THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Roger M. Young, Trial Court Judge
Civil Action No. 2009-CP-10-267
Appellate Case No. 2012-207850

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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, 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 Defendant.

FINAL BRIEF OF RESPONDENT
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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT CORRECTLY RULE THAT THE HOA'S 2003 EXPERT INSPECTION/REPORT PUT THE HOA ON NOTICE OF POTENTIAL CLAIMS FOR CONSTRUCTION/DESIGN DEFECTS IN 2003, AND THUS THAT THE HOA'S 2010 CLAIM AGAINST ARCHITECT WAS BARRED BY THE STATUTE OF LIMITATIONS?

STATEMENT OF THE CASE

This is a case regarding alleged deficiencies in the development and construction of the condominium complex located at 3 Chisolm Street in Charleston, South Carolina. Plaintiff 3 Chisolm Street Homeowners Association, Inc. ("HOA"/"Appellant") originally commenced this action on January 16, 2009 against the general contractor, developers, and others. The HOA filed an Amended Complaint on January 20, 2009. (R.pp.114-131.) The HOA filed a Second Amended Complaint on April 8, 2010 for the first time naming Brock Green Architects & Planners, LLC ("Architect"/"Respondent") as a Defendant. (R.pp.164-184.) In its Answer, Architect denied the substantive allegations and asserted numerous defenses, including the statute of limitations. Architect filed its motion for summary judgment on December 7, 2010 pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. (R.pp.230-232.) Other Defendants and Third Party Defendants involved in the condominium construction project also filed motions for summary judgment.

The trial court held a hearing on those motions for summary judgment on March 28, 2011. (R.pp.443-489.) Following the hearing, the trial court granted—in whole or in part—all of the motions for summary judgment before it (except for Architect's) based

on the expiration of the statute of limitations. (See R.pp.11-59.)[1] Architect's motion for summary judgment was initially denied. (R.pp.5-10.)

Architect filed a motion for reconsideration on June 23, 2011. (R.pp.525-534.) On June 24, 2011, the HOA filed a motion to reconsider the trial court's order granting partial summary judgment to the general contractor. (R.pp.536-540.) Following a hearing on those motions for reconsideration (R.pp.545-589), the trial court reversed its earlier ruling and granted summary judgment to Architect (R.pp.60-68.) The trial court denied the HOA's motion to reconsider the order granting partial summary judgment to the general contractor. (R.pp.69-80.) The HOA appealed those orders. (R.pp.610-612.) The HOA also appealed the order granting summary judgment to Masterpiece Millwork, Inc. The remaining orders in the case granting summary judgment to the other parties were not challenged or appealed.

STATEMENT OF FACTS

This lawsuit involves a condominium complex located at 3 Chisolm Street in the Historic District of Charleston, South Carolina. The property was originally opened in 1923 as the Andrew B. Murray Vocational School, which closed around 1970. A renovation project was undertaken in the early 2000s to transform the school facility into condominiums. Chisolm Street Partners, LLC and Murray School Partners, LLC (collectively "Developer") functioned as the developer for the condominium project. Genoa Construction Services, Inc. ("Genoa") served as the general contractor. Architect

[1] For purposes of this brief, Lacy Painting may be treated as a first-party defendant originally identified in Plaintiff's Second Amended Complaint as "John Doe #1." (R.p.167, ¶ 20.) This fact was included in the unchallenged order granting Lacy Painting's motion for summary judgment. See discussion *infra* Part II regarding unchallenged orders becoming the law of the case.

provided architectural services for the condominium renovation project. The Certificate of Occupancy was issued in July 2002.

The 3 Chisolm Street complex consists of residential units in three buildings: the former three-story classroom facility ("Main Building"), the former gymnasium ("Gym Building"), and the former caretaker's cottage ("Cottage"). The window frames in the Main Building are steel, while the window frames in the Gym Building and Cottage are wood. All three of the buildings were constructed with single-paned windows.

After construction was completed, unit owners began noticing water intrusion issues and condensation on the windows in the Main Building. (R.p.676, lines 4-14; R.p.681, lines 20-23; R.p.737, lines 7-19; R.p.738, lines 5-12.) The HOA discussed the unit owners' concerns about the windows at a March 19, 2002 meeting. (R.p.858.) In response to those window issues, in late 2002/early 2003, the HOA commissioned a forensic architectural expert, Myles Glick, AIA of Glick/Boehm & Associates, Inc., to investigate. (R.p.678, lines 14-16; R.p.722, lines 3-5.)

Glick conducted an inspection of the property on January 30, 2003 accompanied by contractors Thomas Carlson and Brett Carlson of Calibogue Construction, Inc. and Joe Dapore, Esq., the HOA's attorney. (R.p.686, line 22 – p. 687, line 3.) Glick issued a formal written report of his findings dated April 11, 2003 to the HOA. (R.pp.745-781[2]; see also R.p.685, lines 19-25.) The Glick Report cited numerous potential construction and design issues in the Main Building, including water intrusion at the windows,

[2] The record in this case also contains evidence of a prior version of the Glick Report dated April 8, 2003, which is substantively identical to the April 11, 2003 Glick Report. The only difference between the two reports is the spelling of the HOA president's name. For purposes of this appeal and the arguments expressed herein, the reports are considered to be one and the same.

condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco.

As to water intrusion and condensation, the Glick Report stated: "The indications of water intrusion into the main building were in the following areas: windows, window ledges, condensation buildup on the inside of the glass, and strong possibility that the roof parapet is leaking." (R.p.745.) According to the Glick Report, the water intrusion and condensation had resulted in mold, mildew, and damage to the drywall around the windows. (R.p.747.) As to stucco cracks, the Glick Report stated: "Intersections of the metal stud walls with the original masonry building are beginning to show cracks because of the **construction defects** associated with the installation of the three-coat masonry system." (R.p.746.) (emphasis added). 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 decision can be made for corrections. . . . **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.**

(R.p.748.) (emphasis added). Glick testified as to his notice to the HOA of his significant concerns about the property, as well as the need for the HOA to conduct further investigations:

> Q. And you put the Homeowners Association on notice of your concern that there were significant and pervasive problems with this entire building, correct?
>
> A. Yes, sir, recommended further documentation and confirmation of my concerns. Because, again, I couldn't get up on a ladder. We walked the roof. We walked the ground.

(R.p.688, line 24 – p.689, line 4.)

> Q. And you actually recommended to the Board that they seek legal counsel and that they pursue a forensic report that would further document the problems that you already discovered that could potentially lead to more discovery of problems; is that correct?
>
> A. Yes, sir.

(R.p.689, lines 15-21.)

Michael Parades, the HOA's property manager and agent during that time period, confirmed that the HOA received the Glick Report, discussed its content, and passed along the information to the unit owners. (R.p.726, lines 18-25.) The HOA's discussions are also reflected in the May 6, 2003 meeting minutes: "It was noted the preliminary building inspection report has been received from Myles Glick. The report and accompanying photographs were reviewed. Discussion followed as to the next steps to be taken." (R.p.859.) At that same meeting, the HOA discussed the necessity of having the Gym Building and Cottage inspected and commissioning destructive testing to further investigate the issues and potential damages:

> Mike [Parades] 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.

(R.p.859.) (emphasis added). The HOA then sought and obtained proposals from Glick and Calibogue Construction Company, Inc. for additional investigations and testing at the property. On June 10, 2003, the HOA discussed those proposals and elected **not** to

pursue the additional inspections and testing at the property. (R.p.862; see also R.p.679, lines 12-17.)

Instead, the HOA sought assistance from the Developer and Genoa in remedying some of the issues identified at the Main Building, which included caulking and sealing efforts related to leaks in the windows. Architect had no involvement in those repair efforts. The repair efforts never addressed the condensation issues as related to the single-paned windows. (R.p.677, lines 10-12; R.p.734, lines 13-25; R.p.737, lines 7-25; Supp.R.p.7, lines 1-10.)

For years, the HOA held the threat of litigation over the head of the Developer, but did not sue. On June 12, 2003, Mr. Parades, the HOA's property manager and agent, sent a letter to the Developer regarding "unresolved" construction issues, stating: "It would be in the best interest of . . . you in your capacity as the Developer to have these matters resolved without legal action. Having been through 10 construction defect lawsuits, I can tell you it is expensive and time consuming." (R.p.875.) Mr. Parades has confirmed that he was referring to condensation and stucco issues in that 2003 letter. (R.p.725, lines 17-23.) Months later, on October 24, 2003, Mr. Parades sent an email to the Developer on behalf of the HOA citing various issues including water intrusion around windows, problems with the roof, and cracks in the stucco: "In summary, it is the Board's position that these issues need to be resolved in the near future. Accordingly, if all issues are not resolved by November 30, 2003, the Board intends to take appropriate action to bring them to a resolution." (R.pp.880-881.) Mr. Parades has testified that the Board was contemplating a lawsuit if the issues were not resolved. (R.p.728, line 25 – R.p.729, line 14.)

Genoa completed its repair efforts and left the site for good in February 2004. (R.pp.666-667.) Nearly six months later, the HOA's attorney sent a "Demand Letter" dated August 2, 2004 to the Developer citing defects including stucco cracks and incorporating language taken directly from the Glick Report. (R.pp.882-883.) The HOA continued to contemplate legal action thereafter, as evidenced by the September 29, 2004 HOA meeting minutes. (R.pp.865-867.) Almost a year and a half later, discussions of legal action continued, as reflected in the February 6, 2006 HOA meeting minutes:

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

(R.p.868.) (emphasis added).

Although the HOA continually contemplated litigation after receiving the Glick Report, the HOA did not sue for construction or design deficiencies until January 2009 when it sued the Developer, Genoa, and various subcontractors. In its lawsuit, the HOA seeks damages arising from alleged issues with the construction of the condominiums, including improper installation of windows, improper window flashing installation, installation of windows that lack adequate wood preservative treatment, improper installation of firewalls between condominium units, and improper installation of roofs. (R.pp.167-168, ¶ 25.) The HOA specifically alleges that Architect was negligent in specifying single paned windows in the Main Building because those single panes have led to condensation. (R.pp.181-182, ¶ 119; Supp.R.pp. 4-6.)

All of those allegedly improper conditions, including the single panes in the windows, occurred at the time of construction of the condominiums and were never modified. Indeed, when the HOA president was shown the Glick Report at his deposition and asked whether it set forth the same issues that the unit owners experience today, he replied: "It looks like the complaints are consistent, yes." (R.p.683, lines 14–21.) The HOA did not sue Architect until April 2010, nearly **seven years** after the HOA's receipt of the Glick Report and subsequent discussions regarding the need for additional forensic investigations at all three buildings.

Years after receipt of the Glick Report and discussing the need for additional investigations, the HOA retained the services of Applied Building Sciences, Inc. ("ABS") for forensic testing. ABS has produced several reports which raise many of the same issues previously noted in the Glick Report and discussed by the HOA in the months thereafter.

All of the original summary judgment motions in this case were essentially based upon the same grounds: (1) the HOA's receipt of the Glick Report, which put the HOA on notice of actual and potential deficiencies at the property and suggested the HOA retain legal counsel, (2) the HOA's subsequent discussions regarding the necessity of engaging further forensic testing for all three buildings, and (3) the HOA's decision to forgo that further forensic testing and legal action with knowledge that the statute of limitations had been triggered.

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 Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 576, 735 S.E.2d 528, 532 (Ct. App. 2012) (citing Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009)). "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) (citing Bankers Trust of S.C. v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). "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, 662 S.E.2d 40, 41 (2008) (citing Rule 56(c), SCRCP).

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). "'[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.'" Guinan v. Tenet Healthsystems of Hilton Head, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009) (quoting David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)). "An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial." Paine

Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. at 576, 735 S.E.2d at 532-33 (citing Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994)).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE HOA'S CLAIMS AGAINST ARCHITECT ARE TIME-BARRED BECAUSE THE HOA WAS ON NOTICE IN 2003 OF THE ALLEGED CONSTRUCTION/DESIGN ISSUES AT THE PROPERTY AND DID NOT SUE ARCHITECT UNTIL 2010.

The statute of limitations is designed "'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights'" and "'to protect potential defendants from protracted fear of litigation.'" Logan v. Cherokee Landscaping and Grading Co., 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) (quoting Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). Here, the applicable statutes of limitations provide a three year window for the filing of a lawsuit. S.C. Code Ann. § 15-3-530 and S.C. Code Ann. § 39-5-150. In South Carolina, the "discovery rule" applies to actions against professionals, such as architects. S.C. Code Ann. § 15-3-535; see also Republic Contracting Corp. v. S.C. Dep't of Highways and Pub. Transp., 332 S.C. 197, 207, 503 S.E.2d 761, 766 (Ct. App. 1998) (citing Mills v. Killian, 273 S.C. 66, 254 S.E.2d 556 (1979)). Under our discovery rule, "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (citation omitted).

The exercise of reasonable diligence means 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." Id. at 363-64, 468 S.E.2d at 647 (citing Snell v. Columbia Gun Exch., 276 S.C. 301, 278 S.E.2d 333 (1981)). "Reasonable diligence is intrinsically tied to the issue of notice." Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 356, 559 S.E.2d 327, 336 (Ct. App. 2001). "[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial." 321 S.C. at 364, 468 S.E.2d at 647 (citing Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *overruled on other grounds by* Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995)).

"The test of whether a person should have known the operative facts is objective, rather than subjective." Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)(citation omitted). Indeed, as our case law clearly illustrates, "South Carolina's statute of limitations requires 'very little to start the clock.'" Maher v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (quoting Roe v. Doe, 28 F.3d 404 (4th Cir. 1994)).

Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (1998), is instructive as to the triggering of the statute of limitations. In Barr, the homeowners had termite inspections performed on their house from 1987 to 1990. Each of those inspections resulted in reports stating that excessive moisture existed under the house and that repairs should be considered. Id. at 642, 500 S.E.2d at 158. In 1992, the homeowners had an engineer inspect the home and prepare a structural report. Id. at 643, 500 S.E.2d at 159.

The report cited moisture problems under the house, as well as structural problems resulting from improper installation of floor joists. The homeowners then sued the home seller in 1994 seeking damages stemming from the structural issues/defects noted in the engineering report. The court held that the lawsuit was barred by the statute of limitations, reasoning that if the plaintiffs "had exercised reasonable diligence and investigated the problems noted in the termite inspection reports, they could have realized the magnitude of the problem and brought suit before the statute of limitations ran." Id. at 645-46, 500 S.E.2d at 160.

Republic Contracting is further instructive as to the concept of inquiry notice for purposes of triggering the statute of limitations. In Republic Contracting, the general contractor sued the project engineer over allegedly defective plans for a bridge. Id. at 201, 503 S.E.2d at 763. Prior to that lawsuit, the general contractor's subcontractor had experienced problems installing rebar at hinges as called for in the design, and those complaints were submitted to the engineer. Id. at 203, 503 S.E.2d at 764. The engineer contended that it was not a design issue, but rather a construction and/or materials problem. Id. The general contractor, relying on the engineer's assessment, terminated its subcontractor and attempted to complete the installation with its own crew. Id. The general contractor attempted to install the fourth hinge on April 22, 1991, and on that date concluded that the problem was the design. Id. at 204, 503 S.E.2d at 765. Days later, on April 26, 1991, the engineer allegedly admitted it was a design problem. The general contractor filed suit on April 25, 1994. Id.

The trial court granted summary judgment to the engineer, holding that the statute of limitations had expired. This Court affirmed, stating that the critical inquiry was when

the general contractor **could have discovered** its claim against the engineer. Id. at 207, 503 S.E.2d. at 767. This Court held that the statute of limitations was triggered (at the latest) on April 22, 1991—the date the general contractor poured the fourth hinge. Id. Per this Court, the work on that date "put [the general contractor] on inquiry notice, which, if developed, would have revealed the defects in [the engineer's] work." Id. at 208, 503 S.E.2d at 767.

A. The statute of limitations was triggered in 2003 when the HOA had actual knowledge of alleged construction/design issues and acknowledged the need to conduct further investigations of all three buildings, but elected to forgo those further investigations.

The HOA contends that there is conflicting evidence as to what and when the HOA knew or should have known regarding the alleged deficiencies. However, as to the Main Building, the evidence clearly shows that the HOA was on notice in 2003 of actual (and potential additional) construction/design deficiencies via the Glick Report. Glick cited "obvious building failures," recommended additional forensic investigations, and also specifically recommended that the HOA retain legal counsel to further explore the ramifications of potential construction/design issues. Indeed, illustrating that the HOA had actual knowledge of problems, the HOA had Genoa and the Developer undertake some repairs at the Main Building. Regardless of any such repairs, the key point is that the HOA was on notice of actual and potential deficiencies which occurred during construction. The statute of limitations was triggered at that point, giving the HOA a limited period of time in which it could seek to recover damages from Architect.

Importantly, the evidence also clearly shows that the HOA specifically discussed—and made the decision to forgo—additional investigations, including

inspections of the Gym Building and Cottage. Glick has testified that if he had been retained to conduct the additional investigations, he would have found and brought to the HOA's attention the same issues later raised in the ABS reports. (R.p.690, line 1 – R.p.691, line 23.)

The fact that the Gym Building and Cottage were not specifically addressed in the Glick Report is of no consequence. The Glick Report, like the termite inspection reports in Barr, clearly put the HOA on notice of potential deficiencies with the property. As in Barr, if the HOA had exercised reasonable diligence in response to the Glick Report, including undertaking the recommended inspections of the Gym Building and Cottage as discussed at the HOA meetings, the HOA "could have realized the magnitude of the problem and brought suit before the statute of limitations ran." 330 S.C. at 645-46, 500 S.E.2d at 160. Similarly, as in Republic Contracting, the Glick Report put the HOA on "inquiry notice, which, if developed, would have revealed the defects" raised in this lawsuit. 332 S.C. at 208, 503 S.E.2d at 767. As noted above, many of the alleged defects at the Gym Building and Cottage—such as single paned windows, improper flashing around windows, and gaps in drywall—existed at the time of construction in 2002, and thus would have been discovered if the HOA had exercised reasonable diligence (i.e., further investigations of all three buildings) in a timely manner. The HOA failed to do so and cannot now avoid the consequences of that decision.

The HOA contends that because the wood windows in the Gym Building and Cottage had not yet begun to rot or otherwise manifest signs of outward damage at that time, no cause of action existed. That argument fails because it ignores the "reasonable diligence" requirement and erroneously presupposes that the HOA must have had **actual**

notice of the issue before the statute of limitations was triggered. Taking the evidence in the light most favorable to the HOA, the HOA clearly knew—or in the exercise of reasonable diligence should have known—of a potential cause of action against Architect in 2003 when the Glick Report and the subsequent recommendations for additional forensic testing were discussed by the HOA. The HOA chose not to pursue additional investigations of the Gym Building and Cottage at the time. The HOA should not now be permitted to skirt the statute of limitations by creatively arguing that because **a particular symptom** (i.e., wood rot) did not exist at the time, the underlying alleged construction/design issue(s), and therefore a potential legal claim, did not exist.

In a further attempt to avoid the statute of limitations, the HOA contends that the Glick Report did not identify any design defects that would place the HOA on notice of any design defects applicable to the architect. The HOA's position is untenable under South Carolina law. Our courts have consistently held that "the focus is upon the date of discovery of the **injury**, not the date of discovery of the wrongdoer." Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994)(emphasis added). On discovery of an injury, "the statute of limitations begins to run for **all claims** based on that injury." Id. (citing Tollison v. B & J Mach. Co., Inc., 812 F. Supp. 618, 620 (D.S.C. 1993))(emphasis added).

In Wiggins, the plaintiff argued that the statute of limitations began to run "at the time she was actually able to investigate her case, discover a cause of action existed, and determine who or what caused her injury." Id. at 128, 442 S.E.2d at 170. Our Supreme Court disagreed, holding that such a test would be "subjective," rather than objective. Id. The Court affirmed the granting of summary judgment to the defendant, holding that the

statute started to run as to all possible claims related to plaintiff's injury at the time she knew she was injured. Id. at 128-29, 442 S.E.2d at 170; see also Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004); Gillman v. City of Beaufort, 368 S.C. 24, 28, 627 S.E.2d 746, 748 (Ct. App. 2006) (holding that the date when a plaintiff learns of a potential new defendant has no bearing on the running of the statute of limitations).

Here, the fact that Architect was the designer—rather than a manufacturer, installer, or builder—is inconsequential for purposes of triggering the statute of limitations. If the Glick Report put the HOA on notice of specific injuries (i.e., moisture intrusion, condensation, stucco cracks, etc.) and triggered the statute of limitations, then pursuant to Wiggins, the statute was triggered as to **all claims and all parties** based on those injuries, whether those injuries were related to design, construction, installation, and/or manufacture.

Furthermore, although Architect contends that the HOA's "design defect vs. other types of defects" argument is immaterial for purposes of triggering the statute of limitations, the HOA's contention that the Glick Report did not identify potential design defects is factually inaccurate. The Glick Report specifically stated that the condensation issues could be related to the **design** of the mechanical systems. (R.p.746.) Furthermore, from a practical standpoint, the fact that Glick—a trained and licensed architect—noted the particular issues he did put the HOA on notice that the issues could have been design-related.

Ultimately, the evidence clearly shows that the HOA was on notice of potential claims against Architect in 2003. The HOA had actual notice of issues at the Main Building via the Glick Report, and was at that time put on inquiry notice of other potential issues at all three buildings. The HOA's hope that the repair efforts had corrected the issues at the Main Building does not change the accrual date for the triggering of the statute of limitations. Accordingly, the trial court was correct in ruling that the HOA's claims against Architect are barred by the statute of limitations, and this Court should affirm the trial court's granting of summary judgment to Architect.

B. Architect did not participate in any repairs at the Main Building, and is thus entitled to summary judgment as to any claims premised upon deficient repairs.

The HOA's counsel conceded at the summary judgment hearing that the HOA's claims as to the Main Building were limited to claims for defective repairs undertaken by the Developer and Genoa.

> THE COURT: The only way you can get past the statute of limitations is pursuing over repairs, not original work.
>
> MR. PARRISH: If that repair—when those repairs were done is where it was leaking, so yes, that would be a failed repair causation problem. The attempts to repair this made by the developer and [Genoa] have failed and has allowed blatant water to accumulate in the walls that could only be discovered by opening, so yes, it's a failed repair case. I said that originally, and I stick with that.

(R.pp.469-470.)

> MR. MCCUE: I would like to make sure I understand. Is this, in fact, a failed repair case—
>
> THE COURT: I don't know how many times [HOA's counsel] can say that differently, but he started to venture off, and he came back and I wrote down again, failed repairs or defective repairs only.

(R.p.471.)

In addition to the HOA's counsel's concessions at the summary judgment hearing that the HOA's claims are premised only upon deficient repairs, the trial court has issued multiple unchallenged orders which confirm this position. Specifically, those unchallenged orders hold that the issues in the Main Building for which the HOA seeks recovery arise **solely** as a result of alleged faulty repair work performed by or on behalf of Genoa and/or the Developer. (See R.p.28; R.p.46; R.p.51; and R.p.57.)[3] It is undisputed that Architect was not involved in Genoa and the Developer's repair efforts at the Main Building. If indeed this is a "defective repair" case as to the Main Building, Architect cannot be held liable for those parties' repairs because Architect was not involved in the repair process.

Further, to the extent Appellant argues that the repairs somehow tolled the statute of limitations, that theory would be inapplicable to Architect. Tolling of the statute of limitations is permissible only when "some conduct or representation by the defendant has induced the plaintiff to delay in filing suit." Hedgepath, 348 S.C. at 360, 559 S.E.2d at 338 (citations omitted); see also Dillon County, 286 S.C. at 220, 332 S.E.2d at 562 (affirming summary judgment as to engineer and materials manufacturers where there was no evidence that those defendants induced the plaintiff to delay in bringing its action). As this Court has noted, "summary judgment is proper where there is no evidence of conduct on the defendant's part warranting estoppel." 348 S.C. at 361, 559 S.E.2d at 339 (citing Vines v. Self Mem'l Hosp., 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994)).

[3] See discussion *infra* Part II regarding unchallenged orders becoming the law of the case.

Here, to the extent the Developer and Genoa's repairs may have "tolled" the statute of limitations, that tolling is inapplicable to Architect. Like the engineer and materials manufacturers in Dillon County, there is simply no evidence that Architect induced the HOA to delay bringing its action. Architect was not involved in the repair efforts on the Main Building. Accordingly, the HOA, like the Plaintiff in Dillon County, cannot rely on a tolling argument against Architect.

In sum, if this is a "failed repair" case, Architect is entitled to summary judgment because Architect was not involved in the repairs. Furthermore, if the HOA's claims are construed to encompass more than "failed repairs," those claims would be barred by the statute of limitations per the Glick Report and the HOA's subsequent discussions of the necessity of additional forensic investigations. Accordingly, this Court should affirm the trial court's granting of summary judgment to Architect.

II. THIS COURT SHOULD AFFIRM SUMMARY JUDGMENT TO ARCHITECT BASED ON THE OTHER UNCHALLENGED ORDERS WHICH FORM THE LAW OF THE CASE.

Where no exception is taken to findings of fact or conclusions of law, they become the "'law of the case.'" Ashy v. WeCare Distributors, Inc., 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986) (quoting Doe v. Doe, 286 S.C. 507, 512, 334 S.E.2d 829, 832 (Ct. App. 1985)). "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, 490-91, 632 S.E.2d 858, 861 (2006) (quoting Austin v. Specialty Transp. Serv., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)). One does not need direct claims against another party to appeal an order granting summary judgment to that other party. See Shaw v. City of Charleston, 351 S.C. 32, 567

S.E.2d 530 (Ct. App. 2002) (holding that a defendant had standing to appeal granting of summary judgment to a co-defendant).

Here, there are a multitude of unchallenged orders which are now the law of the case. Those orders bear directly on the issues involved in this appeal, and therefore provide further grounds to affirm summary judgment for Architect. For example, the order granting summary judgment to Lacy Painting (the original painter for the wood windows) states that the statute of limitations related to Lacy Painting's work began to run in 2003 with the Glick Report and the HOA's subsequent acknowledgement of "the need to investigate further to determine the full extent of the damage." (R.pp.23-24.) Further, the order granting summary judgment to Ferst Plastering (the stucco subcontractor at the Main Building) states that the HOA's claims as to original stucco work are barred by the statute of limitations. (R.p.41.) Additionally, the order granting summary judgment to Charleston Glass & Mirror Company, Inc., Metro Waterproofing, Inc., and The Fox Steel Company (contractor/supplier entities related to the steel windows and doors in the Main Building) states that the HOA "is not claiming any damages associated with the . . . design, drawings, warranties . . . representations, or consultation regarding the . . . work associated with the steel windows and doors prior to April 2003 as all related issues were known by the [HOA]" per the Glick Report. (R.p.47.) Accordingly, the law of the case is clear that the statute of limitations was triggered as to **all three** buildings per the Glick Report and the HOA's subsequent discussion of the need for further forensic investigations. That law of the case applies to Architect for purposes of determining when the statute of limitations was triggered, and therefore, Architect is thus entitled to summary judgment on those grounds. To hold

otherwise would not only contravene the law of the case, but would also illogically subject Architect to claims for construction issues that the HOA cannot maintain against those who actually performed the work.

CONCLUSION

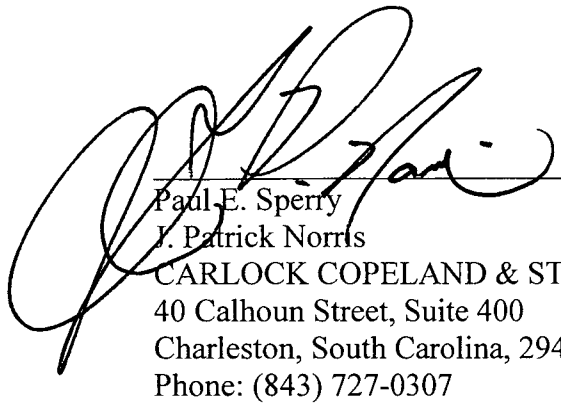
For the HOA's action against Architect to stand, the law requires that the HOA must not have known—or not have had the opportunity to learn—of the alleged construction/design issues more than three years before April 8, 2010 (the date the HOA sued Architect). The evidence shows that the HOA was on notice of actual and potential construction/design issues in 2003 per the Glick Report, and actually discussed (and elected to forgo) additional forensic investigations of all three buildings, which would have revealed the issues for which the HOA now seeks to recover from Architect.

Therefore, pursuant to South Carolina law, the HOA's claims against Architect are barred by the applicable statutes of limitations. Further, as multiple unchallenged orders form the law of the case, Architect is entitled to summary judgment pursuant to the grounds expressed in those orders. Accordingly, Architect respectfully requests that this Court affirm the trial court's granting of summary judgment to Architect on the grounds expressed herein, as well as any ground appearing on the record as provided by Rule 220(c), SCACR.

SIGNATURE BLOCK TO FOLLOW

Respectfully submitted,

July 18, 2013



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Roger M. Young, Trial Court Judge
Civil Action No. 2009-CP-10-267

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, 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 Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondent Brock Green Architects and Planners, LLC's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

July 18, 2013

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THE STATE OF SOUTH CAROLINA
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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, 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,

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PROOF OF SERVICE OF THE FINAL BRIEF OF RESPONDENT BROCK GREEN ARCHITECTS AND PLANNERS, LLC

I hereby certify that on July 18, 2013, I served a copy of the within and foregoing **Final Brief of Respondent Brock Green Architects and Planners, LLC** upon all parties to this matter by depositing a true copy of same in the United States Mail, proper postage prepaid, addressed to counsel of record as follows:

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