THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable Roger M. Young, Circuit Judge
Civil Action No.: 2009-CP-10-267

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3 Chisolm Street Homeowners Association, Inc., Plaintiff-Appellant,

v.

Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a Masonry Brickwork and Stucco, John Doe #1, John Doe #2, and Brock Green Architects and Planners, LLC, Defendants,

Of whom Genoa Construction Services, Inc., Masterpiece Millwork, Inc., and Brock Green Architects and Planners, LLC, are the Respondents.

Genoa Construction Services, Inc., Third-Party Plaintiff,

v.

The Fox Steel Company, Carolina Services, Inc., Lesco Restoration, Inc., Ferst Plastering, Inc., Charleston Glass & Mirror Company, 3d Renovations, Williams Mechanical, Mastercraft Interior & Exterior, Coastal Glass and Block, Adams Davis & Partners, and Troy Pardee Heating and Air Conditioning (d/b/a Pardee Heating and Air), CT Windows Limited, and Architectural Materials & Systems, Third-Party Defendants,

Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party Defendant.

FINAL BRIEF OF APPLEANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR BY DISREGARDING CONFLICTING FACTS AND BY FAILING TO APPLY THE SCINTILLA OF EVIDENCE STANDARD IN GRANTING PARTIAL SUMMARY JUDGMENT AGAINST APPEALLANT BASED ON THE STATUTE OF LIMITATIONS?

STATEMENT OF THE CASE

This is an appeal of the trial court's granting of partial summary judgment based on the statute of limitations in a condominium construction defects case. Appellant 3 Chisolm Street Homeowners Association, Inc. (the "HOA") filed a Summons and Complaint (R. p. 94) against the developer, general contractor (Genoa Construction Services, Inc.), and the window manufacturer (Masterpiece Mill Work, Inc.) involved in the construction of the Chisolm Street condominium development. The HOA subsequently filed a First Amended Complaint (R. p. 113) and a Second Amended Complaint (R. p. 162) to add direct claims against the architect (Brock Green Architects and Planners, LLC). Genoa filed third-party claims against its various subcontractors.

Genoa and the architect filed motions to dismiss the HOA's complaint based on the three-year statute of limitations. (R. p. 230; R. p. 237). Genoa's subcontractors then filed motions to dismiss Genoa's third-party claims against them based on the statute of limitations. At the motions hearing (March 28, 2011, Hearing Transcript; R. p. 443). Genoa did not oppose the subcontractors' motions and the Trial court granted summary judgment to the subcontractors and dismissed Genoa's third-party claims against them. Genoa did not appeal the orders applicable to the subcontractors and those orders are not at issue in this appeal.

As to the motions of Genoa and the architect directed towards the HOA's claims, the trial court initially issued two orders, one which denied the architect's motion in its entirety (R. p. 5) and the other which granted in part and denied in part Genoa's motion. (R. p. 11). The HOA filed a motion to reconsider the order granting partial summary judgment to Genoa (R. p. 536), and the architect filed a motion to reconsider the order denying its motion. (R. p. 525). Following a hearing on the motions to reconsider (August 12, 2011, Hearing Transcript; R. 545), the trial court issued two subsequent orders, one of which granted summary judgment to the architect (R. p. 60), and the other which again granted in part and denied in part Genoa's motion, but with modifications to the original order. (R. p. 69). The HOA filed an appeal of both orders.

Thereafter, the window manufacturer (Masterpiece Mill Work) sought summary judgment based on the same statute of limitations arguments asserted by Genoa and the architect. (R. p. 590). Following a telephone status conference the trial court issued an order granting summary judgment to the Masterpiece Millwork based on the same grounds as the orders applicable to Genoa and the architect. (R. p. 85 at p.5). Thereafter the trial court denied the HOA's motion to reconsider the order applicable to Masterpiece Millwork (Plaintiff's Motion to Reconsider, Alter, or Amend Order Granting Summary Judgment to Masterpiece Millwork, Inc. filed June 18, 2012, R. p. 645; and Order Denying Plaintiff's Motion to Reconsider, Alter, or Amend Order Granting Summary Judgment to Masterpiece Millwork, Inc. filed July 16, 2012, R. p. 91), and the HOA then filed an appeal of that order.

The Court of Appeals subsequently granted the HOA's motion to consolidate the two appeals into one consolidated appeal of all three orders on the basis that the three orders were granted on the same grounds and involve common questions of law and facts. Accordingly, this

Brief addresses the HOA's appeal of the summary judgment motions applicable to Genoa, the architect (Brock Green), and Masterpiece Millwork.

FACTS

The HOA is the homeowners association for the condominium horizontal property regime known as the 3 Chisolm Street Condominiums, which are located at 3 Chisolm Street in the City of Charleston, South Carolina.

The Chisolm Street condominiums are located on the site of the old Andrew B. Murray Vocational School, and the condominiums were developed by converting the former school buildings into condominiums. Chisolm Street Partners, LCC and Murray School Partners, LLC (collectively, the "developer") purchased the old Andrew B. Murray Vocational property, converted the property into condominium units, and then marketed and sold the condominiums to individual condominium unit owners. The developer also controlled and directed the HOA by virtue of its right to appoint a majority of the board of directors of the HOA.

In 2003 the developer transferred control of the HOA to a board of directors elected by the condominium unit owners. (Aff. of Mike Parades, Second Supplemental Record 4 at ¶ 3; Aff. of Jack Burnett, R. p. 662 at ¶ 6). When the developer transferred control of the HOA to the owners, a number of units had not been sold and the developer still owned and was marketing the unsold units. (Aff. of Jack Burnett, R. p. 663 at ¶ 7).

The HOA condominiums are contained in three separate buildings, the "main building," which has metal frame windows, and the "gym building" and "caretaker cottage," which have wood windows. After the developer transferred control, the HOA then hired an architect, Miles Glick, to perform a preliminary assessment because of concerns about potential leaks at the roof

parapets in main building. (Aff. of Jack Burnett, R. p. 663 at ¶ 7). Mr. Glick sent a letter to the HOA dated April 8, 2003 (the "Glick report"), which identified some problems in the main building. (Letter from Glick/Boehm & Associates, Inc. dated April 8, 2003, R. p. 745). Glick only examined the main building, and his report states that the comments in the report "are specific to the main . . . building" and "[t]he other two buildings were not reviewed. (Glick Report, R. p. 745 at ¶ A "Introduction") (emphasis added).

The HOA delivered the Glick's report to the developer's representative and the developer had the general contractor, Genoa, repair the problems identified in the Glick report by installing caulk and seals to address water leaks at the metal windows, repairing roof leaks, and repairing cracks in the stucco on the main building. (Aff. of Mike Parades, Second Supplemental Record p. 4 at ¶¶ 4-5; Aff. of Jack Burnett, R. p. 663 at ¶¶ 7-9; Dep. of Michael Parades, R. p. 722, line 6, to R. p. 723, line 17; Parades Dep. Exhibit 244, R. p. 732). After the Glick report was issued, Genoa's workers were on and off the site for over a year performing repair work to address the issues raised in the Glick report. (Aff. of Jack Burnett, R. p. 663 at ¶ 9).

In addition to the exterior repair work performed by Genoa, the developer had a handyman perform interior repair work, including cleaning bleaching, and painting mold accumulations in the unoccupied units that were still owned by the developer. (Dep. of Jerry Huddleston, R. p. 708, lines 4-11; R. p. 709, line 18, to R. p. 716, line 8). The developer had the handyman install temporary dehumidifiers and run fans to stop water accumulation from condensation on the metal windows in the main building that was occurring because of lack of air conditioning circulation in the unoccupied units. (Dep. of Jerry Huddleston, R. p. 709, line 18, to R. p. 716, line 8), the moisture accumulation problems in those units stopped once the

empty units were sold and the occupants began operating the air conditioning systems. (Dep. of Jerry Huddleston, R. p. 716, lines 6-8). When Genoa and the developer completed the repair work, the HOA was informed and believed that the water intrusion issues and other issues referenced in the Glick report had been repaired. (Aff. of Mike Parades, Second Supplemental Record p. 5 at ¶ 6; Aff. of Jack Burnett, R. p. 663 at ¶ 10).

Several year later, the wood windows in gym building began rotting, which prompted the HOA to hire a forensic engineering firm, Applied Buildings Sciences, Inc. ("ABS"), to investigate the cause of the rotting wood windows. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; Aff. of Scott Harvey, R. p.664 at ¶ 4). The HOA filed this lawsuit after the developer and Genoa refused to repair the problems with the wood windows on the gym building. (Aff. of Jack Burnett, R. p. 663 at ¶ 11). Thereafter, while ABS was on the site looking at the wood windows and firewalls in the gym building, ABS looked at the metal windows in the main building. (Aff. of Scott Harvey, R. p. 664 at ¶ 5). During those observations ABS noted staining and deterioration around some of the metal windows. (Aff. of Scott Harvey, R. p. 664-665 at ¶ 6). Based on those observations, ABS recommended that portions of the walls under the metal windows in the main building be cut open so that ABS could survey the wall cavities for evidence of water intrusion. (Aff. of Scott Harvey, R. p. 664-665 at ¶ 6). The HOA authorized ABS to conduct some destructive cuts in the walls of the main building, at which point ABS cut open walls and observed water in the walls under some of the metal windows in the main building. (Aff. of Scott Harvey, R. p. 665 at ¶ 7). At this point the HOA learned that the repair work performed by the developer and Genoa on the main building in response to the Glick report

had not eliminated water intrusion issues in the main building. (Aff. of Walter G. Seinsheimer, Jr., R. p. 674 at ¶ 4).

Genoa and the architect (Brock Green Architects) filed motions for summary judgment based on the three-year statute of limitations under S.C. Code Ann. § 15-3-530, contending that the HOA took no action and delaying filing this lawsuit more than three years from the date of the "Glick report. Their evidence and arguments presented at the hearing on the summary judgment were focused on the stucco repair work performed around the metal frame windows on main building. They did not argue or suggest that the wood windows in the other two buildings (i.e. the gym building and cottage) had started to fail (rot) or manifest any problems at the time of the Glick report.

Following a hearing on the motions, the trial court issued two separate orders. One order denied the architect's motion on the ground that "the Glick report does not identify any design defects that would place the HOA on notice of design defects applicable to the architect[.]" (Order Denying Summary Judgment as to Brock Green Architects and Planners, LLC filed June 9, 2011, R. p. 9). The other order granted in part and denied in part Genoa's motion (Order Granting in Part and Denying in Party Defendant Genoa Construction Services, Inc.'s Motion for Summary Judgment filed June 9, 2011, R. p. 11). Specifically, the trial court's order granted Genoa partial summary judgment as to any claims related to Units 305 and 306 (a double unit located in the main building), on the ground that the owner of that unit had been involved in litigation with the developer in 2002 (a year before the Glick report was issued). (R. p. 17).**1**

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1 The owner of the Units 305 and 306 (a double unit) is not a party in this case and the HOA is not appealing the portion of the trial court's orders applicable to Units 305 and 306.

The remainder of the order applicable to Genoa is contradictory and confusing. For example, the order states: "When Genoa and the Developer completed the repair work, the HOA was informed and believed that the water intrusion issues and other issues referenced in the Glick report had been repaired." (R. p. 14). The order also states: "Contrary to the Defendants' assertion that the HOA took no action to address the issues raised in the Glick report, the HOA took affirmative action by forwarding the report to the Developer and Genoa to repair the problems. The Developer and Genoa responded by repairing the problems and indicated that the problems had been fixed." (R. p. 15). The order further states: "[T]he HOA did not learn that repairs performed by the Developer and Genoa to address the items in the Glick report were not properly and completely performed until ABS examined the main building in 2009 while it was onsite examining problems with the wood windows on the other two buildings." (R. p. 15). However, the order then states:

> [T]his Court finds that South Carolina's three-year statute of limitations on any claims Plaintiff could have brought relating to Genoa Construction Services' original stucco work on the conversion project has tolled. However, this Court finds there is a genuine issue of material fact regarding the repair work Genoa Construction Services' was contracted to complete in response to the Glick report. When viewed in the light most favorable to the HOA, as the Court must for purposes of a summary judgment motion, the facts indicate that the HOA did not learn that repairs performed by the Developer and Genoa to address the items in the Glick report were not properly and completely performed until ABS examined the main building in 2009 while it was onsite examining problems with the wood windows on the other two buildings."

(R. p. 16). The order then concludes as follows:

> ORDERED, ADJUDGED AND DECREED that:
>
> 1. Genoa Construction Services' Motion for Summary Judgment is GRANTED as [sic] claims relating to the original construction work on the conversion project [emphasis added]

2. Genoa Construction Services' Motion for Summary Judgment is DENIED as [sic] claims relating to the repair work conducted in 2003 [emphasis added];

3. Genoa Construction Services' for Summary Judgment is GRANTED as to all claims at they pertain to units 305 and 306.

(R. p. 18). The HOA filed a motion to reconsider (R. p. 536) the order applicable to Genoa because the order is internally contradictory and because Genoa was attempting to construe the terms "original construction work on the conversion project" as contained at the end of the order as applying to the wood windows in the gym building and cottage—even though Genoa's motion was based on the Glick report and that report only applied to the main building and did not in any way suggest that any problems existed or had manifested with the wood windows in the other buildings (the gym building and cottage) at the time of the report. The architect also filed a motion to reconsider the trial court's denial of its summary judgment motion (R. p. 525).

Following a hearing on the motions to reconsider the trial court issue two new orders, one which granted summary judgment to Brock Green on all of the HOA's claims (R. p. 60) and the other which denied the HOA's motion to reconsider the order granting partial summary judgment to Genoa as to all of the "original construction work on the conversion project." (R. p. 69). Both orders are based on the premise that the HOA was on notice of potential problems in all of the buildings (main building, gym building, and cottage) at the time of the 2003 Glick report and took no action, despite the fact that Genoa had repaired the problems identified in the Glick report, the Glick report did not discuss the other two buildings, and no evidence indicates that the wood windows in the other buildings had started to fail (rot) or manifest any problems at the time of the Glick report.

Thereafter the trial court granted summary judgment to Masterpiece Mill Work (which manufactured the wood windows in the gym and cottage buildings), based on the trial court's finding that the 2003 Glick report regarding the main building had placed the HOA "on notice of potential problems" regarding the wood windows in the other two buildings. (R. p. 85).

The HOA appeals from the trial court's orders granting summary judgment to Genoa, the architect, and Masterpiece Millwork, all of whom are sometimes collectively referred to as "Respondents" for ease of reference.

ARGUMENT

I. THE TRIAL COURT DISREGARDED CONFLICTING FACTS AND FAILED TO APPLY THE SCINTILLA OF EVIDENCE STANDARD IN GRANTING SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS.

A. Standard of Review

This Appellate Court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009); *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 532 (Ct. App. 2012). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v.*

Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (internal citations omitted). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). "Additionally, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." *Major v. City of Hartsville*, 398 S.C. 257, 270-271, 728 S.E.2d 52, 59 (Ct. App. 2012).

B. The trial court failed granted summary judgment based on conflicting facts.

"Under the discovery rule, the statute of limitations begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists." *Holmes v. National Service Industries, Inc.*, 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011). "If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010) (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338–39, 534 S.E.2d 672, 681–82 (2000)). In the present matter, the affidavits and deposition testimony submitted by the HOA in opposition to the motions, which must viewed in the light most favorable to the HOA, indicate as follows:

When the HOA received the Glick report in 2003 that identified some issues in the main building, the HOA delivered the report to the developer, which in turn sent the report to Genoa to repair the problems identified in the report. (Aff. of Mike Parades, Second Supplemental Record p. 4 at ¶ 5; Aff. of Jack Burnett, R. p. 663 at ¶¶ 7-8).

Genoa repaired the problems identified in the Glick report by repairing cracks in the stucco cladding on the main building and by checking and re-seating the weather stripping around the metal windows on the main building. (Aff. of Mike Parades, Second Supplemental Record p. 4 at ¶ 5; Aff. of Jack Burnett, R. p. 663 at ¶ 9; Dep. of Mike Parades, R. p. 722, lines 12-17; Parades Dep. Ex. 244, R. p. 732). Genoa's workers were on and off the site for over a year performing repair work to address the issues raised in the report (Aff. of Jack Burnett, R. p. 663 at ¶ 9), and upon completion Genoa reported that the metal windows were not leaking and the problems on the main building had been occurring because of the cracks in the stucco, which Genoa has repaired. (Parades Dep. Ex. 244, R. p. 732).

When Genoa completed the repair work the HOA was informed and believed that the issues identified in the Glick report had been repaired. (Aff. of Mike Parades, Second Supplemental Record p. 5 at ¶ 6; Aff. of Jack Burnett, R. p. 663 at ¶ 10). The HOA's handyman testified that in 2004 the wood windows in the gym building were "fine, they were all right." (Dep. Jerry Huddleston, R. p. 709, lines 9-12). At that point the HOA had no reason or cause to file suit, because all identified problems had been repaired and no other problems had been identified or manifested. Therefore, no cause of action existed and the statute of limitation did not begin to run under the discovery rule. *See Holmes v. National Service Industries, Inc.*, 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011) ("Under the discovery rule, the statute of limitations

begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists.") (emphasis added).

Years later the wood windows in the gym building began rotting, which prompted the HOA to hire an engineer, Applied Building Sciences (ABS), to investigate the wood windows (Aff. of Jack Burnett, R. p. 663 at ¶ 11). While investigating the wood windows in the gym building, ABS observed moisture problems around the metal windows in the main building. (Aff. of Scott Harvey, R. p. 664 at ¶ 5). ABS then cut open some walls and discovered water in the some of the wall cavities under the metal windows. (Aff. of Scott Harvey, R. p. 664-665 at ¶¶ 6-7). The owner of a unit in the main building did not notice and was not aware of that there were any water intrusion issues associated with water leaks at the metal windows in the main building until ABS conducted destructive testing (i.e., cut open the walls in the main building) in 2009 and reported to the HOA that it had observed water under some, but not all, of the metal windows in the main building. (Aff. of Walter G. Seinsheimer, Jr., R. p. 674 at ¶ 4).

In short, the evidence indicates that when it received the 2003 Glick report regarding problems in main building, the HOA took affirmative action by forwarding the report to the developer and Genoa to repair the problems. The developer and Genoa responded by repairing the problems in the main building and reported that the problems had been fixed. The HOA believed the problems in the main building had been repaired, there were no problems evident with the wood windows in the gym building at that time, and the HOA had no reason to believe that any problems existed until years later when the wood windows in the gym building and cottage began to rot.

When viewed in the light most favorable to the HOA, these facts indicate that the HOA did not learn that water problems in the main building existed until ABS examined the main building in 2009 while it was onsite examining problems with the wood windows in the gym and cottage. Moreover, the Glick report does not identify any design defects that would place the HOA on notice any design defects applicable to the architect. Nonetheless, the trial court granted summary judgment the HOA based on the premises that following its receipt of the Glick report the HOA "took no action" and was on notice of potential problems in all three buildings—even though Genoa had repaired the problems in the main building identified in the Glick report, and even though the wood windows in the gym building and cottage had not begun to rot or manifest any problems. At the very least, there is conflicting evidence as to what and when the HOA knew or should have known, making the question one for the jury and rendering it inappropriate for the trial court to decide the factual disputes on summary judgment. *See Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.") (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338–39, 534 S.E.2d 672, 681–82 (2000)).

In granting summary judgment, the trial court factually decided that the HOA should have immediately filed suit regarding the identified problems that that HOA believed had just been satisfactorily repaired (i.e., the repairs to the stucco cracks in the main building) and should have identified and immediately filed suit for then unknown and non-existent problems with the wood windows in the gym and cottage. It is contrary to the facts, law, and logic for the trial court to find that Genoa repaired problems with the original work but then exclude claims related

to defectively repaired "original work" that the HOA was unaware had not been properly performed until ABS inspected that work in 2009. The trial court also reached the illogical and contradictory finding that the Glick report placed the HOA on notice of non-reported and then non-existent problems with the wood windows in the gym and cottage.

The trial court failed to properly apply the standard applicable to a motion for summary judgment and granted summary judgment based on conflicting facts and based on assumptions of non-existence facts. Accordingly, there is a genuine issue of material fact regarding whether the three-year statute of limitations applies to the HOA's claims.

C. The trial court erroneously shifted the burden to the HOA by deeming the HOA was on notice of problems with the wood windows that did not exist at the time.

The wood windows at issue in this case are located only in the gym building and caretaker cottage. Mr. Glick did not examine those buildings, and the wood windows are not mentioned in the 2003 Glick report. At the time of the Glick report the wood windows had not started to rot and no problems with the wood windows were identified or known to exist. No repairs were required or made to the wood windows as a result of the Glick report because the wood windows did not begin to fail (rot) until years after the Glick report was issued. The HOA could not have been on notice of problems with the wood windows that had not yet occurred at the time of the Glick report and for which no repairs were required or made at that time.

In granting summary judgment the trial court found the HOA was on notice of a problem with the wood windows that was not observed or reported by anyone and that had not yet occurred. The trial court's finding directly conflicts with evidence that the issues identified in the Glick report had been repaired (Aff. of Mike Parades, Second Supplemental Record p. 5 at ¶

6; Aff. of Jack Burnett, R. p. 663 at ¶ 10), and its finding directly conflicts with the fact that in 2004 the wood windows in the gym building were "fine" (Dep. Jerry Huddleston, R. p. 709, lines 9-12) and did not begin to rot until years later. (Aff. of Jack Burnett, R. p. 663 at ¶ 10).

The trial court in effect erroneously shifted the burden to the HOA to prove that the then non-existent problems with the wood windows did not exist.[2] No evidence indicates that the problems with the wood windows existed, was apparent, or was discoverable at the time of the Glick report, and the trial court erroneously placed the burden on the HOA to show that it was unaware of a problem that did not exist at the time. *See Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.") (internal citations omitted). Moreover, the evidence indicates that the windows did not begin rotting until years after the Glick report was issued. (Aff. of Jack Burnett, R. p. 663 at ¶ 10). In granting summary judgment, the trial court erred by ignoring or discounting conflicting evidence and by improperly shifting the burden onto the HOA to show that it had no knowledge of problems (with the wood windows) that did not exist at the time. Accordingly, there is a genuine issue of material fact regarding whether the three-year statute of limitations applies to the HOA's claims related to the failure of the wood windows in the gym building and caretaker cottage.

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2 The summary judgment order states in pertinent part: "Further, there is no evidence suggesting that the construction defects alleged to be present in the gym and cottage buildings were either not present in 2003-2006 or would not have been discovered by the exercise of reasonable diligence, such as having a forensic architect, general contractor, and attorney inspect the building in question." (Order Granting Defendant Genoa Construction Services, Inc.'s Motion for Summary Judgment, R. p. 78).

CONCLUSION

The trial court erred by granting summary judgment in the face of conflicting facts and by failing to construe the facts and inferences drawn therefrom in the light most favorable to the HOA. Accordingly, the trial court's orders granting summary judgment to Respondents should be reversed and the matters remanded for a jury trial.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief of Appellant complies with Rule 211, SCACR.

Respectfully submitted,

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July 17, 2013

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Proof of Service

I, hereby certify that on July 18, 2013, I served one copy each of the ***Final Brief of Appellant, Final Reply Brief of Appellant, and Second Supplemental Record on Appeal*** on counsel for the parties of record in this case via United States Mail, postage pre- paid, as addressed shown below or via hand delivery.

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