Genoa

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert M. Young, Circuit Court Judge

Case No.: 2009-CP-10-267
Appellate Case No.: 2012-207850

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3 Chisolm Street Homeowners Association, Inc., ...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.....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.

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent, Genoa Construction Services, Inc.** in this case on Appellant, 3 Chisolm Street Homeowners Association, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2013 addressed to the attorney of record, David J. Parrish, Esquire, NEXSEN PRUET, LLC, Post Office Box 486, Charleston, South Carolina 29402.

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v.

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

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Respondent Genoa Construction Services, Inc., complies with Rule 211(b) of the South Carolina Appellate court Rules.

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Lesco Restoration, Inc., ... Fourth-Party Plaintiff,

v.

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FINAL BRIEF OF RESPONDENT GENOA CONSTRUCTION SERVICES, INC.

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO GENOA BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS WHERE THE TRIAL COURT PREVIOUSLY GRANTED SUMMARY JUDGMENT TO LACY PAINTING, ALONG WITH NUMEROUS OTHER SUBCONTRACTORS, BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS AND THAT ORDER WAS NEVER APPEALED, THUS BECOMING THE LAW OF THE CASE AND THE LAW OF THE CASE ISSUE HAS NOT BEEN APPEALED BY THE HOA.

II. WHETHER THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO GENOA BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS WHERE THE HOA WAS PUT ON NOTICE BY AN EXPERT OF THE ALLEGED CONSTRUCTION DEFECTS NEARLY 6 YEARS BEFORE THIS LAWSUIT WAS FILED.

STATEMENT OF THE CASE

On January 16, 2009, Appellant 3 Chisolm Street Homeowners Association, Inc. ("HOA") filed a Complaint against, among others, Genoa Construction Services, Inc. ("Genoa"). (R. pp. 94-112.) On January 20, 2009, the HOA filed its Amended Complaint, of which Genoa timely filed its Answer to HOA's Amended Complaint. (R. pp. 113-131 and 132-161.) Subsequently, the HOA filed a Second Amended Complaint. (R. pp. 162-184.)

The lawsuit alleges multiple defects associated with the construction of condominiums, including the following:

(a) improper installation of windows;
(b) installation of windows that lack adequate wood preservative treatment;
(c) improper priming and painting of the windows;
(d) improper flashing of the windows and window openings;
(e) improper connection of the windows to side walls;
(f) rusting and deterioration of the brick lintel over windows;
(g) improper installation of firewalls between condominium units;
(h) improper installation of interior grade doors in exterior applications;
(i) such additional items as may be discovered during investigation of construction deficiencies.

(R. pp. 167-168 at ¶ 25.)

The Second Amended Complaint further alleges that the condominiums (all three buildings) have sustained water damage and water intrusion to the common elements caused by and resulting from defects and deficiencies in the construction of the condominiums. (R. p. 168 at ¶ 26.) Further, the HOA alleges that as a result of the defects and deficiencies, the roofs, brick lintels, windows, and doors in the condominiums are

prematurely failing and resulting in water intrusion and damage to the buildings. (*Id.* at ¶ 27.)

On January 31, 2011, Genoa filed a Motion for Summary Judgment, or, in the alternative, for Partial Summary Judgment as to all three buildings on statute of limitations grounds. (R. pp. 237-239.) Later, Genoa filed a Memorandum in Support of its Motion for Summary Judgment, or, in the alternative, for Partial Summary Judgment. (R. pp. 241-451.)

Various subcontractors that performed work on the project also filed motions for summary judgment on the same statute of limitations grounds. Those subcontractors included subcontractors that only performed work on the main building (The Fox Steel Company), that performed work on all three buildings (Williams Mechanical), and that only performed work on the cottage and gymnasium buildings (Lacy Painting). The lower court was provided with numerous memoranda in support of the motions by Genoa and the various subcontractors.

Oral arguments were heard on these motions on March 28, 2011. (R. pp. 443-490.) The lower court subsequently issued its Order dated June 7, 2011, granting summary judgment in part and denying summary judgment in part to Genoa. That Order was entered on June 9, 2011. (R. pp. 11-28.) In the Order, the lower court granted Genoa's motion for summary judgment as to the HOA's claims relating to original work on the Project, and denied Genoa's motion as it pertained to claims relating to any defective repairs conducted in 2003. (R. pp. 11-28.)

The lower court also granted the motions for summary judgment made by the various subcontractors as to original work performed on any of the three buildings. (R.

pp. 11-47; 60-68; and 81-84.)

In the lower court's order granting summary judgment as to Lacy Painting as to work it performed on the gym and cottage buildings, the lower court held that the statute of limitations began to run on alleged defective original work for all three buildings by at least 2003. (R. pp. 23-24.) Because the HOA did not file a lawsuit until 2009, the court held that the HOA's claims were barred. (*Id.*) The HOA did not appeal or otherwise challenge the court's decision to grant Lacy Painting summary judgment on the grounds that statute of limitations had run on its work.

On June 24, 2011, the HOA filed a Motion to Reconsider, Alter, or Amend the Order Granting Partial Summary Judgment as to Genoa Construction Services, Inc. (R. pp. 536-540.) On August 12, 2011, a hearing was held before Judge Young on the HOA's Motion to Reconsider. (R. pp. 545-588.) Subsequently, the lower court, by Order dated January 4, 2012, denied the HOA's Motion to Reconsider. (R. pp. 626-637.)

The HOA filed its Notice of Appeal on February 13, 2012. (R. pp. 610-637.)

STATEMENT OF FACTS

This case arises out of the conversion of historical school buildings into luxury condominium units. The HOA owns and governs the common elements contained in the condominium horizontal property regime known as the Chisolm Street Condominiums located at 3 Chisolm Street in the City of Charleston, South Carolina ("Condominiums"). (R. p. 165 at ¶ 2.) Genoa acted as the general contractor for the conversion of the Condominiums. (R. p. 166 at ¶ 15.) Genoa stopped performing work on the project on or around February of 2004. (R. p. 667 at ¶ 3.)

The Condominiums are located on the site of the old Andrew B. Murray Vocational School and are on the list of the National Register of Historic Places in South Carolina. (R. pp. 165 at ¶ 3, and 166 at ¶11.) The Condominiums were converted from three historical buildings: A three-story main building, a gymnasium building, and a care taker building. (R. p. 165 at ¶ 4.)

Myles Glick Report

The HOA commissioned a study to evaluate problems, and specifically moisture instruction problems, allegedly occurring at the property in order to evaluate the extent of the situation. (R. p. 678:14–25.) On April 8, 2003, Glick/Boehm & Associates, Inc. issued a report to the HOA ("Glick Report") after visual observations of the main building by Myles Glick (architect), Thomas Carlson (general contractor with Calibogue Construction), Brett Carlson (Calibogue Construction), and Joe Dapore (attorney for the HOA). (R. pp. 741-744.) The goal of those observations was to "get an understanding of the project and to see what appeared to be some very obvious building failures." (*Id.*)

The Glick Report stated the following on the issue of water intrusion:

> 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 a strong possibility that the roof parapet is leaking. Of the four areas identified, the roof parapet will need more research so that this area can be eliminated or to determine that it is contributing to the water intrusion into the exterior wall cavity.

(*Id.*)

The Glick Report also addressed an issue with the steel windows:

> In almost every case, the window system is a steel window with fixed panes of glass and an opening panel that does not close. Therefore, the windows do not stop water from intruding into the building. Water has accumulated on window sills as a result of water intrusion through the gaps created in operable window areas. It also appears that water is coming through the frames (mullions) of the fixed panes as well.

(*Id.*)

The Glick Report goes on to discuss problems with the interior wood floors, mechanical systems, and exterior stucco. (*Id.*) In regards to the exterior stucco, the report states the following:

> It was noticed that there were new walls built at the rear courtyard of the main building and these walls appear to be metal studs with a three-coat masonry stucco finish. Intersection 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. There are other areas of this exterior system that are also not installed in accordance with the standard of care for stucco as called for in the ASTM Standards which are in turn, called for in the building code. Stucco cracks will allow water to enter the building envelope.

(*Id.*)

The Glick Report also provides a list of predictable problems that have occurred as a result of water intrusion, including "an extensive amount of mold and mildew," "rotted drywall associated with the windows," and "an excessive amount of rust showing up on the steel windows." (*Id.*) Further, the observers noticed numerous patches on the roof of the main building and stated that "[a] full investigation is recommended to see if there are any hidden failures." (*Id.*)

The Glick Report concludes with the following statement to the HOA:

> All of the above issues are significant and were persuasive 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. Without correction, the issues 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.

(*Id.*)

The Glick Report was brought before the HOA Board on May 6, 2003 as reflected in the 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. It was noted that Mr. Glick looked at the main building.
>
> 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.

(R. pp. 859-860 (emphasis added).)

Consequently, the HOA was on notice as of May 6, 2003 that there were window leak issues, condensation issues, stucco issues, as well as other possible deficiencies associated with the buildings. The HOA was also put on notice as of May 6, 2003, by its own Community Association Manager, a former President of Community Associations Institute ("CAI"), that according to normal procedure the gym and cottage buildings as well as the main building should be inspected.

In his deposition, Mr. Glick stated that in all the cases that he has recommended additional testing, there have only been three or four instances where he had not been asked to perform that additional testing and this was one of those instances. (R. pp. 692:19-693:7.) In this case, the HOA chose not to follow Mr. Glick's advice; significantly, however, Mr. Parades testified that the HOA kept Mr. Glick's findings in mind over the years. (R. p. 724:7–25.)

Williamson and Associates Report

In addition to Myles Glick, on April 10, 2003, Williamson & Associates ("Williamson") conducted a visual examination and water nozzle spray test on various windows including windows in the main building. (R. p. 783.) Williamson prepared an extensive written report which included photographs of the windows. According to the report:

> Condensation was observed in the interior of the windows in several of the occupied units, to the extent that moisture flowed down, collecting on the sills. This condition has been noted prior to our inspection.
>
> Water nozzle spray tests were conducted on several

> windows, including some that were cited as currently leaking. Water was observed entering the interior of Unit 101 when water was applied to the left jamb of the corner window on the west exposure, near the courtyard. An examination of the exterior showed that the sealant was applied to damaged masonry, and the water is entering behind the sealant at these points.
>
> Water was observed entering the interior of Unit 201, along the top of the operable window. The plastic diverter was not apparent on this window, and water running down the face of the window leaked in at this horizontal section.

(*Id.*)

In short, the Williamson Report addresses condensation issues, sealant issues, cracks in the stucco around the windows, and waterproofing of the patios. Its recommendations include cutting out and repairing sealant and perimeter joints around leaking windows. (R. p. 785.) However, the Williamson Report specifically states that "[n]one of the recommendations will address the condensation on the interior of the windows." (*Id.*)

Genoa's Sealant and Caulk Repairs

In 2003, although not within Genoa's Scope of Work on the Project, Genoa agreed to coordinate the performance of some repairs related to sealants and caulking.

Specifically, the repairs consisted of actions such as cutting out perimeter sealants around windows, re-sealing perimeter joints in the stucco, and removing loose plaster adjacent to windows. (R. pp. 870-872; and 876-879.) Indeed, during the summary judgment hearing, the HOA's counsel identified the repairs as consisting of caulking and sealing. (R. p. 462:16–20.) The HOA's counsel stated that "the evidence in the record is the developer and Genoa came back out there [and] added caulk and seals around the

window." (R. p. 469:22-25.)

In other words, if Plaintiff's counsel is correct, Genoa's repairs addressed some of the sealant issues in the Williamson Report, but not the issues highlighted in the Glick Report, such as window condensation and the overall misapplication of stucco. (R. pp. 741-744; 782-790; and 876-879.) Indeed, in Genoa's letter regarding scheduling certain repairs, it expressly lists the items in the Williamson Report and then whether or not Genoa has scheduled work related to that item. (R. pp. 876-879.)

Genoa stopped performing work on the project on or around February of 2004. (R. p. 667 at ¶ 3.) Additionally, it should be noted that Genoa was not involved in any repairs to either the gymnasium or cottage buildings.

Problems Continued

After receiving the Glick Report and after Genoa had completed all its work on the Project, the deficiencies described in the Glick Report and alleged in the Second Amended Complaint continued. (R. 682:20–21.)

On December 29, 2004, 10 months after Genoa left the site and a year and a half after the HOA was presented with the Glick and Williamson Reports, the HOA was presented with a proposal from Carolina Concrete Systems, Inc. that included: "concrete repair, parapet cap repairs, recaulking all windows and doors, repairing up to 2000 s.f. of stucco, patching all cracks and installing 2 coats of acrolastic elastomeric coating." (R. pp. 884-885.)

Furthermore, condensation issues with the metal windows in the main building continued long after Genoa left the site. In fact, eight out of ten unit owners in the main building who were deposed testified that condensation had been an issue from the time

they moved into their apartment until the present. (R. pp. 676:10-15; 680:20-21; 681:20-23; 717:17-20; 718:22-23; 720:7-9; 721:14-16; 733:13-19; 734:2-5; 736:1-7; 739:7-9; 738:5-12; 739:25 and 740:1.)

Jack Burnett, then President of the HOA, stated the following when asked about the condensation issue and any attempted repairs:

> Q. Has anybody ever tried to do a fix on the condensation issue?
> A. Not to my knowledge.

(R. p. 677:10–12.)

Mike Parades, the community association manager for the property, stated that, even after Genoa did some caulking repairs on the windows, "There were still other sources of water coming in, I believe." (R. p. 727:20–21.) In other words, the evidence of record is that the HOA was well aware by at least December of 2004 that moisture intrusion problems were still occurring despite any repairs that had been made and that there had not even been an attempt to repair some of the problems noted by the HOA's consultants. Despite this knowledge, the HOA chose not to pursue any claims they might have had until 5 years later.

Between 2007 and 2011, the HOA received multiple reports produced by the HOA's current expert, Applied Building Sciences, Inc. (R. pp. 791-826.) The ABS Reports focused on issues such as window installation, stucco installation, fire protection, and sound attenuation. (*Id.*) The ABS Reports failed to mention any deficiencies specifically related to repairs performed by Genoa.

Indeed, the HOA's expert, Scott Harvey of ABS, failed to provide any criticism of repairs during his deposition. Mr. Harvey's testimony focused on the issue of window

condensation and he had no opinion regarding any repairs on either the metal or wood windows. Mr. Harvey testified that, "as it relates to the single-paned metal windows in the School Building, the source of water intrusion associated with that area is condensation." (R. p. 705:6–7.) In fact, Plaintiff's expert testified that the proposed fix for the steel windows would correct only condensation issues and not any other moisture intrusion source associated with the windows. (R. p. 700:7–18.)

Mr. Harvey goes on to explain that metal window sealants in the main building and wood window sealants in the gym and cottage buildings have not been identified as deficient. (R. pp. 694:8–11 and 705:19–706:4.) In fact, no testing was performed on the sealants at all. (R. pp. 696:22–49:5; and 698:12–18.)

Likewise, for the stucco, Mr. Harvey failed to describe any deficiencies related to stucco repairs. After discussing original work issues such as lack of drip screeds, weeps, and thru-wall flashing, Mr. Harvey indicated that there were no other issues relating to the stucco. (R. p. 699:10–15.) Plaintiff's only stucco repair estimates relate to the same installation issues referred to in ABS's opinion, which occurred during the original work and were highlighted by the Glick Report.

The HOA Took No Action Until Almost 6 Years After Discovery Of The Alleged Construction Deficiencies

Even though the alleged construction deficiencies were present and continued long after the Glick Report was issued and Genoa left the Project, the HOA took no action. The former HOA Board president gave the following testimony regarding the HOA's actions after receiving the expert recommendations:

> Q. Was a program of destructive testing ever undertaken pursuant to that recommendation?

A. Not pursuant to this, no.
Q. Was a program of destructive testing ever undertaken outside of the present litigation?
A. Not to my knowledge.

(R. p. 679:12–17.)

Instead of taking action on the Glick Report recommendations, the HOA sent demand letters to the developer of the Condominiums that went unanswered. (R. pp. 865-867 and 882-883.)

On February 6, 2006, the HOA again discussed what action to take regarding the issues alleged in this lawsuit:

> Jack reported he spoke with Joe Dapore, the association's lawyer, and he said that they had until ***April 2006*** to take action . . . .

(R. pp. 868-869 (emphasis added).)

The HOA took no legal action until January of 2009, nearly three years after this meeting and nearly 6 years after the Glick Report was issued to the HOA. When the current Board president was shown the Glick Report and asked whether it looked like the same complaints that the unit owners have made to the Board today, he gave the following testimony:

A. It looks like the complaints are consistent, yes.

(R. p. 682:20–21.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard of review as the trial court under Rule 56, SCRCP. *Cowburn v Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"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 South Carolina v Benson*, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). "[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

ARGUMENT

This case is simply about a contractor's right to protect itself through the statute of limitations against a stale claim known about by a party who slept on its rights for nearly 6 years before a lawsuit was filed. Based on the following arguments, Genoa respectfully requests that this Court affirm the holding of the lower court.

I. WHETHER THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO GENOA BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS WHERE THE TRIAL COURT PREVIOUSLY GRANTED SUMMARY JUDGMENT TO LACY PAINTING, ALONG WITH NUMEROUS OTHER SUBCONTRACTORS, BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS AND THAT ORDER WAS NEVER APPEALED, THUS BECOMING THE LAW OF THE CASE AND THE LAW OF THE CASE ISSUE HAS NOT BEEN APPEALED BY THE HOA.

A. Because The HOA Did Not Appeal The Law Of The Case Issue From The Lower Court's Order, The Lower Court Should Be Affirmed Under The Two Issue Rule

Because the HOA failed to appeal the law of the case issue decided by the lower court, this Court should affirm the Order granting summary judgment in favor of Genoa.

The lower court granted Genoa's Motion for Summary Judgment and denied the HOA's Motion to Reconsider, Alter, or Amend on at least two grounds. One of those grounds is based on the merits, where the lower court found that the statute of limitations on all original work had run on all three buildings before the HOA filed the lawsuit. (R. pp. 634-637). The other ground for granting summary judgment as to Genoa was that the order granting Lacy Painting summary judgment represented the "law of the case." (R. pp. 633-634.) Specifically, in a separate section of the Order, the lower court analyzed both law of the case authority and its grant of summary judgment as to Lacy Painting on the basis that the statute of limitations had run as to all three buildings. (R. pp. 633-634.)

The lower court concluded that its prior ruling that the statute of limitations had run as to all three buildings constituted the law of the case and it stated that "Plaintiff in effect requests that this Court ignore its previous unchallenged ruling on when the statute of limitations began to run on all three buildings. The Court declines to do so." (R. p. 634)

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In *Anderson v. S. Carolina Dept. of Highways & Pub. Transp.*, the South Carolina Supreme Court illustrated the use of the two issue rule in regards to orders of a trial court:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Anderson v S. Carolina Dept. of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

Here, the HOA appeals the lower court's Order only on the merits of the statute of limitations ground and not on the lower court's determination that the Lacy Painting order constituted the law of the case. This is evidenced by reviewing the statement of issues on appeal and the argument sections of the HOA's brief.[1] In the HOA's brief, there

[1] "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Jones v Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (internal citations omitted). "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

exists no mention of the "law of the case" issue. Therefore, because the HOA merely appealed the statute of limitations issue and chose not to appeal the law of the case issue, the lower court's Order granting summary judgment as to Genoa should be affirmed.

B. Because The Lower Court Granted Summary Judgment As To Lacy Painting On Statute Of Limitations Grounds And The Order Was Never Appealed, It Is The Law Of The Case

Even if the HOA had appealed the law of the case issue, it still remains that the law of the case was set by the unchallenged and unappealed order granting Lacy Painting summary judgment on the grounds the statute of limitations began running in 2003 as to all 3 buildings. Because the HOA never appealed the order granting Lacy Painting summary judgment, the position that the statute of limitations began running in 2003 as to all three buildings is the law of the case. Therefore, this Court should affirm the ruling of the lower court.

An unchallenged ruling, right or wrong, is the law of the case. *Ulmer v Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("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." (citing *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004))); *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance."); *Matheson v. McCormac*, 187 S.C. 260, 196 S.E. 883, 884 (1938) ("That a decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter is the well-settled law

in this state. . . ."); *Fickling v. City of Charleston*, 372 S.C. 597, 601, 643 S.E.2d 110, 112 (Ct. App. 2007) ("[A]n unappealed ruling becomes the law of the case and neither party here took any exception to the method by which the trial court concluded the case.").

The issue in front of this Court is the same issue that was involved in the Lacy Painting motion. The lower court granted summary judgment as to Lacy Painting and held that the statute of limitations began to run on any alleged defective work in 2003. (R. pp. 23-24.) Because the HOA did not file a lawsuit until 2009, the lower court held that the HOA's claims were barred. (*Id.*)

Lacy Painting was a named direct defendant in this action, identified as John Doe #1. (R. p. 167 at ¶ 20.) It identified itself as such in discovery requests, in its motion for summary judgment against the HOA's direct claims against it, and twice in court at oral arguments when it said expressly that the HOA had direct claims against it. (R. p. 485: 5-11.). Consequently, Lacy Painting made an appearance as a direct defendant (*see* SCRCP 4(d) "[v]oluntary appearance by defendant waives personal service.") and considered itself a direct defendant. The HOA never objected to Lacy Painting's identification as a direct defendant, and never informed the lower court or Genoa that Lacy Painting was anything other than a direct defendant.

The Order Granting Lacy Painting Summary Judgment on the grounds that the statute of limitation began running in 2003 as to all three buildings was never appealed. Thus, the ruling that the statute of limitation began running in 2003 as to all three buildings constitutes the law of the case. *See Ulmer v Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). As a result, the lower court's Order should be affirmed.

C. Should This Court Reverse The Lower Court's Order And Allow The HOA To Proceed On Its Claims Against Genoa Relating To Original Work, There Will Be At Least Two Orders In This Case Regarding Exactly The Same Work, Facts, And Circumstances That Apply The Law Differently

If this Court reverses the lower court's Order and finds that the statute of limitations did not begin running in 2003 on the HOA's claims against Genoa relating to original work performed in the gym and cottage buildings, then there will be two directly contradictory orders in this case.

The lower court has determined in an uncontested decision that the HOA's claims against Lacy Painting began running in 2003 as to work it performed in the gym and cottage buildings. To the extent that the HOA has a claim relating to wood window defects in the gymnasium and cottage buildings, the HOA's experts have identified Lacy Painting's work on those windows as a major source of concern.

Genoa, as the general contractor of the Project, did not perform the work. In the case of Lacy Painting, Lacy Painting performed the work. Genoa was sued at least in part because, according to the HOA's expert, Lacy Painting's work was defective. (R. pp. 695:19-23; 696:12-17; 702:11 – 18; and 703:14 – 20.).

Thus, for both Genoa and Lacy Painting, the work was exactly the same, notice to the HOA was exactly the same, and the HOA's claims as to both arise out of identical facts and circumstances. Consequently, if the statute of limitations has run as to the work Lacy Painting performed on the gym and cottage buildings, it must necessarily have also run as to Genoa. Likewise, pursuant to the discovery rule, if the statute has run on the HOA's claims against Lacy Painting for the work Lacy Painting performed on the wood windows in the gym and cottage buildings, it also has to have run on all claims relating to

original work in those buildings.

In sum, the lower court's decisions are legally consistent as they stand, but would be inconsistent were this Court to reverse the Order as to Genoa and allow the HOA to proceed on claims for original work in the gym and cottage buildings. As a result, this Court should affirm the ruling of the lower court.

II. WHETHER THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO GENOA BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS WHERE THE HOA WAS PUT ON NOTICE BY AN EXPERT OF THE ALLEGED CONSTRUCTION DEFECTS NEARLY 6 YEARS BEFORE THIS LAWSUIT WAS FILED.

A. Because Of The Glick Report, The HOA Knew Or Should Have Known Of All Alleged Construction Deficiencies In All Three Buildings And The Lower Court Should Be Affirmed

Because the Glick Report put the HOA on notice of all the alleged construction defects nearly six years before the lawsuit was filed, this Court should affirm the lower court's ruling.

Section 15-3-530 of the South Carolina Code sets forth a three-year statute of limitations for actions based in negligence and contract. S.C. Code § 15-3-530(1) (providing for a three-year statute of limitations for "an action upon a contract"); § 15-3-530(5) (providing for a three-year statute of limitations for "any injury to the person or rights of another, not arising on contract and not enumerated by law").

"A statute of limitations reduces the interval between the accrual and commencement of a right of action to a fixed period, thereby putting to rest claims after the passage of time." *City of N. Myrtle Beach v Lewis-Davis*, 360 S.C. 225, 230, 599 S.E.2d 462, 464 (Ct. App. 2004). Statutes of limitations "are not simply technicalities," but instead "have long been respected as fundamental to a well-ordered judicial system."

Id. at 231, 599 S.E.2d at 465. "Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred." *Id.* at 231, 599 S.E.2d at 464.

The courts of South Carolina have adopted the "discovery rule" in determining when a cause of action accrues. *Dillon County Sch. Dist. No. Two v Lewis Sheet Metal Works*, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985) (overruled on other grounds). Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 370–71, 597 S.E.2d 27, 29 (Ct. App. 2004). One is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim *might* exist. *Id.* at 372, 597 S.E.2d at 29 (citing *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987) (emphasis added)).

Regarding the discovery rule and construction defect cases, the South Carolina Supreme Court has found that an owner can be put on notice that some claim might exist when the owner observes a construction defect and retains a consultant who warns that the defect may continue to worsen. *See Dean v Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645,647 (1996) (holding that there was no question of fact for the jury to decide and the claim was barred by the statute of limitations because the cause of action arose when the owner first observed a building crack and retained a consultant). Further, a party's actual ignorance of a defect is irrelevant if a person exercising reasonable care under similar circumstances would have been aware of the injury. *See Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (stating that "[t]he statutory

limitations period begins to run when a person ***could or should have known***, through the exercise ***of reasonable diligence***, that a cause of action ***might*** exist in his or her favor." (emphasis added)).

In *Dean v Ruscon Corp.*, the South Carolina Supreme Court, in resolving a statute of limitations issue, held that a homeowner was put on a notice of her claim when she first observed a crack in her building and retained a consultant to investigate, even though greater damage was not discovered until later. In its opinion, the court stated that "the evidence establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage. As a result, Dean was warned that the crack might expand. In fact, Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984. Because Dean had notice in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date. Dean's subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved." *Dean*, at 365–66; 468 S.E.2d at 648. Thus, the court held that the owner's claim was barred by the statute of limitations. *Id.* at 366; 468 S.E.2d at 648.

Likewise, in *Watters v Terminix Serv., Inc.*, the South Carolina Court of Appeals affirmed the trial court's grant of summary judgment on statute of limitations grounds where a homeowner brought suit alleging failure to disclose moisture damage against a pest control company that issued a termite letter at closing. *Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 634, 658 S.E.2d 110, 111 (Ct. App. 2008). In addition to the closing letter, the court looked at a letter from the homeowner's attorney to the pest control company as well as a report by the homeowners' expert. *Id.* at 635, 658 S.E.2d at 111–12.

In affirming the grant of summary judgment to the pest control company, the court reasoned as follows:

> For purposes of commencement of the statute of limitations, Watters likely received notice of a potential cause of action at closing when he received the Terminix report together with the suggestion by Terminix for an evaluation of the home's structural integrity by a qualified building inspector. Under the summary judgment standard, we give Watters every benefit of the doubt.
>
> Even measured against the exacting summary judgment standard, it seems an insurmountable hurdle for Watters to delay the start of the statute of limitations after his attorney's May 15, 1997 letter to Terminix referencing the moisture damage. At that time, when viewed objectively, one would reasonably conclude that a claim might 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.

1. All claims regarding original work in the main building are barred by the statute of limitations.

In the instant case, like in *Dean* and *Watters*, the HOA knew or should have known of the alleged construction defects and deficiencies more than three years prior to the filing of this lawsuit; thus all claims regarding the main building are barred by the statute of limitations.

The Glick Report described problems ranging from water intrusion and condensation to rust on the windows and potential problems with the roof. It concluded with an unequivocal recommendation that "concerns be confirmed and documented through a program of destructive testing so that a decision can be made for corrections" and that the board should "seek legal counsel" relative to the issues he identified. Thus, at the time the HOA received and discussed the Glick Report in the May 6, 2003 HOA

Board meeting, it had the knowledge of the main building's problems described therein. However, the HOA failed to follow the expert recommendation of the Glick Report which strongly suggested destructive testing. Instead of taking corrective action to protect the value of the property and unit owners, the HOA merely sent demand letters to the Condominium developer, which went unanswered.

On February 6, 2006, nearly three years after the Glick Report was issued, and over three years before commencement of this action, filing a lawsuit was again brought up to the HOA. Those meeting minutes report that Jack Burnett, then President of the HOA, reported to the HOA Board that he ". . . spoke with Joe Dapore, the association's lawyer, and he said that they had until ***April 2006*** to take action . . . ." (R. pp. 868-869 (emphasis added)). However, the HOA did not commence this action until January of 2009, almost three years after this meeting where they learned they had two months to file suit and almost six years after originally receiving the Glick Report.

As admitted by the current Board president, the building problems referenced in the Glick Report are the same complaints that the HOA is receiving today. Thus, at the time of the Glick Report, the HOA knew of the injuries that are the subject of this lawsuit and it was put on notice that some claim might exist, and was expressly told that claims might exist for conditions Mr. Glick did not note. Had the HOA followed the Glick Report's expert advice and moved forward with destructive testing of the main building, it would have discovered any construction defects or deficiencies alleged in this lawsuit. Indeed, the HOA did not even have to conduct destructive testing because the Glick Report noted all of the claims and conditions upon which the HOA ultimately brought suit almost six years later. However, the HOA ignored the Glick Report, failed to follow

the expert recommendations, and sat on its known rights until it finally filed this lawsuit in 2009.

2. All claims regarding work in the gym and cottage buildings are barred by the statute of limitations.

Summary judgment based on the three year statute of limitations applies not only to the main building, but to the gymnasium building and care taker building as well.

The Glick Report was brought before the HOA Board on May 6, 2003 as reflected in the meeting minutes where it was noted that the typical sequence of steps that should be followed included:

> *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.

(R. pp. 859-860 (emphasis added)).

Thus, in the May 2006 HOA Meeting Minutes, Mike Parades stated that the course of action that should be followed was destructive testing of the main building and an inspection of the gymnasium and cottage building. Indeed, such an inspection would have been the reasonable course of action to take under the circumstances, given that all three buildings were built at the same time, by the same developer, general contractor, and many of the same subcontractors. Had the HOA followed the advice of its property manager, the inspection would have discovered the issues with the wood windows and other alleged construction deficiencies in these two buildings. Instead, the HOA failed to perform any type of inspection and allowed the alleged construction deficiencies to remain. Thus, the HOA ignored its property manager and intentionally ignored all three buildings, consciously choosing to take no action on any of the buildings despite the

advice of its experts. Those experts, hired for their experience and expertise, not only advised that the HOA should take action but also the very actions they should take. The thought process of the HOA at the time was apparently that a lawsuit was more of an inconvenience than it was worth.

The HOA has stipulated and is on the record as stating that this case is merely about defective repairs. Because no repairs were ever performed in the gym and cottage buildings, summary judgment was proper as to those buildings.

At oral argument, the HOA stated that "everything in litigation is stuff they repaired . . . ." (R. p. 462: 12-15). The HOA also stated that "[f]ailed repair is probably the best summation that I have." (R. p. 462:10-11). The lower court on multiple occasions clarified on the record its understanding that this was a failed repair case and went so far as to state that: "The only way [the HOA] can get past the statute of limitation is pursuing over repairs, not original work." (R. p. 469:3–5.) Later, the HOA was asked to stipulate that this was a failed repair case and the lower court stated "I don't know how many times [the HOA] can say that differently, but he started to venture off, but he came back and I wrote it down again, failed repairs or defective repairs only." (R. p. 471:14–17.).

These stipulations by counsel for the HOA are binding on the HOA. *See Koutsogiannis v BB& T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) (In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority.); *Greenville Income Partners v. Holman*, 308 S.C. 105, 107, 417 S.E.2d 107, 108 (Ct. App. 1992) ("The acts of an attorney are directly attributable to and binding on his client."); *Kirkland v. Allcraft Steel Co., Inc.*, 329 S.C. 389, 392, 496

S.E.2d 624, 626 (1998) ("A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them." (internal citations omitted)).

Under the "discovery rule," the HOA's claims regarding all three buildings began to run in 2003 when it received the Glick Report and knew, or should have known with further testing, that the alleged construction defects and deficiencies existed. Thus, based on the applicable three year statute of limitations, the HOA's claims regarding all three buildings are time barred and the lower court's ruling should be affirmed. *See Dean v Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645,647 (1996) (holding that there was no question of fact for the jury to decide and the claim was barred by the statute of limitations because the cause of action arose when the owner first observed a building crack and retained a consultant); *Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (stating that "[t]he statutory limitations period begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor.").

B. Because Genoa's Sealant And Caulking Repairs Did Not Address The Construction Issues Highlighted In The Glick Report, The HOA's Claims Are Barred By The Statute Of Limitations And The Lower Court Should Be Affirmed

The HOA rests its argument for reversal on the allegation that Genoa repaired the problems identified in the Glick Report and the HOA believed that the issues had been resolved. However, this argument is not supported by the record and must fail.

Genoa scheduled small sealant and caulking repairs to be made at the Project as directed by the HOA. Specifically, these repairs consisted of actions such as cutting out perimeter sealants around windows, re-sealing perimeter joints in the stucco, and

removing loose plaster adjacent to windows. (R. pp. 870-872 and 876-879.) During the summary judgment hearing, the HOA's counsel identified the repairs as consisting of caulking and sealing. (R. p. 462:16–20.) The HOA's counsel stated that "the evidence in the record is the developer and Genoa came back out there [and] added caulk and seals around the window." (R. p. 465:22–25.) Genoa stopped performing work on the project on or around February of 2004. (R. p. 667 at ¶3.)

The limited scope of repairs Genoa performed related to caulking and sealing did not repair the issues set out in the Glick Report. For example, any caulk Genoa placed around the windows did not fix the condensation issues referenced in the Glick Report. According to the HOA's expert, Scott Harvey of ABS, the focus of his investigation was on the issue of window condensation and he had no opinion regarding any sealant repairs on either the metal or wood windows. Instead, the condensation problems continued long after Genoa officially left the site in February 2004. In fact, a majority of the unit owners in the main building who were deposed testified that condensation had been an issue from the time they moved into their apartment until the present.

Additionally, the small sealant and caulking repairs made by Genoa certainly could not have repaired the major issues highlighted in the Glick Report. For example, with the stucco walls, the Glick Report stated that there were "areas of [the] exterior system that are also not installed in accordance with the standard of care for stucco as called for in the ASTM Standards which are in turn, called for in the building code." (Glick Report). No reasonable person would believe that the referenced building code installation issues were remedied by sealing small areas and patching cracks allegedly caused by the installation issues.

In other words, Genoa's repairs addressed some of the sealant issues in the Williamson Report, but not the issues highlighted in the Glick Report, such as window condensation and the overall misapplication of stucco. (R. pp. 741-744; 782-790; and 876-879 (specifically listing the issues in the Williamson Report that Genoa addressed).) Jack Burnett, then President of the HOA, stated no one ever attempted to fix the condensation issues. (R. p. 677:10–12). [2] Further, Mike Parades stated that, even after Genoa did some caulking repairs on the windows, moisture intrusion problems continued. (R. p. 727:20–21). [3]

Moreover, not only did construction issues that were highlighted by the Glick Report continue after Genoa completed its work on the Project, but the HOA actually took non-legal actions to attempt to get the construction deficiencies repaired.

For example, on August 2, 2004, the HOA sent a demand letter to the developer that ultimately went unanswered. Additionally, the HOA requested and received an estimate to repair the work that was highlighted by the Glick Report and sealant repairs that were allegedly performed by Genoa just 10 months after Genoa left the Project. Specifically, on December 29, 2004, Carolina Concrete Systems, Inc. sent a proposal to the HOA for repairs including "concrete repair, parapet cap repairs, recaulking all windows and doors, repairing up to 2000 s.f. of stucco, patching all cracks and installing

[2] This earlier testimony directly contradicts the subsequently offered affidavit of Jack Burnett, which the HOA uses to support its allegation that the HOA believed the water intrusion issues reference in the Glick Report had been repaired. As a result, the affidavit constitutes a "sham affidavit" and cannot be used to create an issue of material fact for the purposes of summary judgment. *Cothran v. Brown*, 357 S.C. 210, 217–19, 592 S.E.2d 629, 632–33 (2004) ("a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement").

[3] This earlier testimony directly contradicts the subsequently offered affidavit of Mike Parades, which the HOA uses to support its allegation that the HOA believed the water intrusion issues reference in the Glick Report had been repaired. As a result, the affidavit constitutes a "sham affidavit" and cannot be used to create an issue of material fact for the purposes of summary judgment. *Cothran*, 357 S.C. at 217–19, 592 S.E.2d at 632–33.

2 coats of acrolastic elastomeric coating." (R. pp. 884-885.). This scope of work mirrors what is highlighted in the Glick Report and the work that is the basis of the present lawsuit. Thus, the HOA was on notice that those alleged deficiencies remained shortly after Genoa left the Project, yet the HOA still did not bring suit until January of 2009.

The above facts directly contradict the HOA's sole argument that the issues identified in the Glick Report were repaired by Genoa. In sum, after the Glick Report was issued, the HOA knew or should have known that the alleged construction deficiencies existed and that it might have a cause of action. As explained above, these issues were not repaired by Genoa and continued after Genoa left the Project in February of 2004. As a result, the HOA's claims as they relate to original work in all three buildings are barred by the statute of limitations and this Court should affirm the lower court's ruling of such.

C. Because The Continuous Treatment Exception Does Not Exist In South Carolina, The HOA's Claims Are Barred By The Statute Of Limitations And The Lower Court Should Be Affirmed

As stated above, the HOA rests its argument for reversal on the allegation that Genoa repaired the problems identified in the Glick Report and the HOA believed that the issues had been resolved. The HOA is attempting to use an exception to the accrual of the statute of limitations that does not exist in South Carolina.

As explained in the previous section, the major issues highlighted in the Glick Report were not repaired by Genoa, continued long after Genoa left the Project in February of 2004, and were known to continue by the HOA. But even if the issues were repaired by Genoa, which they were not, the repair would not stop the accrual of the statute of limitations.

In *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, the South

Carolina Court of Appeals held that attempted repairs of construction deficiencies by the contractor did not toll the statute of limitations. In *Dillon*, a school district sought damages resulting from defective design and construction of a roof to a school building. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 209, 332 S.E.2d 555, 556 (Ct. App. 1985) (overruled on other grounds). Construction of the roof began in 1970 and was completed the same year. *Id.* at 210, 332 S.E.2d at 556. The first report of a roof leak occurred in 1970 and roof problems were persistent from then on. *Id.* In November 1972, the architect, in a letter to the Chairman of the School District's Board of Trustees, refereed to the problem as a "continual problem" and suggested involving the county attorney if the situation were not soon remedied. *Id.* In the years following, several repairs were made to the roof, but leaks continued. *Id.* at 211–14, 332 S.E.2d at 557–58. The school district did not file suit until 1981. *Id.* at 214, 332 S.E.2d at 559.

Upon the filing of suit, the contractor asserted the statute of limitations in defense of the action and moved for summary judgment. *Id.* In response, the school district argued that continuous efforts on the part of the contractor and others to repair the roof tolled the statute of limitations as to those parties. *Id.* at 216, 332 S.E.2d at 560. To this issue, this Court stated the following:

> As far as we can determine, the Supreme Court of this state has never applied, at least not in a case involving either negligence, breach of warranty, or strict liability, the so-called "continuous treatment" exception to the general rule governing the accrual of a cause of action. *See* Annot., 90 A.L.R.3d 507 (1979). We doubt if the Supreme Court would do so, especially since the "discovery" rule is applicable in South Carolina [*see Brown v. Sandwood Development Corporation, supra; Campus Sweater v. M.B. Kahn, supra;* S.C. Code of Laws § 15-3-535 (Cum.Supp.1984)] and

> is itself an exception to the traditional rule of accrual. *See Gattis v. Chavez, supra.*
>
> Indeed, our research discloses no case adopting the "continuous treatment" exception where the "discovery" rule is in effect. As Judge Hemphill observed in *Gattis,* the "continuous treatment" exception is "on the whole ... simply an aberrant form of the traditional rule which some courts seem to have adopted either to do justice in a specific case or to present the appearance of having effected a compromise between two antithetical rules." 413 F.Supp. at 39.

Id. at 216–17, 332 S.E.2d at 560.

The Court went on to officially reject the "continuous treatment" exception and hold that the statute of limitations began to run in November 1972, when the owner learned that the roof leak was a continuous problem and well before repairs were attempted by the contractor. *Id.* at 217, 332 S.E.2d at 560.

Therefore, even if Genoa repaired the items highlighted in the Glick Report, which it did not, like in *Dillon*, the statute of limitations would have still began to run when the Glick Report was received by the HOA and it was put on notice of alleged serious deficiencies. As a result, this Court should affirm the ruling of the lower court.

CONCLUSION

Based on the foregoing reasons, Genoa respectfully requests that this Court affirm the decision of the trial court.

Respectfully submitted,

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