THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2014-002765

Oscar Mendiondo, individually and as representative of a class of similarly situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums, ...Appellants

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC, Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, 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.; Spectech, 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; are . . . Respondents

---

INITIAL BRIEF OF RESPONDENT FIRST EXTERIORS, LLC

Jonathan J. Anderson
Danielle B. Wegener
ANDERSON REYNOLDS &
STEPHENS, LLC
37 ½ Broad Street
P O Box 87
Charleston, SC 29402
843-723-0185

AND

James H. Elliott, Jr.
Richardson Plowden & Robinson, PA
40 Calhoun Street
Charleston, SC 29401
843-805-6550

Attorneys for Respondent
First Exteriors, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

FACTS OF THE CASE 6

ARGUMENT 9

I. THE TRIAL COURT PROPERLY APPLIED SCRCP 56(C) IN CONSIDERING CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT. 9

II. PARTIAL SUMMARY JUDGMENT AGAINST APPELLANT WAS PROPER BASED ON THE TRIAL COURT'S APPLICATION OF THE DISCOVERY RULE TO THE ACCRUAL OF APPELLANT'S CAUSE OF ACTION AGAINST CAROLINA CONCRETE. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Barr v City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct.App. 1998). 11, 14, 15

Baughman v American Tel & Tel Co , 306 S.C 101, 410 S.E.2d 537 (1991) 9

Binkley v Burry, 352 S.C. 286, 573 S.E.2d 838, (Ct. App. 2002) 14

Brown v Sandwood Development Corp., 277 S.C. 581, 291 S.E 2d 375 (1982) 10

Cluett, Peabody & Company, Inc v Campbell, Rea, Hayes & Large, 492 F.Supp. 67 (Pa. 1980) 17, 18

David v McLeod Regional Medical Center, 367 S.C 242, 626 S.E.2d 1 (2006) 10

Dean v Ruscon Corp , 321 S.C. 360,468 S.E.2d 645(1996) 11, 13, 19

Dillon County Sch Dist v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S E.2d 555 (Ct.App.1985) 11, 13, 16, 17, 18

Graniteville Co v IH Servs , Inc ,316 S.C. 146, 447 S.E 2d 226 (Ct.App.1994) 11

Harrison v Bevilaqua, 354 S.C. 129, 138, 580 S.E.2d 109 (2003) 17

Hooper v Ebenezer Sr Services and Rehab Center, 386 S.C. 108, 687 S.E.2d 29 (2009) 15, 16

Kelly v Logan, Jolley & Smith, L L P, 383 S.C. 626, 682 S.E.2d 1 (2009) 11, 12, 13

Kreutner v David, 320 S.C. 283, 465 S.E.2d 88 (1995) 11

Osborne v Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) 9

Ross v Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct.App. 2011) 16

Snell v Columbia Gun Exchange, Inc , 276 S.C 301, 278 S.E 2d 333(1981) 11

True v Monteith, 327 S.C 116, 119, 489 S.E.2d 615 (1997) 11

Watters v Terminix Services, Inc , 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008). . 13, 14

Statutes

S.C. Code Ann. § 15-3-530 10

S.C. Code Ann. § 15-3-535 10

Court Rules

Rule 56(c), SCRCP 9

STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT PROPERLY APPLY RULE 56(C), SCRCP IN CONSIDERING CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT?**

II. **DID THE TRIAL COURT PROPERLY APPLY THE DISCOVERY RULE TO THE ACCRUAL OF APPELLANT'S CAUSE OF ACTION IN ITS DETERMINATION THAT CAROLINA CONCRETE WAS ENTITLED TO PARTIAL SUMMARY JUDGMENT AGAINST APPELLANT?**

STATEMENT OF THE CASE

This is a construction defects lawsuit involving the Shipwatch condominiums (hereinafter "Project") located on Isle of Palms, South Carolina. The Project was originally constructed in the 1980's. First Exteriors, LLC (hereinafter "First Exteriors") served as a stucco subcontractor during a series of renovations which were performed to the buildings between the years 2002 and 2011 Carolina Concrete Systems, Inc (hereinafter "Carolina Concrete") served as the general contractor during these repairs and renovations.

Appellant Oscar Mendiondo, as class representative, filed the instant lawsuit on June 13, 2012 against Carolina Concrete, First Exteriors, and other entities involved in the renovations. (ROA ___; Summons and Complaint). A companion case was filed against the same parties by the Shipwatch Homeowners Association.

On September 12, 2014, Carolina Concrete filed a motion for summary based on the statute of limitations against Appellant. (ROA ___; Carolina Concrete's Motion for Summary Judgment) A memorandum in support of this motion with attached exhibits was filed on October 27, 2014. (ROA ___; Carolina Concrete's Memorandum in Support of Motion for Summary Judgment and attached exhibits). Appellant also filed a memorandum in opposition to Carolina Concrete's motion for summary judgment with attached exhibits (ROA ___; Appellant's Memorandum in Opposition to Carolina Concrete's Motion for Summary Judgment and attached exhibits). A hearing was held by Judge Dennis on Carolina Concrete's motion for summary judgment on October 27, 2014 At the hearing, counsel for Carolina Concrete presented argument in support of its

motion for summary judgment and counsel for Appellant presented argument in opposition. (ROA ___: Hrg. Transcript p.2, line 1 – p. 7, line 12).

The Court issued an oral order granting Carolina Concrete partial summary judgment based on the statute of limitations for any work performed at the Project prior to 2010 (ROA ___; Hrg. Transcript p.6, lines 20 - 22). Judge Dennis signed a Form 4 Order granting Carolina Concrete partial summary judgment, which was filed on October 30, 2014. (ROA ___, Order granting Carolina Concrete Partial Summary Judgment). On November 11, 2014, prior to Carolina Concrete's submission of a proposed formal order granting them partial summary judgment, Appellant filed a motion for reconsideration of the Order granting Carolina Concrete Partial Summary Judgment. (ROA ___; Appellant's Motion for Reconsideration). On November 21, 2014, Appellant filed a Supplemental Response in Opposition to Carolina Concrete's Motion for Summary Judgment and Memorandum in Support of their Motion for Reconsideration and Rehearing. (ROA ___, Appellant's Supplemental Response in Opposition to Carolina Concrete's Motion for Summary Judgment and Memorandum in Support of their Motion for Reconsideration and Rehearing). On December 1, 2014, the Court issued an Order denying Appellant's Motion for Reconsideration. (ROA ___; Order denying Motion for Reconsideration).

Appellant filed a Notice of Appeal on December 30, 2014, appealing the Order granting summary judgment in part to Carolina Concrete. (ROA ___; Notice of Appeal). Appellants filed an Amended Notice of Appeal on January 8, 2015. (ROA ___; Amended Notice of Appeal). First Exteriors was served with a copy of Appellant's Initial Brief in this matter via U.S mail on March 4, 2015.

FACTS OF THE CASE

This is a construction defects case involving the Shipwatch condominiums located on the Isle of Palms, South Carolina. The Project includes four EIFS-clad oceanfront buildings which were constructed in the mid 1980's. Appellant filed a lawsuit against the Respondents on June 13, 2012 related to alleged deficiencies in the construction of the Project.

None of the Respondents were involved in the original construction of the Project. In 2002, Carolina Concrete was hired by Appellant as a general contractor to perform various renovations and upgrades to the four buildings, including the partial removal of the EIFS (exterior insulation finish system) cladding and replacement with a DEFS system (Durock wall system). Appellant elected to perform these renovations in a piecemeal approach over a period of several years spanning from 2002 to 2011. First Exteriors acted as a subcontractor of Carolina Concrete and was involved in the partial removal of the original EIFS and replacement with a DEFS system.

For several years prior to the filing of this lawsuit, Appellant was aware that there were issues with the construction of the Project. The below timeline of events highlights Appellant's repeated notice of issues with the construction of the Project:

- July 10, 2006 - Robert Sisnroy, P.E. issued a report to Appellant identifying chronic water intrusion at the sliding glass doors (ROA ___; Sisnroy report of July 10, 2006, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).
- January 20, 2007 – Shipwatch Building Committee issued a report stating that a number of units on the fourth and fifth floors are experiencing leaking sliding glass doors. (ROA ___; Shipwatch Building Committee Report of January 20,

2007, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment)

- March 9, 2007 - Shipwatch HOA Building Report issued acknowledging that past HOA boards have been well aware of a leakage problem with the sliding glass doors. (ROA ___; Shipwatch HOA Building Report, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).
- May 10, 2007 - Carolina Concrete issued an Exterior Building Inspection Report to Appellant stating that damage is being caused to new metal studs behind the DEFS from leaks which continue to be a problem at and around the old sliding glass doors. (ROA ___; Carolina Concrete Building Inspection Report, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).
- August 23, 2008 – Robert Sisnroy, P.E. issued a report to Appellant titled "Roof Flashing Installation Deficiencies and Exterior Cladding Failure Investigation" which identified evidence of blistering of the DEFS lamina off of the concrete board substrate. Sisnroy reported that this condition was indicative of DEFS failure. Sisnroy also reported raised joint lines in the field of the wall in the areas of the first three floors and cracking of the DEFS on the stair towers. (ROA ___; Sisnroy Report of August 23, 2008, Exhibit to Appellant's Supplemental Response to Carolina Concrete's Motion for Summary Judgment and Memorandum in Support of Motion for Reconsideration).

Despite repeated knowledge of construction issues with the Project, Appellant elected not to investigate the extent of the problems or to remove and replace all of the failed building components at that time. Appellant did not engage any engineers to

investigate the Project until Sutton Kennerly & Associates, Inc. (hereinafter "SKA") was hired in January 2012. Appellant delayed filing suit until June 13, 2012 or five years and 11 months after Robert Sisnroy, P.E. issued a report to Appellant identifying chronic water intrusion at the sliding glass doors.

ARGUMENT

I. THE TRIAL COURT PROPERLY APPLIED SCRCP 56(C) IN CONSIDERING CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review.

In reviewing the grant of a summary judgment motion, the appellate court applies "the same standard which governs the trial court under Rule 56(c), SCRCP: 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." *Osborne v Adams*, 346 S.C. 4, 7, 550 S.E.2d 319 (2001) (quoting *Baughman v American Tel & Tel Co*, 306 S.C 101, 115, 410 S.E.2d 537 (1991)); Rule 56(c), SCRCP.

B. The trial court correctly applied SCRCP Rule 56(c) in considering Carolina Concrete's motion for summary judgment.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides, "The judgment sought shall be rendered forthwith 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.

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony, however, summary 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 Regional Medical Center,* 367 S C 242, 250, 626 S.E.2d 1, 5 (2006).

Appellant alleges that the trial court failed to apply the proper standard for considering a motion for summary judgment by disregarding the existence of an issue of material fact as to when the Appellant discovered its legal claim against Respondents This argument lacks merit Both Appellant and Respondent Carolina Concrete filed memoranda in support of their respective positions regarding Carolina Concrete's motion for summary judgment. At the hearing, Judge Dennis stated, "all memorandum filed in conjunction with this motion are incorporated fully for the purposes of review. And each of you may rely on the memos as submitted." (ROA ___; Hrg. Transcript p. 2, lines 4 - 6). The memorandum and exhibits which were filed by Appellant and handed up to the trial court were taken into consideration in the Court's ruling on Carolina Concrete's motion for summary judgment. (ROA ___; Hrg Transcript p. 2, lines 4 - 6). Additionally, Appellant filed a supplemental response to Carolina Concrete's motion for summary judgment and memorandum in support of its motion for reconsideration. (ROA ___; Supplemental Response to Carolina Concrete's Motion for Summary Judgment and Memorandum in Support of Motion for Reconsideration) All of these materials were taken into consideration by the trial court in its ruling.

The applicable statute of limitations for Appellant's causes of action against Respondents is three (3) years. *See* S.C. Code Ann. § 15-3-530. The courts of South Carolina have adopted the "discovery rule" to determine when the statute of limitations begins to run. S.C. Code Ann. § 15-3-535. The discovery rule applies to construction defect cases. *See Brown v Sandwood Development Corp* , 277 S.C. 581, 583, 291 S E.2d

375, 376 (1982). "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence that a cause of action exists for the wrongful conduct." *True v Monteith,* 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). See also *Dean v Ruscon Corp* ,321 S.C. 360,468 S.E.2d 645(1996); *Barr v City of Rock Hill,* 330 S.C. 640, 644-645, 500 S.E 2d 157, 160 (Ct. App 1998). "Furthermore, the statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to act with some promptness." *Kelly v Logan, Jolley & Smith, L L P*, 383 S.C. 626, 633, 682 S E 2d 1, 4 (2009). "A party has constructive notice if the party knows of 'facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right ... has been invaded or that some claim against another party might exist.' " *Barr*, 330 S.C. at 645, 500 S.E.2d at 160 citing *Graniteville Co v IH Servs , Inc* , 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct App.1994) (quoting *Snell v Columbia Gun Exchange, Inc* , 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)) "Failure of the injured party to comprehend the full extent of damages, however, is immaterial." *Id* citing *Dean,* 321 S.C 360, 468 S.E.2d 645; *Dillon County Sch Dist. v Lewis Sheet Metal Works, Inc* , 286 S.C. 207, 332 S.E 2d 555 (Ct.App.1985); *Kelly,* 383 S.C. at 635. "The date on which discovery should have been made is an objective, not subjective, question." *Id* citing *Kreutner v David,* 320 S.C. 283, 285-86, 465 S.E.2d 88, 90 (1995).

"Statutes of limitations are not simply technicalities " *Kelly,* 383 S.C. at 632. "On the contrary, they have long been respected as fundamental to a well-ordered judicial system " *Id* "Statute of limitations embody important public policy concerns as they

stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Kelly v Logan, Jolley & Smith, L L.P.,*383 S C. 626, 632 (2009)

The below timeline of events highlights Appellant's repeated notice of issues with the construction of the Project:

- July 10, 2006 - Robert Sisnroy, P.E. issued a report to Appellant identifying chronic water intrusion at the sliding glass doors. (ROA ___; Sisnroy report of July 10, 2006, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).
- January 20, 2007 – Shipwatch Building Committee issued a report stating that a number of units on the fourth and fifth floors are experiencing leaking sliding glass doors. (ROA ___; Shipwatch Building Committee Report of January 20, 2007, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment)
- March 9, 2007 - Shipwatch HOA Building Report issued acknowledging that past HOA boards have been well aware of a leakage problem with the sliding glass doors. (ROA ___; Shipwatch HOA Building Report, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).
- May 10, 2007 - Carolina Concrete issued an Exterior Building Inspection Report to Appellant stating that damage is being caused to new metal studs behind the DEFS from leaks which continue to be a problem at and around the old sliding glass doors. (ROA ___, Carolina Concrete Building Inspection Report, Exhibit to Carolina Concrete's Memorandum in Support of Motion for Summary Judgment).

- August 23, 2008 – Robert Sisnroy, P.E. issued a report to Appellant titled "Roof Flashing Installation Deficiencies and Exterior Cladding Failure Investigation" which identified evidence of blistering of the DEFS lamina off of the concrete board substrate. Sisnroy reported that this condition was indicative of DEFS failure. Sisnroy also reported raised joint lines in the field of the wall in the areas of the first three floors and cracking of the DEFS on the stair towers. (ROA ___; Sisnroy Report of August 23, 2008, Exhibit to Appellant's Supplemental Response in Opposition to Carolina Concrete's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration).

Appellant's knowledge of issues with the construction of the Project placed Appellant on notice that it may have a claim against another party. Whether or not Appellant understood the full extent of the damages to the Project is immaterial. *See Dean v Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); *Dillon County Sch Dist v Lewis Sheet Metal Works, Inc*, 286 S.C. 207, 332 S.E 2d 555 (Ct.App.1985), *Kelly v Logan, Jolley & Smith, L L P*, 383 S.C. 626, 635, 682 S E.2d 1(2009). Appellant acknowledges in its brief that they were aware that the EIFS cladding was failing and the sliding glass doors were leaking more than three years prior to the filing of this lawsuit but argues that this does not constitute knowledge for purposes of triggering the statute of limitations to begin running. (ROA ___; Appellant's Brief at p. 10). This argument lacks merit.

The important date under the discovery rule is the date of discovery of the injury, not the date of discovery of the wrongdoer Identifying the wrong source of damages does not delay the triggering of the statute of limitations. *Watters v Terminix Services,*

Inc , 376 S.C. 632, 635, 658 S.E.2d 110, 112 (Ct. App. 2008)(plaintiff's expert identified the source of a moisture problem in the crawl space as related to the installation of the duct work. Plaintiff brought a claim against the HVAC installer, but failed to bring a claim within the statute of limitations against Terminix for not disclosing the moisture damage.)

"Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." *Binkley v Burry*, 352 S.C. 286, 297-298, 573 S.E.2d 838, 843 (Ct. App. 2002)

In *Barr v City of Rock Hill*, the plaintiff homeowners filed suit against the developers and the City based on the sale and construction of their home. The defendants asserted the statute of limitations as a defense to plaintiff's claims After purchasing their home, plaintiff's annual termite inspections revealed excessive moisture under the plaintiffs' home, yet plaintiffs failed to file suit until after they received a report from a forensic engineer several years later which highlighted certain construction issues with the house The Court, in holding that plaintiffs' claims were barred by the statute of limitations, found that the termite inspection reports advised plaintiffs of water and other problems under their house, but Plaintiffs failed to correct the problems or investigate further to determine the extent of the problems. "If the [plaintiffs] had exercised reasonable diligence and investigated the problems noted in the termite inspection reports, they could have realized the magnitude of the problem and brought suit before

the statute of limitations ran. They failed to act, however, and let the statute of limitations expire on any claim against the City or [developer]." *Barr v City of Rock Hill*, 330 S.C. 640, 645-646 (1998)

Here, similarly the Appellant was repeatedly put on notice that they had problems with the buildings. The Record on Appeal is replete with evidence that Appellant was aware of issues with the construction of the Project more than three years prior to the filing of this lawsuit, and the timeline above highlights some of it. Appellant even acknowledges in their brief and through testimony of Shipwatch homeowners awareness of issues with the EIFS and sliding glass doors (ROA ___; Appellant's Brief p. 10; ROA ___; Depo. of Fred Trombino p. 37, line 24 – p. 38, line 17; ROA ___; Depo. of Arnie Schaewe p. 78, lines 1-19; ROA ___; Depo. of Linda Jernigan taken on July 15, 2014, p 219, lines 8-23). However, Appellant failed to investigate these issues further to determine the extent of the damage Appellant waited until January 2012 to engage the services of SKA to investigate the Project. Appellant has failed to act with reasonable diligence to determine the extent of the problems with the Project and allowed the statute of limitations to expire.

II. PARTIAL SUMMARY JUDGMENT AGAINST APPELLANT WAS PROPER BASED ON THE TRIAL COURT'S APPLICATION OF THE DISCOVERY RULE TO THE ACCRUAL OF APPELLANT'S CAUSE OF ACTION AGAINST CAROLINA CONCRETE.

A. The Statute of Limitations expired prior to the filing of this action by Appellant and is not subject to equitable tolling.

"'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." *Hooper v. Ebenezer Sr Services and Rehab Center*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). "Equitable tolling typically

applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Hooper v Ebenezer Sr Services and Rehab Center*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009); *Ross v Ross,* 394 S.C. 261, 264, 715 S.E.2d 359, 360 (Ct.App. 2011)("The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff.") "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.* at 117. The burden of establishing sufficient facts to justify equitable tolling is borne by the party asserting the statute of limitations should be tolled. *Id*

Appellant focuses on the case of *Dillon County School* for the proposition that the statute of limitations should be tolled based on the conduct of Carolina Concrete. However, the actions of Carolina Concrete do not rise to the level of those of the defendants in *Dillon County School* and do not warrant the tolling of the statute of limitations See *Dillon County School Dist No Two v. Lewis Sheet Metal Works, Inc* , 286 S C. 207, 332 S.E.2d 555 (Ct. App. 1985) In *Dillon County School,* the school filed suit regarding the design and construction of the school roof. The roof began leaking before the building was completely finished and became a persistent problem. *Id* at 210. The architect reached out to the school and provided assurances that the issues with the roof would be corrected to the school's satisfaction. *Id* at 211-212. They also employed roofing experts to investigate the leaks, met with the school multiple times to discuss the roof issues, and made repeated repairs to the roof. *Id* The conduct of Carolina Concrete in this case does not rise to the level of the architect in *Dillon County School.* Unlike in *Dillon County School*, upon notification of blistering of the DEFS outlined in a report

prepared by Robert Sisnroy, P.E. on August 28, 2008, Appellant reached out to Carolina Concrete and requested that they "repair the failed claddings in accordance with the manufacturer's installation requirements and warranty requirements." (ROA ___;Sisnroy Report of August 28, 2008, Exhibit 18 to Plaintiff's Supplemental Response in Opposition to Carolina Concrete's Motion for Summary Judgment). At that point it was clear that Appellant was on notice that the DEFS was allegedly failing. Carolina Concrete did not reach out to Appellant and provide assurances as the architect did in *Dillon County School*, but instead Appellant reached out to them. Also, Carolina Concrete did not employ any expert to investigate the issues with the DEFS identified by Sisnroy in his 2008 report.

Appellant also argues that the statute of limitations should be tolled based on the continuing work performed by Carolina Concrete on the project. However, South Carolina has declined to adopt the "continuous treatment" exception to the general rule regarding the accrual of a cause of action. *Harrison v Bevilaqua*, 354 S.C. 129, 138, 580 S.E.2d 109, 113 (2003); *Dillon County School Dist No Two v Lewis Sheet Metal Works, Inc* , 286 S.C 207, 332 S.E 2d 555 (1985). In *Dillon County School*, the Court declined to apply the continuous treatment exception based on the defendants 'continuous efforts to repair the school's leaking roof. *Dillon County School,* 286 S.C. at 217, 332 S.E.2d at 560. In considering the issue, the Court looked to the Pennsylvania case of *Cluett, Peabody & Company, Inc v Campbell, Rea, Hayes & Large,* 492 F. Supp. 67 (Pa. 1980), where the court applied the discovery rule and held that plaintiff's claims regarding the construction of the roof were barred by the statute of limitations despite the defendants efforts to repair the roof over a long period of time. If the continuous treatment rule were

to apply, "a cause of action for breach of warranty or negligent performance ... would never accrue so long as the defendants periodically did some repair work, however ineffectual." *Dillon County School*, 286 S.C. at 217, 332 S.E.2d at 560 (citing *Cluett, Peabody & Company, Inc v Campbell, Rea, Hayes & Large,* 492 F.Supp. at 77).

Additionally, the work performed by Carolina Concrete and its subcontractors, including First Exteriors, was not one continuous project as suggested by Appellant The below timeline shows the breakdown:

- November 5, 2002- Work by Carolina Concrete and subcontractors begins on the Project. Carolina Concrete enters into contract with Appellant for waterproofing repairs, application of traffic coating, and chimney repairs (ROA ___, Contract between Shipwatch and Carolina Concrete dated November 5, 2002)
- September 22, 2003 – Carolina Concrete enters into contract with Appellant for window and door repairs, re-sloping of balconies, and the removal of EIFS and replacement with DEFS on the end walls, fourth and fifth floors street side, stairwells, elevator towers, and privacy walls (ROA ___, Contract between Shipwatch and Carolina Concrete dated September 22, 2003; ROA ___, Proposal of Carolina Concrete dated June 3, 2003).
- February 2, 2005 – Work at Shipwatch by Carolina Concrete and subcontractors ends and final pay application submitted. (ROA ___, February 2, 2005 Facsimile from Bob Wiggins to Shipwatch Properties,

Exhibit to Appellant's Supplemental Response to Carolina Concrete's Motion for Summary Judgment)

- December 19, 2008 – Carolina Concrete enters into contract for the removal and replacement of 16 EFCO doors
- September 1, 2010 – Removal of EIFS on the ocean side of buildings A and B begins. (ROA ___, September 1, 2010 Contract between Shipwatch and Carolina Concrete, Exhibit to Appellant's Supplemental Response in Opposition to Carolina Concrete's Motion for Summary Judgment and Memorandum in Support of Motion for Reconsideration)

As demonstrated above, the work performed at the Project was not continuous. There is a large gap of time when Carolina Concrete and its subcontractors were not completing any repairs at the Project The EIFS was removed and replaced in two separate phases from 2003-2005 and 2010-2011, and each phase involved different areas of the buildings. (ROA ___; Sisnroy Report of August 23, 2008; ROA ___ Carolina Concrete Proposal of April 26, 2010; ROA ___; September 1, 2010 Contract between Carolina Concrete and Shipwatch) Appellant is not entitled to equitable tolling of the statute of limitations based on a continuation of repair because separate contracts were entered into with Appellant for each particular scope of work completed and the repairs performed on the project were not continuous.

Appellant cites the case of *Dean v Ruscon Corp* for the proposition that the statute of limitations should be tolled based upon the investigations performed by SKA. However, similar to the plaintiff in *Dean*, Appellant failed to act with reasonable diligence. Appellant did not hire the SKA engineers to investigate the property until

several years after Appellant was informed of issues with the construction of the Project. Despite knowledge of construction issues at the Project, Appellants chose not to take action and instead let the building components continue to deteriorate. Appellant's failure to act with reasonable diligence in pursuing a claim is no reason to toll the statute of limitations until Appellant became aware of further damages to the Project.

CONCLUSION

For the reasons set forth above, First Exteriors respectfully requests that the decision of the trial court be affirmed

Jonathan J. Anderson
Danielle B. Wegener
ANDERSON REYNOLDS & STEPHENS, LLC
37 ½ Broad Street
P O Box 87
Charleston, SC 29402
843-723-0185

AND

James H. Elliott, Jr.
RICHARDSON PLOWDEN & ROBINSON, PA
40 Calhoun Street
Charleston, SC 29401
843-805-6550

Attorneys for Respondent First Exteriors, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2014-002765

Oscar Mendiondo, individually and as representative of a class of similarly situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums, ...Appellants

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC, Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, 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.; Spectech, 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; are ..... Respondents.

PROOF OF SERVICE

I certify that I have served Respondent First Exteriors, LLC's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy in the

U. S. mail, postage paid on April 29, 2015 and via electronic mail addressed to counsel of record as set forth below:

R. Patrick Flynn, Esquire
Robertson Hollingsworth & Flynn
177 Meeting Street, suite 300
Charleston, SC 29401
Attorney for Plaintiff/Appellant

David S. Cobb, Esquire
Turner Padget Graham & Laney, PA
P O Box 22129
Charleston, SC 29413
Attorney for Defendant/Respondent Carolina Concrete Systems, Inc

R. Britton Kelly, Esquire
Rosen Rosen & Hagood, LLC
P O Box 893
Charleston, SC 29402
Attorney for Defendant/Respondent W C Johnston Architectural Sales, Inc

Erin D. Dean, Esquire
Stacey P. Canaday, Esquire
Tupper Grimsley & Dean, PA
P O Box 2055
Beaufort, SC 29901
Attorneys for Defendant/Respondent GlassTec, Inc

L. Gregory Horton, Esquire
Adriane Belton, Esquire
Womble Carlyle Sandridge & Rice, PLLC
P O Box 999
Charleston, SC 29402
Attorneys for Defendant/Respondent Acrocrete, Inc

R. Britton Kelly, Esquire
Rosen Rosen & Hagood
P O Box 893

Samia H. Nettles, Esquire
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
And
L. Dean Best, Esquire
Best Honeycutt, PA
P O Box 13466
Charleston, SC 29422
Attorneys for Defendant/Respondent Glasgow Roofing, Inc

Paul E. Sperry, Esquire
Tyler P. Winton, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Defendant/Respondent Sisnroy Engineering, LLC and Robert Sisnroy

Amanda R. Maybank, Esquire
Marshall A. Earhart, Esquire
Maybank Law Firm, LLC
P O Box 12579
Charleston, SC 29422
Attorneys for Defendant/Respondent Charleston Glass Company

David A. Root, Esquire
Kernodle Root & Coleman
P O Box 13897
Charleston, SC 29422
Attorney for Defendant/Respondent BASF Corp

Michael Barfield, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H

Charleston, SC 29402
Attorneys for Defendant/Respondent EFCO Corp, Inc

Charleston, SC 29402
Attorneys for Defendant/Respondent Gary Freeman

Anderson Reynolds & Stephens, LLC
P O Box 87
Charleston, SC 29402

ANDERSON REYNOLDS & STEPHENS, LLC

ATTORNEYS AT LAW
37 ½ BROAD STREET
POST OFFICE BOX 87
CHARLESTON SOUTH CAROLINA 29402

JONATHAN J ANDERSON
LISA A REYNOLDS
SHANNA M STEPHENS
KATHERINE C MIARS
CURTIS B MARTIN
DANIELLE B WEGENER

TEL 843-723-0185
FAX 843-723-0977
email dwegener@arslawsc com

April 29, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re. Oscar Mendiondo, individually and as representative of a class of similar situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums v. Carolina Concrete Systems, Inc., et al.
Case No.: 2012-CP-10-3858
Claim No.. 72-39-288720 (PEG)
ARS No.. 20120 38
Appellate Case No: 2014-002765

Dear Ms Kitchings:

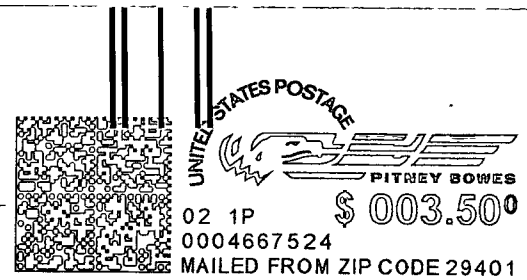
Please find enclosed, the original and one (1) copy of Respondent First Exteriors, LLC's Initial Brief, Designation of Matter to be included in the Record on Appeal and the Proof of Service to all counsel. Upon filing, please return one (1) clocked copy of the Initial Brief, Designation of Matter and Proof of Service to me in the self-addressed, postage page envelope enclosed

Your assistance in this matter is greatly appreciated. With kindest regards, I am

Sincerely yours,

Danielle B Wegener

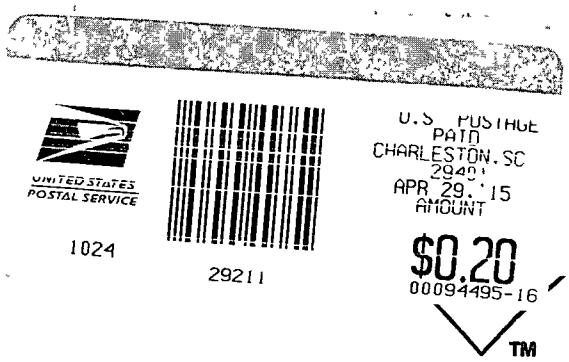
DBW/jcd
Enclosures
cc. All Counsel of Record
(via electronic mail & U.S. mail)

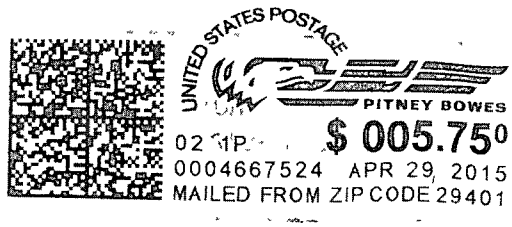


NO POSTAGE STAMP NECESSARY
POSTAGE HAS BEEN PREPAID BY

ANDERSON REYNOLDS & STEPHENS LLC
ATTORNEYS AT LAW
PO BOX 87
CHARLESTON SC 29402-0087

JCD





& STEPHENS, LLC
Street
ox 87
29402

RECEIVED
MAY 01 2015
SC Court of Appeals

RECEIVED
MAY 01 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

untry of Destination: /Pays de destination: