THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-03857
Appellate Case No. 2014-002766

Shipwatch Condominium Association, Inc., Appellant,

vs.

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.; 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 the Respondents.

INITIAL BRIEF OF RESPONDENTS EFCO CORP AND W.C. JOHNSTON ARCHITECTURAL SALES, INC.

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STATEMENT OF THE CASE

This lawsuit was filed on June 13, 2012, by Appellant alleging property damages resulting from construction defects at a 104 unit condominium complex in the Wild Dunes development of Isle of Palms, South Carolina, known as Shipwatch. The Respondents EFCO Corporation ("EFCO") and WC Johnston Architectural Sales, Inc. ("WCJ") were named as Defendants. On April 7, 2014, a Scheduling Order was entered by the Court making the case subject to trial after December 1, 2014. Discovery was taken by the parties, and Appellant represented on several occasions that it was prepared to try the case during the first part of 2015.

On or about September 12, 2014, Respondent Carolina Concrete Systems ("CCS") filed a Motion for Summary Judgment requesting the Court to rule that Appellant's claims were barred by the statute of limitations. A hearing on the motion for summary judgment was held before the Honorable R. Markley Dennis, Jr. on October 27, 2014. As a result of the hearing, the Court issued a Form 4 Order dated October 30, 2014, finding that Appellant's claims relating to work performed at the condominium project before 2010 were barred by the statute of limitations. While the Form 4 Order contemplated a formal order to be submitted, Appellant filed a Motion to Reconsider before the formal order had been submitted to the Court. The Court denied the Motion to Reconsider, without a hearing, by Order dated December 1, 2014. Appellant filed a Notice of Appeal on December 30, 2014.

Respondents EFCO and WCJ filed motions for summary judgment, with supporting documentation, on December 4, 2014. The motions were scheduled for a hearing before Judge Dennis on January 15, 2015. After the motions were set for a

hearing, counsel for the Appellant advised the Clerk of Court that the motions had been stayed by this appeal taken by the Appellant on December 30, 2014. Respondents EFCO and WCJ told the Clerk of Court that the motions should go forward because the issues in their motions for summary judgment were not affected by the appeal. Counsel for Appellant took the position that the appeal affected the issues presented to the trial court because the "order on appeal purports to dismiss a substantial portion of damages claimed by the Plaintiffs against each defendant." (ROA ___; 1/6/15, 10:45 am E-mail from Flynn to Leonard, et al.). Judge Dennis asked the parties to be prepared to argue the motions for summary judgment in the event he found the stay not to apply and conducted a hearing on January 15, 2015, to discuss the question of the stay. (ROA ___; 1/13/15 Michel E-mail to Kelly, et al.). While there is no formal order, Judge Dennis declined to hear Respondents EFCO and WCJ's motions for summary judgment. (ROA ____; April 14, 2015, E-mail from Flynn to Leonard, et al.).

Appellant has named EFCO and WCJ as Respondents to this appeal and have repeatedly taken the position that the Order issued by Judge Dennis effectively dismisses claims against the Defendants, including Respondents EFCO and WCJ. *See* (ROA ___, Appellant's Return to Acrocrete and Glasstec's Motion to Dismiss). Accordingly, as winners at the trial court level, Respondents EFCO and WCJ are entitled to argue on appeal additional reasons why this court should affirm the trial court's dismissal of the claims against Respondents EFCO and WCJ, "whether those reasons have been presented to or ruled on by the lower court." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406,419, 526 S.E.2d 716, 723 (2000). As stated by the I'On court, "[i]t would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other

arguments to preserve them for appellate review." Id. Such a policy especially makes sense in this case because Respondents EFCO and WCJ presented the arguments to the trial court, but the trial court declined to rule on the additional sustaining grounds because Appellant challenged the jurisdiction of the trial court.

STATEMENT OF THE FACTS

Appellant is the Horizontal Property Regime created to govern the affairs of the owners of the Shipwatch condominiums in Wild Dunes. (ROA ___, Master Deed of Shipwatch Condominium Association, Inc.). It was established in the mid-1980s by the recording of a Master Deed, dated April 24, 1984, upon construction of the buildings. (ROA ___, Master Deed of Shipwatch Condominium Association, Inc.). Shipwatch is comprised of four buildings, A, B, C, and D, which each have five floors of living space. (ROA ___; Jernigan Deposition Pg. 25, Ln 13-16 & P. 37, Ln 1-24). In total, there are 104 condominium units in the four Shipwatch buildings. (ROA ___; Plaintiffs' Response in Opp. To Carolina Concrete Systems, Inc's Motion for Summary Judgment). Originally, the buildings were constructed with a synthetic stucco exterior cladding system (EIFS) and approximately 344 windows and approximately 264 sliding glass doors that did not contain impact rated glass products. (ROA ___, Isaacs Depo. P. 253, Ln. 2 – P. 255, Ln. 19 & P. 270, Ln. 5- P. 271, Ln. 18; Jernigan Depo. P. 45, Lns 18-24).

In approximately 2002, Shipwatch began a relationship with Carolina Concrete Systems, Inc. ("CCS") for periodic building inspections and improvements/repairs. (ROA ___; Jernigan Depo. P. 73, Ln 21- P. 74, Ln. 9). The Board of Directors at Shipwatch chose to undertake a piece meal repair and replacement of the synthetic stucco cladding on the building from 2002-2010 rather removing and replacing all synthetic

stucco at one time. (ROA _____; Jernigan Deposition P. 27, Ln 14-23). At various points between 2003 and 2010, the Board of Directors also authorized CCS to replace a number of the original windows and sliding glass doors. (ROA ___; Jernigan Depo. P. 35, Ln. 25- P. 39, Ln. 4 & P. 77, Ln. 8- P. 78, Ln. 24). For example, 72 sliding glass doors were replaced on floors 1-3 of the four buildings in the 2003-2004 timeframe. (ROA ___; Jernigan Depo. P. 97, Ln 17-20). In 2008, approximately 14 sliding glass doors were replaced on the 4th and 5th floors. (ROA ___; Deposition Exhibit 140). Approximately 17 more were replaced in 2009, and approximately 18 more were replaced in 2010. (ROA ___; Deposition Exhibit 140). Like the original windows and doors, none of the product installed at Shipwatch between 2003 and 2010 by CCS contained impact rated glass. (ROA ___, Deposition Exhibit 132).

EFCO, a Missouri based company, manufactures commercial grade windows and sliding glass doors. (ROA___; Affidavit of Johnston ¶ 4). From 2003-2010, it manufactured and sold impact rated products and non-impact rated products. (ROA___; Affidavit of Johnston ¶ 9&10). From 2003-2010, WCJ was the distributor of EFCO products in South Carolina. (ROA___; Affidavit of Johnston ¶ 5). During that time, WCJ offered impact rated and non-impact rated products for sale to commercial contractors in the Charleston County, South Carolina area. (ROA___; Affidavit of Johnston ¶ 10). EFCO manufactured and WCJ sold window and door products installed into the Shipwatch buildings between 2003 and 2010. (ROA___; Affidavit of Johnston, Exhibits 1-5). Neither EFCO nor WCJ had any responsibility for the installation of windows and sliding glass doors at Shipwatch. (ROA___; Affidavit of Johnston & Deposition Exhibit 132).

Charleston Glass and Mirror Company, Inc. ("Charleston Glass") was a subcontractor to CCS on the Shipwatch project for the installation of windows and doors. It is in the business of installing windows and doors on commercial projects in the Charleston County area. (ROA___; Affidavit of Johnston & Deposition Exhibit 132). The company was incorporated in 1964. (ROA ___; Secretary of State Online Records). Charleston Glass has purchased EFCO products from WCJ, and its predecessors, since approximately 1988. (ROA___; Affidavit of Johnston ¶ 12). In 2003, Charleston Glass contacted WCJ about purchasing certain EFCO products and submitted a purchase order. (ROA___; Affidavit of Johnston ¶ 11 and 13). WCJ was Charleston Glass' only contact for EFCO product; Charleston Glass did not have direct contact with EFCO. (ROA___; Affidavit of Johnston ¶ 6 & 7).

As part of its sales process, WCJ has its customers fill out an order form and confirm that they are asking for the products that WCJ is being asked to supply. (ROA___; Affidavit of Johnston ¶ 14). In 2004, Randy Morgan with Charleston Glass signed a WCJ order form and confirmed that Charleston Glass wanted to purchase EFCO product that did not contain impact rated glass for Shipwatch. (ROA___; Affidavit of Johnston ¶ 14 & 15). The process repeated itself for orders in 2008, 2009, and 2010. (ROA___; Affidavit of Johnston ¶ 16). On each occasion, Charleston Glass confirmed that it intended to order EFCO products with non-impact glass for Shipwatch. (ROA___; Affidavit of Johnston ¶ 17). With each order, EFCO extended a Limited Warranty for the products supplied. (ROA___; Affidavit of Johnston ¶ 21 & 22). The Limited Warranty states that the products will be free from material defects and disclaims implied

warranties of merchantability and fitness for a particular purpose. (ROA___; Affidavit of Johnston, Exhibits 6 & 7).

In addition to the order forms, various proposals of Charleston Glass and CCS that were reviewed by Appellant establish that the contractors intended to purchase non-impact rated EFCO products. (ROA___; Deposition Exhibits 103 & 139). A November 11, 2010, fax from Randy Morgan at Charleston Glass to the chief executive of CCS explains that the contractors did not believe impact rated products were necessary for the projects they were performing at Shipwatch. (ROA___; Deposition Exhibit 132). Likewise, a proposal from CCS to Appellant dated September 6, 2007, for the installation of new sliding glass doors specifically informed Appellant that the proposal was for doors that did not contain impact resistant glass. (ROA___; Deposition Exhibit 103). The proposal was accepted by Appellant. (ROA___; Jernigan Deposition P. 452). In agreeing to a subsequent 2008 CCS proposal, the Appellant agreed that the EFCO door products would match the doors that it had received in 2004 – doors that did not contain impact rated glass. (ROA ___; Jernigan Deposition P. 451, Ln 1- P. 454, Ln 19 & Deposition Exhibit 139). It was also understood that the doors installed in 2009 and 2010 would match the doors installed in 2004. (ROA ___; Deposition Exhibit 134). Charleston Glass, CCS, nor Appellant ever paid for impact rated windows and doors. (ROA ___; Jernigan Deposition P. 479, Ln 18-Pg. 480, Ln 10).

Appellant alleges causes of action against EFCO and WCJ for negligence, breach of warranties, and strict liability relating to its supply of non-impact rated glass products to the Shipwatch project from 2003-2010. (ROA ___; Complaint). To support its claims against the Respondents, Appellant has disclosed Jeff Miller, PE with Sutton Kennerly &

Associates ("Sutton Kennerly") and Peter Sherratt, AIA as testifying expert witnesses. (ROA; Expert Disclosure). Mr. Miller and Mr. Sherratt are designated to offer opinions as to the nature of the problems with the buildings at Shipwatch and the cause of the damages.[1] (ROA; Expert Disclosure).

As part of a comprehensive building evaluation in 2012, Mr. Miller asked his project team to conduct water testing of various portions of the building, including windows and doors. (ROA ____; Miller Deposition P. 55, Ln 6-23). The water testing of the windows and doors was conducted in such a manner that Mr. Miller's team could test the method of installation of the windows and doors in one test and the window and door products themselves in other tests. (ROA ___; Isaacs Deposition P. 543, Ln 9-13). The testing ordered by Mr. Miller revealed no deficiencies in the EFCO products supplied to the job, as the EFCO products passed the water tests. (ROA ___; Isaacs Deposition P. 543, Ln 14-18 & P. 545, Ln 9-17).

After concluding his investigation of the buildings, Sutton Kennerly was engaged to design a repair for buildings C & D at Shipwatch. (ROA ___; Isaacs Deposition P. 10, Ln. 3- P. 11, Ln 3). Sutton Kennerly's originally conceived repair for buildings C & D included reuse of the EFCO product that was then installed in the buildings. (ROA ___; Isaacs Deposition P. 542, Ln 11-16). Because of the scope of the proposed work and the applicable building code for the repairs proposed at Shipwatch, the Isle of Palms building official required the Sutton Kennerly design to include impact rated products for all window and door openings. (ROA ___; Miller Deposition P. 567, Ln. 9-20). Therefore,

[1] Mr. Miller has been deposed for three days and Mr. Sherratt has been deposed for one day. Greg Isaacs, an engineer with Sutton Kennerly and Associates who worked with Mr. Miller on the project, has also been deposed for three days.

Sutton Kennerly could not incorporate the non-impact rated EFCO products into the final design to repair the buildings. (ROA ___; Miller Deposition P. 567, Ln. 9-20).

Appellant's experts admit that the ECFO products are not contributing or causing any water intrusion at the buildings. (ROA ___; Isaacs Deposition P. 314, Ln 11-21). Likewise, they admit that no property damage has resulted from the EFCO products. (ROA ___; Miller Deposition P. 609, Ln 24- P. 610, Ln 13). Appellant's experts have not pointed to any defect with the product, and the undisputed evidence is that the product has performed as intended. (ROA ___; Miller Deposition P. 611, Ln 5-7).

ARGUMENT

I. BECAUSE APPELLANT HAS NOT SUSTAINED PROPERTY DAMAGE OR INJURY FROM THE NON-IMPACT GLASS, THE APPELLANT'S CLAIMS FAIL AS A MATTER OF LAW.

Appellant has sued EFCO and WCJ for negligence, breach of warranties, and strict liability. To recover, each of these causes of action require the Appellant to prove that the product caused property damage or injury. Because the EFCO window and door products have not caused property damage or injury, the claims against EFCO and WCJ are without merit.

To recover on its negligence action, the Appellant must prove (1) a duty of care owed to the Appellant by EFCO and WCJ; (2) a breach of the duty by a negligent act or omission by EFCO and WCJ; and (3) **damages proximately resulting from the breach**. Crolley v. Hutchins, 300 S.C. 355, 356, 387 S.E.2d 716, 717 (S.C. Ct. App. 1989)(emphasis added). Likewise, a strict liability claim under section 15-73-20 of the South Carolina Code requires the Appellant to prove "physical harm caused to the ultimate user or consumer, or to his property. . ." S.C. Code Ann § 15-73-20. Finally,

Appellant cannot recover on its warranty claims without proving the alleged product defects caused property damage or injury. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 627 S.E.2d 733 (S.C. 2006).

Wilson is remarkably similar to this case. In Wilson, the Supreme Court of South Carolina affirmed the granting of summary judgment because the plaintiff could not prove that allegedly defectively designed and assembled mobile homes had caused or suffered any damages from high wind events. Id. The Wilson mobile home owner plaintiffs asserted claims for negligence, negligence per se, breach of express warranty, breach of implied warranty of workmanlike service, breach of implied warranty of merchantability, fraud and misrepresentation, negligent misrepresentation, and fraudulent concealment. Id. at 656. On appeal, the plaintiffs dropped the negligence claims and argued that they could recover on the warranty and fraud claims despite the fact that the owners' property had not been damaged or injured. Id. The Supreme Court of South Carolina disagreed and found that the lack of damages meant that the mobile homes had performed satisfactorily and were, in fact, merchantable. Id. at 658. Accordingly, the court affirmed the granting of summary judgment by the trial judge. Id.

As in Wilson, the Appellant, through its expert, has admitted that the non-impact rated EFCO windows and doors are performing and have not caused any damage to the Shipwatch buildings. The following exchanges took place during a deposition of Appellant's expert Jeff Miller:

Q. The fact that buildings A and B have non-impact windows and doors installed in the buildings, is the fact that those windows and doors are non-impact causing any damage to the building?

A In and of itself, I would say no.

(ROA __; Miller Deposition P. 609, Ln 24 – P. 610, Ln 3)

Q. Did the presence of non-impact glass in those windows and doors lead to any damage to buildings C and D?

A No damage, fortunately, because we had no hurricane blow through there. But no.

(ROA __; Miller Deposition P. 610, Ln 9-13).

Like in Wilson, the failure to prove damages caused by the allegedly defective product is fatal to Appellant's claims.[2] Accordingly, the claims are without merit and summary judgment as to Respondents EFCO and WCJ should be affirmed on this ground.

II. NO EVIDENCE OF A DEFECT WITH THE PRODUCTS HAS BEEN PRESENTED BY APPELLANT

Appellant cannot recover on any of its product liability claims against EFCO and WCJ unless it can prove that the EFCO products were defective in some way. The strict liability claim requires Appellant to prove that the product was sold in a defective condition and is unreasonably dangerous. Similarly, a claim for breach of implied warranty of merchantability requires the Appellant to prove that the products were not "fit for the ordinary purposes for which [they] are used" and that they would not "pass without objection in the trade under the contract description." S.C. Code Ann § 36-2-314.

[2] It should be pointed out that Plaintiff had already removed and replaced the EFCO products from buildings C and D at the time of Mr. Miller's deposition. The removal and replacement of the EFCO products from buildings A and B are underway and will be accomplished by the time this matter is considered on appeal.

Appellant has presented no evidence that the product is defective or that it is unreasonably dangerous. In fact, the undisputed evidence is that the EFCO products are performing as intended. Mr. Miller, Appellant's expert, testified as follows concerning defects with the EFCO product:

Q Do the units themselves exhibit any evidence of a defect?

A None that I recall.

(ROA __; Miller Deposition, P. 611, Ln 5-7).

As indicated above, the failure to prove damages resulting from an allegedly defective product is evidence that a product is merchantable and not defective. Wilson, 367 S.C. at 658. Because no evidence of a defective product has been presented by Appellant, the claims against EFCO and WCJ fail. Consequently, the dismissal of Appellant's claims against Respondents EFCO and WCJ should be affirmed.

III. EFCO AND WCJ HAVE NO LIABILITY FOR SELLING SOPHISTICATED CUSTOMERS EXACTLY WHAT WAS ORDERED

Charleston Glass, WCJ's customer, purchased exactly what it intended to purchase, non-impact rated window and door products from EFCO. The documents to the transaction establish that the window installation contractor that has been in business since the 1960s knew what it was purchasing. (ROA ___; Deposition Exhibit 132 & Affidavit of Johnston). The records further reflect that CCS knew it was obtaining non-impact rated products, and that the Appellant, no later than September 6, 2007, knew that it was receiving non-impact rated products. (ROA __; Deposition Exhibits 103 & 134, & 139). Charleston Glass, CCS, nor Appellant ever paid for impact rated windows and doors. (ROA ___; Jernigan Deposition P. 479, Ln 18-Pg. 480, Ln 10). EFCO and WCJ

willingly would have supplied impact rated products had they been purchased. (ROA ___; Affidavit of Johnston ¶ 20).

In furtherance of its negligence claim, Appellant seeks to invent a duty that it alleges WCJ and EFCO had when selling and/or manufacturing window and door products for the Shipwatch project. Through its expert Peter Sherratt, Appellant appears prepared to argue that WCJ, as a product distributor, has a duty to advise its customers on the requirements and conditions of the building codes that might be applied by the jurisdiction where the construction is taking place as it relates to window and door building components. While the testimony is less clear against the product manufacturer, EFCO, Appellant's expert, Peter Sherratt, appears prepared to offer the same opinion. Therefore, Appellant appears to argue that the terms and conditions of the commercial contract between WCJ and Charleston Glass are meaningless.

The terms of the agreement between WCJ and Charleston Glass, however, are of paramount importance. Both companies are commercially sophisticated entities. Charleston Glass had the option to order impact glass or non-impact glass from WCJ. It unequivocally made the informed decision to purchase non-impact rated glass. The only duty WCJ owed was to provide its customer what it promised to provide through the order agreement. Appellant's theory would require a vendor of a product to essentially become a building designer and dictate what products should and should not be used in the construction of buildings. It is a novel theory with no precedent in the law or in the construction materials industry.

Appellant's theory is an even greater stretch when applied to the manufacturer, EFCO. EFCO did not have direct contact with Charleston Glass concerning the purchase

of products or the location of the project. (ROA ___; Affidavit of Johnston ¶ 6 & 7). WCJ simply informed EFCO as to what Charleston Glass intended to purchase. (ROA ___; Affidavit of Johnston). In return, EFCO fabricated the products requested and supplied them to Charleston Glass. (ROA ___; Affidavit of Johnston).

While novel, Appellant's theory is akin to a "failure to warn" negligence claim. Products liability law is clear that there is no duty to warn of dangers when the customer purchasing the products in question has equal or greater knowledge about the dangers of the products than the supplier or manufacturer. *See* Lawing v. Trinity Mfg. Inc., 406 S.C. 13, 749 S.E.2d 126 (S.C. Ct. App. 2013)(confirming that the sophisticated user doctrine is the law of South Carolina). Because Charleston Glass was a sophisticated glass contractor and had knowledge of the performance limitations of the glass contained within the window and door products it chose to purchase, WCJ had no duty to warn or to advise Charleston Glass or Appellant concerning any potential dangers associated with the non-impact glass that was selected for purchase.

Because the law does not support Appellant's theory of the duty it alleges EFCO and WCJ owed in regards to the sale of non- impact rated windows and doors, Appellant's claim for negligence fails and the dismissal of Appellant's claims against Respondents EFCO and WCJ should be affirmed.

IV. EFCO AND WCJ DISCLAIMED ALL IMPLIED WARRANTIES

The warranty claims also fail because EFCO and WCJ disclaimed all implied warranties as part of the sale of the commercial windows and sliding glass door products to Charleston Glass. (ROA ___; Affidavit of Johnston, Exhibits 6 and 7). The first page of the limited warranty document contains a paragraph that states "[t]here are no

warranties which extend beyond the description on the face hereof," and the final sentence in the document states that "[t]here are no other expressed or implied warranties from EFCO." (ROA ___; Affidavit of Johnston, Exhibits 6 and 7). The only warranty made in the limited warranty document is a limited express warranty. (ROA ___; Affidavit of Johnston, Exhibits 6 and 7). Appellant's implied warranty claims are barred by the clear disclaimers of warranties that are clearly communicated in the limited warranty document.

Appellant has asserted claims against EFCO and WCJ alleging that they breached implied warranties of merchantability and fitness for a particular purpose. The general rule is "a warranty that [] goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." S.C. Code Ann. § 36-2-314(1) (1976). Implied warranties, however, may be disclaimed by the seller's language. S.C. Code Ann. § 36-2-316 (1976). Under section 36-2-316(2) of the South Carolina Code, the implied warranty of merchantability is disclaimed where the purported disclaimer (1) mentions "merchantability", (2) is conspicuous if in writing, and (3) is specific so as not to create an ambiguity in the contract. S.C. Code Ann. § 36-2-316(2).

EFCO and WCJ specifically disclaimed the implied warranty of merchantability and fitness for a particular purpose when it sold products to Charleston Glass for use in the Appellant's project by including the written disclaimers in the limited warranty document in such a way that the disclaimer referenced the word "merchantability" and the customer was aware of the disclaimers. Using bold font in a paragraph in the middle of the first page of the document and set apart from other language in regular font, EFCO and WCJ disclaimed the implied warranties of merchantability and fitness for a particular

purpose by stating: "**EFCO CORPORATION excludes any implied warranties of merchantability and fitness for a particular purpose.**"

The disclaimer made by EFCO and WCJ specifically states the word "merchantability" and thereby satisfies the first requirement of section 36-2-316(2) of the South Carolina Code. Likewise, the disclaimer meets the second and third elements of section 36-2-316(2), as it was conspicuous and not likely to create an ambiguity. Language is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. S.C. Code Ann. § 36-1-201(10). It must be in a distinctive color or type. Id. ("Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."). Factors to be considered in determining whether a written disclaimer is conspicuous for purposes of § 36-2-316(2) include the following:

> (1) the color of print in which the purported disclaimer appears; (2) the style of print in which the disclaimer is written; (3) the size of the disclaiming language, particularly in relation to other print in the document; (4) the location of the disclaimer in the contract; (5) the appearance of the term "merchantability" with respect to color, style, size, and type of print in the disclaimer clause; and (6) the status of the parties contesting the validity of the disclaimer, namely whether they be consumers or commercially sophisticated entities.

Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp.1027, 1038 (D.S.C. 1993). The factors listed above are not individually dispositive nor are they exhaustive of all the criteria that can be used in examining a disclaimer. Id.

EFCO and WCJ's disclaimer of the implied warranty of merchantability and fitness for a particular purpose meets the conspicuous requirement of section 36-2-316(2)

because it is set forth as a separate paragraph in the middle of the first page of the document and styled in bold font where the remainder of the language on the page is not in bold font. Accordingly, Appellant's claims for relief under any implied warranty theory fails.

V. APPELLANT CANNOT SUCCEED ON A CLAIM FOR BREACH OF WARRANTY FOR A PARTICULAR PURPOSE BECAUSE WCJ AND EFCO DID NOT RECOMMEND OR SUGGEST THE USE OF PRODUCTS WITH NON-IMPACT GLASS

Where implied warranties are not disclaimed, section 36-2-315 of the South Carolina Code creates an implied warranty for situations where the buyer relies on the skill and judgment of a seller to furnish suitable goods. S.C. Code Ann § 36-2-315. Although EFCO and WCJ effectively disclaimed any warranty of fitness for a particular purpose, Appellant's claim also fails because it has not presented any evidence to suggest that Charleston Glass was relying on WCJ or EFCO to furnish the "suitable goods" for the Shipwatch project. The only evidence is that Charleston Glass knowingly and intentionally purchased non-impact rated windows and doors instead of impact rated products offered for sale by WCJ and EFCO because it believed that non-impact rated products were acceptable for the projects.

VI. IF APPELLANT IS PERMITTED TO STATE CLAIMS AGAINST EFCO AND WCJ FOR THE PROVISION OF NON-IMPACT GLASS PRODUCTS, THE CLAIMS SHOULD NEVERTHELESS BE DISMISSED BECAUSE THE APPELLANT FAILED TO TIMELY ASSERT ITS CLAIMS

If the Court finds that Appellant has stated a cause of action against EFCO and WCJ for providing non-impact rated products for the project, the next inquiry is when those causes of action accrued. As stated more completely above, Appellant's experts

admit that the products are performing as intended and have not caused any property damage to the buildings. Appellant appears to contend, though no expert has been able to give testimony on the subject, that impact glazing was required for the window and door products installed at Shipwatch between 2003-2010. It appears to be alleged that the provision of the materials without impact glass was wrongful at the time the products were supplied. Based on Appellant's theory of the case, the claims against Respondents EFCO and WCJ would therefore have accrued at the time the products were supplied to the project.

The EFCO products were supplied to the Shipwatch buildings at various times between 2003 and 2010. The Shipwatch Board of Directors "chose the doors they wanted and approved the installation in 2002." (ROA ___; Deposition Exhibit 134). In approximately 2004, 72 EFCO sliding glass doors were installed in the buildings. (ROA ___; Jernigan Depo. P. 97, Ln 17-20). In performing subsequent door replacements between 2004 and 2010, Appellant desired that the new doors match the doors installed in 2004. (ROA ___; Jernigan Deposition P. 451, Ln 1- P. 454, Ln 19 & Deposition Exhibit 134).

Under South Carolina law, a cause of action generally accrues at "'the moment the defendant breaches a duty owed to the plaintiff.'" Barr v. City of Rock Hill, 330 S.C. 640, 644, 500 S.E.2d 157, 159-60 (Ct. App. 1998) (quoting Grooms v. Medical Soc'y of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989)). As an exception to the general rule, the South Carolina courts have adopted the "discovery rule", allowing for the tolling of the statute of limitations until the Plaintiff either knows or should know, by the exercise of reasonable diligence, that a cause of action may exist. Id. Under the

discovery rule, the statute of limitations begins to run upon the discovery of facts that would lead a person exercising reasonable diligence to discover that a claim might exist against another. Id. The date of discovery is to be determined by an objective analysis of the facts. Id. Even under the discovery rule, the statute of limitations starts to run before the injured party has sought counsel or developed "a full blown theory of recovery." Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (S.C. 2005).

Respondents EFCO and WCJ do not believe any claims against Respondents EFCO and WCJ exist under the facts of this case, and thus, the statute of limitations never began to run. Appellant, however, seems to contend that its claims against Respondents EFCO and WCJ accrued when non-impact rated products were supplied to the project. In other words, it was "injured" when Respondents EFCO and WCJ supplied non-impact rated products. If Appellant is correct that it has been injured, the statute of limitations for any potential claim against Respondents EFCO and WCJ began to run when non-impact rated products were supplied to the project.

From the time the new EFCO products were installed at Shipwatch in 2003 and 2004, Appellant had the ability to discover whether the EFCO products contained impact glass by asking questions of contractors, engineers, and others about the products provided. Likewise, it could have reviewed or asked for product literature on the products supplied. The products were visible, and the characteristics of the glass, in terms of impact rating, were not hidden in any way. There is no reason to use the discovery rule to delay the running of the statute of limitations in this case.

If the discovery rule is applied to delay the running of the statute of limitations, Appellant knew, or should have known, no later than September 6, 2007, that it had and

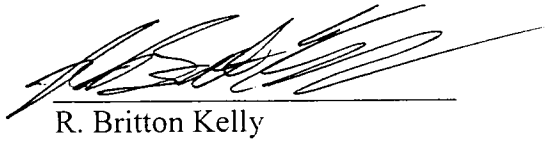
was going to receive EFCO products that did not contain impact rated glass. (ROA ___, Deposition Exhibit 103). On that date, CCS submitted a proposal to Appellant for the installation of new EFCO sliding glass doors. (ROA ___, Deposition Exhibit 103). The proposal specifically informed Appellant that CCS proposed to install sliding glass doors that did not contain impact resistant glass. (ROA___; Deposition Exhibit 103). The proposal was accepted by Appellant. (ROA___; Jernigan Deposition P. 452). Appellant had the opportunity at that time to discuss the significance of impact glass with the contractors, the engineer for the project, and others. Appellant elected to purchase doors that matched what had previously been selected in 2002. (ROA ___; Jernigan Deposition P. 451, Ln 1- P. 454, Ln 19 & Deposition Exhibit 134). Therefore, it was on notice of the alleged "injury" from the 2003 and 2004 provision of non-impact materials no later than September 6, 2007.

Appellant has conceded in its Brief that the claims in this lawsuit are governed by the three year statute of limitations. (Appellant's Initial Brief, P. 11). Because Appellant was on notice that Respondents EFCO and WCJ were supplying non-impact rated products for the Shipwatch project by September 6, 2007, it was required to commence any lawsuit against Respondents EFCO and WCJ by September 6, 2010. If the discovery rule is not applied, the deadline for filing would have been much earlier. This lawsuit was commenced on June 13, 2012. Accordingly, Appellant's claims are time barred and were properly dismissed by the trial court on summary judgment.

CONCLUSION

For the reasons set forth above, the Court should affirm the dismissal of the claims against Respondents EFCO and WCJ for any work or materials allegedly provided to Shipwatch prior to 2010.

Respectfully submitted,



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April 30, 2015
Charleston, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-03857
Appellate Case No. 2014-002766

Shipwatch Condominium Association, Inc.; 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 Corporation; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc. FirstExteriors, 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 Corporation; W.C. Johnston Architectural Sales, Inc.; Charelston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; and Gary Freeman, individually; are the Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 30, 2015 a true and correct copy of *Respondents EFCO Corporation and W.C. Johnston Architectural Sales, Inc.'s Designation of Matter and Initial Brief* was delivered via US Mail and/or electronic transmission to the following:

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