IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26776

EAST SIDE LUTHERAN CHURCH OF SIOUX FALLS, SOUTH DAKOTA, a South Dakota Nonprofit Corporation,

Plaintiff and Appellant,

vs.

NEXT, INC., a South Dakota Corporation,

Defendant, Third-Party Plaintiff, and Appellee,

vs.

FIEGEN CONSTRUCTION CO., a South Dakota Corporation and BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC., a Nebraska Corporation,

Third-Party Defendants, Fourth-Party Plaintiffs, and Appellees

vs.

M.J. DALSIN CO. OF S.D., INC.,

Fourth-Party Defendant, Fifth-Party Plaintiff, and Appellee,

vs.

JEFF PRINS, d/b/a AJ CONSTRUCTION, Fifth-Party Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART R. TIEDE, CIRCUIT JUDGE

BRIEF OF APPELLANT EAST SIDE LUTHERAN CHURCH

NOTICE OF APPEAL FILED: JULY 30, 2013

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index will be to the designation (R) and the applicable page. References to the Appellant's Appendix will be to the designation (App.) and the applicable page. References to the transcript of the motions hearing held before the circuit court on June 17, 2013 will be to the designation (HT) and the applicable page. References to the Addendum to this brief will be to the designation (Add.) and the applicable page.

STATEMENT OF JURISDICTION

Plaintiff East Side Lutheran Church respectfully appeals from the Order Granting Defendant's Motion for Summary Judgment and Judgment entered in favor of the defendants in Minnehaha County of the Second Judicial Circuit on June 25, 2013. (R. 655) (Add. 1). Notice of entry of judgment was served by U.S. mail upon the plaintiff on July 8, 2013. (R. 659). East Side Lutheran Church filed its notice of appeal on July 30, 2013. (R. 662). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3(1) and SDCL 15-26A-10.

REQUEST FOR ORAL ARGUMENT

East Side Lutheran Church respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Are there disputed material facts – precluding summary judgment against East Side Lutheran Church – on the defendant's statute of limitations affirmative defense?

The trial court held that there were no genuine issues of disputed fact and granted summary based on the statute of limitations.

- *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510
- *Huron Center, Inc. v. Henry Carlsen Co.*, 2002 S.D. 103, 650 N.W.2d 544
- *Johnston v. Centennial Log Homes*, 305 P.3d 781 (Mont. 2013)

II. When did the applicable six-year statute of limitations accrue under the individualized facts of this case?

The trial court held as a matter of law that East Side Lutheran had actual or constructive notice of all of its claims, constituting accrual, immediately after substantial completion of the construction project in August of 2003.

- *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510
- *Huron Center, Inc. v. Henry Carlsen Co.*, 2002 S.D. 103, 650 N.W.2d 544
- *Harrison v. City of Sanford*, 627 S.E.2d 672 (N.C. Ct. App. 2006)

III. Whether disputed material facts on the issue of equitable estoppel precluded summary judgment.

The trial court held that the doctrine of equitable estoppel was not applicable because it discerned no genuine issues of material fact on the element of misrepresentation or concealment or the element of reasonable reliance.

- *Corner Construction Co. v. United States Fidelity & Guaranty Co.*, 2002 S.D. 5, 638 N.W.2d 887
- *L.R. Foy Construction Co., Inc. v. South Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 344 (S.D. 1987)
- *Cooper v. James*, 2001 S.D. 59, 627 N.W.2d 784

STATEMENT OF THE CASE

This is a complex construction litigation involving a three-million-dollar renovation and addition to East Side Lutheran Church in Sioux Falls in which the contractor and subcontractors have each assigned blame to one another for various construction defects and serious structural deficiencies.

On July 26, 2010, East Side Lutheran filed this action against its general contractor, NEXT, Inc., in Minnehaha County Circuit Court of the Second Judicial Circuit. (R. 23) (App. 2). The complaint alleged that NEXT had breached its obligations to East Side Lutheran by not remedying structural deficiencies and not performing the construction in a good and workmanlike fashion. (R. 22) (App. 3). It further alleged that NEXT was negligent in its construction of the addition and its supervision of the various subcontractors. (R. 22) (App. 3).

On August 16, 2010, NEXT filed its answer, raising the statute of limitations as an affirmative defense. (R. 26). Two days later, NEXT filed a third-party complaint against its two subcontractors, Fiegen Construction Co. and Brown Architecture, for negligence and breach of contract, contending that to the extent that it was liable, "Next's liability in this matter is passive and secondary to the liability of Fiegen which completed the construction and Brown which completed the design and architectural work of the church project." (R. 53).

Fiegen Construction and Brown Architecture timely filed their answers to the third-party complaint. (R. 62, 67). Pursuant to a stipulation between the parties (R. 73), Fiegen then filed a fourth-party complaint against its own subcontractor, M.J.

Dalsin Co. of S.D., Inc. (R. 134). M.J. Dalsin made its appearance and filed counterclaims against Fiegen and cross-claims against NEXT and Brown Architecture. (R. 140, 147). Each implicated party filed either replies or answers to those new pleadings. (R. 210, 213, 217).

M.J. Dalsin also filed a fifth-party complaint against its own subcontractor, Jeff Prins doing business as AJ Construction, which provided certain roofing materials and installation services. (R. 207). Prins, however, never filed an answer. On August 7, 2012, the circuit court entered default judgment against Prins. (R. 233).

On April 9, 2013, NEXT filed a motion for summary judgment against East Side Lutheran contending "that there is no genuine issue of material fact and that Defendant [NEXT] is entitled to judgment in its favor as a matter of law pursuant to the applicable statute of limitations, SDCL 15-2-13." (R. 242-43). On May 31, 2013, Brown Architecture also filed a motion for summary judgment. (R. 396). Both Fiegen Construction and M.J. Dalsin then filed joinders in the motions for summary judgment brought by NEXT and Brown Architecture. (R. 392, 429).

On June 17, 2013, the trial court held a hearing on the motions at the Minnehaha County Courthouse before the Hon. Stuart L. Tiede, Circuit Judge. At the close of arguments by counsel, the trial court issued its oral ruling granting NEXT's motion for summary judgment against East Side Lutheran. On the issue of when the statute of limitations began to run, the trial court simply stated:

> Well, I think that there is no genuine issue of material fact that the plaintiff knew or reasonably should have known, or to put it a different way, that the plaintiff had actual or constructive notice of a cause of action immediately after the substantial completion in August of 2003.

> There's no dispute that these problems began immediately, continued through the end of the year into 2004, and, quite frankly, continued for another four or five years, if I'm not mistaken. But we are looking at when – the case was commenced in July of 2010, so you go back six years you're looking at July 2004. Did the plaintiff have actual or constructive notice prior to that date? And I think there is no dispute that it did.

(HT 62) (Add. 5). On the issue of equitable estoppel, the trial court then stated:

> With respect to the issue of estoppel, it does not appear to me from the record that there is any genuine issue of material fact regarding whether or not any of the defendants misrepresented or concealed material facts from the plaintiff in order to induce the plaintiff to change its position in reliance upon either those misrepresentations or that concealment. No allegations, no evidence that I am aware of.
>
> Furthermore, it appears to me that – and I think the operative date was January of 2009 – January 23 – the Greenfield letter. By then the record shows that plaintiff had legal counsel, lawyers were involved, notification had been given to insurance companies. There's certainly, if not an overt threat of litigation, there was an inference of litigation if things weren't resolved fairly quickly, and we're still in the statute of limitations period at that point. If you go back six years from July 2010, you're in July 2004. If the cause of action accrued earlier than that from January 23, 2009, would take you back to January 23, 2003. That was prior to substantial completion.
>
> So even if there was an issue as to whether or not there was active concealment or misrepresentation, I don't know how there can be any finding that there was reasonable reliance at that point because everyone agrees – January 23, 2009, Mr. Greenfield said we're done and the plaintiff agrees with that, and there was still time under the statute of limitations to have commenced the cause of action at that time.

(HT 62-64) (Add. 5-7). Finally, the trial court added:

> So I realize that this is a harsh result, but I think that it's required under the law and we have statutes of limitations for a reason. One can debate the wisdom of those and whether or not it should be longer or shorter or have them at all. But, in any event, I think I'm compelled by the case, my understanding as to the facts and the fact that there is no

> genuine issue regarding the facts and that the plaintiff [sic] is entitled to judgment as a matter of law, so I'm going to grant the motion for summary judgment.

(HT 64) (Add. 7).

On June 25, 2013, the trial court entered its Order Granting Defendant's Motion for Summary Judgment and Judgment, which provided that "the Court hereby finds there are no genuine issues of material fact and that all Plaintiff's claims accrued more than six (6) years before the lawsuit was commenced in July of 2010" and that NEXT's motion for summary judgment was "in all respects granted on the basis of the applicable statute of limitations." (R. 654-55) (Add. 1-2). The order and judgment further provided that "due to the dismissal of Plaintiff's claims, the Third-Party Complaint and Fourth-Party Complaint are also dismissed on the merits and with prejudice." (R. 654) (Add. 2).

This appeal timely followed.

STATEMENT OF THE FACTS

Viewed in the light most favorable to the plaintiff and granting it the benefit of all reasonable inferences, as required in evaluating the defendant's motion for summary judgment, the relevant facts are as follows.

East Side Lutheran Church of Sioux Falls, South Dakota, is a house of worship and South Dakota non-profit corporation. It was founded in 1941 and originally located on Cliff Avenue. (R. 329). In 1950, the church moved into its current sanctuary located on East 10th Street in northeast Sioux Falls. (R. 329). Today, the church has approximately 1900 members. (R. 329).

Reverend Olaf Roynesdal is a native of Brooklyn, New York, and has been the Senior Pastor at East Side Lutheran since May 1, 2000. (R. 297, 327, 574-75) (App. 32-33). He is joined on staff by his colleague, Reverend Lon Kvanli. (R. 296, 327, 575) (App. 32). All of the church's major business decisions are committed to an eight-member council selected by a vote of the congregation. (R. 296, 329).

April 2002: The Construction Agreement with NEXT

On April 18, 2002, East Side Lutheran Church entered into a contract with NEXT, Inc. (as "Design/Builder") for construction of a new addition to the church and renovation of its existing structure. (R. 294, 458-59) (App. 148-49). The new addition would essentially double the size of the building. (R. 294). As compensation for these services, the agreement called for East Side Lutheran to pay NEXT the sum of $2,966,00.00. (R. 448) (App. 159).

The agreement recognized that NEXT would be subcontracting the design and architectural work to Brown Architecture & Design Co. (R. 458) (App. 149). However, Section 3.1.3 provided that NEXT "shall be responsible to the Owner for acts and omissions of [its] employees, subcontractors and their agents and employees, and other persons, including the Architect and other design professionals" related to the construction and renovation. (R. 456) (App. 151). Sections 3.2.6, 3.2.8 and 9.1 further held NEXT responsible "for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the work" and "for correcting Work which does not conform to the Contract documents," "whether

observed before or after Substantial Completion and whether or not fabricated, installed, or completed." (R. 450, 456) (App. 151, 157).

The subcontractors

To meet its obligations, NEXT first entered into a subcontract with Brown Architecture for the design and architectural work for the project. (R. 53). NEXT also entered into a subcontract with Fiegen Construction Co. to perform general contracting work. (R. 53). Fiegen Construction then entered into a subcontract with M.J. Dalsin Co. of South Dakota to perform some of the construction work for the project. (R. 103). M.J. Dalsin, in turn, entered into a subcontract with Jeff Prins, a sole proprietor doing business under the fictitious name "AJ Construction," to provide certain roofing materials and installation services. (R. 206).

With all of the necessary elements in place, construction soon began.

<u>July - August 2003</u>:
"Substantial Completion" of the Project

NEXT and its subcontractors completed construction of the new addition to the church in approximately March of 2003. (R. 292, 330). Renovations to the existing sanctuary were declared completed in late July or early August of 2003. (R. 281). On August 1, 2003, Dwayne Brown of Brown Architecture certified to NEXT that the "Eastside Lutheran Church Addition and Renovation was constructed in general conformance to the plans and specifications and in my professional opinion, all work as indicated in our construction documents, has been completed including punch list items." (R. 434) (App. 173). During construction, East Side Lutheran did

not see anything that was concerning or notice any particular problems and, based upon what it knew, was satisfied with the work as it progressed. (R. 284, 291).

August 2003:
Water infiltration observed

Almost as soon as the construction was deemed to be substantially completed, East Side Lutheran personnel began to notice water leaks in various areas of the church. (R. 283, 289-90, 327, 575, 304) (App. 32). It contacted NEXT, which sent out its subcontractors to try to address the problem. (R. 289).

August 27, 2003:
More water leakage and "bats in the belfry"

The water leaks continued and, soon after, a bat infestation occurred. On August 27, 2003, Pastor Roynesdal emailed Steve Larson of NEXT advising:

> Steve:
>
> Hope all is well. Thanks again for a lovely evening at your home.
>
> … We've had five bats in narthex this week! Don't know where they're coming from. We turned on ceiling fans and killed them all! Nightmare on East 10th Street.
>
> Punch list items:
>
> 1. Water continues to seep in basement on north side of building. The culprit is the gutter. I've had Arch Sheet Metal and Gutter come to do bid. He (Darrold) can't believe how some of the gutters empty onto the sidewalk.
>
> 2. West concrete landing (right outside door) is chipping on top.
>
> 3. There are exposed plywood corners on north roof.
>
> Olaf

(R. 274, 572) (App. 35). On September 9, 2003, the church again contacted NEXT to report water leaks occurring in the west entrance. (R. 273).

Winter 2003-04:
Drainage problems observed

In the winter of 2003-04, as cold weather first descended, East Side Lutheran began to notice ice accumulation and drainage issues that caused water to collect near the entryways and freeze. (R. 290-91). On February 2, 2004, Fiegen Construction wrote a letter to NEXT and Brown Architecture, copied to East Side Lutheran, attributing a water leak at the east vestibule roof to heat loss in the attic space and requesting that NEXT and Brown design a solution. (R. 270, 569) (App. 38). Three days later, on February 5, 2004, Brown Architecture wrote a letter to NEXT stating that it had reviewed Fiegen's letter and recommended additional attic heating and ventilation and removal of heat tape in certain areas, and indicated that the situation should be monitored for "future evaluation." (R. 568) (App. 39).

April 18, 2004:
Hail enters building, continued water leaks

On April 18, 2004, East Side Lutheran reported that hail had entered the building in the narthex. (R. 268, 473) (App. 134). Fiegen Construction was dispatched and believed that the hailstones had simply entered through a ridge vent. (R. 473) (App.134). Throughout 2004, the church renovation and addition continued to experience water infiltration. (R. 260-65, 267) (App. 135). When contacted about the leaks, NEXT would typically instruct its subcontractors to come out to try to determine the problem. (R. 323, 570-71) (App. 36, 37).

July 2004:
Six years before the lawsuit

On July 9, 2010, East Side Lutheran would eventually sign a complaint against NEXT, Inc. that was filed with the circuit court on July 26, 2013. Thus, any part of East Side Lutheran's claims in this action that accrued *after* July of 2004 cannot be barred by the applicable six-year statute of limitations.

August 6, 2004:
NEXT assures that roof leaks would be repaired

On August 6, 2004, NEXT wrote to Fiegen confirming its understanding that "Fiegen Construction will repair the existing roof leaks as required under contractor's warranty." (R. 567, 471) (App. 40, 136).

September 30, 2004:
NEXT provides assurances that leaks will be fixed

On September 20, 2004, NEXT emailed East Side Lutheran to assure that the identified water leaks would be fixed, no matter what:

> **…** We will continue to address the unfinished items in the addition. Can you give me an updated list of that addition warranty issues that have not been completed? I have a list, but I want to make it complete. Any item that was identified within the "addition" warranty period WILL be completed and made right. For example, I am not convinced that the roof leaks are totally sealed. Especially at the west vestibule. I am sure that there are other items as well.

(R. 470) (App. 137).

Throughout 2005:
Continued water infiltration; defective shingles suspected

Through 2005, water penetration continued to be an occasional problem. (R. 566, 468, 467) (App. 41, 139, 140). NEXT suspected the leaks might be due to

defective shingles. (R. 567, 469) (App. 40, 138). A warranty claim was filed with the shingles manufacturer. (R. 280, 307, 305).

NEXT also continued to provide assurances to East Side Lutheran that it would remedy the problem. (R. 566) (App. 41) ("When you see the leak again, give me a call. We need to stay on top of it. Bummer… I really don't understand why this continues to leak"); (R. 565) (App. 42) ("We will follow up with it. I do not understand the issue, it seems to me it has been fixed several times and that sloped roofing is not rocket science. … Thanks for your patience. We will continue."); (R. 564) (App. 43) ("Thanks. I appreciate your help. This is a pesky leak"); (R. 465) (App. 142) ("Thanks for the call. The roof is nearly resolved; however, it is very disappointing that the roofer has not desired to assist in a timely manner. The General Contractor has removed himself from the resolution. We will persevere"); (R. 433) (App. 174) ("It is clear that the leaks have been consistent from the start").

<u>March 2006</u>:
It's not the shingles

On March 27, 2006, East Side Lutheran was informed that the shingles themselves were not defective, but that they may have been improperly installed. (R. 280, 305, 307, 563) (App. 44).

<u>May 2006</u>:
More patchwork on the roof

On May 25, 2006, NEXT sent a note to Fiegen regarding an invoice for some patchwork done on the church by M.J. Dalsin, writing "I still consider this to be fixing original leaks, let me know if you think differently." (R. 432) (App. 175).

January 2007:
NEXT asks for patience and advises the church to wait

On January 31, 2007, NEXT met with East Side Lutheran and later responded to a request for assurances that a solution was forthcoming as follows:

> As a follow up to our meeting yesterday, I do believe all parties involved are committed to resolving your water problem. The next step as I understand it is to wait for warmer weather and when the leaks reoccur, someone from the Church will call both Fiegen Construction and NEXT, Inc. to make a site visit and see if it is possible to trace back to the points of entry for the water.

(R. 464) (App. 143). By summer, the leaks resumed. (R. 463) (App. 144). At some point in late 2007, the church apparently spoke with an attorney. (R. 462) (App. 145).

February 2008:
Flashing on shingles suspected

On February 8, 2008, Steve Larson of NEXT created a memorandum documenting that it had been informed that the issues "at all locations of the leaks may be due to bad flashing on the asphalt shingles and not necessarily related to the flat E.P.D.M. roof." (R. 562) (App. 45). Larson relayed this to the church, which was "in agreement to try this method and will report this action back to their Church Council." (R. 562) (App. 45). Larson then contacted Jeff Fiegen, who stated that his company would be willing to assist, and remarked that "to date all that he has seen are ideas with no action." (R. 562) (App. 45).

June – August 2008:
NEXT confesses to "botched job" and assures repair

On June 13, 2008, NEXT informed East Side Lutheran that there was no membrane in the roof, that the flashing had been done wrong, that the roof had not

been not installed correctly, that the plans had not been followed according to the design specifications, and that it was a "botched job." (R. 440) (App. 167).

On July 16, 2008, Fiegen contacted M.J. Dalsin, which agreed to make the suggested repairs. (R. 461) (App. 146). NEXT emailed East Side Lutheran, advising that "[w]e have written confirmation from Fiegen construction that Dalsin understands the roof problems and is prepared to repair them at their expense." (R. 460) (App. 147).

On August 27, 2008, NEXT again emailed East Side Lutheran stating "I [Steve Larson] visited with the people at Fiegen yesterday. NEXT and BHI have spelled out the requirements for the repair work." (R. 437) (App. 170).

Nothing, however, was resolved.

Fall of 2008:
NEXT out of ideas

From 2003 to 2008 or so, NEXT had been responsive in trying to come up with a solution to address the water infiltration problems. (R. 323, 310). By 2008, however, the only thing that seemed to be happening was the shifting of blame among the NEXT and its various subcontractors:

> Q: In any event, would it be safe to say that from your perspective sometime in about 2008, the efforts that were being made kind of stopped and it – as you put it, it kind of turned into a whose fault is this kind of a thing?
>
> A: Correct.

(R. 322-23). After attempting over the years to patch the leaks, M.J. Dalsin was now contending that there was a design problem. (R. 322-23, 439) (App. 168). "They

would come out with a caulk gun. And they kept coming out with caulk guns, and then finally they said it's a design issue." (R. 323). Fiegen Construction, at that point, was not saying much of anything. (R. 322). And NEXT was "just as puzzled" about the cause of the problems as was East Side Lutheran. (R. 322). "It got to be a finger-pointing game then, and it was never getting resolved." (R. 323).

January 23, 2009:
NEXT's attorney advises church of impasse

On January 23, 2009, NEXT's attorney, Gregg Greenfield, wrote a letter to East Side Lutheran advising that it would no longer provide assistance regarding the water infiltration issues:

> Dear Pastor Roynesdal:
>
> This is to inform you that this law firm represents NEXT, Inc. ("NEXT"). I do not know if East Side Lutheran Church ("East Side") is represented by an attorney in the above matter and therefore, I am sending this letter to you directly. **…**
>
> **…** It appears Fiegen and Dalsin are unwilling to perform any additional work. NEXT has contacted BHI, Inc. ("BHI") regarding the roof issues. While BHI has additional ideas on how to address the roof issues, NEXT cannot compel East Side to hire or accept the work of BHI.
>
> At this juncture, NEXT has notified its insurance carrier of a potential claim. NEXT is awaiting a response from its insurance carrier. NEXT has also placed Fiegen and Dalsin on notice of a potential claim.

(R. 436) (App. 171).

2009 to early 2010:
Church hires Beck & Hofer and ATS (Ollerich)

At a loss over what to do, East Side Lutheran eventually contacted Beck & Hofer Construction to see if it could determine the source of the continuing leaks.

(R. 560) (App. 47). Beck & Hofer, in turn, recommended hiring Mike Ollerich of American Technical Services (ATS) to conduct an investigation of the water infiltration. (R. 560) (App. 47).

<u>March 11, 2010</u>:
ATS Begins Investigation and Issues Reports

In early March of 2010, Ollerich met with the Church Council at East Side Lutheran and was retained. (R. 560) (App. 47). On March 9, 2010, he sent the church a letter regarding the terms of his retention. (R. 560) (App. 47). In his initial report, dated March 11, 2010, Ollerich detailed his proposed sequence of activities, which was to first evaluate the problems and then establish a design team to determine and implement a solution. (R. 560) (App. 47).

Ollerich began to investigate and identify various problems, code violations, and structural deficiencies with the construction of the new addition and the renovation of the church building. (R. 551, 289) (App. 56).

Some of the problems were the result of water penetration. After opening part of the roof, he was able to document damage from water leakage in the east wing where the renovation had occurred, stating that "[t]he roof deck has been subjected to water infiltration since construction." (R. 550, 548) (App. 57, 59). He was also able to document that several areas over the west entrance had been leaking and damaging the interior walls since the addition was constructed. (R. 536) (App. 71).

However, some of the structural deficiencies discovered in 2010 either were definitively *not* related to water leaks, did not appear to be related to water leaks so as to provide constructive notice, or may have only been partially related to water leaks.

1. Structural load-bearing deficiencies in flat roofs over east and west entrances

For example, Ollerich determined that the flat roofs over both the east and west sides of the church were not adequately supported in violation of code. (R. 550) (App. 57). He advised the church that the supporting infrastructure was not designed for the snow weight load and thus both entrances were unsafe and required immediate placement of temporary support beams and installation – as soon thereafter as possible – of adequate, permanent support. (R. 110, 289, 312, 304, 558-59) (App. 48-49). As relayed by Pastor Roynesdal, "[t]he first safety risk" identified by Ollerich "was the fact that the roof was designed – the roof was built to hold only one fourth of the weight that the code required it should be able to hold." (R. 289). Ollerich's report indicated that although "[t]he entrances with shoring are safe on a temporary basis (about 30 days)," the church would need to "[r]eplace both entrances with new correctly design[ed] structures." (R. 548) (App. 59).

2. Structural deficiencies related to elevator and east wing (renovated building)

Ollerich further determined that there were structural problems related to the safety of the elevator. Specifically, he concluded that the "[l]edgers south of the elevator are installed with 1/3 of the required bolt capacity [and] may collapse under loading." (R. 528) (App. 79). In addition, he concluded that "[t]he second floor is to be attached to the elevator shaft which is constructed of block. The block walls are not filled as required and do not have bond beams at the floor truss ledger." (R. 525) (App. 82). Ollerich also discovered that the lateral bracing in the east wing wall was

insufficient and did not contain any X-braces or blocking. (R. 520) (App. 87). As Ollerich testified, "for years, for almost six years," East Side Lutheran incorrectly believed it "had a safe, nice building." (R. 552) (App. 55). As a result of these structural problems, however, he advised them in March of 2010 that "[t]he east wing has very serious and dangerous conditions such as the 2nd floor ledger at the elevator. All structural repairs must be completed now or the east wing should be closed." (R. 524, 523, 522, 556) (App. 83, 84, 85, 51).

3. Lack of bracing in the west wing (new addition)

Ollerich further identified dangerous structural deficiencies in the new addition, particularly the west wall. (R. 505, 498, 497) (App. 102, 109, 110). As his ATS Report No. 5 concluded: "The west wing-west wall has very serious and dangerous conditions because of the lack of lateral bracing to the wall at the top and bottom chord of the trusses. If wind speed exceeds 50 mph, the west wing should be closed." (R. 503, 497) (App. 104, 110). As Ollerich explained:

> Well, when a structural system for a roof is designed, all the components have to be there to withstand the wind loading conditions on the building. And since our X bracing is missing and there is lateral bracing not tied to the exterior walls – those big heavy block walls, nothing is tied to that the way it's supposed to be – I told the church that if the wind gets much around 50 miles an hour, I would clear the building.

(R. 554) (App. 53). East Side Lutheran was not aware of these dangerous structural deficiencies until Ollerich informed it "[t]hat the outer wall was not attached properly and that if a big wind came up, there was no guarantee that that building would – that part of the building would stay up." (R. 311).

4. Roof trusses lack X-bracing and hurricane clips

Ollerich's report identified additional structural problems, including a lack of X-bracing at the roof truss centers and hurricane clips for uplift and lateral support along the roof. (R. 526, 505, 500, 556) (App. 81, 102, 107, 51). As he testified:

> Q: Just so I understand you, that's not a water issue. That's basically a structural issue, right?
>
> A: It's a construction error, right.

(R. 556) (App. 51).

5. Air infiltration, heat loss, and structural stress in the narthex

In addition, Ollerich discovered air infiltration and heat loss along the length of the narthex that needed to be filled in and insulated, resulting in as well as insufficient vertical support and lack of "uniform loading" causing it to be "over stressed." (R. 524, 527, 521, 506, 501, 500, 484) (App. 80, 83, 86, 101, 106, 107, 123).

6. Parts of sprinkler system in east wing not installed

In addition, it was discovered at that time that parts of the sprinkler system had never been installed during the renovation. (R. 323, 317).

7. Insulation and ventilation deficiencies

Ollerich also identified problems with a lack of insulation, insufficient insulation, and problems with a lack of ventilation. (R. 525, 526, 282, 317, 517, 518, 505, 499, 475) (App. 81, 82, 89, 90, 102, 108, 132). Although Ollerich eventually attributed a lack of ventilation and flashing problems as a probable cause of some water infiltration, (R. 556) (App. 51), East Side Lutheran had been unaware of the insulation and ventilation problems until Ollerich was retained and never suspected

that water leaks might indicate structural problems related to air ventilation or deficient insulation:

Q: Okay. And so, first of all, when I say they, who put in the ventilation to remedy this problem?

A: Beck & Hofer.

Q: And they did that to try to stop the leaking in that corner of the east entryway?

A: That didn't have anything to do with the leaking. That had to do with the air flow through the building.

Q: And what was the problem with the air flow?

A: There was none.

Q: And why was that a problem, or how did you notice, if you did, that there was a problem with the ventilation in the, I guess it would be the east wing of the addition?

A: It's throughout the whole church, but we are just speaking about the east.

Q: Both the old and new?

A: No, the new construction.

Q: And you noticed it? How was it brought to your attention that there was a problem with the ventilation?

A: Well, we didn't know about it until Mr. Ollerich had opened certain parts of the building and saw what was done.

Q: And he told you evidently that there is not enough ventilation, and we have to do something about it?

A: Yes.

Q: And until he told you that, you didn't know there was a problem?

A: No.

Q: You agree with me. You didn't know there was a problem until Mr. Ollerich told you?

A: Yeah, **…** until he opened it up.

(R. 317).

8. Drainage problems on the north side

Finally, in conjunction with the ATS investigation, a drainage study was performed by Sayre & Associates that identified drainage problems resulting from a design problem on the north side of the building and proposed a solution to correct the problems. (R. 286-87, 320-21). Apparently, the original design called for the drainage to be connected to the sewer on 9th Street, but no such sewer exists. (R. 286-87). One of the problems resulting from the drainage problems is water leaking into church basement. (R. 320-21).

April-May 2010:
East Side Lutheran undertakes certain repairs

Under Ollerich's supervision, East Side Lutheran acted immediately to complete whatever essential repairs it could afford. Beck & Hofer served as general contractor over various subcontractors, and Van De Walle & Associates provided the architectural and design services. (R. 284, 289, 308-09, 311, 317, 321-22,).

First, temporary support beams were installed in both the east and west entrances that were in danger of collapse. (R. 110, 289, 312, 304).

Next, the air conditioners were removed from the flat roof on both sides of the building and a new rubber membrane was installed, though on the east side the

membrane still needs to be extended further up to meet the new addition. (R. 282, 318, 316, 313-14, 325).

In addition, the east wing was repaired to correct the dangerous structural deficiencies, including those related to the 2nd floor elevator. (R. 325-327, 575, 555, 552) (App. 32, 52, 55).

The east entrance was also completely redone, including the walls and roof. (R. 323). This also included redoing and installing parts of the sprinkler system that had never been installed. (R. 323, 317). And in the kitchen, ceiling tiles were removed to allow warm air into the space above kitchen and prevent the sprinkler system from freezing. (R. 282, 287, 322).

To date, East Side Lutheran has spent at least $338,298.51, raised through fundraising appeals, attempting to correct some of the most immediate problems. (R. 324, 320, 293). Beck & Hofer has estimated that the total cost to correct all of the problems with the building, including those that have already been completed, will be $1,289,000.00 (R. 285, 319).

However, the church is still burdened by a debt of approximately $1.9 million remaining from the $2.996 million price of the construction project that it paid to NEXT. (R. 293). Thus, no funds remain for additional repairs, including the west wall rendered unstable as the result of inadequate bracing. (R. 286, 311, 313) ("It is beyond our financial means"). Because of insufficient funds, nothing has been done to repair the new addition other than removal of air conditioners from the flat roof, installation of the membrane, and installation of the temporary support beams. (R.

327, 575, 311) (App. 32). The church attempted to borrow additional funds in order to complete the remaining repairs resulting from construction errors and design defects, but its request was denied by its lender because its existing debt load is already too great. (R. 293, 312-13).

July 2010:
East Side Lutheran files suit

In July of 2010, East Side Lutheran filed the current action against NEXT for all of the construction errors and structural defects that it had discovered, including – but certain not limited to – those related to the water leaks. (R. 22-23) (App. 2-3). Although the problems on the east side have been largely remedied, multiple structural issues remain unresolved and the church continues to experience water leaks in the basement and on west side of the building, where the new addition was constructed, including above the entrance, fellowship hall, kitchen, narthex, and vestibule. (R. 324, 321).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment under the de novo standard and will affirm "only where there are no genuine issues of material fact and the legal questions have been correctly decided." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761-62. In making these assessments, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Id.* And significantly, "[t]he burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Id.*

This Court thus has consistently enforced the principle that "[s]ummary judgment is not the proper method to dispose of factual questions." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 9, 817 N.W.2d 395, 399 (citation omitted). Rather, it is "an extreme remedy, [and] is not intended as a substitute for trial." *Discover Bank*, 2008 S.D. 111 at ¶ 19, 757 N.W.2d at 762.

This Court's familiar admonishment to the lower courts evokes particular resonance in this case: "Summary judgment is a drastic remedy, and should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." *Donald Bucklin Construction v. McCormick Construction Co.*, 2013 S.D. 57, ¶ 31, 835 N.W.2d 862, 869; *Berbos v. Krage*, 2008 S.D. 68, ¶ 15, 754 N.W.2d 432, 436; *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

ARGUMENT

I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT ON EAST SIDE LUTHERAN'S CLAIMS BASED UPON NEXT'S STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE SHOULD BE REVERSED.

As this Court has explained, "[w]hen asserting a statute of limitations affirmative defense, the defendants have to establish that the lawsuit was brought beyond the statutory period." *Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 23, 836 N.W.2d 611, 621. Pursuant to SDCL 15-2-13, the applicable statute of limitations for all of East Side Lutheran's various breach of contract and negligence claims is six years. The church initiated this action in July of 2010. (R. 22-23) (App.

2-3). Therefore, any part of its claims that accrued *after* July of 2004 cannot be barred by the applicable six-year statute of limitations.[1]

In ruling from the bench at the summary judgment hearing, however, the trial court found that there was "no genuine issue of material fact that the plaintiff knew or reasonably should have known, or to put it a different way, that the plaintiff had actual or constructive notice" of each of its claims prior to July of 2004. (HT 62) (Add. 5). Viewing the facts in the light most favorable to East Side Lutheran Church and granting it the benefits of all reasonable inferences on the statute of limitations question, *see Robinson v. Ewalt*, 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126, that determination is clearly incorrect and should be reversed.

A. Statutes of limitations are questions of fact normally reserved for determination by a jury.

The construction and application of statutes of limitation presents a legal question that this Court reviews de novo. *See Masloskie v. Century 21 Am. Real Estate, Inc.,* 2012 S.D. 58, ¶ 6, 818 N.W.2d 798, 800 (citing *Jensen v. Kasik,* 2008 S.D. 113, ¶ 4, 758 N.W.2d 87, 88). As this Court has made abundantly clear, however, "[n]ormally, statute of limitations questions are to be resolved by the jury. Summary judgment is proper on statute of limitations issues only when application of the law is in question, and not when there are remaining issues of material fact." *Greene v. Morgan, Theeler, Cogley & Petersen,* 1998 S.D. 16, ¶ 6, 575 N.W.2d 457, 459. Hence, summary judgment

[1] There is no dispute that East Side Lutheran brought its claims within the applicable ten-year statute of repose set forth in SDCL 15-2A-3.

is "improper where there is a dispute of material fact which would affect the application of the statute of limitations." *Cooper v. James,* 2001 S.D. 59, ¶ 13, 627 N.W.2d 784, 788 (emphasis removed); *see also Robinson*, 2012 S.D. 1, ¶ 7, 808 N.W.2d at 125; *Iron Wing v. Catholic Diocese of Sioux Falls*, 2011 S.D. 79, ¶ 9, 807 N.W.2d 108, 111 n. 2; *Murray v. Mansheim*, 2010 S.D. 18, ¶ 4, 779 N.W.2d 379, 381-82.

B. Although the question of *what* constitutes accrual is one of law, the question of *when* a statute of limitations begins to run is often a disputed question of fact precluding summary judgment.

What constitutes the accrual of a claim under a particular statute of limitations? *When* does a statute of limitations begin to run in a particular case? And in what circumstances is the determination of those questions reserved for the *jury* as a *factual* determination or committed to the *trial court* as a pure question of *law* ?

The struggle to answer these questions has produced some divergent results in this Court's decisions, as well as those produced by other jurisdictions.

This Court has noted that deciding what constitutes accrual of a cause of action – when it entails "statutory construction" – "presents an issue of law." *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 7, 581 N.W.2d 510, 513; *see also Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 8, 827 N.W.2d 871, 874; *One Star v. Sisters of St. Francis*, 2008 S.D. 55, ¶ 12, 752 N.W.2d 668, 675; *Jacobson v. Leisinger*, 2008 S.D. 19, ¶ 24, 746 N.W.2d 739, 745; *Cooper*, 2001 S.D. 59 at ¶ 7, 627 N.W.2d at 787.

Thus, in *Strassburg*, this Court interpreted the undefined term "accrued" as used in SDCL 15-2-13 as meaning "arise, to happen, to come into force or

existence." 1998 S.D. 72 at ¶ 9, 581 N.W.2d at 514 (citing *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966); BLACK'S LAW DICTIONARY (6th ed. 1968)).

This Court then held that "[a] statute of limitations ordinarily begins to run when the plaintiff has actual notice of a cause of action or is charged with notice." *Strassburg,* 1998 S.D. 72 at ¶ 10, 581 N.W.2d at 514.

Actual notice "consists in express information of a fact.'" *Id.* (quoting SDCL 17-1-2). Constructive notice is "notice imputed by the law to a person not having actual notice." *Id.* (quoting SDCL 17-1-3). A person that has actual notice of circumstances deemed sufficient to put a prudent person on inquiry about "a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." *Id.* (quoting SDCL 17-1-4); *see also Thurman*, 2013 S.D. 63 at ¶ 24, 836 N.W.2d at 621. The bottom line is that "[i]n all events, a claim accrues and limitations become its course when a person 'has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544 (quoting *Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 68 (S.D. 1988)); *see also Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 15, 598 N.W.2d 213, 216.

Although the issue what constitutes accrual of a cause of action as a matter of statutory construction is a question of law, application of that legal standard to the facts of a particular case is frequently held to be a factual determination. *See Strassburg*, 1998 S.D. 72 at ¶ 1, 581 N.W.2d at 512.

As this Court expressly held in *Huron Center, Inc. v. Henry Carlsen Co.*, "[w]hile the question of *what* constitutes accrual is one of law, the question of *when* accrual occurred is one of fact generally reserved for the jury." 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 549; *see also Wissink*, 1999 S.D. 92, ¶ 11, 598 N.W.2d at 215-16. And as delineated in one respected treatise:

> The determination of when a cause of action accrues, as affecting the running of the statute of limitations, is frequently a question of fact to be determined by the jury or trier of fact under the evidence, as where the evidence is conflicting, the facts are disputed, or the time is not clearly proved and is matter of inference from the testimony.
>
> **…** The time of the accrual of the cause of action is properly a question of law to be determined by the court when the facts in the case are undisputed and only one conclusion can be drawn therefrom.

54 C.J.S. Limitations of Actions, § 438.

Thus, although it is generally true that "[s]tatutes of limitation begin to run when plaintiffs first become aware of facts prompting a reasonable person to seek information about the problem and its cause," when that occurred in a particular case is often dependent upon disputed facts and inferences. *Strassburg*, 1998 S.D. 72, ¶ 7, 581 N.W.2d at 513.

It is precisely "[b]ecause the point at which a period of limitations begins to run must be decided from the facts of each case," that this Court has repeatedly held that "statute of limitations questions are normally left for a jury." *Id.* at ¶ 7, 581 N.W.2d at 513.

In *Strassburg*, for example, this Court reversed the trial court's grant of summary judgment based upon the statute of limitations because "whether plaintiff

knew or should have known of his cause of action at the time the Bank's attorney admitted only a fractional setoff *is a question of fact*." *Id.* at ¶ 1, 581 N.W.2d at 512.

In *Huron Center*, 2002 S.D. 103, ¶ 14, 650 N.W.2d at 548, similarly, this Court held that genuine issues of material fact as to when a convention center's cause of action against an architectural firm and a general contractor accrued, triggering the six-year statute of limitations under SDCL 15-2-13, precluded summary judgment.

In *Salem School Dist. 43-3 v. Puetz Construction, Inc.*, 353 N.W.2d 51 (S.D. 1984), as well, this Court held that questions of fact as to when the cause of action by the school district against an architect accrued precluded summary judgment under the applicable six-year statute of limitations established by SDCL 15-2-13. As explained in that decision:

> School steadfastly maintains that the new construction was not completed until the roof had been replaced and that the replaced roof leaks because of faulty design. School also maintains that the building has never been finally accepted because of the faulty roof, and, therefore, final payment has not been made and, in fact, is not due. Further, school maintains that the cause of action did not accrue under SDCL 15-2-13(1) until they found the replaced roof continued to leak. These are disputed questions of fact.

Id. at 53. As a result, this Court held that "[w]hen this cause of action accrued is a genuine question of material fact." *Id.*; *see also Robinson*, 2012 S.D. 1, ¶ 7, 808 N.W.2d at 125 (reversing grant of summary judgment on statute of limitations in light of disputed material facts); *Wissink*, 1999 S.D. 92, ¶ 15, 598 N.W.2d at 216 ("Clearly, this disputed time of notice is sufficient to establish that genuine issues of material fact

still exist regarding the date of accrual" so that "the question of the applicability of the statute of limitations should have been presented to a jury").[2]

C. At a minimum, there are disputed material facts regarding when all or most of East Side Lutheran's claims accrued.

In the present case, the issue of when the statute of limitations on each of the various claims identified by East Side Lutheran began to run was disputed. NEXT's statement of material facts states: "According to East Side, these numerous structural deficiencies which [sic] resulted in water penetration into the church." (R. 257) (App. 7). East Side Lutheran's complaint, however, simply listed water penetration as *one* of the problems that resulted from various different structural deficiencies. (R. 22, 380) (App. 3). Many of the structural deficiencies and defects had *nothing* to do with water infiltration and the plaintiff did not discover them until 2010.

There is no dispute that the church had early notice of water leaks in the building. Prior to July of 2004, which was six years before the complaint in this action was served and filed, the church also had notice of "bats," "ice dams,"

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[2] *And see Association of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, 167 P.3d 225, (Haw. 2007) (holding that "in the instant case, we cannot conclude, as the circuit court did, that, as a matter of law, the AOAO discovered, or through the use of reasonable diligence should have discovered, the negligent act, the damage, and the causal connection between the two more than two years prior to the initiation of the present action on February 18, 1997"); *Colony Apartments v. AIMCO Residential Group*, 63 Fed.Appx. 122, 125-26 (4th Cir. 2003) (unpublished) (holding that fact issues as to whether tenant complaints regarding water infiltration placed purchaser on inquiry notice as to structural damage); *Performing Arts Center Auth. v. Clark Construction Group*, 789 So.2d 392, 393-94 (Fla. Ct. App. 2001) (reversing grant of summary judgment on statute of limitations defense and holding that only obvious manifestation of a construction defect will permit notice to be inferred as a matter of law for statute of limitations purposes).

"drainage issues," some hailstones in the narthex, chipped concrete in the sidewalks, exposed plywood in the north corners, and some loose "puckering up" shingles that in the period from the date of completion in August 2003 to June 16, 2004. (R. 255-59) (App. 5-9). At the time, these were essentially considered "punch list" items.

The extent to which these claims were connected to – or should have prompted inquiry regarding – each of the various construction errors and structural deficiencies discovered years later by East Side Lutheran, however, is far from clear. As set forth in great detail with citations to the record in the statement of facts, viewing them in the light most favorable to the plaintiff, there is no connection between water leaks and: (1) latent structural load-bearing deficiencies over the entrances; (2) concealed structural deficiencies in the east wing; (3) lack of bracing in the west addition; (4) lack of X-bracing and hurricane clips in the roof trusses; (5) air infiltration, heat loss, and structural stress in the narthex; and (6) sprinkler system parts that were never installed. And the connection to (7) insulation and ventilation deficiencies; and (8) drainage issues related to surface area design flaws, as opposed to ice damming on the roof, is tenuous and highly disputed at best.

In the trial court, the defendants relied upon *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 329 S.E.2d 350, 351 (N.C. 1985), a North Carolina case in which the court held that the plaintiff's knowledge of water leaks placed it on notice that it had a defective roof, which commenced the running of the statute of limitations, even though it was not on notice of the extent of the damage or that further damage resulting from the same defect might aggravate the original injury. *See id.* at 354. In

Strassburg, 1998 S.D. 72, ¶ 13, 581 N.W.2d at 515, this Court cited the *Pembee* decision in a string cite for the proposition that where "further damage which plaintiff did not expect was discovered" that "does not bring about a new cause of action."

But while "further damage" not expected by the plaintiff does not give rise to a separate cause of action, different acts constituting breaches of contract or negligence resulting in separate or different damages surely do give rise to separately accrued claims. Thus, *Harrison v. City of Sanford*, 627 S.E.2d 672, 676-77 (N.C. Ct. App. 2006), the court distinguished *Pembee*, which had involved only "one single injury, leaks in the roof, which was only further exacerbated by entrapment of the moisture from the leaks in the roof," from situations comprised of more than one injury "of a separate and distinct nature," and held that the statute of limitations did not bar the plaintiff's claims. *Id.* at 675; *see also Williams v. House of Distinction, Inc.*, 714 S.E.2d 438, 446 (N.C. Ct. App. 2011) (distinguishing *Pembee* and holding that disputed facts as to start of limitations period precluded summary judgment).

The Montana Supreme Court, as well, recently rejected a defendant's claim that notice of one type of damage automatically places a plaintiff, as a matter of law, on constructive or inquiry notice of other unrelated defects. *See Johnston v. Centennial Log Homes & Furnishings*, 305 P.3d 781, 789-90 (Mont. 2013). Echoing the *Harrison* decision, it stated that "[w]e disagree with Centennial that the case simply raises dispute about whether the extent of the plaintiffs' damages was known." *Id.* at 790. Rather, it agreed "with the Johnstons that factual questions arise in determining the extent to which the problems discovered by 2005 are *related to* the issues discovered

between 2008 and 2010." *Id.* at 789. The court therefore reversed the trial court's grant of summary judgment on Centennial's statute of limitations defense. *See id.* at 790 ("Factual questions exist as to whether the 2004 and 2005 repairs to the log home should have alerted the Johnstons to the potential for more serious underlying structural defects and whether those defects were self-concealing").

This Court made a similar distinction in *Holland v. City of Geddes*, 2000 S.D. 71, ¶ 10, 610 N.W.2d 816, 818, when it noted that cases involving independent events or claims are "distinguishable from cases where the wrong flows from a single tortious event." *See also Performing Arts Center Auth.*, 789 So.2d at 394 ("We construe none of these cases to hold that in all construction disputes notice attaches the instant a plaintiff discovers any leak in a building").

Viewing the facts in the light most favorable to East Side Lutheran, that is the case here. In *Pembee*, all of the damages flowed from a single tortious event. In the present action, the multiple, varied damages flowed from multiple, discrete acts committed by NEXT or its subcontractors – different code violations, different construction errors, different structural deficiencies – constituting individual breaches of contract or negligence not known until 2010. At a minimum, as set forth in the plaintiff's response to NEXT's statement of material facts, these issues are disputed.

D. Even if the issue of when the statute of limitations began to run is deemed a pure question of law in this case, the trial court decided it incorrectly.

As noted above, this Court has stated in some recent cases that, regarding constructive notice, a claim "accrues and the plaintiff is put on inquiry notice when

facts come to light that would prompt a reasonably prudent person to seek out information regarding his or her injury or condition and its cause," *Iron Wing*, 2011 S.D. 79, ¶ 13, 807 N.W.2d at 112 (quoting *One Star*, 2008 S.D. 55, ¶ 18, 752 N.W.2d at 677), and that "[i]nquiry notice is determined by an objective standard." *Iron Wing*, 2011 S.D. 79, ¶ 13, 807 N.W.2d at 112 (quoting *Rodriguez v. Miles*, 2011 S.D. 29, ¶ 13, 799 N.W.2d 722, 726).

Pursuant to its de novo review, this Court should hold in the alternative that for each of the eight separate categories of construction defects detailed above, the circumstances were not sufficient to "prompt a reasonably prudent person to seek out information regarding his or her injury or condition and its cause." *Iron Wing*, 2011 S.D. 79, ¶ 13, 807 N.W.2d at 112.

E. Disputed material facts on the issue of equitable estoppel precluded summary judgment.

Finally, this Court should hold that there are genuine issues of material fact on the issue of equitable estoppel. This Court has held that a defendant may be estopped from raising the statute of limitations as a defense. *See Corner Construction Co. v. United States Fidelity & Guaranty Co.*, 2002 S.D. 5, ¶ 35, 638 N.W.2d 887, 896 n. 2; *L.R. Foy Construction Co., Inc. v. South Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 344 (S.D. 1987); *Jandreau v. Sheesley Plumbing and Heating Co., Inc.*, 324 N.W.2d 266, 272 (S.D. 1982). An estoppel arises "where, by conduct or acts, a party has been induced to alter his position or do that which he would not otherwise have done to his prejudice." *Id.* at 344; *see also* ***Cooper***, 2001 S.D. 59, ¶ 16, 627 N.W.2d at 789; *L.R. Foy Construction*, 399 N.W.2d at 344 (quoting *Taylor v. Tripp*, 330 N.W.2d 542, 545

(S.D. 1983)); *Action Mechanical, Inc. v. Deadwood Historic Preservation Comm'n*, 2002 S.D. 121, ¶ 29, 652 N.W.2d 742, 751. One of elements of equitable estoppel requires the concealment of the material facts and the plaintiff "must have been without knowledge of the real facts." *Spencer*, 2008 S.D. 129, ¶ 21, 759 N.W.2d at 545.

This Court has also recognized that equitable estoppel has been applied "to prevent a defendant from lulling a plaintiff 'into a false sense of security,'" such as where an attorney leads a client to believe that service was effected and a statute of limitations period met. *Cooper*, 2001 S.D. 59, ¶ 17, 627 N.W.2d at 789.

In addition, where the defendant conducts himself in such a manner that the plaintiff is induced to believe that an amicable resolution of his claim will be made, an estoppel against the defendant's subsequent plea of the statute of limitations may be created. *See Industrial Indem. Co. v. Industrial Accident Co.*, 115 Cal.App.2d 684, 690, 252 P.2d 649, 652-53. And where equitable estoppel is invoked on the basis of a defendant's promise to resolve a dispute, the question whether the doctrine will be applied depends largely on the facts and circumstances of the particular case. *See State Farm Mut. Auto Ins. Co. v. Budd*, 175 N.W.2d 621, 623-24 (Neb. 1970), *overruled on other grounds*, *Aken v. Nebraska*, 511 N.W.2d 762, 768 (Neb. 1994).

Significantly, "[w]hether the plaintiff can demonstrate that the defendant's misrepresentations tolled the statute of limitation is a question of fact for the trial of fact." *Corner Construction*, 2002 S.D. 5, ¶ 35, 638 N.W.2d at 896 n. 2; *L.R. Foy Construction*, 399 N.W.2d at 344.

As set forth with record citations above, East Side Lutheran was led by NEXT's actions and representations to delay in bringing a legal action against it. NEXT made numerous promises to repair the premises over several years after the construction was deemed completed, stating repeatedly that it would make the repairs, that it had ascertained the problems, and that it had written commitments that the premises would be repaired. Viewing the facts favorably to the plaintiff, East Side Lutheran was lulled into inaction by false promises to resolve the dispute. The trial court incorrectly granted summary judgment on this ground as well.

CONCLUSION

WHEREFORE, Appellant East Side Lutheran Church of Sioux Falls respectfully requests that this Honorable Court reverse the grant of summary judgment entered below and remand this case for further proceedings.

Dated this 18th day of November, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief and all appendices were served via first class U.S. mail, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,222 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

_____

Ronald A. Parsons, Jr.

ADDENDUM

••••••••IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26776

EAST SIDE LUTHERAN CHURCH OF SIOUX FALLS, SOUTH DAKOTA, a South Dakota Nonprofit Corporation,

Plaintiff and Appellant,

vs.

NEXT, INC., a South Dakota Corporation,

Defendant, Third-Party Plaintiff, and Appellee,

vs.

FIEGEN CONSTRUCTION CO., a South Dakota Corporation and BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC., a Nebraska Corporation,

Third-Party Defendants, Fourth-Party Plaintiffs, and Appellees,

vs.

M.J. DALSIN CO. OF S.D., INC.,

Fourth-Party Defendant, Fifth-Party Plaintiff, and Appellee,

vs.

JEFF PRINS, d/b/a AJ CONSTRUCTION,

Fifth-Party Defendant

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Stuart L. Tiede, Circuit Judge

BRIEF OF APPELLEE, BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC.

Notice of Appeal Filed: July 30, 2013

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PRELIMINARY STATEMENT

Appellant East Side Lutheran Church of Sioux Falls, South Dakota, will be referred to as "East Side." Appellee Next, Inc. will be referred to as "Next." Appellee Brown Architecture & Design Co. n/k/a Studio 360 Architecture, Inc. will be referred to as "Brown Architecture." References to the Clerk's Register of Actions will be referred to as "RA" with the applicable page number listed in the Clerk's Index. References to East Side's Appellant's Brief will be "East Side Brief" with applicable page number. References to the Hearing Transcript from the hearing on Next's and Brown Architecture's Motion for Summary Judgment held on June 17, 2013, will be referred to as "HT" with applicable page number. References to the Appellees' Joint Appendix will be referred to as "Jt. App." with the applicable page number.

STATEMENT OF JURISDICTION

East Side appeals from the Order Granting Defendants' Motion for Summary Judgment signed by the Honorable Stuart L. Tiede and filed with the Minnehaha County Clerk of Courts on June 25, 2013. (RA 655.) Next served notice of entry of this order upon East Side by U.S. mail on July 8, 2013. (RA 659.) Notice of appeal was timely filed by East Side and served upon Defendants on July 30, 2013. (RA 662.) This Court has jurisdiction pursuant to SDCL § 15-26A-3(1) and SDCL § 15-26A-10.

REQUEST FOR ORAL ARGUMENT

Third-Party Defendant Brown Architecture respectfully requests the privilege of appearing before this Court for oral argument on the issues set forth in this appeal.

STATEMENT OF THE ISSUES

I. Whether the trial court correctly concluded that East Side's cause of action accrued more than six years before it filed suit.

The trial court concluded, based on undisputed facts, that East Side's cause of action accrued more than six years before it filed suit. Therefore, the applicable statute of limitations barred East Side's claims as a matter of law.

- *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510.
- *Huron Center, Inc. v. Henry Carlson Co.,* 2002 S.D. 103, 650 N.W.2d 544.
- *Spencer v. Estate of Spencer*, 2008 S.D. 129, 759 N.W.2d 539.
- *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 329 S.E.2d 350 (1985).

II. Whether the trial court correctly concluded that the accrual of a cause of action is a separate legal inquiry from the extent of damages.

The trial court concluded, based on undisputed facts, that East Side's cause of action accrued more than six years before it filed suit. The trial court reached this conclusion after acknowledging that under settled South Dakota law, accrual operates independent of whether a plaintiff has a full understanding of the surrounding facts or the extent of its damages. Therefore, the trial court concluded that the statute of limitations barred East Side's claims as a matter of law.

- *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510.
- *Huron Center, Inc. v. Henry Carlson Co.,* 2002 S.D. 103, 650 N.W.2d 544.
- *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc*., 313 N.C. 488, 329 S.E.2d 350 (1985).

III. Whether the trial court correctly concluded that East Side failed to cite any facts supporting its equitable estoppel argument.

The trial court concluded, based on undisputed facts, that East Side did not cite anything in the record demonstrating that any defendant "misrepresented or concealed material facts from [East Side] in order to induce [East Side] to change its position in reliance upon either those misrepresentations or that concealment." Therefore, collateral estoppel did not apply to toll the statutory period as a matter of law, and summary judgment was appropriate.

- *Jandreau v. Sheesley Plumbing*, 324 N.W.2d 266 (S.D. 1982).
- *Crouse v. Crouse*, 1996 S.D. 14, 552 N.W.2d 413.
- *Estate of Williams,* 348 N.W.2d 471 (S.D. 1984).

STATEMENT OF THE CASE

On July 26, 2010, East Side filed a complaint in Minnehaha County in the Second Judicial Circuit. (RA 23) (Jt. App. p. 003-5.) East Side's complaint alleged that various structural deficiencies existed as a consequence of inferior construction workmanship, "which resulted, among other things, in water penetration into the church." (RA 22) (Jt. App. p. 004.) On August 16, 2010, Next filed its answer.

(RA 26.) Next's answer properly raised the statute of limitations as an affirmative defense. (RA 26.) On August 18, 2010, Next filed a third-party complaint against two subcontractors, Fiegen Construction Company ("Fiegen") and Brown Architecture. (RA 54, 357) (Jt. App. p. 148.) Next's third-party complaint sought indemnification or contribution from Fiegen and Brown Architecture. (RA 52, 355) (Jt. App. p. 150.)

Fiegen and Brown Architecture timely filed answers to Next's third-party complaint. (RA 62, 67.) Fiegen then filed a fourth-party complaint against its subcontractor, M.J. Dalsin Co., Inc. ("M.J. Dalsin") (RA 134.) M.J. Dalsin subsequently filed counterclaims against Fiegen and cross-claims against Next and Brown Architecture. (RA 140, 147.) M.J. Dalsin then filed a fifth-party complaint against subcontractor Jeff Prins, doing business as AJ Construction. (RA 207.) Prins never filed an answer, and a default judgment was entered against him on August 7, 2012. (RA 233.)

On May 8, 2013, Next filed a motion for summary judgment against East Side on the basis of the applicable statute of limitations. (RA 242-43.) On May 31, 2013, Brown Architecture filed a motion for summary judgment on statute of limitations grounds. (RA 396.) Next's and Brown Architecture's motions for summary judgment, while separate and distinct, included consistent and complimentary legal arguments. (RA 242-43, 396.) Fiegen and M.J. Dalsin filed joinders in both Next's and Brown Architecture's motions for summary judgment. (RA 392, 429.)

A hearing on Next's and Brown Architecture's motions for summary judgment was held on June 17, 2013, before the Honorable Stuart L. Tiede at the Minnehaha County Courthouse. After reviewing the briefs and hearing arguments from counsel, Judge Tiede issued an oral ruling granting the motions for summary judgment. Judge Tiede concluded that there were no disputed facts that were material to when the lawsuit accrued and that East Side's lawsuit was not filed within the statute of limitations. (HT 62-64) (Jt. App. p. 091-93.) Judge Tiede further concluded that there was no genuine issue of material fact precluding summary judgment on the equitable estoppel issue raised by East Side. (HT 62-64) (Jt. App. p. 091-93.)

STATEMENT OF THE FACTS

Importantly, there are no material, disputed facts that impact the resolution of this appeal.[1] East Side is located in Sioux Falls, South Dakota. (RA 399) (Jt. App. p. 020.) Next, is a design and construction business also located in Sioux Falls. (RA 399) (Jt. App. p. 020.) In April 2002, East Side contracted with Next for construction and renovations to East Side's building. (RA 399) (Jt. App. p. 020.) Next then contracted with Brown Architecture to perform design and architectural work at the East Side project. (RA 399) (Jt. App. p. 020.) Next similarly contracted with the various other parties to this action. (RA 399) (Jt. App. p. 020.) The construction and renovation work concluded in August 2003. (RA 399) (Jt. App. p.

[1] Because this case is an appeal from summary judgment, Next and Brown Architecture have construed all facts in the light most favorable to East Side. This recitation of facts is limited to the summary judgment proceedings.

020.) East Side immediately experienced construction-related problems after the construction and renovation work was complete. (RA 255-59) (Jt. App. p. 006-11.) East Side concedes these facts in its opening brief to this Court.[2]

East Side concedes that "There is no dispute that the church had early notice of water leaks in the building" prior to July 2004.[3] (East Side Brief p. 30.) East Side further admits that "East Side did experience roof issues, drainage issues, and ice problems, [sic] almost immediately after construction was completed." (RA 584) (Jt. App. p. 024.) These construction-related problems were reported directly to Next and included ice accumulation and water penetration that gave rise to East Side's lawsuit against Next for "numerous structural deficiencies which resulted . . . in water penetration into the church." (RA 398-99) (Jt. App. p. 020-21.) These structural deficiencies were "throughout the [church's] structure." (RA 327) (Jt. App. p. 178.)

Crucially, in East Side's Statement of Material Facts filed with the trial court, East Side admitted that the "[i]ce accumulation and water penetration issues

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[2] Furthermore, at the trial-court level, East Side failed to object to Brown Architecture's Statement of Material Facts filed in support of its motion for summary judgment. (RA 581-85) (Jt. App. p. 023-27.) East Side's responsive facts instead only clarified or augmented the facts Brown Architecture asserted without specifically objecting to or refuting those facts. (RA 581-85) (Jt. App. p. 023-27.) Because East Side offered no objections to Brown Architecture's Statement of Facts, those facts are deemed admitted. *See Hass v. Wentszlaff*, 2012 S.D. 96, ¶ 14, 816 N.W.2d 96, 101-02 (citing SDCL § 15-6-56(c)(3)).

[3] East Side served Next with the summons and complaint on July 19, 2010. (RA 24) (Jt. App. p. 002.) Accordingly, July 19, 2004, is the relevant date for determining whether suit was filed within the six-year statute of limitations.

experienced at East Side *were the result or after effects of the structural deficiencies; they are not themselves the defect*." (RA 581) (Jt. App. p. 027) (emphasis added.) The structural deficiencies causing water penetration were so severe that they resulted in stained ceiling tiles throughout the church and *the accumulation of hailstones in the building*. (RA 268-69) (Jt. App. p. 236-37) (emphasis added.) Plainly, from the very beginning, the church had significant and widespread construction-related problems. (RA 411-12) (Jt. App. p. 215-16.) These facts are not, and cannot be, disputed.

For proper context, it is also important to understand the procedural posture of this case as it was presented to the trial court. Below, East Side focused extensively on the applicability of a statute of repose to defeat Brown Architecture's statute of limitations defense. In fact, East Side dedicated the bulk of its Brief in Opposition to Summary Judgment to the statute-of-repose issue. (HT 35.) At the summary judgment hearing, however, East Side abandoned this argument because it was contrary to settled South Dakota law.[4]

East Side has now shifted its focus to other, undeveloped issues – issues that

[4] In regard to the statute of repose issue it briefed so extensively for the trial court, East Side's counsel stated at the summary judgment hearing that: "We will concede here, your Honor, that's not our strongest argument and I'm not going to spend any more time on it here today, but I'm just going to rely on the maybe-thinking-outside-the-box arguments we made in our brief." (HT 35) (Jt. App. p. 064.) Even though the statute of repose issue was its primary argument below, East Side has abandoned that issue on appeal in exchange for an entirely new argument.

were not directly and concretely presented to the trial court. These issues include most notably the identification of eight separate categories of damages. (East Side Brief p. 31.) Such a partitioning of damages, however, was never presented to the trial court as it is now presented to this Court. As a result, that argument is not properly before this Court because raising an argument on appeal without first addressing it below puts the adverse party, and the trial court, which was not able to consider the argument, at an "extreme disadvantage." *Hall v. State ex rel. S.D. Dep't Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27; *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 18, 816 N.W.2d 96, 102 ("General arguments at the summary judgment hearing do not satisfy the requirement that [Plaintiff] specifically respond to the [Defendant's] statement of material facts."). Thus, this Court may properly "decline to review this particular argument" because those facts and arguments were not presented below. *Hall*, 2006 S.D. 24, ¶ 12, 712 N.W.2d at 27.

STANDARD OF REVIEW

"Summary judgment is proper '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 the moving party is entitled to judgment as a matter of law.'" *Horne v. Crozier*, 1997 S.D. 65, ¶5, 565 N.W.2d 50, 52 (citing SDCL § 15-6-56(c)). Summary judgment is the "preferred process to dispose of meritless claims." *Id.* Further, the United States Supreme Court dictates that "Summary judgment . . . is properly regarded not as a disfavored procedural

shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). "When a motion for summary judgment is made and supported as provided in SDCL § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in SDCL § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *U.S. Bank Nat. Ass'n v. Scott*, 2003 S.D. 149, ¶ 38, 673 N.W.2d 646, 656 (citing SDCL § 15-6-56(e)).

Moreover, the standard of review is well settled in actions where the parties agree that the material facts are not contested but the dispute is centered on the application of substantive law. "'With the material facts undisputed, our review is limited to determining whether the [trial] court correctly applied the law.'" *Am. Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 S.D. 106, ¶ 9, 757 N.W.2d 584, 588 (quoting *Johns v. Black Hills Power, Inc.,* 2006 SD 85, ¶ 4, 722 N.W.2d 554, 556 (citation omitted)). The standard of review for questions of law is de novo. *Id.* (quoting *Daktronics Inc. v. LBW Tech. Co.,* 2007 S.D. 80, ¶ 2, 737 N.W.2d 413, 416 (citations omitted)).

Finally, if any legal reason justifies summary judgment "it must be affirmed" even if the circuit court "relied upon a wrong ground or gave a wrong reason." *Strassburg v. Citizens State Bank,* 1998 S.D. 72, ¶ 5, 581 N.W.2d at 513 (quoting

Helvering v. Gowran, 302 U.S. 238, 245 (1937) (citations omitted)). "In response to a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden then shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations, e.g., fraud or fraudulent concealment." *Id.* (citing *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 117 (S.D.1990); *Glad v. Gunderson, Farrar, Aldrich & DeMersseman*, 378 N.W.2d 680, 682 (S.D.1985)).

ARGUMENT

I. East Side's cause of action accrued more than six years before it filed suit.

Next and Defendant Brown Architecture have both raised the applicable statute of limitations as an affirmative defense.[5] The South Dakota Supreme Court has recognized that this defense is meritorious and should not be regarded with disfavor. *Openhowski v. Mahone*, 2000 S.D. 76, ¶ 11, 612 N.W.2d 579, 582. Summary judgment based upon the statute of limitations is appropriate when the application of law is at issue and there are no genuine issues of material fact. *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 113 (S.D. 1990) (citing *Schoenrock v.*

[5] Under SDCL § 15-6-14(a), Brown Architecture, as the third-party Defendant, is entitled to assert against East Side any "defenses which the third-party plaintiff [Next] has to the plaintiff's [East Side's] claim." *Id.* Here, Brown Architecture, for itself and on Next's behalf, has asserted the statute of limitations as an absolute bar to East Side's claims.

Tappe, 419 N.W.2d 197 (S.D. 1988) (where summary judgment was also granted based upon the statute of limitations defense)).

A. A six-year statute of limitations applies.

The parties agree on the applicable statute of limitation, which is found under SDCL § 15-2-13. Under this statute, a civil action based on "contract, obligation, or liability, expressed or implied, as well as any action for injuring goods" must be commenced within six years of the date of accrual. (East Side Brief p. 25.) ("Pursuant to SDCL § 15-2-13, the applicable statute of limitations for all of East Side Lutheran's various breach of contract and negligence claims is six years."). The question, then, is when the six-year period began to run, or stated differently, when the cause of action accrued.

B. Settled South Dakota caselaw provides the legal standard for accrual.

In South Dakota, a cause of action accrues to commence the running of the six-year time period when a plaintiff has actual or constructive notice of a cause of action. *See Strassburg,* 1998 S.D. 72, ¶ 10, 581 N.W.2d at 514 (emphasis added). "A cause of action accrues when the right to sue arises." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544 (citing *Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 68 (S.D. 1988)). A cause of action arises, or becomes "complete and present," when the plaintiff "can file suit and obtain relief." *Strassburg,* 1998 S.D. 72, ¶ 10, 581 N.W.2d at 514 (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192 (1997)). Further, "deciding what constitutes accrual of a cause of action [] entailing statutory construction[] presents an issue of law." *Id*. at 513 (citing *Bosse v. Quam*,

537 N.W.2d 8, 10 (S.D. 1995) (citations omitted)). In cases with undisputed material facts, determining when accrual takes place presents a question of law.[6]

Strassburg provides the analytical framework for determining when accrual takes place. In *Strassburg*, the Court stated:

> A statute of limitations ordinarily begins to run when the plaintiff either has actual notice of a cause of action or is charged with notice. "Actual notice consists in express information of a fact." SDCL § 17-1-2. "Constructive notice is notice imputed by the law to a person not having actual notice." SDCL § 17-1-3. One having actual notice of circumstances sufficient to put a prudent person on inquiry about a "particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." SDCL § 17-1-4. Either actual or constructive notice, therefore, will equally suffice to start the statute of limitations' clock running.

Id. Therefore, the accrual date is based on when the cause of action is first discovered. *See Strassburg,* 1998 S.D. 72, ¶ 10, 581 N.W.2d at 514.

It appears the parties agree on the legal standard. East Side states in its opening brief that "the bottom line is that '[i]n all events, a claim accrues and limitations become its course when a person "has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him."'" (East Side

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[6] In East Side's brief, the following rhetorical questions are posed in a manner that implies no answers exist. (East Side Brief p. 26.) First, East Side asks "What constitutes the accrual of a claim under a particular statute of limitations?" Second, "When does a statute of limitations begin to run in a particular case?" Contrary to these questions' form and implied import, settled South Dakota caselaw provides definitive answers to both questions. *See infra*.

Brief p. 27) (citing *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544 (quoting *Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 68 (S.D. 1988); *see also Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 15, 598 N.W.2d 213, 216)).

Thus, East Side's own citations indicate that accrual takes place when a party has notice of a cause of action based on perceivable damages – not when that party understands the full extent of its damages. This distinction, which East Side ignores, is the key to this case.

C. East Side's own admissions establish that accrual occurred in August 2003.

It is undisputed that East Side experienced ice accumulation and water penetration almost immediately after construction was complete. (RA 584) (Jt. App. p. 024.) Gigi Rieder, East Side's office manager who was "very familiar with the problems," testified at her deposition that she has "as much knowledge as anyone" regarding the water penetration issues. (RA 328, 407) (Jt. App. p. 177.) Gigi was specifically asked when the water issues began:

> Q: [W]hen did the leaking, to your knowledge, first become evident, and just kind of walk me through the process the church has been through with regard to the leaks.
>
> A: The leaking started right after the construction was finished.
>
> Q: So if construction was done in 2003, then, obviously, we are talking about right away in 2003 you started having problems.
>
> A: Correct.

(RA 327, 406) (Jt. App. p. 178.) Gigi also confirmed that construction was

completed in March 2003. (RA 330, 408) (Jt. App. p. 175.) Gigi was specifically asked where the leaks occurred:

> Q: And again, during that initial time frame, was there leaking problems kind of throughout the structure, or was it confined in particular areas?
>
> A: No, it was throughout the structure.

(RA 327, 406) (Jt. App. p. 178.) Gigi was later asked when the flat roof areas experienced water-related issues:

> Q: Let's turn to the actual flat roof areas on the east and west. How soon after construction did snow and ice accumulate or build up in those areas? I believe you said you moved in in March of 2003.
>
> A: Uh-huh. Probably not until the first snowfall in 2003.

(RA 306, 405) (Jt. App. p. 199.) Gigi's deposition testimony demonstrates that East Side was aware of widespread, water-related construction issues by the fall of 2003 or, at the very latest, the beginning of 2004.

East Side's senior pastor, Olaf Roynesdal, was also deposed. Olaf confirmed that construction was completed in March 2003. (RA 292, 413) (Jt. App. p. 213.) Olaf was also specifically asked when construction problems were first evident:

> Q: After the construction was completed then in 2003, when did it become evident to you, per your best recollection, as to a first problem with the addition to the church?
>
> A: I believe it was that winter.
>
> Q: 2003-2004?
>
> A: We began having icicles and things from the eaves and so on, and then we installed heat tape and all kinds of things. I mean, the roof issues arose almost immediately.

Q: Any particular areas where these problems were primarily located?

A: All along the edge – eaves of the addition on the east and the west sides as well as on the north side we had massive drainage – drainage issues. And on the southwest corner of the fellowship hall, the exterior before you walk up the steps, we had massive ice problems.

(RA 290-91, 411-12) (Jt. App. p. 214-15.) Pastor Olaf further stated that ice damming caused the water leaks in the late fall or early winter of 2003:

Q: In terms of leaking then, you have shown from Exhibit 10 the ice damming and that sort of thing that started occurring in 2003 and 2004. Did you start having water leaks at that point in time?

A: Correct.

Q: And was that in the area of the damming?

A: I think some of the leaks were from damming and then water – snow melting and going up. There were other leaks like in the dormers and so on, and I can't explain why they happened.

. . .

Q: And were all of those dormers leaking?

A: No.

Q: Which dormers had a leaking problem?

A: The dormers in the fellowship hall and then at least one dormer on the north side on the east, and I believe that is the dormer above Pastor Lon's office because he was rudely dripped upon at one time.

Q: When these leaks first – the damming and the leaks first became evident in 2003 and 2004, and you indicated that you would have been in contact with Next about it, correct?

A: Correct.

(RA 290-91, 410-11) (Jt. App. p. 215-16.) Pastor Olaf's deposition testimony

similarly establishes that East Side experienced and observed extensive, structure-wide water-related issues in 2003.

The documentary evidence produced augments and compliments the deposition testimony by providing additional support that East Side knew of significant and widespread water-related construction issues in 2003. This documentary evidence includes: (1) an email from Olaf Roynesdal to Next, dated August 27, 2003, regarding water intrusion from gutters, (RA 274) (Jt. App. p. 231); (2) an internal note from Next that details phone calls from East Side regarding water leaks in the west entry, (RA 273) (Jt. App. p. 232); (3) a letter from Next to Fiegen Construction, dated November 12, 2003, addressing some concerns East Side had raised regarding flashing problems resulting in overflowing water at the west entrance, (RA 272, 404) (Jt. App. p. 233); (4) an email from Next to Fiegen Construction, dated January 19, 2004, referencing water intrusion into East Side, (RA 271) (Jt. App. p. 234); (5) a letter from Fiegen Construction to Next, dated February 2, 2004, outlining water leaks into the east vestibule, (RA 270) (Jt. App. p. 235); (6) an email from Gigi to Next, dated March 15, 2004, discussing water-stained ceiling tiles in the west entrance, (RA 269) (Jt. App. p. 236); (7) an email from Olaf Roynesdal to Next, dated April 19, 2004, regarding hail penetrating the church's exterior, (RA 268) (Jt. App. p. 237); (8) an email from Gigi to Next dated May 24, 2004, that references water stains on the ceiling in the west entrance, (RA 267, 403) (Jt. App. p. 238); (9) an email from Gigi to Cheryl Drew, dated June 4, 2004, noting

that the church's shingles were "puckering up," (RA 266) (Jt. App. p. 239); (10) an email from Gigi to Next dated June 9, 2004, discussing rain that resulted in water accumulating in Pastor Lon's office, (RA 265, 402) (Jt. App. p. 240); (11) an email from Lon Kvanli to Cheryl Drew, dated June 11, 2004, identifying rooms with water intrusion, (RA 264) (Jt. App. p. 241); (12) an email from Lon Kvanli to Next, dated June 11, 2004, stating that water was coming through the west entrance, (RA 263) (Jt. App. p. 242); (13) an email from Gigi to Next dated June 16, 2004, referring to additional water issues in the west entrance, (RA 262, 401) (Jt. App. p. 243); (14) an email from Gigi to Cheryl Drew, Lon Kvanli, and Olaf Roynesdal, dated June 16, 2004, noting wet ceiling tiles, (RA 261) (Jt. App. p. 244); and (15) an email from Gigi to Cheryl Drew, Lon Kvanli, and Olaf Roynesdal, dated June 16, 2004, identifying water intrusion in the church, (RA 260) (Jt. App. p. 245.) These documents, collectively, establish that East Side had experienced ongoing, extensive, and pervasive water-related construction problems throughout the church in fall 2003 through spring 2004.

Once East Side experienced these pervasive problems, the cause of action accrued for the negligent construction and breach of contract claims. Simply put, a party knows that it "has suffered an injury or that another person has committed a legal wrong [that] ultimately may result in harm to him" when water and hailstones are pouring into a new building. *See Spencer*, 2008 S.D. 129, ¶ 16, 759 N.W.2d at 544 (citing, in part, *Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 15, 598 N.W.2d 213,

216)); 54 C.J.S. *Limitations of Actions*, § 131 (2013) ("Any manifest and palpable injury will commence the statutory limitations period.") But East Side did not serve its summons and complaint until July 19, 2010. (RA 24.) That was undisputably more than six years after East Side became aware of its causes of action based on extensive, structure-wide construction issues.

East Side has never argued that it did not know it suffered an injury and had a cause of action for negligent construction or breach of contract as early as August 2003. East Side concedes that it did. Rather, to side-step this key concession, East Side now argues that it did not know the *extent of its damages* in 2003. But the accrual of a cause of action and the extent of damages are two separate legal issues.

II. The accrual of a cause of action is not dependent on the extent of damages.

Rather than addressing the undisputed facts on when East Side became aware of its cause of action, which was the focal point at the summary judgment hearing, East Side has elected in its opening brief to divert this Court's attention to tangential facts that were not put squarely before the trial court. Essentially, East Side appears to now be arguing, for the first time, that because it did not ascertain the extent of its eight recently identified categories of damages until 2010, its causes of action had not accrued. (East Side Brief p. 33.) This argument however, is contrary to settled South Dakota law and must be rejected.

A. East Side's pleadings did not partition damages into separate, distinct categories.

In its Complaint, East Side has alleged two causes of action. First, "breach of contract for not performing the construction in a good and workmanlike manner." (RA 22) (Jt. App. p. 004.) Second, Next was "negligent in its construction and supervision of its subcontractors on the work completed." (RA 22) (Jt. App. p. 004.) Notably, East Side did not allege in its complaint or argue to the trial court that there were "eight separate categories of construction defects" that, according to East Side, gave rise to eight separate causes of action. (East Side Brief p. 34.) Therefore, it is inappropriate to now argue, for the first time since this case's inception, that there are more than two causes of action. There are not. And East Side is confined to the allegations in its complaint. *See Klinker v. Beach*, 1996 S.D. 56 ¶ 17 n.3, 547 N.W.2d 572, 576 n.3 (noting that party's complaint did not contain allegations to permit consideration of that issue); *State ex rel. Scott v. Rooney*, 65 S.D. 510, 275 N.W. 349 (1937) ("It is elementary that a court is limited to the allegations of a complaint[.]"). East Side has asserted general allegations in its complaint for two causes of action: (1) breach of contract and (2) negligence, both of which stem from the "construction" at East Side. (RA 22) (Jt. App. p. 004.) Based on East Side's own concessions in this case, these two causes of action both accrued in August 2003, or shortly thereafter, when damages were undisputedly experienced and observed. That is when East Side could have "file[d] suit and obtain[ed] relief." *Id.* at 514 (citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*

of California, Inc., 522 U.S. 192 (1997). Further, when serving notice of its suit in July 2010, East Side had its expert's reports, which outlined all the damages now referenced in its brief. (RA 478-551.) Even with the benefit of those reports, which outlined *all* damages now claimed, East Side still only alleged two causes of action for (1) breach of contract and (2) negligence based on poor construction. East Side's complaint did not allege any facts specific to these newly minted "eight categories of damages." These points are not disputed and are dispositive of East Side's claims on appeal. Without alleging eight separate causes of action attributable to these eight categories of damages, and without responding to the motion for summary judgment by either raising this argument to the trial court or amending its complaint, East Side cannot fairly claim "multiple, varied damages" giving rise to different accrual dates. (East Side Brief p. 33.) This case, at its core, is that simple.

East Side further seeks to avoid the statute of limitations by attempting to superimpose inapplicable legal theories to unnecessarily complicate this case. East Side argues that because the full extent of its damages related to the eight categories of damages were not ascertained until 2010, East Side should be able to avoid the fall 2003/spring 2004 accrual date. But *Strassburg* dictates otherwise. *Strassburg* directs that "limitations periods will not abide indefinitely while those aggrieved discover all their damages." 1998 S.D. 72, ¶ 11, 581 N.W.2d at 515. Instead, "statutes of limitations begin to run when plaintiffs first become aware of facts prompting a reasonably prudent person to seek information about the problem and its

cause." *Id*. (citing *Woodroffe v. Hasenclever*, 540 N.W.2d 45, 48 (Iowa 1995); *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc*., 313 N.C. 488, 329 S.E.2d 350, 354 (1985) (that further damage which plaintiff did not expect was discovered does not bring about a new cause of action) (parenthetical original)). East Side was duty-bound to "seek the problem and its cause" when water and hail were pouring into its building in fall 2003/spring 2004. But East Side did not.

Judge Tiede seized on this point at the summary judgment hearing. Judge Tiede found that East Side had "actual or constructive knowledge" of its cause of action when the building "start[ed] leaking." (HT 37) (Jt. App. p. 066.) That was in August 2003. Then, Judge Tiede responded to East Side's argument that it did not discover the full extent of its damages until 2010 by stating that "the fact that you didn't know what the problem was or how extensive the problem was goes, in my judgment, *to the issue of damages*. You may not have known the extent of your damages. You may have thought it was a little problem and it turned out to be a big one, but in the eyes of the law I don't think that makes any difference; *it's whether or not you had actual or constrictive notice of a cause of action*." (HT 37) (Jt. App. p. 066) (emphasis added.) East Side knew of its causes of action for breach of contract and negligence based on the widespread, systemic water-penetration issues that were present almost immediately after construction was complete. This point is undisputed. Judge Tiede's statement accurately summarizes the real issue before this Court – that is, when the cause of action accrued – not when all the damages were

discovered. Simply put, accrual of a cause of action is a separate and distinct issue from complete knowledge of all damages. The two issues operate independent of one another. *Strassburg,* 1998 S.D. 72, ¶ 13, 581 N.W.2d at 515 ("A claim accrues under the fraud discovery rule even when one may not yet know all the underlying facts or the full extent of damages."). *See, e.g. Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 207 (Tex. 2011) ("Once a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know the 'specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it."); *Day v. deVries and Assocs., P.C.*, 98 S.W.3d 92, 96 (Mo.Ct.App. 2003) (recognizing that accrual occurs even if "the extent of potential damages [is not] even [] knowable" and "all that is required for accrual is that some damage be sustained and capable of ascertainment." (citations omitted)); *Yalamanchili v. Mousa*, 316 S.W.3d 33, 38 (Tex.Ct.App. 2010) ("Accrual occurs upon notice of injury, even if the claimant does not yet know the full extent of damages." (citation omitted)). This rule – that accrual operates independent of a plaintiff's complete understanding of the facts or the extent of its damages – is the standard in every jurisdiction.

Additionally, East Side's citation to cases from other jurisdictions is unavailing. First, East Side did not present these cases, or the thrust of their holdings, to the trial court. Thus, any argument based on these cases is deemed waived. *Hall*, 2006 S.D. 24, ¶ 12, 712 N.W.2d at 27.

Second, these cases, which appear without accompanying analysis, are actually compatible and supportive of Brown Architecture's, and the trial court's, legal analysis. In *Association of Apartment Owners of Newtown Meadows v. Venture 15, Inc*., 167 P.3d 225, 280 (Haw. 2007), the court applied the "discovery rule" on disputed facts regarding when the plaintiff first discovered, "or through the use of reasonable diligence should have discovered, the negligent act, the damages, and the causal connection between the two[.]" In this case, there is no dispute on when East Side discovered extensive damages at the church, which gave rise to its causes of action. That was as early as August 2003 and no later than spring 2004. So, unlike in *Venture 15*, there are no disputed facts here that would prevent summary judgment based on the accrual date.

Similarly, in *Colony Apartments v. AIMCO Residential Group*, 63 Fed.Appx. 122, 125-26 (4th Cir. 2003) (unpublished), there was "uncontroverted" evidence that the initial complaints pertaining to water were "fairly minor." *Id.* at 125. On that basis, the court concluded that a factual question existed on accrual, which precluded summary judgment. Here, no such factual questions exist because the relevant facts are undisputed and hailstones and water penetration throughout the structure cannot be characterized as "minor." Thus, *Colony Apartments* is materially different.

Finally, in *Performing Arts Center Authority v. Clark Construction Group*, 789 So.2d 392, 393-94 (Fla.Ct.App. 2001), the trial court held that the plaintiff's cause of action accrued in February 1995 simply because there was a puddle of water on the

floor and some "minor" cracks that were the result of the building's natural settling process. *Id.* at 393. Despite the trivial nature of the water puddle and minor cracks, the trial court granted the defendant's motion for summary judgment based on the statute of limitations. The appellate court reversed because the water puddle and minor cracks were not an "obvious manifestation of a defect." *Id* at 394. The appellate court recognized, though, that "where there is an obvious manifestation of a defect, notice will be inferred at the time of the manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect." Therefore, *Clark Construction Group* supports the proposition that when defects are plainly observable, or "manifest," the statute of limitations begins to run. That is the case here. Unlike the facts in that case involving a "water puddle," the undisputed facts here establish that major water penetration issues existed throughout the building. Because resulting damages were plainly observable in August 2003 or shortly thereafter, the statute of limitations began to run.[7]

[7] In *Pamida, Inc. v. Christenson Building Corporation*, 285 F.3d 701 (8th Cir. 2002), the Eighth Circuit Court of Appeals provided a pithy analysis on the accrual of a claim when damages are plainly present and observed by the plaintiff. There, the Eighth Circuit concluded that a defective-construction claim accrued when "[the plaintiff] discovered . . . significant cracking and settling injury in 1991" and again in 1996. *Id.* at 705. Based on the observation or discovery of those damages, the lawsuit had accrued and the statutory period began to run – even though the *cause of the damages* was not definitively determined until years later. On that basis, the Eighth Circuit concluded that the plaintiff's claims were time-barred and summary judgment was affirmed.

B. Structural defects caused water penetration problems.

Further, East Side definitively alleged in its Complaint and has subsequently conceded that the water penetration issues were *directly* tied to structural defects. Here, the link between water penetration and structural defects is clear. (RA 581) (Jt. App. p. 027) (East Side concedes that "[i]ce accumulation and water penetration issues experienced at East Side were the result or after effects of the structural deficiencies; they are not themselves the defect.") Indeed, the two are interrelated and all damages in this case flow from various structural defects. And those damages were known to East Side as early as August 2003 and not later than spring 2004. These facts are based on East Side's own admissions and statements.

On this basis, East Side is correct when it asserts that "[i]ce accumulation and water penetration issues experienced at East Side were the result or after effects of the structural deficiencies; they are not themselves the defect." (RA 581) (Jt. App. p. 027.) Under *Strassburg*, East Side had an obligation when it experienced these construction-related issues in August 2003 to "seek information about the problem and its cause" because the statutory period was not going to "abide indefinitely while [East Side] discovered all [its] damages." *Strassburg,* 1998 S.D. 72, ¶ 11, 581 N.W.2d at 515. Because East Side knew of the water-related issues in August 2003, which, according to East Side, were caused by structural defects, East Side had actual knowledge of its cause of action and was required to explore the extent of its damages flowing therefrom. But East Side did not. Consequently, as the trial court

concluded, East Side's causes of action for "structural deficiencies" are now barred under the six-year statute of limitations.

C. There are no factual issues impacting the accrual date in this case.

In an attempt to manufacture a "question of fact" on when accrual took place, East Side cites several South Dakota cases. Most notably, East Side relies extensively on *Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 548, for the proposition that "when accrual occurred is one of fact generally reserved for the jury." (East Side Brief p. 28.) This citation, however, is inappropriate and patently inapplicable under the facts of this case.

In *Huron Center,* there were disputed facts on virtually every issue related to the accrual date. These disputed facts included "the time of the first occurrence of damage, the extent of that damage, the time of [plaintiff's] first awareness of [its damages], and the time [plaintiff] suspected something out of the ordinary." *Huron Center*, 2002 S.D. 103, ¶ 14, 650 N.W.2d at 548.

In sharp contrast, here, there is no dispute in this case as to the first occurrence of East Side's damages. The parties agree that was in August 2003. There is also no dispute that the damages observed in August 2003 (and several months after) were significant and widespread. The parties further agree that East Side knew of, and reported, these damages to Next because something was "out of the ordinary" as early as August 2003. *Huron Center*, 2002 S.D. 103, ¶ 14, 650 N.W.2d at 548. These facts are not disputed – notwithstanding East Side's attempts to tacitly insinuate

otherwise. Thus, *Huron Center* actually supports affirmance of summary judgment under the undisputed facts of this case.

The trial court astutely recognized these undisputed facts. In addressing East Side's oscillating position on the accrual date, Judge Tiede expressly inquired of East Side's counsel when East Side had actual knowledge of building deficiencies:

> The Court: [Counsel], during your argument you stated that a three-million-dollar building just should not leak, there should not be water penetration. And doesn't that undercut your argument because you knew right away that there was water penetration right from the get-go and that just doesn't happen unless there is something wrong with the building, right?
>
> . . .
>
> The Court: [A] three-million-dollar new addition shouldn't leak and as soon as it starts leaking I think you're into the rule that plaintiff had actual or constructive notice of a cause of action. The fact that you didn't know what the problem was or how extensive the problem was goes, in my judgment, to the issue of damages. You may not have known the extent of your damages. You may have thought it was a little problem and it turned out to be a big one, but in the eyes of the law I don't think that makes any difference; it's whether or not you had actual or constructive notice of a cause of action. And I agree with you [East Side's counsel], it just doesn't make sense for a three-million dollar new addition to be leaking like that right from the get-go, so I think you knew about it[.]

With these comments, Judge Tiede faithfully applied *Strassburg's* holding and properly declined to misapply *Huron Center*. By doing so, the court concluded that East Side's claims are time-barred and recognized that East Side's ignorance of the extent of its damages, willful or not, did not delay the accrual of the cause of action.

And no issues on appeal detract from or alter Judge Tiede's central holding.[8]

III. Whether the trial court erred when it concluded that East Side failed to cite any facts supporting its equitable estoppel argument.

Finally, East Side's opening brief only makes passing reference to its equitable estoppel argument. In fact, East Side's brief contains no analysis in support of its argument. Instead, East Side simply cites selective caselaw from various jurisdictions. To resolve this issue, however, this Court need not look past settled South Dakota caselaw or East Side's complaint.[9]

East Side's equitable estoppel argument is premised on the fact that the defendants should be estopped from asserting the statute of limitations as a defense because the defendants were unable to fix the construction defects. In South Dakota, equitable estoppel may apply when, "by conduct or acts, a party has been induced to

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[8] Rather than address these issues head-on, East Side's brief includes only scant recognition and analysis of *Strassburg*. East Side's failure to adequately address this case is telling. *Strassburg* provides the analytical framework necessary for resolving this dispute. But, because a straightforward application of *Strassburg* compels a conclusion that East Side does not like, East Side has opted to effectively ignore precedent. Further, to hold as East Side now requests would require this Court to effectively reverse *Strassburg*. *Strassburg*, however, has provided the standard for accrual in South Dakota for over 15 years and is in accord with decisions from other jurisdictions. Accordingly, it should not be indirectly or inadvertently revisited here.

[9] As noted, East Side only pleaded two causes of action – (1) breach of contract and (2) negligence. (RA 22) (Jt. App. p. 004.) Because East Side did not plead a cause of action for equitable estoppel or assert any facts supporting the same, that claim is barred. *Harmon v. Christy Lumber, Inc.*, 402 N.W.2d 690, 693 (S.D. 1987) (noting that failure to plead equitable estoppel, or sufficient facts supporting that cause of action, would bar claim).

alter his position or do that which he would not otherwise have done to his prejudice." *Estate of Williams*, 348 N.W.2d 471, 475 (S.D. 1984). However, "essential to equitable estoppel is the presence of fraud, false representations, or concealment of material facts." *Crouse v. Crouse*, 1996 S.D. 14, 552 N.W.2d 413, 417. *See also Jandreau v. Sheesley Plumbing*, 324 N.W.2d 266, 272 (S.D. 1982). *See also Cleveland v. BDL Enterprises, Inc.*, 2003 S.D. 54, ¶ 20, 663 N.W.2d 212, 217 (noting that fraudulent concealment can be a potential basis for tolling a statute of limitation); *Klinker v. Beach*, 547 N.W.2d 572, 574 (S.D. 1996) (same).

East Side does not identify anything – not a single cite – in the record demonstrating fraud, false representations, concealment of material facts, or intentional misrepresentation to invoke equitable estoppel. *See Jandreau,* 324 N.W.2d at 272. Indeed, the record does not contain anything demonstrating the requisite misconduct to support the application of equitable estoppel. This point is undisputed.

Further, *Jandreau*, which was the case the trial court cited to resolve this issue, is both instructive and controlling. In *Jandreau*, the plaintiff alleged that the defendants were estopped from asserting the statute of limitations as a defense because they continually attempted to assist the plaintiff to resolve defective conditions with an irrigation system. *Id.* at 272. On that basis, the plaintiff claimed that the statute of limitations should not apply on estoppel grounds. *Id.* But the South Dakota Supreme Court rejected that argument and held that the defendants did

not "intentionally mislead [the plaintiff] into not asserting his legal rights" by continuing to help him. *Id.* The same is true here.

While it is undisputed that Next and other defendants continued to attempt to resolve East Side's concerns with its building, there is no evidence that any defendant induced East Side to "alter its position or do that which it would not otherwise have done, to its prejudice." *Id.* While Next and the other defendants did attempt to remedy the alleged construction issues, East Side has not cited anything in the record demonstrating fraud, false representations, concealment of material facts, intentional misleading, or coercing East Side into not exercising its legal rights. Without *any* factual basis for this argument, East Side's estoppel argument is appropriately rejected, which is exactly what the trial court did.

The trial court concisely resolved this issue by noting:

> The Court: With respect to the issue of estoppel, it does not appear to me from the record that there is any genuine issue of material fact regarding whether or not any of the defendants misrepresented or concealed material facts from the plaintiff in order to induce the plaintiff to change its position in reliance upon either those misrepresentations or that concealment. No allegations, no evidence that I am aware of.

Even with this strong statement by the trial court, East Side has still failed to cite *any* facts demonstrating fraud, misrepresentations, or concealment on appeal. East Side's failure, even with the assistance of able counsel, to produce record cites to *any* facts showing the requisite fraud, misrepresentations, or concealment confirm that no such facts exist.

Moreover, the trial court also recognized that Next gave East Side notice that it was no longer going to attempt to remedy the construction defects. Significantly, Next provided this notice to East Side *before* the statute of limitations expired. The trial court noted that Next's attorney sent a letter on January 23, 2009, to East Side stating that Next was no longer going to take "further action" to resolve the structural deficiencies. (RA 435-36, 600-01) (Jt. App. p. 248-49.) By providing this letter before the statute of limitations had expired, the trial court determined that East Side had notice that it should file its lawsuit within the statutory period. (HT 63) (Jt. App. p. 092.) On this basis, Judge Tiede concluded that:

> even if there was an issue as to whether or not there was active concealment or misrepresentation, I don't know how there can be any finding that there was reasonable reliance at that point because everyone agrees – January 23, 2009, [Next's counsel's letter] said we're done and the plaintiff agrees with that, and there was still time under the statute of limitations to have commenced the cause of action at that time. (HT 63-64.)

Judge Tiede then went on to conclude that, "I'm compelled by the case, my understanding as to the facts and the fact that there is no genuine issue regarding the facts and that the [the defendants] [are] entitled to judgment as a matter of law, so I'm going to grant the motion for summary judgment." (*Id.*) On this record, the trial court reached the only result justified under settled South Dakota law and the undisputed facts of this case.

CONCLUSION

The six-year statute of limitations outlined in SDCL § 15-2-13 began to run "when the plaintiff either ha[d] actual notice of a cause of action or is charged with notice." *Strassburg,* 1998 S.D. 72, ¶ 10, 581 N.W.2d at 514. The facts, as set forth by East Side's own employees and confirmed by both parties, definitively establish that East Side knew of significant, construction-related issues as early as August 2003 and no later than spring 2004. That is when East Side's causes of action for (1) breach of contract and (2) negligence accrued. But East Side waited until July 19, 2010, to file suit.

Further, because East Side had actual notice of its causes of action for (1) breach of contract and (2) negligence, East Side was required to conduct a timely, reasonable investigation into the extent of its damages. East Side, however, conducted no such investigation, even after Next made it clear that it was no longer willing to resolve the construction problems East Side was experiencing. These facts are undisputed. So, based on undisputed facts, East Side failed to file suit within the statutorily prescribed period or conduct any investigation into the extent of its claimed damages until *after* the statute of limitations expired. As a result, the trial court properly granted summary judgment as a matter of law.

Furthermore, East Side did not plead equitable estoppel in its complaint, so that claim is barred. But even if properly pleaded, in South Dakota, equitable estoppel requires some showing of fraud, fraudulent concealment, or intentional misrepresentation. East Side recognizes this requirement in its opening brief. (East Side Brief p. 35.) Nonetheless, East Side has not identified anything – not a single cite – in the record demonstrating fraud, fraudulent concealment, or intentional

misrepresentation to invoke equitable estoppel. By failing to cite any relevant, material fact in support of this claim, East Side has waived the issue. Moreover, Next gave East Side notice, more than six months before the statute of limitations expired, that Next was no longer attempting to remedy any purported defects. This notice reasonably prompted East Side to file suit within the statutory period. But East Side did not. Consequently, there is simply no basis to apply equitable estoppel under these facts. For these reasons, the trial court must be affirmed as a matter of law.

Dated this 21st day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014, I sent via electronic mail and by United States first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee, Brown Architecture & Design Co. n/k/a Studio 360 Architecture, Inc. to:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Word Perfect 12 and contains 8,202 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Derek A. Nelsen
One of the Attorneys for Brown Architecture

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 26776

EAST SIDE LUTHERAN CHURCH OF SIOUX FALLS, SOUTH DAKOTA, a South Dakota Nonprofit Corporation,

Plaintiff and Appellant,

v.

NEXT, INC., a South Dakota Corporation,

Defendants, Third Party Plaintiff, and Appellee,

v.

FIEGEN CONSTRUCTION CO., a South Dakota Corporation and BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC., a Nebraska Corporation,

Third Party Defendants, Fourth-Party Plaintiffs, and Appellees,

v.

M.J. DALSIN CO. OF S.D., INC.,

Fourth-Party Defendant, Fifth-Party Plaintiff, and Appellee,

v.

JEFF PRINS, d/b/a AJ CONSTRUCTION,

Fifth-Party Defendant.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART L. TIEDE

BRIEF OF APPELLEE NEXT, INC.

NOTICE OF APPEAL FILED: JULY 30, 2013

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PRELIMINARY STATEMENT

Throughout Appellee's brief, Appellee NEXT, Inc. will be referenced as "NEXT". Appellant East Side Lutheran Church of Sioux Falls, South Dakota, will be referred to as "East Side". The record, as reflected by the Clerk's Index, will be denoted as "R," and the appropriate page number citation; references to East Side's appellate brief shall be denoted as "Appellant's Brief, p." followed by the appropriate page number(s); references to the transcript of the motions hearing held before the circuit court on June 17, 2013 will be denoted as "Motions Hearing," followed by the appropriate page(s). References to Appellees' Joint Appendix will be denoted as "Jt. App. p." with corresponding page reference.

JURISDICTIONAL STATEMENT

On June 25, 2013, the Second Judicial Circuit Court, the Honorable Stuart L. Tiede, issued an Order Granting Defendant's Motion for Summary Judgment and Judgment. (R. 655). The Clerk for the Second Judicial Circuit Court, Minnehaha County, filed a Notice of Entry of this Order and Judgment on July 8, 2013. (R. 659). East Side filed its Notice of Appeal on July 30, 2013. (R. 662). NEXT does not contest this Court's appellate jurisdiction.

STATEMENT OF THE LEGAL ISSUES

I. Whether the circuit court correctly concluded, as a matter of law, that East Side's claims are barred by the applicable statute of limitations?

The circuit court held there were no genuine issues of material fact that East Side had actual or constructive notice of injury to its property more than six years before the lawsuit was commenced on July 19, 2010.

- *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510
- *Spencer v. Estate of Spencer*, 2008 S.D. 129, 539 N.W.2d 539
- *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 329 S.E.2d 350 (N.C. 1985)
- *Pamida, Inc. v. Christenson Building Corp.*, 285 F.3d 701 (8th Cir. 2002)
- SDCL 15-2-13

II. Whether the circuit court correctly concluded, as a matter of law, that the doctrine of equitable estoppel did not toll the applicable statute of limitations.

The circuit court held that there were no genuine issues of material fact on the elements of misrepresentation or concealment on the part of NEXT and reasonable reliance on the part of East Side. Further, the circuit court found, as a matter of law, the doctrine of equitable estoppel was not applicable and did not toll the six-year statute of limitations.

- *Hahne v. Burr*, 2005 S.D. 108, 705 N.W.2d 867
- *Wilcox v. Vermeulen*, 2010 S.D. 29, 781 N.W.2d 464
- *Jandreau v. Sheesley Plumbing*, 324 N.W.2d 266 (S.D. 1982)

STATEMENT OF THE CASE

Steve Larson, the principal and registered agent of NEXT, was served with East Side's Summons and Complaint on July 19, 2010. (R. 24) (Jt. App. 002). On July 26,

2010, East Side filed its Complaint in the Second Judicial Circuit, Minnehaha County, against NEXT alleging breach of contract and negligence on the part of NEXT. (Id.). The Complaint specifically alleged:

> Next, Inc. breached its contract with East Side Lutheran Church by not performing the construction in a good and workmanlike manner.
>
> Next, Inc. was also negligent in its construction and supervision of its subcontractors on the work completed at East Side Lutheran Church, which resulted in structural deficiencies to the building.

(R. 21-23) (Jt. App. 003-005). NEXT filed its Answer to the Complaint on August 16, 2010, and raised the affirmative defense of the statute of limitations. (R. 26). On August 19, 2010, NEXT filed a Third Party Complaint against the general contractor, Fiegen Construction Co. ("Fiegen Construction"), and against the architect, Brown Architecture & Design Co., n/k/a Studio 360 Architecture, Inc. ("Brown Architecture"). (R. 54). In the Third Party Complaint, NEXT asserted claims of both negligence and breach of contract against both Fiegen Construction and Brown Architecture. (R. 53-54).

Fiegen Construction and Brown Architecture filed timely answers to the Third Party Complaint. (R. 62, 67). In late 2010 and early 2011, the parties stipulated to allow Fiegen Construction to bring a fourth-party complaint against its subcontractor, M.J. Dalsin Co. of S.D., Inc. ("M.J. Dalsin"), and the court entered such an order on January 5, 2011. (R. 73, 68). Pursuant to the stipulation and order, Fiegen Construction filed its fourth-party complaint against M.J. Dalsin on January 13, 2011. (R. 134). In turn, M.J.

Dalsin made its appearance and filed counterclaims against Fiegen Construction and cross-claims against NEXT and Brown Architecture. (R. 140, 147). Following M.J. Dalsin's pleading, each party filed answers or replies. (R. 210, 213, 217). In addition to asserting counter claims and cross-claims, M.J. Dalsin brought a fifth-party complaint against its roofing material and installation subcontractor, Jeff Prins, a sole proprietor doing business as AJ Construction, asserting liability on the part of Prins should M.J. Dalsin be found liable. (R. 207). Prins never appeared in the action and a default judgment in favor of M.J. Dalsin was entered against him on August 7, 2012. (R. 233).

On April 9, 2013, NEXT moved for summary judgment against East Side on the basis of the statute of limitations contained in SDCL 15-2-13. (R. 242-43). Brown Architecture likewise moved for summary judgment on the basis of the applicable 6-year statute of limitations. (R. 396). Fiegen Construction and M.J. Dalsin filed joinders in NEXT and Brown Architecture's motions for summary judgment. (R. 392, 429).

The summary judgment motions by NEXT and Brown Architecture were heard by the Hon. Stuart L. Tiede, Circuit Judge, Minnehaha County, Second Circuit on June 17, 2013. (Jt. App. 028-119). Following arguments by counsel, the court issued its findings and decision from the bench. (Motions Hearing, 62-64) (Jt. App. 091-093). The circuit court granted NEXT's motion for summary judgment, finding no genuine issues of material fact as to when the cause of action accrued and that there had been no facts

supporting the application of the doctrine of equitable estoppel. (Id.). The circuit court entered its Order Granting Defendant's Motion for Summary Judgment and Judgment on June 25, 2013. (R. 654-55).

STATEMENT OF THE FACTS[1]

In 2002 and 2003, East Side completed an addition as well as a remodel of its existing church building. (R. 281, 292) (Jt. App. 224, 213). Within weeks of the certification of substantial completion from Brown Architecture, issued on August 1, 2003, East Side complained of construction defects, including water intrusion, drainage problems, and structural deficiencies with the building's roofing system. (R. 274, 327) (Jt. App. 231, 178). In addition, concern of the potential for "greater structural failure" was brought to East Side's attention within a few months of substantial completion. (R. 272) (Jt. App. 233).

East Side is a church of approximately 1900 members. (R. 329) (Jt. App. 176). It has existed at its current site, on East 10th Street in Sioux Falls, since 1950. (Id.). The church leadership is comprised of senior pastor Olaf Roynesdal, who has served East Side since 2000, and associate pastor Lon Kvanli, who has been at East Side since approximately 2002. (R. 295-97) (Jt. App. 208-210). Both pastors have been at East

[1] Because this case is an appeal from summary judgment, NEXT and Brown Architecture have construed all facts in the light most favorable to East Side. This recitation of facts is limited to the summary judgment proceedings.

Side for the duration of the time pertinent to this appeal. (Id.). The church is governed by a congregational council of eight church members. (R. 296, 329) (Jt. App. 209, 176).

Appellee NEXT is in the business of providing services as an owner's representative on construction projects throughout the region. (R. 54). NEXT assists owners with facility evaluations and long term facility planning. (R. 296) (Jt. App. 209). In addition, NEXT provides services as a coordinator of construction services for various owners. (R. 295) (Jt. App. 210).

CONSTRUCTION CONTRACTS AND BUILDING PROCESS

In April 2002, the congregational council approved East Side to enter into a contract with NEXT for the construction of an addition to the church as well as a renovation of its existing structure. (R. 294-95, 360-78) (Jt. App. 210-211, 127-145). Pursuant to Section 3.2.5 of the contract, NEXT served as "design/builder" for the project and was responsible to "provide or cause to be provided and shall pay for design services, labor, materials, equipment, tools, construction equipment and machinery . . . necessary for proper execution and completion" of East Side's addition and renovation." (R. 375) (Jt. App. 130). The congregational council also approved the final design and blueprints of the project. (R. 291) (Jt. App. 214).

Prior to the execution of the April 2002 contract, NEXT, on behalf of East Side, solicited bids for the construction work and four bids from general contractors were

received. (R. 292-93) (Jt. App. 212-213). Additionally, the contract provided NEXT would retain Brown Architecture for design and architectural services. (R. 294, 379) (Jt. App. 211, 126). The contract included a guaranteed maximum price (GMP) of $2,966,000.00, which represented the total to be paid by East Side for "all professional services, materials and labor for the Renovation and Addition" and included the compensation for construction and architectural costs. (R. 367) (Jt. App. 138). NEXT's services as design/builder began in May 2002 with the anticipated completion date of the project no later than August 2003. (R. 365) (Jt. App. 140).

After being selected as the general contractor, Fiegen Construction, in July 2002, retained M.J. Dalsin to provide a portion of the project's construction services. (R. 292-93, 103) (Jt. App. 212-213). M.J. Dalsin, in turn, retained Jeff Prins, d/b/a AJ Construction, to provide roofing materials and installation services. (R. 150-51, 206). Construction began in late spring 2002. (R. 292-93, 318, 330, 365) (Jt. App. 212-213, 187, 175, 140).

Throughout the construction process, East Side was satisfied with the services of NEXT, Fiegen Construction, and the subcontractors. (R. 291) (Jt. App. 214). Pastor Roynesdal testified that "things went very well" through construction. (Id.). East Side's congregational council appointed a building committee, comprised of members of the church with building industry experience, to be responsible for handling of issues, such

as change orders, as they arose during construction. (R. 291) (Jt. App. 214). East Side representatives were present daily for the duration of the construction and were in regular contact with construction personnel, via weekly project status meetings with NEXT, Fiegen Construction, Brown Architecture, and the subcontractors. (R. 284, 291, 330) (Jt. App. 221, 214, 175).

EAST SIDE HAD IMMEDIATE NOTICE OF INJURY TO ITS BUILDING

Construction of East Side's addition was completed in March 2003. (R. 330) (Jt. App. 175). After completion of the addition, construction efforts turned to remodeling the existing church sanctuary. (R. 281, 292) (Jt. App. 224, 213). The sanctuary remodeling was completed in July or August of 2003. (R. 281) (Jt. App. 224). Brown Architecture provided written notification and certification of substantial completion of both the addition and remodel on August 1, 2003. (R. 434).

"[R]oof issues arose almost immediately" in August 2003, and leaks "started right after the construction was finished." (R. 291, 327) (Jt. App. 214, 178). Both the east and west wings of East Side's recently completed addition "had water leaks from the time that the church took over the control of the building." (R. 507, 529, 551, 556). Most of the initial noted roof failures were in areas "[a]ll along the edge – eaves of the addition on

the east and west sides . . . ." (R. 291) (Jt. App. 214). Further, over the course of the first several months, East Side concedes it became aware the building had significant problems "throughout the structure." (R. 327) (Jt. App. 178).

On **August 27, 2003**, less than a month after Brown Architecture provided certification of substantial completion and East Side began to fully occupy both the church addition and the renovated sanctuary, Pastor Roynesdal sent an email to NEXT, complaining of structural deficiencies of the building's roof. (R. 274) (Jt. App. 231). Roynesdal identified "exposed plywood corners" visible at the north end of the building and gap in the building's roof were apparently large enough to allow the entry of bats. (Id.).

Just three weeks later, on **September 18, 2003**, Pastor Kvanli contacted NEXT and complained of water leaks in the west entry. (R. 273) (Jt. App. 232). The west entrance was again noted as a problem in **mid-November 2003** when James Nord of NEXT sent a letter to Fiegen Construction and highlighted the problem as being caused by the roofer. (R. 272) (Jt. App. 233). Also, as soon as there was weather cold enough, the church "began having icicles and things from the eaves." (R. 291) (Jt. App. 214).

On **January 19, 2004**, East Side contacted NEXT and complained the "last 'blast of water'" that had entered the building had damaged the church. (R. 271) (Jt. App. 234). Moreover, during the **winter of 2003-2004**, Pastor Roynesdal noted roof failures causing

ice dams and leaks. (R. 290-91) (Jt. App. 214-215). Some of the water penetration was attributed to the ice damming, while other leaks were unexplained. (Id.). Most of the leaking problems were identified as being around the exterior of the building where the exterior walls met the roof. (R. 318) (Jt. App. 187). According to engineer Mike Ollerich, who East Side retained as an expert in March 2010 to identify sources and causes of the failing roof, ice dams were being caused by "a problem with insulation or lack of ventilation." (R. 557, 560). The church also experienced water problems in the kitchen caused by condensation that East Side's expert attributes to a lack of insulation in the ceiling. (R. 287, 322) (Jt. App. 218, 183). This lack of insulation caused a fire sprinkler to burst. (Id.).

On **February 2, 2004**, Fiegen Construction sent a letter to NEXT and Brown Architecture, copying Pastor Kvanli. (R. 270) (Jt. App. 235). The letter discussed continued roof failures. (Id.). This time the failures were noted at the east entrance and also at the joint between the existing church and the addition. (Id.). Fiegen Construction identified "abnormally high temperature" readings in the attic spaces creating a "situation where heat and cold combine in one location causing ice buildup." (Id.). These ventilation issues comport with the explanation of ice dams later provided by Ollerich. (R. 557, 560).

Throughout the spring of 2004, East Side identified structural deficiencies and notified NEXT of the same on a nearly monthly basis. After East Side continued to experience structural deficiencies with the building's roof, parish secretary Georgine ("Gigi") Rieder was made responsible for tracking and reporting problems. (R. 328-331) (Jt. App. 174-177). Ms. Rieder fielded reports from parishioners of problems with the construction and then communicated those issues, via email and telephone, to NEXT. (R. 328) (Jt. App. 174).

On **March 15, 2004**, Ms. Rieder emailed NEXT and identified further roof failure at the west entrance as water had stained ceiling tiles. (R. 269) (Jt. App. 236). Ms. Rieder complained the water intrusion was "[f]rom [the] last leaking!" (Id.). In addition, in the same email, Ms. Rieder identified symptoms of water leakage in other areas throughout the church. (Id.).

Approximately a month later, on **April 19, 2004**, Pastor Roynesdal emailed NEXT and complained that hail had entered the building the day before. (R. 268) (Jt. App. 237). Pastor Roynesdal identified the structurally deficient gap between the addition and the original sanctuary as the likely source of "a lot of stones." (Id.). On **May 24, 2004**, Ms. Rieder emailed an employee of NEXT and communicated the leaking roof in the west entrance was "again" resulting in water stains. (Id. 267) (Jt. App. 238).

June 2004 brought more than a half of a dozen instances in which East Side contacted NEXT to complain of continuing water intrusions:

- **June 4, 2004**, Ms. Rieder emailed NEXT and identified shingles on the addition being "very waving (sic) and . . . are puckering up." (R. 266) (Jt. App. 239). This curling of the shingles was resulting in a visible gap at the bottom of the shingles. (Id.).
- **June 9, 2004**, Ms. Rieder contacted NEXT and complained of water in Pastor Kvanli's office as well as wet ceiling tiles in the kitchen. (R. 265) (Jt. App. 240).
- Two days later, on **June 11, 2004**, Pastor Kvanli emailed NEXT to communicate additional roof failures. (R. 264) (Jt. App. 241). Moisture had again entered Pastor Kvanli's office. (Id.). This time, East Side noted water on the floor of the furnace room, located immediately above Pastor Kvanli's office. (Id.). Kvanli noted the source may have been a particular dormer on the northeast portion of the church's addition. (Id.).
- On **June 11**, water was "once again coming through at the new west entrance. This [had] been a persistent problem." (R. 263) (Jt. App. 242).
- On **June 16, 2004**, Ms. Rieder reported water intrusion again causing problems throughout the building, including the kitchen, second floor spaces, classrooms, and Pastor Kvanli's office. (R. 260-62) (Jt. App. 243-245).

East Side acknowledges that the damages associated with water penetration and leaking were the result of later-discovered alleged design and/or construction deficiencies. (R. 478-551, 589) (Jt. App. 015, ¶ 9).

In addition to the observed roof failures in the months following substantial completion, East Side noted nearly immediate problems with water drainage at various locations around the church building. (R. 264, 272, 274, 290-91, 321, 568-69) (Jt. App. 241, 233, 231, 214-215, 184). During the first winter following conclusion of construction (winter of 2003-2004), the church experienced ice "[a]ll along the edge – eaves of the addition on the **east and west sides** as well as on the **north side** we had massive drainage – drainage issues. (R. 291) (Jt. App. 214). The entrances to the church were of concern due to the accumulation of ice on the sidewalk. (R. 290, 322) (Jt. App. 215, 183). Of particular alarm was **the west entrance** as "[t]he landing just before you go up on the steps became a serious ice issue . . . ." (R. 290) (Jt. App. 215). Similarly, during the first year following completion of construction, East Side experienced drainage issues on the north end of the building. (R. 290-91, 274) (Jt. App. 214-215, 231). The gutters, as designed, dump water onto the sidewalk immediately outside the church's north entrance. (R. 274, 322) (Jt. App. 231, 183). These drainage problems were known to East Side as early as August 27, 2003. (R. 274) (Jt. App. 231).

EFFORTS TO RESOLVE THE PROBLEMS

Beginning in August 2003, after East Side became aware of alleged structural deficiencies with its newly completed building, NEXT, and others involved in the construction, worked to assist East Side in identifying the source of the problems and remedying the alleged construction defects. (R. 270-73, 472-73, 568, 571) (Jt. App. 232-235). As problems with the construction of the roof persisted, various causes were explored. For a time, it was thought the shingles were defective. (R. 469, 567). Then, there was a theory the shingles had been improperly installed. (R. 280, 305, 307, 563) (Jt. App. 225, 200, 198). Later, it was believed that the flashing installation was the cause of the continued roof failures. (R. 562). Finally, it was believed the rubber membrane on the flat roof entryways had not been installed and that the roof had not been installed pursuant to the plans. (R. 440). Despite the varying theories as to the cause over the years, the injuries experienced by East Side continued to be similar to those experienced during the first eleven and a half months after substantial completion. (R. 564-66, 467-68, 433, 463).

As early as November 22, 2005, East Side became aware NEXT was not able to arrive at a solution with the other parties involved. (R. 465). In response to this, NEXT, at its own expense, retained BHI, Inc., a general contractor, to provide additional ideas on how to address the alleged structural deficiencies experienced by East Side. (R. 437, 562, 601) (Jt. App. 248). The problems first experienced by East Side persisted and at least as

early as October 18, 2007, after more than four years of experiencing the repeated problems resulting from structural deficiencies, East Side retained legal counsel who was appraised of the problems experienced by the church. (R. 462).

NEXT PUTS INSURER AND PARTIES ON NOTICE OF POTENTIAL SUIT

On January 23, 2009, after five and a half years of East Side experiencing ice dams, water penetration, drainage problems and general roof failures, NEXT's legal counsel notified East Side, and East Side's legal counsel, that NEXT had notified its insurer of a claim and had also placed Fiegen Construction and M.J. Dalsin on notice. (R. 600-601) (Jt. App. 248-249). In the weeks that followed, counsel for East Side acknowledged receipt of the January 23 correspondence and also acknowledged, on February 5, 2009, "time is of significance and dictates what action my client should pursue." (R. 598-99) (Jt. App. 250-251).

ATS INVESTIGATION REVEALS PREVIOUSLY-IDENTIFIED PROBLEMS

In March 2010, more than a year after East Side and its counsel were notified by NEXT's counsel that NEXT had put its insurer on notice of a potential claim, East Side retained Mike Ollerich of American Technical Services (ATS) to conduct an investigation as to "why there is so much water essentially in every part of the building." (R. 560). During the months of March, April, and May 2010, Ollerich conducted an

intensive investigation of East Side and prepared eleven (11) written reports regarding his findings. (R. 478-551).

The investigation by Ollerich revealed what everybody involved in the problems at East Side already knew. East Side's building had experienced water intrusion "for an extended period of time." (R. 551). Prolonged roof failures which had manifested itself for years prior were identified throughout the building – the east and west entrances (R. 551), the east wing of the church addition (R. 529), and the west wing of the church addition (R. 507). In his eleven reports, Ollerich identified the same injuries East Side had been experiencing and had been aware of since "almost immediately" after East Side first took control of the building following construction in 2003, including ice dams, ventilation issues, drainage problems, and water damage throughout the church. (R. 478-551).

STANDARD OF REVIEW

In reviewing a lower court's grant of summary judgment, this Court "must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, -- N.W.2d --, -- (quoting *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101); SDCL 15-6-56(c). In so doing, the evidence must be viewed in the light most favorable to the nonmoving party. *See Niesche,* 2013 S.D.

90, ¶9, -- N.W.2d --, -- (quoting *Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101). That being said, this Court requires the nonmoving party to "present specific facts showing that a genuine, material issue for trial exists." *Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101 (quoting *Saathoff v. Kuhlman,* 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). "[A] material fact is one that might affect the outcome of the case[.]" *Englund v. Vital*, 2013 S.D. 71, ¶ 9, 838 N.W.2d 621, 626 (quoting *Smith ex rel. Ross v. Lagow Constr. & Developing Co*, 2002 S.D. 37, ¶ 9, 642 N.W.2d 187, 190). A "party challenging summary judgment "must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Tolle v. Lev*, 2011 S.D. 65, ¶ 10, 804 N.W.2d 440, 444 (quoting *Schwaiger v. Mitchell Radiology Assocs., P.C.,* 2002 S.D. 97, ¶ 7, 652 N.W.2d 372, 376). The mere assertion that there is a material question of fact is insufficient to create one. *See Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101.

SDCL 15-6-56(e) provides: "When a motion for summary judgment is made and supported as provided in 15-6-56, an adverse party may not rest upon the mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so response, summary judgment, if appropriate, shall be entered against him." This Court has also noted that,

> while we often distinguish between the moving and non-moving party in referring to the parties' summary judgment burdens, the more precise inquiry looks to who will carry the burden of proof on the claim or defense at trial. Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

W. Consol. Coop. v. Pew, 2011 S.D. 9, ¶ 21, 795 N.W.2d 390, 396. Finally, on a motion for summary judgment, a party may not claim a version of the facts more favorable than given in the party's own testimony. *See Dahl v. Combined Ins. Co.*, 2001 S.D. 12, ¶ 21, 621 N.W.2d 163, 169.

When, as here, a motion for summary judgment is brought on grounds of the applicable statute of limitations, "the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations. . . ." *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 5, 581 N.W.2d 510, 513. This Court has repeatedly acknowledged "[t]he construction and application of statutes of limitation presents a legal question" that is reviewed de novo. *Estate of Henderson v. Estate of Henderson*, 2012 S.D. 80, ¶ 9, 823 N.W.2d 363, 366 (quoting *Masloskie v. Century 21 Am. Real Estate, Inc.,* 2012 S.D. 58, ¶ 6, 818 N.W.2d 798, 800).

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPER AS EAST SIDE'S CAUSES OF ACTION WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS. WHAT CONSTITUTES ACCRUAL IS A LEGAL QUESTION & SOUTH DAKOTA DOES NOT

REQUIRE EAST SIDE TO BE FULLY AWARE OF THE SCOPE OF ITS INJURIES FOR A CAUSE OF ACTION TO ACCRUE.

The case before this Court is dramatically different than the lawsuit initially brought by East Side. Indeed, the case is even postured differently than before the circuit court. On appeal and for the first time, East Side posits it has "separate claims" for the various symptoms experienced. Despite the creative legal argument by appellate counsel, the record is undisputed summary judgment was properly granted in favor of NEXT, and the other defendants. East Side has failed to establish the existence of material facts which preclude the entry of summary judgment on the basis of the applicable statute of limitations. Further, East Side has failed to establish material facts which warrant application of equitable estoppel. The circuit court should be affirmed in all respects.

East Side concedes "*what* constitutes accrual" is a question of law. (Appellant's Brief, p. 28); *Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 11, 598 N.W.2d 213, 215. There are no disputes as to the date when East Side had actual notice of injury to its building.[2] Previously, in such circumstances, this Court has found summary judgment to be the proper remedy. *See Strassburg*, 1998 S.D. 72, ¶ 7, 581 N.W.2d 510, 513 ("Here, we

[2] The decisions cited on pages 28 and 29 of Appellant's Brief all address issues of *when* a statute of limitations accrued. *See Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶¶ 11, 14, 650 N.W.2d 544, 548-49; *Wissink v. Van De Stroet*, 1999 S.D. 92, ¶22, 598 N.W.2d 213, 215-16; and *Salem School Dist. 43-3 v. Puetz Construction, Inc.*, 353 N.W.2d 51 (S.D. 1984). In each of these cases, unlike the case at present, *when* the plaintiff had notice constituting accrual was in dispute.

must ascertain whether there is any genuine issue of material fact concerning the date the cause of action accrued; if not, and if the applicable limitations period has expired as a matter of law, then the [defendant] was entitled to summary judgment.").

As East Side concedes,[3] this matter is controlled by SDCL 15-2-13 which provides:

> Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:
>
> (1) An action upon a contract . . . .

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[3] *See* Appellant's Brief, p. 24-25. In argument to the circuit court and relying on SDCL 15-2A-3, East Side's counsel argued for application of a ten-year "statute of limitations"; however, counsel acknowledged the position was "not our strongest argument . . . but I'm just going to rely on the maybe-thinking-outside-the-box arguments we made in our brief." (Motions Hearing, p. 35) (Jt. App. 064). Although the case law is cumbersome, this Court has recognized SDCL 15-2A-3 contains a 10-year statute of repose which is a limitation separate and distinct from the applicable six-year statute of limitation contained in SDCL 15-2-13. *See Clark County v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 24, 753 N.W.2d 406, 414 (internal citations omitted). Rather than *limiting* the time within which a plaintiff may sue to *enforce* a remedy on an accrued cause of action as a statute of limitations does, statutes of repose, after a lapse of time, *prevent* the cause of action from ever arising. Statutes of repose represent a legislative determination that a person protected by the statute can *never* be liable for a defect that occurs more than the specified number of years after the completion of the project. *Zacher v. Budd Co.*, 396 N.W.2d 122, 129 n.5 (S.D. 1986). Appellees would implore the Court to use the opportunity presented by the matter to clarify such distinction.

SDCL 15-2-13.[4] As recognized in *Strassburg*, this Court has determined a cause of action "shall have accrued" "when the plaintiff either has actual notice of a cause of action or is charged with notice." SDCL 15-2-3; *Strassburg*, 1998 S.D. 72, at ¶ 10, 581 N.W.2d at 514.

The Legislature has defined these concepts. *See* SDCL 17-1-2, -3. Actual notice is one possessing "express information of a fact." *Strassburg*, 1998 S.D. 72, at ¶ 10, 581 N.W.2d at 514 (quoting SDCL 17-1-2). A person "charged with notice" is put on constructive notice. *Id.* Constructive notice is "notice imputed by the law to a person not having actual notice." *Id.* (quoting SDCL 17-1-3). "One having actual notice of circumstances sufficient to put a prudent person on inquiry about 'a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact, itself." *Id.* (quoting SDCL 17-1-4). Regardless of the

[4] Seemingly, on appeal, East Side's appellate counsel seeks to ignore the contents of East Side's Complaint. In its Complaint, East Side did not specify various claims of breach of contract, but now essentially seeks to amend its Complaint to assert new causes of action for damage it claims to have discovered in 2010. This is contrary to *Strassburg* and its progeny as well as sound public policy. East Side seeks to have problems finally uncovered in 2010 serve to extend the statute of limitations. This would create circumstances in which plaintiffs would be incentivized to not fully seek to uncover their damages within six-year of the accrual of an action. Further, the statute of limitations would depend neither on when the offense occurred, as in the case of most tort cases, nor on when the plaintiff had actual or constructive knowledge of an injury. This would turn decades of South Dakota jurisprudence on its head and gut the meaning and import of the statute of limitations.

type of notice, "[e]ither actual or constructive notice . . . will equally suffice to start the statute of limitations' clock running." *Id.*

In South Dakota, "[a] cause of action accrues when the right to sue arises." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 16, 539 N.W.2d 539, 544. "This means that in all events, a claim accrues and limitations become its course when a person has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him." *Id.* (*quoting Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 68 (S.D. 1988)).

Of special importance in the context of this case, this Court has previously recognized "[l]imitations periods will not abide indefinitely while those aggrieved discover all their damages." *Strassburg*, 1998 S.D. 72, at ¶ 11, 581 N.W.2d at 515. In fact, "a plaintiff . . . need not be fully aware of all his or her injuries before the statute of limitations accrues." *One Star v. Sisters of St. Francis*, 2008 S.D. 55, ¶ 18, 752 N.W.2d 668, 677 (citing *Strassburg*, 1998 S.D. 72, ¶ 11, 581 N.W.2d at 515). This Court simply requires a plaintiff to be aware it has sustained an *injury* in order to start the running of the statute of limitations. *See Strassburg*, *supra*. It is not necessary a plaintiff be fully aware of the extent or the cause of its injuries. *Id.*; *Spencer*, 2008 S.D. 129, ¶ 16, 759

N.W. 2d at 545. A plaintiff, once injured, has a "duty to seek information about the problem and its cause. . . ." *One Star*, 2008 S.D. 55, ¶ 26, 752 N.W.2d at 679.

Here, the deposition testimony, emails and other documentation clearly establish *when* East Side became aware of structural deficiencies. Thus, there is no factual dispute as to when East Side's breach of contract claim accrued.[5] East Side personnel acknowledged, and the documentation further establishes, East Side had notice of its cause of action more than six-years before it commenced this lawsuit. As testified to by Ms. Rieder and Pastor Roynesdal, structural deficincies were identified very shortly following substantial completion on August 1, 2003. Over the course of the next several months, bats, hail, and water found their way into East Side's building.

Despite the record before the circuit court being replete with references to her role of Georgine ("Gigi") Rieder, East Side's recitation of the facts and the record is notably silent. Ms. Rieder was identified by East Side as being the person with the most knowledge of the problems experienced by the church. In her capacity as parish secretary Ms. Rieder fielded reports from the pastors and parishioners of problems with

[5] Although East Side's Complaint contains both a breach of contract and a negligence claim, East Side's only cognizable cause of action is that of breach of contract. *See Sundt Corp. v. South Dakota DOT.,* 1997 SD 91, 566 N.W.2d 476, and *Fisher Sand & Gravel Co. v. South Dakota DOT,* 1997 SD 8, 558 N.W.2d 864. When a contract exists between parties, the contract controls the parties' relationship and no legal duty exists between the parties outside of the contract.

the construction following substantial completion. She was also the person responsible for communicating these problems to NEXT. On appeal, East Side ignores the person with the most information about East Side's knowledge of structural deficiencies.

East Side's effort to highlight later-obtained information is a red herring and ignores the actual and constructive notice East Side had of alleged construction problems "almost immediately" after construction was completed. Our case law simply requires East Side to have "an awareness it suffered an injury" for the statute of limitations to accrue. East Side need not "be fully aware of the extent or the cause of its injuries." Simply, it is enough that East Side was aware of injury to it's building – it need not be aware of the exact underlying structural defect for the cause of action to accrue.

Indeed, in its response to NEXT's motion for summary judgment East Side conceded the interconnectedness of the injuries it experienced as early as August 2003 and the newly identified "structural deficiencies" relied upon by East Side as a means of avoiding application of the statute of limitations. (Plaintiff's Statement of Disputed Material Facts in Response to Defendant NEXT's Statement of Undisputed Material Facts; R. 589) (Jt. App. 015).[6]

[6] East Side's response to paragraph nine (¶ 9) of NEXT's statement of undisputed material facts provides: "Ice dams, water penetration, and drainage issues experienced at East Side were the result or after effects of the structural deficiencies; they are not themselves the defect."

Similar to this Court's decision in *Spencer*, as early as August 2003, East Side "had actual knowledge of the same alleged wrong and the same alleged injury for which [East Side] first sough redress" in 2010. 2008 S.D. 129, ¶ 17, 539 N.W.2d at 544. Fundamentally, East Side seeks redress for a failed building project – it was aware of such failure more than six years before the lawsuit was commenced.

The Eighth Circuit Court of Appeals has similarly held a plaintiff's claim for construction defects accrues upon discovery of an injury. *See Pamida, Inc. v. Christenson Building Corp.*, 285 F.3d 701 (8th Cir. 2002). In *Pamida*, a new store was built in November 1990 and the following spring, after a particularly wet snowfall, the store manager identified interior floor cracks at the north end of the store. *Id.* at 703. In the spring of 1996, years after repairs to the problems first noted in 1991 were completed, new interior floor cracking was discovered on the south end of the building. *Id.* Over the next two years, Pamida experienced even more interior floor cracking and settlement. *Id.* After suit was filed in 1999, the defendant moved for summary judgment on the basis of the applicable two-year statute of limitations. *Id.* The District Court for the District of Minnesota granted defendant's motion. *Id*. at 703. In affirming the trial court, the Eighth Circuit Court of Appeals found that Pamida's knowledge of additional floor settlement in 1996 put the store on notice of injuries to the floor slab throughout the store and accrued the statute of limitation. *Id.* at 705-06. Although greater floor problems were discovered

in 1997 and 1998, the Eighth Circuit held "[d]iscovery that an injury arises out of a defective condition is discovery of the defective condition." *Id.* at 704. Here, within months of substantial completion, and more than six years before the action was commenced, East Side was aware of structural deficiencies throughout its building. Moreover, East Side's discovery that the water penetration was a result of a structurally deficient roof is discovery of the structural deficient roof. In Appellant's Brief, East Side seeks to distinguish the authority of *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 329 S.E.2d 350, 351 (N.C. 1985) cited in *Strassburg*, by citation to *Harrison v. City of Sanford*, 627 S.E.2d 672 (N.C. Ct. App. 2006) and *Williams v. House of Distinction, Inc.*, 714 S.E.2d 438 (N.C. Ct. App. 2011). (Appellant's Brief, p. 32).

Despite East Side's efforts, *Pembee* more closely reflects the law of South Dakota as compared to *Harrison* and *Williams*.[7] Additionally, the facts in *Pembee* most closely parallel those here. As in *Pembee*, all of East Side's injuries relate to the same complaint of structural deficiency which was "discovered and recurred repeatedly." 329 S.E.2d at 354. Despite East Side's best efforts to broaden the scope of its complaints for purposes

of this appeal, the record establishes the various problems experienced (ice, poor ventilation, drainage issues, intrusion of hail and bats, general water penetration) all relate to the alleged structural deficiency of the roof East Side has been aware of since August 2003.

East Side's reliance upon *Johnston v. Centennial Log Homes & Furnishings*, 305 P.3d 781 (Mont. 2013) is misplaced. Beyond East Side's defects being related to the very problems experienced as early as August 2003, *Johnston* is distinguishable on the basis of Montana's "discovery rule" statute which does not exist in South Dakota. *Id.* at 787-88. The analysis conducted by the *Johnston* court is not appropriate under South Dakota's case law given the lack of allegations of fraudulent concealment or misrepresentations on the part of NEXT. *Id*. at 787-88, 790-91. There is no basis in the record, nor did East Side argue below in order to preserve the issue, for structural deficiencies experienced by East Side to be considered concealed or self-concealing. *A-G-E Corp. v. State*, 2006 S.D. 66, ¶, 19, 719 N.W.2d 780, 786 ("This Court does not review issues raised for the first

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[7] In *Harrison*, the court reversed the entry of summary judgment on the basis of the "separate and distinct nature" of the injury – in one episode injury to plaintiff's real property and in the second, later episode, significant injury to plaintiff's personal property. 627 S.E.2d at 674. In *Williams*, unlike in the case at present, the leaks the plaintiffs experienced were "intermittent." 714 S.E.2d at 445. Moreover, in *Williams*, the plaintiff's complaint articulated numerous specific and particular breaches of contract claims. *Id*. at 441. Here, the injury experienced by East Side is the same and East Side did not plead multiple specific defects in its Complaint.

time on appeal.") (*citing Cain v. Fortis Ins. Co.,* 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714).

Likewise, the other authorities relied upon by East Side treat similar issues differently than in South Dakota. In *Ass'n of Apartment Owners of Newtown Meadows ex rel. its Bd. of Directors v. Venture 15, Inc.*, 167 P.3d 225 (Haw. 2007), the court reversed summary judgment, in part, on the basis of the need for a plaintiff to be aware of the "causal connection" between an act of negligence and damages. *Id.* at 270. Further, the authorities are factually distinct from the present action. Here, East Side was immediately aware of structural defects with the recently completed roof – problems with the roof and water penetration persist and are conceded by East Side to be connected to the structural deficiencies.

Further, the cases cited by East Side involve circumstances in which plaintiffs were put only on inquiry notice and not on actual notice of the defects. *See Venture 15*, 167 P.3d at 273; *see also Colony Apartments v. AIMCO Residential Group, L.P.*, 63 Fed.Appx. 122 (4th Cir. 2003) (apartment property manager was told of particular unit moisture complaints but was not put on actual notice of issues of structural soundness of the building). In addition, the holding of *Performing Arts Center Authority v. Clark Construction Group, Inc.*, 789 So.2d 392 (Fla. Ct. App. 2002) actually supports the circuit court's ruling as the court summarized several leaking-roof construction cases by

recognizing the line of cases stands for the proposition "when newly finished roofs leak it is not only apparent, but obvious, that someone is at fault." *Id.* at 394. This is precisely what was observed at East Side. "Almost immediately" after substantial completion, East Side was faced with a leaking roof. Obviously someone was at fault and East Side was aware of its injury and its right to pursue a remedy.

On the basis of the undisputed material facts and the record before this Court, the circuit court's entry of summary judgment on the basis of the statute of limitations should be affirmed.

II. EQUITABLE ESTOPPEL IS INAPPLICABLE BASED UPON THE FACTS OF THIS CASE.

Fundamental to East Side's argument of equitable estoppel is the premise that it was unaware of the condition of its building. In order to invoke equitable estoppel in South Dakota, each of four elements must be present. *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 19, 781 N.W.2d 464, 471 n.7 (emphasis added)(citations omitted). These four elements are: (1) false representations or concealment of material facts must exist; (2) the party to whom it was made must have been without knowledge of the real facts; (3) the representations or concealment must have been made with the intention that it should be acted upon; and (4) the party to whom it was made must have relied thereon to his prejudice or injury. *Id.*; *see also Hahne v. Burr*, 2005 S.D. 108, ¶ 17, 705 N.W.2d 867, 873; *Taylor v. Tripp*, 330 N.W.2d 542, 545 (S.D. 1983).

A party who is aware that it has a cause of action cannot claim estoppel. *See Strassburg*, 1998 S.D. 72, ¶ 15, 581 N.W.2d at 516 (*citing Dierking v. Bellas Hess Superstore, Inc.*, 258 N.W.2d 312, 314 (Iowa 1977) (refusing to apply estoppel when party was aware of injury)). As established by the record, there is no dispute East Side was aware as early as August 2003 it had structural deficiencies with its recently completed construction project.

As this Court has enumerated previously, "[e]stoppel is not applicable if any of these elements are lacking or have not been proven . . . ." *Hahne*, 2005 S.D. 108, ¶ 18, 705 N.W.2d at 873 (quoting *Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861, 866 (S.D. 1991) (citations omitted). "[I]n order for equitable estoppel to exist, there must be fraud, false representations, or concealment of material facts." *L.R. Foy Const. Co., Inc*, 399 N.W.2d 340, 344 (S.D. 1987) (citations omitted). In addition, equitable estoppel requires East Side to "have been without knowledge of the real facts." *Spencer v. Estate of Spencer*, 2008 S.D. 129, ¶ 21, 759 N.W.2d 539, 545 (quoting *Heupel v. Imprimis Tech. Inc.*, 473 N.W.2d 464, 466 (S.D. 1991)).

Gigi Rieder, on behalf of East Side, documented East Side's injuries and disseminated information relating to the structural failures to NEXT. Further, Pastors Roynesdal and Kvanli were apprised through numerous email communications as well as meetings to the problems and discussed solutions to East Side's building failures.

Despite the inclusion of numerous communications from NEXT in the materials before the circuit court, East Side is unable to identify any false representations or concealment of material facts on the part of NEXT.

The record provides no basis for equitable estoppel as there was no allegation of false representations or concealment on the part of NEXT. East Side, even when specifically asked by the circuit court, was unable to identify evidence in the record of false representations or concealment by NEXT. (Motions Hearing p. 45) (Jt. App. 074). Additionally, based on the record and the undisputed material facts, the circuit court found there was no basis for East Side to rely on any representations by NEXT as both parties were award of the structural problems experienced by East Side. *See Spencer*, 2008 S.D. 129, ¶ 21, 759 N.W.2d at 545.

As an acknowledgement of the lack of any false representations or concealment, East Side must argue NEXT somehow lulled East Side "into a false sense of security" or led East Side "to believe an amicable resolution of [it's] claim will be made." (Appellant's Brief, 35). NEXT's efforts to resolve the structural deficiencies experienced by East Side do not serve to estop NEXT from raising the statute of limitations defense. This Court has previously so held. *See Jandreau v. Sheesley Plumbing*, 324 N.W.2d 266, 272 (S.D. 1982). In *Jandreau*, the plaintiff alleged the defendants were estopped from asserting the statute of limitations as a defense after defendants had continually attempted

to assist the plaintiff in remedying problems with an irrigation system defendants sold to and installed for plaintiff. *Id.* This Court, in affirming the circuit court, rejected the argument that defendants' assistance to plaintiff estopped defendants from raising the statute of limitations as a defense. *Id.* Additionally, NEXT did not "intentionally mislead [East Side] into not asserting [its] legal rights" by continuing to help . . . . *Id; see also Spencer*, 2008 S.D. 129, ¶¶ 20-21, 759 N.W.2d at 545 (plaintiffs "must have been without knowledge of the real facts" in order to assert equitable estoppel).

Here, there is no basis for the application of equitable estoppel. East Side was represented by legal counsel as early as October 2007. Moreover, by receipt of the January 23, 2009, letter from Gregg Greenfield, East Side was put on notice more than six months before the running of the statute of limitations that NEXT had put its insurer, Fiegen Construction, and other subcontractors on notice of a potential claim by East Side. In response to the January 23rd letter, East Side's counsel acknowledged "time is of significance and dictates what action [East Side] should pursue." (R. 598) (Jt. App. 251).

Despite the acknowledgement of the importance of time in relation to East Side's options, East Side waited more than a year, until March 2010, before hiring an independent construction expert to investigate the structural deficiencies being experienced. Even more, correspondence from May 2009 communicated the position of NEXT's insurer that "leaking issues with the roof dat[ed] back to 2003." (R. 596) (Jt.

App. 253). East Side was made aware that NEXT anticipated litigation and NEXT's insurer was aware East Side had experienced structural deficiencies beginning in 2003. East Side should not now be able to avoid the application of the statute of limitations when it, and its counsel, were aware of such issues prior to the limitations period running. Such a result is contrary to the very public policy established by statutes of limitations in the first place.

Furthermore, East Side's argument that NEXT's continued assistance of East Side should serve to equitably estop NEXT from raising a statute of limitations defense would create a chilling effect on contractors and subcontractors in South Dakota from returning to job sites to remedy problems being experienced. Contractors would be punished for completing punch-list items that exist following substantial completion. This is bad public policy for South Dakota.

Here there is no evidence that NEXT misled East Side. The documentary evidence demonstrates East Side was aware of the alleged construction issues as they were reported to NEXT by East Side employees and representatives. Despite East Side's assertions that it did not know the extent of the alleged construction deficiencies, East Side was undeniably aware of "sufficient material facts to bring a cause of action" within the six-year statute of limitations. *See Spencer*, 2008 S.D. 29, ¶ 21. East Side has no

legal basis for its assertion that NEXT should be equitably estopped from raising the defense of the statute of limitations and seeking summary judgment on the same.

The authority relied upon by East Side for these arguments are markedly distinct from the facts before this Court. In *Cooper v. James*, 2001 S.D. 59, 627 N.W.2d 784, this Court held the statute of limitation equitably estoppel from running on the basis that the defendant had misled a former client regarding service of process until the statute of limitations had run by lulling the plaintiff "into a false sense of security". *Id.* at ¶¶ 15, 17, 627 N.W.2d at 789. Unlike *Cooper*, here, NEXT made a point of informing East Side of the need to bring a claim prior to the expiration of the statute of limitations.

Equitable estoppel was invoked in *Industrial Indem. Co. v. Industrial Accident Co.*, 252 P.2d 649, 652-53 (Cal. App. 1953), when an insurer gave an unrepresented and "gullible" employee the "runaround" so as to avoid having to pay benefits under the California Industrial Accident Commission, a precursor to California's workers' compensation act. Here, East Side had sophisticated personnel and church members at its disposal and was represented by counsel three years before the expiration of the statute of limitations. More than six months before the running of the statute, East Side's attorney communicated the time sensitive nature of the decisions facing East Side to opposing counsel.

Finally, East Side cites *State Farm Mut. Auto Ins. Co. v. Budd*, 175 N.W.2d 621, 623-24 (Neb. 1970), *overruled on other grounds*, *Aken v. Nebraska*, 511 N.W.2d 762, 768 (Neb. 1994) in support of the premise of employing equitable estoppel when a defendant caused delays in matter until after statute of limitations had run. There are no such allegations here.

The record is devoid of any instances in which NEXT, through false representations or concealment of material facts, prevented East Side from obtaining knowledge of the actual condition of East Side's building. This, coupled with NEXT's willingness to work to resolve the problems experienced by East Side, precludes application of equitable estoppel here.

CONCLUSION

On the basis of the arguments contained herein and the record before this Court, Appellee NEXT, Inc. respectfully requests this Court affirm the Order of Judge Tiede in all respects. NEXT is authorized to represent that third-party defendant Fiegen Construction and fourth-party defendant M.J. Dalsin join in this brief and the request that this Court affirm the Order of Judge Tiede.

Dated this 21st day of January, 2014.

/s/ Paul W. Tschetter
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REQUEST FOR ARGUMENT

NEXT respectfully requests oral argument before this Court.

CERTIFICATE OF COMPLIANCE

I, Paul W. Tschetter, do hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 8,429 words and 43,165 characters. I have relied on the word and character count of the word-processing system used to draft this brief in preparing this certificate as permitted under SDCL 15-26A-66(b)(4).

/s/ Paul W. Tschetter
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CERTIFICATE OF SERVICE

I, Paul W. Tschetter, do hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P., attorneys for Appellee NEXT, Inc., and that on the 21st day of January, 2014, I served true and correct copies of the foregoing Appellee's Brief via US Mail and Electronic Mail on the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

EAST SIDE LUTHERAN CHURCH OF SIOUX FALLS, SOUTH DAKOTA, a South Dakota Nonprofit Corporation, Plaintiff and Appellant, vs. NEXT, INC., a South Dakota Corporation, Defendant and Third-Party Plaintiff and Appellee, vs. FIEGEN CONSTRUCTION CO., a South Dakota Corporation and BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC., a Nebraska Corporation Third-Party Defendants and Fourth-Party Plaintiff and Appellee, vs. M. J. DALSIN CO. OF S.D., INC., Fourth-Party Defendant and Fifth-Party Plaintiff and Appellee, vs. JEFF PRINS, d/b/a AJ CONSTRUCTION, Fifth-Party Defendant.	Appeal No. 26776 **NOTICE OF JOINDER IN APPELLEE BRIEFS**

Pursuant to SDCL 15-26A-67, Appellee Fiegen Construction hereby joins in the Brief of Appellee Brown Architecture & Design Co. n/k/a Studio 360 Architecture, Inc.,

and the Brief of Appellee Next, Inc., and fully adopts by reference all of the arguments made therein in support of the Court's entry of summary judgment.

Dated this 21st day of January, 2014.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26776

EAST SIDE LUTHERAN CHURCH OF SIOUX FALLS, SOUTH DAKOTA, a South Dakota Nonprofit Corporation,

Plaintiff and Appellant,

vs.

NEXT, INC., a South Dakota Corporation,

Defendant, Third-Party Plaintiff, and Appellee,

vs.

FIEGEN CONSTRUCTION CO., a South Dakota Corporation and BROWN ARCHITECTURE & DESIGN CO. n/k/a STUDIO 360 ARCHITECTURE, INC., a Nebraska Corporation,

Third-Party Defendants, Fourth-Party Plaintiffs, and Appellees

vs.

M.J. DALSIN CO. OF S.D., INC.,

Fourth-Party Defendant, Fifth-Party Plaintiff, and Appellee,

vs.

JEFF PRINS, d/b/a AJ CONSTRUCTION, Fifth-Party Defendant.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART R. TIEDE, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT EAST SIDE LUTHERAN

NOTICE OF APPEAL FILED: JULY 30, 2013

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REPLY ARGUMENT

I. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BASED UPON NEXT'S STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE SHOULD BE REVERSED.

Appellees NEXT, Inc. and Brown Architecture & Design Co. have filed separate briefs, with the other defendants filing joinders. The arguments appearing in both briefs can be distilled as follows: (1) the defendants claim to be surprised by a "new argument" that they represent has been made "for the first time on appeal"; (2) they argue that there are no disputed material facts regarding when East Side Lutheran had actual or constructive notice of each of the separate and independent defects; and (3) they contend that there are no disputed material facts regarding application of the doctrine of equitable estoppel.

The defendants' argument is unpersuasive. Although both appellee briefs purport to set forth all of the material facts and inferences in the light most favorable to East Side Lutheran Church, each is unsuccessful in that endeavor. Above all, the defendants' silence expressed by their failure to meaningfully engage the material factual disputes identified by East Side in circuit court and on appeal frustrates their attempts to salvage the unwarranted grant of summary judgment in this case.

A. The suggestion that a "new argument" has been presented on appeal is incorrect.

The appellate argument submitted by NEXT begins with a breathless announcement. "The case before this Court is dramatically different than the lawsuit initially brought by East Side," we are told. (NEXT Brief at 18). "Indeed, the case is even postured differently than before the circuit court." (*Id.*). Brown, as well, has

tucked a similar accusation onto the end of its "Statement of the Facts," complaining variously that East Side has "now shifted its focus to other, undeveloped issues – issues that were not directly and concretely presented to the trial court" and "never presented to the trial court as it is now presented to this Court," constituting "an entirely new argument," involving "facts and arguments" that "were not presented below." (Brown Brief at 6-7).

The gist of the accusation is that East Side Lutheran never contended at the trial court level that there were multiple, distinct structural deficiencies in the building constituting different contractual violations, and that it did not have actual constructive notice of many of these violations until it received a report from American Technical Services in March of 2010.

The accusation does not withstand even minimal scrutiny. It appears to be constructed, for the most part, upon the mundane observation that East Side Lutheran did not set out and list each of the various, independent structural deficiencies in its original complaint. (Brown Brief at 19). Rather, the complaint is only about two pages long and frames the claims in broad terms, stating that NEXT "ultimately breached its obligations to East Side Lutheran Church by not remedying the structural deficiencies" and "by not performing the construction in a good and workmanlike manner." (R. 380) (App. 3).

This is perfectly acceptable under South Dakota law. As this Court has explained, "South Dakota still adheres to the rules of notice pleading." *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409. Under

this standard, "a complaint need only contain '[a] short and plain statement of the claim showing that the pleader is entitled to relief[.]'" *Id.* (quoting SDCL 15-6-8(a)(1)). Furthermore, "under notice pleading, 'a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'" *St. Pierre v. State ex rel. South Dakota Real Estate Comm'n*, 2012 S.D. 25, ¶ 20, 813 N.W.2d 151, 157 (quoting *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 13, 729 N.W.2d 335, 341). East Side Lutheran's specification of NEXT's various contract violations in citing to record evidence and in its argument to the circuit court is more than sufficient to have placed the defendants on notice of its claims. *See, e.g., Patitucci v. City of Hill City*, 2013 S.D. 62, ¶ 19, 836 N.W.2d 623, 629 n. 5 ("The complaint and Edna's answers were sufficient under notice pleading to permit claims of negligence beyond negligent design").

The defendants' further suggestion that East Side Lutheran did not specify or delineate the various different ways in which the contract was breached in its argument before the circuit court is both surprising and confusing. As a litigation tactic, NEXT and the other defendants have consistently referred to each of the various alleged breaches in the aggregate, as a single injury, so as to try to persuade the circuit court (and now this Court) to do the same. But East Side Lutheran has never gone along with NEXT's simplistic framing of the evidence in that way.

First, in its response to NEXT's statement of undisputed material facts, East Side Lutheran specifically averred, with citation to evidence in the record, that it did not have notice of several independent structural deficiencies, many of which could

not possibly be related to water intrusion, and argued that it did not have notice of these independent violations until March of 2010:

> It was not until March 2010 when American Technical Services performed its preliminary inspection of the premises that East Side became aware of the numerous construction deficiencies present at the church. "For years, for almost six years, [East Side] thought they had a safe, nice building..." (Kunstle Affidavit, Ex. N, Deposition of Michael J. Ollerich, 06/28/12, p. 81, line 2-25). According to the Engineering Evaluations performed by American Technical Services, numerous construction deficiencies were found during their March 2010 inspection. One such deficiency was a code violation relating to the snow drift load for flat roof areas. (Kunstle Affidavit, Ex. O, ATS Report #2, 03/12/2010, p. 2; and Kunstle Affidavit, Ex. N, p. 12, line 18 – p. 13, line 10, and p. 16, line 10-25). Additionally, the flat roof areas had internal roof drains with no over flow protection as required by the International Building Code. (Kunstle Affidavit, Ex. O; and Ex. N, p. 18, line 5-25). Joists were found to not have the capacity to meet the code required load conditions and ledger attachments were inadequate in the east and west entry. (Kunstle Affidavit, Ex. O). Both the ventilation and the insulation were wrong. (Kunstle Affidavit, Ex. N, p. 27, line 12 – p. 28, line 23). Roof trusses were not braced according to code which was a construction error. (Kunstle Affidavit, Ex. P, ATS Report #4, 03/30/10, p. 4; Ex. N, p. 31, line 22 – p. 32, line 11; Ex. Q, Photograph #6). Roof trusses required X bracing at 20' on center each way; however, no bracing was present. (Kunstle Affidavit, Ex. P, p. 4; Ex. Q, p. 3; Ex. Q, Photograph #6). The east wing east wall required bracing, but upon inspect did not have X braces or blocking. (Kunstle Affidavit, Ex. P, Photograph #8). A serious deficiency was found in the west wing-west wall due to the lack of lateral bracing to the wall at the top and bottom chord of the trusses. (Kunstle Affidavit, Ex. Q, ATS Report #5, 03/18/10, p. 5). As a result of these structural deficiencies which were previously unknown to East Side, Michael Ollerich informed East Side that if wind speed exceeds 50 mph, the west wing should be closed and the building should be cleared. (Kunstle Affidavit, Ex. Q; and Ex. N, p. 40, line 3-14). Further, at the common wall between the east wing/Narthex and west wing/Narthex a gap was found at the top of the wall where the wall terminates and the roof begins. (Kunstle Affidavit, Exhibit R, ATS Report #6, 04/13/10, p. 2) (See Exhibit R, Photograph #4). The gap was approximately 1 ¼" in height and running the length of the Narthex (40 feet). (Kunstle Affidavit, Exhibit R, p. 2 and Photograph #4). This gap allowed the heated air inside the narthex to go directly out into the roof

truss and out the roof. (Kunstle Affidavit, Exhibit N, p. 67, line 13-20). When trying to heat the narthex, this condition would be similar to having two windows open at the top and letting out the air. (Kunstle Affidavit, Exhibit N, p. 68, line 3-6).

(R. 589-90) (App. 13-14). In addition, East Side Lutheran averred the following:

Other construction deficiencies included, in part, flashing details that were not sufficient and underlayments, felts, ice shields, and water shields that were not installed to code. (Kunstle Affidavit, Ex. S, Deposition of Arlan Van Voorst, 06/29/12, p. 42, line 6-11). Other deficiencies in the plans were related to the lack of surface drainage (Kunstle Affidavit, Ex. S, p. 49, line 7-19) and ventilation installed not according to the architectural plans (Kunstle Affidavit, Ex. S, p. 50, line 15 – p. 51, line 11).

In addition to construction deficiencies, it was not until March 2010 that East Side was made aware of defects in the actual design of the building. (Kunstle Affidavit, Ex. N, p. 47, line 2-24). Design errors included, in part, the design of the east and west wing which allowed snow to blow into the flat roof areas. (Kunstle Affidavit, Ex. N, p. 47, line2-7). An additional design error was the way the drainage around the building was designed. (Kunstle Affidavit, Ex. N, p. 47, line 7-8). Also, East Side was not made aware of the negligent supervision on the part of Defendant Next until mid-2010. (Kunstle Affidavit, Ex. S, p. 65, line 3-4).

(R. 589-90) (App. 13-14).

The same was true at the summary judgment hearing. Some of the violations, such as the lack of an adequate roof membrane and water shields, may well have been signaled by water leaks. But while admitting that it had knowledge of water intrusion early on, East Side Lutheran specifically argued to Judge Tiede that it did not have actual or constructive notice of many of the *non-water-related* structural deficiencies at the summary judgment hearing:

> It is East Side's position that Next [sic: East Side] first had notice of the structural-related deficiencies in the spring of 2010 after receiving Mike Ollerich's reports. Again, we are going to get into those in a little more detail, Judge, but the position here if that we had knowledge of

> water intrusion in 2003 and 2004 – or East Side did. They had water coming in through the rough. They had some stained ceiling tiles. They had some issues in some walls and ceilings. They had no knowledge, absolutely nothing, related to the major structural deficiencies. They talked about gutters and downspouts and flashing. Those are not million-and-a-half-dollar problems, your Honor.

(HT 18). Although certainly not required to repeat what it had submitted into the record in its entirety, East Side's counsel specifically addressed most of these separate and independent breaches during the summary judgment hearing, arguing that they could not have accrued until East Side was placed on notice of them in 2010. This included specific reference to latent structural load-bearing deficiencies over the entrances (HT 20), concealed structural deficiencies related to the inadequate ledger attachment for the elevator in the east wing (HT 19), lack of required wall bracing in the west addition (HT 20), lack of X-bracing and hurricane clips in the roof trusses (HT 19, 20), air infiltration and structural stress in the narthex (HT 19), and lack of insulation and ventilation deficiencies (HT 19). As East Side's counsel explained at the hearing:

> Now in the *Huron Center vs. Henry Carlson* case, which we cited in our brief, the Supreme Court held that there was a factual dispute in that case as to when the plaintiff received notice of the cause of action. Now in *Huron* the Court found that the plaintiff did not have actual notice of defendant's breach until testing revealed the existence of architectural defects, okay. Similar to what we have in this case, okay? So we know, <u>but we did not know about those structural defects until the spring of 2010</u>. Now they're arguing that it occurred earlier. That would be did they have constructive knowledge of those claims as a result of the water intrusion issues they had way back in 2003 and 2004. <u>I submit, your Honor, that presents a genuine issue of material fact for the jury to decide as to when, if at all, East Side Lutheran was put on constructive notice of the claims involving the structural deficiencies</u>.

(HT 21-22) (emphasis supplied). A jury might well conclude that water leaks were sufficient to place East Side Lutheran on actual or constructive notice of some of the contract violations associated with the building, such as the failure to install an adequate roof membrane that would have prevented the leaks.

But, as argued by East Side in its pleadings and at the summary judgment hearing, neither water infiltration nor the various other "punch list" items discussed in the emails between the parties prior to July 19, 2004 had anything to do with many of the other separate structural deficiencies in the building that were first identified by ATS in 2010. Thus, although it is certainly true that the circuit court – in its six-paragraph oral ruling tossing the entire case – did not address the evidence and arguments presented by East Side Lutheran with any specificity, the defendants' suggestion that East Side is now making "an entirely new argument" on appeal involving "facts and arguments" that "were not presented below" is not a supportable characterization.[1]

[1] In an odd footnote, Brown also argues that "East Side failed to object to Brown Architecture's Statement of Material Facts filed in support of its motion for judgment." (Brown Brief at 6 n.2). This claim is apparently based upon the idea that East Side did not specifically use the term "object," but instead used the term "Response" and then set forth all of the facts in the record that controverted the applicable assertion. A reasonable reading of East Side's responses readily shows that it sufficiently controverted the disputed statements with citations to evidence in the record in accordance with SDCL 15-6-56(2) & (3). One might say that Brown's argument places form over substance, but the specific language in SDCL 15-6-56(c)(2) likewise speaks to an opposing party's "response" to assertions of undisputed fact, not "objections."

B. At a minimum, the factual question of when East Side Lutheran had notice of various separate and independent injuries to the building is disputed.

The reason that the defendants appear so invested in their waiver argument may be that a close examination of the relevant evidence submitted to the circuit court shows that their summary judgment motion should have been denied. That is because when one views the material facts in East Side Lutheran's favor, and grants it the benefit of any and all reasonable inferences to be drawn from those facts, it is clear that the issue of when East Side's various claims accrued is, as with most statute of limitations questions, properly committed to the jury in this case.

The parties do not dispute that *what* constitutes accrual of a cause of action – when it entails "statutory construction" – "presents an issue of law." *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 7, 581 N.W.2d 510, 513. As explained by East Side Lutheran in its opening brief, that question of law was answered in *Strassburg,* 1998 S.D. 72 at ¶ 10, 581 N.W.2d at 514, when this Court held that "[a] statute of limitations ordinarily begins to run when the plaintiff has actual notice of a cause of action or is charged with notice." (East Side's Brief at 26-27).[2]

[2] In another odd footnote, Brown accuses East Side Lutheran of including "only scant recognition and analysis of *Strassburg*" and having "opted to effectively ignore precedent," even while East Side's brief cites *Strassburg* as the most relevant case in its Statement of the Issues and includes a three-page discussion of its holding. (Brown Brief at 28 n. 8). Significantly, however, the circuit court never analyzed or cited *Strassburg* (or any other case) in its ruling.

The question of *when* that occurred, however, requires an examination of the facts and the drawing of reasonable inferences and conclusions from those facts. Thus, "[w]hile the question of *what* constitutes accrual is one of law, the question of *when* accrual occurred is one of fact generally reserved for the jury." *Huron Center, Inc. v. Henry Carlsen Co.*, 2002 S.D. 103, ¶ 11, 650 N.W.2d 544, 549. Where the facts are disputed or different inferences can reasonably be drawn from those facts, the summary judgment standard requires that they be resolved by the jury. That is what this Court held in *Strassburg*, when it *reversed* the trial court's grant of summary judgment based upon the statute of limitations because "whether plaintiff knew or should have known of his cause of action at the time the Bank's attorney admitted only a fractional setoff *is a question of fact*." *Id.* at ¶ 1, 581 N.W.2d at 512.[3] That is the law upon which East Side Lutheran has always relied.

On appeal, as a matter of strategy, the defendants have attempted to reframe East Side Lutheran's argument so as to try to knock it down. NEXT's brief asserts that "Here, the deposition testimony, emails and other documentation clearly establish when East Side became aware of structural deficiencies," lumping all of its contract violations together as one, and concludes that "[t]hus, there is no factual dispute as to when East Side's breach of contract claim accrued." According to NEXT, "[s]imply, it is enough that East Side was aware of injury to it's [sic] building

[3] *See also Huron Center*, 2002 S.D. 103, ¶ 14, 650 N.W.2d at 548 (same result); *Salem School Dist. 43-3 v. Puetz Construction, Inc.*, 353 N.W.2d 51, 53 (S.D. 1984) (same); *Robinson v. Ewalt*, 2012 S.D. 1, ¶ 7, 808 N.W.2d 123, 125 (same); *Wissink v. Van De Stroet*, 1999 S.D. 92, ¶ 15, 598 N.W.2d 213, 216 (same).

– it need not be aware of the exact underlying structural defect for the cause of action to accrue." (NEXT Brief at 22). But is that really true under South Dakota law, that if *any* injury to a building is known by the plaintiff, the statute of limitations begins to run for every conceivable breach of contract or code violation, even if the known injury does not have *anything* to do with a particular structural defect that is later discovered? Does knowledge of a crack in a floor commence the statute of limitations for an unrelated claim related to holes in the roof? Does knowledge of a water dripping from the ceiling commence the statute of limitations for an unrelated claim related to code violations for a lack of adequate bracing in the walls or the weight-bearing load of an elevator?

Brown Architecture mischaracterizes East Side Lutheran's assignment of error in the same fashion, as "arguing, for the first time, that because it did not ascertain the *extent* of its eight recently identified categories of damages until 2010, its causes of action had not accrued." (Brown Brief at 18) (emphasis supplied). Really, though, that is just about the opposite of what East Side has argued. Contrary to that characterization, East Side has contended that different breaches were committed by NEXT or its subcontractors – different code violations, different construction errors, different structural deficiencies – and that, viewing the facts in its favor, the early issues in 2003 and the first half of 2004 involving water leaks, bats, and ice damming, did not place it on notice of many of the major construction deficiencies in the building that are completely unrelated to those symptoms.

And so while further damage resulting from the *same* code violation or breach does not give rise to a new or separate cause of action, *different* acts constituting breaches of contract or negligence resulting in separate or different damages surely do give rise to separately accrued claims. *See, e.g., Johnston v. Centennial Log Homes & Furnishings*, 305 P.3d 781, 789-90 (Mont. 2013).

Based on the evidence in the record, the questions of accrual are disputed and thus committed to the jury. Construction of the addition to East Side Lutheran Church began in August of 2003. The record reveals that in the ensuing eleven months (before July 19, 2004 or six years before the complaint in this action was served), East Side Lutheran had notice – at most – of some water leaks, "bats," "ice dams," "drainage issues," some hailstones in the narthex, chipped concrete in the sidewalks, exposed plywood in the north corners, and some loose, "puckering up" shingles. (R. 255-59) (App. 5-9). Most which were considered to be small "punch list" items by the parties at the time.

Whether these occurrences were sufficient to provide notice to East Side Lutheran that it should file a lawsuit because there might also be latent structural load-bearing deficiencies over the entrances – that "the roof was built to hold only one fourth of the weight that the code required it should be able to hold" – as ATS first determined in 2010, is, at a minimum, a disputed question of fact. (R. 289).

The same is true for concealed structural deficiencies related to the ledgers supporting the elevator in the east wing (R. 520, 522-25, 552, 556) and the lack of

code-required bracing in the west addition wall, creating a hazard that it could blow down in winds exceeding 50 miles per hour. (R. 311, 497-98, 503-05, 554).

And for the lack of X-bracing and hurricane clips in the roof trusses (R. 526, 505, 500, 556), air infiltration, heat loss, and structural stress in the narthex (R. 524, 527, 521, 506, 501, 500, 484), sprinkler system parts that were never installed (R. 323, 317), insulation and ventilation deficiencies (R. 525, 526, 282, 317, 517, 518, 505, 499, 475), and drainage issues related to surface area design flaws (R. 286-87, 320-21).

On appeal, both NEXT and Brown have cited to the Eighth Circuit's decision in *Pamida, Inc. v. Christenson Building Corp.*, 285 F.3d 701 (8th Cir. 2002) (applying Minnesota law). But that case does not help their cause. In *Pamida*, there was only one alleged breach or violation in question: "the interior fill contained black dirt and sod, which can decompose and cause settling." *Id.* at 703. Affirming the district court, the Eighth Circuit held that significant cracking and settling in the floor in 1991, and then again in 1996, was sufficient to place Pamida on notice of the claim, because the cracking and settling in the floors was a clear manifestation of the violating conduct for which the claim was eventually brought: "At that point, Pamida has discovered injuries to the floor slab spanning virtually the entire store area. Though greater damage materialized in 1997 and 1998, the two-year limitations period in § 541.051, subd. 1(a), 'does not await a leisurely discovery of the full details of the injury.'" *Id.* at 705 (citation omitted).

That is far different from the present case. At a minimum, the eight categories of code violations identified above are of a separate and distinct nature and not

related to water leaks, bats, ice in the gutters, or the like. It was not until 2010 that East Side discovered these different violations resulting in different injuries that had not manifested themselves, in any way, before that time. Viewing the facts in the light most favorable to East Side Lutheran and granting it the benefit of all reasonable inferences, the circuit court erred in granting summary judgment on East Side Lutheran's entire case without any discussion or differentiation between its separate claims. Thus, the present case is much more similar to the Montana Supreme Court's recent decision admonishing: "We disagree with Centennial that the case simply raises dispute about whether the extent of the plaintiffs' damages was known," but rather it agreed "with the Johnstons that factual questions arise in determining the extent to which the problems discovered by 2005 are *related to* the issues discovered between 2008 and 2010." *Johnston*, 305 P.3d at 789-90.[4]

In their briefs, the defendants also seize upon an isolated sentence plucked from East Side's response to NEXT's statement of undisputed facts as being a kind of "smoking gun" that means they should prevail as a matter of law. (NEXT Brief at

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[4] *See also Harrison v. City of Sanford*, 627 S.E.2d 672, 676-77 (N.C. Ct. App. 2006) (distinguishing *Pembee*, which involved only "one single injury, leaks in the roof, which was only further exacerbated by entrapment of the moisture from the leaks in the roof," from situations comprised of more than one injury "of a separate and distinct nature," and holding that the statute of limitations did not bar plaintiff's claims); *Target Corp. v. Greenberg Farrow Architecture, Inc.*, 2012 WL 1963362 * 8 (D.Minn. May 31, 2012) (applying Minnesota law) ("Because the precast panel connection failures are separate and distinct from any earlier-reported damages to the parking deck, the statute of limitations did not begin running until Target became aware of the connection failures…").

23; Brown Brief at 25). The statement was made in response to NEXT's grammatically incorrect assertion in paragraphs eight and nine of its statement that:

> 8. The problems included ice dams, water penetration and drainage issues.
>
> 9. According to East Side, these numerous structural deficiencies which resulted in water penetration into the church.

(R. 257) (App. 7) (citations omitted). In response to that non-sequitur, East Side stated as follows: "Response – incorrect statement of the record. Ice dams, water penetration, and drainage issues experienced at East Side were the result or after effects of the structural deficiencies; they are not themselves the defect. The structural deficiencies that form the basis of east Side's claim for damages are those identified by Michael J. Ollerich of American Technical Services 'ATS' in his reports from March 2010." (R. 589) (App. 14).

The defendants ask this Court to treat the first sentence as constituting an admission or "acknowledgement" as a matter of law that East Side was on prior notice of all of the structural deficiencies first discovered by ATS in 2010. That is not a reasonable reading of the response. Rather, it is clear that East Side was simply pointing out that ice dams, water penetration, and drainage issues were a symptom of some of the structural deficiencies, rather than constituting the structural deficiencies themselves. That sentence cannot be reasonably extrapolated to mean that East Side was acknowledging as a matter of law that all of the serious code violations and hidden structural deficiencies in the building first identified by ATS in 2010 – many of which had nothing to do with water penetration, ice dams, or drainage – were

signaled by the presence of dripping water, bats in the belfry, or ice in the gutters in 2003-04. That is a question for the jury.

CONCLUSION

"Because the point at which a period of limitations begins to run must be decided from the facts of each case," this Court cautions that "statute of limitations questions are normally left for a jury." *Strassburg*, 1998 S.D. 72, ¶ 7, 581 N.W.2d at 513. Here, the disputed facts and competing inferences raised demonstrate that these statute of limitations questions should be properly resolved by the trier of fact.

WHEREFORE, Appellant East Side Lutheran Church of Sioux Falls respectfully requests that this Honorable Court reverse the grant of summary judgment entered below and remand this case for further proceedings.

Dated this 18th day of February, 2014.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 3,826 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

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