THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Case No.: 2014-CP-07-829
Appellate Case No.: 2015-001523

Jerrold France Appellant,

vs.

Club Development, Inc., John H. Barrett, individually, Barrett Investment Properties, LLC, Woodbury Properties, Inc., Taliaferro Corp., Taliaferro Corp. d/b/a Woodbury Properties, Harbour Homes, Coastal Foundation, Inc., and John Does 1-10, defendants,

Of which Club Development, Inc., John H. Barrett, individually, and Barrett Investment Properties, LLC are Respondents.

INTIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT PROPERLY RULE THAT THE EIGHT YEAR STATUTE OF REPOSE UNDER S.C. CODE ANN. 15-3-640 APPLIES?**

II. **DID THE TRIAL COURT PROPERLY RULE THAT THE INCLUSION OF STATUTORY LANGUAGE IN A BUILDING PERMIT DOES NOT CONSTITUTE A CONDITION PRECEDENT AND DOES NOT BAR RESPONDENTS FROM ASSERTING THE STATUTE OF REPOSE AS A DEFENSE?**

III. **DID THE TRIAL COURT PROPERLY RULE THAT RESPONDENTS' DEFENSE OF THE STATUTE OF REPOSE UNDER S.C. CODE ANN. 15-3-640 IS NOT EXCLUDED BY S.C. CODE ANN. 15-3-670?**

STATEMENT OF THE CASE

On April 7, 2014, Appellant filed its Summons and Complaint against Respondents, as well as Woodbury Properties, Inc., Taliferro Corp., Taliaferro Corp. d/b/a Woodbury Properties, Coastal Foundation, Inc., and John Does 1 – 10.

On June 9, 2014, defendant Coastal Foundation Inc. filed a motion to dismiss on the grounds that Appellant was barred by the statute of repose under S.C. Code Ann. 15-3-640.

On July 3, 2014, Respondents filed their motion to dismiss on the grounds that Appellant was barred by the statute of repose under S.C. Code Ann. 15-3-640.

On September 18, 2014, Judge Marvin H. Dukes, III, Special Circuit Court Judge, ruled in favor of Coastal Foundation, Inc., granting its motion to dismiss on the grounds that Appellant failed to file the subject action within the applicable statute of repose. Appellant filed a motion to reconsider the September 18, 2014 Order. That motion was denied by order of the court on December 18, 2014.

Appellant filed an appeal with this court on January 20, 2014, appealing the decision of the trial court granting the motion to dismiss dated September 18, 2014. Appellant and Coastal Foundation, Inc. reached a settlement and that appeal was dismissed without being heard.

A hearing was held on Respondents' motion to dismiss on May 13, 2015. Judge Dukes granted Respondents' motion to dismiss on June 17, 2015, on the grounds that the subject action was brought outside the relevant statute of repose. All of Appellant's causes of action were dismissed, with the exception of his claim for gross negligence.

FACTS

Appellant alleges various defects in the design and construction of his home on Hilton Head Island. One of the Respondents, Club Development, Inc., acquired the Subject Property from John Woodbury, by deed, on June 7, 2006, and subsequently sold the Subject Property to Appellant on August 16, 2006.

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

When Club Development Inc. acquired the Subject Property, construction had been completed and the certificate of occupancy issued. Appellant entered into a residential real estate purchase agreement for the purchase of the Subject Property with John Barrett, and that is the only agreement between Appellant and Respondents regarding the Subject Property. Appellant did not have any role in the construction of the house located on the Subject Property. Appellant entered into the purchase agreement on

June 8, 2006, after the issuance of the building permit, substantial completion of the home and after the issuance of the certificate of occupancy.

STANDARD OF REVIEW

A granting of a motion to dismiss under Rule 12(b)(6), SCRCP, is proper "when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. "The question is whether in the light most favorable to plaintiff, and with every doubt resolved in [his] behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). A Rule 12(b)(6) motion is "directed to the factual and legal sufficiency of the complaint..." Woodell v. Marion Sch. Dist., 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992).

A motion to dismiss premised upon Rule 12(b)(6) is converted to a motion for summary judgment if the moving party submits matters outside the pleadings to, and not excluded by, the Court. Rule 12(b), 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. Rule 56, SCRCP.

ARGUMENT

I. BECAUSE THE APPELLANT'S ACTION APPLIES TO IMPROVEMENTS TO REAL PROPERTY FOR WHICH THE CERTIFICATE OF OCCUPANCY WAS ISSUED AFTER JULY 1, 2005, THE EIGHT YEAR STATUTE OF REPOSE APPLIES, AND DISMISSAL OF APPELLANT'S ACTION BY THE TRIAL COURT WAS PROPER.

South Carolina law imposes an eight year statute of repose on actions based on defective or unsafe conditions resulting from improvements to real property. S.C. Ann. 15-3-640 (2005). In pertinent part S.C. Ann. 15-3-640 reads as follows:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
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> ...
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> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
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> ...
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> (8) an action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement; ...
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> ...
>
> A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of an owner or possessor to contract for extended liability under this section. Nothing in this section prohibits a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement or component.
>
> For any improvement to real property, a certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion of the improvement under the provisions of Section 15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion. Id.

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

that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland Cnty. Council, 350 S.C. 433, 567 S.E.2d 240 (2002). "The language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." Chem-Nuclear, 374 S.C. at 205, 648 S.E.2d at 603.

When construing statutory language, the statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Duvall v. S.C. Budget and Control Board, 377 S.C. 36, 659 S.E.2d 125 (2008). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." Floyd v. Nationwide Mutual Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2006). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000).

In the present case, Appellant's appeal is based primarily on his argument that a thirteen year statute of repose, which existed under the old version of §15-3-640, applies based on the date of substantial completion occurring prior to July 1, 2005. In taking such a position, Appellant conflates two distinct points in time. Appellant confuses the date from which the statute begins to run, the date of substantial completion, with the date which the General Assembly set as the date certain for determining which statute applies, the date the certificate of occupancy was issued. The General Assembly clearly stated that the eight year statute of repose contained in §15-3-640 would "apply to improvements to real property for which certificates of occupancy are issued by a county

or municipality ..." after July 1, 2005. Act No. 27, 2005 S.C. Acts 107. Contrary to Appellant's position that "there is no evidence in the record to suggest that the Certificate of Occupancy was not issued on August 26, 2004," the actual certificate of occupancy issued by the Town of Hilton Head explicitly states "Date CO Issued: 07/20/2005." See Certificate of Occupancy. Appellants entire argument revolves around the date of substantial completion, and Appellant is correct that all statutory and case law holds that the statute begins to run from that date. However, whether the statute is one of thirteen years or eight years, is solely determined by the date the certificate of occupancy was issued.

Acceptance of Appellant's argument that the applicable length of the statute of repose in S.C. Code Ann. 15-3-640, would require the court to ignore the specific direction of the General Assembly. The language of the act is clear, and acceptance of the Appellant's argument would "defeat the plain legislative intention." Unisun, 339 S.C. at 368, 529 S.E.2d at 283. The eight year period of repose expired on July 20, 2013, eight years after the certificate of occupancy was issued and nine months before Appellant filed his Summons and Complaint. Therefore, the Appellant's claims are barred by the statute of repose, and the decision by the trial court should be confirmed.

II. THE TRIAL COURT PROPERLY RULED THAT THE BUILDING PERMIT DOES NOT CONSTITUTE A CONDITION PRECEDENT AND DOES NOT BAR RESPONDENTS FROM ASSERTING THE STATUTE OF REPOSE AS A DEFENSE.

Appellant claims that a condition precedent to asserting a defense under the statute of repose contained in S.C. Code Ann. 15-3-640 is that the certain language must be placed in the building permit. The purpose of the notice is to put the owner on notice

of his ability to "contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement." S.C. Code Ann. 15-3-640. The statute goes on to say that "The Department of Consumer Affairs shall publish in conspicuous places the right of an owner or possessor to contract for extended liability under this section." Id. Again, in the final sentence of the paragraph at issue, the General Assembly references a person's ability to contract for extension of the time to file suit based on a defective or unsafe condition, prior to the date of substantial completion. Id.

The building permit was issued on August 25, 2003, by the Town of Hilton Head Island, nearly three years prior to Appellant acquiring the Subject Property. See Building Permit. At no time prior to substantial completion did Appellant have the ability or right to contract for an extension of liability contemplated by § 15-3-640. Further, the building permit, which is required to have the provision included, was produced by the Town of Hilton Head, not Respondents. In essence, Appellant argues that a municipality's failure to include necessary language in its building permit precludes a defense provided by state law to Respondents. This cannot be. Further, it is the responsibility of the Department of Consumer Affairs to make sure appropriate notice is published in a conspicuous location. The result of Appellant's argument would be to abolish the statute of repose as a defense for any defendant for improvements to real property made in the Town of Hilton Head, and any other similarly situated municipality in the state, during the time which this nonconforming building permit was in effect. Such an interpretation would lead to an absurd result and cannot stand. The General Assembly clearly meant this as a directive to

the local governments and the Department of Consumer Affairs, and not as a condition precedent to the protection afforded by state law.

III. BECAUSE S.C. CODE ANN. 15-3-670 DOES NOT EXCLUDE ALL PROPERTY DAMAGE CLAIMS RESULTING FROM PROLONGED EXPOSURE, THE TRIAL COURT PROPERLY APPLIED THE STATUTE OF REPOSE AND PROPERLY DISMISSED APPELLANT'S CLAIMS.

When construing statutory language, the statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Duvall, 377 S.C. at 36, 659 S.E.2d at 125 (2008). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words." Floyd, 367 S.C. at 253, 626 S.E.2d at 6 (2006). Further, "courts must presume the legislature did not intend to do a futile act." State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008). When construing the meaning of a statute, an interpretation should be avoided which would "read a provision out of a statute." Proctor v. Dept. of Health and Envtl. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 514 (Ct. App. 2006). S.C. Code Ann. 15-3-670 limits the statute of repose defense provided in S.C. Code Ann. 15-3-640. S.C. Code Ann. 15-3-670 (2012). S.C. Code Ann. 15-3-670 (C) reads as follows:

> (C) The limitation provided by Section 15-3-640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or property damage which is:
>
> > (1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and

> (2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.

Appellant asks this court to interpret § 15-3-670 in a way that would eliminate § 15-3-640. When read in context of the entire section it is clear that the General Assembly intended that the exemptions provided for in § 15-3-670(C) apply in cases involving personal injury. The final portion of Section (C)(2) is illustrative of that intent. When describing the length of exposure, the statute states that the exposure should be over a period of time and not from a "sudden and fortuitous trauma." Webster's dictionary defines trauma as "a bodily injury or shock." Webster's New World Dictionary and Thesaurus 652 (1996). By using trauma to explain the length of time necessary to accomplish this exception, it is clear the legislature intended this exception to apply to cases involving personal injury, even if those cases also involved property damage.

Additionally, acceptance of Appellant's argument would eviscerate § 15-3-640. Under Appellant's theory, any property damage resulting from exposure to any substance, element or particle over an extended period of time would be exempted from § 15-3-640, resulting in no property damage scenario that would be subject to the statute of repose. For example, weight from the structure of a house would be the result of weight imposed on a foundation by an element or particle. Therefore, all property damage resulting from settling of a foundation is not subject to the statute of repose. Moreover, water is an element and any property damage done by water intrusion would also not be subject to the protections afforded by the § 15-3-640. Pursuant to Appellant's logic, any

property damage resulting from exposure to any element on the periodic table, be it hydrogen, oxygen, or carbon, would not fall under § 15-3-640. It is hard to imagine any scenario where any kind of property damage would not fall under that definition. Therefore, to accept Appellant's interpretation would be to accept that the legislature intended a futile act in drafting § 15-3-640 and that § 15-3-670 would eliminate a section that it is only intended to limit.

While § 15-3-670 provides limitations to § 15-3-640, it does not exempt all property damage claims arising out of prolonged exposure to any element. Appellant's interpretation is too broad and should not be accepted.

CONCLUSION

Appellant's claim that the effective date of the eight year statute of repose is based on the date of substantial completion is in clear conflict with the plain language of the enabling act that changed the statute from one of thirteen years to one of eight. Additionally, Respondents' statutory rights under the statute of repose are not contingent on the inaction or failure of the Town of Hilton Head. The trial court was correct in dismissing the action based on failure to file within the statute of repose, and this court should accept Appellant's argument and construe one provision of the law in a way that would eliminate another related provision.

For the reasons stated herein this court should affirm the trial court's ruling dismissing all Appellant's causes of action, with the exception of his claim for gross negligence.

HARVEY & BATTEY, P.A.

By: _____

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Attorneys for Respondents, Club Development, Inc., John H Barrett, and Barrett Investment Properties, LLC

Beaufort, South Carolina

October 8, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Case No.: 2014-CP-07-829
Appellate Case No.: 2015-001523

Jerrold France Appellant,

vs.

Club Development, Inc., John H. Barrett, individually, Barrett Investment Properties, LLC, Woodbury Properties, Inc., Taliaferro Corp., Taliaferro Corp. d/b/a Woodbury Properties, Harbour Homes, Coastal Foundation, Inc., and John Does 1-10, defendants,

Of which Club Development, Inc., John H. Barrett, individually, and Barrett Investment Properties, LLC are Respondents.

PROOF OF SERVICE

PERSONALLY APPEARED BEFORE ME, the undersigned, who being duly sworn, states that he served Jerrold France with a copy of Respondents' Initial Brief on October 8, 2015, by depositing a copy of the same in the United States Mail, with correct postage attached thereto, to the following counsel of record:

Andrew J. Toney, Esq.
Mullen Wylie, LLC
P.O. Box 5969
Hilton Head Island, SC 29938

Kevin E. Dukes

SWORN to before me this
8th day of October, 2015

Notary Public for South Carolina
My commission expires: 10-15-15

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October 8, 2015

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11679
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Re: Jerrold France v. Club Development, Inc., John H. Barrett, individually, Barrett Investment Properties, LLC, Woodbury Properties, Inc., Taliaferro Corp., Taliaferro Corp. d/b/a Woodbury Properties, Harbour Homes, Coastal Foundation, Inc., and John Does 1-10
Appellate Case No. 2015-001523

Dear Ms. Kitchings:

Enclosed for filing with your court, please find the original and one copy of Respondents Initial Brief relative to the above, as well as Proof of Service upon Andrew J. Toney, Esquire, attorney for the Appellant. I would greatly appreciate it if you would return a clocked copy of same to me in the envelope provided.

By copy of this letter I am forwarding a copy of same to Mr. Toney.

Thank you for your attention to this matter.

Yours truly,

HARVEY & BATTEY, P.A.

Kevin E. Dukes

KED/kdb
Enclosures
cc: Andrew J. Toney, Esq.
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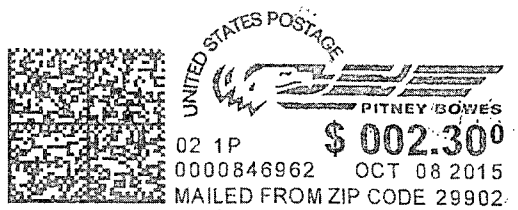

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