:21 PM CST Minnehaha County, South Dakota 49CIV15-003072

(d) Failing to design, construct, and/or rebuild/remodel/repair the retaining wall in conformance with industry standards.

17.

As a direct and proximate cause of the Defendant/Third Party Plaintiff's negligence, the Plaintiff has sustained injuries, including, but not limited to: personal injuries resulting in a course of medical treatment; past, present and future pain and suffering; loss of enjoyment of the capacity of life, emotional distress; past and future medical costs and expenses; and other general and special damages, all of which are compensable under South Dakota law.

WHEREFORE, Plaintiff respectfully prays for damages against the Defendant/Third Party Plaintiff as follows:

(1) For Plaintiff's compensatory, general and special damages in an amount that the jury deems just and proper under the circumstances;

(2) For Plaintiff's costs and disbursements;

(3) For pre-judgment and post-judgment interest; and

(4) For such other and further relief as the Court determines to be just and proper.

Dated this 26th day of September, 2016.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS, LLP

BY _____

Steven M. Johnson (steve@janklowabdallah.com)
Kimberly J. Lanham (kim@janklowabdallah.com)
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby respectfully demands trial by jury on all issues so triable.

Steven M. Johnson
Kimberly J. Lanham

Filed: 9/26/2016 3:46:21 PM CST Minnehaha County, South Dakota 49CIV15-003072

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28064

SUZANNE BRUDE,

Plaintiff/Appellant,

vs.

SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING,

Defendant/Third-Party Plaintiff/Appellee

vs.

GREGORY AND ELIZABETH JAMISON,

Third-Party Defendants.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE JOHN R. PEKAS

BRIEF OF APPELLEE

Steven M. Johnson
Ronald A. Parsons, Jr.
Kimberly J. Lanham
Johnson, Janklow, Abdallah,
Reiter & Parsons LLP
PO Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304
Attorneys for Appellant

Melanie L. Carpenter
Jordan J. Feist
Woods, Fuller, Shultz & Smith P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890
Attorneys for Appellee

Notice of Appeal filed December 7, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

JURISDICTIONAL STATEMENT

The Order Granting Defendant/Third Party Plaintiff's Motion for Summary Judgment was entered by the Circuit Court on December 5, 2016. (SR 361.) A Notice of Entry of Order was filed on December 8, 2016. (SR 374.) The Appellant's Notice of Appeal was filed on December 7, 2016. (SR 362.)

REQUEST FOR ORAL ARGUMENT

Shane Breen d/b/a Yellow Jacket Irrigation and Landscaping respectfully requests oral argument on all of the issues set forth herein.

STATEMENT OF ISSUES

1. Did the circuit court correctly hold that no improvement to real property occurred by the repair of a retaining wall which was returned to the same condition as it was originally constructed through use of the same design and materials?

   The circuit court held that the repair to the retaining wall was not an improvement to real property and, thus, that the statue of repose under SDCL § 15-2A-3 was not restarted. Accordingly, plaintiff Suzanne Brude's claim against Shane Breen d/b/a Yellow Jacket Irrigation and Landscaping was barred.

   Clark County v. Sioux Equipment Corp., 2008 S.D. 60, ¶ 11, 753 N.W.2d 406, 410.
   Schott v. Halloran Const. Co., Inc., 982 N.E. 2d 965 (Ill. App. Ct. 2013).
   SDCL § 15-2A-3.

STATEMENT OF THE CASE

Plaintiff Suzanne Brude ("Brude") fell from a retaining wall on property owned by Gregory and Elizabeth Jamison, on October 7, 2014. (SR 3 and 174.) Brude was walking on top of the wall when she fell. (*Id.*) Brude settled her claim against the Jamisons for $300,000, and then she brought suit against Shane Breen d/b/a Yellow Jacket Irrigation and Landscaping ("Yellow Jacket") alleging negligent design and

construction of the retaining wall. (SR 275.) Brude filed her Complaint against Yellow Jacket on November 6, 2015. (SR 2 and 175.) Yellow Jacket brought a Motion for Summary Judgment on July 29, 2016. (SR 138.)

The original retaining wall was built in 2005 as part of a landscaping project where Yellow Jacket constructed a sunken patio, fire pit, and performed other landscaping services. There is no dispute that the original construction of the sunken patio and the retaining wall in question was an "improvement" within the meaning of South Dakota's statute of repose. The parties disagree whether later repairs performed by Yellow Jacket in 2011[1] constituted an "improvement" to real property such that the ten-year statute of repose would have restarted at the time of substantial completion of the repairs. If the repairs performed in 2011 do not constitute an "improvement," Brude's claim would be barred by the statute of repose because it was brought more than ten years after the substantial completion of the original construction.

The Circuit Court properly concluded that the 2011 repairs did not constitute an "improvement" to real property and granted Yellow Jacket's motion for summary judgment. The decision of the Circuit Court should be affirmed.

STATEMENT OF FACTS

In 2005, Greg and Elizabeth Jamison hired Yellow Jacket to construct a sunken patio in their backyard. (SR 8, at ¶ 4; SR 148 and 154.) The project included the construction of a retaining wall, fire pit, and waterfall, as well as other landscaping

[1] As explained in more detail in the Statement of Facts, the parties have different recollections of when Yellow Jacket performed its repair work on the retaining wall. The Jamisons thought the repairs were performed in 2013, (SR 156, 161, 149, 152), but Breen testified that the wall was repaired in 2011, (SR 166-68). When the repairs were performed is immaterial to the issue before the Court. The only issue for resolution is whether the repairs constituted an "improvement" within the meaning of the statute of repose. If the repairs are not an "improvement," regardless of whether they were performed in 2011 or 2013, the repairs would not have restarted the statute of repose, and Brude's claim would be untimely.

services at the Jamisons' residence in Sioux Falls, South Dakota. (*Id.*) Yellow Jacket completed construction of the sunken patio and retaining wall by September 28, 2005. (SR 148, 154-55, 159, and 164.) Specifically, Ms. Jamison testified that she was "positive" the retaining wall was completed by September 28, 2005. (SR 148.) Further, she testified that September 27, 2005, was the date the Jamisons closed on their house, and that "it would have been completed, or majority, at least presentable so we could close on the house." (*Id.*) Mr. Jamison testified that Yellow Jacket would have had the landscaping done by the date they moved into their home in September of 2005. (SR 154-55.) The backyard patio project, including the retaining wall, cost the Jamisons approximately $17,500.00. (SR 164.)

The initial quality of the project was described by Elizabeth Jamison as "beautiful" and "absolutely stunning," and the project was even featured on Home and Garden TV. (SR 148, 159-60, and 171.) The Jamisons used their backyard patio area to host guests at "parties" and "neighborhood events," which included family and friends. (SR 158 and 151.)

Years after completion, at the request of the Jamisons, Yellow Jacket returned to perform some repairs to the retaining wall. (SR 166-68.) The repairs were necessary due to movement in a section of the wall resulting from the natural shifting of the ground. (SR 167 and 170.) According to Shane Breen, a portion of the wall had moved around and cap stones had become loose and a portion of the wall leaned in a bit toward the patio. (SR 167.) The parties have different recollections of when the repairs occurred. Shane Breen, the owner/operator of Yellow Jacket, recalls that the repairs took place in 2011. (SR 166-68.) The Jamisons recall that the repairs took place in 2013, although the

Jamisons admitted they could not be sure of the dates. (SR 156, 161, 149, 152.) Regardless of when the repairs were performed, the parties agree that the repairs involved Yellow Jacket deconstructing part of the retaining wall and reconstructing it so it was straight. (SR 168, 172, 150.) During the reconstruction, Yellow Jacket reused the original materials it used to build the retaining wall in 2005. (SR 151, 172, 157, and 162.) The wall was placed back in the same configuration as it had been prior to the repair. (*See* SR 167-168.) It was not expanded or enlarged and was not redesigned. *Id.* The only "redesign" work done to the Jamison property in either 2011 or 2013 was that the fire pit was made larger which had no bearing on the retaining wall. (*See* SR 219.)

Yellow Jacket did not charge the Jamisons for the repair work. (SR 172, 162-63.) When Greg Jamison was asked during his deposition whether he recalled "receiving an invoice or being charged for any of the repair work that Yellow Jacket did in 2013," he responded: "I don't." (SR 162.) Mr. Jamison was also asked: "And to the best of your recollection Yellow Jacket/Shane never charged you for any of the subsequent work that was done on the retaining wall area after 2005?" He responded: "To the best of my recollection, yes." (SR 163.) Similarly, Ms. Jamison testified: "To me, it did *seem* like we had one more invoice, but I checked the checkbooks, and everything, and I could not find anything." (SR 148) (emphasis added).

ARGUMENT

The Court reviews a circuit court's grant of summary judgment under the *de novo* standard of review. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508 (quoting *Ass Kickin Ranch, LLC v. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726). "[S]ummary judgment is a preferred method for disposing of any

legally inadequate claim." *Berbos v. Krage*, 2008 S.D. 68, ¶ 8, 754 N.W.2d 432, 435 (quoting *Farm Credit Services of Am. v. Dougan*, 2005 S.D. 94, ¶ 7, 704 N.W.2d 24, 27). On review of a grant of summary judgment, the Court must "decide 'whether genuine issues of material fact exist and whether the law was correctly applied.'" *Id.* (quoting *Ass Kickin Ranch*, 2012 S.D. 73, ¶ 6). The Court "will affirm a circuit court's decision so long as there is a legal basis to support its decision." *Id; see also Klein v. Sanford USD Medical Center*, 2015 SD 95, ¶ 20, 872 N.W.2d 802, 808.

1. The statute of repose applies to and bars Brude's claim against Yellow Jacket.

Brude brought her complaint more than ten years after construction of the retaining wall was complete, and therefore her claim is barred by the statute of repose. The Jamisons both testified, and Brude does not dispute, that construction of the retaining wall was completed by September 28, 2005. (SR 148, 154-55, 159, and 164.) However, Brude did not bring her claim until November 6, 2015, which is more than ten years after substantial completion of construction on the retaining wall. (SR 2 and 175.)

South Dakota's statute of repose states:

> No action to recover damages for any injury to real or personal property, *for personal injury* or death arising out of any deficiency in the *design, planning, supervision, inspection, and observation of construction, or construction*, of an *improvement to real property*, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction of such an improvement more than *ten years* after substantial completion of such construction. The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended.

SDCL § 15-2A-3 (emphasis added). The plain language of the statute of repose bars personal injury claims resulting from any deficiency in the observation of construction or the construction itself, of an improvement to real property, that arises more than ten years after substantial completion of construction. Brude's claim falls precisely within this definition.

The statute of repose began running on September 28, 2005, the date of substantial completion of the retaining wall. As a result, Brude had ten years—until September 28, 2015—to bring a claim for any injuries resulting from defects in the construction of the wall, which she alleges caused her fall. Brude brought this suit on November 6, 2015.

2. Yellow Jacket's subsequent repair of the wall does not constitute an "improvement to real property" which would have restarted the statute of repose.

Both Brude and Yellow Jacket agree that the original construction of the retaining wall in September of 2005 constituted an improvement to real property. *(See Appellant's Br. at 12.)* Brude argues, however, and Yellow Jacket disputes, that the repairs performed by Yellow Jacket on the wall in 2011 constituted an improvement to real property that would have restarted the statute of repose. The parties agree that if the Court concludes that Yellow Jacket's 2011 repairs did not constitute an "improvement" within the meaning of the statute of repose, Brude's claim is time-barred.

Brude argues at length that the repairs performed by Yellow Jacket in 2011 were an "improvement to real property" that would restart the statute of repose. Brude's argument fails for several reasons. First, Brude misstates the undisputed material facts or relies on facts that are irrelevant to resolving the issue. Second, Brude's argument is not

supported by this Court's interpretation of the term "improvement to real property." Finally, Brude's argument is unsupported by the case law.

In determining what constitutes an "improvement" to real property, this Court has taken a "common sense approach" to defining the term. *Clark County v. Sioux Equipment Corp.*, 2008 S.D. 60, ¶ 11, 753 N.W.2d 406, 410. In *Clark County*, this Court adopted the following definition of "improvement":

> A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Id. at ¶ 11. "[T]he question is whether the addition is designed to make the property more useful or valuable as distinguished from *ordinary* repairs or replacements." *Id.* at ¶ 15. (emphasis in original.)

Based on the definition of "improvement" articulated in *Clark County*, there are essentially three elements to an "improvement:" (1) a permanent addition to or betterment of real property that enhances its capital value; (2) that involves the expenditure of labor or money; and (3) that is designed to make the property more useful or valuable. The original landscaping project completed in 2005 had all the hallmarks of an "improvement to real property." The project involved a permanent addition to and a betterment of the real property. The sunken patio, retaining wall, and fire pit, were added to an otherwise empty space, enhancing the capital value of the property. The project also involved the expenditure of labor and money, as the patio and retaining walls alone cost the Jamisons approximately $17,500.00. (SR 164.) Finally, the initial project enhanced the usefulness and value of the property. Ms. Jamison described the completed project as "beautiful" and "absolutely stunning," and it was featured on Home and

Garden TV. (SR 148, 159-60, and 171.) She also used the property to host neighborhood parties and other functions. (SR 248.) Brude acknowledges in her brief that the original construction constituted an "improvement to real property" within the meaning of the statute of repose. (Appellant's Br. at 12.) In contrast, as explained below, the repairs made in 2011 to the retaining wall are missing the key elements of an "improvement." Even if a fact-finder could conclude that changes were made to the retaining wall when Yellow Jacket repaired it in 2011, Brude has failed to offer any evidence suggesting that any such changes to the retaining wall meet the definition of "improvement" as defined in *Clark County.*

A. Brude has failed to meet her burden of demonstrating facts in the record to preclude the application of the statute of repose to bar her claim.

This Court has set forth the burden of proof as it relates to a defense based upon the statute of repose, as follows:

> A statute of repose is an affirmative defense, and the burden of proof to establish an affirmative defense is on the party who seeks to rely on it. *Clancy v. Callan*, 90 S.D. 115, 118, 238 N.W.2d 295, 297 (1976) (citing *Lang v. Burns*, 77 S.D. 626, 97 N.W.2d 863, 865 (1959)). The burden of production, however, shifts in summary judgment proceedings. For the sole purpose of analyzing this procedural aspect of burden shifting in summary judgment proceedings, we consider the statute of repose in the same manner as we would consider a statute of limitations. Therefore, where a defendant, by motion for summary judgment, asserts this type of affirmative defense that bars an action, 'and presumptively establishes the defense by showing the case was instituted beyond the statutory period, *the burden then shifts to the plaintiff to establish the existence of material facts in avoidance of the statute . . . ." Conway v. Conway*, 487 N.W.2d 21, 21 (S.D. 1992).

Clark County, 2008 S.D. 60, ¶ 17 (emphasis added). Yellow Jacket has met its initial burden by demonstrating that Brude brought her claim more than ten years after substantial completion of the retaining wall. Consequently, it is Brude's burden to

establish the existence of material facts to avoid of the statute of repose. As set forth below, Brude has failed to meet her burden.

B. The 2011 repairs did not involve a permanent addition or betterment of the real property.

Yellow Jacket's repair work in 2011 did not constitute a "permanent addition to or betterment of real property that enhances its capital value" because Yellow Jacket merely rebuilt the retaining wall exactly as it was previously constructed, using the same materials. Brude repeatedly alleges that Yellow Jacket "redesigned the project by enlarging the fire pit and reconfiguring the layout" and by building the "U-shaped wall to different specifications." (Appellant's Br. at 12.) Yet, the evidence in the record does not support this argument.

Brude quotes Breen's deposition testimony where he describes the 2011 repairs. Breen first testified that he "straightened" the retaining wall. (SR 208-09; Appellant's Br. at 7.) Next, he stated: "[W]e would have tore out some of the pavers on the bottom. The rock in this corner, I would have tore out. The landscaping on top, we would have tore out. So all that would have had to be redone. Once the wall was in, we put the pavers back, and then after that we would have did the rock, edging, put any plants back in and stuff like that." (SR 208-09; Appellant's Br. at 7.) Brude also argues that the fire pit was enlarged.

First, any statements regarding the pavers, the rock, the fire pit, and the landscaping have nothing to do with the scope of repairs to the retaining wall. With regard to the wall itself, Breen testified that he merely "straightened" it. Second, this quoted testimony does not demonstrate that the project was built to different specifications, nor does it establish that the layout was reconfigured. To the contrary,

this testimony demonstrates that Yellow Jacket took out some of the elements of the landscaping project to straighten out the wall, and then merely put the materials back in their place. Other testimony in the record makes clear that Yellow Jacket used the same materials to rebuild the wall in order to straighten it out after it had shifted due to the moving ground. Breen specifically testified that Yellow Jacket rebuilt the retaining wall with the same material, and Mr. Jamison also acknowledged that the same stones were used to rebuild the retaining wall. (SR 172, 157, and 162.) In addition, Ms. Jamison stated that she could tell the same stones were used in the rebuild because some of them had changed colors due to the use of the fire pit. (SR 151.)

Brude argues that the work performed by Yellow Jacket in 2011 was a "replacement" which constitutes an "improvement" under *Clark County* definition of "improvement." While it is true, as Brude argues, that replacements under appropriate circumstances may sometimes be considered improvements to real property, Yellow Jacket's work here did not constitute a replacement. Rather, Yellow Jacket merely reconstructed what had already existed using the same materials. In addition, the test for determining whether certain work constitutes an improvement or repair never changes. Even if Brude argues that the work was a "replacement," Brude still must demonstrate that the "replacement" was also an "improvement," which Brude has failed to show.

In *Clark County*, the county hired Sioux Equipment to install a fuel storage and dispensing system. *Clark County*, 2008 S.D. 60, ¶ 3. Sioux Equipment raised the issue of the statute of repose because its work was performed more than ten years prior to the suit being brought. The county argued, however, that the statute of repose was inapplicable because Sioux Equipment merely replaced a fuel storage and dispensing

system which could not constitute an "improvement to real property." *Id*. at ¶ 16. This Court disagreed, finding that Sioux Equipment established that "any equipment that existed on the site prior to Sioux Equipment's work was removed by a third party before Sioux Equipment arrived" and that Sioux Equipment was hired "to install a completely new fuel storage and dispensing facility." *Id*. at ¶ 18. Based upon these facts, the Court concluded: "This was sufficient to presumptively show entitlement to the statute of repose as a defense." *Id.* The Court also noted that the "addition of the Sioux Equipment fuel system, for which County paid $15,000, clearly enhanced the use of the property." *Id.* at ¶ 14.

The facts in *Clark County* which led the Court to conclude that a replacement constituted an improvement to real property are easily distinguishable from the repairs Yellow Jacket made in 2011. As explained in more detail below, Yellow Jacket was not paid for the repair work, nor did Yellow Jacket install a new retaining wall after a third party removed the old wall. Yellow Jacket did not add anything new to the property, but instead repaired what was already there using existing materials.

At least one other court has specifically considered whether rebuilding and repairing a retaining wall constitutes an improvement to real property. *See Schott v. Halloran Const. Co., Inc.*, 982 N.E. 2d 965 (Ill. App. Ct. 2013). There, the defendant construction company built a retaining wall in 1990, and more than ten years later, the plaintiff brought suit for injuries resulting from a fall from the retaining wall. *Id.* at 966-67. Years after the initial construction, a rain storm caused part of the retaining wall to collapse, and the wall had to be rebuilt. *Id.* at 967. Just as Brude argues here, the plaintiff in *Schott* argued that the rebuild of the wall restarted the statute of repose. *Id.*

The court held that while the initial construction constituted an improvement to real property, the repair and rebuild of the wall was not an improvement. *Id.* at 968-69.

In evaluating whether the rebuild of the retaining wall constituted an improvement, the *Schott* court used similar criteria to the criteria adopted by this Court. *See id*. at 969 ("[R]elevant criteria for determining what constitutes 'an improvement to real property' include: whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced."); *cf. Clark County*, 2008 S.D. 60, ¶ 11 (defining "improvement" as "A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."). After concluding the initial construction was an improvement, the *Schott* court concluded:

> However, it seems just as clear that the work done on the wall after it was washed out by rain in 1994 was not an improvement to real property but was mere repair of an existing structure. The rebuilding of the wall did not add anything to the property; it simply returned it to the condition it had been in prior to the heavy rain doing damage. Neither the value nor the use of the property was enhanced by the work; the property was simply returned to the condition it had been in prior to being damaged by heavy rain. The retaining wall was rebuilt in exactly the same configuration it had been in prior to being damaged, and using for the most part the same materials. The work did not substantially increase the value of the property, enhance its use, or add anything to it. The rebuild of the retaining wall did not constitute the "construction of an improvement to real property" within the meaning of the statute of repose.

Id. at 970.

This analysis is directly applicable here. Yellow Jacket rebuilt the retaining wall due to the natural shifting of the ground. (SR 167 and 170.) Despite Brude's claims that

Yellow Jacket reconfigured the project and built it to different specifications, the actual evidence in the record establishes that the rebuild did not add anything to the property, it was accomplished using the same materials used in the original construction, and it merely sought to return the retaining wall to substantially the same condition as it was before the repairs became necessary.

Brude argues that "[c]entral to [the *Schott*] decision, however, was the fact that the portion of the retaining wall from which plaintiff fell was not rebuilt in 1994, when the plaintiff contended that the statute of repose should begin to run, but rather in 1990 when the wall was originally constructed, more than ten years prior to the incident." (Appellant's Br. at 22.) This argument is misplaced. The court's alternative holding was not "central" to its main holding. The court stated: "We reject the plaintiffs' argument for two reasons." *Schott*, 982 N.E.2d at 968. The first reason was that the court did "not believe that the work done to rebuild the retaining wall after it collapsed in 1994 constitutes the 'construction of an improvement to real property' within the meaning of the statute of repose." *Id.* The court later stated: "The second reason we reject the plaintiffs' argument is that the portion of the retaining wall from which [the plaintiff] stepped or fell was not repaired or rebuilt in 1994. The portion of the wall from which [the plaintiff] stepped or fell was the original retaining wall built by [the contractor] in 1990, more than 10 years prior to the accident." *Id.* The court did not hold that, if the plaintiff had stepped or fell from a portion of the wall that was rebuilt, the statute of repose would somehow automatically restart without first determining whether the repair work constituted an "improvement to real property." The court's second reason for rejecting the plaintiff's argument was its alternative holding—i.e., the court merely

concluded that even if the repairs did constitute an improvement, the statute of repose would not be implicated because the plaintiff did not fall from the portion of the wall that was rebuilt.

Brude further relies on *Horoscz v. Alps Estates, Inc.*, 642 A.2d 384 (N.J. 1994), in support of her argument that when a plaintiff merely alleges that an injury occurred from a repair, as opposed to an "improvement," the statute of repose automatically restarts without application of the test for whether a repair constitutes an "improvement to real property." Brude's reading of this case is incorrect.

In *Horoscz*, a contractor built a home for the plaintiffs, which had some alleged defects, ultimately causing the house to sink. A few years later, a contractor repaired the house by lifting it and adding concrete and steel under the part of the house that was sinking, and by replacing the foundation. *Id.* at 386. The plaintiffs eventually sued the contractor, who then raised the statute of repose as a defense. Importantly, the court concluded that the repair work, which involved the lifting the entire house, adding new steel and concrete, and replacing the foundation, constituted an "improvement to real property" under the statute of repose. *Id.* at 387.

After the *Horoscz* court concluded the repair was an "improvement," it cited as another reason for its holding the fact that the plaintiffs' claims involved damages resulting only from the subsequent repairs, as opposed to the original construction. However, the court never dispensed with the requirement that the repairs must meet the test for an "improvement" to implicate the statute of repose. In fact, the court made very clear that its holding was premised on its finding that the repairs were also an "improvement." The court stated: "[A]ny deficiency related to a subsequent

improvement of the property may form the basis of a lawsuit, provided that the property owner commences such an action within ten years after the completion of that *improvement." Id.* at 389 (emphasis added). "As is any other builder, [the contractor] is liable for a defect that appears within ten years of the completion of its *improvement to real property." Id.* (emphasis added). "When a builder-developer performs *repairs that constitute an improvement to real property* after the initial construction has been completed, the owner has ten years from the completion of the repair work to file an action against the builder-developer for defects relating solely to that repair work." *Id.* (emphasis added).

The court never dispensed with the requirement that, for the statute of repose to be implicated, repairs must still constitute an improvement to real property. If Brude could automatically set aside the statute of repose by merely alleging that her injuries resulted from the 2011 repair work, as opposed to the original construction, the statute of repose would have no effect. Even if this is the law in New Jersey, it is certainly not the law in South Dakota. In South Dakota, both the plain language of SDCL § 15-2A-3, and the Court's interpretation of the statute of repose set forth in *Clark County*, make clear that the statute of repose begins running from the date of substantial completion of an "improvement" to real property. To overcome the statute of repose, Brude is required to make an affirmative showing that Yellow Jacket's 2011 repairs constituted an "improvement," rather than merely alleging that the 2011 work caused Brude's injuries. To hold that the application of the statute of repose is contingent upon whether a plaintiff alleges her injuries arise from the original construction or subsequent repairs without first

determining whether a particular project constitutes an "improvement to real property," would require the Court to rewrite the statute.

Finally, an improvement to or betterment of real property must enhance the capital value of the property to constitute an "improvement." As pointed out in more detail in the next subsection below, there is no evidence in the record to suggest the 2011 repair work enhanced the capital value of the property.

C. There is no evidence in the record suggesting Yellow Jacket's 2011 repairs enhanced the capital value or made the property more useful or valuable.

Pursuant to the standard set forth in *Clark County*, an "improvement" must enhance the capital value of the real property. *See Clark County*, 2008 S.D. 60, ¶ 11. There is absolutely no evidence in the record to suggest that the repair work done by Yellow Jacket in 2011 enhanced the capital value of the property.

In addition, the *Clark County* standard also requires that an "improvement" "is designed to make the property more useful or valuable . . . ." *Id.* Brude merely argues that "the redesign, rebuilding and expansion of the retaining wall and expansion of the fire pit made the property more useful and valuable," but Brude cites no facts to support this argument. (Appellant's Br. at 17.) Brude points to Ms. Jamison's testimony that she quit hosting neighborhood parties due to the condition of the retaining wall to suggest that, because the condition of the wall was not satisfactory prior to Yellow Jacket's repairs, the repairs must have increased the usefulness or value of the property. However, Ms. Jamison testified that even after Yellow Jacket repaired the wall she was dissatisfied with the condition of the project. Specifically, Ms. Jamison was asked during her deposition what had happened after Yellow Jacket repaired the u-shaped portion of

the wall. (SR 256.) In response, she testified that she was not satisfied with the repairs. (*Id*.) She stated: "So that was – basically after that [the 2011 repairs], occasionally there would just be a few family members and we would sit by the fire pit, but I did not do anymore parties in my back yard." (SR 257.) Ms. Jamison gave no indication that the property was more useful or valuable after Yellow Jacket repaired the wall. There are simply no facts in the record to show that the repairs either enhanced the capital value of the property, or that they increased the usefulness or the value of the property.

D. Yellow Jacket was not paid for the 2011 repair work.

Brude argues that the issue of whether the Jamisons paid Yellow Jacket for the 2011 repairs "was a disputed factual issue improperly resolved against Brude." However, Brude ignores this Court's rule that "when challenging a summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Peters v. Great Western Bank, Inc*., 2015 S.D. 4, ¶ 13, 859 N.W.2d 618, 624 (quoting *Estate of Elliott ex. rel Elliott v. A&B Welding Supply Co*., 1999 S.D. 57, ¶ 16, 594 N.W.2d 707, 710). Further, this Court has cautioned that "proof of a mere possibility is never sufficient to establish a fact." *Id.*

The deposition testimony regarding the issue of payment for the 2011 repairs demonstrates that Brude is relying on speculation to establish a factual dispute. Shane Breen testified he did not charge the Jamisons for the repair work. (SR 162-63, 172.) The Jamisons testified that they *might* have been charged for the repair work, but when they searched for the invoices and proof of payment, they found no evidence that Yellow Jacket charged for the 2011 repair work. Specifically, when Mr. Jamison was asked

whether Yellow Jacket charged for the repairs, he stated: "I think he might have." (SR 219) (emphasis added). He was then asked whether he recalled "receiving an invoice or being charged for any of the repair work that Yellow Jacket did in 2013," to which he responded: "I don't." (SR 224.) Finally, Mr. Jamison was asked: "And to the best of your recollection Yellow Jacket/Shane never charged you for any of the subsequent work that was done on the retaining wall area after 2005?" He responded: "To the best of my recollection, yes." (SR 225.) Ms. Jamison testified similarly, stating: "To me it did *seem like* we had one more invoice, but I checked the checkbooks, and everything, and I could not find anything." (SR 230.) (emphasis added). The fact that the Jamisons could produce invoices from Yellow Jacket from 2005, (*see* SR 164), but not 2011, is telling. Brude has done nothing more than show a "mere possibility," based upon speculation, that the Jamisons paid for the 2011 repairs. Brude has failed to meet her burden of substantiating her allegations as is required under the standard articulated in *Peters*. This issue was not improperly resolved against Brude by the Circuit Court, but instead the Circuit Court properly concluded that there was no genuine dispute of materials facts that would preclude summary judgment.

3. Courts must apply the statute of repose, regardless of its harsh effects.

This Court has consistently enforced statutes that operate to bar claims despite their harsh effects. "Traditionally, compliance with statutes of limitations is strictly required and doctrines of substantial compliance or equitable tolling are not invoked to alleviate a claimant from a loss of right to proceed with a claim." *Citibank, N.A. v. South Dakota Dept. of Revenue*, 2015 S.D. 67, ¶ 8, 868 N.W.2d 381, 385 (quoting *Dakota Truck Underwriters v. S.D. Subsequent Injury Fund*, 2004 S.D. 120, ¶ 17, 689 N.W.2d

196, 201). Further, this Court has recognized that statutes of limitations "ensure a 'speedy and fair adjudication of the rights of parties.'" *Id.* (quoting *Murray v. Mansheim*, 2010 S.D. 18, ¶ 21, 779 N.W.2d 379, 389). "In most cases, this important principle underlining the statute of limitations is appropriately advanced by refusing to judicially modify the harsh effect imposed by a statute of limitations." *Id.* (quoting *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 18).

CONCLUSION

Yellow Jacket has met its initial burden of proof by demonstrating that the initial construction of the retaining wall was completed in 2005 and that Brude did not bring her claim until more than 10 years after substantial completion of the construction on the retaining wall. In accordance with the principles set forth in *Clark County*, the burden then shifted to Brude to demonstrate that material facts exist for the avoidance of the statute of repose. However, Brude has failed to demonstrate that the 2011 repairs of the retaining wall involved an addition to or a betterment of the real property. In addition, Brude has failed to demonstrate any facts suggesting that the repair work increased the capital value of the property or made the property more valuable or useful. Brude has further failed to show that the Jamisons paid Yellow Jacket for the repair work. Because Brude has failed to meet her burden of setting forth facts that would preclude the application of the statute of repose to bar her claim, the Circuit Court properly concluded that the statute of repose applies. Yellow Jacket respectfully requests the Court affirm the Circuit Court's grant of summary judgment.

Dated this 27th day of March, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

Melanie L. Carpenter
Jordan J. Feist
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Melanie.Carpenter@woodsfuller.com
Jordan.Feist@woodsfuller.com
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 5,931 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 27th day of March, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

Melanie L. Carpenter
Jordan J. Feist
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Melanie.Carpenter@woodsfuller.com
Jordan.Feist@woodsfuller.com
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2017, I electronically served via e-mail, a true and correct copy of the foregoing Brief of Appellee upon the following:

Steven M. Johnson
Kimberly J. Lanham
Ronald A. Parsons, Jr.
Johnson, Janklow, Abdallah, Reiter & Parsons, LLP
PO Box 2348
Sioux Falls, SD 57101-2348
steve@janklowabdallah.com
kim@janklowabdallah.com
ron@janklowabdallah.com

Eric C. Schulte
Davenport, Evans, Hurwitz & Smith, LLP
PO Box 1030
Sioux Falls, SD 57101-1030
eschulte@dehs.com

_____
One of the Attorneys for Appellee

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28064

SUZANNE BRUDE,

Plaintiff and Appellant,

vs.

SHANE BREEN d/b/a YELLOW JACKET IRRIGATION AND LANDSCAPING,

Defendant, Third-Party Plaintiff, and Appellee,

vs.

GREGORY AND ELIZABETH JAMISON,

Third-Party Defendants.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

ATTORNEYS FOR APPELLANT:

Steven M. Johnson
Ronald A. Parsons, Jr.
Kimberly J. Lanham
JOHNSON JANKLOW ABDALLAH
REITER & PARSONS LLP
P.O. Box 2348
Sioux Falls SD 57101-2348
(605) 338-4304

ATTORNEYS FOR APPELLEE:

Melanie L. Carpenter
WOODS FULLER SHULTZ & SMITH P.C.
300 S. Phillips Avenue #300
Sioux Falls, SD 57117
(605) 336-3890

Notice of Appeal filed on December 7, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

South Dakota Supreme Court Cases:

Other Cases:

REPLY ARGUMENT

I. THIS COURT SHOULD REVERSE THE GRANT OF SUMMARY JUDGMENT BECAUSE BRUDE'S CLAIMS ARE NOT BARRED BY THE STATUTE OF REPOSE.

In its brief, Yellow Jacket argues that "Brude misstates the undisputed material facts or relies on facts that are irrelevant to resolving the issue," that "Brude's argument is not supported by this Court's interpretation of the term 'improvement to real property,'" and that "Brude's argument is unsupported by the case law." (Brief at 6-7). Those are bold assertions, and worth examining.

A. The Facts

As the basis for its claim that Brude has misstated the facts, Yellow Jacket argues that there is no evidence that the wall was rebuilt to different specifications and claims instead that it was simply torn down and rebuilt "exactly as it was previously constructed[.]" (Brief at 9). But as the Jamisons testified in their interrogatory answers set forth in the record: "In 2013, we also needed Yellow Jacket Landscaping to come out to do a fairly significant fix due to settling and leaning of some of the landscaping stones. At his time, we also enlarged the dimensions of the fire pit in our backyard and some of the changes would have been made to the wall surrounding the fire pit." (R. 199) (emphasis supplied).

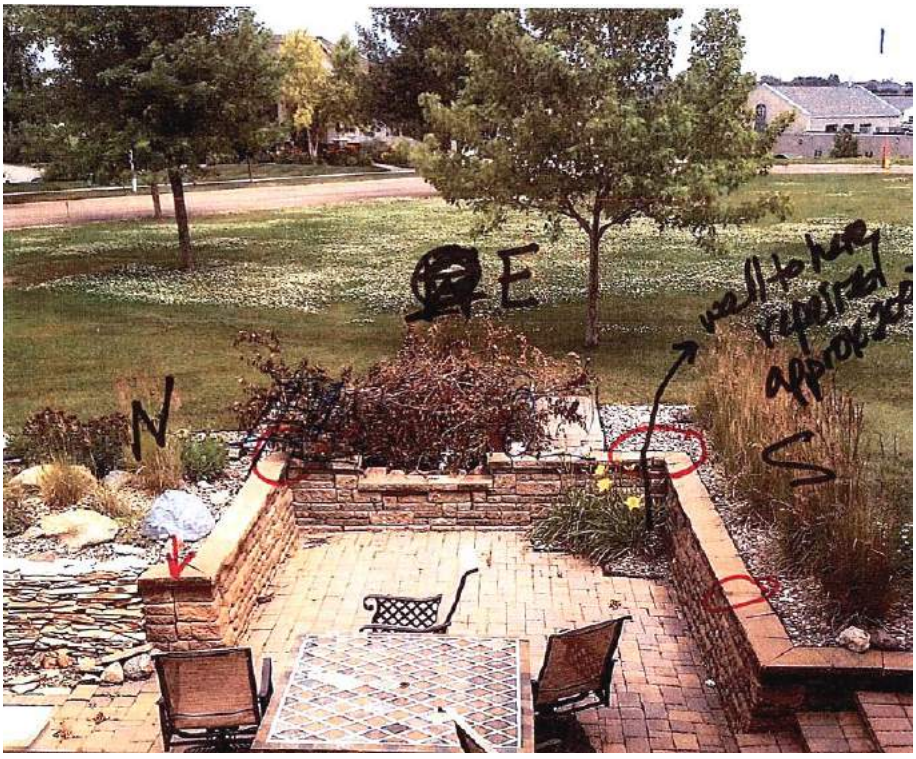
As Greg Jamison further testified, "it changed a little bit after its original installation." (R. 216, 217) ("But in 2013 he came out and removed essentially this U-shape"). During that process, the fire pit was redesigned and expanded. (R. 233,

218) ("the fireplace was enlarged from its original scope. Boulders were added at the perimeter of it"). As Greg explained his conversations with Breen in 2013:

> He said, "well, in order to fix it, we've got to tear out and rebuild the walls. And in order to do that it's a little bit of work," And we said, I think, at the time, "as long as you're tearing down these walls, let's make this fire pit a little bigger at the same time. And that was easy because it was all apart. And he seemed very amenable. And, like I say, I can't remember finding a bill, but I'm assuming there was probably – it was a lot of work.

(R. 218-19; *see also* 149-50, 220, 221, 224, 233, 244-47, 250, 256).

The "wall surrounding the fire pit" that was enlarged and changed, as the Jamisons testified, is the retaining wall in question. (R. 208). Suzanne Brude fell from the top of the wall right in front of the fire pit when the capstone dislodged. (R. 223, 234, 259-60).



(R. 358, 360). In fact, because the wall was redesigned, rather than simply taken apart and exactly reassembled as Yellow Jacket curiously contends, the stones actually had to be cut to different sizes. (R. 150). As Elizabeth testified:

> **…** Originally this would have been two pavers. And so they would have cut them at an angle in the center, so there would have been one here and one here. When their guys went to put them back, it wasn't that I needed more capstones. They had all the capstones from around the fire pit they had just taken. And they weren't able to get them to fit. They just didn't have them lined up correctly. So they were cutting these pieces from these top pieces that were maybe three inches, two inches on some of them. Each one of these stones cost me $15, and so to watch them just cutting these and not making them fit was just putting me into, like I said, a place that I was very unhappy with.

(R. 150). After the redesign and rebuild, Yellow Jacket took home "[a]ll the extra stones" that were left over unused from the previous design, stones for which the Jamisons previously paid, which further irked Elizabeth Jamison. (R. 150).

B. The improvement

Yellow Jacket's argument that the redesign and rebuild of the wall does not qualify as an improvement fares no better. Brude submitted specific facts into the record demonstrating that the redesign and rebuild was an improvement under the governing definition. To refresh, the controlling definition under the common sense approach adopted by this Court requires:

> A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Clark County v. Sioux Equipment Corporation, 2008 S.D. 60, ¶ 11, 753 N.W.2d 406, 410.

The evidence in the record is clear that the property here was bettered by the

project in 2011 or 2013, as fire pit and wall had fallen into such a state of disrepair that the Jamisons were embarrassed to let anyone in their backyard. (R. 255, 257). It requires no leap, but only the application of common sense, to acknowledge that redesigning, enlarging, and rebuilding a dilapidated fire pit and the wall that surrounds it enhances the value of a property and makes it more useful or valuable. *See, e.g., Merritt v. Mendel*, 690 N.W.2d 570, 572-73 (Minn. Ct. App. 2005) (explaining that "[c]ommon sense dictates that new roofing is an enhancement involving the expenditure of labor and money, integral to and incorporated into the structure, and designed to make the property more useful and more valuable").

On the issue of whether the redesign and rebuild involved the "expenditure of labor or money," Yellow Jacket focuses only on the latter alternative, suggesting that there was not enough disputed evidence on the issue of whether Yellow Jacket was paid for the redesign and rebuild in 2011 or 2013. Even assuming that true, however, there is no dispute that the redesign and rebuild involved the substantial expenditure of labor. The project took several days for several paid laborers to complete. (R. 210, 219-20, 223, 224, 233, 244-47, 250, 256). Yellow Jacket's brief does not address that point, because it does not have a response.

Finally, it cannot seriously be maintained that the tearing down, redesign, and rebuild of the fire pit and retaining wall constituted mere "ordinary repairs." This was not the filling in of a crack or patching of a hole. This was a demolition, redesign, and rebuild to different specifications. It was, in other words, an improvement to real property. *See Kirby v. Jean's Plumbing Heat & Air*, 222 P.2d 21,

26-27 (Okla. 2009) (holding that the replacement of a sewer pipeline was an "improvement to real property within meaning of ten-year statute of repose); *Merritt*, 690 N.W.2d at 572-73 (Minn. Ct. App. 2005) (holding that replacement of existing roof covering was improvement); *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972) (finding improvement for the repaving of a road); *Yakima Fruit and Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 503 P.2d 108 (Wash. Ct. App. 1972) (finding improvement that involved reinstallation of pipe, coils, hangers, and rods for a previously existing refrigeration system); *Pinneo v. Stevens Pass, Inc.*, 545 P.2d 1207 (Wash. Ct. App. 1976) (finding improvement where company replaced certain portions of an existing ski lift).

C. The case law

Finally, Yellow Jacket argues that Brude's position is "unsupported by the case law." (Brief at 7). But Yellow Jacket's brief does not address this Court's holding that statutes of repose are measured "from the date of the last culpable act or omission of the defendant." *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 18, 878 N.W.2d 406, 413. It does not address the expert testimony submitted into the record by Brude demonstrating that the negligent redesign and rebuild of the wall were the proximate cause of her injuries. (R. 264-65). And it does not address the myriad of cases on this issue cited by Brude in support of her argument, with the exception of its unique takes on *Clark County*, *Schott*, and *Horoscz*. Brude respectfully suggests that Yellow Jacket is the party more accurately described here as seeking to sidestep the sting of the law.

CONCLUSION

WHEREFORE, Appellant Suzanne Brude respectfully requests that this Honorable Court *reverse* the summary judgment order and remand this case for trial.

Dated this 14th day of April, 2017.

JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.* .
Steven M. Johnson
Ronald A. Parsons, Jr.
Kimberly J. Lanham
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
(605) 338-4304

Attorneys for Appellant Suzanne Brude

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via email upon the following:

Melanie L. Carpenter
WOODS FULLER SHULTZ
& SMITH P.C.
300 S. Phillips Avenue #300
Sioux Falls, SD 57117
Melanie.Carpenter@woodsfuller.com

Eric C. Schulte
DAVENPORT EVANS
206 W. 14th Street
Sioux Falls, SD 57101
eschulte@dehs.com

Dated this 14th day of April, 2017.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,365 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.