THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Circuit Case No. 2012-CP-10-3857

Appellate Case No. 2014-002766

Shipwatch Condominium Association, Inc., ... Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectec, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually, ... Defendants,

Of Which, Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Sonneborn, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually, are ..... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in granting partial summary judgment in favor of CCS despite the existence of a genuine issue of material fact as to when Appellant had notice of its construction-defect claims against Respondents?

II. Did the lower court err in granting partial summary judgment on the statute of limitations without following applicable precedent of the discovery rule, and without considering the applicable doctrine regarding the equitable tolling of the statute of limitations?

STATEMENT OF THE CASE

This is an appeal of a ruling from the bench in which the lower court granted partial summary judgment in favor of the Respondent, general contractor Carolina Concrete Systems ("CCS"). The Appellant sued CCS and the other Respondents for negligent repair work performed at Shipwatch, a 104 unit oceanfront condominium complex located on Isle of Palms, South Carolina.

The Appellant is the Shipwatch homeowners association, and a companion lawsuit was filed against the same defendants by Oscar Mendiondo, Class Representative of the class of the 104 homeowners at Shipwatch. That class was certified by order of the lower court on August 8, 2014. The lower court granted partial summary judgment to CCS in that matter as well, and that case is also on appeal for the reasons stated herein.

Following limited oral arguments during the hearing on October 27, 2014, and without the opportunity to review the written memoranda, the lower court ordered that CCS's motion was granted in part. Transcript of Hearing at 6. CCS presented its written brief to the lower court moments before the hearing, and the lower court adopted the version of facts presented by CCS, despite the material presented by Appellants which establishes the existence of factual disputes. Although the lower court requested that CCS prepare a proposed order, CCS elected to proceed without a formal written order. This appeal is, thus, based upon the lower court's oral comments at the hearing and the one-page "Form 4" Order filed three days after the hearing, which indicated only that the motion of CCS had been granted in part. R. at _____. The lower court abandoned any requirement of a formal written order when it denied the Appellant's Motion for Rehearing on December 1, 2014.

The lower court's order granting partial summary judgment must be reversed with instructions to allow the case to proceed to the jury, because the lower court failed to apply the proper standard when considering a motion for summary judgment; failed to apply the discovery rule when considering the statute of limitations defense; and failed to recognize the applicability of the doctrine of equitable tolling.

FACTS

On June 13, 2012, Appellant filed this action against CCS and the other Respondents to assert construction and design defect claims for the Shipwatch Condominiums on the Isle of Palms ("Shipwatch"). The Shipwatch Condominium Association, Inc. is the homeowner's association for the 104 condominium units within the 4 buildings at Shipwatch.

The original construction of Shipwatch was completed in the mid-1980's. Respondents were not involved in the original construction. Rather, Respondents are those entities which acted as contractors, design professionals, manufacturers, distributors, and/or suppliers which provided labor and material for extensive renovations and repairs conducted at Shipwatch from 2002 to 2012.

Linda Jernigan is the property manager for Shipwatch, and has served in that role since February 2005. She testified that she and the homeowners association considered CCS (and Bob Wiggins, its principal) to be their "contractor of choice" for the renovations and repairs conducted at Shipwatch from 2002 through 2011. Deposition of Linda Jernigan at 231. "I would have recommended that we do what Bob Wiggins says, because he was our contractor of choice. I had great faith and trust in him." Id.

CCS and the other Respondents began extensive renovation and repairs at Shipwatch in November 2002. The repairs encompassed the chimneys, balconies, doors, windows, exterior

cladding system, ceilings in stairwells, concrete, roofs, and handrails. CCS also agreed to perform regular inspections and caulking of the buildings. CCS contended that its work from 2002 to 2012 was one continuous project, and it worked under the same building permit from 2003 through 2012.

As recently as April 14, 2011, CCS reported to Appellant that "[o]verall the Duroc/BASF stucco system is in good condition. . . . Our inspection reveals that the buildings are in good condition." Plaintiffs' Supp. Response in Opp. to CCS Motion, Exhibit 36. CCS reassured the Appellant of the sufficiency of its work by stating, among other things: "General maintenance of the doors and windows, deck coatings, stucco system and caulk inspection and repairs on an annual maintenance program should extend the life cycle of Shipwatch Properties for years to come." Id.

In late 2011, Appellant engaged the engineering firm Sutton-Kennerly & Associates ("SKA") to examine the Project in order to prepare for the final phase of the renovation and repairs at Shipwatch. During its preparation, SKA discovered that the repair work performed by CCS and its team was defective and deficient, and by its reports in January and April of 2012, SKA concluded that Shipwatch required a massive amount of immediate corrective action in order to comply with the applicable building codes and standards. See SKA Reports dated January 11 and April 5, 2012.

In its 2012 reports, SKA identified problems with the DEFS cladding system, metal stud framing, window and door flashing, waterproofing at balconies, flashing at roof to wall intersections, Tyvek moisture barrier, and wall penetrations, among other major concerns. Less than ninety days after SKA issued its report on April 5, 2012, Appellant commenced the instant lawsuit.

The immediate nature of the problems with the work performed by CCS compelled Appellant to hire a new contractor to correct these problems, and that remedial work began in September, 2013. That new work, which included a total removal and replacement of the exterior DEFS

cladding installed by CCS and its team, has a total cost in excess of $15 million, and has required all unit owners to vacate their property for more than 9 months during repairs, resulting in lost rent and other loss of use claims in excess of $6 million. The aggregate damages claim in the underlying actions against the Respondents exceeds $20 million.

Prior to the mediation of these cases, CCS filed its Motion for Summary Judgment, which simply stated that CCS believed "Plaintiffs' claims are barred by the applicable statute of limitations." CCS Motion for Summary Judgment dated Sept. 15, 2014. CCS provided no further explanation of the basis for its motion until the hearing on October 27, 2014, when CCS filed and submitted a supporting memorandum moments before the hearing began. The lower court acknowledged receipt of memoranda from both CCS and Shipwatch as the hearing began. Tr. at 2.

In its argument in support of summary judgment, CCS improperly used the term "EIFS" (also known as "synthetic stucco" or "artificial stucco)" interchangeably with the term "DEFS". Tr. at 3. The term "EIFS" stands for "Exterior Insulation and Finish System" which was a synthetic stucco cladding system popular and widely installed in projects during the 1980's. The original cladding installed on Shipwatch in the mid-1980's was an EIFS system. In contrast, "DEFS" stands for Direct-Applied Exterior Finish System, which was the replacement cladding that CCS installed at Shipwatch from 2002 to 2011.

The DEFS cladding was installed by CCS in order to replace the aged and failing original 1980's EIFS cladding. Appellant does not assert that CCS performed any installation of EIFS cladding in the 1980's, nor does Appellant attempt to make claims against any of the original 1980's contractors in the underlying lawsuit. In spite of those facts, CCS argued at the hearing that somehow Appellant's knowledge of the aged and failing 1980's EIFS cladding caused the statute

of limitations clock to begin running as to future claims against CCS for deficient DEFS installation.

At the hearing, Appellant proffered dozens of documentary exhibits and enlarged presentation boards showing the time line of events relating to the claims against CCS, including the aforementioned April 14, 2011 letter from CCS declaring its work to be in good condition. Plaintiffs' Supp. Response, Exh. 36. The lower court declined to review any of these documents during the hearing, stating "I don't need all of this. This is summary judgment, isn't it? . . . It's not going to influence me. Maybe it will influence you. If it makes you feel better, put it up." Tr. at 5.

The lower court adopted the flawed reasoning espoused by CCS at the hearing, and did not acknowledge the factual dispute over the date upon which the Appellant knew, or reasonably should have known, that it had a claim against CCS and the other Respondents relating to their work performed from 2002 to 2011. The Court asked counsel for Appellant: "Well, why don't you start by telling me how in the world you get any action for damages done for work in 2005?" Tr. at 5. Counsel for Appellant replied that the instant lawsuit did not involve the installation of the original artificial stucco; that CCS reported that it had corrected any workmanship issues it had during the course of the DEFS installation; and that Appellant did not know it had any problems with Respondents' work until SKA's reports in January and April, 2012.

The lower court nonetheless ruled from the bench a few moments later, granting partial summary judgment against Appellant. The lower court stated that "[Plaintiffs] are entitled to sue [CCS] for anything [Plaintiffs] can relate to things that [CCS] did in 2010." Tr. at 6. Although the Court instructed counsel for CCS to prepare a formal written order, the Court later abandoned that requirement by denying Shipwatch's motion for reconsideration in the absence of a formal written order. This appeal is, accordingly, based upon the transcript of the hearing which establishes the

basis of the bench ruling, and by the standard language of a Form 4 Order dated October 30, 2014 which indicated that the motion was granted in part. See, Transcript of Hearing dated Oct. 27, 2014 and Form 4 Order dated Oct. 30, 2014.

Appellant moved for rehearing and filed a supplemental brief which, among other things, included copies of the 41 documentary exhibits which the lower court declined to consider at the hearing. Plaintiffs' Supp. Response, supra. Those exhibits, along with the other documents in the Record on Appeal, provide overwhelming evidence of a genuine issue of material fact as to the date upon which Appellant knew or reasonably should have been aware of problems with the Respondents' repair and renovation work. On December 1, 2014 the lower court denied Appellant's Motion for Reconsideration without oral argument, and this appeal followed.

Appellant brought this action based upon defects and deficiencies in the repairs and renovation work performed by the Respondents. Appellant was obviously aware that the EIFS cladding originally installed in the 1980's was aged and failing. That was the reason why Respondents were working at Shipwatch. Appellant did not, however, know that the repair and renovation work by Respondents was itself defective, until the engineers at SKA identified these issues in reports in January and April of 2012.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "Summary judgment is proper when, after reviewing the motion, supporting affidavits, and the pleadings, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In

determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." Id.

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court. Boyd v. Liberty Life Ins. Co., 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012).

ARGUMENT

I. Partial Summary Judgment Against Appellant was Improper When the Lower Court Disregarded the Existence of a Genuine Issue of Material Fact as to When Appellant Discovered its Legal Claims Against Respondents.

The lower court ruled that Appellant cannot sue respondents for work performed before January 1, 2010. Specifically, the lower court stated in its ruling from the bench: "You are entitled to sue [CCS] for anything you can relate to things [CCS] did in 2010." The lower court's bench ruling was based upon the facts as represented by CCS at the hearing, without considering testimony, documents, or other evidence offered by Appellant. Tr. at 6. The opposing brief and exhibits which Appellant provided to the lower court directly contradict the facts as presented by CCS, and provide ample basis for establishing the existence of a genuine issue of material fact.

CCS first argued that "[t]he lawsuit . . . seeks to recover costs and damages associated with the original EIFS system applied to the building, sliding glass doors, windows, of which were originally installed in the buildings in 1995 . . . ." Tr. at 3. However, CCS was not involved in the original construction of Shipwatch. CCS was engaged and paid for work performed from 2002 through 2012 including the installation of DEFS. Plaintiff's Response in Opposition to Summary Judgment, Exhibit B. Appellant first became aware of defects in the DEFS installation and CCS's other repair and renovation work when Appellant received SKA's reports dated January 11 and April

5, 2012. R. at ____. At the very least, the evidence contained in the exhibits referenced above establish the existence of a factual dispute between the positions of CCS and the Appellant.

Moreover, contrary to its own argument, the language CCS relied upon from the depositions of Shipwatch board members actually establishes the existence of disputed facts: CCS quotes board member Arnie Schaewe's testimony about known "leakage problems at end walls, oceanside sliding glass doors, and bay windows when CCS began work in 2003." Tr. at 3; CCS Memorandum in Support at 5. A plain reading of that quoted language establishes that Mr. Schaewe was referring to original work in place before CCS even began its repairs in 2003. Similarly, CCS offered deposition testimony of board member Fred Trombino: "the board knew EIFS was problematic and not the right application for a coastal environment." CCS Memorandum in Support at 5. However, as noted above, the "EIFS" material was installed on the Project as part of original construction in the 1980's. There is nothing in that quote which supports CCS's argument that Mr. Trombino knew that there were defects in the repair and renovation work that CCS performed.

CCS next argued that ". . . the HOA minutes clearly identify that the plaintiffs knew about problems with the synthetic stucco, with the EIFS well before 2009." Tr. at 3. Of course, this is certainly not evidence that Appellant had knowledge that the renovation and repair work by CCS was deficient. Indeed, in its argument at the summary judgment hearing, CCS acknowledged that in 2008, Appellant was planning to engage CCS for removal of the original 1980's synthetic stucco cladding: "In fact, probably the most telling piece of exhibit [sic] is in September of 2008, Ms. Jernigan goes to the board saying that she has a contract, and estimate for $2.3 million to do various repairs of the project, 1.8 million of which is for the removal of the remaining parts of this synthetic stucco off the buildings." Tr. at 3-4. After 2008, CCS was indeed hired and paid to perform

hundreds of thousands of dollars worth of work relating to the removal and replacement of the aged and failing original 1980's cladding at Shipwatch. Plaintiffs' Memo. In Opp., Exh. B. Knowledge of the aged and failing 1980's cladding in 2008 certainly cannot establish that Appellant had notice of defective repairs by CCS that had yet to be performed.

CCS continued its argument by noting that ". . . in 2003, 2004, 2005, the HOA implemented a program to remove somewhere in the neighborhood of 5 to 15 sliding glass doors and some periodic windows because of various leaks." Tr. at 4. "But as far as the work and cost associated with removing things that they clearly knew about in 2005, 2006, 2007, and 2008, that's what we are trying to sever from this lawsuit. And that includes the sliding glass doors, the windows, and the cost associated with removing the synthetic stucco." Id.

As noted above, Appellant planned for a phased removal and replacement of the aged and failing original EIFS cladding, along with the original sliding glass doors and windows during the period of 2002 through 2011. The evidence presented to the lower court establishes only that Appellant knew of the aged and failing original 1980's building elements. CCS's effort to transform knowledge of those aged and failing elements of original 1980's construction into knowledge by Appellant of defective work by CCS from 2002 through 2012 is simply unfounded and an inappropriate basis upon which to argue summary judgment.

Further, none of the testimony cited by CCS in its Memorandum in Support establishes any knowledge of defects or deficiencies in the repair work performed by CCS from 2002 through 2012. To the extent that CCS is attempting to argue that the original contractor's installation of EIFS somehow contributed to the damages identified in the April 2012 report of SKA, that argument is

one of causation, rather than notice. The lower court erred in adopting the approach by CCS which conflates the defense of causation with the statute of limitations defense.

CCS somehow reached the conclusion, and argued that the lower court should rule, that Appellant's knowledge of problems with the original 1980's EIFS cladding, windows, and sliding glass doors establishes notice of legal claims against CCS and the other Respondents for defects and deficiencies in the renovation and repair work from 2002 to 2011. Not only is that conclusion illogical, because CCS did not perform the original work, but it is directly contradicted by evidence presented by Appellant in response to the motion for summary judgment, as Appellant was not aware of these claims before it received the reports of SKA in January and April of 2012. Because of the genuine issue of material fact regarding the discovery of Appellant's claims against CCS and the other Respondents, the lower court's order granting partial summary judgment against Appellant must be reversed, with instructions to allow a jury to determine these questions of fact.

II. Partial Summary Judgment Against Appellant was Improper When the Lower Court Did Not Apply the Discovery Rule Regarding the Accrual of a Cause of Action.

A. Appellant Did Not Discover the Existence of its Causes of Action Against Respondents Prior to June 13, 2009.

It is axiomatic at this point in South Carolina jurisprudence that the Statute of Limitations does not begin to run in a construction-defect case until the Plaintiff knew, or in the exercise of reasonable diligence should have known, that a cause of action exists against a defendant. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989); Dean v. Ruscon Corp., 321 S.C.360, 468 S.E.2d 645 (1996). The claims in this lawsuit are subject to the three-year Statute of Limitations pursuant to S.C. Code Ann. §15-3-530 (Law. Co-op., as amended). This lawsuit was filed on June 13, 2012.

The lower court ruled that "[Appellants] are entitled to sue [CCS] for anything [Appellants] can relate to things that [CCS] did in 2010." Tr. at 6. Implicit in this ruling is that any work at the Shipwatch Project which the Respondents performed on or before December 31, 2009 is barred by the three-year statute of limitations. Because this lawsuit was filed on June 13, 2012, such a restriction is a clear misapplication of the plain reading of the three-year statute of limitations in S.C. Code Ann. Section 15-3-530.

Regardless, the statute of limitations begins to run only upon actual knowledge of a claim or "when the underlying cause of action reasonably ought to have been discovered." Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). Under the discovery rule, "the three-year clock starts ticking on 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." Id. at 575-76, 593 S.E.2d at 627. The lower court erred in disregarding the material presented by Appellant which specifically contradicts any conclusion that Appellant had actual or constructive notice of a claim against CCS prior to June 13, 2009.

Appellant presented information, including deposition testimony of the property manager, which establishes that Appellant did not know, and had no reason to know, that there were unresolved issues with the way in which Respondents repaired the Shipwatch buildings before June 13, 2009. Shipwatch Property Manager Linda Jernigan testified regarding CCS and its principal, Bob Wiggins, as follows:

Q. Who do you rely on for any kind of information concerning the actual conditions of the buildings at Shipwatch?

A. Up until Sutton-Kennerly was hired in 2011, 2012, whenever they did the investigation report, Carolina Concrete, we relied on them for just about everything. They were the contractor of choice.

Q. What's your opinion of the work that Carolina Concrete performed?

A. I don't have an opinion of the quality of their work.

Q. Well, why would you keep hiring them back and forth for what seems like to be a decade if there was some issue of concern about the quality of work?

A. We believed in them and trusted them completely. They were the contractor of choice.

Q. And how did they fail to live up to that trust?

A. The inspection that was done by Sutton-Kennerly revealed some things that weren't properly done.

Deposition of Linda Jernigan, at 231-32.

CCS was indeed the "contractor of choice" for the Appellant for the repairs performed at the Shipwatch Project between 2003 and 2011. The first invoice from CCS to the Appellant was dated December 19, 2002, and the final invoice was dated March 21, 2012. Plaintiff's Response in Opposition to Summary Judgment, Exhibit B.

Moreover, Appellant engaged CCS to perform test cuts in the buildings in conjunction with the forensic analysis performed by SKA in February 2012. Id. A reasonable inference may be drawn from this information that as of February 2012, approximately 120 days before the lawsuit was filed on June 13, 2012, neither Appellant nor CCS suspected any deficiencies with the repair work performed by CCS. It is reasonable to infer that if Appellant knew that it had a claim against CCS for deficient work, it would have neither hired CCS to perform test cuts, nor would it have paid CCS over $23,000 for cuts and patches to the areas investigated by SKA in February and March 2012. Id. It is also reasonable to infer that if CCS knew that these test cuts would have uncovered the extensive damages described in SKA's April 2012 report, CCS would not have agreed to participate in that investigation.

In its Motion for Summary Judgment, CCS failed to establish that Appellant knew, or should have known prior to June 12, 2009 that it had a legal claim against CCS for deficiencies in its renovation work performed between 2003 and 2011. Appellant presented ample evidence to the lower court which directly contradicted the representations of CCS, and the lower court erred in failing to resolve all factual disputes in favor of Appellant, as the non-moving party.

Further, CCS attempted to establish notice of these claims by suggesting that some of Appellant's damages may have been partially caused by the underlying EIFS installation by the original contractors in the 1980's. However, as the Court of Appeals stated:

> It would be paradoxical to hold that a person suffering an injury is required to determine the causation of the injury without benefit of expert opinion and then require causation testimony at trial to be limited to expert opinion. When the injury requires an expert to make a determination of the cause of the injury and an expert is retained, this, in and of itself, is evidence of reasonable diligence in determining whether or not the injury is attributable to a wrong inflicted by someone else.
>
> Graniteville Co., Inc. v. I H Svcs., Inc., 316 S.C.146, 148,447 S.E.2d 226, 228 (Ct. App. 1994)

To the extent that the lower court accepted CCS's argument and conflated the defense of causation with the statute of limitations defense, the lower court erred and its order granting partial summary judgment must be reversed, with instructions requiring Appellant's claims against the Respondents to be fully adjudicated by a jury.

B. The Conduct and Representations by Carolina Concrete Systems to Appellant Require that the Statute of Limitations Be Equitably Tolled.

In Dean v. Ruscon, supra at 360, 468 S.E.2d at 645, the South Carolina Supreme Court adopted the reasoning of the Court of Appeals in Graniteville, supra at 146, 447 S.E.2d at 226. In Graniteville, the Court of Appeals held that the Statute of Limitations was equitably tolled for the

amount of time it took the Plaintiff's fire investigation expert to perform its investigation and render opinions as to causation. Id. "The Court of Appeals held that when an injury requires an expert to determine its cause and an expert is retained, there is evidence that the injured party exercised reasonable diligence and the statute of limitations should be tolled. Accordingly, the statute was tolled for eight days which was the date the injured party discovered that a cause of action existed." Dean v. Ruscon at 360, 468 S.E.2d at 645 (citing Graniteville, supra at 146, 447 S.E.2d at 226).

Even if, *arguendo*, Appellant should have known there were problems with CCS's work prior to June 13, 2009, the Statute of Limitations must be equitably tolled based upon the investigation performed by SKA along with the continuing work and reassurances provided by CCS as to the quality and sufficiency of its work at the Shipwatch project.

A defendant may be estopped from asserting the statute of limitations as a defense if the delay that otherwise would give operation to the statute was induced by the defendant's conduct. Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994). Such inducement may consist either of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. Id. Deceit is not an essential element of estoppel; rather, it is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire. Dillon County School Dist. No. 2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218, 332 S.E.2d 555, 561 (1985).

In the instant case, Appellant provided evidence to the lower court which established continuing actions and assurances by CCS that it was performing its work in a sufficient manner. On April 14, 2011, CCS reported to property manager Linda Jernigan that "[o]verall the Duroc/BASF Stucco system is in good condition with the exception of some staining that cannot be

removed by pressure washing." Plaintiffs' Supp. Response in Opp., Exh. 36. As noted above, when CCS submitted invoices to Appellant as late as March 21, 2012, Appellant paid those invoices in full. Plaintiffs' Memorandum in Opp., Exh. B. Ms. Jernigan testified that Appellant "relied on [CCS] for just about everything. They were the contractor of choice." Jernigan Depo. at 231.

During the course of the its work between 2002 and 2011 CCS detected certain issues which were promptly repaired by CCS. On August 23 2008, for example, Respondent engineer Robert Sisnroy noted in a periodic report that his observations "revealed evidence of blistering of the DEFS lamina off of the concrete board substrate." Plaintiffs' Supp. Response in Opp., Exh. 18. Following receipt of that report by Mr. Sisnroy, Appellant wrote to CCS on January 26, 2009, made note of the issues reported by Mr. Sisnroy, and requested that CCS "repair the failed claddings in accordance with the manufacturer's installation requirements and warranty requirements." Id. at Exh. 19. In the last sentence of that letter, Ms. Jernigan concluded: "Please contact me to make arrangements to accomplish this work as soon as possible." Id. There is no evidence that Appellant knew, or reasonably should have suspected, that CCS would have been negligent or otherwise failed to perform those repairs to its own work properly.

The Record on Appeal contains numerous letters and proposals from CCS to Appellant after January 26, 2009, and payment records establishing that CCS was paid over $900,000.00 between February 2009 and April 2012. Moreover, as of April 14, 2011, CCS reported that the exterior cladding system that it installed was "in good condition." Id. at Exh. 36. Notably, in support of its Motion for Summary Judgment, CCS failed to adduce any evidence which shows that CCS notified Appellant, or even suggested to Appellant, that there were defects and deficiencies in the performance of CCS's work that were causing damage at the Shipwatch project. A reasonable

inference can be drawn that neither CCS nor Appellant was aware of any of the claims against CCS until SKA reported these issues to Appellant in its January and April 2012 reports.

In Dillon County Schools, the Court was presented with an owner who complained that its roof was designed and constructed in a deficient manner. The defendant contractor, architect, and roofer argued that the Plaintiff's claims were barred by the statute of limitations. The Court held that "[o]ne's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation." Id. at 219 (quoting City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977)). Therefore, the defendants' employment of a roofing expert, frequent meetings at the school to resolve the issue, and numerous attempts to repair the roofs allowed an inference that the defendants assured the Plaintiff that the problems would be corrected and litigation would not be required. Further noting that whether equitable tolling applies to a defendant's conduct is usually a jury question, the Court reversed the trial court's grant of summary judgment. Id. at 219-220.

Appellant is in the same position as the plaintiff in Dillon County Schools: Even if one assumes, *arguendo*, that Appellant should have known of its claims against CCS prior to June 13, 2009, it was nonetheless reasonable for Appellant to believe that CCS was addressing these problems as part of its ongoing work at the Project. Whether a defendant's conduct warrants equitable tolling of the Statute of Limitations is a question for the jury. Id. at 218, 332 S.E.2d at 561. Appellant must at least be afforded the opportunity to present evidence of the assurances provided by CCS to the jury.

CONCLUSION

For the foregoing reasons, the Order by the lower court granting partial summary judgment to Respondents must be reversed, with instructions to the lower court indicating that the Appellant has demonstrated the existence of a genuine issue of material fact regarding the date upon which Appellant was on notice of the claims against Respondents, and further instructions to have the Appellant's claims be fully adjudicated by a jury.

Respectfully Submitted,

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March 2, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Of Whom, Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Sonneborn, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually, are,
..... Respondents.

CERTIFICATE OF SERVICE

I, Frances Klotsch, an employee of Robertson Hollingsworth & Flynn, hereby certify that I have served parties in this action with a copy of the following document(s) via U.S. Mail and E-Mail as follows:

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