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In The Supreme Court

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ON CERTIFICATION FROM THE UNITED STATES S.C. SUPREME COURT
DISTRICT COURT FOR SOUTH CAROLINA
Richard Mark Gergel, United States District Judge

Appellate Case No. 2017-002350

Mark Lawrence, individually and on behalf of all others
similarly situatedPlaintiff/Appellant,

v.

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

FINAL BRIEF OF PLAINTIFF/APPELLANT

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QUESTION PRESENTED FOR REVIEW

1. IS A CERTIFICATE OF OCCUPANCY PRIMA FACIE EVIDENCE OF THE TRIGGER DATE FOR SOUTH CAROLINA'S STATUTE OF REPOSE?

STATEMENT OF THE CASE

This is a products liability case arising out of the premature failure of the roof on a brand-new home in Awendaw, South Carolina. The Plaintiff, Mark Lawrence, completed his home in December of 2008. In building his new home, Mr. Lawrence used a specialized building product known as Structurally Insulated Panels (“SIPs”). The defendant, General Panel, designed, manufactured, and sold the SIPs that were installed in Mr. Lawrence’s home.

SIPs are a building product that is intended to be a substitute for traditional home framing and insulation. A number of different manufacturers design and build SIPs in a factory setting by sandwiching an insulating foam core between two structural facings, typically oriented strand board. The resulting SIPs are typically trimmed to a homeowner's desired design specifications for a particular application, like the wall or roof of a specific house. The SIPs are then delivered to the homeowner and installed in lieu of traditional wood framing and insulation. The SIPs provide structural framing and insulation. In concept, SIPs provide a building system that is strong, energy efficient and cost effective.

As an integral part of its product, General Panel provides instructions for the proper installation of its SIPs system. Unlike traditional framing methods, the success of General Panel’s system is highly dependent upon creating an airtight building envelope at the original construction, particularly at the joints or seams between the SIPs. If the building envelope is not completely airtight, condensation will occur at the seams of the SIPs and the entire system will prematurely rot and ultimately fail. Because SIPs are also structural, failure of the SIPs system leads to structural failure of the home.

After construction is complete, the SIPs system is typically concealed by the home's finishes. As such, a homeowner may not discover defects in the SIPs system until some damage to the home manifests itself. If a SIPs system is slowly rotting away because of improper original installation, a homeowner might not discover the defect in the SIPs until many years after the SIPs system was first installed.

South Carolina's statute of repose for new construction specifically limits a homeowner's ability to bring claims arising out of "defective or unsafe condition of an improvement to real property" to eight years from the date of "substantial completion" of the new construction. *See* S.C. Code Ann. §15-3-640 (Supp. 2005). In this case, Mark Lawrence first discovered that the SIPs system in his home was defective and unsafe almost eight years after Charleston County issued a certificate of occupancy for his home. The question is whether the certificate of occupancy provides prima facie evidence of "substantial completion" of Mr. Lawrence's home.

Mr. Lawrence filed suit for products liability against General Panel on December 8, 2016. General Panel removed the case to federal court on March 3, 2017 based upon diversity jurisdiction. Discovery began and General Panel moved for summary judgment based on an argument that Mr. Lawrence's claims are time-barred by the statute of repose because he filed suit more than eight years after "substantial completion" of the installation of General Panel's SIPs.

In the context of addressing General Panel's motion for summary judgment, United States District Judge Richard Gergel certified the question of whether the certificate of occupancy provides evidence of the "trigger" date for South Carolina's statute of repose or whether the earlier completion of the installation of the SIPs system

provided the trigger date for measuring the statute of repose.¹ Judge Gergel certified the question because of the apparent conflict between this Court's decision in *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001), interpreting the former version of South Carolina's statute of repose, and the General Assembly's subsequent 2005 amendment of the statute of repose for new construction.

ARGUMENT

I. A CERTIFICATE OF OCCUPANCY IS EVIDENCE OF "SUBSTANTIAL COMPLETION" AS THAT TERM IS USED BY THE SOUTH CAROLINA STATUTE OF REPOSE.

Judge Gergel has presented this Court with a straightforward question of statutory interpretation. The Supreme Court's primary function in interpreting a statute is to ascertain the intention of the legislature. *Anders v. South Carolina Parole and Community Corrections Board*, 279 S.C. 206, 305 S.E.2d 229 (1983). This Court has previously held that "[a] cardinal rule of statutory construction is that legislative intent prevails." *Folk v. Thomas*, 344 S.C. 77, 543 S.E.2d 556 (2001) (citing *Joint Legislative Comm. v. Huff, et al.*, 320 S.C. 241, 464 S.E.2d 324 (1995)); see also *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) (holding that the literal and ordinary meaning of a statute applies where the terms are clear and unambiguous). When this Court interprets statutes, "[a] statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Hay v. South Carolina Tax Com.*, 273 S.C. 269, 273, 255 S.E.2d 837, 840 (1979).

¹ For purposes of resolving the certified question, Judge Gergel limited the question and did not provide any facts about the underlying case or provide copies of any of the pleadings, motions, or orders in the underlying case. See S.C. App. Ct. Rule 244(b).

This Court has previously recognized that the General Assembly has the power to revise and modify statutes. "If it is advisable that the statute be changed, the solution lies within the province of the Legislature. We have no right to legislate the provision from the statute or to modify its application under the guise of judicial interpretation." *Davis v. Doe*, 285 S.C. 538, 331 S.E.2d 352, 354 (1985) quoting *Coker v. Nationwide Insurance Company*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968). When the General Assembly modifies existing statutes, the General Assembly is presumptively aware of the Supreme Court's interpretations of its statutes and is utilizing its inherent power to change the law. See *Wigfall v. Tideland Utils.*, 354 S.C. 100, 580 S.E.2d 100 (2003) (explaining that the General Assembly is presumed to be aware of court precedent).

- a. **In 2005, the General Assembly amended the statute of repose to provide that certificates of occupancy would thereafter serve as prima facie evidence of "substantial completion."**

South Carolina's old version of the statute of repose made no reference to certificates of occupancy. In relevant part, South Carolina's old statute of repose provided:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement.

See S.C. Code Ann. §15-3-640 (Supp. 2000)

"Substantial completion" was defined in S.C. Code Ann. § 15-3-630 (Supp. 2000) as "that degree of completion of a project, improvement, or a specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended" See S.C. Code Ann. §15-3-630 (Supp. 2000). Questions soon followed about how to determine the date of "substantial completion" of a

construction project under the language of the statute. *See Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001). Opposing parties interpreted the old version of the statute of repose differently. Owners argued that “substantial completion” occurred when the county issued a certificate of occupancy. Vendors, subcontractors, and building trades argued that “substantial completion” occurred when they finished their specific work. In 2001, this Court issued *Ocean Winds* to resolve the conflict.

Ocean Winds was a construction defect case that included products liability claims against Andersen Windows. The Plaintiff was the developer of a condominium complex on Seabrook Island. The facts pertaining to the statute of repose were not disputed. All of Andersen’s windows were fully installed in the condominiums on or before December 2, 1986. Charleston County issued certificates of occupancy for the condominiums between June 9, 1987 and May 6, 1991. The developer filed suit against Andersen Windows in February of 2000 – more than 13 years after the completion of the installation of the windows, but less than 13 years after the county had issued the certificates of occupancy.

At that time, South Carolina’s statute of repose for new construction was 13 years. *See* S.C. Code Ann. § 15-3-640 (Supp. 2000). On those facts, this Court ruled that the 13-year statute of repose for new construction was triggered at the time of completion of the windows. This Court analyzed the statute of repose and the policies behind it. This Court reasoned that the certificates of occupancy for the project as a whole were irrelevant to the analysis. Specifically, this Court held that “under the facts of this case “substantial completion of such improvement” occurred upon substantial completion of

the installation of the windows and not upon substantial completion of the project as a whole, nor on the date of issuance of certificates of occupancy.” *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 422, 556 S.E.2d 377, 380 (2001). *Ocean Winds* presented a novel set of facts at the time, and this Court expressly limited its holding in *Ocean Winds* to the facts of that case. *Id.*

In the wake of *Ocean Winds*, the General Assembly amended the statute of repose in 2005 to specifically provide that certificates of occupancy would be prima facie evidence of “substantial completion,” under the statute. Unlike the old version of statute of repose, the revised, 2005 version of the statute of repose includes new language that provides:

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 S.C Code Ann. § Section 15-3-630, unless the contractor and owner, by written agreement, establish a different date of substantial completion. S.C Code Ann. § 15-3-640(9) (Supp. 2005) (emphasis added).

By adding certificates of occupancy to the plain language of the statute, the General Assembly changed the law as interpreted by this Court in *Ocean Winds*. The new language included in the 2005 amendment clarified that the certificate of occupancy would ordinarily be prima facie evidence of “substantial completion” as that term is used in the statute of repose. In its notes to the 2005 Amendments, the General Assembly made it clear that the “paragraph relating to a certificate of occupancy as proof of substantial completion of an improvement project” was an intentional change to the prior version of the statute that this Court had interpreted in 2001. *See* 2005 S.C. Acts 27, 2005 S.C. H.B. 3008, 2005 S.C. R. 23. The General Assembly's addition of specific

mandatory language referencing certificates of occupancy is compelling evidence that the General Assembly intended for a certificate of occupancy to be prima facie evidence of "substantial completion" as that term is used in the statute of repose for new construction.² See e.g., *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002) (the use of "shall" in a statute reflects mandatory intent).

b. Other courts have relied upon the certificate of occupancy as prima facie evidence of "substantial completion" as that term is used by statutes of repose.

In a recent federal case in South Carolina, United States District Judge David Norton alluded to the same question that was certified to this Court by Judge Gergel. See *Belfor USA Grp., Inc. v. Banks*, No. 2:15-cv-01818-DCN, 2016 U.S. Dist. LEXIS 91483 (D.S.C. 2016). In the case decided by Judge Norton, an owner contracted with a contractor to perform restoration work on the owner's home that had been partially destroyed by a fire. The contractor argued that the owner's receipt of a certificate of occupancy entitled the contractor to recover for its substantial performance on the completion" as that term is used by the statute of repose. In ruling in favor of the owner, Judge Norton opined that while the certificate of occupancy was not proof of substantial

² Shortly after the amending of the statute, an article in *South Carolina Lawyer* noted that "The legislature amended S.C. Code § 15-3-640 to lower the statute of repose for construction defects from 13 years to eight years: "substantial completion may be determined by either (1) written agreement between the contractor and owner; (2) the certificate of occupancy in the case of new construction; or (3) the final inspection by the appropriate building official in the case of improvements to existing improvements." John C. Moylan, *After The Dust Clears: Changes In S.C. Tort Law*, 17 S. Carolina Lawyer 36 (2005).

performance on a contract, it was “proof of substantial completion to trigger the statute of repose.” *See Belfor USA Grp., Inc. v. Banks*, 2016 U.S. Dist. LEXIS 91483 at 26.

Other jurisdictions with statutes of repose similar to South Carolina's have also ruled that the certificate of occupancy or its equivalent is prima facie evidence of “substantial completion” under their respective statutes of repose. For example, Wyoming's statute of repose for new construction provides that: “substantial completion” means the degree of completion at which the owner can utilize the improvement for the purpose for which it was intended. *See Wyo. Stat. Ann. § 1-3-110* (2013). Further, the statute states:

Unless the parties to the contract agree otherwise, no action to recover damages, whether in tort, contract, indemnity or otherwise, shall be brought more than ten (10) years after substantial completion of an improvement to real property...
See Wyo. Stat. Ann. § 1-3-111 (2013).

Wyoming's Supreme Court ruled that “substantial completion” occurs on the date when a certificate of occupancy is issued.

Horning v. Penrose Plumbing & Heating, Inc. addressed the question of whether a certificate of occupancy provided prima facie evidence of substantial completion under Wyoming's statute of repose. The case turned on how to calculate the trigger date for Wyoming's statute of repose. Wyoming's Supreme Court ruled the statute of repose is not triggered by the date on which the subcontractor's HVAC work was completed, but rather was triggered by the date of the home's certificate of occupancy. *See Horning v. Penrose Plumbing & Heating, Inc.*, 2014 Wyo. 133, 336 P.3d 151 (2014); *see also Georgetown Coll. v. Madden*, 505 F. Supp. 557 (D. Md. 1980) (holding that occupancy by the owner, the date of complete occupancy by the owner, or the date certificates of

occupancy are issued by the relevant housing administration are deemed relevant factors where the construction contract is otherwise silent as to when the contract is substantially completed); *See also Great N. Ins. Co. v. Architectural Env'ts, Inc.*, No. 05-12356-NMG, 2007 U.S. Dist. LEXIS 76003 (D. Mass. 2007) (holding that statute of repose begins to run when a certificate of occupancy is issued). South Carolina's current version of the statute of repose leads to the same conclusion.

c. Allowing certificates of occupancy to be prima facie evidence of the trigger date for the statute of repose will make for better law in South Carolina, and will not defeat the purpose of the statute of repose.

Unlike statutes of limitation which require plaintiffs to bring claims within a certain period of time after discovery of their claims, statutes of repose prohibit plaintiffs from bringing claims after a certain deadline, regardless of whether the plaintiff has ever discovered that they have a claim. *See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006). Statutes of repose extinguish liability strictly for policy reasons. *See Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007), *quoting Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). South Carolina's statute of repose for new construction reflects just such a policy decision. *See Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 556 S.E.2d 377 (2001). The 2005 amendments to the South Carolina statute of repose maintain the same policy protections for defendants. The 2005 amendments to the statute of repose continue to reflect the legislature's intent to permanently terminate the liability of defendants after a fixed period of time. By amending the statute, the General Assembly has used the certificate of occupancy as a clear mark for the triggering of the statute of repose. The 2005 amendment greatly reduces the need for a factually intensive and case-by-case analysis of

the trigger date. The use of the certificate of occupancy as prima facie evidence of the trigger date for the statute of repose for new construction will not disrupt the original policy goals of the statute of repose and provides more clarity for litigants and judges who must apply the law. If the parties fail to contract for an earlier trigger date, the General Assembly intended for the certificate of occupancy to provide the default trigger date.

CONCLUSION

The 2005 amendment to South Carolina's statute of repose is straightforward and plain. The General Assembly intends for certificates of occupancy to be prima facie evidence of "substantial completion" as that term is used by the statute of repose. This Court should answer Judge Gergel's question accordingly.



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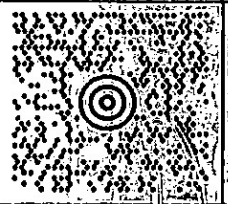
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