No. COA12-1385 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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GEORGE CHRISTIE and DEBORAH CHRISTIE, Appellants, v. HARTLEY CONSTRUCTION, INC.; GRAILCOAT WORLDWIDE, LLC; and GRAILCO, INC., Appellees.	)	From Orange County

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DEFENDANT-APPELLEE'S BRIEF

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INDEX

APPENDIX:

TABLE OF CASES AND AUTHORITIES

CASES:

STATUTES:

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BRIEF OF DEFENDANT-APPELLEE HARTLEY CONSTRUCTION, INC.

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ARGUMENT

I. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFFS-APPELLANTS'CLAIMS AGAINST DEFENDANT-APPELLEE HARTLEY CONSTRUCTION, INC. BECAUSE THOSE CLAIMS ARE BARRED BY THE STATUTE OF REPOSE AND PLAINTIFFS-APPELLANTS ARE UNABLE TO PRESENT COMPETENT EVIDENCE ON AN ESSENTIAL ELEMENT OF THEIR CLAIM.

A. Summary Judgment Standard

> [S]ummary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

The burden is on the moving party to establish the lack of any triable issue. *Collingwood,* 324 N.C. at 66, 376 S.E.2d at 427.

> A movant may meet the burden of proof (1) by proving that an essential element of the opposing party's claim is non-existent, or (2) showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim or (3) showing the plaintiff cannot surmount an affirmative defense.

Boor v. Spectrum Homes, Inc., 196 N.C. App. 699, 703, 675 S.E.2d 712, 715 (2009). Defendant-Appellee Hartley Construction, Inc.[1] prevails on both the second and third methods of obtaining summary judgment.

Additionally, this Court reviews an order allowing summary judgment *de novo*. *Cobb v. Pennsylvania Life Ins. Co.*, -- N.C. App. --, --, 715 S.E.2d 541, 547 (2011) (citations omitted). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Cobb*, -- N.C. App. at --, 715 S.E.2d at 547 (citations omitted). The trial court's order granting of summary judgment should be affirmed by this court because the Plaintiffs-Appellants'[2] claims against Defendant Hartley are barred by the statute of repose and Plaintiffs are unable to establish an essential element of their claims.

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[1] For clarity and simplicity, hereinafter "Defendant Hartley" or "Hartley."

[2] For clarity and simplicity, hereinafter "Plaintiffs."

B. When Applied To The Facts Of The Case At Bar, The Summary Judgment Standard Requires The Trial Court's Grant of Summary Judgment To Be Affirmed Because The Plaintiffs' Claims Are Barred By The Statute Of Repose.

As the general contractor of the Residence, it is undisputed that the statute of repose that applies to Hartley is North Carolina General Statute § 1-50(a)(5), which reads in pertinent part:

> (5) (a) No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than ***six years*** from the later of the specific last act or omission of the defendant giving rise to the cause of action or ***substantial completion*** of the improvement.
>
> (b) For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:…
>
> (9) Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observations of construction, or ***construction of an improvement to real property***, or a repair to an improvement to real property.

N.C. Gen. Stat. § 1-50(a)(5) (2012)(emphasis added).

"Whether a statute of repose has expired is a question of law." *Vogl v. LVD Corp.*, 132 N.C. App. 797, 800, 514 S.E.2d 113, 115 (1999). The statute of repose serves as "an ***unyielding*** and ***absolute barrier*** that prevents a plaintiff's right of action even before his cause of action may accrue." *Boor,* 196 N.C. App.

at 703, 675 S.E.2d at 715 (2009) (*quoting Black v. Littlejohn,* 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985)) (emphasis added). Generally, an action is deemed to have accrued at "the point in time when the elements necessary for a legal wrong coalesce." *Boor,* 196 N.C. App. at 703, 675 S.E.2d at 715 (citations omitted). Accordingly, '[a] statute of repose creates an ***additional element*** of the claim itself which must be satisfied in order for the claim to be maintained." *Boor,* 196 N.C. App. at 703, 675 S.E.2d at 715 (emphasis added).

The certificate of occupancy for the Residence was issued on March 22, 2005. R p 39. Plaintiffs' claims against Defendant Hartley should have been filed by March 22, 2011 to satisfy the six (6) year statute of repose. It is clear from the face of the Complaint that this action was instituted on October 31, 2011, more than six years and seven months after the Certificate of Occupancy was issued, and thus more than seven months after the expiration of the statute of repose. Therefore, upon a review of the pleadings filed in this case, it is clear that Plaintiffs' claims were initiated after the six-year statute of repose, and a judgment should be entered barring this cause of action pursuant to North Carolina General Statute § 1-50(a)(5).

C. Plaintiffs' Allegations of "Intentional and/or Reckless Acts" Are An Attempt To Save Their Claim For Gross Or Willful And Wanton Negligence, And Such Allegations Are Without Merit And Unable To Be Substantiated By Evidence.

North Carolina General Statute § 1-50(a)(5) makes an exception to the statute of repose for any defendant:

> who shall have been guilty of fraud, or willful or wanton negligence in . . .construction of an improvement to real property . . . or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

N.C. Gen. Stat. § 1-50(a)(5)(e). Plaintiffs mistakenly refer to this exception as N.C. Gen. Stat. § 1-50(e); in fact, the proper citation is N.C. Gen. Stat. § 1-50(a)(5)(e). Plaintiffs' Br., p 30. After ample opportunity to come forth with any evidence of gross or willful and wanton negligence, Plaintiffs have failed to show anything beyond alleged violations of the North Carolina Building Code. Without any evidence beyond Building Code violations, North Carolina case law is clear that willful and wanton negligence cannot be proven. *See Moore v. F. Douglas Biddy Constr. Inc.*, 161 N.C. App. 87, 91, 587 S.E.2d 479, 483 (2003).

The Plaintiffs have not alleged fraud, so the potential exception to the statute of repose would only be applicable if the Plaintiffs could show that Harley engaged in gross or willful and wanton negligence. In *Moore,* the plaintiffs argued that the defendants should be estopped from asserting a statute

of repose defense since there were allegations of gross negligence. However, in that matter, the plaintiffs failed to produce any evidence ***other than allegations that defendants' work was in violation of certain building codes***.

> Plaintiffs' complaint alleges that defendant's furnishing of materials and failure to follow manufacturer's specifications or Building Code requirements constitute more than ordinary negligence. We have held that violation of the Code, standing alone, has been held by this Court to be insufficient 'to reach the somewhat elevated level of gross negligence.'

Moore, 161 N.C. App. at 92, 587 S.E.2d. at 483. In the present case, the plaintiffs can only present evidence of alleged violations of the Building Code, and thus as a matter of law they cannot forecast gross or willful and wanton negligence and cannot forecast facts sufficient to show that their claims are not barred by the statute of repose.

In this action, Plaintiffs have not forecast any facts of gross negligence or willful and wanton conduct. There are no ***facts*** shown in discovery that Hartley's conduct constituted "conscious and intentional disregard of . . . the rights and safety of others." *Moore*, 161 N.C. App. at 93, 587 S.E.2d. at 483. Instead, Plaintiffs merely rely upon the bare ***allegations*** of the Complaint that Hartley "intentionally or recklessly installed GrailCoat Stucco on the Residence" and that his actions violated the Building Code. R p 22. These allegations,

even if true, do not support claims of gross or willful and wanton negligence. The facts alleged to support the claim of gross negligence are nothing more than a recital of the allegations used to support Plaintiffs' claims for negligence, breach of contract and breach of implied warranty, and do not show any heightened claims of misconduct by Hartley. *See Cacha v. Montaco, Inc.,* 147 N.C. App. 21, 33-4, 554 S.E.2d 388, 396 (2001) (even if arguably tending to reflect negligence, the record falls woefully short of evidence of any 'wicked purpose,' or 'intentional disregard of an indifference to the rights and safety of others').[3]

North Carolina case law is clear that due to the facts shown here, the Plaintiffs have no facts to show the only applicable exception to the statute of repose. The decisions in *Starkey v. Cimarron Apartments, Inc.,* 70 N.C. App. 772, 321 S.E.2d 29 (1984)*; Moore v. F. Douglas Biddy Construction, Inc.;* and *Cacha v. Montaco, Inc.* are particularly instructive on this

[3] Mr. Hartley, the former president of Hartley Construction, Inc., unfortunately passed on June 3, 2011. Accordingly, Plaintiffs currently have all of the evidence regarding his state of mind that will ever be available. Since the evidence put forth by Plaintiffs is insufficient to support their claims, the trial court has properly found that summary judgment in favor of Defendant Hartley is appropriate. Defendant Hartley believes that providing this information to this Court is appropriate since any remand will likely end in the same result because Plaintiffs' insufficient evidence cannot be supplemented. (D. Christie depo. p. 101, line 21 through p. 102, line 6) [App. 7-8].

issue. In *Starkey*, the Court of Appeals found that the lack of firewalls and the failure to correct that deficiency was evidence of negligence, "but not of willful and wanton negligence." The Court of Appeals further stated that the plaintiff ***did not*** produce evidence that the defendant had:

> [A] deliberate purpose to fail to install the firewalls as required by law, nor have they shown any evidence of recklessness or of a 'wicked purpose' which would make [defendant's] negligence willful or wanton.

Starkey, 70 N.C. App. at 775, 321 S.E.2d at 231. In *Moore*, summary judgment was granted in favor of the defendant construction company when the plaintiffs failed to show any evidence of willful and wanton negligence in failing to seal exterior siding on a home. The Court noted that "plaintiffs did not offer evidence regarding defendant's knowledge or experience with" the exterior finish on the home. As such, the Court of Appeals held that the allegations that the defendant furnished materials and failed to follow the building code did not constitute more than ordinary negligence, and that "violation of the code, standing alone, has been held by this court to be insufficient to reach the somewhat elevated level of gross negligence." *Moore*, 161 N.C. App. at 91, 587 S.E.2d at 483. Similarly, the *Cacha* court held that even if the evidence "arguably tend[ed] to reflect negligence," because plaintiffs could not show that the defendants had any indication or reason

to know that using EIFS on the exterior of the home would cause damage to the residence, "the record falls woefully short of evidence of any 'wicked purpose' or 'intentional disregard of an indifference to the rights and safety of others' [on the part of the defendants]." *Cacha*, 147 N.C. App. at 33-34, 554 S.E.2d at 396.

The only evidence from the Plaintiffs produced in discovery is that certain actions of Hartley allegedly violated the Building Code.[4] There is no evidence at all on the intent of Hartley, and no evidence to show that Hartley undertook the construction of the Plaintiffs' home with any "wicked purpose" or "intentional disregard of and indifference to the rights and safety of others." *Cacha*, 147 N.C. App. at 33-34, 554 S.E.2d at 396. As such, this court should affirm the trial court's order granting of summary judgment in favor of Defendant Hartley.

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[4] This Court has held "violation of the Code, standing alone, to be insufficient 'to reach the somewhat elevated level of gross negligence,' *Bashford v. N.C. Licensing Bd. for General Contractors,* 107 N.C.App. 462, 467, 420 S.E.2d 466, 469 (1992), much less wilful and wanton negligence, *see Olympic Products Co. v. Roof Systems, Inc.,* 88 N.C.App. 315, 326, 363 S.E.2d 367, 373-74 ('failure to check Code compliance' prior to applying roof system 'does not indicate a reckless indifference which rises to the level of wilful or wanton negligence'), *disc. review denied,* 321 N.C. 744, 366 S.E.2d 862 and 321 N.C. 744, 366 S.E.2d 863 (1988); *see also Collins v. CSX Transportation, Inc.,* 114 N.C.App. 14, 24, 441 S.E.2d 150, 155-56 (noting distinction between 'gross negligence' and 'wilful and wanton negligence'), *disc. review denied,* 336 N.C. 603, 447 S.E.2d 388 (1994)." *Cacha*, 147 N.C. App. at 33, 554 S.E.2d at 395.

The concepts of willful and wanton negligence as applied in matters other than construction defect cases show that it is a high burden for a plaintiff to meet, and that general acts of negligence, even if they result in serious injuries, are not enough to meet this elevated standard. For example, in upholding the dismissal of a claim for punitive damages against a bus driver who fell asleep while operating a commercial passenger bus, the Court of Appeals held that:

> [D]river error by falling asleep behind the wheel *by itself* does not show a reckless indifference to the rights of others or a deliberate purpose not to discharge a duty even though it was in violation of federal safety regulations.

George v. Greyhound Lines, Inc., -- N.C. App. --, --, 708 S.E.2d 201, 207 (2011). Similarly, in *Green v. Kearney*, -- N.C. App. --, --, 719 S.E.2d 137, 141 (2011), the Court of Appeals found North Carolina Gen. Stat. § 90-21.14, which allows damages against emergency medical providers in cases of gross negligence or wanton conduct, to be similar to the exception for the statute of repose at issue here. The Court of Appeals held that the difference between ordinary negligence and gross negligence "is substantial" and connotes "intentional wrongdoing" and that the failure of EMS personnel to recognize that the plaintiff was not dead and transported the plaintiff to the morgue rather than to the hospital was not sufficient to show gross negligence.

The evidence here includes a book Mrs. Christie wrote about her experience in building the Residence. (D. Christie depo. p. 17, lines 17-19) [App. 3]. In that book, Mrs. Christie described John Hartley as having "integrity" (D. Christie depo., Ex. 1) [App. 9], stated that she had a "high degree of confidence" in him (D. Christie depo., Ex. 10) [App. 10-11], and added "we owe a great debt to our architect/builder, John Hartley, whose collaboration and expertise have resulted in a home we enjoy every day." (D. Christie depo., Ex. 12) [App. 12]. Mrs. Christie further stated she had no documents or other evidence to show John Hartley was aware of any potential problems with Grailcoat at the time the Residence was designed and built (D. Christie depo., p. 43, lines 7-17) [App. 4], and that she was unaware of anything Hartley did with a wicked purpose or as an intentional disregard to her rights or safety other than violations of the Building Code. (D. Christie depo., p. 96, line 13 to p. 97, line 20) [App. 5-6]. Thus, as discussed above, simply stating that Hartley violated the Building Code fails to forecast sufficient evidence of the willful or wanton nature of Hartley's conduct under North Carolina law, and summary judgment must be granted in favor of Hartley.

The fact that the Plaintiffs have secured an affidavit from engineer Ronald Wright stating that the actions of Hartley were

done "intentionally and/or recklessly" is not relevant to any decision here. First, Wright only opined that the violations of the Building Code were done intentionally or recklessly, which the courts in this state have held to be insufficient to show willful or wanton negligence. Further, the fact that Ronald Wright, as an engineer, is attempting to opine on legal standards is not admissible evidence in North Carolina. It is a "well established rule" in North Carolina that expert opinions concerning matters that require legal interpretation, is not permitted under North Carolina law. *E.g., State v. Baldwin*, 330 N.C. 446, 459, 412 S.E.2d 31, 39 (1992). The case of *Howard v. Jackson*, 120 N.C. App. 246, 461 S.E.2d 793 (1995), addresses the specific issue raised by Mr. Wright's affidavit. In *Howard*, the plaintiff offered an affidavit from an expert in aquatic safety that the defendant's actions constituted willful or wanton negligence. The court held that when an expert provides opinion testimony on matters about which he has no special knowledge, skill or experience, the evidence is not helpful to the trier of fact. Since the plaintiff's expert was not a legal expert, "his legal characterization of defendants' acts did not create a genuine issue of material fact." *Howard*, 120 N.C. App. at 249, 461 S.E.2d at 798. Similarly, in *Yates v. J.W. Campbell Electrical Corp.*, 95 N.C. App. 354, 360, 382 S.E.2d 860, 864 (1989), the Court of Appeals held that the affidavit of

plaintiff's expert in the field of engineering and highway design "ventured out of his area of expertise by giving an opinion as to the defendant's state of mind" when he testified that defendant had "substantial disregard for the lives and safety" of the plaintiff. *Yates*, 95 N.C. App. at 360, 382 S.E.2d at 864. The Court of Appeals held that these are legal conclusions, and that as an expert in engineering, the witness was not competent to enter an opinion on legal questions. Thus, it is clear that the affidavit of Ronald Wright, at least to the extent that he gives opinions that the action of Hartley were intentional or reckless, should be disregarded by this Court.

If the allegations are taken in a light most favorable to Plaintiffs, at most, Plaintiffs have made claims for negligence, breach of contract, and breach of warranty. There are no facts shown in discovery of any type of conduct by Hartley that would rise to the level of gross or willful and wanton negligence. Since Plaintiffs have failed to forecast any particular facts or acts by Defendant Hartley that would support a claim for gross or willful and wanton negligence, this Court should grant summary judgment to Defendant Hartley under Rule 56 of the North Carolina Rules of Civil Procedure.

D. Plaintiffs' Contention That Hartley Is Estopped From Asserting The Statute Of Repose Is Preposterous.

Plaintiffs' newly constructed argument regarding estoppel is completely without merit. The consistent problem for Plaintiffs' claims against Hartley is that 1) they are barred by the statute of repose, and 2) the only exception to this ***absolute bar*** is a showing that Hartley was "guilty of fraud, or willful or wanton negligence…" N.C. Gen. Stat. § 1-50(a)(5)(e). Plaintiffs have attempted to shoehorn the facts of this case into that exception, but can show no evidence to support their attempts.

In Plaintiffs' Brief, they address their new estoppel argument with a cursory overview of two cases that are inapplicable to the case at bar, which may be why no information regarding the facts of those cases is provided in Plaintiffs' brief. This Court has set forth the elements for equitably estopping a party from asserting the statute of repose as a defense:

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the

> real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Hensell v. Winslow, 106 N.C. App. 285, 290-91, 416 S.E.2d 426, 430 (1992). Importantly, the *Hensell* Court goes on to note that "[i]t is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party." *Hensell,* 106 N.C. App. at 290-91, 416 S.E.2d at 430. Plaintiffs are unable to point to an inconsistent position by Hartley. More importantly, Plaintiffs are unable to provide any evidence to support the first element of the estoppel claim – that Hartley engaged in any conduct that amounts to a false representation or concealment of material fact. Plaintiffs' citations to the record do nothing to establish that Hartley was actively concealing information, intended to induce the Christies to action, or that Hartley had any knowledge of the "real facts" as the elements in *Hensell* require. *Hensell*, 106 N.C. App. at 290-91, 416 S.E.2d at 430 (1992). North Carolina law on equitable estoppel is consistent in its requirement that the plaintiff must have been in some way induced to delay the filing of plaintiff's lawsuit ***because*** of some action on the part of the defendant to be estopped. *See, Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987)(Where evidence showed debtor made affirmative representations to mislead the creditor, and where creditor acting in good faith failed to file

lawsuit within statute of limitations, estoppel prevented debtor from asserting statute of limitations as defense); *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959) (Contractor who induced plaintiff not to file lawsuit by promising to perform any necessary correction and then refused to assume responsibility as soon as the statute of limitations had run was estopped from asserting statute of limitations as a defense); *Wood v. BD&A Construction, L.L.C.*, 166 N.C. App. 216, 221, 601 S.E.2d 311,315 (2004) ("In order for equitable estoppel to bar application of the statute of repose, a plaintiff must have been induced to delay filing of the action by the conduct of the defendant that amounted to the breach of good faith").

Turning to Plaintiffs' specific allegations, it is clear they are unable to meet their burden to establish the essential elements for equitably estopping Hartley from asserting the statute of repose. The only citations in Plaintiffs' Brief ***refer to their own responses to interrogatories*** included in the Rule 9(d) Documentary Exhibits 1-111 filed by Plaintiffs in this matter. Plaintiffs assert that "all of [the equitable estoppel] elements are present in this case for both Hartley and GrailCoat." Plaintiffs' Br., p 37, citing Doc. Ex. 44-58. Unfortunately, their evidentiary support for this contention includes only answers they provided to interrogatories in this litigation. Plaintiffs' Br., 37-38. Plaintiffs attempt to

support their estoppel argument by stating "[w]hen Hartley met with Ms. Christie . . . he was aware that he had designed a "non-drainage/barrier" system that had trapped water, resulting in substantial rot to the substrate." Plaintiffs' Br., p 37. Plaintiffs never explain how they intend to prove that Hartley had knowledge of any trapped water or "substantial rot to the substrate," and do not even cite to one of their interrogatory answers in an attempt to substantiate this claim. Plaintiffs' Br., p 37. Plaintiffs also state that:

> Hartley failed to recommend to the Christies that a comprehensive inspection be made of the Residence in order to ascertain the extent of the moisture damage, and merely advised Christie to apply more caulk.

Plaintiffs' Br., p 38, citing Doc. Ex. 54-58. Again, this contention is unsubstantiated and cannot be supported by evidence. Most damaging is the fact that Plaintiffs are unable to establish that "the defendant's intention that its conduct will be acted on by the plaintiff," an essential element of establishing equitable estoppel. In sum, Plaintiffs have no evidence to support their equitable estoppel argument and this court should affirm the trial court's order granting summary judgment in favor of Defendant Hartley and dismissing all Plaintiffs' claims against Hartley.

E. Plaintiffs' Contention That Hartley Concealed The Fact That It Was Applying GrailCoat To The Residence Is Utterly Without Merit And Cannot Be Substantiated By The Evidence.

Plaintiffs advance a new contention in their Appellate Brief that Hartley "concealed [the fact that] it was Applying a "Barrier" System on the Christie Residence." Plaintiffs' Br., p 29. In support of this new contention, Plaintiffs cite Ms. Susan Mellott. Plaintiffs' Br., p 29. Interestingly, the affidavit cited in Plaintiffs' Brief also states that Ms. Mellott was not the "actual building code enforcement official who reviewed the permits and performed the field inspections on the Christie Residence." R p 108. Despite not having first-hand knowledge of the permits and admitting that she had not reviewed the permits, Ms. Mellott's affidavit goes on to state that she "does not recall that a new cladding system that was designed to be a 'non-drainable' or 'barrier' system was being installed on the Christie Residence." Plaintiffs' Br., p 29; R p 110. This Court is provided no basis for any reason that Ms. Mellott would have the ability to recall the details of a permit that she had never reviewed.

Such a discrepancy in the logic of Plaintiffs' arguments certainly provides grounds for the trial court's determination that Plaintiffs were unable to proffer competent evidence to support their claims for willful and wanton negligence against

Hartley. Further, this failure to provide sound proof of Hartley's alleged "concealment" supports the trial court's order dismissing Plaintiffs' claims against Hartley. Accordingly, this Court should not disturb the sound judgment of the trial court in this case and should affirm the order granting summary judgment in favor of Defendant Hartley.

CONCLUSION

Plaintiffs' have failed to present any evidence to this Court or, indeed, to the trial court to excuse their failure to file their lawsuit within the six year period prescribed by North Carolina law. Furthermore, Plaintiffs have failed to forecast any evidence of willful or wanton negligence sufficient to overcome the statute of repose. Because Plaintiffs' claims are barred by the statute of repose for improvements to real estate, this Court should affirm the trial court's order granting summary judgment and dismissing all of Plaintiffs' claims against Defendant Hartley.

Respectfully submitted, this the 14th day of February, 2013.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing reply brief on counsel for Plaintiff-Appellee by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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APPENDIX

§ 1-50. Six years.

(a) Within six years an action –

(1) Repealed by Session Laws 1997-297, s. 1.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
2. Actions to recover damages for the negligent construction or repair of an improvement to real property;
3. Actions to recover damages for personal injury, death or damage to property;
4. Actions to recover damages for economic or monetary loss;
5. Actions in contract or in tort or otherwise;
6. Actions for contribution indemnification for damages sustained on account of an action described in this subdivision;
7. Actions against a surety or guarantor of a defendant described in this subdivision;
8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

c. For purposes of this subdivision, "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

d. The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

e. The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

f. This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

(6) Repealed by Session Laws 2009-420, s. 1, effective October 1, 2009, and applicable to causes of action that accrue on or after that date.

(7) Recodified as G.S. 1-47(6) by Session Laws 1995 (Regular Session, 1996), c. 742, s. 1.

(b) This section applies to actions brought by a private party and to actions brought by the State or a political subdivision of the State. (C.C.P., s. 33; Code, s. 154; Rev., s. 393; C.S., s. 439; 1931, c. 169; 1963, c. 1030; 1979, c. 654, s. 2; 1981, c. 644, s. 1; 1991, c. 268, s. 2; 1995, c. 291, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 1(a); 1997-297, s. 1; 2009-420, s. 1.)

a little over the weekend and yesterday. Haven't had a chance to copy them yet.

And I have them with me. They're actually in the trunk of my car. Since it's raining, I didn't want to get them wet.

But if at any time there are some documents that you think that you need to refer to to help with your answer, if you'll let me know, I'll be glad to take a break and --

A **Very good.**

Q -- and bring them in. All right. From my review of the documents that have been provided to us, it appears that you had done some research on your own of a number of items that you wanted to incorporate into the house. Is that correct?

A **That's correct.**

Q And you wrote a book about your experience in designing and building a house --

A **That's correct.**

Q -- did you not? Okay. As far as the research that you did about selecting different materials or items that might be incorporated into the house, do you still have all those records?

A **Yes. I have many of them.**

Q Okay. And have you given those records to your

claddings under the North Carolina Building Code, and with not recommending claddings that don't conform to the North Carolina Building Code, particularly ones that have had such an egregious history as nondrainable claddings, recent history, which I was unaware. That's the fact.

Q Have you seen any documents that show that Mr. Hartley was aware of any potential problems with the use of GrailCoat as the exterior cladding on your home at the time that it was designed and built?

A No.

Q And has anyone else told you that they had any conversations with Mr. Hartley that showed he had any knowledge about the potential problems that might result from the use of GrailCoat as the exterior cladding on your home?

A No.

(Defendant's Exhibit No. 2 Marked)

Q I'll show you what we've marked as Exhibit 2. Is this a -- the picture here, is that you and your husband?

A It is.

Q Okay. And that, I take it -- this picture and all the pictures are pictures of your home.

A It is.

Q Okay. All right. Was everything in the book written

did with respect to the construction of your home that was fraudulent?

MR. HARRIS: Objection to form.

A **Well, I don't know what the technical definition of fraud is. But I was not properly informed by John ever of the requirement of the building code that exterior claddings be drainable.**

I don't know what constitutes fraud in terms of the fact that he never discussed this with me and the fact that he represented to me that our house was built in conformance with the building code, and it wasn't.

Q Okay. Are you aware of anything that Hartley Construction did with a wicked purpose in the construction of your home?

MR. HARRIS: Objection to form.

A **A wicked purpose. I don't know what -- I don't know -- I don't have an answer to that. I don't know -- I don't know what that means.**

Q Are you aware of anything that Hartley Construction did to intentionally disregard your rights or safety?

A **I am aware that John inspected my home in December of 2010 and again in the spring of 2011 and failed to inform me of the seriousness of the problem, both in the cracking and in the clear moisture damage.**

MS. CHRISTIE

He never recommended to me that I consider replacing the cladding. He never recommended to me that I get it inspected. He never suggested to me that I get an inspection with moisture meters.

The only recommendation he made was additional caulking.

Q How about at the time the house was being designed or built.

A And the question, again, was with regard to -- at the time the house was being designed or built, any --

Q Any intentional disregard that Hartley Construction had for your rights or safety.

A Yes. Well, again, the -- I can only say that I -- I don't understand why he was not informing me of the requirements of the building code regarding a drainable cladding. I just do not understand that. That, to me, was in disregard of my rights and safety.

Q Anything other than the building code?

A I can't think of anything other than the building code.

(Defendant's Exhibit No. 15 Marked)

Q Let me show you what I've marked as Exhibit 15. And I will represent to you that these are some documents from a folder that I copied out of the documents you had produced for us.

MS. CHRISTIE

A **I don't, no recall.**

Q Okay.

A **No, I don't -- I don't think so.**

Q All right. And there's a sticky note on there that says, "Linda Meierer," with a phone number?

A **Yes.**

Q Do you recognize that handwriting?

A **Not mine. I don't think it was John's, either, though. It doesn't look like his handwriting, but I don't know.**

Q Next page is just the signed proposal --

A **Right.**

Q -- that we've already seen.

A **Next page is John's handwriting. And I don't recall this.**

Q Okay. Do you know how you came to be in possession of these documents --

A **I --**

Q -- other than the emails, of course, which you would have generated.

A **I went to see Steve Bailey, John's vice president, although I didn't know that -- his bookkeeper and vice president -- shortly after John's death in 2011. I don't know how long.**

John died on June 3rd, 2011, and I contacted

Steve Bailey with regard to GrailCoat and asked him for information about GrailCoat. And he gave me some -- he would not allow me to look at my file, which I didn't understand.

But anyway, he -- he made photocopies and gave them -- he may have given this to me then.

Q And what was your purpose -- you say it was June 2011?

A I would say June or July, something like that. Maybe -- maybe July 2011. Sometime in the summer.

Q And what was your purpose in asking Mr. Bailey for this information?

A I wanted to see what he had in his files that I might not have in mine about GrailCoat.

Q Okay. Other than asking for copies of it, do you recall having any substantive conversations with Mr. Bailey about the issues --

A Yes.

Q -- on your house?

A Yes.

Q Okay. Was it just one conversation?

A Yes. I believe.

Q Okay. About the --

A After.

Q -- time that you got these documents?

A Right. Well, this one document. The others look like

Acknowledgements

For critiquing entire drafts of this book, I thank my husband, George, my nephew, Bruce McDermott, Hillel and Charlotte Koren, John Hartley and Eve Olive.

Thank you to John Hartley, architect/builder, for partnering with us on this challenging project. John showed a lot of patience and integrity throughout the design and building phases.

I am grateful to Steve Badanes, nationally-known architect/builder with Jersey Devil design-build, for suggesting that I try to draw the house I envisioned. Without Steve's encouragement, I might never have put on paper a design concept.

Bill Warren, building scientist, was a key player in the design and construction of our home. His suggestions and testing led to better drained foundations and much tighter air sealing of the house, as well as identifying novel solutions to HVAC issues, notably the Taco D'Mand® pump in the west bedroom and the Koolspace® cooler in the wine room.

Two craftsmen played an invaluable role in the interior function and beauty of our home: Bruce Pratt and Ray Penland.

To Bruce Pratt and his workers at Old Growth Cabinets, we owe a great debt for their expertise and craftsmanship in assisting with the design and in the construction, painting and installation of the extensive built-in cabinetry and shelving throughout our house. In many instances, Bruce found on-site conditions at considerable variance from the plans and dimensions he was given (a not unusual occurrence, it seems), and he adjusted his plans with no complaint. The function of our house is much enhanced by the built-in cabinetry, desks, shelves, beds and benches which form an important part of the design and construction. The work of Bruce and his crew was critical, and we enjoy the quality of their work every day.

The ductwork of Ray Penland is a key element in both the function and aesthetic of the main house. Ray and his crew spent hours to get the right aesthetic effect as well as the correct function. When Ray installed the Vent-a-hood® exhaust hood and fans, he created a custom set of interior ducts to match the HVAC ducts, and found a good-looking exhaust chimney to install on the exterior of the roof. We owe a great deal of the beauty of our home to the craftsmanship of Ray Penland.

Thanks to Rachel Davies, for referring me to *A Pattern Language*, an invaluable design resource (see Appendix 1: Principal Reference Materials).

For general inspiration and support, in addition to my husband, George, I also thank my dear friends, Tonia Weeks and Gail Mangold-Vine.

15 THE CONSTRUCTION CONTRACT

Fixed-price versus fixed-profit

Even after working with John for many months on the design of the house, researching materials, equipment, and appliances, we had not completed the design process when we signed the construction contract on April 1, 2004. John and I understood that we would continue to review, adjust and make changes during the construction process. Even though some adjustments would continue to be made, we had reached the point where we were ready to take a leap of faith. We had gotten to know and trust John, and John had sourced enough of the materials to be able to come up with the contract price. Some of the major material prices threatened to increase, and we were anxious to lock-in their cost. Interest rates were at an all-time low, and we wanted to secure our construction loan as soon as possible. We had recently refinanced our Stoneridge townhouse to take advantage of low adjustable mortgage rates, and essentially had two more years of a three-year window in which to build our Piney Mountain house and sell our Stoneridge townhouse.

For all of these reasons, we felt it was time to sign a contract and trust that we knew enough to commit to the cost of the construction of the Piney Mountain House.

John's practice, as already described, is to present his clients with a design-build fixed price contract at the end of the design process. Even a fixed-price contract, of course, usually has "allowances" for certain items—typically lighting, wallpaper, fixtures, appliances and other features selected by the owners rather than the design-builder. The owner understands that the design-builder has no control over the selection of these items, and so accepts the risk of paying any excess over the "allowed" amount in the contract.

In our case, however, because some of the materials were so novel and/or their prices so volatile, John put in an enormous number of "allowances" for major structural items such as SIP panels, Grailcoat and structural steel. Out of a total construction price of $714,201, $216,587 was allocated to categories of materials on which we, the "Owner," not John, the "Contractor," bore the risk of material increases. This meant that thirty percent of the price of the house was not fixed and could increase if John was unable to secure the materials at the price he estimated.

In response, George and I asked John to include all of his profit in the basic contract, rather than, as is often the case, counting on adding more profit if changes were to be made during construction. In particular, we asked John to use his best efforts to purchase the allowance items at the best possible prices, in consultation with us. We then asked that

the contract state expressly that "the contract price includes all of the Contractor's profit for the work. Contractor shall not add additional profit to the contract price for any changes to the work so long as such changes do not materially alter the basic design of the work."

In essence, we converted a fixed-price contract to a fixed-profit contract, without expressly stating the amount of the profit.

In retrospect, I believe that a fixed-profit contract was reasonable and optimal. When, during construction, John later asked for payment for a major item, a crane, which he had inadvertently omitted from the contract, we protected his profit by paying for the cost of the crane. I felt this was appropriate, given John's honest attempt to minimize our costs, and I believe that John thereafter did all he could to keep our costs as low as possible.

One sticking point John and I did have concerned an "integration clause," the gist of which is that the parties agree that all of the terms of the contract are contained in the stated written agreement, and that there are no oral agreements or written side agreements not described and attached to the terms of the central written agreement. I argued that we should not include such an integration clause because our specifications were necessarily incomplete, and that in fact there were many expectations on both sides which were not necessarily spelled out in detail in the written contract. The truth is that the specifications for our house consisted almost entirely of the plans and a few photocopies of equipment. I felt we did not have the luxury to work out detailed lists of specifications for every aspect of the house, as is routinely done for commercial construction, but not necessarily for residential construction.

I was conscious of the fact that the construction contract was a hasty affair, but George and I felt a high degree confidence in John, and an urgency to get going on the project. In the final agreement we worked out a compromise which obligated us to "negotiate in good faith to resolve any differences in what should be an addition to or reduction in the contract price," and stated that "This Agreement constitutes the comprehensive agreement between the parties hereto and both of the parties affirm that they have not made any material promises, representations, or agreements except as are herein expressly set forth." In other words, we agreed that all major items were set forth in the contract, but that minor items might well have been discussed and yet not included.

On April 1, 2004, we signed the Building contract, consisting of a basic five-page "Construction Agreement," Architectural plans which we initialed and dated, a list of "Contract Price and Allowances" (two pages), a six-page "Description of Materials", two pages of HVAC specifications, plus a host of photocopies of accepted subcontractor bids and photographs of particular materials and subcontractor drawings (for example, the built-in shelving).

The environs of our home have been another source of wonder. Even though our Piney Mountain home is only five miles from our Stoneridge townhouse, we find ourselves in a much more rural setting surrounded by many acres of forest owned by Duke University, and many creeks, along with our pond, the nature and care of which has also been a new discovery. We continue to learn about our native wildflowers and mosses.

We are grateful to have our longtime friends, the Korens, next door, and grateful for many more recent friends in both in the Piney Mountain subdivision and nearby communities. We continue to discover the history of our area.

We owe a great debt to our architect/builder, John Hartley, whose collaboration and expertise have resulted in a home we enjoy every day.

We are conscious of the great luxury our Piney Mountain home provides. Every day I feel enormous gratitude for our Piney Mountain home, where we hope to live into very old age.