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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

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Case No.: 2012-CP-10-3857 and 2012-CP-10-3858

Appellate Case No.: 2015-001644

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Shipwatch Condominium Association, Inc., ..... Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete ..... Defendants,

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

Oscar Mendiondo, individually and as representative of a class of similarly situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums, Appellants,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp.; Gary Freeman Architect, Inc.; Gary Freeman, individually; ..... Defendants,

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

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**FINAL BRIEF OF APPELLANTS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL ..... 1

STATEMENT OF THE CASE ..... 2

FACTS ..... 3

STANDARD OF REVIEW ..... 7

ARGUMENT ..... 8

I. The Lower Court Erred in Failing to Recognize a Genuine Issue of Material Fact as to When Appellants Discovered their Legal Claims Against Respondents ..... 8

II. The Lower Court Erred in Failing to Apply the Discovery Rule Regarding the Accrual of Causes of Action ..... 11

A. Appellants Did Not Discover the Existence of their Causes of Action Against Respondents Prior to June 13, 2009 ..... 11

B. The Conduct and Representations by Carolina Concrete Systems to Appellants Require that the Statute of Limitations Be Equitably Tolled ..... 15

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) . . . . . 9

Boyd v. Liberty Life Ins. Co., 399 S.C. 401, 732 S.E.2d 180, (Ct. App. 2012) . . . . . 9

City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977) . . . . . 24

Dean v. Ruscon Corp., 321 S.C.360, 468 S.E.2d 645 (1996) . . . . . 18, 21

Dillon Cty. Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (1985) . . . . . 22, 23, 24

Graniteville Co., Inc. v. I H Svcs., Inc., 316 S.C.146, 447 S.E.2d 226, (Ct. App. 1994) . . . . . 21

Martin v. Companion Healthcare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct. App. 2004) . . . . . 18

Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) . . . . . 9

Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) . . . . . 18

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC et al., Op. No. 5343 (S.C. Ct. App. Filed August 19, 2015) . . . . . 9

Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994) . . . . . 22

## STATUTES AND OTHER AUTHORITIES

S.C. Code Ann. §15-3-530 (Law. Co-op. 1976, as amended) . . . . . 18

## STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in granting partial summary judgment in favor of CCS despite the existence of a genuine issue of material fact as to when Appellant had notice of its construction-defect claims against Respondents?

II. Did the lower court err in granting partial summary judgment on the statute of limitations without following applicable precedent of the discovery rule, and without considering the applicable doctrine regarding the equitable tolling of the statute of limitations?

## STATEMENT OF THE CASE

On June 13, 2012, Appellants Shipwatch Condominium Association and Oscar Mendiondo, the representative of the proposed class of 104 unit owners at Shipwatch, each filed separate lawsuits against CCS and the other Respondents for negligent repair work performed at Shipwatch, which is an oceanfront condominium complex located within the Wild Dunes Resort on Isle of Palms, South Carolina (R. pp. 36-77). The class of unit owners was certified by order of the lower court on August 8, 2014.

Following limited oral arguments during the hearing on October 27, 2014, and without the opportunity to review the written memoranda, the lower court ordered that CCS's motion was granted in part (R. p. 639). CCS presented its written brief to the lower court moments before the hearing, and the lower court adopted the version of facts presented by CCS, despite the material presented by Appellants which establishes the existence of factual disputes.

On October 27, 2014 the lower court issued an oral ruling granting partial summary judgment in favor of the Respondent, general contractor Carolina Concrete Systems ("CCS"). That ruling applied to both actions consolidated in the present Appeal. A form order was entered on October 30, 2014 which stated that summary judgment was granted in part, and indicated that a formal written order would follow (R. p. 1). The Appellants timely filed motion for rehearing pursuant to Rule 59, SCRCP (R. pp. 191-289). The lower court issued a written order denying that motion on December 2, 2014, but did not enter any written order as to the partial summary judgment granted at the hearing on October 27, 2014 (R. p. 2).

As of December 30, 2014, the lower court had still not issued any written order granting partial summary judgment, and the Appellants timely filed their Notice of Appeal in each of the two

actions in the present Appeal (R. p. 290). As of July 2, 2015, those two Appeals had not been consolidated by the Court of Appeals, and the South Carolina Court of Appeals dismissed both of those appeals based upon the fact that the lower court had indicated that a written order was forthcoming, and such a written order was necessary for the appeals of those matters to move forward. Order of the South Carolina Court of Appeals (Few, C.J.) dated July 2, 2015 (R. pp. 7-18).

The Court of Appeals issued a Remittitur dated July 22, 2015. Counsel for CCS then submitted a proposed written order to the lower court granting partial summary judgment to CCS. On July 27, 2015, the lower court conducted a status conference, and indicated that it would review the proposed written order which would grant partial summary judgment in both of the underlying actions. The lower court signed that proposed written order without modification after the status conference and filed that Order the next day (hereinafter, the "Order") (R. pp. 19-32). Appellants filed a Notice of Appeal on July 28, 2015 in each of the underlying matters, seeking reversal of the lower court's written order granting partial summary judgment to Respondent CCS (R. p. 511). By letter dated August 14, 2015, the Clerk of the South Carolina Court of Appeals notified counsel of record that the above-captioned actions were consolidated for appeal (R. p. 33).

The lower court's Order granting partial summary judgment must be reversed with instructions to allow the case to proceed to the jury, because the lower court failed to apply the proper standard when considering a motion for summary judgment; failed to apply the discovery rule when considering the statute of limitations defense; and failed to recognize the applicability of the doctrine of equitable tolling.

## FACTS

On June 13, 2012, Appellants filed these actions against CCS and the other Respondents to assert construction and design defect claims for the Shipwatch Condominiums on the Isle of Palms ("Shipwatch"). The Shipwatch Condominium Association, Inc. is the homeowner's association for the 104 condominium units within the 4 buildings at Shipwatch.

The original construction of Shipwatch was completed in the mid-1980's. Respondents were not involved in the original construction. Rather, Respondents are those entities which acted as contractors, design professionals, manufacturers, distributors, and/or suppliers which provided labor and material for extensive renovations and repairs conducted at Shipwatch from 2002 to 2012.

Linda Jernigan is the property manager for Shipwatch, and has served in that role since February 2005. She testified that she and the homeowners association considered CCS (and Bob Wiggins, its principal) to be their "contractor of choice" for the renovations and repairs conducted at Shipwatch from 2002 through 2011 (R. p. 150). "I would have recommended that we do what Bob Wiggins says, because he was our contractor of choice. I had great faith and trust in him." (R. p. 155).

CCS and the other Respondents began extensive renovation and repairs at Shipwatch in November 2002. The repairs encompassed the chimneys, balconies, doors, windows, exterior cladding system, ceilings in stairwells, concrete, roofs, and handrails. CCS also agreed to perform regular inspections and caulking of the buildings. CCS contended that its work from 2002 to 2012 was one continuous project, and it worked under the same building permit from 2003 through 2012.

As recently as April 14, 2011, CCS reported to Appellant that "[o]verall the Duroc/BASF stucco system is in good condition. . . . Our inspection reveals that the buildings are in good

condition." Plaintiffs' Supp. Response in Opp. to CCS Motion, Exhibit 36; (R. pp. 282, 284). CCS reassured the Appellant of the sufficiency of its work by stating, among other things: "General maintenance of the doors and windows, deck coatings, stucco system and caulk inspection and repairs on an annual maintenance program should extend the life cycle of Shipwatch Properties for years to come." (R. p. 284).

In late 2011, Appellant engaged the engineering firm Sutton-Kennerly & Associates ("SKA") to examine the Project in order to prepare for the final phase of the renovation and repairs at Shipwatch. During its preparation, SKA discovered that the repair work performed by CCS and its team was defective and deficient, and in its report dated April 5, 2012, SKA concluded that Shipwatch required a massive amount of immediate corrective action in order to comply with the applicable building codes and standards. See SKA Report dated April 5, 2012; (R. pp. 185-190).

In its April 5, 2012 report, SKA identified problems with the DEFS cladding system, metal stud framing, window and door flashing, waterproofing at balconies, flashing at roof to wall intersections, Tyvek moisture barrier, and wall penetrations, among other major concerns. Less than ninety days after SKA issued its report on April 5, 2012, Appellant commenced the instant lawsuit.

The immediate nature of the problems with the work performed by CCS compelled Appellant to hire a new contractor to correct these problems, and that remedial work began in September, 2013. That new work, which included a total removal and replacement of the exterior DEFS cladding installed by CCS and its team, has a total cost in excess of $15 million, and has required all unit owners to vacate their property for more than 9 months during repairs, resulting in lost rent and other loss of use claims in excess of $6 million. The aggregate damages claim in the underlying actions against the Respondents exceeds $20 million.

Prior to the mediation of these cases, CCS filed its Motion for Summary Judgment, which simply stated that CCS believed "Plaintiffs' claims are barred by the applicable statute of limitations." CCS Motion for Summary Judgment dated Sept. 15, 2014; (R. pp. 78-81). CCS provided no further explanation of the basis for its motion until the hearing on October 27, 2014, when CCS filed and submitted a supporting memorandum moments before the hearing began. The lower court acknowledged receipt of memoranda from both CCS and Shipwatch as the hearing began. Tr. at 2; (R. p. 635).

In its argument in support of summary judgment, CCS improperly used the term "EIFS" (also known as "synthetic stucco" or "artificial stucco)" interchangeably with the term "DEFS". Tr. at 3; (R. p. 636). The term "EIFS" stands for "Exterior Insulation and Finish System" which was a synthetic stucco cladding system popular and widely installed in projects during the 1980's. The original cladding installed on Shipwatch in the mid-1980's was an EIFS system. In contrast, "DEFS" stands for Direct-Applied Exterior Finish System, which was the replacement cladding manufactured by Respondent Acrocrete which CCS installed at Shipwatch from 2002 to 2011.

The DEFS cladding was installed by CCS in order to replace the aged and failing original 1980's EIFS cladding. Appellant does not assert that CCS performed any installation of EIFS cladding in the 1980's, nor does Appellant attempt to make claims against any of the original 1980's contractors in the underlying lawsuit. In spite of those facts, CCS argued at the hearing that somehow Appellant's knowledge of the aged and failing 1980's EIFS cladding caused the statute of limitations clock to begin running as to future claims against CCS for deficient DEFS installation.

At the hearing, Appellant proffered dozens of documentary exhibits and enlarged presentation boards showing the time line of events relating to the claims against CCS, including the

aforementioned April 14, 2011 letter from CCS declaring its work to be in good condition. Plaintiffs' Supp. Response, Exh. 36; R. (pp. 282-284). The lower court declined to review any of these documents during the hearing, stating "I don't need all of this. This is summary judgment, isn't it? . . . It's not going to influence me. Maybe it will influence you. If it makes you feel better, put it up." Tr. at 5 (R. p. 638).

The lower court adopted the flawed reasoning espoused by CCS at the hearing, and did not acknowledge the factual dispute over the date upon which the Appellant knew, or reasonably should have known, that it had a claim against CCS and the other Respondents relating to their work performed from 2002 to 2011. The Court asked counsel for Appellant: "Well, why don't you start by telling me how in the world you get any action for damages done for work in 2005?" Tr. at 5 (R. p. 638). Counsel for Appellant replied that the instant lawsuit did not involve the installation of the original artificial stucco; that CCS reported that it had corrected any workmanship issues it had during the course of the DEFS installation; and that Appellant did not know it had any problems with Respondents' work until SKA's reports in January and April, 2012 (R. pp. 638-639).

The lower court nonetheless ruled from the bench a few moments later, granting partial summary judgment against Appellant. As noted above, the lower court did not file a formal written order for this ruling until July 28, 2015.

Appellant moved for rehearing and filed a supplemental brief which, among other things, included copies of the 41 documentary exhibits which the lower court declined to consider at the hearing. Plaintiffs' Supp. Response, supra; (R. pp. 196-289). Those exhibits, along with the other documents in the Record on Appeal, provide overwhelming evidence of a genuine issue of material

fact as to the date upon which Appellant knew or reasonably should have been aware of problems with the Respondents' repair and renovation work.

Appellants brought this action based upon defects and deficiencies in the repairs and renovation work performed by the Respondents. Appellants were obviously aware that the EIFS cladding originally installed in the 1980's was aged and failing. That was the reason why Respondents were working at Shipwatch. Appellants did not, however, know that the repair and renovation work by Respondents was itself defective, until the engineers at SKA identified these issues in its April 5, 2012 report (R. pp. 185-190).

## STANDARD OF REVIEW

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "Summary judgment is proper when, after reviewing the motion, supporting affidavits, and the pleadings, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC et al., Op. No. 5343 (S.C. Ct. App. Filed August 19, 2015), citing Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court. Boyd v. Liberty Life Ins. Co., 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012).

## ARGUMENT

### I. The Lower Court Erred in Failing to Recognize a Genuine Issue of Material Fact as to When Appellants Discovered their Legal Claims Against Respondents.

The lower court's Order entered on July 28, 2015 must be reversed and these cases must be remanded for trial by jury, because the lower court failed to consider evidence in the Record on Appeal in the light most favorable to the Appellants as the non-moving parties. Had it done so, the lower court would have recognized that a genuine issue of material fact exists as to when Appellants discovered their legal claims for construction and design defects which were commenced on June 13, 2012.

As an initial matter, lower court erred in finding that the Statute of Limitations "began to run before July 12, 2009." The lawsuits were commenced on June 13, 2012, rather than July 12, 2012. More significantly, there is simply no evidence for the assertion that Appellants knew of their claims against CCS until the engineers at SKA issued their report on April 5, 2012.

On April 14, 2011 CCS represented to Appellants that any deficiencies in its work had been corrected, and that the buildings were in good condition. Plaintiffs' Supp. Response in Opp., Exh. 36; (R. pp. 282-284). Appellants paid CCS for its work, and were considering proposals for additional work by CCS based upon the satisfactory progress and performance reported by CCS. After SKA Engineering issued its April 5, 2012 report describing devastating latent defects which required all of CCS's work be removed and replaced, the underlying lawsuits were commenced in June 2012.

In the Order, the lower court states the following:

> Plaintiffs' [sic] assert in this litigation that CCS and the other defendants should be liable for the costs associated with the repairs arising from the failure of original building components such as

> EIFS and original sliding glass doors and windows (which were not installed, repaired, or replaced by CCS or any of the defendants in this litigation); however, the applicable statutes of limitations bar those claims because the undisputed facts show that Plaintiffs knew about water intrusion and alleged construction defects more than three years before commencing this litigation.
>
> Order at p. 5 (R. p. 23)

This passage demonstrates the lower court's failure to view the evidence presented in the light most favorable to the non-moving party. There is no evidence that Appellants sought damages against CCS for "repairs arising from the failure of original building components." Id. Instead, Appellants' Complaints simply claim that the Defendants are liable for their own negligent acts and omissions. Complaint (R. pp. 36-77). CCS began its work at Shipwatch in 2002 in order to repair and replace original building components installed in the 1980's, and it is the failure of CCS to carry out its work properly which led to the claims brought in the underlying lawsuits.

The passage quoted above thus mischaracterizes the Appellants' claims and creates a false premise upon which the remainder of the Order is based. Further, the use of the phrase "undisputed facts" in the passage above indicates that the lower court failed to properly consider the voluminous evidence propounded by the Appellants see, e.g., Plaintiffs' Supp. Response in Opp., Exhibits 1 - 41 (R. pp. 206-289), and certainly failed to consider this evidence in a light most favorable to Appellants.

In its Order the lower court "strikes the claims associated with (a) EIFS; (b) originally-installed sliding glass doors; ( c) originally-installed windows; (d) deck coatings; (e) balcony ceiling coatings; (f) handrails; (g) metal framing behind originally-installed EIFS and adjacent to originally-installed sliding glass doors and windows; and (h) lack of kickout flashing or drip edge flashing." Order at pp. 13-14 (R. pp. 31-32).

The phrase "strikes the claims associated with" itself demonstrates that the jury, as finder of fact, must be presented evidence upon which it can render a decision on how Appellants' claims relate to those listed items. Id. (emphasis added). The following information describes evidence within the Record on Appeal which demonstrates that a genuine issue of material fact exists as to each of those claims which were stricken by the lower court.

**As to the claims for "(a) EIFS; (b) originally-installed sliding glass doors; and (c)originally-installed windows":**

The lower court struck the above claims based upon the following statement: "Schaewe [referring to a Shipwatch Unit Owner and Board Member Arnold Schaewe] testified Plaintiffs had leakage problems at various locations including the end walls, oceanside sliding glass doors, and bay windows when CCS began work in 2002-2003." Order at p. 6 (R. p. 24) (emphasis added).

This passage demonstrates that the lower court failed to consider this evidence in the light most favorable to the non-moving party, and even leads to an absurd conclusion. If Shipwatch was experiencing these problems before CCS began its work, then that knowledge by Mr. Schaewe must relate to original conditions and defects present at the Shipwatch buildings. Any attempt to use Mr. Schaewe's statement to support an inference that the Appellants were aware of uncorrected defects in work by CCS is improper and certainly not an appropriate basis for the partial summary judgment granted by the lower court.

Additionally, the lower court relied upon deposition testimony of Fred Trombino, another Unit Owner and former Shipwatch board member, who "testified that during his tenure on the board between 2005-2007, the board knew EIFS was problematic and not the right application for a coastal environment." Order at 6 (R. p. 24). As noted above, the "EIFS" was originally installed in the 1980's, and "DEFS" or "Acrocrete" was installed by CCS from 2002-11. That testimony cannot be

a justification for partial summary judgment against Appellants, because Mr. Trombino is not even referring to "DEFS" or any other work performed by CCS. Instead, this testimony supports Appellants' position that the Shipwatch Board recognized that the 1980's cladding had problems, and that is why the Board engaged CCS. Especially when read in the light most favorable to the non-moving party, that testimony cannot support partial summary judgment against Appellants.

The Order further cites a May 9, 2007 letter in which Bob Wiggins, President of CCS, reported to Shipwatch that "[l]eaks continue to be a problem at and around the old sliding doors . . . these doors are leaking and I am sure there is damage that is occurring in the new metal stud walls with the Durock system that we installed." Order at p. 11 (R. p. 29); see also Letter from Wiggins to Jernigan dated May 9, 2007 (R. pp. 224-225). Based upon this document alone, the lower court concludes that the only source of leaks was from the original sliding glass doors, and that there were no deficiencies in the installation of the Durock system (DEFS) which was installed by CCS next to those original doors.

However, in reaching its conclusion the lower court patently failed to consider evidence in the Record which puts that letter in context and thereby describes a circumstance vastly different from the inaccurate factual finding by the lower court. On June 19, 2007, Linda Jernigan sent a reply letter to Mr. Wiggins (R. p. 226), in which she requested a proposal for corrective action to those particular doors. On September 6, 2007 Mr. Wiggins replied to that request with a proposal for the replacement of numerous sliding glass doors (R. pp. 227-232). Then, on March 20, 2008 Mr. Wiggins sent an invoice for the removal and replacement of those particular leaking sliding glass doors (R. p. 233). A copy of that invoice marked "paid" was produced from the project files of CCS, and was included within the documents presented to the lower court for its consideration of this

motion. Id. Further, the lower court's finding that "Plaintiffs clearly knew about various water intrusion issues at the Shipwatch project at least 5-10 years before filing this litigation and, clearly, well before July 12, 2009" is not only inconsistent with the evidence when viewed in the light most favorable to the non-moving Appellants, but it is also based upon the false premise that CCS is being sued for work performed during the original construction in the 1980's. Order at p. 5 (R. p. 23). At the very least, it is apparent that this evidence was not properly reviewed by the lower court in a light most favorable to the non-moving party, and the resulting Order granting partial summary judgment is erroneous and must be reversed.

**As to the claims for "(d) deck coatings; (e) balcony ceiling coatings; and (f) handrails":**

In reaching its conclusion to strike claims "associated with" deck coatings and balcony ceiling coatings, the lower court failed to consider evidence in the Record which indicates that in fact CCS did install deck coatings at the Shipwatch project in 2008, contrary to the findings set forth in the Order. On March 20, 2008 Mr. Wiggins sent an invoice for the reinstallation of "Sonneborne Deck Coating." (R. p. 233). A copy of that invoice marked "paid" was produced from the project files of CCS, and was included within the documents presented to the lower court for its consideration of this motion. Id.

As for the balcony ceiling coatings, it was not until September 9, 2009 that Mr. Wiggins of CCS presented evidence establishing that the ceiling coatings were deficient and in need of replacement. See CCS Proposal of September 9, 2009 (R. pp. 257-259). This was within three years before the underlying lawsuits were commenced, and therefore provide no basis for relief to Respondents in a Statute of Limitations analysis.

In signing and filing the proposed order by CCS as indicated above, the lower court adopted the flawed logic espoused by CCS in connection with the handrail claim as well. Similar to the false premise established regarding the EIFS, doors, and windows claims noted above, the lower court found that "[i]n this litigation, Plaintiffs demanded CCS pay for the costs of removing and replacing the exterior handrails throughout the complex even though CCS did not install the original handrails and Plaintiffs knew about damage associated with the deteriorated handrails by 2008." Order at p. 10 (R. p. 28).

There is nothing in the Record on Appeal which indicates that Appellants assert that CCS is liable for "the cost of removing and replacing the exterior handrails throughout the complex." As noted above, Appellants clearly assert in the Complaint that CCS and the other defendants named therein are liable for their own negligent acts and omissions, and for the damages resulting therefrom. Complaint (R. pp. 36-77).

However, the Record in fact does include evidence that CCS admitted performing "handrail reinstallation" as of February 2, 2005. See, e.g., Plaintiffs' Supp. Response in Opp., Exh. 3 (R. p. 208). Nothing in the testimony of Messrs. Schaewe and Trombino indicates that the two unit owners absolved CCS from responsibility for any negligence which caused damage to handrails. Whether and to what extent damage to handrails was caused by the negligence of CCS is a question of fact for the jury to decide. As with the other findings noted above, it is apparent that this evidence was not properly reviewed by the lower court in a light most favorable to the non-moving party, and the resulting Order granting partial summary judgment is erroneous and must be reversed.

**As to the claims for "(g) metal framing behind originally-installed EIFS and adjacent to originally-installed sliding glass doors and windows; and (h) lack of kickout flashing or drip edge flashing":**

The language in item (g) is in itself an inappropriate basis for partial summary judgment, because in order to give it any effect, that finding actually requires a factual inquiry and finding of whether CCS actually installed metal framing next to certain originally-installed sliding glass doors, but not other sliding glass doors. The Record on Appeal contains evidence, for example, that CCS installed new sliding glass doors and DEFS cladding on the ocean side of the C and D buildings, but there were also certain original 1980's installed windows on those buildings. That is an example in which there would be DEFS installed next to (i.e., adjacent to) those original windows. See, e.g., Plaintiffs' Supp. Response in Opp., Exh. 35 (R. pp. 279-281).

In order to carry out the terms of this Order, the parties must present facts to a jury in order to determine whether a portion of a claim is or is not recoverable damages. That confusion is precisely why this Order must be reversed: it is the jury's role to evaluate evidence and make findings of fact, particularly in complex matters such as the multi-million dollar repair work by CCS which Appellants allege to be deficient.

Until SKA issued its report on April 5, 2012, Appellants were unaware that CCS failed to properly install those new sliding glass doors and failed to properly flash the DEFS termination adjacent to those. SKA Report dated April 5, 2012 (R. pp. 185-190). Any finding by the lower court that Appellants knew of latent defects in this work by CCS is not supported by the evidence, and the Order must be reversed so that a jury may properly determine the issues of fact.

Finally, the lower court struck any claims by Appellants relating to the "lack of kickout flashing or drip edge flashing" because a property assessment in January 2008 discussed the lack of this type of flashing on the Shipwatch project. However, the Record on Appeal contains a spreadsheet prepared by CCS dated October 15, 2009, less than three years before these lawsuits

were filed, which has annotations indicating that the "kickout flashing" work was in fact completed by Respondent First Exteriors ("F.E.") and Respondent Glasgow Roofing ("G.R.") on or after October 15, 2009. Plaintiffs' Supp. Response in Opp., Exh. 24 (R. pp. 260-261). This provides another example of the lower court failing to acknowledge evidence in the light most favorable to the non-moving party, and highlights the error in granting the partial summary judgment.

Not only does the lower court's partial summary judgment ruling confuse the actual claims presented in the underlying lawsuits and wrongly conclude that knowledge of the original aged and failing buildings equates to knowledge of latent defects caused during the repair, but the lower court's order itself mandates a factual inquiry by the jury.

The trial court also excludes claims associated with metal framing both behind EIFS and "adjacent to" originally-installed sliding glass doors and windows. This is also an unworkable standard for a Court or jury to follow in that it requires a factual finding and, thus, demonstrates the flawed reasoning behind the Order. In granting this partial summary judgment, the lower court effectively issued a premature jury instruction that a future jury in the underlying matters cannot award any damages "associated with" EIFS and the other claims struck in the Order. Instead, the lower court must properly allow the Appellants as Plaintiffs to present their evidence of deficient construction by CCS and damages resulting therefrom.

At trial, CCS can challenge that evidence and the jury can make its determination accordingly. The lower court adopted the approach offered by CCS which purports to convert an argument about damages causation into an argument about the applicable Statute of Limitations. The questions which are the subject of findings in the lower court's orders are questions of causation, which are properly within the province of the jury.

This accumulation of errors requires reversal of this partial summary judgment and remand to the lower court for a trial by jury. At the very least, it is apparent that a genuine issue of material fact exists as to when Appellants became aware of the uncorrected defects lurking within CCS's repairs.

## II. The Lower Court Erred in Failing to Apply the Discovery Rule Regarding the Accrual of Causes of Action

### A. Appellants Did Not Discover the Existence of their Causes of Action Against Respondents Prior to June 13, 2009.

It is axiomatic at this point in South Carolina jurisprudence that the Statute of Limitations does not begin to run in a construction-defect case until the Plaintiff knew, or in the exercise of reasonable diligence should have known, that a cause of action exists against a defendant. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (overruled on other grounds); Dean v. Ruscon Corp., 321 S.C.360, 468 S.E.2d 645 (1996). The claims in this lawsuit are subject to the three-year Statute of Limitations pursuant to S.C. Code Ann. §15-3-530 (Law. Co-op., as amended). This lawsuit was filed on June 13, 2012.

The lower court ruled that "[Appellants] are entitled to sue [CCS] for anything [Appellants] can relate to things that [CCS] did in 2010." (Tr. at 6; R. p. 467). Implicit in this ruling is that any work at the Shipwatch Project which the Respondents performed on or before December 31, 2009 is barred by the three-year statute of limitations. Because this lawsuit was filed on June 13, 2012, such a restriction is a clear misapplication of the plain reading of the three-year statute of limitations in S.C. Code Ann. Section 15-3-530.

Regardless, the statute of limitations begins to run only upon actual knowledge of a claim or "when the underlying cause of action reasonably ought to have been discovered." Martin v.

Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). Under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Id. at 575-76, 593 S.E.2d at 627. The lower court erred in disregarding the material presented by Appellant which specifically contradicts any conclusion that Appellant had actual or constructive notice of a claim against CCS prior to June 13, 2009.

Appellant presented information, including deposition testimony of the property manager, which establishes that Appellant did not know, and had no reason to know, that there were unresolved issues with the way in which Respondents repaired the Shipwatch buildings before June 13, 2009. Shipwatch Property Manager Linda Jernigan testified regarding CCS and its principal, Bob Wiggins, as follows:

Q. Who do you rely on for any kind of information concerning the actual conditions of the buildings at Shipwatch?

A. Up until Sutton-Kennerly was hired in 2011, 2012, whenever they did the investigation report, Carolina Concrete, we relied on them for just about everything. They were the contractor of choice.

Q. What's your opinion of the work that Carolina Concrete performed?

A. I don't have an opinion of the quality of their work.

Q. Well, why would you keep hiring them back and forth for what seems like to be a decade if there was some issue of concern about the quality of work?

A. We believed in them and trusted them completely. They were the contractor of choice.

Q. And how did they fail to live up to that trust?

A. The inspection that was done by Sutton-Kennerly revealed some things that weren't properly done.

Deposition of Linda Jernigan, at 231-232; (R. pp. 150-151).

CCS was indeed the "contractor of choice" for the Appellant for the repairs performed at the Shipwatch Project between 2003 and 2011. The first invoice from CCS to the Appellant was dated December 19, 2002, and the final invoice was dated March 21, 2012. (Plaintiff's Response in Opposition to Summary Judgment, Exhibit B; R. pp. 158-160).

Moreover, Appellant engaged CCS to perform test cuts in the buildings in conjunction with the forensic analysis performed by SKA in February 2012. (Id.) A reasonable inference may be drawn from this information that as of February 2012, approximately 120 days before the lawsuit was filed on June 13, 2012, neither Appellant nor CCS suspected any deficiencies with the repair work performed by CCS. It is reasonable to infer that if Appellant knew that it had a claim against CCS for deficient work, it would have neither hired CCS to perform test cuts, nor would it have paid CCS over $23,000 for cuts and patches to the areas investigated by SKA in February and March 2012. (Id.) It is also reasonable to infer that if CCS knew that these test cuts would have uncovered the extensive damages described in SKA's April 2012 report, CCS would not have agreed to participate in that investigation.

In its Motion for Summary Judgment, CCS failed to establish that Appellant knew, or should have known prior to June 13, 2009 that it had a legal claim against CCS for deficiencies in its renovation work performed between 2003 and 2011. Appellant presented ample evidence to the lower court which directly contradicted the representations of CCS, and the lower court erred in failing to resolve all factual disputes in favor of Appellant, as the non-moving party.

Further, CCS attempted to establish notice of these claims by suggesting that some of Appellant's damages may have been partially caused by the underlying EIFS installation by the original contractors in the 1980's. However, as the Court of Appeals stated:

> It would be paradoxical to hold that a person suffering an injury is required to determine the causation of the injury without benefit of expert opinion and then require causation testimony at trial to be limited to expert opinion. When the injury requires an expert to make a determination of the cause of the injury and an expert is retained, this, in and of itself, is evidence of reasonable diligence in determining whether or not the injury is attributable to a wrong inflicted by someone else.
>
> Graniteville Co., Inc. v. I H Svcs., Inc., 316 S.C.146, 148,447 S.E.2d 226, 228 (Ct. App. 1994)

To the extent that the lower court accepted CCS's argument and conflated the defense of causation with the statute of limitations defense, the lower court erred and its order granting partial summary judgment must be reversed, with instructions requiring Appellant's claims against the Respondents to be fully adjudicated by a jury.

### B. The Conduct and Representations by Carolina Concrete Systems to Appellants Require that the Statute of Limitations Be Equitably Tolled.

In Dean v. Ruscon, supra at 360, 468 S.E.2d at 645, the South Carolina Supreme Court adopted the reasoning of the Court of Appeals in Graniteville, supra at 146, 447 S.E.2d at 226. In Graniteville, the Court of Appeals held that the Statute of Limitations was equitably tolled for the amount of time it took the Plaintiff's fire investigation expert to perform its investigation and render opinions as to causation. Id. "The Court of Appeals held that when an injury requires an expert to determine its cause and an expert is retained, there is evidence that the injured party exercised reasonable diligence and the statute of limitations should be tolled. Accordingly, the statute was tolled for eight days which was the date the injured party discovered that a cause of action existed." Dean v. Ruscon at 360, 468 S.E.2d at 645 (citing Graniteville, supra at 146, 447 S.E.2d at 226).

Even if, *arguendo*, Appellant should have known there were problems with CCS's work prior to June 13, 2009, the Statute of Limitations must be equitably tolled based upon the investigation

performed by SKA along with the continuing work and reassurances provided by CCS as to the quality and sufficiency of its work at the Shipwatch project.

A defendant may be estopped from asserting the statute of limitations as a defense if the delay that otherwise would give operation to the statute was induced by the defendant's conduct. Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994). Such inducement may consist either of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. Id. Deceit is not an essential element of estoppel; rather, it is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire. Dillon County School Dist. No. 2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218, 332 S.E.2d 555, 561 (1985) (overruled on other grounds).

In the instant case, Appellant provided evidence to the lower court which established continuing actions and assurances by CCS that it was performing its work in a sufficient manner. On April 14, 2011, CCS reported to property manager Linda Jernigan that "[o]verall the Duroc/BASF Stucco system is in good condition with the exception of some staining that cannot be removed by pressure washing." (Plaintiffs' Supp. Response in Opp., Exh. 36; R. pp. 282-284). As noted above, when CCS submitted invoices to Appellant as late as March 21, 2012, Appellant paid those invoices in full. (Plaintiffs' Memorandum in Opp., Exh. B; R. pp. 158-160). Ms. Jernigan testified that Appellant "relied on [CCS] for just about everything. They were the contractor of choice." Jernigan Depo. at 231; (R. p. 150).

During the course of its work between 2002 and 2011, CCS detected certain issues which were promptly repaired by CCS. On August 23, 2008, for example, Respondent engineer Robert

Sisnroy noted in a periodic report that his observations "revealed evidence of blistering of the DEFS lamina off of the concrete board substrate." Plaintiffs' Supp. Response in Opp., Exh. 18; (R. pp. 243-249). Following receipt of that report by Mr. Sisnroy, Appellant wrote to CCS on January 26, 2009, made note of the issues reported by Mr. Sisnroy, and requested that CCS "repair the failed claddings in accordance with the manufacturer's installation requirements and warranty requirements." Id. at Exh. 19 (R. p. 250). In the last sentence of that letter, Ms. Jernigan concluded: "Please contact me to make arrangements to accomplish this work as soon as possible." (Id.) There is no evidence that Appellant knew, or reasonably should have suspected, that CCS would have been negligent or otherwise failed to perform those repairs to its own work properly.

The Record on Appeal contains numerous letters and proposals from CCS to Appellant after January 26, 2009, and payment records establishing that CCS was paid over $900,000.00 between February 2009 and April 2012. Moreover, as of April 14, 2011, CCS reported that the exterior cladding system that it installed was "in good condition." Id. at Exh. 36; R. p. 282). Notably, in support of its Motion for Summary Judgment, CCS failed to adduce any evidence which shows that CCS notified Appellant, or even suggested to Appellant, that there were defects and deficiencies in the performance of CCS's work that were causing damage at the Shipwatch project. A reasonable inference can be drawn that neither CCS nor Appellant was aware of any of the claims against CCS until SKA reported these issues to Appellant in its January and April 2012 reports.

In Dillon County Schools, the Court was presented with an owner who complained that its roof was designed and constructed in a deficient manner. The defendant contractor, architect, and roofer argued that the Plaintiff's claims were barred by the statute of limitations. The Court held that "[o]ne's assurances to an injured party that defects can be corrected coupled with his attempts to

correct them is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation." Id. at 219 (quoting City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977)). Therefore, the defendants' employment of a roofing expert, frequent meetings at the school to resolve the issue, and numerous attempts to repair the roofs allowed an inference that the defendants assured the Plaintiff that the problems would be corrected and litigation would not be required. Further noting that whether equitable tolling applies to a defendant's conduct is usually a jury question, the Court reversed the trial court's grant of summary judgment. Id. at 219-220.

Appellant is in the same position as the plaintiff in Dillon County Schools: Even if one assumes, *arguendo*, that Appellant should have known of its claims against CCS prior to June 13, 2009, it was nonetheless reasonable for Appellant to believe that CCS was addressing these problems as part of its ongoing work at the Project. Whether a defendant's conduct warrants equitable tolling of the Statute of Limitations is a question for the jury. Id. at 218, 332 S.E.2d at 561. Appellant must at least be afforded the opportunity to present evidence of the assurances provided by CCS to the jury.

## CONCLUSION

For the foregoing reasons, the Order by the lower court granting partial summary judgment to Respondents must be reversed, with instructions to the lower court indicating that the Appellants have demonstrated the existence of a genuine issue of material fact regarding the date upon which Appellants were on notice of the claims against Respondents, and further instructions to have the Appellants' claims be fully adjudicated by a jury.

Respectfully Submitted,

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December 28, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2012-CP-10-3857 and 2012-CP-10-3858

Appellate Case No.: 2015-001644

Shipwatch Condominium Association, Inc., ..... Appellant,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech, Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete ..... Defendants,

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

and

Oscar Mendiondo, individually and as representative of a class of similarly situated owners of condominium units in the horizontal property regime known as Shipwatch Condominiums, Appellants,

v.

Carolina Concrete Systems, Inc.; Sisnroy Engineering, LLC; Robert G. Sisnroy, individually; Terrence J. McKelvey; Glasgow Roofing, Inc.; GlassTec, Inc.; Spectech Inc.; Sonneborn, Inc.; Chimney Sweeps, Inc.; Low Country Chimneys, Inc.; EFCO Corp.; W.C. Johnston Architectural Sales, Inc.; Charleston Glass Company, Inc.; First Exteriors, LLC; Acrocrete, Inc.; BASF Corp., Gary Freeman Architect, Inc.; Gary Freeman, individually, ..... Defendants,

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

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## CERTIFICATE OF COUNSEL

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

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December 28, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Case No.: 2012-CP-10-3857 and 2012-CP-10-3858

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CERTIFICATE OF SERVICE

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I, Frances Klotsch, an employee of Robertson Hollingsworth & Flynn, hereby certify that I have served parties in this action with a copy of the Final Brief of Appellants via U. S. Mail and Electronic Mail as follows:

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