

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS  
)  
) CIVIL ACTION NO: 2014-CP-07-00829

JERROLD FRANCE,  
Plaintiff,

vs.

CLUB DEVELOPMENT, INC., JOHN  
H. BARRETT, individually, BARRETT  
INVESTMENT PROPERTIES, LLC,  
WOODBURY PROPERTIES, INC.,  
TALIAFERRO CORP., TALIAFERRO  
CORP. d/b/a WOODBURY  
PROPERTIES, COASTAL  
FOUNDATION, INC., HARBOR  
HOMES, and JOHN DOES 1 – 10,  
Defendants.

**RECEIVED**

JAN 20 2015

**SC Court of Appeals**

ORDER GRANTING COASTAL  
FOUNDATION, INC.'S MOTION  
TO DISMISS ON ALL CAUSES  
OF ACTION EXCEPT GROSS  
NEGLIGENCE

This matter comes before the Court upon motion by Defendant, Coastal Foundation, Inc., seeking to dismiss the claims asserted by Plaintiff in the instant litigation, for a failure by Plaintiff to assert the claims within the relevant period of repose, pursuant to S.C. Code. Ann. §15-3-640. This Court held hearings on this matter on August 12, 2014, and August 25, 2014, accepted memoranda and exhibits from the parties. Based upon a full consideration of the parties' submissions, as well as the relevant law, this Court finds that Coastal Foundation is entitled to a dismissal of all claims except for gross negligence<sup>1</sup>.

FACTS

Plaintiff, by way of a Summons and Complaint filed April 7, 2014, alleges various defects in the design and construction of Plaintiff's home on Hilton Head

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Island. Coastal Foundation, as a subcontractor, provided services relating to the installation of the foundation of the residence.

The Town of Hilton Head Island issued a certificate of occupancy on July 20, 2005, following the final inspection of the residence by its codes official. The certificate of occupancy references August 24, 2004, as the date of substantial completion.

Coastal Foundation filed a motion to dismiss, contending that Plaintiff's claims were subject to an eight year period of repose. Coastal Foundation argues that the eight year period of repose applies to all structures for which certificates of occupancy were issued after July 1, 2005. Plaintiff contends that the August 2004 date of substantial completion controls which period of limitations length applies. Consequently, Plaintiff argues, the thirteen year period of repose is effective. Plaintiff further argues that various questions of fact revolve around the issuance of the certificate of occupancy, and that those questions preclude the granting of Coastal Foundation's motion.

#### STANDARD OF REVIEW

A granting of a Motion to Dismiss claims under Rule 12(b)(6), SCRPC, is proper "when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. The "The question is whether in the light most favorable to plaintiff, and with every doubt resolved in [his] behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). A Rule

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<sup>1</sup> Counsel for Coastal Foundation conceded at the first hearing that a gross negligence claim would not be subject to dismissal, pursuant to S.C. Code Ann. §15-3-670(a).

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12(b)(6) motion is "directed to the factual and legal sufficiency of the complaint...." Woodell v. Marion School Dist., 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992).

A motion to dismiss premised upon Rule 12(b)(6) is converted to a motion for summary judgment if the moving party matters outside the pleadings are submitted to and not excluded by the Court. Rule 12(b)(6), SCRPC. 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.

#### ANALYSIS

Notwithstanding the arguments presented by Plaintiff, the issue before this Court is straightforward: Whether Plaintiff's claims are subject to an eight or thirteen year period of repose. If the period is thirteen years, Plaintiff has clearly asserted his claims within the statute of repose, and the claims will be allowed to proceed. Conversely, if the claims are subject to the eight year period, Plaintiff's claims have been asserted clearly outside of the statute, and are therefore subject to dismissal. Consequently, the question before the Court is purely one of law, and the outcome of the within motion can be determined merely by deciding which period of repose applies. Therefore, it is appropriate for this Court to rule on the within motion at this time.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Chem-Nuclear Systems, LLC v. S.C. Board of Health and Environmental Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). All rules of statutory construction are subordinate to this rule if the legislative intent can be reasonably determined in the language used, and that language must be

construed in light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002). "The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." Chem-Nuclear at 205, 648 S.E.2d at 603.

When construing statutory language, the statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Duvall v. S.C. Budget and Control Board, 377 S.C. 36, 659 S.E.2d 125 (2008). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." Floyd v. Nationwide Mutual Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2006).

Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Section 15-3-640 currently provides:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

- (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
- (2) an action to recover damages for the negligent construction or repair of an improvement to real property;

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(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise;

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section;

(7) an action against a surety or guarantor of a defendant described in this section;

(8) an action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement;

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This section describes an outside limitation of eight years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of an owner or possessor to contract for extended liability under this section. Nothing in this section prohibits a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement or component.

For any improvement to real property, a certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion of the improvement under

the provisions of Section 15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion.

Section 15-3-640 was most recently amended by 2005 South Carolina Laws Act 27. The 2005 Act reduced the period of repose from thirteen to eight years, and added a final paragraph establishing the Certificate of Occupancy issuance date as the "default" date for substantial completion. The statute was otherwise largely unchanged.

Section 16 of Act 27 addresses the date of enactment, and establishes that the amendments to §15-3-640 "take[] effect on July 1, 2005, and appl[y] to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible local building official after the effective date."

Coastal Foundation asserts that §15-3-640, as amended in 2005, plainly applies to the claims asserted in the instant litigation, because the Certificate of Occupancy was issued on July 20, 2005—after the effective date of the amended statute. Coastal Foundation further asserts that the eight year period of repose expired, at the very latest, on July 20, 2013—eight years after the Certificate of Occupancy was issued, and nine months before Plaintiff filed his Summons and Complaint.

Plaintiff contends that the August 2004 date of substantial completion controls, and therefore the claims are subject to the thirteen year period of repose. Plaintiff also raises other issues regarding purported questions of fact, but as previously stated, because the question presented is solely one of law, those matters are irrelevant to this Court's determination of the motion before it.

Moreover, Plaintiff's counsel has merely offered arguments without any evidence to support those contentions. It is well settled that arguments by counsel are not evidence. S.C. Dept. of Trans. v. Thompson, 357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003). Consequently, this Court is compelled to disregard those unsupported assertions<sup>2</sup>.

Plaintiff, in arguing that the date of substantial completion controls the length of the period of repose, conflates when the period of repose begins to run with the length of the period of repose. By the plain language of 15-3-640, the period of repose (whether eight or thirteen years) begins to run at the date substantial completion is achieved. However, according to the plain language of Act 27, the certificate of occupancy issuance date determines whether the period of repose is eight or thirteen years. These provisions are unambiguous and capable of only one interpretation. Therefore, because the certificate of occupancy was issued after the eight year period of repose took effect, Plaintiff's claims are subject to that eight year period and therefore must be dismissed.

To further demonstrate the distinction between the certificate of occupancy issuance date and the date of substantial completion, the General Assembly explicitly recognized distinctions between the two. Notably, the final sentence of the amended statute states:

[A] certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to

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<sup>2</sup> The Court notes that Plaintiff's counsel contends that the final inspection by the building official occurred in August 2004. However, a review of the Town of Hilton Head Island inspections history for the property establishes the final inspection took place on July 20, 2005, the same day the Certificate of Occupancy was issued. The Court further notes that Plaintiff's counsel challenges the legitimacy of issuance date on the Certificate of Occupancy, without any evidence or affidavit to substantiate such claims.

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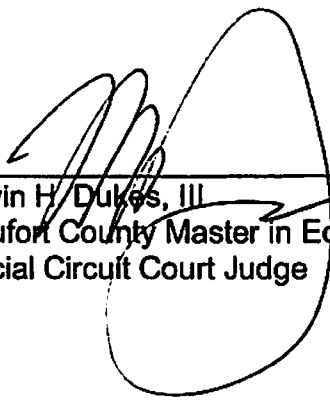
existing improvements, shall constitute proof of substantial completion of the improvement under the provisions of Section 15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion.

This sentence clearly demonstrates that the General Assembly was aware of distinctions between the two terms. Had, as Plaintiff suggests, the General Assembly considered substantial completion to be the same as the issuance date of the certificate of occupancy, the above sentence would be superfluous. Courts must presume that the legislature intended to accomplish something when enacting a statute. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).

Keeping in mind the recognized distinction between the certificate of occupancy issuance date and the date of substantial completion, this Court returns to the enactment language of Act 27, which provides that the eight year period of repose applies to all improvements for which certificates of occupancy were issued after July 1, 2005. In applying the rules of statutory construction, the unambiguous interpretation of the Act requires finding that the General Assembly clearly and unequivocally established an eight year period of repose for all improvements whose Certificates of Occupancy were issued after July 1, 2005. Therefore, because the Certificate of Occupancy for the subject residence was issued July 20, 2005, the eight year period of repose must apply to the subject residence. To put it simply, the General Assembly meant what it said. Consequently, Coastal Foundation's motion is granted as to all causes of action except for Plaintiff's claim in gross negligence.

IT IS SO ORDERED!

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By:   
Marvin H. Dukas, III  
Beaufort County Master in Equity and  
Special Circuit Court Judge

Beaufort, South Carolina

September 17, 2014.

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JERROLD FRANCE, )  
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 Plaintiff, )  
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 vs. )  
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 CLUB DEVELOPMENT, INC., JOHN )  
 H. BARRETT, individually, BARRETT )  
 INVESTMENT PROPERTIES, LLC, )  
 WOODBURY PROPERTIES, INC., )  
 TALIAFERRO CORP., TALIAFERRO )  
 CORP. d/b/a WOODBURY )  
 PROPERTIES, COASTAL )  
 FOUNDATION, INC., HARBOR )  
 HOMES, and JOHN DOES 1 – 10, )  
 )  
 Defendants. )

ORDER DENYING PLAINTIFF  
JERROLD FRANCE'S MOTION TO  
RECONSIDER

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This matter comes before the Court upon Motion of the Plaintiff, Jerrold France, to reconsider this Court's Order dismissing all causes of action against the Defendant Coastal Foundation, Inc. except for gross negligence. The Court's Order dismissing these claims is dated September 17, 2014 and is incorporated herein by reference. The hearings on the Motion to Dismiss were heard by the Court on August 12, 2014 and August 25, 2014. A hearing on the Plaintiff's Motion to Reconsider was held on November 14, 2014. At that hearing, the Court denied the Plaintiff's Motion to Reconsider on all grounds briefed and argued by the Plaintiff, but specifically reserved judgment and requested that both parties submit proposed Orders regarding the Plaintiff's contention that this Court erred in not ruling, or addressing what the Plaintiff contends was a condition precedent

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in the applicable statute. Specifically, Plaintiff contends that the lack of bold type notice on the building permit of the owner's rights under S.C. Code Ann. 15-3-640 was a condition precedent of the applicable statute of repose contained in S.C. Code. Ann. §15-3-640. The pertinent section reads: "*..A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of an owner or possessor to contract for extended liability under this section...*" (S.C. Code. Ann. §15-3-640). It is undisputed that the permit did not contain the language.

Based upon the full consideration of the parties submissions, as well as relevant law, this Court respectfully denies the Plaintiff's Motion to Reconsider.

The Plaintiff contends that the Defendant Coastal had not met a condition precedent of the applicable eight (8) year statute of repose contained in S.C. Code. Ann. §15-3-640, and as such, Coastal is not entitled to said defense. There is no case law in South Carolina that supports this conclusion. Even if one were to assume that compliance with the building permits requirements set out in S.C. Code. Ann. §15-3-640 were a condition precedent to the applicable statute of repose, the burden of such compliance would clearly be that of the issuing municipality (in this case, the Town of Hilton Head), or the general contractor, and not that of a sub-contractor, such as Coastal.

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Further, S.C. Code. Ann. §15-3-670 specifically sets out the circumstances in which the defenses under S.C. Code. Ann. §15-3-640 through S.C. Code. Ann. §15-3-660 are not available as a defense. The alleged condition precedent, referenced above, is not listed among the circumstances which would make this defense unavailable to Coastal. As stated in my Order to dismiss Coastal, the cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. When construing statutory language, the statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Duvall v. S.C. Budget and Control Board, 377 S.C. 36, 659 S.E.2d 125 (2008). Similarly, Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Simply put, if the legislature had intended that the building permit requirements were a condition precedent to the defense of the statute of repose, it clearly would have listed the same as one of the circumstances in which the defense was not available under S.C. Code. Ann. §15-3-670.

Lastly, the Plaintiff's interpretation of a condition precedent requirement would open up a "Pandora's Box" of uncertainty for homeowners and contractors alike as to the availability of the statute of repose as a defense. Such interpretation would also eviscerate the legislature's clear intent of providing a statute of repose, except where specifically unavailable to a Defendant pursuant to the provisions of S.C. Code. Ann. §15-3-670. The building permit

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requirements, as set out by S.C. Code. Ann. §15-3-640, would more accurately be described as a directive to the issuers of a building permit rather than a condition precedent of the availability of the statute of repose. For the above stated reasons, the Plaintiff's Motion to Reconsider is respectfully DENIED.

IT IS SO ORDERED.

Beaufort, South Carolina

December 17<sup>th</sup>, 2014

By:   
Marvin W. Dukes, III  
Judge, Master-In-Equity

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