

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

Marvin H. Dukes, III, Special Circuit Court Judge

DEC 21 2015

Case No. 2015-001523

SC Court of Appeals

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.

RECORD ON APPEAL

Andrew J. Toney
Mullen Wylie, LLC
PO Box 5969
Hilton Head Island, SC 29938
(843)785-6969
Attorney for Appellant

John M. Tatum, III, Esq.
Kevin E. Dukes, Esq.
HARVEY & BATTEY, P.A.
P.O. Drawer 1107
Beaufort, SC 29901
(843) 524-3109
Attorney for Club Development, Inc., John H. Barrett, and Barrett Investment Properties,
LLC

TABLE OF CONTENTS

	<i>Page</i>
Order Granting Club Development, Inc., John H. Barrett, And Barrett Investment, Inc. Motion to Dismiss.....	1
Appellant's Complaint, dated April 7, 2014.....	12
Appellant's Memorandum In Opposition to Respondent's Motion to Dismiss, dated August 21, 2014, Filed August 25, 2014.....	27
Certificate of Occupancy.....	52
Building Permit.....	53
Report of Theodore Padgett, Dated March 28, 2014.....	54
Affidavit of Theodore Padgett, Dated September 26, 2014.....	57

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A No.: 2014-CP-07-0829

Jerrold France,

Plaintiff,

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.

ORDER GRANTING CLUB
DEVELOPMENT, INC, JOHN H
BARRETT, AND BARRETT
INVESTMENT, INC.'S MOTION
TO DISMISS

2015 JUN 17 PM 2:31

This matter comes before the Court upon motion by defendants Club Development, Inc., John H. Barrett and Barrett Investment Properties (collectively "Defendants"), seeking to dismiss the claims asserted by Plaintiff in the above-captioned case, for a failure by Plaintiff to assert those claims within the relevant period of repose, pursuant to S.C. Code Ann. §15-3-640. A hearing on Defendants' motion was conducted on May 13, 2015. Based upon that hearing and applicable South Carolina law, this Court finds that Club Development, Inc., John H. Barrett and Barrett Investment Properties are entitled to a dismissal of all claims except for gross negligence¹.

FACTS

Plaintiff, by way of a Summons and Complaint filed April 7, 2014, alleges various

¹ The Parties agree that the statute of repose established in S.C. Code Ann. §15-3-640 does not apply to Plaintiff's claim of gross negligence.

defects in the design and construction of Plaintiff's home on Hilton Head Island. Club Development, Inc. sold the Subject Property to Plaintiff.

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.

Defendants' filed a motion to dismiss, contending that Plaintiff's claims were subject to an eight year period of repose. Defendants' argue that the eight year period of repose applies to all structures for which certificates of occupancy were issued after July 1, 2005. Plaintiff contends that the August 2004 date of substantial completion controls which period of limitations length applies. Consequently, Plaintiff argues, the thirteen year period of repose is effective.

Additionally, Plaintiff claims that the Defendants' use of the statute of repose is limited by S.C. Code Ann. §15-3-670 for two reasons: (1) Plaintiff claims Defendants should be classified as a developer under S.C. Code Ann. §15-3-670(A), and as a developer the statute of repose does not apply; and (2) Plaintiff alleges that S.C. Code Ann. §15-3-670(C) limits the application of the statute of repose when property damage is not discoverable, with the exercise of reasonable diligence, at the time of its occurrence and the damage is a result of exposure to an injury producing substance, element or particle over a period of time. Defendants argue that there is not a specific exclusion carved out under S.C. Code Ann. §15-3-670(A) for developers and that a clear reading of "developing real property" should not be read as excluding developers from the statute of repose. Further, Defendants argue that S.C. Code Ann. §15-3-670(C) specifically provides for an exclusion from the statute of repose for personal injuries. Defendants argue such a broad reading of S.C. Code Ann. §15-3-670(C) as an exclusion for latent property damage would eviscerate the protections set forth in S.C. Code Ann. §15-3-640, creating an absurd result.

2

M

Plaintiff further argues that various questions of fact revolve around the issuance of the certificate of occupancy, and that those questions preclude the granting of Coastal Foundation's motion.

STANDARD OF REVIEW

A granting of a motion to dismiss under Rule 12(b)(6), SCRPC, 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 School Dist., 307 S.C. 297, 298, 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), SCRPC. 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.

ANALYSIS

Notwithstanding the arguments presented by Plaintiff, the issues before this Court are clear:

1. Whether Plaintiff's claims are subject to an eight or thirteen year period of repose.

If the period is thirteen years, Plaintiff has clearly asserted his claims within the statute of repose, and the claims will be allowed to proceed. Conversely, if the claims are subject to the eight year period, Plaintiff's claims have been asserted clearly outside of the statute, and are therefore subject to dismissal.

2. Whether the statute of repose is applicable to a developer.
3. Whether the exclusion from the statute of repose outlined in S.C. Code Ann. §15-3-670(C) is limited to an action for personal injury or whether an action for property damage is also excluded. The present action is not one for personal injury, and if the exclusion listed in S.C. Code Ann. §15-3-670(C) is only applicable to actions in personal injury, then the Plaintiff's claims against Defendants are subject to dismissal.

Consequently, the questions before the Court are based in the law, and the outcome of the within motion can be determined merely by deciding which period of repose applies and whether S.C. Code Ann. §15-3-670 applies under the present circumstances. Therefore, it is appropriate for this Court to rule on the within motion at this time.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Chern-Nuclear Systems, LLC v. S.C. Board of Health and Environmental Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (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 County 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." Chern-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, 368, 529 S.E.2d 280, 283 (2000).

1. Application of eight or thirteen year statute of repose

Defendants assert that §15-3-640, as amended in 2005, plainly applies to the claims asserted in the instant litigation, because the Certificate of Occupancy was issued on July 20, 2005, after the effective date of the amended statute. Defendants further assert that the eight year period of repose expired, at the very latest, on July 20, 2013, eight years after the Certificate of Occupancy was issued, and nine months before Plaintiff filed his Summons and Complaint.

Plaintiff contends that the August 2004 date of substantial completion controls; and therefore, the claims are subject to the thirteen year period of repose. Plaintiff also raises other issues regarding purported questions of fact, but as previously stated, because the question presented is solely one of law, those matters are irrelevant to this Court's determination of the motion before it.

Section 15-3-640 currently provides:

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:

- (1) an action to recover damages for breach of a contract to construct or repair an

5

improvement to real property;

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise;

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section;

(7) an action against a surety or guarantor of a defendant described in this section;

(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;

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This section describes an outside limitation of eight years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

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 15-3-640, unless the contractor and

owner, by written agreement, establish a different date of substantial completion. Section 15-3-640 was most recently amended by 2005 South Carolina Laws Act 27. The 2005 Act reduced the period of repose from thirteen to eight years, and added a final paragraph establishing the Certificate of Occupancy issuance date as the "default" date for Substantial completion. The statute was otherwise largely unchanged.

Section 16 of Act 27 addresses the date of enactment, and establishes that the amendments to §15-3-640 "take effect on July 1, 2005, and appl[y] to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible, local building official after the effective date."

Plaintiff, in arguing that the date of substantial completion controls the length of the period of repose, conflates when the period of repose begins to run with the length of the period of repose. By the plain language of §15-3-640, the period of repose (whether eight or thirteen years) begins to run at the date substantial completion is achieved. However, according to the plain language of Act 27, the certificate of occupancy issuance date determines whether the period of repose is eight or thirteen years. These provisions are unambiguous and capable of only one interpretation. Therefore, because the certificate of occupancy was issued after the eight year period of repose took effect; Plaintiff's claims are subject to that eight year period and therefore must be dismissed.

To further demonstrate the distinction between the certificate of occupancy issuance date and the date of substantial completion, the General Assembly explicitly recognized distinctions between the two. Notably, the final sentence of the amended statute states:

[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 15-3-640, unless the contractor and owner, by written agreement, establish a different date of substantial completion.

This sentence clearly demonstrates that the General Assembly was aware of distinctions between the two terms. Had, as Plaintiff suggests, the General Assembly considered substantial completion to be the same as the issuance date of the certificate of occupancy, the above sentence would be superfluous. Courts must presume that the legislature intended to accomplish something when enacting a statute. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).

Keeping in mind the recognized distinction between the certificate of occupancy issuance date and the date of substantial completion, this Court returns to the enactment language of Act 27, which provides that the eight year period of repose applies to all improvements for which certificates of occupancy were issued after July 1, 2005.

2. Applicability of the statute of repose to a developer

Plaintiff argues Defendants should be classified as a developer under S.C. Code Ann. §15-3-670(A), and as a developer the statute of repose does not apply because the Plaintiff alleges that Defendants were engaged in "developing real property" at time the defective improvements occurred. While no evidence has been provided establishing Defendants as a developer, the question before the court is simply whether the exclusion under §15-3-670(A) applies to developers as a whole, and is therefore proper to consider as a matter of law.

Section 15-3-640(A) provides:

The limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or

furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

It is clear from the plain language of the statute that the General Assembly intended that an action in "fraud, gross negligence, or recklessness" occurring at the time of the listed activities is excluded from the statute of repose. If the court were to accept the argument of Plaintiff, then land surveyors, engineers, contractors, land planners and almost every other individual involved in the construction of an improvement to real property would be excluded from the statute. When read in context with the subject matter of the statute, it is clear that the General Assembly would not provide a limitation on a cause of action against a class of people, only to exclude that very action in the same title. Such an interpretation leads to an absurd result because and would eviscerate § 15-3-640. The rules of statutory interpretation will not allow such a reading. Therefore, this court finds that the exclusions from the statute of repose listed in § 15-3-670(A) are solely for claims of "fraud, gross negligence, or recklessness," and a separate exclusion for developers does not exist.

3. Applicability of the statute of repose to actions for property damage resulting as described in S.C. Ann. § 15-3-670(C)

Plaintiff alleges that S.C. Code Ann. § 15-3-670(C) limits the application of the statute of repose when property damage is not discoverable, with the exercise of reasonable diligence, at the time of its occurrence and the damage is a result of exposure to an injury producing substance, element or particle over a period of time.

Section 15-3-640(A) provides:

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.

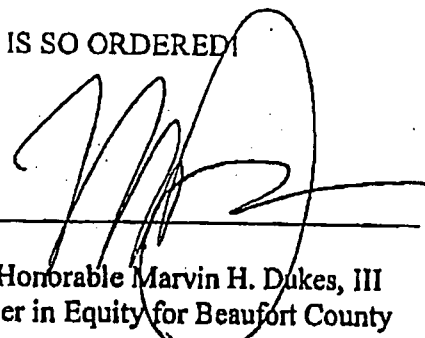
Similar to the court's earlier analysis, reading §15-3-670(C) to create an exclusion for latent property damage would completely obviate the effect of the statute of repose for improvements to real property. By parsing §15-3-670(C), Plaintiff has argued that a cause of action for "property damage" is excluded. However, when §15-3-670(C) is read in its entirety, it is clear that the intent of the exclusion therein is for actions arising in personal injury. The references to "ingestion," "toxic" and "injury producing" substances, and "trauma" all suggest personal injury. Additionally, if both latent personal injury claims and property damage claims are excluded from the statute of repose, as Plaintiff suggests, then the statute of repose would be inapplicable to actions resulting from defects in improvements to real property, which is itself the purpose of the statute. Such a broad reading of §15-3-670(C) as an exclusion for latent property damage would completely rid all defendants of the protections set forth in §15-3-640, creating an plainly absurd result. When considered as a whole and in context with the other code sections referenced, the only reasonable interpretation of §15-3-670(C) is that it provides for an exception in the case of a personal injury arising out of the circumstances stated in §15-3-670(C)(1) and (2).

In applying the rules of statutory construction, the unambiguous interpretation of the Act requires finding that the General Assembly clearly and unequivocally established an eight year period of repose for all improvements whose Certificates of Occupancy were issued after July 1, 2005. Therefore, because the Certificate of Occupancy for the subject residence was issued July

20, 2005, the eight year period of repose must apply to the subject residence. Further, the exclusions raised by Plaintiff are inapplicable in this case. The motion of Club Development, Inc., John H. Barrett and Barrett Investment Properties hereby is granted as to all causes of action except for Plaintiff's claim in gross negligence. IT IS SO ORDERED

Dated: 6/16/17

Beaufort, South Carolina

By: 

The Honorable Marvin H. Dukes, III
Master in Equity for Beaufort County

11

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JERROLD FRANCE,

Plaintiff,

vs.

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.,
HARBOUR HOMES, and JOHN DOES 1-
10,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No. 2014-CP-07- 821

COMPLAINT

(JURY-TRIAL DEMANDED)

14 APR -7 PM 4:41
BEAUFORT COUNTY S.C.
CLERK OF COURT

The Plaintiff, Jerold France ("Plaintiff"), complaining of the Defendants above named, would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff is a citizen and part-time resident of Beaufort County, South Carolina.
2. This matter involves the design and construction deficiencies existing at the Plaintiff's residence located at 9 Whistling Swan Rd., Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina ("Subject Property").
3. Defendant, Club Development, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of a State other than South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.

12

4. Defendant, Barrett Investment Properties, LLC, is, upon information and belief, a corporation organized and existing pursuant to the laws of a State other than South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.

5. Defendants, Club Development, Inc., and Barrett Investment Properties, LLC (hereinafter collectively "Club Development" or "Club Development Defendants") are subsidiaries of, instrumentalities and/or alter ego entities of each other and are responsible for the condition of the Subject Property and the damages set forth herein below.

6. Defendant, John H. Barrett (hereinafter "Barrett"), is, upon information and belief, a citizen and resident of a State other than South Carolina who, at all times relevant hereto, was the CEO, President and/or Principal of Club Development Defendants and did conduct business in Beaufort County, South Carolina.

7. Defendant, Barrett, as CEO, President and/or Principal of Club Development, did, at all times relevant hereto and upon information and belief, commit some or all of the following particulars to wit: grossly undercapitalize Atlantis, failed to observe corporate formalities of Club Development, non-payment of Club Development dividends, insolvency of Club Development, siphoning of funds of Club Development, non-functioning of other officers and directors of Club Development, absence of Club Development records, Club Development was merely a façade for the operations of the dominant stockholder, and injustice and fundamental unfairness will exist if the corporate veil of Club Development is not pierced.

8. Defendants, Club Development and Barrett, were, at all times relevant hereto, engaged in business in Beaufort County, South Carolina for the purpose of acting as developer of the Subject Property and said Defendants were to hold legal title to certain real estate in Beaufort

County, South Carolina, to develop and to construct the Subject Property on that real estate, and to market the Subject Property. This litigation concerns design and construction problems associated with the Subject Property.

9. Defendant, Woodbury Properties, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.

10. Defendant, Taliaferro Corporation, is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina.

11. Defendants, Woodbury Properties, Inc., and Taliaferro Corporation (hereinafter collectively "Woodbury" or "Woodbury Defendants") are subsidiaries of, instrumentalities and/or alter ego entities of each other and are responsible for the condition of the Subject Property and the damages set forth herein below.

12. Woodbury Defendants, at all times relevant hereto, engaged in business in Beaufort County, South Carolina for the purpose of acting as general contractor for the construction of the Subject Property

13. Defendant, Coastal Foundation, Inc. (hereinafter "Coastal"), is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina for the purpose of acting as the foundation and masonry subcontractor for the construction of the Subject Property.

14. Defendant, Harbour Homes (hereinafter "Harbour"), is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina and conducted business, in whole or in part, at all times relevant hereto in Beaufort County, South Carolina for the purpose of acting as the stucco applicator and subcontractor for the construction of the Subject Property.

15. John Doe Defendants 1 through 10, are persons or entities who participated in the construction, design, and development of the Subject Property as subcontractors, material providers/manufacturers, and/or design professionals, whose identities are not yet known to the Plaintiff.

16. This Court has jurisdiction over the subject matter and the parties to this action.

FACTUAL ALLEGATIONS

17. On August 25, 2003 a building permit was issued for the construction of the Subject Property listing Woodbury Defendants as the general contractor.

18. On August 26, 2004 substantial completion of construction of the Subject Property was reached.

19. Upon information and belief, the Subject Property contains numerous design and construction defects including, but not limited to, the following:

- a. Failure to follow plans, specifications, and/or applicable building code and industry standards;
- b. Failure to properly install exterior cladding;
- c. Failure to provide proper structural reinforcement;
- d. Failure to properly install the foundation;
- e. Failure to properly install the structural framing;
- f. Failure to install the pier system;

- g. Failure to install subfloor;
- h. Failure to install floor joists, beams, and columns;
- i. Failure to comply with the appropriate standard of care and applicable building code;
- j. Failure to properly inspect and/or monitor work of parties involved in designing and constructing the project;

20. Due to the design and construction deficiencies, continuous and repeated exposure to harmful conditions beginning from the date of substantial completion, including structural failure, resulting in physical and consequential damages, including, but not limited to, failure of the exterior cladding, deterioration of the interior, and the creation of life safety hazards.

21. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

FOR A FIRST CAUSE OF ACTION

(Negligence/Gross Negligence – As to Club Development and Barrett)

22. Each and every allegation set forth above is fully incorporated herein.

23. Club Development and Barrett owed a duty to Plaintiff to exercise that degree of skill necessary to select an architect, engineer and contractor and to oversee the Subject Property and otherwise deliver the Subject Property free of construction defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry.

24. The deficiencies and defects which exist at the Subject Property are the proximate and direct result of the negligence, gross negligence, recklessness, willfulness, and wantonness of Club Development and Barrett in one or more of the following particulars:

- a. In failing to properly select an architect and contractor so that the Subject Property would be designed and built by methods of construction and design conforming with accepted industry standards;
- b. In failing to properly oversee the construction of the Subject Property in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;
- c. In allowing and/or accepting non-conforming or defective work;
- d. In accepting and performing deficient and/or defective workmanship and/or materials, without proper inspection to insure that the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;
- e. In failing to inform the architect and contractor of any defects found in the Subject Property;
- f. In placing, marketing and selling the Subject Property in the stream of commerce; and
- g. In failing to act as a reasonable and prudent developer would act under the circumstances then and there prevailing.

25. On information and belief, Club Development and Barrett, Woodbury Defendendats, the subcontractors' superintendent, and the Town of Hilton Head building inspector inspected the Subject Property but failed to discover the defective work and failed to comprehend the damage that may result therefrom, which defective work did result in unintended consequences and damages caused by the negligence of the Defendants.

26. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to damages in the amounts equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Subject Property, loss of use and loss of value, design fees and costs, punitive damages, consequential damages, plus costs, prejudgment and post-judgment interest.

FOR A SECOND CAUSE OF ACTION

(Breach of Warranty of Habitability – As to Club Development and Barrett)

27. Each and every allegation set forth above is fully incorporated herein.

28. Club Development and Barrett represented and warranted that the Subject Property was habitable and of the highest quality. Those representations and warranties were made in connection with the sale of the Subject Property.

29. Club Development and Barrett have breached said warranties by producing and selling to the Plaintiff an inferior and rapidly deteriorating Subject Property, plagued with extensive and severe construction defects and problems.

30. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the Subject Property, loss of use and loss of value, design fees and costs, punitive damages where recoverable, consequential damages, plus costs, prejudgment and post-judgment interest.

FOR A THIRD CAUSE OF ACTION

(Breach of Express and Implied Warranties – As to Club Development and Barrett)

31. Each and every allegation set forth above is fully incorporated herein.

32. Club Development and Barrett as seller, grantor, and developer made express and implied warranties of quality and fitness for intended use.

33. Club Development and Barrett has breached their express and implied warranties by producing and selling to Plaintiff the inferior and rapidly deteriorating Subject Property, plagued with extensive and severe construction defects and problems.

34. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use and loss of value, design fees and costs, punitive damages where recoverable, consequential damages, plus costs, prejudgment and post-judgment interest.

FOR A FOURTH CAUSE OF ACTION
(Negligence/Gross Negligence – As to Woodbury Defendants)

35. Each and every allegation set forth above is fully incorporated herein.

36. Woodbury Defendants owed a duty to Plaintiff to exercise that degree of skill necessary to develop, construct, supervise, and review the design and otherwise deliver the Subject Property free of construction defects and in conformity with customary and ordinary standards of the building and construction industry.

37. The deficiencies and defects referenced above which exist at the Subject Property are the proximate and direct result of the negligence and/or gross negligence of Woodbury Defendants, as general contractor, in one or more of the following particulars:

- (a) In failing to properly develop and construct the Subject Property by deviating from the applicable building codes and the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the applicable building codes and the plans and specifications, or in violation of the manufacturer's instruction;
- (b) In failing to properly supervise the subcontractors and/or other trades in order to ensure that all work proceeded in accordance with the applicable

building codes and the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;

- (c) In accepting non-conforming or defective materials;
- (d) In accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the applicable building codes and the plans and specifications and the manufacturer's instructions;
- (e) In constructing the Project in violation of applicable building codes;
- (f) In failing to construct the Project in good and workmanlike manner; and
- (g) In failing to act as a reasonable and prudent General Contractor would have acted under the circumstances then and there existing.

38. Woodbury Defendants knew, or should have known, that their work was in breach of their duty owed to Plaintiff.

39. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

FOR A FIFTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanship – As to Woodbury Defendants)

40. Each and every allegation set forth above is fully incorporated herein.

41. Woodbury Defendants impliedly warranted that the Subject Property would be constructed in accordance with all applicable building codes and standards in a careful, diligent, and workmanlike manner, free of construction defects, and that all materials and products

20

utilized therein would be installed in accordance with manufacturer's instructions and in accordance with industry standards.

42. As set forth more fully above, Woodbury Defendants breached the implied warranty of workmanship.

43. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the subject property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

FOR A SIXTH CAUSE OF ACTION

(Breach of Express and Implied Warranties – As to Woodbury Defendants)

44. Each and every allegation set forth above is fully incorporated herein.

45. Upon information and belief, Woodbury Defendants, acted as general contractor in connection with contracts to build the Subject Property, made express warranties to the effect that the Subject Property would be free from construction defects.

46. Woodbury Defendants also impliedly warranted that the Subject Property would be constructed in a careful, diligent, and workmanlike manner, free of construction deficiencies.

47. Woodbury Defendants breached their expressed and implied warranties in the following particulars:

(a) In failing to properly construct the Subject Property by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;

(b) In using and/or supplying defective materials;

(c) In installing materials not in accordance with the plans and specifications;

- (d) In installing materials in violation of manufacturer's instructions;
- (e) In performing work which violated applicable building codes;
- (f) In failing to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- (g) In accepting defective and/or non-conforming materials and labor;
- (h) In failing to construct the Project in a good and workmanlike manner; and
- (j) In providing deficient and/or defective workmanship and/or materials, without proper inspections to assure that the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instruction and applicable building codes.

48. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

FOR A SEVENTH CAUSE OF ACTION
(Negligence/Gross Negligence – As to Coastal and Harbour)

49. Each and every allegation set forth above is fully incorporated herein.

50. Defendants Coastal and Harbour each owed duties to the Plaintiff to exercise that degree of skill necessary to construct and supervise the construction of and review the design of and otherwise to deliver the Subject Property free of construction defects and built in conformity with the design and customary and ordinary standards of the building and construction industry and the applicable building codes and manufacturers' installation instructions.

22

51. The deficiencies and defects which exist at the Subject Property are the proximate and direct result of the negligence, gross negligence, recklessness, willfulness, and wantonness of Coastal and Harbour in one or more of the following particulars:

- (a) in failing to properly construct the Subject Property by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- (b) in using and supplying defective material;
- (c) by installing materials not in accordance with the plans and specifications;
- (d) by installing materials in violation of manufacturer's instructions;
- (e) in performing work which violated applicable building codes;
- (f) in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- (g) in accepting defective and/or non-conforming materials and labor;
- (h) in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure that the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instructions;
- (i) in failing to adequately construct a foundation, structural framing, structural supports, pier system, floor joists, and other necessary elements to uphold the structural integrity of the Subject Property;
- (j) in failing to inform the architect and/or general contractor of the defects in the plans and specifications; and

23

(k) in failing to act as reasonable and prudent subcontractor would act under the circumstances then and there existing.

52. As a direct and proximate result and consequence of the negligence and gross negligence of Coastal and Harbour, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to damages in the amounts equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use and loss of value, design fees and costs, punitive damages, consequential damages, plus costs, prejudgment and post-judgment interest.

FOR AN EIGHTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanship -- As to Coastal and Harbour)

53. Each and every allegation set forth above is fully incorporated herein.

54. Coastal and Harbour impliedly warranted that the Subject Property would be constructed in accordance with all applicable building codes and standards in a careful, diligent, and workmanlike manner, free of construction defects, and that all materials and products utilized therein would be installed in accordance with manufacturer's instructions and in accordance with industry standards.

55. As set forth more fully above, Coastal and Harbour breached the implied warranty of workmanship.

56. As a direct and proximate result, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

24

FOR A NINTH CAUSE OF ACTION

(Breach of Express and Implied Warranties – As to Coastal and Harbour)

57. Each and every allegation set forth above is fully incorporated herein.
58. Upon information and belief, Coastal and Harbour acted as subcontractors in connection with contracts to build the Subject Property, made express warranties to the effect that the buildings would be free from construction defects.
59. Coastal and Harbour also impliedly warranted that the Subject Property would be constructed in a careful, diligent, and workmanlike manner, free of construction deficiencies.
60. Coastal and Harbour breached their expressed and implied warranties in the following particulars:
- (a) In failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
 - (b) In using and/or supplying defective materials;
 - (c) In installing materials not in accordance with the plans and specifications;
 - (d) In installing materials in violation of manufacturer's instructions;
 - (e) In performing work which violated applicable building codes;
 - (f) In failing to properly supervise employees, agents and subcontractors to assure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
 - (g) In accepting defective and/or non-conforming materials and labor;
 - (h) In failing to construct the Project in a good and workmanlike manner; and

25

- (e) In providing deficient and/or defective workmanship and/or materials, without proper inspections to assure that the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instruction and applicable building codes.
- (f) In failing to inform the architect and/or developer of the defects in the plans and specifications.

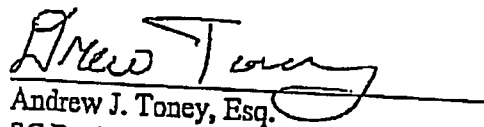
61. As a direct and proximate result, and consequence of Coastal and Harbour's breach of their express and implied warranties, Plaintiff has suffered injuries and continues to suffer injuries and is entitled to the recovery of damages in the amount of the cost to repair the Subject Property, reasonable attorney's fees, consequential damages, including loss of use and loss of value, punitive damages where applicable, plus costs and prejudgment and post judgment interest.

WHEREFORE, Plaintiff prays for judgment against the Defendants and is entitled to recover the cost to repair the defects, his attorney's fees, and damages, consequential damages, punitive damages where applicable, treble damages, loss of use and loss of value, plus cost and interest.

JURY TRIAL DEMANDED.

Respectfully submitted,

MULLEN WYLIE, LLC



Andrew J. Toney, Esq.

SC Bar No. 73037

Post Office Box 5969

Hilton Head Island, SC 29938

(843) 785-6969

(843) 785-6711 (Fax)

dtoney@mullenwylie.com

Attorney for the Plaintiff

April 4, 2014
Hilton Head Island, South Carolina

26

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JERROLD FRANCE,

Plaintiff,

vs.

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.,
HARBOUR HOMES, and JOHN DOES 1-
10,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No. 2014-CP-07-829

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO CLUB DEVELOPMENT,
INC.'S, JOHN J. BARRETT'S, BARRETT
INVESTMENT PROPERTIES, LLC'S AND
COASTAL FOUNDATION, INC.'S MOTIONS
TO DISMISS

TO: THE HONORABLE MARVIN H. DUKES, III

FACTUAL BACKGROUND

Plaintiff owns the home located at 9 Whistling Swan Rd., Hilton Head Island, South Carolina ("Subject Property"). As a result of the of the Subject Property's interior exhibiting widespread cracks in dry wall and sheetrock, and certain doors becoming unable to open or shut, plaintiff commissioned an engineer to investigate the cause of the problems. Subsequent to the engineer's investigation, plaintiff filed suit against all defendants who were involved in the development and construction of the Subject Property.

Plaintiff has asserted Club Development, Inc., John Barrett and Barrett Investment Properties, LLC (hereinafter collectively "Club Development") acted as the developers for the construction of the Subject Property and has alleged causes of actions against Club Development of negligence/gross negligence, breach of the warranty of habitability, and breach of expressed

and implied warranties. In response to plaintiff's Complaint, Club Development did not file an Answer, but rather filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP, for failure to state a cause of action for which relief may be granted.

Plaintiff has asserted Coastal Foundation, Inc. (hereinafter "Coastal") acted as a subcontractor for the construction of the Subject Property, specifically installing the foundation and piers, and has alleged causes of actions against Coastal of negligence/gross negligence, breach of implied warranty of workmanship, and breach of expressed and implied warranties. Coastal has filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCPP, for failure to state a cause of action for which relief may be granted.

12(b)(6) MOTION TO DISMISS GENERALLY AND CONTROLLING LAW

South Carolina Rules of Civil Procedure rule 12(b)(6) states, in part, that "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state facts sufficient to constitute a cause of action... A motion making any of these defenses shall be made before pleading if a further pleading is permitted..." South Carolina case law is controlling that "A ruling on a 12(b)(6) motion to dismiss [for failure to state a claim] must be based solely upon allegations set forth on the face of the complaint." Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

Rule 12(b)(6), SCRCPP, goes on to state "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall

28

be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56(c) of the South Carolina Rules of Civil Procedure provides for judgment as a matter of law where "there is no genuine issue as to any material fact." A motion for summary judgment "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."

S.C.R.C.P. 56 (c). At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. Hill v. York County Sheriff's Office Department, 313 S.C. 303, 308 (Ct.App. 1993)

I. BY THE FACE OF THE COMPLAINT A MOTION TO DISMISS FAILS

Paragraph 18 of the complaint alleges as follows: "On August 26, 2004 substantial completion of construction of the Subject Property was reached." 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 Exhibit 1, 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, plaintiff's complaint had to be filed prior to August 26, 2017 in order for it not to be barred by the statute of repose. Plaintiff'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, plaintiff's complaint was filed

within the prescribed 13-year statute of repose, and, therefore, Club Development's and Coastal's motion to dismiss fails. See Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

II. IF THE COURT ACCEPTS THE CERTIFICATE OF OCCUPANCY AS EVIDENCE, A MOTION FOR SUMMARY JUDGMENT FAILS

Club Development and Coastal have sought to introduce into evidence the purported Certificate of Occupancy for the Subject Property, which lists a date of 'Substantial Completion' of August 26, 2004, which converts this motion to one for Summary Judgment. See Exhibit 2, Certificate of Occupancy. The Certificate of Occupancy should not be introduced into evidence because no building code official has authenticated the same. However, if the Court accepts the Certificate of Occupancy into evidence, Club Development's and Coastal's motion to dismiss still fails.

Because the date of substantial completion for the Subject Property was August 26, 2004, the introduction of the Certificate of Occupancy defeats dismissal of the Complaint pursuant to Summary Judgment, on the grounds that the applicable statute of repose began to run on August 26, 2004, when the 13-year statute of repose was in effect, and, as such, plaintiff filed his complaint well within the time limitations allowed by the statute.

As stated above, the 13-year statute of repose was in effect on August 26, 2004, when substantial completion was reached on the Subject Property. 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. See Exhibit 3, S.C. Code §15-3-640 (2005). The statute in effect at the time the Subject Property 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). 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 Property 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 Property, and the statute in effect at that time was the 13-year statute, meaning that plaintiff 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 on the Subject Property for almost a year. There is no evidence on 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).

"[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."). The cardinal rule of statutory construction is that legislative intent prevails. 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 Property was reached on August 26, 2004, which is when the 13-year statute of repose was in effect. Club Development's and Coastal'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 was in effect when the Subject Property 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 Club Development and Coastal have argued, also beginning to run on August 26, 2004. This result would be in violation of reasonable and practical construction of the 13-year statute of repose, as is required for statutory construction in South Carolina.

Furthermore, much more than a mere scintilla of evidence is before the Court, which prevents the granting of Summary Judgment. The Certificate of Occupancy in evidence has at least four dates on it, and one date left blank. At the top, right-hand corner, in bold, the "Substantial Completion" date of August 26, 2004 is listed. To the right of the Substantial Completion date, a "Date CO Issued" is listed as July 20, 2005. To the right of the Date CO Issued is listed a "Date Final Issued", which is left blank. In the middle of the Certificate of Occupancy there is an "Entry" date of June 30, 2003, and below that there is a second "Entry" date of August 25, 2003. When this Certificate of Occupancy document was prepared is a question of fact. Why Substantial Completion occurred on August 26, 2004, and the CO was issued is a question of fact. However, there is no question, that on the face of the evidence before the Court, Substantial Completion occurred on August 26, 2004, when the 13-year statute of repose was in effect, which would bar claims made by this plaintiff after August 26, 2017. As stated above, to hold contrary that the 13-year statute of repose applies to this cause of action would be in stark contrast to rules of statutory construction and public policy, and would result in an outcome unfair to plaintiff.

III. CLUB DEVELOPMENT AND COASTAL ARE IN VIOLATION OF BOTH THE 13-YEAR AND 8-YEAR STATUTE OF REPOSE, AND, THEREFORE, SUMMARY JUDGMENT FAILS

S.C. Code Section 15-3-640 that was in effect at the time substantial completion was reached on the Subject Property, 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 building permit for the construction of the Subject Property 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 thirteen years after substantial completion of the improvement. See Exhibit 4, Building Permit. When S.C. Code Section 15-3-640 was amended on July 1, 2005 the precise language was included into the statute, however, the word "shall contain" was replaced with "*must* contain."

Assuming, arguendo, that the 2005, 8-year statute of repose applies to plaintiff's complaint, which it does not due to substantial completion being reached on August 26, 2004, Club Development and Coastal are in violation of the statute of repose. Because Club Development and Coastal did not provide notice to the owner of his rights under the statute, and of his rights to contract for a guarantee of the property being free of constructive defects for longer than 8-years, neither defendant can assert the statute of repose as a defense in this action because they have violated the statute.

IV. CLUB DEVELOPMENT AND COASTAL CANNOT ASSERT THE STATUTE OF REPOSE AS A DEFENSE BECAUSE OF S.C. CODE ANN. § 15-3-670

S.C. Code Ann. § 15-3-670 states:

" (A) ... The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specification, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

...(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."

Plaintiff has asserted allegations against Club Development and Coastal of gross negligence for all of his causes of action. See Plaintiff's Complaint. Because plaintiff has asserted gross negligence against both defendants, each may not assert either the 13-year or 8-year statute of repose as a defense to this action.

Plaintiff's claims are related to damage to his property. In plaintiff's complaint, he specifically avers in paragraph 20, that " Due to the design and construction deficiencies, continuous and repeated exposure to harmful conditions beginning from the date of substantial completion, including structural failure, resulting in physical and consequential damages, including, but not limited to, failure of the exterior cladding, deterioration of the interior, and the creation of life safety hazards." Such construction deficiencies, plaintiff alleges, caused harm to his house beginning at substantial completion on August 26, 2004, and continuing until his discovery in 2014. By the nature of the property damage, it was not discoverable in the exercise of reasonable diligence at the time of its occurrence. The alleged damage was not discoverable until it manifested itself through cracks and inoperable doors. See Exhibit 5, March 28, 2014 Theodore Padgett, PE, PC, Report.

35

Additionally, the property damage, it is alleged, is the result of exposure to harmful and injury producing substances and elements over a period of time as opposed to resulting from a sudden and fortuitous trauma. See Exhibit 5. Specifically, due to the defective construction of the Subject Property and its exposure to the elements of water, wind, ice, and dirt, the Subject Property's damage could not be discovered at the time of substantial completion, but, rather, occurred over a period of time. Because of these allegations, S.C. Code Ann. § 15-3-670, specifically paragraphs (C)(1)(2), prohibits defendants from asserting the statute of repose as a defense to this action. Therefore, Club Development's and Coastal's motions to dismiss fail.

CONCLUSION

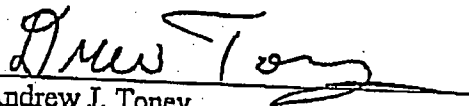
For the reasons stated above Plaintiffs' claims are not barred by the statute of repose, because based upon the allegations of the complaint and the date of substantial completion, the 13-year statute of repose governs. Plaintiff filed his complaint within the 13-year statute of repose, and, therefore, Club Development's and Coastal's Motions to Dismiss must be denied. Additionally, Club Development and Coastal violated the statute of repose by not placing the appropriate notices on the building permit, pursuant to the statute, and, therefore, each defendants' Motion to Dismiss must be denied. Furthermore, Club Development and Coastal, it is alleged, were grossly negligent in their respective roles in the construction of the Subject Property, and, therefore, S.C. Code Ann. § 15-3-670 prevents each defendant from asserting the statute of repose as a defense, which defeats Club Development's and Coastal's Motions to Dismiss. Lastly, the nature of damages alleged in the complaint were undiscoverable through the exercise of due diligence, the damages are to property, and the damages are the result of continued exposure to harmful or injury producing substances, elements, and particles, which

36

bars these defendants from asserting the statute of repose as a defense, and, therefore, Club Development's and Coastal's Motions to Dismiss must be denied.

Respectfully submitted,

MULLEN WYLLIE, LLC



Andrew J. Toney

Post Office Box 5969

Hilton Head Island, SC 29938

(843) 785-6969

(843) 785-6711 (Fax)

dtoney@mullenwylie.com

Attorney for the Plaintiff

August 21, 2014

Hilton Head Island, South Carolina

37

EXHIBIT 1

38

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

§ 15-3-640. Limitation of Actions § 33, Actions Relating To Property.

Notes of Decisions

when certificates of occupancy were issued, where windows were specified area or portion of larger condominium project, and, upon incorporation into larger project, windows could be used for purpose for which they were intended. Ocean Winds Corp. of Johns Island v. Lane (S.C. 2001) 947 S.C. 416, 556 S.E.2d 377. Limitation Of Actions § 55(5)

§ 15-3-640. Actions based upon defective or unsafe condition of improvement to real property; right to contract for guarantee of structure for extended period.

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. 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:

- (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
- (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
- (3) an action to recover damages for personal injury, death, or damage to property;
- (4) an action to recover damages for economic or monetary loss;
- (5) an action in contract or in tort or otherwise;
- (6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision;
- (7) an action against a surety or guarantor of a defendant described in this section;
- (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;
- (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation

of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This section describes an outside limitation of thirteen years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

Any 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 thirteen years after substantial completion of the improvement. The Department of Consumer Affairs shall publish in conspicuous places the right of any owner or possessor to contract for such extended liability under this section. Nothing in this section shall prohibit any person from entering into any 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 thirteen years after substantial completion of the improvement or component.

HISTORY: 1962 Code § 10-152; 1970 (56) 2397; 1986 Act No. 412, § 1.

Cross References

Construction of this section so as to extend the period or periods provided by the laws of South Carolina, see § 15-3-660.

Circumstances in which the limitation provided by this section is not available as a defense, see § 15-3-670.

Construction of this section so as to create new causes of action or to bar causes of action existing on May 12, 1986, see § 15-3-680.

Department of Consumer Affairs generally, see §§ 37-6-501 et seq.

Architects generally, see §§ 40-3-10 et seq.

Engineers and land surveyors, see §§ 40-22-10 et seq.

Contractors, see §§ 40-11-10 et seq.

Library References

Westlaw Key Number Search: 241k32.

Limitation of Actions C-52.

C.J.S. Limitations of Actions § 71.

Research References

ALR Library

2002 ALR 5th 21, Validity, As To Claim Alleging Design Or Building Defects, Of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, Or Builder For Injury Or Death Arising Out Of Defective Or Unsafe Condition Of Improvement To Real Property.

Encyclopedias

S.C. Jur. Appeal and Error § 71, The Four Basic Requirements.

S.C. Jur. Architects and Engineers § 33, Generally.

S.C. Jur. Architects and Engineers VII Ref, Divisional References.

S.C. Jur. Contribution § 5, Generally.

EXHIBIT 2

41



CERTIFICATE OF OCCUPANCY
TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA

Building Permit Number: **B0301918**
Substantial Completion: **08/26/2004**

Date CO Issued: **07/20/2005** Date Final Issued:

Location: Lot: **B**
9 WHISTLING SWAN ROAD

District/Map/Parcel: **R55001800A02150000**
Building No: Unit No:

Description: **SEA PINES / NEW SINGLE FAM RES - DEMO PERMIT #B0001843**

Total Parcel Area: **10424** Total Impervious Surface Area: **3678**

Applicable Code: International Code Council, Inc.'s 2000 IRC 7/02

Type of Construction: **RES** Occupancy Sub-type:
Occupancy Classification: **RES**
To Be Used As: **RESIDENCE**

Design Occupant Load: **0**
Automatic Sprinkler System: **Provided: N Required: N**

Condition: **Comp: 020**

[MET] General Condition 2:

Entry: **06/30/2003** By: **NS** Action: **INFO CUSTOMER MUST RECEIVE FINAL ON DEMOLITION PERMIT -**
BEFORE WORK STARTS Entry: **08/25/2003** By: **ag** Action: **AP DEMOLITION PERMIT B0001843 APPROVED**

Owner Name/Address: **CLUB DEVELOPMENT INC**

150 CLEVELAND ROAD
BOGART GA 30622

Contractor Name/Address: **WOODBURY JOHN R**
WOODBURY PROPERTIES
PO BOX 3205
HILTON HEAD ISLAND SC 29928-0205

The above described structure has been constructed in accordance with regulations as adopted in Title 15 of the Town of Hilton Head Island Municipal Code and the Zoning Ordinances for the Town of Hilton Head Island including any and all related codes or ordinances adopted by the Town of Hilton Head Island. It is further declared that the structure has been inspected for compliance with the code requirements for the occupancy, division of occupancy and the proposed use of the structure and is physically sound and structurally and mechanically safe for occupancy.

Frank P. Hodge, Jr.
Building Official

42

WHITE: OFFICE COPY YELLOW: CONTRACTOR'S COPY PINK: OWNER'S COPY GOLDEN: TAX ASSESSOR'S COPY

EXHIBIT 3

43

§ 15-3-600. Action for other relief.

Notes of Decisions

1. In general

Ten-year default statute of limitations applied to workers' compensation insurers' claims for reimbursement from Second Injury Fund for benefits paid to employees for their work-related injuries; seventy-eight week provision governing reimbursement from second injury fund in Workers' Compensation Act was not a statute

of limitation, but a notice requirement and, consequently, there was no statute of limitations in the Act that applied to claims for reimbursement. *Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund* (S.C. 2010) 389 S.C. 422, 699 S.E.2d 687, rehearing denied. *Workers' Compensation* 1030.1(5)

§ 15-3-640. Actions based upon defective or unsafe condition of improvement to real property; right to contract for guarantee of structure for extended period.

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:

(1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise;

(6) an action for contribution or indemnification for damages sustained on account of an action described in this section;

(7) an action against a surety or guarantor of a defendant described in this section;

(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;

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

This section describes an outside limitation of eight years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.

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 s
contra
which
or un:
ment

For
count
inspe:
existi
impro:
owne:

HIST
ef

Editor
2001
"Sec
real p
compl

Effect
The
nated
"secti
of occ

Resea:
ALI

5 A
Time
Out o
17.

Party
122

Repor

Enc

S.C

S.C

Tra

Br:

Defec

Limit

Un
the d
in co
impr
of st
veyor
ty's e
of bei
bled:
spect
tion,
could
numl
or m
abno

ins
itation, but a notice requirement and,
quently, there was no statute of limitations
Act that applied to claims for reimburse-
Transportation Ins. Co. and Flagstar
v. South Carolina Second Injury Fund
2010) 989 S.C. 422, 699 S.E.2d 687, re-
ig denied. Workers' Compensation §
1(5)

ve or unsafe condition of improve-
t for guarantee of structure for

or arising out of the defective or
operty may be brought more than
improvement. For purposes of this
he defective or unsafe condition of

of a contract to construct or repair

gligent construction or repair of an

sonal injury, death, or damage to

nic or monetary loss;

ise;

fication for damages sustained on

r of a defendant described in this

ir prior owner of the real property
having a current or prior interest in

ers of components, or against any
son who develops real property, or
specifications, surveying, planning,
uction, or construction of an im-
an improvement to real property.
of eight years after the substantial
ormal statutes of limitations contin-

improvement to real property must
essor of the property of his rights
of the structure being free from
after substantial completion of the
fairs shall publish in conspicuous
tract 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.

HISTORY: 1962 Code § 10-152; 1970 (56) 2397; 1986 Act No. 412, § 1; 2005 Act No. 27, § 2, eff July 1, 2005.

Editor's Note

2005 Act No. 27, § 16(2), provides as follows:

"Section 2 [amending this section] takes effect on July 1, 2005, and applies to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible local building official after the effective date[.]"

Effect of Amendment

The 2005 amendment substituted "eight years" for "thirteen years" in the first three undesignated paragraphs and made nonsubstantive language changes; at the end of item (6), substituted "section" for "subdivision"; and added the fourth undesignated paragraph relating to a certificate of occupancy as proof of substantial completion of an improvement project.

Research References

ALR Library

5 ALR 6th 497, Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising Out of Defective or Unsafe Condition of...

17 ALR 6th 1, Contribution Between Joint Tortfeasors as Affected by Settlement With Injured Party by One or More Tortfeasors.

122 ALR 5th 1, What Constitutes "Improvement to Real Property" for Purposes of Statute of Repose or Statute of Limitations.

Encyclopedias

S.C. Jur. Action § 38, Commencement.

S.C. Jur. Limitation of Actions § 33, Actions Relating to Property.

Treatises and Practice Aids

Bruner and O'Connor on Construction Law App 1, 50 State Statutory Survey-Construction Defects.

Notes of Decisions

Limitation of actions 5

2. In general

Under South Carolina law, as predicted by the district court, incline conveyor system used in cotton baling operation was not permanent improvement to real property within meaning of statute of repose, even though incline conveyor was bolted down and hardwired to facility's electrical system, where system was capable of being moved and had actually been disassembled and moved to new location, system was not specifically integrated into building's construction, incline conveyor and related equipment could be installed and function properly in any number of industrial buildings, and disassembly or movement of equipment was not peculiar or abnormal occurrence. *Ervin v. Continental*

Conveyor & Equipment Co., Inc., 2009, 674 F.Supp.2d 709. Products Liability § 505

3. Actions for contribution

One-year statute of limitations for settling tortfeasor to bring contribution action was not in irreconcilable conflict with and, therefore, did not impliedly repeal thirteen-year statute of repose to bring an action for contribution based upon or arising out of the defective or unsafe condition of an improvement to real property; thus, the statute of repose barred property owner's contribution claim against contractor more than thirteen years after completion, but less than one year after settlement of tort claim. *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.* (S.C. 2006) 368 S.C. 137, 628 S.E.2d 38. Contribution § 9(3); Limitation Of Actions § 49(6).

45

EXHIBIT 4

46

28833

BUILDING PERMIT
Town of Hilton Head Island
Beaufort County, South Carolina

B0301918

Issue Date: August 25, 2003 Est. Completion: Cost of Construction: \$301,785.00
 Type of Occ: Residential Type of Permit: New Single Family Res Permit Fee: \$1,132.00
 Parcel: R55001800AD2150000 Lot #: 8 Pl. Zone/Min. Finished flr. El.: A7(14)
 Street: 9 WHISTLING SWAN ROAD **** Subdivision: SEA PINES
 Unit: Type Construction:
 Description: SEA PINES / NEW SINGLE FAM RES - DEMO PERMIT #B0001843

Owner: CLUB DEVELOPMENT INC 150 CLEVELAND ROAD BOGART GA 30622 0000 706-353-7627
 Contractor: WOODBURY JOHN R WOODBURY PROPERTIES PO BOX 3206 HILTON HEAD ISLAND SC 29928-0206 843-671-2046
 Applicant: WOODBURY JOHN R WOODBURY PROPERTIES PO BOX 3206 HILTON HEAD ISLAND SC 29928-0206 843-671-2046
 Architect:

Heated Sq. Ft.:	4284	Unheated Sq. Ft.:	104	Total Square Feet:	4388
Number of Units:	1	Type of Construction:??		Sq.Ft. Swimming Pool:	0
Number of Stories:	2	Type of Exterior:	STUCCO		
Number of Bedrooms:	4	Type of Roofing Material:	ASP/METAL		
Number of Baths:	5	Type of Heating/Air:	HEAT PUMP		
Total # of Res. Rooms:	10	Type of Fuel:	ELECTRIC		
Number of Elevators:	0	Gas Appliances:	Y		
Number of Fireplaces:	1	Size of LP Tank:	0		
Fire Alarm System:	Y	Type of Sewage:	PUBLIC	Septic Tank #:	0
Sprinklered:	N				

ALL WORK MUST COMPLY WITH TOWN OF HILTON HEAD ISLAND CODES.

Print Name: JOHN R. WOODBURY

Signature: *John R. Woodbury*

Cond: 020

Date: 27 Aug 03

General Condition 2

Entry: 06/30/2003 By: BK

Action: INFO. CUSTOMER MUST RECEIVE FINAL ON DEMOLITION PERMIT - BEFORE WORK STARTS

Entry: 08/26/2003 By: BK Action: AF

DEMOLITION PERMIT B0001843 APPROVED

EXHIBIT 5

48

www.theodorepadgettpe.com

Theodore Padgett, PE, PC
Consulting Engineer
4865 Highlander Lane
Hollywood, SC 29449

email: theodorepadgett@aol.com
843-860-1307
843-769-7710

March 28, 2014

Mr. Jerry France
France Media, Inc.
3500 Piedmont Road, Suite 415
Atlanta, GA 30305

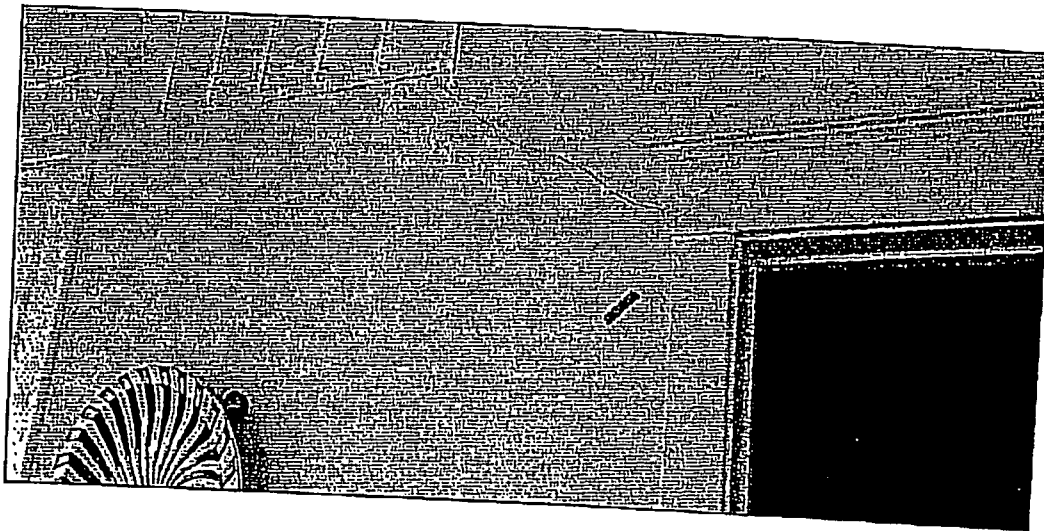
Re: 9 Whistling Swan, Hilton Head Island, SC

Mr. France:

As requested, I have performed a limited inspection of the above property. The purpose of my visit was to determine the cause of the numerous floor deflections and interior wall cracks.

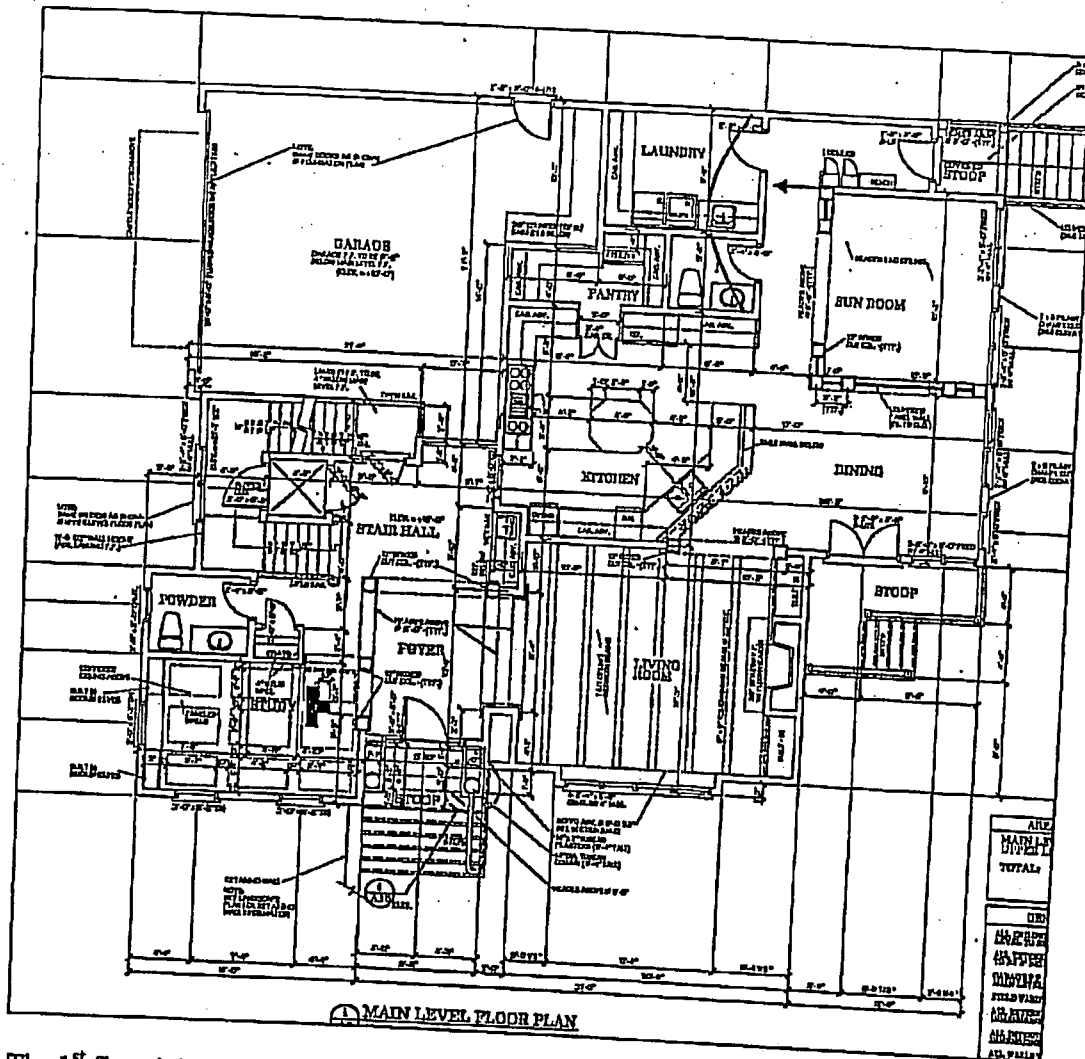
The structure is a 2-story, split level dwelling. Foundations consist of masonry piers and walls supported by shallow concrete footings. The framing system for the 1st floor and presumably the 2nd is a manufactured wood joist system. The remainder of the building is timber frame typical of residential construction. The exterior finish is a combination of tabby shell stucco and horizontal siding.

Visual inspection of the interior of the house indicated dish shaped floors in the Study and Kitchen areas. There were cracks in the sheetrock at numerous locations. Separations in the crown molding were also observed. The sheetrock fissure adjacent to the 1st floor Laundry Room is shown below.



49

The floor deformities and the wall cracks are a result of the deflection of the floor joists. In the figure below, the Laundry Room crack is delineated along with the joist span and deflected shape.



The 1st floor joists are an "T" shaped wooden, manufactured joist product with an overall depth of 11-7/8". These members are spaced at 19.2" which corresponds to 5 spaces over the 8 foot width of the plywood floor sheathing. By my calculations, the joists are properly sized for open floor areas. However, there are numerous interior walls that are situated parallel to the floor joists. The additional weight of the parallel walls has caused the deformities noted. This is also true for the large Kitchen island which is situated at the approximate joist mid-span.

Inspection of the crawlspace revealed that the ends of the multiple 2x12 wood girders had crushed at the supports. This is due to insufficient the bearing surface provided. This crushing is limited to approximately 1/4". According to my calculations, the 2x12 girders are sufficient in size.

It is common in the residential building industry to use manufactured joists throughout a house and it is likely that the same or similarly sized joists were used on the 2nd floor here. This could be verified either by reference to the manufacturer's placement drawings or through investigation by destructive means. There is little question, however, that the floor and wall deformities observed on the 2nd floor are related to floor framing issues.

In terms of repair to the 1st floor, the inadequate bearing condition cited may be overcome by fully grouting the top cells of the masonry piers and then installing a full length pressure treated wood 2x8 plate. Additional horizontal support for the parallel walls can be obtained by the installation of multiple beams of laminated veneer lumber (LVL). It is possible to level the Study and Kitchen floor by installing jack piers similar to J57 by Simpson (see below).

J/JP Floor Beam Levelers

Jack piers and standard floor beam levelers offer unique leveling simplicity during and after construction.

MATERIALS: 12 gauge plates, 1/2" threaded rod, 1/4" O.D. steel pipe (FINISH); None. Connectors installed in damp areas, or corrosive environments that are not exposed to rain or periodic washing, will deteriorate at a faster rate. Corrosion-resistant finishes and maintenance can improve the connector's service life.

INSTALLATION: Use all specified fasteners. See General Notes.

- Joles are provided for installation with 4-10d x 1 1/2" nails.
- Do not use J/JPs for dynamically jacking of structures, such as houses.

CODES: See page 13 for Code Reference Key Chart.

Model	Dimensions (inches)	Weight (lb)	Capacity (lb)
J57	24" x 4" x 1/2"	170	4200
JP44	24" x 4" x 1/2"	170	4200

1. Consider allowable loads for all rods.
2. Loads may not be increased for dynamic loading.
3. NAILS: 10d x 1 1/2" = 12-14" long. 1/2" x 12-14" for jacking rods and in horizontal.

J57 Floor Beam Leveler

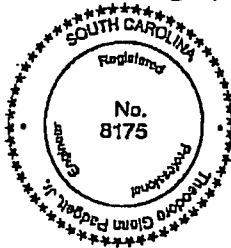
Two Methods of JP44 Installation

While it is clear that there are framing issues with the 2nd floor, there is insufficient information to develop a repair plan. It is not recommended to proceed with 1st floor repairs independent of the 2nd floor needs.

I appreciate the opportunity to be of service and stand ready to assist further.

Best Regards,

Theodore Padgett, PE, PC



Theodore Padgett

Digitally signed by Theodore Padgett
DN: cn=Theodore Padgett, o=ou, email=theodorepadgett@aol.com, c=US
Date: 2014.04.01 06:50:01 -04'00'

Mr. France
March 28, 2014

51



CERTIFICATE OF OCCUPANCY
TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA

Building Permit Number: **B0301918**
Substantial Completion: **08/26/2004**

Date CO Issued: **07/20/2005** Date Final Issued:

Location: Lot: **8**
9, WHISTLING SWAN ROAD

District/Map/Parcel: **R55001800A02150000**
Building No: Unit No:

Description: **SEA PINES / NEW SINGLE FAM RES - DEMO PERMIT #B0001843**

Total Parcel Area: **10424**

Total Impervious Surface Area: **3678**

Applicable Code: International Code Council, Inc.'s 2000 IRC 7/02

Type of Construction:

Occupancy Classification:

RES

To Be Used As:

RESIDENCE

Occupancy Sub-type:

Design Occupant Load:

0

Automatic Sprinkler System:

Provided: **N**

Required: **N**

Condition:

Cond: **020**

[MET] General Condition 2:

Entry: **06/30/2003** By: **NS**

BEFORE WORK STARTS

Action: **INFO CUSTOMER MUST RECEIVE FINAL ON DEMOLITION PERMIT**

Entry: **08/25/2003** By: **ag** Action: **AP DEMOLITION PERMIT B0001843 APPROVED**

Owner Name/Address: **CLUB DEVELOPMENT INC**

150 CLEVELAND ROAD
BOGART GA 30622

Contractor Name/Address:

WOODBURY JOHN R
WOODBURY PROPERTIES
PO BOX 3205
HILTON HEAD ISLAND SC 29928-0205

The above described structure has been constructed in accordance with regulations as adopted in Title 15 of the Town of Hilton Head Island Municipal Code and the Zoning Ordinances for the Town of Hilton Head Island including any and all related codes or ordinances adopted by the Town of Hilton Head Island. It is further declared that the structure has been inspected for compliance with the code requirements for the occupancy, division of occupancy and the proposed use of the structure and is physically sound and structurally and mechanically safe for occupancy.

Frank P. Hodge, Jr.
Building Official

52

WHITE: OFFICE COPY YELLOW: CONTRACTOR'S COPY PINK: OWNER'S COPY GOLDEN: TAX ASSESSOR'S COPY

28833

BUILDING PERMIT
Town of Hilton Head Island
Beaufort County, South Carolina

B0301918

Issue Date: August 25, 2003 Est. Completion: Cost of Construction: \$301,785.00
 Type of Occ: Residential Type of Permit: New Single Family Res Permit Fee: \$1,132.00
 Parcel: R55001800A02150000 Lot #: 8 Pl. Zone/Min. Finished flr. El.: A7(14)
 Street: 9 WHISTLING SWAN ROAD **** Subdivision: SEA PINES
 Unit: Type Construction:
 Description: SEA PINES / NEW SINGLE FAM RES - DEMO PERMIT #B0001843

Owner: CLUB DEVELOPMENT INC 150 CLEVELAND ROAD HOGART GA 30622 0000 706-352-7627
 Contractor: WOODBURY JOHN R WOODBURY PROPERTIES PO BOX 3206 HILTON HEAD ISLAND SC 29928-0206 843-671-2046
 Applicant: WOODBURY JOHN R WOODBURY PROPERTIES PO BOX 3206 HILTON HEAD ISLAND SC 29928-0206 843-671-2046
 Architect:

Heated Sq. Ft.: 4284
 Number of Units: 1
 Number of Stories: 2
 Number of Bedrooms: 4
 Number of Baths: 5
 Total # of Res. Rooms: 10
 Number of Elevators: 0
 Number of Fireplaces: 1
 Fire Alarm System: Y
 Sprinklered: N

Unheated Sq. Ft.: 104
 Type of Construction:??
 Type of Exterior: STUCCO
 Type of Roofing Material: ASP/METAL
 Type of Heating/Air: HEAT PUMP
 Type of Fuel: ELECTRIC
 Gas Appliances: Y
 Size of LP Tank: 0
 Type of Sewage: PUBLIC

Total Square Feet: 4388
 Sq. Ft. Swimming Pool: 0

Septic Tank #: 0

53

ALL WORK MUST COMPLY WITH TOWN OF HILTON HEAD ISLAND CODES.

Print Name: JOHN R. WOODBURY

Signature: *John R. Woodbury*

Cond: 020

Date: 27 Aug 03

General Condition: 2

Entry: 06/30/2003 By: NS Action: INFO. CUSTOMER MUST RECEIVE FINAL ON DEMOLITION PERMIT - BEFORE WORK STARTS Entry: 08/26/2003 By: NS Action: AF
 DEMOLITION PERMIT B0001843 APPROVED

Theodore Padgett, PE, PC

*Consulting Engineer
4865 Highlander Lane
Hollywood, SC 29449*

*email: theodorepadgett@aol.com
843-860-1307
843-769-7710*

www.theodorepadgettpe.com

March 28, 2014

Mr. Jerry France
France Media, Inc.
3500 Piedmont Road, Suite 415
Atlanta, GA 30305

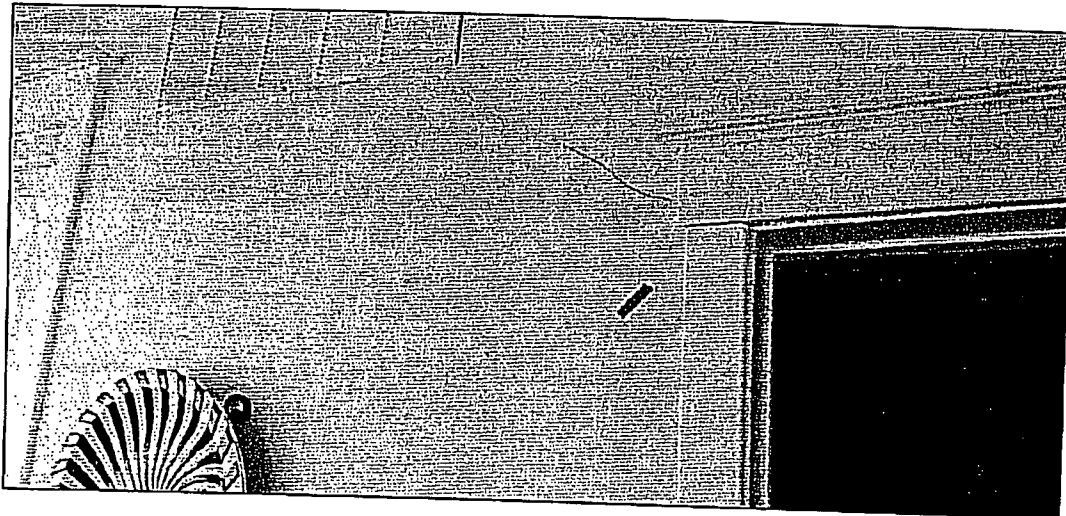
Re: 9 Whistling Swan, Hilton Head Island, SC

Mr. France:

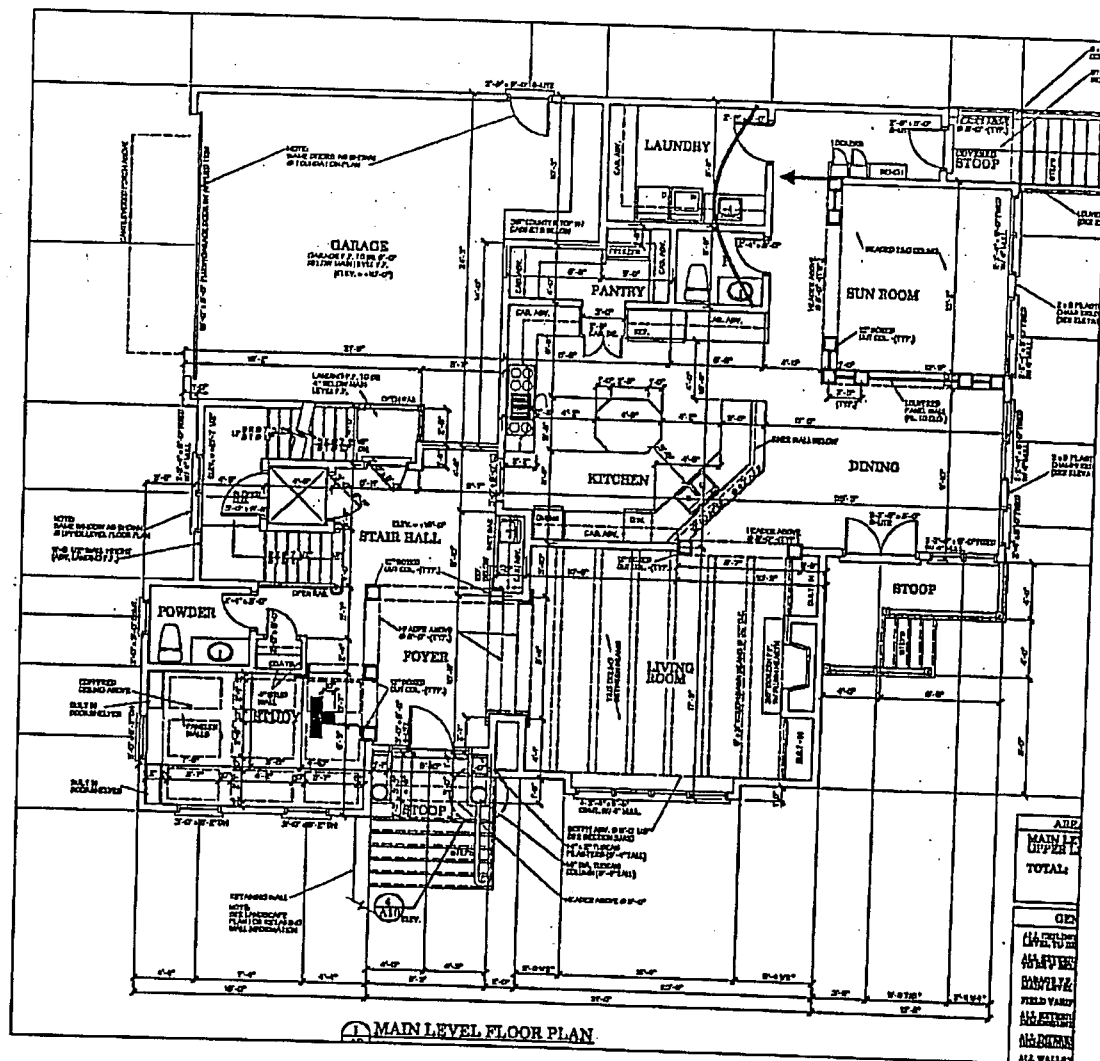
As requested, I have performed a limited inspection of the above property. The purpose of my visit was to determine the cause of the numerous floor deflections and interior wall cracks.

The structure is a 2-story, split level dwelling. Foundations consist of masonry piers and walls supported by shallow concrete footings. The framing system for the 1st floor and presumably the 2nd is a manufactured wood joist system. The remainder of the building is timber frame typical of residential construction. The exterior finish is a combination of tabby shell stucco and horizontal siding.

Visual inspection of the interior of the house indicated dish shaped floors in the Study and Kitchen areas. There were cracks in the sheetrock at numerous locations. Separations in the crown molding were also observed. The sheetrock fissure adjacent to the 1st floor Laundry Room is shown below.



54



The 1st floor joists are an "I" shaped wooden, manufactured joist product with an overall depth of 11-7/8". These members are spaced at 19.2" which corresponds to 5 spaces over the 8 foot width of the plywood floor sheathing. By my calculations, the joists are properly sized for open floor areas. However, there are numerous interior walls that are situated parallel to the floor joists. The additional weight of the parallel walls has caused the deformities noted. This is also true for the large Kitchen island which is situated at the approximate joist mid-span.

Inspection of the crawlspace revealed that the ends of the multiple 2x12 wood girders had crushed at the supports. This is due to insufficient the bearing surface provided. This crushing is limited to approximately 1/4". According to my calculations, the 2x12 girders are sufficient in size.

It is common in the residential building industry to use manufactured joists throughout a house and it is likely that the same or similarly sized joists were used on the 2nd floor here. This could be verified either by reference to the manufacturer's placement drawings or through investigation by destructive means. There is little question, however, that the floor and wall deformities observed on the 2nd floor are related to floor framing issues.

In terms of repair to the 1st floor, the inadequate bearing condition cited may be overcome by fully grouting the top cells of the masonry piers and then installing a full length pressure treated wood 2x8 plate. Additional horizontal support for the parallel walls can be obtained by the installation of multiple beams of laminated veneer lumber (LVL). It is possible to level the Study and Kitchen floor by installing jack piers similar to J57 by Simpson (see below).

J/JP Floor Beam Levelers

Jack piers and standard floor beam levelers offer unique leveling simplicity during and after construction.

MATERIAL: 12 gauge plates, 3/4" threaded rod, 1 1/2" O.D. steel pipe

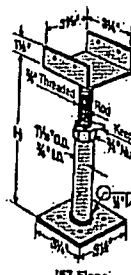
FINISH: None. Connectors installed in damp areas, or corrosive environments that are not exposed to rain or periodic washing, will deteriorate at a faster rate. Corrosion-resistant finishes and maintenance can improve the connector's service life.

INSTALLATION: • Use all specified fasteners. See General Notes.
• Holes are provided for installation with 4-10d x 1 1/2" nails.
• Do not use J/JPs for dynamic loading of structures, such as houses.

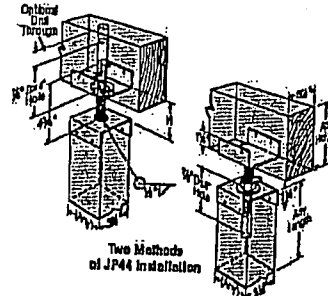
CODES: See page 13 for Code Reference Key Chart.

Model No.	Dimensions		Allowable Bearing Loads (100)	Code Ref.
	N (Inches)	Threaded Rod Length		
JP44	2-4	4 1/4	4400	170
J57	5-7	4	4300	

1. Consider allowable loads for 4x4 post.
2. Loads may not be increased for short-term loading.
3. NAILS: 10d x 1 1/2" = 0.141" dia. x 1 1/2" long. See page 22-23 for other nail sizes and information.



J57 Floor Beam Leveler



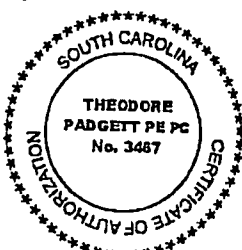
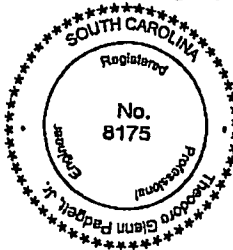
Two Methods of JP44 Installation

While it is clear that there are framing issues with the 2nd floor, there is insufficient information to develop a repair plan. It is not recommended to proceed with 1st floor repairs independent of the 2nd floor needs.

I appreciate the opportunity to be of service and stand ready to assist further.

Best Regards,

Theodore Padgett, PE, PC



Theodore
re
Padgett

Digitally signed by
Theodore Padgett
DN: cn=Theodore
Padgett, o, ou,
email=theodorepad
gett@aol.com, c=US
Date: 2014.04.01
06:50:01 -04'00'

56

Mr. France
March 28, 2014

Page 3

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No. 2014-CP-07-829

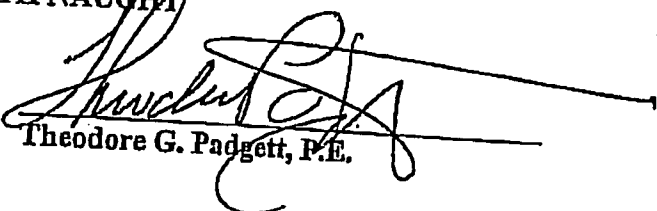
AFFIDAVIT OF THEODORE PADGETT, PE PC

Personally appeared before me Theodore G. Padgett, who, having been duly sworn, deposes and states as follows:

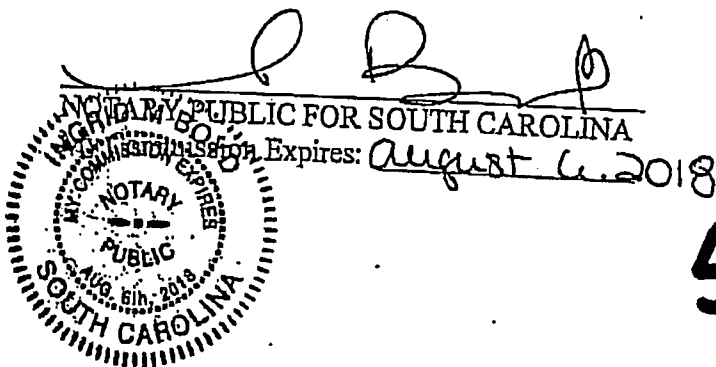
1. I am over 21 years of age, a citizen and resident of Charleston County, South Carolina and qualified and competent to testify under oath in this affidavit as an expert witness;
2. I am a registered professional engineer in the State of South Carolina and have previously been qualified as an expert in state and federal courts;
3. I am regularly engaged to conduct forensic investigations, the investigation and analysis of building failures.
4. I have inspected the property owned by Jerrold France, located at 9 Whistling Swan, Hilton Head Island, South Carolina, as a result of the numerous floor deflections and interior wall cracks.

5. I was engaged by Mr. France for the purposes of determining the causes of the numerous floor deflections and interior wall cracks, and to formulate a remediation plan that would prevent further damage to the house and allow Mr. France to repair the current damage.
6. My investigation has determined that the cause of the numerous floor deflections and interior wall cracks is the overloading of the floor joists of the house as the result of the improper joist assembly and design. Additional construction deficiencies exist at Mr. France's home.
7. In my opinion the discovery of the improper floor joist assembly and design would not have been discoverable by Mr. France due to the hidden condition of the assembly behind the building cladding and interior sheet rock and drywall.
8. Mr. France would not have had reason to investigate the hidden condition of the joist assembly until the manifestation of the numerous floor deflections and interior wall cracks, which occurred over a period of time due to the home's exposure to the natural elements, such as wind, water, and temperature, resulting in property damage to Mr. France's home.

FURTHER AFFLIANT SAYETH NAUGHT


Theodore G. Padgett, P.E.

SWORN to and subscribed before me this
21st day of September, 2014



58

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

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,
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 the Respondents.

PROOF OF SERVICE

This is to certify that I have on this 30th day of November, 2015 delivered a true and correct copy of the Record on Appeal in the above captioned case by depositing a copy of the same in the United States Mail with correct postage to ensure delivery to:

John M. Tatum, III, Esq.

Kevin E. Dukes, Esq.

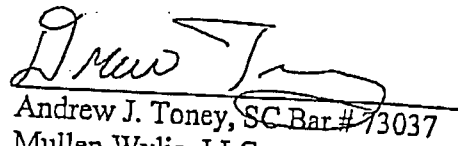
HARVEY & BATTEY, P.A.

P.O. Drawer 1107

Beaufort, SC 29901

(843) 524-3109

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



Andrew J. Toney, SC Bar # 73037

Mullen Wylie, LLC

PO Box 5969

Hilton Head Island, SC 29938

(843)785-6969

Attorney for Appellant