

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-26-08136
Appellate Case No. 2018-000597

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SC Court of Appeals

The Greenbriar Condominium Association, Appellant-Respondent,

v.

Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC, Right Way Construction, Inc., Right Way Group, Inc., RWG, Inc., RWGR, Inc., Craftmaster Manufacturing, Inc. d/b/a CMI, Martin Masonry, Inc., Gary Hunnell d/b/a Grand Strand Roofing, Stock Building Supply, LLC f/k/a Stock Building Supply, Inc., Stock Building Supply, LLC, f/k/a Carolina Builders Corporations, Morningstar Consultants, Inc., LPM Enterprises, Inc. f/k/a Loss Prevention Management, Inc. a/k/a Loss Prevention Managed Home Inspections, Inc., Jeld-Wen, Inc., successor to and/or merger with Craftmaster Manufacturing, Inc. d/b/a CMI, Elite Exteriors, LLC, and South Strand Landscaping, Respondents,

v.

Centex Homes, A Nevada General Partnership, Respondent-Appellants,

v.

Michael Dawson d/b/a Michael Dawson Construction, Inc., General Landscape Maintenance, LLC, Universal Forest Products Shoffner, LLC, Universal Forest Products, Inc., Universal Forest Products Eastern Division, Inc. n/k/a UFP Eastern Division, Inc., Weather Protection Systems, Inc., Grand Strand Roofing & Siding, Carolina Drywall & Interiors, Inc. a/k/a Carolina Drywall Contractors, Inc., Tri-City Insulation and Building Products of Myrtle Beach, Inc., American Residential Services, LLC, Thomas Heating & Cooling, Inc., JS Elite Flooring Company a/k/a JS Elite Tile Company, John Doe, Vance Johnson Plumbing Co., Inc., RJM Plumbing, Inc., Rice Planters Carpets, Inc. n/k/a Creative Touch

Interiors, Inc., Floors, Inc. successor by merger to Rice Planter Carpets, Inc., The Martin Architectural Group, P.C., The Harman Group, Inc., f/k/a Cagley Harman & Association, Inc., Sunland Fire Protection, Inc., Cohen's Drywall Company, Inc., Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc., Builders FirstSource-Southeast Group, LLC, and Georgetown Construction Services, Inc., Respondents,

Of which Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC are the Respondent/Appellants.

RESPONDENT-APPELLANTS' INITIAL BRIEF

Thomas C. Hildebrand, Jr., Esquire
William G. DesChamps, IV, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting St., Suite 301
Charleston, SC 29401
(843) 727-2650
tomhildebrand@parkerpoe.com
willedschamps@parkerpoe.com

Katon E. Dawson, Jr. , Esquire
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 253-6854
katondawson@parkerpoe.com

Attorneys for Respondent-Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING THE ASSOCIATION'S MOTION FOR DIRECTED VERDICT AND STRIKING THE STATUTE OF REPOSE AS AN AFFIRMATIVE DEFENSE.
- II. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO TAKE JUDICIAL NOTICE OF THE CERTIFICATE OF OCCUPANCY FOR BUILDING FOUR.
- III. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO REDUCE THE VERDICT BY TWENTY-FIVE PERCENT BECAUSE THE ASSOCIATION'S CLAIMS ARISING FROM BUILDING FOUR ARE BARRED BY VIRTUE OF THE APPLICATION OF THE STATUTE OF REPOSE.

STATEMENT OF THE CASE

This action arises out of the construction of condominiums located in a development known as The Greenbriar (the “Greenbriar”), in North Myrtle Beach, South Carolina. The Greenbriar is comprised of four (4) identical buildings. The certificate of occupancy for Building Four (the “Certificate of Occupancy”) was issued on September 22, 2005.

A certificate of occupancy issued by a county or municipality constitutes proof of substantial completion of an improvement to real property. S.C. CODE ANN. § 15-3-640. The South Carolina Statute of Repose, S.C. CODE ANN. § 15-3-640 (the “Statute of Repose”), bars actions to recover damages arising out of the defective or unsafe condition of an improvement to real property if brought more than eight years after substantial completion. The Statute of Repose was amended in 2005 to change the time limitation from thirteen (13) to eight (8) years for improvements to real property with certificates of occupancy issued after July 1, 2005. *See Ervin v. Cont'l Conveyor & Equip. Co.*, 674 F. Supp. 2d 709, 713 n.2 (D.S.C. 2009). Therefore, for buildings for which the certificate of occupancy was issued after July 1, 2005—such as Building Four at the Greenbriar—construction defect claims asserted more than eight years after substantial completion of that building are barred by the Statute of Repose as a matter of law.¹ S.C. CODE ANN. § 15-3-640.

On December 9, 2014—more than eight years after the issuance of the Certificate of Occupancy for Building Four—the Greenbriar Condominium Association (the “Association”) filed a complaint against Centex Homes, a Nevada General Partnership, Centex Construction Company, Inc., Centex Construction, LLC, Centex-Rooney Construction Co., Inc., Centex-

¹ It is not disputed that Building One, Building Two, and Building Three at the Greenbriar are subject to the previous version of the Statute of Repose with a thirteen-year limitation that is applicable to structures for which the certificate of occupancy was issued on or before July 1, 2005.

Rodgers, Inc., Balfour Beatty Construction, LLC f/k/a Centex Construction, LLC (collectively “Centex”) alleging construction defects were present in each building at the Greenbriar.

The case proceeded to trial before a jury on February 5, 2018. The construction defect claims were identical as to all four buildings and the Association’s claimed damages (the cost to repair) were identical as to all four buildings. The repair experts presented by the Association and Centex each presented a repair cost estimate that did not individually estimate the cost to repair each building. Instead, each repair expert submitted a single estimate to repair all four buildings at the Greenbriar.

After the close of evidence—but prior to closing arguments or charges to the jury—Centex requested the circuit court to take judicial notice of the Certificate of Occupancy for Building Four pursuant to Rule 201 of the South Carolina Rules of Evidence. The circuit court refused to take judicial notice of the Certificate of Occupancy on the grounds that the Certificate of Occupancy was not a proper document for judicial notice, and granted the Association’s directed verdict motion to strike the Statute of Repose as an affirmative defense because there was otherwise no evidence in the record establishing the date that Building Four was substantially complete.

While the jury was deliberating, Centex presented the circuit court with a notarized Certificate of Authenticity from the Chief Building Official of the Planning and Development Department for the City of North Myrtle Beach certifying that the Certificate of Occupancy for Building Four enclosed therewith was true, accurate, and complete as kept in the normal course of business. The circuit court again refused Centex’s request that it take judicial notice of the Certificate of Occupancy.

The jury returned a verdict in favor of the Association in the amount of \$580,000. The jury only found in favor of the Association on the Association's negligence claim against Centex. On the special verdict form, the jury expressly stated that it found no gross negligence.

On February 19, 2018, Centex filed a Motion to Reduce the Verdict based on the application of the Statute of Repose to Building Four. In its motion, Centex argued the circuit court should take judicial notice of the Certificate of Occupancy and reduce the verdict by twenty-five percent (25%) on the grounds that the Association is barred from recovering damages arising from the construction of Building Four pursuant to the Statute of Repose.² The circuit court held a hearing on Centex's motion and again refused Centex's request to take judicial notice of the Certificate of Occupancy and to reduce the verdict.

On April 3, 2018, the circuit court issued an order denying Centex's Motion to Reduce the Verdict. On April 3, 2018, the Association filed a Notice of Appeal.

On April 30, 2018, Centex filed a Notice of Appeal. Centex respectfully requests the Court reverse the circuit court's order denying its Motion to Reduce the Verdict on the grounds that (1) the circuit court erred in granting the Association's motion to strike the Statute of Repose as an affirmative defense because the Statute of Repose creates a substantive right to be immune from suit beyond a specified time period; (2) the circuit court erred in refusing to take judicial notice of the Certificate of Occupancy; and (3) the circuit court erred in refusing to reduce the damages award by twenty-five percent (25%) because the South Carolina Statute of Repose bars the Association from recovering damages based upon or arising out of the defective or unsafe

² Centex did not request the circuit court apply the Statute of Repose to claims arising out of the construction of Building One, Building Two, or Building Three because those buildings were completed while the thirteen-year Statute of Repose was still in effect and the period of repose had not yet lapsed.

condition of an improvement to real property more than eight (8) years after substantial completion of the improvement.

FACTS AND PROCEDURAL HISTORY

The Greenbriar is a development comprised of four (4) identical, three-story buildings with eighteen (18) condominium units in each building. Centex, as developer and general contractor of the Greenbriar, contracted with subcontractors to provide labor, material and services for construction of the buildings.

Construction on the Greenbriar occurred from 2002 through 2005. The Certificate of Occupancy for Building Four at the Greenbriar was issued on September 22, 2005. More than eight years later, on December 9, 2014, the Association first filed a complaint against Centex alleging various construction defects were present in all four identical buildings at the Greenbriar, which included a claim for gross negligence against Centex.

The case proceed to trial before a jury on February 5, 2018. The construction defect claims were identical as to all four buildings and the Association's claimed damages (the cost to repair) were identical as to all four buildings. The repair expert for the Association testified that he estimated the repair cost for a single building and then multiplied the figure by four to create a repair cost estimate for all four buildings. Therefore, the repair cost for each building in the proposed damages estimate (including Building Four) makes up twenty-five percent (25%) of the total damages.

The Certificate of Occupancy for Building Four was not introduced into evidence in either the Association's or Centex's case-in-chief. However, after the close of evidence, Centex provided the circuit court with a copy of the Certificate of Occupancy and requested the circuit court to take judicial notice of the Certificate of Occupancy. This document was admitted as the

Court's Exhibit 1. The circuit court refused to take judicial notice of the Certificate of Occupancy on the grounds that it was not a document that was proper for judicial notice.

The circuit court instructed the jury on the applicable law and the jury began deliberations. While the jury was deliberating, Centex presented the circuit court with a notarized Certificate of Authenticity from the Chief Building Official of the Planning and Development Department for the City of North Myrtle Beach with a subject line "Greenbriar, 5650 Barefoot Resort Rd, Bldg 4, North Myrtle Beach, SC," certifying that the enclosed Certificate of Occupancy for Building Four was true, accurate, and complete as kept in the normal course of business. This document was admitted as Court's Exhibit 2. The circuit court again refused to take judicial notice of the Certificate of Occupancy.

The jury returned a verdict in favor of the Association on its negligence claim in the amount of \$580,000. On the special verdict form, the jury expressly stated that it found no gross negligence.

On February 19, 2018, Centex filed a Motion to Reduce the Verdict by twenty-five percent (25%) on the grounds that the Association is barred by virtue of application of the eight-year Statute of Repose from recovering damages arising out of the construction of Building Four at the Greenbriar. Therefore, since Building Four accounted for twenty-five percent (25%) of the total damages, that portion of the award must be eliminated since the Statute of Repose bars its recovery as a matter of law.

On March 6, 2018, the circuit court heard oral arguments on Centex's post-trial motion. The circuit court again refused to take judicial notice of the Certificate of Occupancy.

On April 3, 2018, the circuit court issued an order denying Centex's Motion to Reduce the Verdict.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the Court may correct errors of law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). On appeal, the Court may correct the circuit court's refusal to apply statutory caps and limits of recovery. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 284, 607 S.E.2d 711, 715 (Ct. App. 2005) (holding the circuit court committed reversible error in denying a request for a reduction of the jury's verdict to conform with a monetary statutory cap).

When reviewing the circuit court's ruling on a motion for a directed verdict, the Court employs the same standard as the circuit court—that is, the Court must consider the evidence in the light most favorable to the non-moving party. *Fickling v. City of Charleston*, 372 S.C. 597, 603, 643 S.E.2d 110, 113-14 (Ct. App. 2007). The Court “must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor.” *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

ARGUMENT

The circuit court erred in refusing to take judicial notice of the Certificate of Occupancy and this error resulted in the circuit court's denial of Centex's Motion to Reduce the Verdict by twenty-five percent (25%) by virtue of application of the Statute of Repose to the claims on Building Four.

I. The circuit court erred in granting Association's motion to strike the Statute of Repose as an affirmative defense because the Statute of Repose is a substantive right to be immune from suit beyond a specified time period and not an affirmative defense.

An affirmative defense (like a statute of limitation) is a procedural device that limits the remedies available from an existing cause of action. *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). "A statute of limitation has no effect on the validity of the claim; it only effects the claim's enforcement." *Linda Mc Co. v. Shore*, 390 S.C. 543, 558-59, 703 S.E.2d 499, 507 (2010) (Beatty, J., dissenting).

Unlike a statute of limitation, the Statute of Repose "is not a claim-avoidance mechanism." *Id.* Instead, the 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, 403-404, 438 S.E.2d 242, 243 (1993). The Statute of Repose extinguishes claims and "is an absolute time limit beyond which liability no longer exists." *Capco of Summerville*, 368 S.C. at 142, 628 S.E.2d at 41. The application of the Statute of Repose is a matter of law for a court to decide. *See Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009) (applying the medical malpractice statute of repose in affirming a grant of summary judgment); *Ervin v. Cont'l Conveyor & Equip. Co.*, 674 F. Supp. 2d 709, 715 (D.S.C. 2009) (analyzing South Carolina courts' application of the statute of repose).

Accordingly, the Court should correct the circuit court's erroneous decision to strike the Statute of Repose as an affirmative defense because the Statute of Repose is not an affirmative defense that may be stricken by the circuit court. *See Nash v. Tindall Corp.*, 375 S.C. 36, 41-42, 650 S.E.2d 81, 84 (Ct. App. 2007) ("Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based

upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.” (citation omitted)).

II. The circuit court erred in refusing to take judicial notice of the Certificate of Occupancy.

A. Judicial notice of the Certificate of Occupancy was mandatory because it was requested by Centex and the circuit court was supplied with the necessary information.

Judicial notice is mandatory when “requested by a party and the court is supplied with the necessary information.” Rule 201(d), SCRE. This mandatory notice may be taken “at any stage of the proceeding.” Rule 201(f), SCRE.

A court may take judicial notice of an adjudicative fact. Rule 201(a), SCRE. An adjudicative fact is one not subject to reasonable dispute in that it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Rule 201(b), SCRE. A court “should take notice of whatever is or ought to be generally known within the limits of their jurisdiction.” *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41, 48 (1935) (citation omitted); *see, e.g., Martin v. Bay*, 400 S.C. 140, 153, 732 S.E.2d 667, 674 (Ct. App. 2012) (holding the master properly took judicial notice of the migration of the critical line and the setback requirements as stated in the county zoning and land development regulations); *Matter of Harry C.*, 280 S.C. 308, 310, 313 S.E.2d 287, 288 (1984) (“We hold the trial court properly took judicial notice, as there are numerous indisputable sources from which he could have discovered that tidy oil, a solvent used in the textile industry, contained aromatic hydrocarbons, and was therefore within the purview of . . . the Aromatic Hydrocarbon Act.”); *Bell v. S.C. State Highway Dep't*, 204 S.C. 462, 30 S.E.2d 65 (1944), *overruled on other grounds*

by *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (taking judicial notice that the population of the Town of Lanes is less than 2,500 people).

Courts in other jurisdictions have repeatedly found that certificates of occupancy are not subject to reasonable dispute, are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and, therefore, are subject to judicial notice. See *United States v. Dawn Properties, Inc.*, No. 1:14CV224-LG-JCG, 2014 WL 5775324, at *2 (S.D. Miss. Nov. 6, 2014) (“The United States has no objection to the Court taking judicial notice of the Secretary of State documents and certificates of occupancy. The Court finds that those documents contain facts that are not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned under Federal Rule of Evidence 201(b).”); *DeFranco v. Dep't of Envtl. Conservation of the State of New York*, No. CV 16-2014, 2017 WL 1497977, at *4 (E.D.N.Y. Apr. 26, 2017) (taking judicial notice of a certificate of occupancy when reviewing a motion to dismiss); *Wing Kwong Ho v. Target Const. of NY, Corp.*, No. 08-CV-4750 KAM RER, 2011 WL 1131510, at *6 (E.D.N.Y. Mar. 28, 2011) (“[T]he court takes judicial notice of the Certificate of Occupancy issued for the St. James Avenue property”); *People v. Yarrington*, 310 N.Y.S.2d 976 (N.Y. Dist. Ct. 1970) (“The court takes judicial notice of all public records, and a building permit and certificate of occupancy is a public record.”).

Centex requested the circuit court take judicial notice of the Certificate of Occupancy for Building Four and presented the circuit court with a notarized statement from the Chief Building Official of the Planning and Development Department for the City of North Myrtle Beach certifying that the Certificate of Occupancy that was presented to the circuit court was a true and accurate copy of the department’s records. When a public record, like the Certificate of

Occupancy, is certified by the correct custodian the document is self-authenticating and additional extrinsic evidence as to the document's authenticity is not required. Rule 902(4), SCRE; *see also* Rule 1001, SCRE (the contents of an official record may be proved by a copy that is certified in accordance with Rule 902). The subject line of the Certificate of Authenticity signed by the Chief Building Official stated, "Greenbriar, 5650 Barefoot Resort Rd, Bldg 4, North Myrtle Beach, SC" and the Certificate of Occupancy enclosed therewith included the City of North Myrtle Beach's city seal and bore the signature of the Building Official for the city, dated September 22, 2005. The Certificate of Occupancy identified "CENTEX HOMES" as the "Owner/Applicant" of the project and "BFR-GREENBRIAR BLDG 4" as the "Project Name." The circuit court admitted into evidence four building permits that were issued by the same building department that issued the Certificate of Occupancy, contained the same city seal, and had the same general format as the Certificate of Occupancy.

The Certificate of Occupancy is the precise type of document that is appropriate for judicial notice, because it is not subject to reasonable dispute and is capable of accurate and ready determination by resort to public records whose accuracy cannot reasonably be questioned. *See* Rule 201(b), SCRE. Thus, pursuant to Rule 201(d), SCRE, judicial notice of the Building Four's Certificate of Occupancy was mandatory because judicial notice was requested by Centex and the circuit court was supplied with the necessary information.

Since judicial notice was mandatory under the South Carolina Rules of Evidence, the circuit court erred each time it refused to take judicial notice of the Certificate of Occupancy. The circuit court first erred by refusing to take judicial notice of the Certificate of Occupancy while hearing the parties' motions for directed verdict. Next, the circuit court erred in refusing to take judicial notice of the Certificate of Occupancy when Centex requested such while the jury

was deliberating. Finally, the circuit court erred when it refused to take judicial notice of the Certificate of Occupancy when considering Centex's Motion to Reduce the Verdict based on the application of the Statute of Repose to the claims involving Building Four.

Accordingly, the Court should find the circuit court committed an error of law in refusing to take judicial notice of the Certificate of Occupancy.

B. The Association had the opportunity to be heard and contradict the date of substantial completion on the Certificate of Occupancy and, therefore, due process is not violated by taking judicial notice of the Certificate of Occupancy.

Due process rights are not violated when a party is given the opportunity to be heard. *S.C. Dep't of Soc. Servs. on Behalf of State of Tex. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849-50 (1995) (“[E]ven if a party is not given the opportunity to confront witnesses, due process is not violated if there has been a meaningful opportunity to be heard.”).

The Association has been aware that Centex alleged that the Association's claims arising from Building Four were barred by the Statute of Repose since the date that Centex filed its answer, January 26, 2015. Centex referenced the application of the Statute of Repose during a pre-trial motions hearing. Centex requested the circuit court take judicial notice of the Certificate of Occupancy during the motions for directed verdict for the purpose of establishing the Statute of Repose as a bar to the Association's recovery of damages related to Building Four. Centex repeated its request that the circuit court take judicial notice of the Certificate of Occupancy for the purpose of applying the Statute of Repose while the jury was deliberating. Centex again requested the circuit court take judicial notice of the Certificate of Occupancy in its post-trial motions and during oral argument on the post-trial motions. The Association obviously had notice that the Certificate of Occupancy and the Statute of Repose were issues at trial, and had the opportunity to be heard.

A certificate of occupancy constitutes proof of substantial completion for an improvement to real property for the purpose of calculating the deadline to file an action within the Statute of Repose “unless the contractor and owner, by written agreement, establish a different date of substantial completion.” S.C. CODE ANN. § 15-3-640. Therefore, the only evidence that is relevant to contradicting the date of substantial completion for Building Four (September 22, 2005) as established by the Certificate of Occupancy would be a written agreement establishing a different date of substantial completion. *See Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. CV 9:17-1575-RMG, 2017 WL 6622508, at *3 (D.S.C. Dec. 27, 2017), *order amended on reconsideration*, No. CV 9:17-1575-RMG, 2018 WL 679454 (D.S.C. Feb. 2, 2018), *on reconsideration*, No. CV 9:17-1575-RMG, 2018 WL 1305427 (D.S.C. Mar. 12, 2018) (finding the plaintiff’s argument challenging the date of substantial completion was without merit on the grounds that there was a signed statement by the plaintiff establishing a date of substantial completion and a certificate of occupancy establishing a date of substantial completion).

Although the Association had notice of the argument and the opportunity to be heard on the issue, the Association never presented any evidence of an agreement establishing a different date of substantial completion. The Association has not claimed, or argued, that any different date was established or agreed upon as the date of substantial completion. Indeed, under the plain language of the Statute of Repose, the Certificate of Occupancy constitutes proof of substantial completion unless another written agreement establishing otherwise is produced. *See* S.C. CODE ANN. § 15-3-640. Therefore, due process is not implicated in this instance. Accordingly, the Court should find the circuit court erred in refusing to take judicial notice of the Certificate of Occupancy.

III. The circuit court erred as a matter of law in denying Centex's Motion to Reduce the Verdict by virtue of application of the Statute of Repose to the claims on Building Four.

The Statute of Repose in effect for Building Four bars any action which purports to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property brought more than eight (8) years after substantial completion of the improvement. S.C. CODE ANN. § 15-3-640. The Certificate of Occupancy for Building Four was issued on September 22, 2005 and constitutes proof of the date of substantial completion. *Id.*

On December 9, 2014—more than eight (8) years after the issuance of Building Four's Certificate of Occupancy—the Association filed its Complaint against Centex. No other evidence was introduced to establish a different or earlier date of substantial completion. Thus, the Certificate of Occupancy conclusively establishes that Building Four was substantially complete on September 22, 2005.

Exceptions to the application of the Statute of Repose are limited. Indeed, section 15-3-670 of the South Carolina Code provides only that “a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such in improvement, or to a person who conceals any such cause of action” may not avail himself/herself of the Statute of Repose.

The jury expressly and specifically found Centex was not grossly negligent in the performance of any of its duties related to the construction of the Greenbriar. When the jury returned the Verdict Form with a finding of no gross negligence, the Association's claim for

damages arising from the construction of Building Four were completely extinguished as a matter of law. The Association did not raise any of the other exceptions to the Statute of Repose. Therefore, the Association's claims related to Building Four are extinguished by the Statute of Repose and it would be an error of law to permit the Association to recover on those claims.

The Court has the authority to reduce the verdict to comply with statutory restrictions. *See Chastain v. AnMed Health Found.*, 388 S.C. 170, 174, 694 S.E.2d 541, 543-44 (2010). In *Chastain*, the plaintiff sued a charitable institution and six nurses who cared for the plaintiff during her hospitalization for circulation problems. *Id.* The plaintiff alleged that over 2,000 deviations from the standard of care resulted in the amputation of her leg. *Id.* The jury returned a verdict of \$2.2 million. *Id.* The circuit court first reduced the verdict by thirty percent (30%) on the grounds that the jury found the plaintiff to be thirty percent at fault. *Id.* The circuit court then reduced the verdict to \$300,000 on the grounds that the plaintiff's damages were capped at \$300,000 per occurrence under the South Carolina Charitable Foundation Act ("CFA") and it was impossible to find that the jury had found more than one occurrence. *Id.* at 174, 694 S.E.2d at 544. The Supreme Court affirmed the circuit court's reduction of the verdict. *Id.*

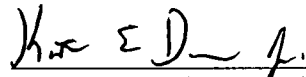
The jury's verdict in this case must be reduced to exclude damages related to Building Four, because the Association is barred by statute (Statute of Repose) from recovering those damages as a matter of law just as in *Chastain* the plaintiff was barred from recovering damages above the statutory cap. The repair experts did not provide individual cost estimates for each building. Instead, the repair experts presented a cost to repair all four buildings, and the Record is clear that the Association's expert expressly stated that his total damages estimate was achieved by multiplying his estimated cost of repair for one building by four. Since the Association is barred from recovering the damages associated with one of the four buildings

(Building Four) as a matter of law, the Court should reduce the jury's damages award by twenty-five percent (25%). Therefore, Centex requests the Court correct the circuit court's error and reduce the \$580,000 judgment by twenty-five percent to \$435,000 ($\$580,000 \times .25 = \$145,000$; $\$580,000 - \$145,000 = \$435,000$).

CONCLUSION AND REQUEST FOR LIMITED RELIEF

The Association's claims related to the Building Four are barred by the Statute of Repose. Centex requests the Court find the circuit court erred in denying its Motion to Reduce the Verdict pursuant to the Statute of Repose. Centex seeks a remand only for a twenty-five percent (25%) reduction of the verdict pursuant to the Statute of Repose. Centex does not seek a new trial, and is not requesting the Court remand the action to the circuit court for a new trial.

Respectfully Submitted,



Thomas C. Hildebrand, Jr., Esquire
William G. DesChamps, IV, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting St., Suite 301
Charleston, SC 29401
(843) 727-2650
tomhildebrand@parkerpoe.com
willedeschamps@parkerpoe.com

Katon E. Dawson, Jr., Esquire
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 253-6854
katondawson@parkerpoe.com

Attorneys for Respondent-Appellants

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