THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Carmen T. Mullen, Trial Court Judge
Civil Action No. 2011-CP-07-2700

Tad Segars, Plaintiff/Appellant,

v.

Ocean Estate Builders, Inc., Ed Flynn, Individually, David Garcia d/b/a Yinet Plastering, Inc., Advanced Roofing, Inc. and Teofilo Lezcano, Individually and d/b/a Advanced Roofing, Inc. a/k/a Yuko Construction, Inc., CMC Construction Company, Inc., and Jaguar Masonry, Inc. Defendants,

Of Whom CMC Construction Company, Inc. is the Respondent.

FINAL BRIEF OF RESPONDENT CMC CONSTRUCTION COMPANY, INC.

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT CORRECTLY RULE THAT APPELLANT KNEW OR SHOULD HAVE KNOWN HE HAD A CLAIM AGAINST RESPONDENT MORE THAN THREE YEARS PRIOR TO SUING RESPONDENT, AND THUS THAT APPELLANT'S CLAIM AGAINST RESPONDENT WAS BARRED BY THE STATUTE OF LIMITATIONS?

STATEMENT OF THE CASE

This is a case regarding alleged deficiencies in the construction of a home located in Hilton Head, South Carolina. Plaintiff/Appellant originally commenced this action on September 23, 2009 against the general contractor, Ocean Estate Builders, Inc. ("Ocean Estate"). (R.pp.1-4.) Appellant struck the case from the docket pursuant to Rule 40(j), SCRCP on or about October 19, 2010. (R.pp.15-16.) Appellant subsequently restored the case in 2011. Ocean Estate named Respondent CMC Construction Company, Inc. ("Respondent") as a Third Party Defendant for the first time in its Amended Third Party Complaint filed on June 11, 2012. (R.pp.60-66.) Ocean Estate (and its principal, Defendant Ed Flynn) dismissed all claims against Respondent with prejudice in August 2013.[1]

Appellant did not name Respondent as a Defendant until the filing of his **Third** Amended Complaint (erroneously captioned as "Second Amended Complaint") on February 12, 2013—more than three years after the filing of the original Complaint. (R.pp.83-94.) In its Answer, Respondent asserted numerous affirmative defenses, including the statute of limitations. (R.pp.95-102.) Respondent filed its motion for summary judgment on April 12, 2013 pursuant to Rule 56, SCRCP. (R.pp.108-112.) Another Defendant, Advanced Roofing, Inc. ("Advanced"), also filed a motion for

[1] Their dismissal of all claims against Respondent is further reflected in Ocean Estate's counsel's statements at the hearing on Respondent's motion for summary judgment.

summary judgment. The grounds for both summary judgment motions were that Appellant's claims against Respondent and Advanced violated the statute of limitations.

The trial court held a hearing on those summary judgment motions on September 4, 2013. (R.pp.138-182.) The trial court granted both motions per Order dated September 11, 2013. (R.pp.183-186.) Appellant did not move to reconsider or seek any further clarification of the trial court's Order granting summary judgment to Respondent and Advanced. Appellant served his Notice of Appeal on or about November 5, 2013. (R.pp.187-190.) Appellant subsequently withdrew his appeal as related to Advanced and now proceeds only against Respondent.

STATEMENT OF FACTS

This construction defect lawsuit involves a house located at 87 Singleton Beach Road in Hilton Head, South Carolina. Appellant is the owner of the home. Construction took place in the 1999-2000 timeframe. The Certificate of Occupancy was issued on June 22, 2000. Ocean Estate served as the general contractor. Respondent was a framing subcontractor retained by Ocean Estate to construct the wood framing and set the windows.

In his original Complaint (2009), Appellant sued Ocean Estate for numerous "defects in construction," including "[i]mproper installation and failure of structural systems." (R.pp.1-2.) Appellant alleged in his original Complaint that "water infiltration" had led to "decay of structural components." (R.pp.1-2.) In his original Complaint, Appellant sought damages for "repairs and reconstruction of the residence." (R.pp.2-3.) Respondent was not a party to the case when Appellant struck the case from

the docket in 2010 pursuant to Rule 40(j), SCRCP. Months after Appellant restored the case in 2011, Ocean Estate filed an Amended Third Party Complaint in June 2012 naming Respondent as a Third Party Defendant. (R.pp.60-66.)

Appellant's Third Amended Complaint (filed on February 12, 2013) was the first time Appellant asserted any claims against Respondent. Appellant's Third Amended Complaint was filed more than three years after Appellant's initial Complaint (filed in 2009). In the Third Amended Complaint, Appellant alleged the exact same injuries and damages as were set forth in the initial Complaint. (R.p.85.) Significantly, prior to being named as a Defendant in this case, Respondent was named as a defendant (along with Ocean Estate) in at least six other cases involving houses in the same neighborhood where Appellant's counsel served as the plaintiffs' attorney.

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) (citing Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14, 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 Props., LLC, 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 APPELLANT'S CLAIMS AGAINST RESPONDENT ARE TIME BARRED BECAUSE APPELLANT WAS ON NOTICE IN 2009 OF THE ALLEGED CONSTRUCTION DEFICIENCIES, BUT DID NOT SUE RESPONDENT UNTIL 2013.

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, under the applicable statute of limitations (S.C. Code § 15-3-530), Appellant had a three-year window in which to bring a claim against Respondent from the point Appellant knew or should have known

he had a claim. It was Appellant's burden to timely investigate the case and identify all potential defendants.

Appellant failed to timely bring his claims against Respondent; therefore, Appellant's claims against Respondent must fail as a matter of law. Appellant now (for the first time) seeks to sidestep the statute of limitations via Ocean Estate's former third party claims against Respondent. This argument was not presented to the trial court and is not properly before this Court, but it nonetheless fails on its merits.

A. The statute of limitations was triggered in 2009 when Appellant had notice of construction deficiencies and proceeded to file a lawsuit against the builder.

In South Carolina, the "discovery rule" applies for purposes of determining when the statute of limitations is triggered. S.C. Code § 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). Here, Appellant knew—or in the exercise of reasonable diligence should have known—of a claim against Respondent at the time of the filing of his original Complaint in 2009 for moisture intrusion and construction defects.

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." Dean, 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 homeowner 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 homeowner 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 Corp. is further instructive as to the concept of inquiry notice for purposes of triggering the statute of limitations. In that case, the general contractor sued the project engineer over allegedly defective plans for a bridge. Republic Contracting Corp., 332 S.C. 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 there was indeed a design problem. 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.

Here, Appellant had notice in 2009 of specific injuries—moisture intrusion and construction defects—and was thus on notice of potential claims against those responsible for the home's construction. Appellant filed a lawsuit to recover for those injuries, and the three-year statute of limitations was triggered at that point. Because the three-year statute was triggered in 2009, Appellant's 2013 claims against Respondent are time barred.

B. Appellant cannot circumvent the statute of limitations by arguing that he did not know the identity of the framer, as it is Appellant's burden to investigate and identify all potential defendants.

In an attempt to avoid the statute of limitations, Appellant contends that the statute was not triggered at the time of the filing of the initial Complaint because he did not at that time know the identity of the framing subcontractor. In support of this contention, Appellant argues that the "official records" from the Town of Hilton Head did not identify Respondent by name and that the subcontractor roster was "wrong" in listing Ocean Estate as the framer, and therefore the statute was not triggered. Appellant's position is untenable under South Carolina law.

Our courts have consistently held that in a statute of limitations inquiry, "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). This is true regardless of whether the plaintiff knows the identity of all defendants at the time.

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. Our Supreme 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, Appellant had notice of specific injuries—moisture intrusion and construction defects—**at the very latest** upon filing of his lawsuit in 2009. That notice triggered the statute of limitations. Accordingly, pursuant to Wiggins and its progeny, the statute was triggered at that point as to all claims and all parties based on those injuries.

Appellant appears to acknowledge that it was his burden to identify the appropriate parties in a timely manner. However, Appellant argues that he had no way of identifying Respondent as a potential Defendant. This is simply not true. As was pointed out at the motion hearing before the trial court, Appellant had years to conduct discovery (via subpoena, deposition, or otherwise) to explore and confirm the subcontractors' identities. Indeed, Appellant's counsel's extensive prior experience with other lawsuits involving houses in the same neighborhood also involving Ocean Estate and Respondent should have provided a catalyst for such discovery efforts.

Further, even assuming *arguendo* that Appellant was somehow prevented from identifying Respondent as a potential Defendant, Appellant failed to timely react once Ocean Estate named Respondent as a Third Party Defendant in June 2012. Appellant had over three months from that point to amend his Complaint and assert claims against Respondent before the statute of limitations ran, and failed to do so.

A final, crucial blow to Appellant's argument is the fact that, per the affidavit of Appellant's wife, he was at all times in possession of documents in his own attic which identified Respondent as the framer. (R.pp.104-105.) The fact that Appellant did not actually come across those documents until "the latter part of 2011" does not negate the fact that the documents were in his possession all along. The point is, even putting aside the multitude of discovery options available to him, Appellant was actually in possession of information all along linking Respondent to the home's construction. Appellant simply failed to timely act upon that information.

This is precisely the type of situation that the statute of limitations is intended to avoid. The law puts the burden on the plaintiff to identify appropriate defendants once the statute of limitations clock starts running. Three years is more than ample time to accomplish such an investigation. The end result is that Appellant failed to timely bring his claims against Respondent, and thus summary judgment is appropriate.

II. APPELLANT'S "RULE 15" ARGUMENT IS NOT PROPERLY BEFORE THIS COURT, AS APPELLANT NEVER RAISED THE ISSUE TO THE TRIAL COURT; NEVERTHELESS, THE ARGUMENT FAILS ON ITS MERITS.

In Appellant's "Summary of Arguments," he contends—for the first time—that Rule 15, SCRCP gives him a way around the statute of limitations. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). Appellant's "Rule 15" argument is not properly preserved and not properly before this Court, as it was never raised to or ruled upon by the trial court. However, even if this argument were properly before this Court, it fails on its merits.

Appellant essentially contends that because Respondent was a "party" to the lawsuit by virtue of Ocean Estate's Third Party Complaint in 2012, Appellant's assertion of claims against Respondent more than three years after his original Complaint did not violate the statute of limitations. Appellant cites Rule 15, SCRCP in support of this argument. Rule 15, SCRCP states:

> **(a) Amendments.** A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at

any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

. . .

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

. . .

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a cause of action or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 15, SCRCP.

Appellant broadly asserts: "Pursuant to Rule 15, SCRCP Plaintiff is free to assert claims against a party." The only case cited by Appellant (Valentine v. Davis, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995)) in support of his argument is inapplicable here. Valentine dealt with the issue of whether an existing plaintiff could add a new plaintiff to a case, and this Court concluded that Rule 15 did not apply.

Rule 15 has four subsections, but it is unclear upon which of those subsections Appellant relies. In his brief, Appellant states: "Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant." It is undisputed that Respondent was not an "existing" Defendant before Appellant filed the Third Amended Complaint and—for the first time—asserted direct claims against Respondent. Thus, Rule 15(a) is inapplicable to Appellant's argument because (1) Respondent was not an existing Defendant and (2) the substance of Rule 15(a) simply addresses timing/deadlines related to amended pleadings.

Rule 15(b) is likewise inapplicable and irrelevant. This Court has stated that Rule 15(b)

> covers two situations. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary.

Sunvillas Homeowner Ass'n, Inc. v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990). Clearly, Rule 15(b) has no bearing on Appellant's argument here, as neither of those two situations is at issue. Rule 15(d) is equally inapplicable, as it deals with supplemental pleadings.

Assuming then, by process of elimination, that Appellant intends to rely upon Rule 15(c), that subsection is also inapplicable. This Court has held that "the addition of a party is not contemplated by Rule 15(c)." Gause v. Smithers, 384 S.C. 130, 133, 681 S.E.2d 607, 609 (Ct. App. 2009). This Court has further explained: "The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant . . . ." Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000).

When Appellant sued Respondent in 2013, Appellant added a new Defendant. It was not as if Appellant had previously named a "John Doe" Defendant framing subcontractor, and then later simply changed the name. To the extent Appellant contends that Rule 15 allowed his claims against Respondent to relate back to his original Complaint, such a position is untenable under South Carolina law. Appellant's argument is akin to the plaintiff's argument in Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004), which failed.

In Cline, the plaintiff brought an action against a rigging contractor after his modular home was damaged during a delivery accident. Over three years after the accident, the plaintiff amended his complaint to add a subcontractor as a defendant. The subcontractor moved for summary judgment on grounds that the three year statute of limitations had expired. The plaintiff argued that the addition of the subcontractor related

back to his original pleading under Rule 15(c), SCRCP. The court granted the subcontractor's motion for summary judgment and the plaintiff appealed. This Court affirmed, holding that Rule 15(c) was inapplicable because "relation back applies only when an existing party is changed, not when a new party is added to a complaint." Id. at 371, 597 S.E.2d at 29 n.2 (internal citation omitted); see also Barnes v. Erie Ins. Exch., 576 S.E.2d 681 (N.C. Ct. App. 2003) and Wicker v. Holland, 495 S.E.2d 398 (N.C. Ct. App. 1998) (holding that plaintiffs could not use North Carolina's Rule 15(c) to assert direct claims against a third party defendant when plaintiffs' statute of limitations had run).

Appellant attempts to muddy the waters by arguing that because Respondent was named as a Third Party Defendant within three years of the filing of Appellant's original Complaint, Respondent was already a "party" to the case, and therefore the statute of limitations does not bar Appellant's claims. Rule 15(c) simply cannot be used in this manner to sidestep the statute of limitations. Appellant's claims against Respondent resulted in the addition of a new Defendant to the Complaint, regardless of whether Respondent had previously been named as a Third Party Defendant by another party.

Further, from a practical standpoint, the statute of limitations must apply separately to each party asserting claims. A plaintiff's claims and a third party plaintiff's claims are inherently different, both in nature of the claims asserted and in terms of alleged damages. See First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) ("[T]he third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability . . . .").

Appellant asserted claims for damages to his home allegedly caused by Respondent's construction work, while Ocean Estate asserted "derivative" claims against Respondent arising out of Appellant's claims against Ocean Estate. See Rule 14, SCRCP. Thus, whereas Respondent's liability to Ocean Estate would have been premised upon a finding of liability as to Ocean Estate, Respondent's liability to Appellant would not have been subject to any such constraint.

Further, each claimant was subject to its own statute of limitations driven by the nature of the respective claims against Respondent. Whereas Appellant's statute of limitations was triggered in 2009 when he knew about the moisture intrusion and construction defects and filed his lawsuit, Ocean Estate's statute of limitations on its indemnity claim would not have been triggered until a judgment was entered against Ocean Estate. See First Gen. Servs. of Charleston, Inc., 314 S.C. at 444, 445 S.E.2d at 449. Appellant simply cannot "bootstrap" his claims to Ocean Estate's. Accordingly, neither South Carolina law nor the Rules of Civil Procedure support Appellant using Ocean Estate's third party claim to make an end run around the statute of limitations. In sum, even if Appellant's Rule 15 argument was properly before this Court—and it is not—the argument fails on multiple fronts.

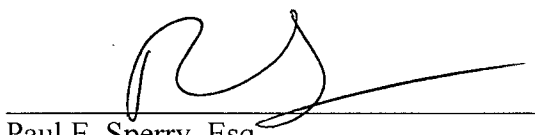
CONCLUSION

The evidence shows that Appellant was on notice of moisture intrusion and construction defects at the latest in September 2009, per the filing of his lawsuit against the builder. The three-year statute of limitations as to his construction defect claims was triggered at that point, and Appellant's 2013 claims against Respondent are thus time barred. There is no genuine issue as to any material fact regarding this issue, and Respondent is entitled to judgment as a matter of law.

Further, Appellant's argument regarding Rule 15, SCRCP is not properly before this Court, as it was not raised to the trial court for consideration, nor did Appellant move for any clarification of the trial court's Order. However, even if this Court could consider the Rule 15 argument, it fails on its merits. Accordingly, Respondent respectfully requests that this Court affirm the trial court's granting of summary judgment to Respondent on the grounds expressed herein, as well as any ground appearing on the record as provided by Rule 220(c), SCACR.

Respectfully submitted,

June 27, 2014



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondent CMC Construction Company, Inc.'s Final Brief complies with Rule 211(b), of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE OF THE FINAL BRIEF OF RESPONDENT

I certify that I have served the within and foregoing **Final Brief of Respondent CMC Construction Company, Inc.** upon Appellant by depositing a copy of same in the U.S. Mail, postage prepaid, on June 27, 2014 addressed as follows:

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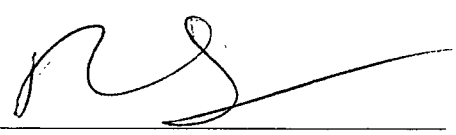

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