

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

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Marvin H. Dukes, III, Special Circuit Court Judge

DEC 21 2015

SC Court of Appeals

Case No. 2015-001523

JERROLD FRANCE.....Appellant,

v.

CLUB DEVELOPMENT, INC., JOHN H. BARRETT, individually, BARRETT INVESTMENT PROPERTIES, LLC, WOODBURY PROPERTIES, INC., TALIAFERRO CORP., TALIAFERRO CORP. d/b/a WOODBURY PROPERTIES, Coastal Foundation, Inc., Harbor Homes, and John Does 1-10, Defendants,

Of Which Club Development, Inc., John Barrett, individually, and Barrett Investment Properties, LLC are the Respondents.

FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

- I. **Genuine Issues of Material Fact Were Presented to the Court as to When The Certificate of Occupancy was Issued, Thus Creating an Issue of Fact as to Whether the 13-Year or 8-Year Statute of Repose Applies to Appellant's Claims, and, as such, Summary Judgment Was Not Appropriate**
- II. **Respondents Failed to Meet a Condition Precedent of the Statute of Repose, Barring Them From Asserting the Statute of Repose as a Bar to Appellant's Claims, and, Therefore, Summary Judgment Was Not Appropriate**
- III. **Appellant's Claims Fall Within S.C. Code Ann. § 15-3-670, Which Prohibits Respondents From Claiming the Statute of Repose as a Bar to Appellant's Claims, And, As Such, Summary Judgment was Not Appropriate**

## STATEMENT OF THE CASE

On April 7, 2014, Appellant filed his summons and complaint against Club Development, Inc., John Barrett, individually, and Barrett Investment Properties, LLC, (“Respondents”), to recover on his claims of construction deficiencies related to the original construction of Appellant's house (R. pp. 12-26).

On July 3, 2014, Respondents replied to Appellant's complaint by filing a Motion to Dismiss. Respondents argued in their motion that the statute of repose they believe applies to Appellant's complaint bars Appellant's claims as to Respondents. Respondents did not file any affidavit in support of their motion, but rather relied entirely upon the Certificate of Occupancy and relevant statutes.

In response to Respondents’ motion to dismiss, Appellant presented his memorandum in opposition to Respondents’ motion, and argued that by the face of the complaint the 13-year statute of repose was applicable to Appellant's cause of action thus

permitting Appellant's claims, that even if the court accepted the purported certificate of occupancy, that had not been placed into evidence, the 13-year statute of repose was applicable to Appellant's causes action thus permitting Appellant's claims, that a question of fact existed as to when the certificate of occupancy was issued, that Respondents failed to meet a condition precedent of the statute of repose thus preventing them from claiming the statute of repose as a bar to Appellant's claims, that S.C. Code § 15-3-670 prohibits Respondents from claiming the statute of repose as a bar to Appellant's claims, and presented the affidavit of Theodore Padgett (R. pp. 27-51).

The Court held oral argument on Respondents' motion to dismiss on May 13, 2015, and issued its Order Granting Respondents' Motion to Dismiss on June 17, 2015 (R. pp. 1-11).

#### **FACTS**

Appellant's home located at 9 Whistling Swan Rd., Sea Pines Plantation, Hilton Head Island, South Carolina ("Subject House") has design and construction deficiencies, which Appellant discovered during the spring of 2014. Respondents acted as the developer of the Subject House. The building permit for the Subject House was issued on August 25, 2003 (R. p. 53). A question of fact exists as to when the certificate of occupancy and substantial completion was accomplished, as conflicting dates are entered throughout the Certificate of Occupancy (R. p. 52).

Around March 28, 2014, Theodore Padgett, PE, PC, a licensed professional engineer, inspected the Subject House at the request of Appellant (R. pp. 54-56). Mr. Padgett inspected the Subject House due to the Appellant's discovery of numerous floor deflections and interior wall cracks (R. p. 57). Mr. Padgett was charged by Appellant

with presenting his opinion on the cause of the floor deflections/wall cracks and formulating a remediation plan of the same (R. p. 58).

Mr. Padgett opines that the causes of the deficiencies at the Subject House are the overloading of the floor joists as a result of the improper joist assembly and design (R. p. 58). The discovery of the improper construction and design of the floor joists was not discoverable by Appellant due to the hidden condition of the assembly behind exterior cladding and interior sheet rock and drywall (R. p. 58). Additionally, Appellant had no reason to investigate the hidden conditions of the assembly until the manifestation of deficiencies, which occurred over a period of time due to the Subject House's exposure to the elements of wind, water, and temperature, all of which damaged the Subject House (R. p. 58).

Appellant alleges that Respondents are responsible for the remediation costs due to Respondents' negligence, breach of warranties, and gross negligence.

## ARGUMENT

### **I. Genuine Issues of Material Fact Were Presented to the Court as to When The Certificate of Occupancy was Issued, Thus Creating an Issue of Fact as to Whether the 13-Year or 8-Year Statute of Repose Applies to Appellant's Claims, and, as such, Summary Judgment Was Not Appropriate**

Since summary judgment is an extreme remedy, and deprives a party of his right to trial, the remedy should be cautiously invoked. Summary judgment is appropriate only when it is clear that there is no genuine issue of material fact at issue and the moving party is entitled to judgment as a matter of law. Rule 56(c) SCRPC; Baughman v. American Tel. & Tel. Col., 306 S.C. 101, 401 S.E.2d 537 (1991); Baird v. City of Charleston, 333 S.C. 519, 511 S.E.2d 69 (1999). In determining whether any triable issue

of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). In fact, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting the determination of a question of fact by the jury. Tanner v. Florence County, 333 S.C. 549, 511 S.E.2d 369 (Ct.App. 1999).

Genuine issues of material fact exist which precluded the court from granting Respondents' motion to dismiss.

Paragraph 18 of Appellant's complaint alleges as follows: "On August 26, 2004 substantial completion of construction of the Subject Property was reached (R. p. 15)." On August 26, 2004, S.C. Code Section 15-3-640 read, in part, "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 thirteen years after substantial completion of such an improvement..." See S.C. Code § 15-3-640 (1986). S.C. Code Section 15-3-640 mandates a thirteen year statute of repose for the allegations alleged in the complaint. See S.C. § 15-3-640 (1986). By the allegations of the complaint the statute of repose began to run on August 26, 2004, and, therefore, Appellant's complaint had to be filed prior to August 26, 2017 in order for it to not be barred by the statute of repose. Appellant's complaint was filed on April 7, 2014, more than three years prior to the expiration of the statute of repose. By the face of the complaint, it was filed within the prescribed 13-year statute of repose, and, therefore, the statute of repose is not a bar to Appellant's claims. See Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

The only evidence presented to the court of the date of substantial completion for the Subject House purports to show that substantial completion occurred on August 26, 2004 (R. p. 52). No affidavit of a building code official or affidavit of any other witness contradicts that substantial completion occurred on August 26, 2004. Because the only evidence before the court showed that the date of substantial completion for the Subject House was August 26, 2004, the applicable statute of repose began to run on August 26, 2004, when the 13-year statute of repose applied.

As stated above, the 13-year statute of repose was in effect on August 26, 2004, when substantial completion was reached on the Subject House. S.C. Code §15-3-640 was amended on July 1, 2005 to change the statute of repose from 13-years to 8-years. 2005 Act No. 27, § 2 became effective on July 1, 2005. The statute in effect at the time the Subject House was substantially completed states that 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 thirteen years after *substantial completion* of such an improvement..." See S.C. Code § 15-3-640 (1986). The new 8-year statute of repose contains the same language as the 13-year statute as to when the statute of repose begins to accrue, stating that "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..." See S.C. Code Ann. §15-3-640 (1976 Rev. 2005). The new statute adds a provision that "a certificate of occupancy...shall constitute proof of substantial completion of the improvement under the provisions of Section 15-3-630..." See Id. The new statute went into effect on July 1, 2005, almost one-year after substantial completion of the Subject Property.

"Substantial Completion" of the Subject House is the controlling date as to when the statute of repose begins to run. On August 26, 2004 substantial completion was reached on the Subject House, and the statute in effect at that time was the 13-year statute, meaning that Appellant had until August 26, 2017 to file the subject lawsuit. When the new 8-year statute was enacted the statute of repose had already been running for claims related to construction of the Subject House for almost a year. There is no evidence in the record to suggest that the Certificate of Occupancy was not issued on August 26, 2004, listing a date of substantial completion, but not listing a date for "CO" issuance.

"Substantial completion" is defined in S.C. Code Ann. § 15-3-630 (1976) as "that degree of completion of a project, improvement, or a specified area or portion thereof ... upon attainment of which the owner can use the same for the purpose for which it was intended...." South Carolina common law holds that the statute of repose begins to run when substantial completion of the work is achieved, not when a certificate of occupancy is issued. See Ocean Winds Corp. of Johns Island v. Lane, 347 S.C. 416 (2001). In Ocean Winds Corp. the Supreme Court held that where the claims were as to the window installer the controlling date for determining when the statute of repose began to run was when the windows were finally installed and could be put to their intended use, not when the certificate of occupancy was issued.

"[S]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." See Langley v. Pierce,

313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) (“A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation.”). Statutory provisions should be given a *reasonable and practical* construction consistent with the purpose and policy expressed in the statute. See Ocean Winds Corp. of Johns Island v. Lane, et al, 347 S.C. 416, quoting Folk v. Thomas, 344 S.C. 77, 81, 543 S.E.2d 556, 558 (2001). It is well settled, however, “that statutes should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” Abraham v. Palmetto Unified School District No. 1, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), *citing* Matter of Decker, 322 S.C. 215, 471 S.E.2d 462, 463 (1995).

The two statutes at issue in this case contain reflective language as to when the statute of repose begins to accrue, specifically upon *substantial completion to the improvement to real property*. Case law on the subject holds that substantial completion is the triggering event, not the issuance of the Certificate of Occupancy. The only evidence in the record indicates that Substantial Completion of the Subject House was reached on August 26, 2004, which is when the 13-year statute of repose controlled. Respondent's assertion that the Certificate of Occupancy controls which statute of repose applies is contrary to the clear, reasonable and practical construction of the 13-year statute of repose, which existed when the Subject House reached substantial completion. To claim otherwise would result in the 13-year statute of repose being in effect from August 26, 2004 until June 30, 2005, and, then, on July 1, 2005, the 13-year statute of repose being reduced to 8-years, presumably, as Respondents assert, also beginning to run on August 26, 2004. This result would be in violation of reasonable and practical

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II. Respondents Failed to Meet a Condition Precedent of the Statute of Repose, Barring Them From Asserting the Statute of Repose as a Bar to Appellant's Claims, and, Therefore, Summary Judgment Was Not Appropriate

S.C. Code Section 15-3-640 (1986) that was in effect at the time substantial completion was reached on the Subject House, states in part "[a]ny building permit for the construction of an improvement to real property *shall* 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 the thirteen years after substantial completion of the improvement."

The statute of repose that Respondents claim is applicable to Appellant's claims, S.C. Code § 15-3-640 as amended on July 1, 2005, states in part "[a]ny 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 building permit for the construction of the Subject House contains no such notice, in bold type or otherwise, to the owner of his rights under section 15-3-640 to contract for a guarantee of the structure being free from defective or unsafe conditions beyond the statutorily prescribed time limit within which a building owner must bring suit (R. p. 53).

Assuming, arguendo, that the 8-year statute of repose applies to Appellant's complaint, Respondents are in violation of the statute of repose. Because Respondents, the developer, did not provide notice to the owner of his rights under the statute (the statute that Respondents rely upon requires that the building permit ***MUST*** contain such notice), and of his rights to contract for a guarantee of the property being free of

constructive defects for longer than 8-years, Respondents have not met a precedent condition of the Statute of Repose and, therefore, Respondents cannot assert the statute of repose as a defense in this action because they have violated the statute.

As South Carolina law holds “statutes should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”

Abraham v. Palmetto Unified School District No. 1, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), *citing* Matter of Decker, 322 S.C. 215, 471 S.E.2d 462, 463 (1995).

Respondents seemingly argue that the court should remove this condition precedent clause altogether and ignore this provision of the statute. Respondents have not met a condition precedent of the statute. As such, Respondents cannot invoke the statute of repose to bar Appellant's claims against them. Because Respondents did not meet a condition precedent of the statute of repose, summary judgment was inappropriate.

**III. Appellant's Claims Fall Within S.C. Code Ann. § 15-3-670, Which Prohibits Respondents From Claiming the Statute of Repose as a Bar to Appellant's Claims, And, As Such, Summary Judgment was Not Appropriate**

South Carolina Code Ann. § 15-3-670 (1976 Rev. 2005) provides an exception to the eight year statute of repose for actions involving improvements to real property. S.C. Code Ann. § 15-3-670 (1976 Rev. 2005) provides two exceptions. §15-3-670 states in pertinent part:

[...] (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.

*S.C. Code Ann. §15-3-670 (1976 Rev. 2005).*

Summary judgment was not appropriate because the facts asserted by Appellant through Theodore Padgett's report and affidavit (See Affidavit of Theodore Padgett, R. p. 57; See Report of Theodore Padgett, R. pp. 54-56) meet the criteria of the exception found in Section 15-3-670. The exception set forth in the statute is:

**The limitation provided by Section 15-3-640 may not be asserted as a defense to any action for [...] property damage which is (i) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence and (ii) the result [of] exposure to some [...] harmful or injury producing substance, element, or particle, [...] over a period of time as opposed to resulting from a sudden and fortuitous trauma.**

*S.C. Code Ann. §15-3-670 (1976 Rev. 2005).*

There are three (3) requirements for this exception to apply:

1. The property damage by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence;
2. The property damage results from exposure to some harmful or injury producing substance, element, or particle; and
3. The property damage occurs over a period of time and not from a sudden or fortuitous trauma.

The property damage in this case as described by Mr. Padgett consists of numerous floor deflections and interior wall cracks (R. p. 58). These numerous floor deflections and interior wall cracks did not manifest until years after construction and were caused by improperly installed and designed framing systems, not visible and not discoverable through reasonable diligence (R. p. 58).

The property damage is due to the overloading of the floor joist system and is caused by the exposure of the Subject House to wind, water and temperature all of which are substances, elements, and/or particles that have caused harm or injury to property (R. p. 58).

The numerous floor deflections and interior cracks occurred over time (R. p. 58). They are not a result of a sudden and fortuitous trauma.

Because the facts alleged by Appellant meet all of these conditions of this exception the Respondents cannot assert the statute of repose as a bar to Appellant's claims, and summary judgment was not appropriate.

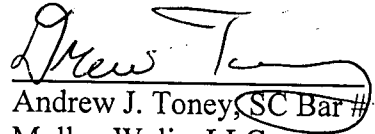
### **CONCLUSION**

Appellant's claims are governed by the 13-year statute of repose. As such Appellant filed his complaint well within the statute of repose. Even assuming, arguendo, that the 8-year statute of repose applies to Appellant's claims, Respondents are prohibited from asserting the statute of repose as a bar to Appellant's claims by Respondents' failure to follow a condition precedent of the 8-year statute of repose. Furthermore, Appellant's claims fall within the exception to the statute of repose as outlined in S.C. Code Ann. § 15-3-670, and, as such, Respondents cannot assert the statute of repose as a bar to Appellant's complaint.

For the reasons stated herein the Court should reverse the ruling of the Circuit Court and reinstate all of Appellant's causes of action as to Respondents.

### **CERTIFICATE OF COUNSEL**

The undersigned counsel certifies that this Final Brief complies with Rule 211(b), SCACR.

  
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