THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals
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Appeal from the Court of Common Pleas For Charleston County
Honorable Roger M. Young, Circuit 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, 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 Defendant.

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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DISCUSSION

Pursuant to Rules 221(a) and 219(b), SCARC, Appellant 3 Chisolm Street Homeowners Association, Inc. ("HOA") respectfully submits this petition for a rehearing, with a suggestion for a rehearing *en banc*, and requests that the Court of Appeals reverse its decision and remand this case for a jury trial on the facts issues presented

1. **This Court's unpublished decision ignores the scintilla of evidence standard and improperly concludes that at the time of the 2003 Glick report the HOA should have been on notice of rot in the wood windows that had not yet appeared and did not appear until years later.**

The unpublished decision in this case concludes that when the Glick report was issued in 2003, the report put the HOA on "inquiry notice" of defects in the wood windows in the gym and cottage buildings. *3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC*, Unpublished Op. No. 2014-UP-128 (S.C. Ct. App. Filed March26, 2014) at page 4. In reaching that conclusion, this Court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the HOA, and summary judgment is inappropriate if even a mere scintilla of conflicting evidence exists. *See* Rule 56(c), SCRCP (stating summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("The burden of establishing the bar of the statute of limitations rests upon the one

interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide."); *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 532 (Ct. App. 2012) (stating the appellate courts review the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP).

The facts before this Court on appeal are as follows: The wood windows at issue in this case are located in the gym building and caretaker cottage. Mr. Glick did not examine those buildings, and the wood windows are not mentioned in his 2003 report. In 2003 the wood windows were brand new (the developer was still selling unsold condominium units in 2003) (Aff. of Jack Burnett, R. p. 663 at ¶ 7). The affidavits and deposition testimony submitted by the HOA indicate that the problem with the windows (i.e., the rotting of the wood window frames) did not exist in 2003 and did not begin until years later. Specifically the HOA's handyman testified that in 2004 the wood windows in the gym building were "fine, they were all right." (Dep. Jerry Huddleston, R. p. 709, lines 9-12). The affidavit of the HOA's former president, Jack Burnett, indicates that the rot did not appear in the wood windows frames until 2008, at which point the HOA hired the forensic engineering firm Applied Building Sciences, Inc. to investigate the cause of the rotting. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; see also Aff. of Scott Harvey, R. p. 664 at ¶ 4). Tellingly, no facts have been presented to this Court suggesting that wood rot was present or visible on the wood windows in 2003. The HOA filed this lawsuit in 2009 after the developer and Genoa refused to repair the problems with the wood windows on the gym building after the rot appeared in 2008. (Aff. of Jack Burnett, R. p. 663 at ¶ 11).

Prior to the appearance of the rot in the windows in 2008, no injury or damage to the wood windows existed, so in 2003 the HOA could not have been placed on notice of then non-existent rot damages. *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (stating that under the discovery rule, the statute does not begin to run from the date the negligent act or the breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.)

The record is devoid of evidence that the wood windows had started to fail (rot) or manifest any problems at the time of the Glick report. The only evidence pertaining to that issue indicates those windows were "fine" in 2004 and the rot did not appear in until 2008. As such, the unpublished decision in this case ignores conflicting evidence and, contrary to the scintilla of evidence standard, improperly concludes that in 2003 the HOA was on notice of a rot problem in the wood windows that was not observed or reported by anyone and that had not yet occurred.

2. This Court's decision is improperly based on this Court's assumption that an investigation of the wood windows in 2003 would have revealed the existence of a problem with the windows.

This Court's decision mentions a 2007 inspection report regarding condensation on the wood windows, and from that concludes the "the defect causing the condensation—the single-pane windows—existed at the time the construction was completed in 2002." Op. 2014-UP-128 at page 4. This Court's conclusion that in 2003 the HOA was on notice of defects in the wood windows is based on this Court's improper assumption—without any factual support—that in 2003 the HOA should have and could have been able to identify the then non-existent rot damage in the wood windows. The question of whether an inspection of the windows in 2003

would have revealed the existence of a problem with those windows requires an analysis of the nature and degree of inspection and testing to which the windows should have reasonably been subjected in 2003 given the absence of any rot damage at that time. Those are questions of fact for a jury to decide. *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (stating that under the discovery rule, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.) It was improper for this Court to weigh conflicting evidence and assume the answers to those factual issues on appeal. *See Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.") (internal citations omitted).

No evidence indicates that the subsequent rot in the wood windows existed, was apparent, or was reasonably discoverable at the time of the 2003 Glick report, and this Court ignored conflicting evidence and improperly assumed that in 2003 the HOA could have and should have identified wood rot in the windows that had not yet appeared. As such, the unpublished decision in this case fails to properly apply the standard applicable to summary judgment and is based on conflicting facts and on assumptions of facts not appearing in the record.

CONCLUSION

Based upon the foregoing arguments, the HOA respectfully requests that this Court of Appeals grant a rehearing (*en banc* if appropriate), reverse its decision, and remand this case to the Circuit Court to

allow a jury to decide the factual issues presented.

Respectfully submitted,

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v.

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Third-Party Defendants,

Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc.,

Fourth-Party Defendants.

Proof of Service

I, hereby certify that on April 10, 2014, I served one copy of the ***Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc*** on counsel for the parties of record in this case via United States Mail, postage pre-paid, as addressed shown below or via hand delivery.

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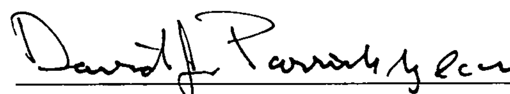

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David J. Parrish
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April 10, 2014

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

Re: 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, et al., Civil Action Case No.: 2009-CP-10-26, Appellate Case No.: 2012-207850

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc along with the $25.00 filing fee.

Also enclosed is a Proof of Service for the Petition for Rehearing with Suggestion for Rehearing En Banc for service upon Respondent's counsel in the above-referenced matter.

Please let me know if you have any questions or need anything else from me regarding this matter.

With kind regards,

David J. Parrish

DJP/cll
Enclosures
cc: Franklin H. Turner, III, Esquire
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