THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Circuit Court Judge

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SC Court of Appeals

Case No. 2015-001644

Shipwatch Condominium Association, Inc.,..Appellant,

v.

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

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,

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FINAL BRIEF OF RESPONDENT FIRST EXTERIORS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

FACTS OF THE CASE 7

ARGUMENT 9

I. APPELLANTS' ARGUMENT CHALLENGING THE TRIAL COURT'S ORDER GRANTING CAROLINA CONCRETE PARTIAL SUMMARY JUDGMENT IS NOT PRESERVED FOR REVIEW BECAUSE APPELLANTS FAILED TO FILE A MOTION TO ALTER OR AMEND THE JUDGMENT AFTER THE TRIAL COURT'S FORMAL ORDER WAS ISSUED. 9

II. THE TRIAL COURT PROPERLY APPLIED SCRCP 56(C) IN CONSIDERING CAROLINA CONCRETE'S MOTION FOR SUMMARY JUDGMENT. 11

III. PARTIAL SUMMARY JUDGMENT AGAINST APPELLANTS WAS PROPER BASED ON THE TRIAL COURT'S APPLICATION OF THE DISCOVERY RULE TO THE ACCRUAL OF APPELLANTS' CAUSE OF ACTION AGAINST CAROLINA CONCRETE. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct.App. 1998). . . .12, 13, 16, 17

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 11

Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002) 16

Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008). 11

Brown v. Sandwood Development Corp., 277 S.C. 581, 291 S.E.2d 375 (1982) 12

Cluett, Peabody & Company, Inc. v. Campbell, Rea, Hayes & Large,
492 F.Supp. 67 (Pa. 1980) 19, 20

Creech v. South Carolina Wildlife and Marine Resources Dep't.,
328 S.C. 24, 491 S.E.2d 571 (1997). 10

David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006) 12

Dean v. Ruscon Corp., 321 S.C. 360,468 S.E.2d 645(1996) 12, 13, 15, 21

Dillon County Sch. Dist. v. Lewis Sheet Metal Works, Inc.,
286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985) 13, 15, 18, 19, 20

*Graniteville Co. v. IH Servs., Inc.,*316 S.C. 146, 447 S.E.2d 226 (Ct.App.1994) 13

Harrison v. Bevilaqua, 354 S.C. 129, 580 S.E.2d 109 (2003) 19

Hooper v. Ebenezer Sr. Services and Rehab. Center,
386 S.C. 108, 687 S.E.2d 29 (2009) 17, 18

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). 10

Kelly v. Logan, Jolley & Smith, L.L.P, 383 S.C. 626, 682 S.E.2d 1 (2009) 13, 15

Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995) 13

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) 11

Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct.App. 2011) 18

Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333(1981) 13

True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997) 12

Watters v. Terminix Services, Inc., 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008). 16

Wilder Corp. v. Wilke, 330 S.C. 71, 479 S.E.2d 510 (1998) 10

Statutes

S.C. Code Ann. § 15-3-530 12

S.C. Code Ann. § 15-3-535 12

Court Rules

Rule 56(c), SCRCP 11, 12

Rule 58(a), SCRCP. 11

STATEMENT OF ISSUES ON APPEAL

I. IS APPELLANTS' ARGUMENT CHALLENGING THE TRIAL COURT'S ORDER GRANTING CAROLINA CONCRETE PARTIAL SUMMARY JUDGMENT PRESERVED FOR REVIEW, WHEN APPELLANTS FAILED TO FILE A MOTION TO ALTER OR AMEND THE JUDGMENT AFTER THE TRIAL COURT'S FORMAL ORDER WAS ISSUED?

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

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

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 Shipwatch Condominium Association filed the instant lawsuit on June 13, 2012 against Carolina Concrete, First Exteriors, and other entities involved in the renovations. (R. pp. 58 - 75). A companion case was filed against the same parties on behalf of the individual condominium owners by Oscar Mendiondo as class representative. (R. pp. 36 - 56).

On September 12, 2014, Carolina Concrete filed a motion for summary judgment based on the statute of limitations against Appellants. (R. pp. 78 - 79). A memorandum in support of this motion with attached exhibits was filed on October 27, 2014. (R. pp. 82 - 135). Appellants also filed a memorandum in opposition to Carolina Concrete's motion for summary judgment with attached exhibits. (R. pp. 136 - 190). A hearing was held by the trial court 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 Appellants presented argument in opposition. (R. p. 635, line 1 – p. 640, line 12).

The trial 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. (R. p. 639, lines 20 - 22). The trial court signed a Form 4 Order granting Carolina Concrete partial summary judgment, which was filed on October 30, 2014. (R. p. 1). On November 11, 2014, prior to Carolina Concrete's submission of a proposed formal order granting them partial summary judgment, Appellants filed a motion for reconsideration of the Order granting Carolina Concrete Partial Summary Judgment. (R. pp. 191 - 194). On November 21, 2014, Appellants 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. (R. pp. 196 - 205). On December 1, 2014, the Court issued an Order denying Appellants' Motion for Reconsideration. (R. p. 2).

Appellants filed Notices of Appeal in each case on December 30, 2014, appealing the Order granting summary judgment in part to Carolina Concrete. (R. p. 290). Appellants filed Amended Notices of Appeal on January 8, 2015. (R. p. 291).

On July 2, 2015, the Court of Appeals dismissed the appeals on the grounds that the order from which the appeals were taken was not a final judgment upon which an appeal may be taken because the trial court's form order stated that a formal order was to follow. (R. pp. 7 – 9). The Court of Appeals issued a Remittitur on July 2, 2015. (R. p. 11).

Following the cases being remitted to the trial court, the trial court conducted a status conference regarding the cases on July 27, 2015 after which it entered a formal order granting partial summary judgment to Carolina Concrete. (R. pp. 19 - 32). Without

filing any motion for reconsideration of the trial court's formal order granting Carolina Concrete partial summary judgment, Appellants filed a Notice of Appeal on July 28, 2015. (R. pp. 511 - 514; R. pp. 529 - 535). Although the order from which this appeal stems grants partial summary judgment to only Carolina Concrete, the Appellants identified all defendants as Respondents to the appeal.[1] The Court of Appeals consolidated the appeals in the above-captioned cases on August 14, 2015. (R. pp. 33 - 34). Appellants filed their initial brief on August 27, 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. Appellants 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 Appellants 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). Appellants 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.

[1] First Exteriors disagrees that it is a proper party to this appeal. First Exteriors has filed its own motion for summary judgment, which is stayed pending this appeal. First Exteriors has filed this brief out of an abundance of caution to the extent necessary to protect the record and ensure no findings by this Court adversely affect First Exteriors. First Exteriors does not waive any right to a hearing or decision on its pending motion for summary judgment by participating in this appeal.

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

- February 2005- Shipwatch Property Manager Linda Jernigan testified that leaking sliding glass doors had been a problem at Shipwatch since she returned to manage the property in February 2005. (R. p. 653, lines 8 – 18; R. p. 654, lines 9 – 12).
- April 1, 2005 – Shipwatch Board of Directors Meeting Minutes noted leaks continued at some sliding glass doors, including the fifth floor penthouse doors. (R. pp. 762 - 763).
- July 10, 2006 - Robert Sisnroy, P.E. issued a report to Appellants identifying chronic water intrusion at the sliding glass doors. (R. pp. 798 - 802).
- 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. (R. pp. 826 - 827).
- 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. (R. pp. 793 - 794).
- May 9, 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. (R. pp. 837 - 838).
- 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. (R. pp. 803 - 825).

- February 5, 2009 – Carolina Concrete Inspection Report to Appellants stated that leaks continued to be a problem at and around the old sliding glass doors on the beachfront and golf course side of the buildings. Carolina Concrete notes that they have repeatedly shown the property manager and numerous board members the leaks, and they are sure that damage is occurring in the new metal stud walls with the DEFS. (R. pp. 839 - 841).

Despite repeated notice of issues with the construction of the Project, Appellants elected not to investigate the extent of the problems or to remove and replace all of the failed building components at that time. Appellants did not engage any engineers to investigate the Project until Sutton Kennerly & Associates, Inc. (hereinafter "SKA") was hired in January 2012. Appellants delayed filing suit until June 13, 2012 or five years and 11 months after Robert Sisnroy, P.E. issued a report to Appellants identifying chronic water intrusion at the sliding glass doors.

ARGUMENT

I. APPELLANTS' ARGUMENT CHALLENGING THE TRIAL COURT'S ORDER GRANTING CAROLINA CONCRETE PARTIAL SUMMARY JUDGMENT IS NOT PRESERVED FOR REVIEW BECAUSE APPELLANTS FAILED TO FILE A MOTION TO ALTER OR AMEND THE JUDGMENT AFTER THE TRIAL COURT'S FORMAL ORDER WAS ISSUED.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) citing *Creech v. South Carolina Wildlife and Marine Resources Dep't.*, 328 S.C. 24, 491 S.E.2d 571 (1997). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Id.* "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.*

Appellants did not file a motion to alter or amend the judgment after the trial court issued its formal order granting partial summary judgment to Carolina Concrete. Although prior to the previous appeal in this case Appellants filed a motion for reconsideration, this was done before the formal order granting partial summary judgment to Carolina Concrete was issued. In the Order of the Court of Appeals dismissing the previous appeal in this case, Chief Judge John Few stated that Appellants' motion for reconsideration was premature because the form order was not a "judgment" under the rules of civil procedure. (R. p. 8). "An oral order of the court is not final and

binding until reduced to writing, signed by the judge and delivered for recordation." *Brailsford v. Brailsford*, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008). SCRCP Rule 58(a) provides in part that "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record." Rule 58(a), SCRCP.

By not filing a motion to alter or amend the judgment before this appeal, the Appellants did not give the trial court the opportunity to fully consider their arguments in opposition to Carolina Concrete's motion for partial summary judgment. Appellants state in their brief that the trial court's order mischaracterizes Plaintiffs' claims, yet there was no motion to alter or amend filed following the written order which would give the trial court the opportunity to fully consider Appellants' arguments in its ruling. Therefore, the issue of whether the trial court erred in granting Carolina Concrete partial summary judgment is not preserved for review.

II. 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, 321 (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).

Appellants allege 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 Appellants discovered their legal claim against Respondents. This argument lacks merit. The applicable statute of limitations for Appellants' 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, 4-5 (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 v. City of Rock Hill*, 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 v. Ruscon Corp.,* 321 S.C. 360, 364, 468 S.E.2d 645, 647 (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. 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, 465 S.E.2d 88, 90 (1995).

"Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P,* 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." *Id.*

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

- February 2005- Shipwatch Property Manager Linda Jernigan testified that leaking sliding glass doors had been a problem at Shipwatch since she returned to manage the property in February 2005. (R. p. 653, lines 8 – 18; R. p. 654, lines 9 – 12).
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Appellants' knowledge of issues with the construction of the Project placed Appellants on notice that it may have a claim against another party. Whether or not Appellants 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). Appellants acknowledge in their 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 argue that this does not constitute knowledge for purposes of triggering the statute of limitations to begin running. (Appellants' Brief at p. 8). 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, 635-636, 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, 500 S.E.2d 157 (Ct. App. 1998).

Here, similarly the Appellants were repeatedly put on notice that they had problems with the buildings. The Record on Appeal is replete with evidence that Appellants were 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. Appellants even acknowledge in their brief and through testimony of Shipwatch homeowners awareness of issues with the EIFS and sliding glass doors. (Appellants' Initial Brief p. 8; R. p. 694, line 24 – p. 695, line 17; R. p. 708, lines 1 - 19; R. p. 653, lines 8 – 23). However, Appellants failed to investigate these issues further to determine the extent of the damage. Appellants waited until January 2012 to engage the services of SKA to investigate the Project. Appellants have failed to act with reasonable diligence to determine the extent of the problems with the Project and allowed the statute of limitations to expire.

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

A. The Statute of Limitations expired prior to the filing of this action by Appellants 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); *See 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.*

Appellants focus 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). Further, there is no evidence of First Exteriors taking any action which would toll the statute of limitations as to claims against it. 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 23, 2008, Appellants reached out to Carolina Concrete and requested that they "repair the failed claddings in accordance with the manufacturer's installation requirements and warranty requirements." (R. p. 250). At that point it was clear that Appellants were on notice that the DEFS was allegedly failing. Carolina Concrete did not reach out to Appellants and provide assurances as the architect did in *Dillon County School*, but instead Appellants 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.

Appellants also argue 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 Appellants. 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 Appellants for waterproofing repairs, application of traffic coating, and chimney repairs (R. pp. 845 - 851).
- September 22, 2003 – Carolina Concrete enters into contract with Appellants 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. (R. pp. 852 – 859; R. pp. 842 - 843).
- February 2, 2005 – Work at Shipwatch by Carolina Concrete and subcontractors ends and final pay application submitted. (R. pp. 835 – 836).
- December 19, 2008 – Carolina Concrete enters into contract for the removal and replacement of 16 EFCO doors (R. pp. 860 - 866).
- September 1, 2010 – Removal of EIFS on the ocean side of buildings A and B begins. (R. pp. 869 – 879).

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. (R. pp. 803 - 825; R. pp. 867 – 868; R. pp. 869 – 879). Appellants are not entitled to equitable tolling of the statute of limitations based on a continuation of repair because separate contracts were entered into with Appellants for each particular scope of work completed and the repairs performed on the project were not continuous.

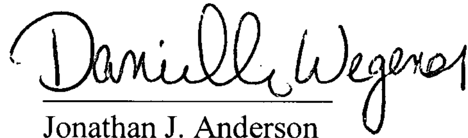
Appellants cite the case of *Dean v. Ruscon Corp.* for the proposition that the statute of limitations should be tolled based upon the investigations performed by SKA. However, similar to the plaintiff in *Dean*, Appellants failed to act with reasonable diligence. Appellants did not hire the SKA engineers to investigate the property until several years after Appellants were 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. Appellants' failure to act with reasonable diligence in pursuing a claim is no reason to toll the statute of limitations until Appellants 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.

Signature appears on following page.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Circuit Court Judge

RECEIVED
JAN 04 2016
SC Court of Appeals

Case No. 2015-001644

Shipwatch Condominium Association, Inc.,..Appellant,

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent First Exteriors, LLC complies with Rule 211(b) of the SCACR

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December 21, 2015