THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable Roger M. Young, Circuit Judge
Civil Action No.: 2009-CP-10-267

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3 Chisolm Street Homeowners Association, Inc., Plaintiff-Appellant,

v.

Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a Masonry Brickwork and Stucco, John Doe #1, John Doe #2, and Brock Green Architects and Planners, LLC, Defendants,

Of whom Genoa Construction Services, Inc., Masterpiece Millwork, Inc., and Brock Green Architects and Planners, LLC, are the Respondents.

Genoa Construction Services, Inc., Third-Party Plaintiff,

v.

The Fox Steel Company, Carolina Services, Inc., Lesco Restoration, Inc., Ferst Plastering, Inc., Charleston Glass & Mirror Company, 3d Renovations, Williams Mechanical, Mastercraft Interior & Exterior, Coastal Glass and Block, Adams Davis & Partners, and Troy Pardee Heating and Air Conditioning (d/b/a Pardee Heating and Air), CT Windows Limited, and Architectural Materials & Systems, Third-Party Defendants,

Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party Defendants.

INITIAL BRIEF OF RESPONDENT MASTERPIECE MILLWORK, INC.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO ALL CLAIMS AGAINST MASTERPIECE MILLWORK, INC. BASED ON THE STATUTE OF LIMITATIONS IN LIGHT OF THE TRIAL COURT'S EARLIER ORDER AS TO LACY PAINTING AND THE EVIDENCE IN THE RECORD SHOWING THAT 3 CHISOLM STREET HOMEOWNERS ASSOCIATION, INC. WAS ON NOTICE OF CONSTRUCTION DEFECT CLAIMS STEMMING FROM THE 2000-2002 RENOVATIONS IN THE SUMMER OF 2003?

STATEMENT OF THE CASE

This case arises from alleged construction defect claims brought by Appellant 3 Chisolm Street Homeowners Association, Inc. ("the HOA") against the developer of the Chisolm Street Condominiums ("Condominiums" or "Project") and other entities involved in the 2000-2002 condominium conversion of a vocational school into luxury condominiums. Among other things, the HOA appeals the trial court's order granting summary judgment in favor of Respondent Masterpiece Millwork, Inc. ("Masterpiece") based on the statute of limitations.

The HOA filed a Summons and Complaint on January 16, 2009 against Chisolm Street Partners, LLC and Murray School Partners, LLC (the Project's developers), general contractor Genoa Construction Services, Inc. ("Genoa"), window manufacturer and supplier Masterpiece, and masonry subcontractor Allen Roper, Jr. d/b/a Masonry-Brickwork and Stucco. (Summons and Compl., Jan. 16, 2009, R. at ____).

The HOA subsequently filed a First Amended Complaint on January 20, 2009 and then a Second Amended Complaint on April 8, 2010, adding claims against the architect Brock Green Architects and Planners, LLC ("Brock Green"). (First Am. Summons and Compl., Jan. 20, 2009, R. at ____; Second Am. Summons and Compl., Apr. 8, 2010, R. at ____). Genoa filed an Answer to both Appellant's Amended Complaint and Second Amended Complaint and asserted cross claims against Masterpiece and Third-Party Claims against various subcontractors. (Genoa's Answer to Pl.'s Am. Compl., Cross-cls., and Am. Third-Party Compl., May 26, 2009, R. at ____; Genoa's Answer to Pl.'s Second Am. Compl., Cross-cls., and Am. Third-Party Compl., May 11, 2010, R. at ____).

On February 1, 2011, Genoa filed a Motion for Summary Judgment to dismiss the HOA's Complaint and all causes of action against it because the HOA's claims were barred by the statute of limitations. (Genoa's Mot. for Summ. J., or in the Alt. for Partial Summ. J., Feb. 1, 2011, R. at ____). Other parties to the action, including Lacy Painting, subsequently filed similar motions for summary judgment raising the same arguments.[1] (See Masterpiece Millwork, Inc.'s Motion for Summary Judgment filed Sep. 1, 2011 attaching Lacy Painting's Notice of Mot. and Mot. for Summ. J. and Memo. in Support, Mar. 21, 2011, R. at ____). The trial court heard Genoa's summary judgment motion on March 28, 2011. (Genoa's Mot. for Summ. J. Hr'g Tr., Mar. 28, 2011, R. at ____).

By order dated June 9, 2011, the trial court granted Genoa's summary judgment motion relating to the original construction of the Condominiums and denied Genoa's motion as to claims arising from later repairs performed by Genoa. (Order Granting in Part and Denying in Part Def. Genoa's Mot. for Summ. J., Jun. 9, 2011, R. at ____). On June 9, 2011, the trial court also issued orders granting summary judgment to other parties involved in the original construction, including Lacy Painting. (See Masterpiece's Mot. for Summ. J. filed Sep. 1, 2011 attaching Order Granting Lacy Painting's Mot. for Summ. J., June 9, 2011, R. at ____). These orders were not challenged.

On June 24, 2011, the HOA filed a motion to reconsider the trial court's order granting partial summary judgment to Genoa. (Pl.'s Mot. to Alter, Recons., or Amend Order Granting Partial Summ. J. to Genoa, Jun. 24, 2011, R. at ____). The trial court held a hearing on August 12, 2011. (3 Chisolm Street Homeowners Association, Inc. Mot. to Recons., Alter, or Amend Order Granting Partial Summ. J. to Genoa

[1] For purposes of this brief, Lacy Painting is treated as a first-party defendant originally identified in Plaintiffs Second Am. Summons and Compl., Apr. 8, 2010 as John Doe #1. This fact was included in the unchallenged Order Granting Lacy Painting's Motion for Summary Judgment.

Construction Services Hr'g Tr., Aug. 12, 2011, R. at ____). By order dated January 10, 2012, the trial court denied the HOA's motion to reconsider its ruling granting partial summary judgment to Genoa. (Order Granting Def. Genoa's Mot. for Summ. J., Jan. 10, 2012, R. at ____). The HOA thereafter filed a notice of appeal as to the orders relating to Genoa. (Notice of Appeal, Feb. 13, 2012, R. at ____). Neither the HOA nor Genoa appealed the grant of summary judgment as to Lacy Painting.

Masterpiece made its initial appearance in this suit on May 25, 2011. (Masterpiece's Answer to Second Amended Complaint, May 25, 2011; Masterpiece's Answer to Genoa Construction Service's Crossclaims, May 25, 2011, R. at ____). In its answer to the Plaintiff's Complaint, Masterpiece denied the substantive allegations against it and asserted numerous defenses, including the statute of limitations. (Masterpiece's Answer to Second Am. Compl., May 25, 2011, R. at ____). Likewise, Masterpiece denied the substantive allegations of Genoa's cross claims and asserted numerous defenses, including the statute of limitations. (Masterpiece.'s Answer to Genoa's Crossclaims, R. at ____).

On September 1, 2011, Masterpiece filed a motion for summary judgment based on the statute of limitations and incorporated into its motion Lacy Painting's Memorandum in Support of its Motion for Summary Judgment and the trial court's Order Granting Lacy Painting's Motion for Summary Judgment. (Masterpiece's Mot. for Summ. J. p. 2, Sep. 1, 2011, R. at ____). On May 25, 2012, the trial court issued an order granting summary judgment in full to Masterpiece as to all claims against Masterpiece asserted by the Plaintiff, Genoa and Chisolm Street Partners. (Order Granting Masterpiece's Mot. for Summ. J. p. 6, May 25, 2012, R. at ____). The HOA filed a

motion to reconsider on June 18, 2012. (Pl.'s Mot. to Recons., Alter, or Amend Order Granting Summ. J. to Masterpiece, June 18, 2012, R. at ____). The trial court denied the HOA's motion by order dated July 16, 2012. (Order Denying Pl.'s Mot. to Recons., Alter, or Amend Order Granting Summ. J. to Masterpiece, July 16, 2012, R. at ____).

The HOA then filed a notice of appeal as to the Masterpiece orders. (Notice of Appeal, Aug. 14, 2012). The Court of Appeals granted the HOA's motion to consolidate the appeals relating to the various grants of summary judgment into one consolidated appeal. (Letter Consolidating Appeals, September 20, 2102).

FACTS

This case involves alleged construction deficiencies discovered by the HOA in 2003 at the Chisolm Street Condominiums arising from its conversion from a vocational school to luxury condominiums. (Second Am. Summons and Compl., Apr. 8, 2010 ¶ 10, R. at ____). The 2000-2002 conversion included the renovation of three adjacent buildings: the main building, gym, and cottage. (*Id.* at ¶ 4, R. at ____). Genoa acted as the general contractor for the Project. (*Id.* at ¶ 15, R. at ____). Masterpiece's sole involvement in the Project was to manufacture and supply wood windows to Genoa for use in the gym and cottage buildings during the condominium conversion. (*Id.* at ¶ 17, R. at ____).

Shortly after construction was complete the HOA discovered roof leaks; so, it retained forensic architect, Myles Glick, to investigate the issues. (Aff. of J. Burnett ¶ 7, R. at ____). On January 30, 2003, Glick conducted a visual inspection of the property with the HOA's attorney Joe Dapore and contractors Tom and Brett Carlson of Calibogue Construction. (Mem. in Supp. of Genoa Construction Services, Inc.'s Mot. for

Summ. J., or, in the Alternative for Partial Summ. J., Ex. H, Glick/Boehm & Associates, Inc. Initial Site Visit p. 1, Apr. 8, 2003, R. at ____). Glick drafted a detailed letter to the HOA Board President Jack Burnett dated April 8, 2003 ("the Glick Report"), citing numerous, significant and pervasive deficiencies, including water intrusion and sealant failures at the windows, condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco in the courtyard area. (Ex. H, p. 1-4, R. at ____).

The Glick Report concluded:

> All of the above issues are significant and were persuasive [sic] throughout the entire building. I would recommend that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. Without correction, the issue of sales of unsold units and resales will come into play. **I recommend that the board seek legal counsel relative to the impacts of the above issues as well as, pursuing a forensic report documenting and recording the above issues.** This report only represents observations during a limited site visit and other construction deficiencies may exist.

(Ex. H, p. 4, R. at ____)(emphasis added).

Minutes recorded during the May 6, 2003 meeting of the Board of Directors for the HOA ("Board") reflect that the Board received a copy of the Glick report and discussed its findings as well as the need to conduct an additional inspection of the cottage and gym buildings. (Mem. in Supp. of Genoa Construction Services, Inc.'s Mot. for Summ. J., or, in the Alternative for Partial Summ. J., Ex. G, Various Meeting Minutes, p. 3, R. at ____). At that meeting, the property manager for the HOA, Mike Parades, specifically discussed the steps that should be taken following the issuance of Glick's April 8, 2003 report:

> Mike discussed the typical sequence of steps that should be followed including:
>
> 1. Inspection of the cottage and gym building.

2. Some destructive testing will be needed to document cause of damage and what should be done to correct the problems.

It was agreed that proposals should be solicited from Glick/Boehm and Calibogue Construction for the next phases of investigation.

(Ex. G, p. 3, R. at ____).

At its next meeting on June 10, 2003, the meeting minutes reflect that the Board reviewed proposals for the "additional investigation" deemed necessary at the Project:

> Copies of the proposals from Glick/Boehm and Calibogue Construction related to additional investigation were distributed. Costs associated with proposed work could reach several thousand dollars. Discussion followed...

(HOA Board Mtg. Min. June 10, 2003, R. at ____).

Genoa returned to the Project to make limited repairs. (Aff. of J. Burnett ¶ 9, R. at ____). Genoa completed its repair efforts and left the site for good in February 2004. (Aff. of R. Moses ¶, R. at ____). Masterpiece was not involved in any repairs after completion.

More than three years after Glick's inspection, at the February 6, 2006 Board meeting, the minutes reflect that the Board president, Jack Burnett, informed the Board that counsel for the HOA warned that the statute of limitations for claims arising from the construction defects would expire in April 2006:

> Jack reported he spoke with Joe Dapore, the association's lawyer, and he said that they had until April 2006 to take action against Purdue, the developer. Mike [Parades] suggested using diplomacy rather than a lawsuit. A lawsuit will probably not be worth the money it would require.

(Ex. G, p. 7, R. at ____).

Notwithstanding the advice of their forensic architect, the advice of counsel, and multiple Board meetings in which the Board discussed the known construction issues and the need for additional investigation in all three buildings, the Board did not file suit until January 2009. (Ex. H, p. 4, R. at ____; Ex. G, R. at ____; HOA Board Mtg. Min. June 10, 2003, R. at ____; Summons and Compl., Jan. 16, 2009, R. at ____).

STANDARD OF REVIEW

This Court "reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 576, 735 S.E.2d 528, 532 (Ct. App. 2012). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008). When a properly supported motion for summary judgment is presented, the nonmoving party must establish specific facts showing that there is a genuine issue of material fact for trial, or the court must grant summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS BEGAN RUNNING IN 2003 WHEN THE BOARD OF THE HOA KNEW OF ALLEGED CONSTRUCTION DEFECTS AND ACKNOWLEDGED THE NEED TO INVESTIGATE ALL THREE BUILDINGS TO DETERMINE THE FULL EXTENT OF THE DAMAGE.

The trial court, citing S.C. Code Ann. § 15-3-530, found that "South Carolina law imposes a three-year statute of limitations on actions concerning damages to real property, general negligence claims, and claims arising out of a 'contract, obligation, or liability, express or implied.'" (Order Granting Masterpiece Millwork, Inc.'s Mot. for Summ. J. p. 4, May 25, 2012, R. at ____).

The application of the statute of limitations in a construction case is best summarized by this court in *Barr v. City of Rock Hill*, 330 S.C. 640, 644-45, 500 S.E.2d 157, 159-60 (Ct. App. 1998).

> Generally, a cause of action accrues under South Carolina law 'the moment the defendant breaches a duty owed to the plaintiff.' The 'discovery rule' provides an exception to the general rule and tolls the statute of limitations until a 'person knows or by the exercise of reasonable diligence should . . . know[] that he has a cause of action.' The statute starts to run upon discovery of 'such facts, as would have led to the knowledge thereof, if pursued with reasonable diligence.' A party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist.' Failure of the injured party to comprehend the full extent of damages, however, is immaterial. 'The date on which discovery should have been made is an objective, not subjective, question.'

(citations omitted). "When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406-07, 680 S.E.2d 778, 782 (Ct. App. 2009).

The South Carolina Supreme Court has "interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The critical inquiry is whether a party is on notice of a possible claim, and "the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id.* 321 S.C. at 364, 468 S.E.2d at 647. Stated differently, the statute of limitations begins to run from the point a party is on notice of a claim and "not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

A. In 2003, the HOA knew of the alleged construction deficiencies and acknowledged the need to investigate all three buildings to determine the full extent of the damage.

The trial court properly found that the Board of the HOA had actual knowledge of the alleged problems in 2003, and acknowledged the need to investigate all three buildings to determine the full extent of the damage. (Order Granting Masterpiece Millwork, Inc.'s Mot. for Summ. J. p. 5, May 25, 2012). There is no question of fact as to when the HOA was put on notice of possible claims relating to the work done at the time of the conversion, including the windows supplied by Masterpiece in 2000-2001.

This Court affirmed a similar grant of summary judgment on the statute of limitations in *Barr*. There, as here, the Plaintiff asserted causes of action for negligence, breach of implied warranty of workmanlike service, breach of implied warranty of habitability, breach of implied warranty of fitness for an intended use, and violation of

the South Carolina Unfair Trade Practices Act arising out of the construction and sale of a house, and the defendants moved for summary judgment on the ground the statute of limitations had expired. *Barr*, 330 S.C. at 641, 500 S.E.2d at 158. The Barrs purchased the home in 1985 and obtained annual termite inspections from 1987-1990 revealing excessive moisture under the home. *Id.* The inspectors suggested repairs, including adding vents, back-filling footers, and installing a polyethelene vapor barrier. *Id.* The Barrs did not act on these recommendations until 1992 when they sought additional expert opinions, and they did not file suit until 1994. *Id.*, 330 S.C. at 643, 500 S.E.2d at 159. The Court held that the applicable statute of limitations for all of the Barrs' claims (except those arising under the South Carolina Tort Claims Act) was S.C. Code Ann. § 15-3-530 and affirmed the grant of summary judgment, reasoning that if the Barrs had exercised reasonable diligence and investigated the problems noted in the termite inspection reports, they would have realized the magnitude of the problem and brought suit before the statute of limitations ran. *Id.*, 330 S.C. at 645-646, 500 S.E.2d at 160.

Like the Barrs, the HOA in the instant case obtained a report from an expert, which revealed construction deficiencies, including water intrusion and sealant failures at the windows, condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco in the courtyard area. (Ex. H, p. 1-4, R. at ____) Similarly, rather than exercising reasonable diligence and acting with some promptness, the Board elected not to pursue the recommended additional inspections which would have revealed the extent of the construction defects throughout the Project. (Ex. G, R. at ____). In 2003, the Board had sufficient knowledge to put it on notice that potential claims existed at all three buildings at the Project. As further evidence of the Board's intentional

inaction, they did not file suit even when confronted with a warning from their attorney advising that the statute of limitations was going to expire in April 2006. (Ex. G, R. at ____). Only one reasonable inference can be drawn from the evidence, which is that the HOA knew of the claims it had in 2003 and chose not to pursue them; thus, allowing the statute of limitations to expire. The HOA's argument that it did not comprehend the full extent of the damage at that time is unavailing in light of the fact that it was clearly on notice of existing claims for construction deficiencies and acknowledged the need to investigate further.

This Court also affirmed another similar grant of summary judgment on the statute of limitations in *Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008), a case arising from the 1997 sale of a moisture-damaged home. There, the defendant seller provided the plaintiff purchaser with a report noting conditions in the crawlspace and recommending an inspection of the house structure. *Id.*, 376 S.C. at 634, 658 S.E.2d at 111. The plaintiff discovered damage, and his attorney wrote a letter to the defendant advising of moisture intrusion in 1997. *Id.* In 1998, the Plaintiff hired an engineer who evaluated the moisture level and issued a report. *Id.* The Plaintiff did not file suit against the defendant until 2002. *Id.* In affirming the grant of summary judgment on the statute of limitations, this court reasoned that

> [e]ven measured against the exacting summary judgment standard, it seems an insurmountable hurdle for Watters to delay the start of the statute of limitation after his attorney's 1997 letter referencing moisture damage. At that time, when viewed objectively, one would reasonably conclude that a claim must exist. Nevertheless, under no circumstances could Watters claim he lacked knowledge of his potential cause of action after August 1998 when he received the report of *his* expert.

Id., 376 S.C. at 635, 658 S.E.2d at 112.

In the instant case, the HOA received notice of a potential cause of action when it received the Glick Report. (Ex. H, R. at ____). Moreover, it seems an insurmountable hurdle for the HOA to claim it was not on notice in light of Board discussions in May and June 2003 acknowledging the need to conduct inspections of the cottage and gym buildings and obtaining proposals for the same. (Ex. G, R. at ____; HOA Board Mtg. Min. June 10, 2003, R. at ____) At that time, when viewed objectively, one would reasonably conclude that a claim must exist. Nevertheless, under no circumstances can the HOA claim it lacked knowledge of its potential cause of action after February 2006, when it received the explicit instruction from its attorney that the statute of limitations would expire in April 2006. (Ex. 32, R. at ____). Therefore, this Court must affirm the grant of summary judgment to Masterpiece.

B. The statute of limitations is not tolled because Masterpiece did not participate in any repairs after supplying the windows for original construction and claims for defective repairs do not apply to Masterpiece.

The trial court denied Genoa's Motion for Summary Judgment in part based on the fact that it made some repairs, the failure of which did not manifest and become known by the HOA until later. (Order Granting in Part and Denying in Part Def. Genoa's Mot. for Summ. J., Jun. 9, 2011, R. at ____).[2] While "a defendant may be estopped from claiming the statute of limitations as a defense if **the defendant's conduct** induced the delay," Masterpiece's conduct did not induce the HOA to delay filing suit. *Watters*, 376 S.C. at 636, 658 S.E.2d at 112 (emphasis added). The later repairs by Genoa and others do not impact the accrual date for the statute of limitations as to Masterpiece because it

[2] This argument is in the nature of estoppel; however, Masterpiece notes that the HOA has not expressly argued estoppel in its brief or before the trial court.

was not involved in any repairs. The HOA's remedy as to claims for defective repairs lies exclusively with Genoa and the repair contractors it used, not Masterpiece. Accordingly, even if the HOA's claims related to the defective repairs are not barred by the statute of limitations, the trial court correctly granted summary judgment in favor of Masterpiece.

II. THE HOA DID NOT APPEAL THE FINDINGS IN THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO LACY PAINTING, AND THOSE FINDINGS ARE NOW THE LAW OF THE CASE.

"A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); *see also Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 355-356 n.9, 628 S.E.2d 902, 910 n.9 (Ct. App. 2006) (noting that the Court's ruling on a previous grant of summary judgment represents the law of the case). Likewise, "[a]n unappealed order becomes the law of the case." *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 377, 597 S.E.2d 181, 184 (Ct. App. 2004); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, , 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003).

Masterpiece incorporated into its Motion for Summary Judgment by reference the facts and arguments set forth in Lacy Painting's Memorandum in Support of Motion for Summary Judgment and the trial court's subsequent Order Granting Lacy Painting's Motion for Summary Judgment. (Masterpiece Millwork, Inc.'s Mot. for Summ. J. p. 2, Sep. 1, 2011, R. at ____). The trial court based its ruling as to Masterpiece on its earlier order as to Lacy Painting. (Order granting Masterpiece Millwork, Inc.'s Motion for Summary Judgment filed May 25, 2012 at p. 2, fn.1, R. at ____).

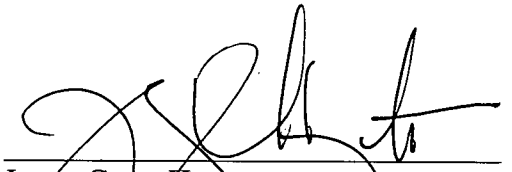
In granting Lacy Painting's Motion for Summary Judgment, the trial court ruled that, "[i]n this instance, the Board of the HOA had actual knowledge of leaking windows and sealant failures identified in the Myles Glick report, but also, in May and June of 2003, acknowledged the need to investigate all three buildings to determine the full extent of the damage. This acknowledgement starts the statute running." (See Masterpiece's Mot. for Summ. J. filed Sep. 1, 2011 attaching Order Granting Lacy Painting's Mot. for Summ. J. p. 5, June 9, 2011, R. at ____).

The HOA failed to challenge this ruling. Thus, the unchallenged order ruling that the statute of limitations began running in June of 2003 presents no issue for determination for this Court and constitutes the law of the case. *See Ulmer*, 369 S.C. at 490, 632 S.E.2d at 861. Accordingly, the Court should uphold the trial court's order granting summary judgment because the HOA cannot now allege that the statute of limitations began running for original construction defects at any time differing from the unchallenged order of the trial court.

CONCLUSION

The trial court properly granted summary judgment to Masterpiece because the statute of limitations began running in 2003 when the HOA acknowledged that there were construction deficiencies and additional investigation of all three buildings was necessary. The HOA Board declined to follow the advice of its forensic architect and counsel who indicated that the statute of limitations would run in 2006 and waited to bring this action until 2009. Accordingly, the judgment as to Masterpiece should be affirmed.

Respectfully submitted,



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March 28, 2013

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PROOF OF SERVICE

I have served a copy the Initial Appellate Brief of Respondent Masterpiece Millwork, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on March 29, 2013, upon the attorneys of record by placing the same in the United States mail, first class postage prepaid, addressed to the following

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