IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-237

Filed: 30 December 2016

Watauga County, No. 14 CVS 134

PETER BUFFA and wife, STACY BUFFA, Plaintiffs,

v.

CYGNATURE CONSTRUCTION AND DEVELOPMENT, INC.; GRANITE HARDWOODS, INC.; THE HARDWOOD COMPANY; WINDSOR WINDOW COMPANY d/b/a WINDSOR WINDOWS AND DOORS; CHRISTOPHER WOTELL; and GARY SOVEL, Defendants.

Appeal by plaintiffs from orders entered 22 September and 13 October 2015 by Judge R. Gregory Horne in Watauga County Superior Court. Cross-appeal by defendants Granite Hardwoods, Inc., and The Hardwood Company from orders entered 24 November 2014 by Judge C. Philip Ginn and 22 September 2015 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 6 September 2016.

Whitfield Bryson & Mason LLP, by Daniel K. Bryson and Matthew E. Lee, for plaintiff-appellants and cross-appellees.

Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper and Timothy D. Swanson, for defendant-appellees Cygnature Construction and Development, Inc., Christopher Wotell, and Gary Sovel.

Wilson Elser Moskowitz Edelman & Dicker, by Hannah Styron Symonds, for defendant-appellees and cross-appellants Granite Hardwoods, Inc., and The Hardwood Company.

Goldberg Segalla LLP, by John I. Malone, Jr., and Leigh R. Trigilio, and Arthur, Chapman, Kettering, Smetak & Pikala, P.A., by Jeffrey M. Markowitz admitted pro hac vice, for defendant-appellee Windsor Window Company.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, for amicus curiae North Carolina Advocates for Justice.

BRYANT, Judge.

Where plaintiffs had the remedy of a manufacturer's express warranty, the economic loss rule precluded plaintiff's claim for recovery based on the tort of negligence. Where the record does not support plaintiffs' claim for unfair and deceptive trade practices, we affirm the trial court's grant of summary judgment in favor of Windsor Windows as to that claim. Where there exists a genuine issue of material fact as to whether Cygnature Construction, Wotell, and Sovel knew or should have known of the defects in the installation of the windows in the Buffas' residence, we reverse the trial court's grant of summary judgment and remand for further proceedings to determine whether those defendants are estopped from asserting the statute of repose as a defense to the Buffas' claims. Lastly, we uphold the trial court's grant of summary judgment in favor of defendants Granite Hardwoods and The Hardwood Company.

Facts and Procedural History

On 10 March 2014, plaintiffs Peter Buffa and Stacy Buffa filed a complaint in Watauga County Superior Court against Cygnature Construction and Development

(Cygnature Construction), Granite Hardwoods Inc. (Granite Hardwoods), The Hardwood Company, Windsor Window Company d/b/a Windsor Windows and Doors (Windsor Windows), Christopher Wotell, and Gary Sovel. Per the complaint, in 2006, the Buffas hired Cygnature Construction along with Christopher Wotell and Gary Sovel as general contractors to construct a house in Beech Mountain, North Carolina. During the two-year construction period, Cygnature Construction subcontracted Granite Hardwoods and The Hardwood Company to install windows purchased from Windsor Windows. A certificate of occupancy for the residence was issued on 16 August 2007. Construction of the residence was completed on 25 March 2008.

On 22 November 2013, water damage was discovered, and the Buffas duly contacted their homeowners' insurance carrier. On 10 December 2013, Louis A. Hackney, P.E., with the engineering firm Moore Hackney & Associates, PLLC, inspected the home and identified rot in connection with moisture intrusion. "The amount of rot was so significant that Hackney concluded a rear exterior wall of the home had experienced a significant reduction in load carrying capacity and was no longer sound." Hackney notified the Buffas that this amounted to a "life safety issue" and recommended that the structure be closed and unoccupied until further evaluation. The Buffas notified Cygnature Construction, Windsor Windows, and The Hardwood Company of the identified problems. On 27 December 2013, representatives of Windsor Windows inspected the Buffa house. Windsor Windows

representatives concluded that the water damage to the house was possibly caused by window failure. Windsor Windows representatives conducted a second inspection on 11 January 2014, while it was raining. Water was observed leaking under glass and at the corners of the glass and rotted wood. On 19 February 2014, Windsor Windows representatives conducted a third inspection, observing leaks in multiple windows in the house.

In their complaint, the Buffas sought recovery against Cygnature Construction for breach of contract, breach of implied warranties, and negligence/negligence *per se*; against Sovel and Wotell, the Buffas claimed negligence; against Granite Hardwood and The Hardwood Company, breach of implied warranties and negligence; and against Windsor Windows, breach of implied warranties, negligence, and unfair and deceptive trade practices.

All defendants moved to dismiss the Buffas' claims and raised various defenses including statutes of limitation and repose, and the economic loss rule. Thereafter, all defendants moved for summary judgment.

Following a 16 October 2014 hearing, the Honorable C. Philip Ginn, Senior Resident Superior Court Judge, entered an order on 24 November 2014 which denied summary judgment in favor of Windsor Windows, Granite Hardwoods, and The Hardwood Company, which together had argued that the six-year statute of repose

codified under General Statutes, section 1-50(a)(6) barred the Buffas' claims. For purposes of the statute of repose,

> the twelve (12) year statute of repose set forth in N.C.G.S. § 1-46.1 applies to this action rather than the former N.C.G.S. § 1-50(a)(6)[(six-year statute of repose)][1]. [Thus, the Buffas] have met their burden of showing that this action was timely brought under N.C.G.S. § 1-46.1.[2] For these reasons, [Windsor Windows, Granite Hardwoods, and The Hardwood Company's] motion[] for summary judgment based on the Statute of Repose barring [the Buffas'] claims should be denied.

Additionally, the court denied summary judgment for Granite Hardwoods and The Hardwood Company, where those defendants raised section 99B-2, otherwise known as the products liability sealed container defense.[3]

---

[1] Pursuant to North Carolina General Statutes, section 1-50(a)(6) (repealed 1 October 2009) (codified within Chapter 1, Article 5, Limitations, Other than Real Property), "[n]o action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." N.C. Gen. Stat. § 1-50(a)(6) (2009) (repealed 2009 N.C. Sess. Laws ch. 420 § 1).

[2] Pursuant to General Statutes, section 1-46.1 (effective 1 October 2009) (codified within Chapter 1, Article 5, Limitations, Other than Real Property) "[n]o action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than 12 years after the date of initial purchase for use or consumption." N.C. Gen. Stat. § 1-46.1(1) (2015) (enacted pursuant to 2009 N.C. Sess. Laws ch. 420 § 1).

[3] Pursuant to General Statutes, section 99B-2,

> [n]o product liability action . . . shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product . . . unless the seller damaged or mishandled the product while in his possession[.]

N.C. Gen. Stat. § 99B-2(a) (2015).

On 4 June 2015, Granite Hardwoods and The Hardwood Company filed a second motion for summary judgment, raising as a defense the six-year statute of repose set forth in section 1-50(a)(5).[4] The Buffas moved to strike the motion, arguing that the issue had been decided by Judge Ginn in his 24 November 2014 order ruling that "[Granite Hardwoods, and The Hardwood Company's] motion[] for summary judgment based on the Statute of Repose barring [the Buffas'] claims should be denied." Thus, argued the Buffas, Granite Hardwoods and The Hardwood Company should be precluded from seeking summary judgment on the same legal issue a second time before a second superior court judge.

On 21 August 2015, Windsor Windows moved for summary judgment on grounds that the Buffas failed to present evidence to support their claims of breach of implied warranty, negligence, and unfair and deceptive trade practices. On 15 September 2015, the Buffas entered a voluntary dismissal without prejudice as to their claim against Windsor Windows for breach of implied warranty.

On 22 September 2015, the Honorable Judge R. Gregory Horne entered an order granting summary judgment in favor of Cygnature Construction, Wotell, and

---

[4] Pursuant to General Statutes, section 1-50(a)(5),

> [n]o 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.

N.C. Gen. Stat. § 1-50(a)(5)(a.) (2015).

Sovel. The court concluded that the statute of repose under General Statutes, section 1-50(a)(5) barred all claims against those defendants. Judge Horne also entered a separate 22 September 2015 order striking Granite Hardwoods and The Hardwood Company's second motion for summary judgment pursuant to the Buffas' motion. The court concluded that Granite Hardwoods and The Hardwood Company were barred from raising as a defense the statute of repose set forth in section 1-50(a)(5) and the sealed container defense in section 99B-2, as those defenses had been presented and decided by Judge Ginn. However, also on 22 September 2015, Judge Horne entered an order granting summary judgment in favor of Granite Hardwoods and The Hardwood Company dismissing with prejudice the Buffas' claims of negligence and breach of implied warranty.

On 13 October 2015, Judge Horne granted summary judgment in favor of Windsor Window, dismissing the remaining claims with prejudice. The Buffas appeal. Granite Hardwoods and The Hardwood Company cross-appeal.

On appeal, the Buffas argue that the trial court erred in granting summary judgment in favor of (I) Windsor Windows; (II) Cygnature Construction, Wotell, and Sovell; and (III) Granite Hardwoods and The Hardwood Company.

(IV) Granite Hardwoods and The Hardwood Company cross-appeal.

Standard of Review

> [Summary] judgment sought shall be rendered forthwith 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.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). "We review a trial court's ruling on summary judgment *de novo*." *Barringer v. Forsyth Cnty. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 247, 677 S.E.2d 465, 472 (2009) (citation omitted).

I.

A. The Economic Loss Rule

The Buffas first argue that the trial court erred by granting summary judgment in favor of Windsor Windows. They contend that the economic loss rule should not preclude the Buffas' tort claims where the Buffas were not in privity with Windsor Windows and thus had no contractual claims.

Because the Buffas had a remedy in Windsor Windows' manufacturer's warranty, we hold that the application of the economic loss rule was appropriate.

1. Privity of Contract

"North Carolina has adopted the economic loss rule, which prohibits recovery for economic loss in tort. . . . [S]uch claims are governed by contract law . . . ." *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998); *see also N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d 345,

350 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." (citations omitted)).

> The rationale for the economic loss rule is that the sale of goods is accomplished by contract . . . . To give a party a remedy in tort, where the defect in the product damages the actual product, would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract. [However,] [w]here a defective product causes damage to property other than the product itself, losses attributable to the defective product are recoverable in tort rather than contract.

Moore, 129 N.C. App. at 401–02, 499 S.E.2d at 780 (citations omitted).

The Buffas cite to this Court's opinion in *Lord v. Customized Consulting Specialty, Inc.* 182 N.C. App. 635, 637, 643 S.E.2d 28 (2007). In *Lord*, the plaintiffs contracted with Customized Consulting Specialty, Inc., to construct a house. The plaintiffs filed a complaint against defendant Customized Consulting and the "84 Lumber Defendants." *Id.* at 637–38, 643 S.E.2d at 29–30. The 84 Lumber Defendants had been subcontracted by Customized Consulting to provide the trusses used in the construction of the residence, trusses that were later confirmed to be defective. *Id.* at 638, 643 S.E.2d at 29. In pertinent part, the plaintiffs sought recovery from the 84 Lumber Defendants on the basis of negligence. *Id.* at 638, 643 S.E.2d at 30. The plaintiffs had not entered into a contract with the 84 Lumber Defendants, *id.* at 640, 643 S.E.2d at 31, but the 84 Lumber Defendants still raised the economic loss rule seeking to bar the plaintiffs' negligence claim. The 84 Lumber

Defendants cited *Moore*, 129 N.C. App. 389, 499 S.E.2d 772, in which the economic loss rule precluded recovery for purely economic losses by tort despite a lack of privity of contract between the plaintiffs and the defendant manufacturer of a component product (an electrical converter in a recreational vehicle). The *Lord* Court noted that "our Legislature has specifically acted to limit liability for purely economic loss in the case of products such as the recreational vehicle in *Moore*. *See* North Carolina Products Liability Act, N.C. Gen. Stat. § 99B-2(b) (2005) . . . ." *Lord*, 182 N.C. App. at 642, 643 S.E.2d at 32. However, "[t]he Legislature has taken no such action in the construction of homes . . . ." *Id.* Quoting the opinion of our Supreme Court in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985),

> [t]he ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy for recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence.

Lord, 182 N.C. App. at 643, 643 S.E.2d at 32–33.

The *Lord* Court held that "[b]ecause there was no contract between the Lords and the 84 Lumber Defendants, we . . . find that the economic loss rule does not apply

and therefore does not operate to bar the Lords' negligence claims." *Id.* at 643, 643 S.E.2d at 33; *contra Wilson v. Dryvit Sys., Inc.*, 206 F. Supp. 2d 749, 754 (E.D.N.C. 2002) (citing Restatement (Third) of Torts: Products Liability § 21 cmt. e (1997) (noting that when a product or system is deemed to be an integrated whole, courts treat damage caused by a component part as harm to the product itself for purposes of economic loss doctrine)), *aff'd*, 71 F. App'x 960 (4th Cir. 2003); *id.* ("The ['widespread and extensive moisture intrusion behind the faces of the house, probable deterioration of the sheathing, and rotting of framing members, doors, windows and subflooring'] caused by the allegedly defective Fastrak therefore constitutes damage to the house itself. No 'other' property damage has resulted, and plaintiffs have suffered purely economic losses. Thus, plaintiffs' negligence claims against Dryvit[, the product manufacturer,] are barred by the economic loss rule, and Dryvit is entitled to summary judgment on those claims."); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 885, 602 S.E.2d 1, 4 (2004) (holding that "[a]s was the case in *Wilson*, any damage caused by the [direct exterior finish systems (DEFS)] constitutes damage to the house itself" and absent other property damage the economic loss rule precludes recovery from defendant DEFS manufacturer Dryvit in tort).

In the case now before us, the allegations in the complaint as well as the deposition testimony of Peter Buffa indicate that the Buffas hired Cygnature Construction as a general contractor to build their home and that Cygnature

Construction subcontracted Granite Hardwoods and The Hardwood Company to install the windows. After the Buffas selected Windsor Windows for their home, The Hardwood Company purchased the windows from Windsor Windows and, in turn, invoiced Cygnature Construction. We hold that due to the lack of privity of contract between the Buffas as homeowners and the window manufacturer, Windsor Windows, the economic loss rule does not act as a bar to the Buffas' negligence claim against Windsor Windows for injury caused by Windsor Windows. *See Lord*, 182 N.C. App. at 643, 643 S.E.2d at 33.

2. Manufacture's Warranty

Windsor Windows argues that should this Court hold that the absence of privity of contract between the Buffas and Windsor Windows does not support the application of the economic loss rule, the trial court's summary judgment should still be affirmed because the manufacturer's warranty allows the Buffas' a contractual remedy despite the lack of privity.

Windsor Windows contends that the case law interpreting the economic loss rule has found the absence of privity of contract to be dispositive to a ruling only where the absence of privity of contract meant the absence of a basis for recovery in contract or warranty. To this end, Windsor Windows cites *Ellis v. Louisiana-Pac. Corp.*, wherein the Fourth Circuit Court of Appeals considered whether North Carolina's economic loss rule barred the plaintiffs' negligence claim against a

manufacturer of a composite building product marketed as exterior trim around windows and doors ("Trimboard"). 699 F.3d 778 (4th Cir. 2012). In *Ellis*, the plaintiffs never directly purchased Trimboard but purchased homes in which it had been installed. The Western District Court of North Carolina dismissed the negligence claim on the basis of North Carolina's economic loss rule; the Fourth Circuit affirmed. *Id.* In its reasoning, the Fourth Circuit's *Ellis* Court noted North Carolina's economic loss rule, as set out in *N.C. State Ports Auth.*, 294 N.C. 73, 240 S.E.2d 345 ("[O]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."), *Ellis*, 699 F.3d at 783, and noted two North Carolina cases which carved out exceptions to the economic loss rule: *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985) (involving a plaintiff who was not the original purchaser of the home built by the defendant); and *Lord*, 182 N.C. App. 635, 643 S.E.2d 28 (affirming the trial court's denial of a directed verdict in favor of the 84 Lumber Defendants on the plaintiffs' negligence claim where no contract existed between the plaintiffs and the 84 Lumber Defendants). The *Ellis* Court noted that the *Lord* Court "merely recogniz[ed] a means of redress for those purchasers who suffer economic loss or damage from improper construction but who have no basis for recovery in contract." *Ellis*, 699 F.3d 778, 784 (quoting *Lord*, ___ N.C. App. ___, 643 S.E.2d at 32). "However, *Ports Authority*, *Oates*, and *Lord* do not squarely address

whether an explicit contract is required to invoke the ELR [("Economic Loss Rule")], or whether a contractual remedy, such as by warranty, will suffice." *Id.* at 784.

To answer the question of whether the remedy of a warranty also gives rise to the enforcement of the economic loss rule, the *Ellis* Court looked to the opinions of *Moore*, 129 N.C. App. 389, 499 S.E.2d 772 (affirming summary judgment for the defendant manufacturer against the plaintiff's tort claim on the basis of the economic loss rule where a defective part caused a fire that destroyed an RV); *Hospira, Inc. v. AlphaGary Corp.*, 194 N.C. App. 695, 671 S.E.2d 7, 14 (2009) (recognizing that *Moore* held "that owners of a recreational vehicle were barred from recovering for pure economic loss . . . under the economic loss rule . . . where . . . the remote supplier was covered under the subsidiary manufacturer's limited warranty"); and *Warfield v. Hicks*, 91 N.C. App. 1, 370 S.E.2d 689, 694 (1988) (applying the economic loss rule to bar original homeowners from recovery based on negligence against a contractor and distinguishing *Oates* by stating "the Court intended . . . to merely recognize a means of redress for those purchasers who suffer economic loss or damage from improper construction but who, because not in privity with the builder, *have no basis for recovery in contract or warranty* (emphasis added)"). *Ellis*, 699 F.3d at 784–85. The *Ellis* Court reasoned that in determining whether the economic loss rule applies, "the relevant inquiry under North Carolina case law is whether the plaintiff 'ha[s] [a] basis for recovery in contract or warranty.' " *Ellis*, 699 F.3d at 786 (quoting *Warfield*,

370 S.E.2d at 694); *see also id.* (quoting *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 736, 407 S.E.2d 819, 825 (1991) ("[A] direct contractual relationship in the sale of the product itself is not a prerequisite to recovery for breach of express warranty against the manufacturer.")).[5] We find this reasoning persuasive.

The record before us indicates that the windows purchased from Windsor Windows for the Buffas' house were covered by the manufacturer's express warranty. Thus, the Buffas had a basis for recovery due to injury potentially caused by defective windows. Where a basis for recovery is available by warranty, applying the economic loss rule to bar claims in tort is appropriate. *See id.* Accordingly, the Buffas argument is overruled, and we affirm the trial court's grant of summary judgment in favor of Windsor Windows dismissing the Buffas' claim of negligence.

B. Unfair and Deceptive Trade Practices

The Buffas next ask this Court to reverse the trial court's grant of summary judgment in favor of Windsor Windows on the Buffas' claim of unfair and deceptive

---

[5]

> If intangible economic loss were actionable under a tort theory, the U.C.C. provisions permitting assignment of risk by means of warranties and disclaimers would be rendered meaningless. It would be virtually impossible for a seller to sell a product "as is" because if the product did not meet the economic expectations of the buyer, the buyer would have an action under tort law. The U.C.C. represents a comprehensive statutory scheme which satisfies the needs of the world of commerce, and courts have been reluctant to extend judicial doctrines that might dislocate the legislative structure.

Ellis, 699 F.3d at 786 (quoting *2000 Watermark Assoc., Inc. v. Celotex Corp.*, 784 F.2d 1183, 1186 (4th Cir.1986)).

trade practices in violation of General Statutes, section 75-1.1. The Buffas contend the trial court erred by applying the economic loss rule to a claim of unfair and deceptive trade practices and that there exist material facts in dispute on that claim which preclude a grant of summary judgment. We disagree.

Pursuant to North Carolina General Statutes, section 75-1.1, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2015). "The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75–1.1 is a question of law for the court." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). "In order to establish a violation of N.C.G.S. § 75–1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Id.* (citations omitted).

In their complaint, the Buffas allege the following:

> Windsor Windows engaged in unfair and deceptive acts or practices . . . when, in selling and advertising the windows in the Buffa Home, Windsor Windows failed to give the Buffas adequate warnings and notices regarding the defect in the windows despite the fact that Windsor knew or should have known of this defect, with the intent that the Buffas would rely upon Windsor's failure to disclose the defect when purchasing the windows. The Buffas were deceived by and relied upon Windsor Windows' failure to disclose.

On appeal, the Buffas contend that in the deposition of Windsor Windows representative Rick McMillen, McMillen acknowledged that the windows had "significant glazing leaks which allowed water to infiltrate through the windows and into other property, including the framing and wall sheathing." However, in his deposition McMillen stated that over the past ten years, he was aware of only three other cases involving claims against Windsor Windows for structural damage to a house as a result of water intrusion. Again, we look for guidance in *Ellis*.

"Egregious or aggravating circumstances must be alleged before the provisions of the [UDTPA] may take effect. Aggravating circumstances include conduct of the breaching party that is deceptive. Finally, in determining whether a particular act or practice is deceptive, its effect on the average consumer is considered." *Ellis*, 699 F.3d at 787 (quoting *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 561 S.E.2d 905, 910–11 (2002) (internal citations omitted)). "Appellants allege that [the manufacturer] knew that [the manufactured product] would not live up to the terms of the warranty and should have disclosed this fact to consumers, but this is simply another way of claiming that [the manufacturer] breached its express warranty to consumers . . . ." *Id.* "[This] allegation simply re-couches Appellants' breach of warranty claim. But North Carolina has held that a 'breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain' a UDTPA claim." *Id.*

(quoting *Wachovia Bank & Trust Co. v. Carrington Dev. Assocs.*, 119 N.C. App. 480, 459 S.E.2d 17, 21 (1995)). We find the reasoning in *Ellis* persuasive.

The Buffas' claim of unfair and deceptive trade practices relies on the allegation that Windsor Windows was aware of a defect in the design of their windows which allowed for water intrusion and failed to notify the Buffas of the defect with the intent the Buffas would rely upon Windsor Windows' failure to disclose when purchasing the windows. A review of the record provides that other than allegations in the complaint, there is no evidence of systematic window failure or a design flaw. As in *Ellis*, here, the Buffas' claim of unfair and deceptive trade practices is in essence a claim for breach of warranty and insufficient to sustain a claim for unfair and deceptive trade practices. *Id.* ("[A] 'breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain' a UDTPA claim."). Therefore, the Buffas argument on this point is overruled. Accordingly, we affirm the trial court's grant of summary judgment in favor of Windsor Windows on the Buffas' claim of unfair and deceptive trade practices.

II

The Buffas next argue that the trial court erred by granting summary judgment in favor of Cygnature Construction, Wotell, and Sovel. The Buffas contend that (A) Cygnature Construction, Wotell, and Sovel are equitably estopped from raising the statute of repose as a defense where Cygnature Construction's conduct

prolonged the period wherein the Buffas could have discovered the defects in the window installations; (B) the statute of repose was incorrectly applied to bar the Buffas' claims where the date of substantial completion of the improvement was some time after the certificate of occupancy was issued; (C) Cygnature Construction acted with willful or wanton negligence in installing the windows; and (D) material issues of fact exist as to the date the house was substantially completed. We agree, in part.

North Carolina General Statutes, section 1-50, provides a statute of repose which our Supreme Court "has recognized constitutes a substantive definition of, rather than a procedural limitation on, rights." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 426, 302 S.E.2d 868, 872 (1983). Section 1-50(a)(5) is "designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Id.* at 427–28, 302 S.E.2d at 873. More exactly, the section "establishes a time frame in which an action must be brought to be recognized." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001) (citations omitted); *see also Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861 (2006) ("[Section 1-50(a)(5)] . . . provides an outside limit of six years for bringing an action coming within its terms." (citation omitted)).

> 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:
>
> . . .
>
> 2. Actions to recover damages for the negligent construction or repair of an improvement to real property[.]

N.C. Gen. Stat. §§ 1-50(a)(5)(a.), (b.)(2) (2015). "The issue of whether the statute of repose has expired is a question of law." *Bryant*, 147 N.C. App. at 657, 556 S.E.2d at 600 (citation omitted).

A. Equitable Estoppel

The Buffas contend Cygnature Construction is equitably estopped from pleading the statute of repose as a defense where the Buffas assert Cygnature Construction "must have known of the serious defect [in the installation of the windows] and covered it up with siding preventing the Buffas from discovering the damage until it was too late." Because we hold the trial court erred by concluding that the Buffas failed to meet their burden of showing Cygnature Construction was estopped from asserting a statute of repose as a defense, we do not address the remaining arguments presented on this issue.

> The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in

> equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.

Duke Univ. v. Stainback, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987) (alteration in original) (quoting *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937)).

> Equitable estoppel may be invoked, in proper cases, to bar a defendant from relying upon the statute of limitations or statute of repose.
>
> . . .
>
> The essential elements of equitable 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.

Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC, 236 N.C. App. 478, 496, 764 S.E.2d 203, 216 (citations omitted), *review denied*, ___ N.C. ___, 766 S.E.2d 619, review denied, ___ N.C. ___, 766 S.E.2d 646, *review dismissed*, ___ N.C. ___, 766 S.E.2d 647, *review denied*, ___ N.C. ___, 766 S.E.2d 836 (2014).

In support of the Buffas' proposition that Cygnature Construction, Wotell, and Sovel are equitably estopped from raising the statute of repose as a defense to the asserted claims, the Buffas cite to *Trillium Ridge Condo. Ass'n* as "binding precedent

on all fours with the case at bar." Therefore, we consider the facts, issues, and reasoning applied by a panel of this Court in *Trillium Ridge Condo. Ass'n*.

In said case, Trillium Links, the developer overseeing the construction of private residences in the Trillium Development, hired Trillium Construction Company to act as general contractor in the construction of twenty-two condominiums to be contained in six buildings numbered 100 through 600. *Id.* at 483, 764 S.E.2d at 208. In October 2004, a report provided to Trillium Construction Company by Structural Integrity Engineering, P.A., cited a lack of two foundational piers in Condominium Building 100, which resulted in a sagging floor. *Id.* at 484, 764 S.E.2d at 208. Structural Integrity confirmed when the foundational piers were subsequently installed, but noted that the confirmation "should not be construed as an implication that there are no deficiencies or defects at other locations in the structure." *Id.* On 24 February 2007, Trillium Links transferred control over the condominium complex to the plaintiff Trillium Ridge Condominium Association but failed to inform the association of the prior problems with Building 100. *Id.* In October 2010, the plaintiff association discovered leaks, extensive water damage, and rotted wood in buildings numbered 100 and 300. *Id.* at 485, 764 S.E.2d at 209. An inspection revealed "[i]mproper flashing details at the doors, windows, and horizontal transitions" in Building 100 and construction defects throughout the condominium complex. *Id.* The plaintiff association filed a claim of negligent construction against

the defendants developer Trillium Links and Trillium Construction Company. The matter was presented to this Court when the plaintiffs appealed from orders granting summary judgment in favor of the defendants.

On appeal, a panel of this Court held that the trial court erred in granting summary judgment in favor of the defendant Trillium Construction Company on the basis of a statute of limitation or a statute of repose, as there existed genuine issues of material fact as to whether the defendant was equitably estopped from asserting those defenses. *Id.* at 497–98, 764 S.E.2d at 217. The plaintiff had argued that the defendant construction company "actively concealed its defective work from [the] Plaintiff . . . [by] plac[ing] other building materials over subsurface construction defects before th[ose] defects could be observed." *Id.* at 497, 764 S.E.2d at 217. The plaintiff asserted that the defendant failed to convey to the plaintiff information that various defects needed to be repaired or failed to ensure the repair took place when the defendant learned of the defects. *Id.* The *Trillium* Court reasoned that there existed issues of fact as to whether "[the] Plaintiff lacked 'knowledge and the means of knowledge as to the real facts in question' sufficient to establish that [the defendant] Trillium Construction [was] equitably estopped from asserting the statute of limitations or statute of repose in opposition to the negligent construction claim . . . ." *Id.* at 497–98, 764 S.E.2d at 217. Thus, the Court held that the trial court erred

in granting summary judgment in favor of the defendant Trillium Construction on the claim of negligent construction based on the assertion of the statute of repose. *Id.*

Here, Wotell, defendant and representative of Cygnature Construction, testified during his deposition that pursuant to the typical protocol, The Hardwood Company would deliver windows to the construction site, where Cygnature Construction workers would unload the windows and store them until they were ready to be installed. On the Buffa home, the "framing crew" subcontracted by Cygnature Construction was responsible for "[p]utting [the windows] in, making sure they were plumb, making sure they were flush with the -- sheathing. Taping them. . . . Nailing [the flanges] in and taping them afterwards." Wotell testified that under the supervision of a Cygnature Construction supervisor certified in window installation for Weather Shield Windows, the framing crew "did all the weatherproofing, the flashing, tape, anything that needed to be done to the rough window opening before the window was nailed in" as well as the final sealing on the windows. Wotell testified that in addition to the supervision of Cygnature Construction's certified window installer, both he and Sovel inspected the work "to be sure it met standards."

The record before us further indicates that an evaluation of moisture intrusion and framing damage was conducted on 10 December 2013 by a property claims

representative of the Buffas' insurance company. The report stated the following observations and conclusions:

> - In some areas there was no gap between the windows and the surrounding wood trim. In other areas it was as wide as 1/8 inch. Many of the sealants along these joints had failed.
>
> - Clear, flexible head flashing was visible along the window heads between the window frame and window trim. This flashing did not extend past the end of the window frame and did not have visible end dams.
>
> - Metal flashing was visible along the window head trim/siding intersection.
>
> **Conclusions**
> . . . The moisture intrusion into the rear elevation exterior wall has likely resulted from a combination of construction deficiencies and window system failures.
>
> First, the windows were installed without engineered sealant joints along the exterior window/trim intersections. Engineered sealant joints are typically required by the window manufacturer and prevent three-point adhesion of the sealant. Without an engineered sealant joint, sealants can fail rapidly.
>
> Second, the amount of deteriorated wall framing observed indicates substantial amounts of moisture intrusion for an extended period of time, likely several years. This is likely the result of window flashing and/or building wrap deficiencies. However, these deficiencies cannot be observed without destructive testing of the exterior wall.

On 10 March and 14 April 2015, the windows were reviewed after some of the exterior wood trim was removed. The report reflected the following conclusion:

> Water penetrates through the wall assembly at the corners of the window frames due to deficient window installation. We see from our water tests and wall probes where large volumes of water readily bypass the window trim at failed sealants; sealants are failed because they do not have adequate geometry to accommodate differential movement between the window and trim. Once water bypasses the trim, it readily reaches the window nailing flanges and flows directly to the interior of the house because the corner seals across nailing flanges were not installed. In one instance . . . the nailing flange was broken off and partially missing providing no barrier to water penetration. . . . These conditions are all installation deficiencies.

As the record indicates support for a finding of window installation review protocols by Cygnature Construction, Wotell, and Sovel as well as a finding of significant window installation deficiencies, there remains a genuine issue of material fact as to whether Cygnature Construction, Wotell, and Sovel were aware or should have been aware of construction defects in the installation of the Buffas' windows and concealed defective work by placing other building materials over subsurface construction before those defects could be observed. Thus, it was improper to grant summary judgment on the issue of whether Cygnature Construction, Wotell, and Sovel were equitably estopped from asserting the statute of repose as a bar to the Buffas' claims. Therefore, we hold the trial court erred by concluding the Buffas failed to meet their burden of showing "the Cygnature Defendants were prohibited or estopped from asserting the statute of repose as a defense in this action pursuant to . . . equitable estoppel, as applied in *Trillium Ridge Condo. Ass'n*" and that the statute

of repose bars the Buffas' claims. *See id.* Accordingly, we reverse the trial court's 22 September 2015 order granting summary judgment in favor of Cygnature Construction, Wotell, and Sovel and remand for further proceedings consistent with this opinion.

III

Next, the Buffas argue that the trial court erred by granting summary judgment for Granite Hardwoods and The Hardwood Company on the Buffas' claims of negligence and breach of implied warranty in its 22 September 2015 order. On appeal, the Buffas contend this ruling conflicts with a previous ruling by a different judge in the same court and overlooks Granite Hardwoods and The Hardwood Company's involvement in the installation of the windows in the Buffa home. We disagree.

As to the argument that by granting the second summary judgment motion, one superior court judge overruled another in the same court,

> [i]t is well-established "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." . . .
>
> In the context of summary judgment, this Court has held that in the granting or denial of a motion for summary judgment, the court is ruling as a matter of law. . . . Such a ruling is determinative as to the issue presented. Thus, although there may be more than one motion for summary

> judgment in a lawsuit, . . . the second motion will be appropriate only if it presents legal issues that are different from those raised in the earlier motion.

Cail v. Cerwin, 185 N.C. App. 176, 181, 648 S.E.2d 510, 514 (2007) (alterations in the original) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)) (citations omitted).

On 21 November 2014, Judge Ginn entered an order denying Granite Hardwoods and The Hardwood Company's motion for summary judgment based on the products liability "sealed container defense" in General Statutes, section 99B-2, and based on the products liability statute of repose in section 1-50(a)(6).[6] We note that while Granite Hardwoods and The Hardwood Company's motion for summary judgment was based on section 1-50(a)(6), allowing a six-year period of repose, section 1-50(a)(6) had been repealed effective 1 October 2009.[7] Judge Ginn applied the twelve-year statute of repose for products liability actions set forth in section 1-46.1[8] (enacted effective 1 October 2009) to deny Granite Hardwoods and The Hardwood Company's motion for summary judgment.[9] Thereafter, Granite Hardwoods and The

---

[6] *See supra* note 1 (quoting N.C.G.S. § 1-50(a)(6) (2009) (repealed 2009 N.C. Sess. Laws ch. 420 § 1)).

[7] N.C.G.S. § 1-50(a)(6) (repealed 2009 N.C. Sess. Laws ch. 420 § 1)

[8] N.C.G.S. § 1-46.1 (codified by 2009 N.C. Sess. Laws ch. 420 § 2).

[9] Judge Ginn found "that for purposes of the application of the products liability statute of repose, this action accrued on the date that the owners first became aware of the alleged problems in the residence as opposed to the date when the subject windows were first purchased and installed in the residence." *Cf. Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474–75 (1985) ("[T]he period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. Thus, the repose serves as an unyielding and

Hardwood Company filed a second motion for summary judgment raising the six-year statute of repose set forth in section 1-50(a)(5)[10] (applicable to actions based on the defective or unsafe condition of an improvement to real property), and moving to dismiss the Buffas' claims for negligence and breach of implied warranty.

The Buffas moved to strike Granite Hardwoods and The Hardwood Company's second motion for summary judgment in its entirety, alleging Granite Hardwoods and The Hardwood Company's second motion involved the same legal issues considered and ruled on by Judge Ginn. Judge Horne agreed in part. In his 22 September 2015 order, he granted the Buffas' motion to strike Granite Hardwoods and The Hardwood Company's second motion for summary judgment as to issues previously considered—the application of the statute of repose in section 1-50(a) and the sealed container defense in section 99B-2—and stated that the second motion for summary judgment would be considered "*only as to new issues which were not presented in its* [*first*] *motion for summary judgment*" pertaining to the Buffas' claims of negligence and breach of implied warranty. (Emphasis added). Then, in a separate 22 September 2015 order on Granite Hardwoods and The Hardwood Company's motion for summary judgment, Judge Horne concluded that "there remain no genuine

---

absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce." (citations omitted)); *Boor v. Spectrum Homes, Inc.*, 196 N.C. App. 699, 703, 675 S.E.2d 712, 715 (2009) (citing *Black*, 312 N.C. 626, 325 S.E.2d 469).

[10] *See supra* note 4 (quoting N.C.G.S. § 1-50(a)(5)).

issues of material fact as to the negligence and breach of implied warranty claims against Defendants Granite Hardwoods, Inc. and The Hardwood Company. The motion for summary judgment is, therefore, granted."

Thus, it appears from the record that Judge Horne ruled on issues that were related to, but distinct from, those ruled on by Judge Ginn and that Judge Horne's rulings did not change or overrule those entered by Judge Ginn. *See Cail*, 185 N.C. App. at 181, 648 S.E.2d at 514.

Upon review, we note that in the complaint, the claims of negligence and breach of implied warranty against Granite Hardwoods and The Hardwood Company are predicated on assertions of a defective window design, while on appeal, the Buffas contend that summary judgment was improper as "there were . . . factual disputes regarding the extent of [The Hardwood Company's] involvement in the window installation. . . . The parties contest the extent of [The Hardwood Company's] involvement in the installation of windows . . . ." We find nothing in the record to support contentions of a defective window design or participation by Granite Hardwoods and The Hardwood Company in the installation of windows in the Buffa home. Therefore, the trial court's ruling that there existed no genuine issue of material fact as to the negligence and breach of implied warranty claims and that Granite Hardwoods and The Hardwood Company were entitled to summary judgment is affirmed. Accordingly, the Buffas' argument on this issue is overruled.

IV. Cross-Appeal

Lastly, on cross-appeal, defendant-cross-appellants Granite Hardwoods and The Hardwood Company argue that the trial court erred by denying their motion for summary judgment based on General Statutes, section 1-50(a)(5)(a)—the negligent construction or repair statute of repose—when denying their motion for summary judgment based on General Statutes, section 99B-2, in Judge Ginn's 24 November 2014 order, and by allowing the Buffas' motion to strike Granite Hardwood and The Hardwood Company's motion for summary judgment pursuant to General Statutes, section 1-50(a)(5)(a), in Judge Horne's 22 September 2015 order.

As we have upheld the trial court's grant of summary judgment in favor of Granite Hardwoods and The Hardwood Company entered by Judge Horne in his 22 September 2015 order which dismissed the Buffas' claims against these defendants with prejudice, *see supra* Issue III, we need not further address these arguments contending for the same result. *See generally Wells v. French Broad Elec. Membership Corp.*, 68 N.C. App. 410, 413, 315 S.E.2d 316, 318–19 (1984) ("Appellate courts will not decide moot or academic questions, and the jury's answer to one issue which determines the rights of a party can render an exception concerning other issues moot, and thus not required to be considered on appeal." (citations omitted)).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).