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 REPLY BRIEF OF APPELLANT

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ARGUMENT

Though each of the three Respondents submitted separate Appellate Briefs, those three Briefs contain the same arguments. For purposes of brevity in this consolidated appeal, this Reply Brief is intended as a consolidated reply to all three Briefs.

I. THE INJURY OR DAMAGE TO THE WOOD WINDOWS IN THE OTHER TWO BUILDINGS DID NOT EXIST WHEN THE 2003 GLICK REPORT WAS ISSUED REGARDING THE METAL WINDOWS IN THE MAIN BUILDING.

When boiled down to its essence, the circuit court concluded that the 2003 Glick report, which pertained only to the main building, started the statute of limitations as to claims pertaining to all other aspects of the construction of the three separate buildings that comprise the HOA's property. Under the discovery rule, the statute does not begin to run from the date the negligent act or the breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981).

The problems with the three buildings involve different issues and damages that occurred at different times. The main building has a problem with water intrusion occurring around the metal frame windows; however, the metal window frames themselves remain fully intact. In contrast, the wood frames in the wood windows in the gym and cottage building are rotting. The 2003 Glick report does not identify any problems, or even mention, the wood windows in the gym and cottage building. In 2003 the wood windows were essentially brand new (the developer

was still selling unsold condominium units in 2003) (Aff. of Jack Burnett, R. p. 663 at ¶ 7). The record is devoid of any evidence that the wood windows had sustained any injury or damage at that time of the Glick report. To the contrary, 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).

No repairs were performed to the wood windows following the Glick report because no problems existed with the windows at that time. Years later in 2007 or 2008 the wood windows frames began to rot, at which point the HOA hired forensic engineering firm Applied Building Sciences, Inc. ("ABS") to investigate the cause of the rotting. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; Aff. of Scott Harvey, R. p. 664 at ¶ 4). Prior to that point no injury or damage to the wood windows existed, so in 2003 the HOA could not have been placed on notice of a then non-existent injury of a different nature pertaining to different types of windows located in different buildings.

In considering the summary judgment motions, the circuit court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the HOA, and summary judgment should have been denied if even a mere scintilla of conflicting evidence exists. *See* Rule 56(c), SCRCP (stating 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); *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.").

In granting summary judgment against the HOA, the circuit court disregarded conflicting facts and ignored material facts indicating that the injury to the wood windows did not exist prior to 2007 or 2008. Accordingly, the circuit court erred in concluding that the 2003 Glick report regarding the main building somehow placed the HOA on notice on an injury or damage to the wood windows in the other two buildings that did not exist at that time. Because the record contains genuine issue of material fact regarding when the injury to the wood windows first occurred and regarding when the HOA discovered or reasonably could have discovered that injury, the circuit court erred in granting summary judgment on that issue.

II. A REASONABLE INFERENCE EXISTS THAT THE HOA WAS JUSTIFIABLY INDUCED TO BELIEVE THAT THE PROBLEMS HAD BEEN REPAIRED AND THE CIRCUIT COURT ERRED IN DECIDING THE ISSUE ON SUMMARY JUDGMENT.

The circuit court erred by summarily concluding the Respondents are not equitably estopped from asserting the statute of limitations as a bar to the HOA's claims pertaining to the main building. Genuine issues of fact exist regarding whether the repair work performed on the main building to address the issues identified in the 2003 Glick report justifiably induced the HOA to refrain from filing suit concerning those repairs.

This Court has stated that attempts to investigate and repair construction problems toll the statute of limitations under the doctrine of equitable estoppel:

In South Carolina,

> [a] defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been *induced by the defendant's conduct.*
>
> The doctrine is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's *intentional* misrepresentation; *but deceit is not an essential element of estoppel.* It is sufficient that the aggrieved party *reasonably relied* on the words and conduct of the person to be estopped in allowing the limitations period to expire.
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue. Some courts hold that repairs by a defendant may toll the statute of limitations. One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that may lead the injured party to *reasonably believe that it will receive satisfaction without resort to litigation.*

Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372-73, 725 S.E.2d 112, 125-26 (Ct. App. 2012) (quoting *Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds, Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (citations and quotation marks omitted) (additional emphasis added).

In *Dillon County School District No. Two*, this Court concluded that investigation and attempts to repair the roof on the school building, and assurances that the problem would be corrected, induced the school district to refrain from filing suit. *Id.* at 219-20, 332 S.E.2d at 562. This Court also observed that, "The question of whether a defendant's conduct lulled a plaintiff into a false sense of security and thereby prevented the plaintiff from filing suit within the

statutory period is ordinarily one of fact for a jury to determine." *Id.* at 219, 332 S.E.2d at 561 (citing *Lovell v. C.A. Timbes, Inc.*, 263 S.C. 384, 210 S.E.2d 610 (1974)).

In the present matter, following transfer of control from the developer to the HOA in 2003, the HOA hired Glick to investigate potential water issues in the main building. The 2003 Glick report identified some issues in the main building only, namely issues related to cracks in the stucco and weather stripping on the metal frame windows. Genoa proceeded to address the items listed in the report by repairing the 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 Supplement 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 performed the repair work over the course of a year or more (Aff. of Jack Burnett, R. p. 663 ¶ 9). Upon completion Genoa reported that the metal windows were not leaking and that the problems on the main building had been occurring because of the cracks in the stucco, which Genoa has repaired (Parades Dep. Exhibit 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). As to the architect, Glick's report does not mention any design defects, and in the course of performing the repair work on the main building Genoa did not notify the HOA of any design issues involving the architect. Moreover, at that time no problems existed with the wood windows on the other two buildings and no repair work was needed or performed on those buildings. After Genoa

completed the repairs to the main building, 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 existed.

Under these facts, a reasonable inference exists that the HOA was justifiably induced to believe that the problems had been repaired. Therefore, a jury issue exists regarding whether reasonable men could differ on the issue of equitable estoppel in this case, and the circuit court erred in deciding the issue on summary judgment.

III. THE ORDERS GRANTING SUMMARY JUDGMENT ON GENOA'S THIRD-PARTY CLAIMS AGAINST ITS SUBCONTRACTORS DO NOT PERTAIN TO THE HOA'S CLAIMS AGAINST RESPONDENTS.

Genoa filed third-party claims against its various subcontractors, and those subcontractors then filed motions to dismiss Genoa's third-party claims 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 circuit court granted summary judgment to the subcontractors and dismissed Genoa's third-party claims. Genoa did not appeal the orders applicable to the subcontractors and those orders are not at issue in this appeal. Respondents now incorrectly contend that this Court should affirm the summary judgment orders pertaining to the HOA's claims against Respondents based on the "unchallenged orders" pertaining to Genoa's third-party claims against its subcontractors.

It is axiomatic that a party cannot appeal from a decision that does not affect his or her interest. *Shaw v. City of Charleston*, 351 S.C. 32, 37, 567 S.E.2d 530, 532 (Ct. App. 2002); *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App.2001); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App.1998). As stated by this Court:

> Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." We recently reiterated that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct.App.2001). "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Id.; see Parker v. Brown*, 195 S.C. 35, 44-45, 10 S.E.2d 625, 629 (1940) ("An aggrieved party or person is one who is injured in a legal sense; one who has suffered an injury to person or property."). "A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589-590; *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct.App.1998).

Shaw, 351 S.C. at 36-37, 567 S.E.2d at 532.

Here, Genoa filed third-party claims against a number of its subcontractors, but Genoa subsequently elected to abandon those claims when it made no effort to oppose their motions for summary judgment. The HOA has not asserted claims against Genoa's subcontractors and the HOA was not aggrieved or injured by the orders granting summary judgment on Genoa's claims against its subcontractors. The HOA had no reason, basis, or standing to argue against those motions or to challenge those orders in this appeal. Moreover, Genoa's subcontractors are not co-defendants with HOA, and the narrow exception recognized by this Court in *Shaw* regarding a co-defendant's right to appeal the grant of summary judgment to its co-defendant does not apply here.

The HOA has not asserted claims against Genoa's subcontractors, and Genoa's decision to abandon those third-party claims does not affect the HOA's claims, rights or interests. The summary judgment orders regarding Lacy Painting and the other subcontractors as referenced by the Respondents pertain only to Genoa's third-party claims against its subcontractors, and those orders have no relevance or binding effect as to the HOA's claims.

CONCLUSION

The circuit 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 circuit court's orders granting summary judgment to Respondents should be reversed and the case remanded for a jury trial on these issues.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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July 19, 2013

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Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc.,

Fourth-Party Defendants.

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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