

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES  
DISTRICT COURT FOR SOUTH CAROLINA  
Richland Mark Gergel, United States District Judge

Appellate Case No. 2017-002350

Mark Lawrence, individually and on behalf of all others  
similarly situated .....Plaintiff/Appellant,

v.

General Panel Corp., a division of Perma "R" Products, Inc. ....Defendant/Respondent.

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## STATEMENT OF CERTIFIED QUESTION PRESENTED

Did 2005 South Carolina Laws Act 27 (H.B. 3008) amend S.C. Code Ann. § 15-3-640 (1976) so that, in an action for damages based upon a defective improvement to new-construction real property, the date of “substantial completion of the improvement” is measured from the date of the certificate of occupancy (unless the parties establish a different date by written agreement), superseding the South Carolina Supreme Court's decision in *Ocean Winds Corporation of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001)?

## STATEMENT OF THE CASE

Pursuant to Rule 208(b) of the *South Carolina Appellate Court Rules*, Defendant rejects and objects to the Statement of the Case provided by the Plaintiff. Rule 208(b)(1)(C), SCACR. That Statement contains facts that are not part of the record presented by the certifying court and should not be considered by this Court. *See* Rule 244(b), SCACR. Some of the facts stated are not relevant to the Certified Question and/or are in dispute. Moreover, Defendant takes exception to many of the inferences stated as facts.

As an alternative Statement of the Case, Defendant adopts the “Background” set forth in the certifying court’s Order and Opinion, dated November 14, 2017:

This is a products liability action. Defendant General Panel manufactures Structural Insulated Panels (“SIPs”), which are made using two sheets of oriented strand board with insulating foam inserted between the sheets. SIPs are an alternative to traditional framing. Plaintiff’s home, located at 675 Faulkner Drive in Mount Pleasant, South Carolina, was built using SIPs manufactured by the Defendant. Plaintiff alleges the SIPs have failed due to moisture intrusion because the Defendant provided defective installation instructions.

It is undisputed that the SIPs were installed by March 2007. It is also undisputed that the certificate of occupancy was issued on December 10, 2008. Plaintiff filed the present action on December 8, 2016, more than eight years after the SIPs were installed, but less than eight years after the certificate of occupancy was issued.

## ARGUMENT

The answer to the Certified Question is: “No.” The 2005 amendment to S.C. Code Ann. § 15-3-640 (1976) did not change the definition of “substantial completion” contained in S.C. Code Ann. § 15-3-630 (1976) and did not alter the analysis or public policy justifications for this Court’s prior decision in *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001).

### **I. The Definition of “Substantial Completion” was not Changed by 2005 South Carolina Law Act 27 (H.B. 3008).**

South Carolina Code § 15-3-640 provides that actions against manufacturers of components used in the construction of real property must be filed within eight years of the “substantial completion of the improvement.” S.C. Code Ann. § 15-3-640 (1976) (*hereinafter* “§ 15-3-640”). “Substantial completion” is defined in the previous section as:

[T]hat degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and owner.

S.C. Code Ann. § 15-3-630 (1976) (*hereinafter* “§ 15-3-630”). In 2005, the South Carolina General Assembly amended § 15-3-640 by reducing the limitations period from thirteen years to eight years and adding the following language:

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.

2005 S.C. Laws Act 27 (H.B. 3008) § 2. The definition of “substantial completion” contained in § 15-3-630 has remained unchanged since the statute was first adopted. S.C. Code Ann. § 15-3-630 (1976).

Proper construction and interpretation of this additional language points to the conclusion that the legislature intended to provide a means of proof consistent with the definitional section in SC Code § 15-3-630, not to supersede or replace it. Reading § 15-3-640 to mean that a certificate of occupancy is a replacement definition for “substantial completion” would render the § 15-3-630 definition of “substantial completion” null and void, in violation of established principles of statutory construction.

In *Capco of Summerville v. J.H. Gayle Const. Co., Inc.*, the Supreme Court was confronted with a similar question of whether § 15-3-640 was repealed by implication by the passage of the Contribution Act (which contains a one-year limitation period). 368, S.C. 137, 628 S.E.2d 38 (2006). Construing these two seemingly inconsistent provisions, the Court held that:

Repeal by implication is disfavored, and is only found when two statutes are incapable of any reasonable reconciliation. Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier, of, the general statute and given such effect.

*Capco of Summerville*, 368 S.C. at 141-42; 628 S.E.2d at 41 (citations omitted). The Court found that the two statutes did not irreconcilably conflict. *Id.* at 143, 628 S.E.2d at 41.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). All rules of statutory construction are subservient to the one that the legislative intent must

prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court must reject an interpretation of a statute that would lead to an absurd result the legislature could not have intended. *Ranucci v. Crain*, 409 S.C. 493, 500-501, 763 S.E.2d 189, 192-93 (2014); *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

It is axiomatic that “words in a statute must be construed in context,” and “the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.” *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008) (citing *Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 122-23, 754 S.E.2d 486, 492-93 (2014); *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006); *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992). This Court should not concentrate on isolated phrases within a statute. *S.C. State Ports Auth.*, 368 S.C. at 398, 629 S.E.2d at 629. Instead, the Court reads a statute as a whole and in a manner consonant and in harmony with its purpose. *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct.App.2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010); *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 127-8, 750 S.E.2d 61, 63 (2013). Thus, the Court must read the

statute so “that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,” *Sweat*, at 377, 665 S.E.2d at 651, for “[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law” *id.* at 382, 665 S.E.2d at 654; *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). The Court must presume in construing a statute that the Legislature did not intend to perform a futile thing. *Steinke v. S.C. Dept. of Lab., Licensing and Reg.*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999). *See, Gaffney v. Mallory*, 186 S.C. 337, 195 S.E. 840 (1938). The Court is constrained to avoid a construction that would read a provision out of a statute, and must reconcile conflicts if possible. *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994).

Reading the amended language of § 15-3-640 as the definition of “substantial completion” creates a manifest conflict with the definition contained in § 15-3-630. The two definitions describe different triggers: Section 15-3-630 is based on beneficial use, while § 15-3-640 is based on an administrative act. Section 15-3-630 looks at the opportunity of the owner, while § 15-3-640 looks to the efficiency of a government official. As a result of the different triggers, the resulting date can differ by days, months, or as in this case, years, and § 15-3-640 should not be construed to permit this inconsistency.

Reading the amended § 15-3-640 by itself, without § 15-3-630, ignores the greater context of the statutory scheme and leads to a construction which nullifies the definitions in § 15-3-630. Plaintiff asks this court to construe the language in § 15-3-640 specifying that a certificate of occupancy constitutes substantial completion as the sole indicator of “substantial completion” apart from contractual modification. This construction completely ignores the definitional language in § 15-3-630 and writes the definition in this section out of the statutory scheme entirely.

Accepting this construction would be improper. If the legislature desired for the amendment to § 15-3-640 to supersede the definitional language in § 15-3-630, it easily could have chosen to amend that section and change the definitional language. Instead, it chose to add the language in a different section, and thus it must be read in context.

While Plaintiff's conclusion of the effect of the amendment should be rejected, his actual "Question Presented"<sup>1</sup> can actually be answered in the affirmative: Because of the amendment, a certificate of occupancy is *prima facie* evidence<sup>2</sup> of the trigger date for the Statute. The wording of the amendment indicates that the certificate of occupancy provides "proof" of substantial completion. In other words, it is evidence that substantial completion has occurred, not that it is substantial completion in and of itself. The proper construction of § 15-3-640 results in establishing an end-date to the set of possible trigger dates after the period of beneficial use has begun.

The added language in § 15-3-640 applies if a question were to arise concerning whether a part of a project was substantially completed *after* the certificate of occupancy is issued. Here, § 15-3-640 clearly precludes starting the clock on the statute of repose at any point after the certificate of occupancy is issued, apart from a contractual agreement otherwise. Thus, construed as a whole, in context, and in such a way as to avoid contradictions or reading out whole sections of the Statute, the definition of "substantial completion" in § 15-3-630 provides the very earliest date from which "substantial completion" may be calculated, and the clarifying language in § 15-

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<sup>1</sup> Plaintiff's Brief at p. 1.

<sup>2</sup> Black's Law Dictionary defines "*prima facie* evidence" as: "Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, . . . which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary (10th ed. 2014).

3-640 amendment provides the very latest date from which substantial completion may be calculated.

**II. The Language Added by Amendment to § 15-3-640 in 2005 Does not Displace the Court's Ruling in *Ocean Winds*, Which Remains Controlling.**

The amendments to § 15-3-640 do not conflict this Court's ruling in *Ocean Winds Corp. of Johns Island v. Lane*, supra. In that case, this Court found that "substantial completion" for installation of windows occurred upon substantial completion of the installation of those windows and not upon substantial completion of the project as a whole or issuance of a certificate of occupancy. *Ocean Winds*, supra. The Certified Question before this Court anticipates a conflict where none should exist.<sup>3</sup>

Contrary to Plaintiff's position, the mere fact that § 15-3-640 was amended four years after the opinion of this Court, is not dispositive of the analysis. The natural and safe guide to legislative intent in passing a statute is the statutory and judicial status of the subject at time of enactment. *Branchville Motor Co. v. Adden*, 158 S.C. 90, 155 S.E. 277 (1930). The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's

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<sup>3</sup> Plaintiff incorrectly suggests that United States District Court Judge Norton has ruled on this issue. See Plaintiff's Brief at p. 8. To the contrary, the court in *Belfor*, determined that the language from S.C. Code Ann. 15-3-640 *did not* apply to determining when a contractor was entitled to payment for completion of work. The court stated that:

[t]he statute does not, however, set forth that a contractor is deemed to have substantially complied with the terms of a contract. The statute outlines only that a certificate of occupancy shall constitute proof of substantial completion to trigger the statute of repose. Therefore, Belfor's argument that the certificate of occupancy proves that it substantially complied with the contract lacks merit.

*Belfor USA Grp., Inc. v. Banks*, No. 2:15-CV-01818-DCN, 2016 WL 3753218, 9 (D.S.C. dated July 14, 2016).

inaction is evidence that the interpretation is correct. *State v. Sawyer*, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014); *McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012); *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). Here, there is no clear intent to change existing case law.

First, the amendment does not directly address the holding of existing law. In *Ocean Winds*, the plaintiffs sued for damages resulting from the installation of defective windows manufactured and installed by the defendant during construction of a condominium project. 556 S.E.2d at 418. There, like here, the Court was presented with a Certified Question concerning the triggering of § 15-3-640 for a material supplier. The issue before the Court was whether the § 15-3-640 statute of repose began to run for Andersen Windows when the window installation was substantially complete, or when the entire project was substantially completed. *Id.* It is important to note that the consideration was not as to the *meaning* of substantial completion, rather *which* substantial completion controlled. The Court relied heavily on the language in the § 15-3-630 that created a trigger when a “*specified area or portion thereof*” was substantially completed. *Id.* at 419 (quoting S.C. Code Ann. § 15-3-630 (1976) (emphasis in original)). That language was not the subject of the 2005 amendment.

The legislature must be assumed to have been aware of the existing case law interpreting these provisions, and took no steps to explicitly contradict this Court’s ruling in *Ocean Winds*. Had the legislature intended to overrule *Ocean Winds*, it could have amended the definitional section in § 15-3-630. This certainly would have overruled *Ocean Winds*. The legislature did not do this, however. Instead, it passed an amendment clarifying that when a specific event occurred -- the issuance of a certificate of occupancy -- proof of the § 15-3-630 definition of “substantial

completion” was satisfied. Thus, the 2005 amendment does not replace the definitional language of § 15-3-630 or the case law interpreting that definitional language.

Secondly, the 2005 amendments to § 15-3-640 actually augment the *Ocean Winds* ruling. This is because in *Ocean Winds*, the Court ruled on the date from which “substantial completion” could be calculated as to a supplier or subcontractor; *i.e.*, that substantial completion of a phase of a project could be completed prior to substantial completion of a whole project. The 2005 amendment, by contrast, clarified the date from which “substantial completion” could be calculated for the improvement as a whole; *i.e.*, that substantial completion of a project is automatically inferred from issuance of a certificate of occupancy. There is no contradiction here. This court should interpret the amended § 15-3-640 in accordance with existing case law, as the legislature must be assumed to be aware of that case law and did not contradict it with the passage of the 2005 amendments.

Finally, interpreting § 15-3-630 and § 15-3-640 as a whole to allow different trigger dates for different portions of a single project is necessary and consistent. As noted above, the definition of substantial completion contains the language “specified area or portion thereof.” § 15-3-630(b). In *Holly Woods Association of Residence Owners v. Hiller*, the Court of Appeals, while not specifically citing this language, recognized the concept that a project is made up many parts that are completed at different times, thus creating different trigger dates. 392 S.C. 172, 708 S.E.2d 787 (2011). In that case, the Court of Appeals held that:

[T]he statute of repose would have barred the Association from suing for construction problems relating to the infrastructure of buildings one through eight (completed more than 13 years prior to the suit) ... However, we hold that the statute of repose did not bar the Association from bringing suit in 2005 because it related to the common areas of the development built in 1996 or later (less than 13 years prior to suit).

*Id.* at 183, 708 S.E.2d at 793 (parentheticals supplied). Plaintiff's proposed interpretation erases this important nuance.

**III. The Legislative Intent Behind Amending § 15-3-640 was to Tighten the Statute of Repose and Promote the Policy Objective of Protecting Builders from Unending Exposure to Suit, not to Expand the Window as the Plaintiff is Asking.**

Plaintiff's preferred interpretation of the 2005 amendments to § 15-3-640 would undermine the public policy of behind both having a statute of repose generally, as well as the 2005 amendments specifically. This Court has acknowledged the importance of protecting statutes of repose as enacted by the legislature. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir.1989), cert. denied, 493 U.S. 1070, 110 S.Ct. 1113 (1990)). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Capco of Summerville*, 368 S.C. at 142, 628 S.E.2d at 41. Society benefits when claims and causes are laid to rest after having been viable for reasonable time. *Langley*, supra at 243. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. *Id.* at 244. This is not only for the convenience of society but also due to necessity, because at that point, society is secure and stable. *Id.*

Statutory provisions should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Folk v. Thomas*, 344 S.C. 77, 81, 543 S.E.2d 556, 558 (2001). When "the language of an act gives rise to doubt or uncertainty as to legislative

intent, the construing court may search for that intent beyond the borders of the act itself.” *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). The statutory language must be construed in light of the intended purpose of the statute. *Id.* In some cases, legislative history may be probative in determining the legislature's intent. *Eagle Container Co. v. Cnty. of Newberry*, 366 S.C. 611, 630, 622 S.E.2d 733, 743 (Ct.App.2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008). In determining legislative intent, the Court may be guided by a statute's preamble. *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). While the term “legislative history” encompasses an event, document, or statement separate from the statutory amendment itself, and is generally relied on if the text of the statute is ambiguous, it is not so limited in application and may include the historical evolution of the statute at issue. *Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017).

The Preamble to the 2005 amendments to § 15-3-640<sup>4</sup> states the legislative purpose of the amendments as follows:

An act to amend section 15-3-640, code of laws of South Carolina, 1976, relating to an action based upon a defective or unsafe improvement to real property, so as to decrease the time an action may be brought from thirteen to eight years after the substantial completion of the improvement.

South Carolina Bill History, 2005 Reg. Sess. H.B. 3008. This reveals the overarching purpose of the amendment in the mind of the legislators drafting it; namely to reduce the time when a construction defect action must be brought by shortening the statute of repose time window significantly. Additionally, the South Carolina Legislative Update, published by the legislature as a record of its proceedings, described the purpose of the amendments as follows:

The bill further provides that 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

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<sup>4</sup> Then “H.B. 3008”.

improvements to existing improvements shall constitute proof of substantial completion of the improvement under the provisions of S.C. Code Ann. §15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion.

South Carolina Legislative Update, 2005 Reg. Sess. 3/22/2005. This stated legislative purpose does not show any intent or desire to overturn or replace the definition of substantial completion set forth in § 15-3-630, but rather clarifies the definition by providing an example of one occurrence which satisfies it. Nothing in the legislative history supports the theory that this was an attempt to replace the existing § 15-3-630 definition with a new one, or condense its meaning to “issuance of a certificate of occupancy” only.

Plaintiff asks this Court to interpret the § 15-3-640 in a manner directly contradictory to the stated purpose of the 2005 amendments and this construction would result in undesirable policy outcomes. Where the overarching purpose of the amendments to § 15-3-640 was to further limit the timeframe in which construction defect actions can be brought, the Plaintiff asks this Court to interpret the statute in a way that would dramatically broaden the window in which construction defects could be brought.

Replacing the issuance of a certificate of occupancy with the definition of substantial completion is anathema to this public policy when applied to subcontractors and material suppliers. First, it potentially expands the period of exposure well beyond the intended eight years where projects take years to complete. Second, it creates the possibility of a completely unbounded period of exposure if no certificate of occupancy is issued. Finally, it is manifestly unfair because it removes control of the trigger-date completely out of the hands of the entity whose risk the legislature intended to limit.

This Court should uphold the legislative purpose of the amendments to § 15-3-640 by rejecting an interpretation that over-broadens the time limitations of the statute of repose and

undermines the policy objectives behind the amendments. Rather, this Court should continue to recognize that the § 15-3-640 statute of repose runs from the date of substantial completion of the whole project, or any portion of the project, as it relates to the parties and the issues being litigated. Where the project as a whole is the subject of the claims, the certificate of occupancy serves as proof of substantial completion for those who are involved in the entire project. This interpretation is entirely consistent with the language and purpose of § 15-3-630 and the 2005 amendments to § 15-3-640.

**IV. Analogous Statutes of Repose from Other States have been Consistently Interpreted to Allow for Substantial Completion of a Portion of a Project Before Substantial Completion of the Whole Project Occurs.**

Twenty-four other states and the District of Columbia have statutes of repose running from the date of substantial completion of construction on an improvement to real property.<sup>5</sup> No other state has provisions identical to South Carolina's § 15-3-640 "certificate of occupancy" language in their statute of repose. However, as discussed below, courts in many of these states have recognized that certificates of occupancy are proof of substantial completion, but maintain a distinction between the trigger dates for portions of the project and the project as a whole.<sup>6</sup>

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<sup>5</sup> Matthew T. Boyer, *Modern Legislation Creates Ambiguities in Determining Deadlines for Asserting Residential Construction Defect Claims*, 26 *Constr. Law.* 28, 32 (Winter 2006); see Ala. Code § 6-5-221 (Supp. 2004); Alaska Stat. § 09.10.055 (Michie 2004); Ariz. Rev. Stat. § 12-552 (2003); Ark. Code Ann. § 16-56-112 (Michie 1987 & Supp. 2005); Cal. Civ. Proc. Code § 337.15 (West 1982); Colo. Rev. Stat. § 13-80-104(2) (2005); D.C. Code Ann. § 12-310 (2001); Ga. Code Ann. § 9-3-51 (1982); Ind. Code § 32-30-1-5 (2002 & Supp. 2005); Ky. Rev. Stat. Ann. § 413.135 (Michie 2005); Minn. Stat. § 541.051 (2000 & Supp. 2005); Nev. Rev. Stat. 11.203 (1998 & Supp. 2003); N.H. Rev. Stat. Ann. § 508:4-6 (1997); N.M. Stat. Ann. § 37-1-27 (Michie 1990); N.D. Cent. Code § 28-01-44 (1991); Ohio Rev. Code Ann. § 2305.131 (West 2001); Okla. Stat. tit. 12, § 109 (2000); Or. Rev. Stat. § 12.135(1) (2003); R.I. Gen. Laws § 9-1-29 (1997); S.D. Codified Laws § 15-2A-3 (Michie 2004); Tenn. Code Ann. § 28-3-202 (2000); Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a) (Vernon 2002); Wash. Rev. Code § 4.16.310 (2005); Wis. Stat. § 893.89 (1997); and Wyo. Stat. Ann. § 1-3-111 (Michie 2005).

<sup>6</sup> In a case of novel impression, the South Carolina court may follow the authorities from other states which are persuasive because of similarity of the statutes of those states to the statutes of

Georgia courts have determined that the “substantial completion” language in their statute of repose, Ga. Code Ann. § 9-3-50 (2) (defining “substantial completion”), is triggered by contractors completing individual portions of a project rather than completion of the project as a whole. *Wilks v. Overall Const. Inc.*, 296 Ga.App. 410, 674 S.E.2d 320 (2009), reconsideration denied; (holding that the limitations period for homeowner's breach of contract claim against contractor on project involving construction of wall containing six large windows began running on date that the work was substantially completed, which was date on which, according to owner, wall appeared to be completed and on which he made final payment on under schedule specified in contract (emphasis added)); *Colormatch Exteriors, Inc. v. Hickey*, 275 Ga. 249, 569 S.E.2d 495 (2002), on remand 258 Ga.App. 186, 573 S.E.2d 455, (noting that there is often significant governmental delay between substantial completion of a project and issuance of a certificate of occupancy); *Standard Fire Ins. Co. v. Kent & Associates, Inc.*, 232 Ga.App. 419, 501 S.E.2d 858 (1998), reconsideration denied, certiorari denied; (ruling that installation of electrical equipment on wave pool was “substantially completed” under statute of repose by time wave pool was turned over to owner, although some of the remaining electrical work on the pool was not completed until a much later date). It is important to note that Georgia courts recognize a certificate of occupancy as evidence of “substantial completion”, while also recognizing that “substantial completion” may occur long before a certificate of occupancy is issued. *Standard Fire*, 232 Ga.App. 419. This shows there is no inherent conflict with interpreting a statute of repose to have multiple triggers for calculating when “substantial completion” is achieved.

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South Carolina, and because they lay down a sound public policy and produce a just result. *Citizens & S. Nat. Bank of S.C. v. Conner*, 195 S.C. 203, 11 S.E.2d 271 (1940).

In California, “substantial completion” applies to the completion of each individual component of a construction project, rather than the completion of the project as a whole. Cal. Civ. Proc. Code Ann. § 337.15 (g) (“the date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement”). California courts have likewise ruled that with respect to a person who has contributed to an improvement on the developed property, the statute of repose period commences when that particular *improvement* has been substantially completed, regardless of the completion time of the development itself. *Nelson v. Gorian & Associates, Inc.*, 71 Cal. Rptr. 2d 345, 348 (Cal. App. 2d Dist. 1998) (emphasis added); (holding that grading and engineering work for purchaser's lot was “substantially completed,” thus triggering running of limitations period governing purchasers' action for soil subsidence damages, in December of 1985, despite claim that limitations period did not run until grading subcontractor repaired another lot and fully performed on second contract to build streets and curbs; street work was not part of same improvement, and repair work on other lot was miniscule part of grading work and was performed after improvement was substantially completed). *See also, Industrial Risk Insurers v. Rust Engr. Co.*, 232 Cal.App.3d 1038, 283 Cal.Rptr. 873 (1991) (finding that the statute of repose period in suits for latent defects in improvements to real property commences when a defendant's work on an improvement is substantially completed, rather than when improvement itself is substantially completed; because a defendant's services with respect to an improvement may be completed well before the improvement itself is finished, and if the limitations period does not commence until substantial completion of the larger improvement, then construction industry members may be subject to liability for an indefinite time after the substantial completion of their work).

Texas also interprets the “substantial completion” portion of their statute of repose in the same manner as Defendant asks this court to interpret it. While the Texas statute does not explicitly define “substantial completion”, *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.009(a), the Texas Court of Appeals does so in *Gordon v. Western Steel Co.*, distinguishing “substantial completion” of individual portions of a project from substantial completion of the entire project:

[W]here different subcontractors were responsible for the construction of different parts of a larger project, the statute of repose should be applied to each of those individual subcontractors when they have completed their respective improvements....In most scenarios, the various improvements contained within a larger project will not stretch beyond several years, and the general contractors or beneficiaries ordinarily have opportunities to supervise or disapprove of the work along the way.

*Gordon v. Western Steel Co.*, 950 S.W.2d 743, 748–49 (Tex.App.1997). The Texas court of appeals also went on to address the policy concerns raised by allowing for the “substantial completion” of individual parts of a larger project:

[I]t is not overly burdensome to decipher when respective contractors substantially complete their improvements (e.g. when they submit their final bills and/or walk away from the project) ... The legislature has ... announced that persons in the construction business should not be liable for an improvement more than ten years after they have completed their contracted-for work and walked away.

*Id.* at 749. In addition to rejecting policy concerns with the approach to construing “substantial completion” advocated for today by the Defendant, the Texas court also expressly rejected a construction of “substantial completion” very similar to what Plaintiff argues for today; namely that “substantial completion” occurs upon completion of a project as a whole only:

An alternate construction would undermine the purpose of the statute. Besides the “potentially limitless liability” a subcontractor might face in such a scenario, the supreme court has noted other difficulties created by allowing suit beyond ten years of substantial completion. *See Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 264 (Tex.1994) (noting evidentiary difficulty of defending suit years after completion of an improvement because of faded memories, as well as increased possibilities of third-party neglect, abuse, poor maintenance, mishandling, improper modification, and/or unskilled repair) .... Starting the statute

of repose when each subcontractor finishes its improvement conforms with the legislative intent of preventing indefinite liability for those who construct or repair improvements to real property.”

*Id.* The South Carolina legislature had the same intent as the Texas legislature in drafting our repose Statute: limiting the timeframe in which actions could be brought against contractors and builders.

Colorado likewise interprets “substantial completion” to attach to individual components of a construction project, rather than completion of the whole project. While Colorado's statute of repose, Colo. Rev. Stat. Ann. § 13-80-104 (creating a six-year statute of repose), does not define when “substantial completion” occurs, the courts have ruled that a subcontractor has substantially completed its role in the improvement at issue when it finishes working on the improvement, not when the project as a whole is completed. *Sierra P. Industries, Inc. v. Bradbury*, 409 P.3d 551, 557 (Colo. App. 2016), overruled on different grounds by *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Colo. 2017). In *Sierra Industries*, the court explicitly noted that the purpose of the Colorado statute of repose was to relieve those involved in the construction business of the prospect of potentially indefinite liability for their acts or omissions, and that interpreting “substantial completion” to occur only when the entire project was completed, regardless of how long a subcontractor had been finished with their portion of it, was inimical to the legislative intent of preventing overly expansive potential liability for subcontractors. *Id.* at 557.

Indiana has codified the meaning of “substantial completion” as the earliest date on which the first beneficial use of the improvement to real property or of any portion of the improvement occurs. Ind. Code Ann. § 32-30-1-4 Sec. 4. The Indiana courts have applied this “substantial completion” standard to individual components of construction projects, looking for substantial completion of the actual work a contractor is hired to do rather than the date on which the entire

project is completed. *See J.C. Spence & Associates, Inc. v. Geary*, 712 N.E.2d 1099 (1999); (holding that the first beneficial use of exterior stairway of condominium, indicating substantial completion and the start date on which 10-year statute of repose began to run, occurred at very latest when stairway was used to show condominium unit to prospective purchaser prior to signing of purchase agreement, if not on earlier date when stairway was used as means of ingress and egress by various contractors).

It is also worth noting how Missouri courts have interpreted their statute of repose. *See*, Mo. Rev. Stat. Ann. § 516.097. This statute uses the term “completion” in the place of the “substantial completion” language in the South Carolina repose statute, but otherwise provides an analogous ten-year statute of repose barring suits arising out of construction defects after the statutory period has expired. *Id.* The use of “completion” instead of “substantial completion” in the Missouri scheme might at first suggest a stricter standard for determining the date on which their statute of repose begins to run which would result in the latest possible start date. This is not the case however, as even Missouri has ruled that “completion” occurs for each individual portion of a project rather than the completion of the entirety of the project. *Fueston v. Burns & McDonnell Engr. Co., Inc.*, 877 S.W.2d 631 (Mo.Ct.App.1994) (holding that where plaintiffs alleged a defect in a component improvement, incorporated within a larger improvement, it was the date on which the *defective improvement* was completed, and not the date on which the larger improvement is completed, that is relevant to the determination whether the statute of repose bars the plaintiffs' action (emphasis added)).

Finally, New Jersey courts have similarly rejected the argument that the liability period for a contractor begins long after they have completed their work. In *Hopkins v. Fox & Lazo Realtors* the New Jersey Superior Court explained:

We conclude that the Legislature's intent in enacting [the New Jersey statute of repose] was to grant architects and contractors repose from liability based upon alleged acts of negligence in the distant past. We think that the statute's purpose is best served by finding that the ten-year statutory period begins when the architect or contractor completes its task with respect to the property involved in the claim.

*Hopkins v. Fox & Lazo Realtors*, 576 A.2d 921, 923 (N.J. Super. App. Div. 1990). The N.J. Superior Court further explained the policy considerations behind this rationale in *Welch v. Engineers Inc.* stating:

[W]e think the Legislature most likely meant that when a person rendered any construction-related services on a particular job, finished them and walked away from the job-site with the work accepted, that person could look back ten years and one day “after the performance or furnishing of such services and construction,” N.J.S.A. 2A:14-1.1, and know there was repose from liability.

*Welch v. Engineers, Inc.*, 495 A.2d 160, 165 (N.J. Super. App. Div. 1985). Even though the New Jersey courts were not specifically construing “substantial completion” their policy reasoning for calculating when the statute of repose begins to run for contractors and subcontractors who only perform an individual job within a larger building project applies fully to construction of the South Carolina repose Statute in accordance with our legislature’s identical stated intent of limiting liability for builders, contractors, and subcontractors.

Of the states cited by Plaintiff, only a single case in Wyoming seems to have established a rule consistent with Plaintiff’s position. The other cases cited in Plaintiff’s Brief are misconstrued and inapplicable. The referenced language from *Georgetown Coll. v. Madden*, cited at page 9, is found within a footnote where the District Court of Maryland is analyzing the date of breach that triggers the limitations period for a claim under a performance bond. *See Georgetown Coll.*, 505 F. Supp. 557, 564-568 and FN 16 (D. Md. 1980). In *Great N. Ins. Co. v. Architectural Env’ts, Inc.*, cited in Plaintiff’s Brief at p. 10, the District Court of Massachusetts does seek to answer the question of when its statute of repose begins to run. Under their statute, the trigger is the earlier

of opening for use or taking possession for occupancy. The court concluded that the issuance of a temporary certificate of occupancy “grants the owner the right to occupy the premises, [and thus] determines the date upon which the improvement was open for use, as well as the date it was occupied.” *Great N. Ins.*, 514 Supp.2d 139, 141-42 (D. Mass 2007) (citing Mass. Gen. Law ch. 260 § 2B). This is not comparable to South Carolina’s “substantial completion” trigger.

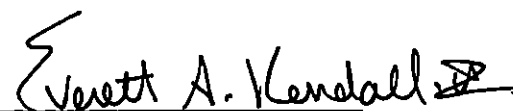
In sum, a review of how other jurisdictions have decided what constitutes “substantial completion” shows that many recognize the distinction between completing a portion of a project and the project as a whole and find that “substantial completion” occurs at different times for different phases of a project. These jurisdictions provide persuasive authority for the proposition that this Court may harmonize the *Ocean Winds* ruling with the amended Statute by ruling that “substantial completion” for individual components of a larger project can occur when each contractor or subcontractor substantially completes the portion of the project which they contracted to complete, while “substantial completion” of the project as a whole may be determined, when relevant, from the date a certificate of occupancy is issued. Numerous jurisdictions have further recognized that the policy purposes of their statutes of repose are not served by starting the clock for contractor liability months or years after a contractor has completed their portion of the construction of a project, and South Carolina should do likewise.

## CONCLUSION

The South Carolina legislature amended § 15-3-640 in 2005 to clarify that a certificate of occupancy signals to occurrence of “substantial completion” of a construction project for the purpose of calculating the when § 15-3-640 bars bringing an action. However, this amendment did not mean that “substantial completion” may not occur earlier, or that a certificate of occupancy is the *only* indicator of “substantial completion”, as other circumstances might still trigger the

definition of “substantial completion” presented in § 15-3-630 prior to issuance of a certificate of occupancy. The primary purpose of the amendment overall was to shorten our repose statute for construction defects from thirteen years to eight. Likewise, the purpose of the amendment to § 15-3-640 at issue here was to create an end date beyond which substantial completion could not be questioned; not to broaden the window for “substantial completion” as the Plaintiff argues. The South Carolina Supreme Court’s ruling in *Ocean Winds* that “substantial completion” for individual parts of a project may occur before “substantial completion” of the entire project is not contradictory to § 15-3-640 as amended, but rather upholds the purpose for which the amendment was passed and must be presumed to be still controlling. Finally, a number of other jurisdictions have interpreted their analogous statutes of repose in a similar fashion to *Ocean Winds*, lending persuasive authority to the Defendant’s proposed construction. In sum, a certificate of occupancy is not the only indicator of “substantial completion”, it is merely the final and ultimate indicator beyond which “substantial completion” cannot be challenged, thus leaving the *Ocean Winds* holding fully intact and that interpretation controlling in this case.

The Certified Question from the United States District Court for the District of South Carolina should be answered in the negative.



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April 9, 2018  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIFIED QUESTION

S.C. SUPREME COURT

ON CERTIFICATION FROM THE UNITED STATES  
DISTRICT COURT FOR SOUTH CAROLINA  
Richland Mark Gergel, United States District Judge

Appellate Case No. 2017-002350

Mark Lawrence, individually and on behalf of all others  
similarly situated .....Plaintiff/Appellant,

v.

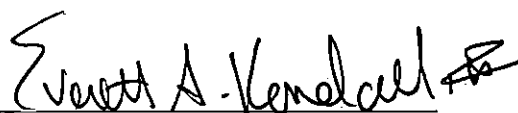
General Panel Corp., a division of Perma "R" Products, Inc. ....Defendant/Respondent.

PROOF OF SERVICE

The undersigned certifies that Defendant's Final Brief was served on Plaintiff's counsel by  
depositing a copy thereof in the United States mail, first class, postage prepaid, and addressed to:

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