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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LTL ACRES LIMITED PARTNERSHIP, Plaintiffs Below, Appellant, v. BUTLER MANUFACTURING COMPANY, a Delaware corporation, and DRYVIT SYSTEMS, INC., a Rhode Island corporation, Defendants Below, Appellees.	)	C.A. No. 468, 2015 Appeal from the July 30, 2015 Decision of the Superior Court in and for Sussex County in C.A. NO: S13C-07-025 ESB

APPELLANT'S SECOND AMENDED OPENING BRIEF

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II. NATURE OF PROCEEDINGS

On July 31, 2015 the Superior Court of Delaware in and for Sussex County rendered its decision on (a) Defendant Butler's Motions for Summary Judgment on the Statutes of Repose and Limitations; and (b) Defendant Dryvit's Motion for Summary Judgment on the Statute of Limitations.

On August 28, 2015, the Plaintiff Below/Appellant, LTL Acres Limited Partnership (also referred to herein and below as "Janosik") filed a Notice of Appeal. On the same day, the Court established the briefing schedule requiring the Appellant's opening brief to be filed on or before October 12, 2015.

This is the Appellant's Opening Brief in support of its Motion for Reconsideration of the July 31, 2015 decision (hereinafter the "**Opinion**").

III. SUMMARY OF ARGUMENT

1. The Trial Court Committed Reversible Error on Pages 5 to 10 of the Opinion, When, In The Face Of Contested Material Facts, It Granted Butler Summary Judgment Pursuant To §8127 of The Builder's Statute.

2. On Pages 12 to 14 of the Opinion, The Trial Court Committed A Reversible Error of Law By Concluding That Dryvit's Warranty Was A "Repair Or Replacement" Pursuant To 6 DEL. C. § 2-725.

3. The Trial Court Committed Reversible Error When It Held on Pages 12 to 14 of the Opinion, As A Factual Matter, That Dryvit's Warranty Is A "Repair or replace" Warranty.

4. The Trial Court Committed A Reversible Error as reflected on Pages 10 to 12 of the Opinion When, In The Face Of Contested Material Facts, It Denied that Equitable Estoppel was Not Supported By the Facts.

IV. STATEMENT OF FACTS

This litigation involves the Johnny Janosik World of Furniture building (hereafter referred to as the "Building" or "Janosik Building") located in Laurel, Delaware. LTL Acres Limited Partnership, the plaintiff below/appellant, owns the property and Building. The complaint seeks a jury trial and asserts the following claims as indicated:

Butler	Dryvit
Breach of Express Warranty	Breach of Warranty
Breach of Warranty/Contract	Breach of Warranty/Contract
Breach of Implied Warranty of Merchantability	
Breach of Warranty for a Particular Purpose	
Negligence	

(**A:335-354**). The following tolling doctrines were pled in the complaint: Waiver, Inherently Unknowable Injury, Estoppel (Repair Doctrine), Fraudulent Concealment and Continuing Breach of Warranty Obligations. *Id.*

Constructing the Janosik Building

The Janosik Building is a two-story structure housing Janosik's retail and management offices. The first floor serves as a retail outlet. The second floor is considerably smaller and straddles the apex of the first floor roof. The Building roof and exterior walls were constructed using Butler parts. Other elements essential to the building's infrastructure, function and operation were supplied by

others. In rough numbers, Butler supplied *at least* 280,000 individual parts.[1]

Merit Builders (hereafter "Merit") used those 280,000 bits and pieces to erect the Building. Merit's contract price for that construction was $978,109.00. (**A:226-231**). After Merit finished construction of the building shell, Advanced Wall Systems applied a Dryvit product to the Building's exterior walls. The Dryvit product served two purposes: First, it covered, protected and sealed the Butler walls from the exterior environment, *i.e*., it blocked water, sunlight, etc. Second, it provided the Building's most prominent aesthetic feature – the exterior finish.

The Butler Wall System

The Butler wall product used in the Building was marketed as both R-Steel and Koreteck. It comes with a one-year warranty that begins running when the product is shipped. Butler started shipments in March 2004. (**A:356)**
The product is a patented wall system offering low cost construction costs by relying on pre-engineered components to form an exterior wall system. Consistent with the Koreteck patent,[2] the design and system components do not change from one building to the next. *Id*. Rather each building's unique geometry and design

[1] (**A:151-76***)*. The number of parts cited herein is the sum of parts reflected on the Engineering Manifests. Those Manifests reflect parts shipped to the project. *Lightfoot* at p. 101/2-10. It appears other shipments were made; however, those manifests are unavailable.

[2]The R-Steel/Koreteck system was licensed by Butler from Acsys, Inc. *See Bryan Lightfoot Deposition* (**A: 6/line 8 -7/line 1**). Attached hereto as **Exhibit 1**. Acsys, in turn, held a patent on the Koreteck system. (**A:7/line 8–22**). *See also* (**A:49)**. The Acsys patent is attached hereto as **Exhibit 3 (A:50-77)**.

elements drive how many and where the system support, attachments and reinforcement components are placed.[3]

According to Butler's marketing material and witnesses, every Koreteck system relied upon the following standard design characteristics:

A. 20-gauge rolled steel panel.
B. Multiple, symmetrical, lengthwise corrugation.[4]
C. 18 feet long, or cut to length as needed.
D. Panels could be stacked for heights greater than 18 feet.
E. Panels 4 feet wide, or cut to width as needed.
F. Hollow core panels covered with Perform Guard EPS[5] insulating foam in 6 or 8-inch thicknesses.
G. The steel panels served as a substrate for the EPS foam.
H. The EPS foam was attached to the steel, front-to-back, by way of holes in the panel.
I. The insulated panels are installed at bottom on a track system.

See **Exhibits 2, 4, and 5.**

From 2004 to 2006 - the time corresponding to the start and finish of the Building - the Koreteck design characteristics never changed. *Lightfoot*, at (**A: 8/line 7 - 11/line 7**); *see also id* at (**A:16/lines1-4**)[6]; *see also* (**A:21/line 6 to 22/line 8**)(relating to steel within the panel); (**A:19A/lines 7-16**); (relating to where the wall is attached to the floor/foundation); (**A:23/lines 2-16**) (stack joint

[3] *See Bryan Lightfoot Deposition* at (**A: 46/line 11-22**).

[4] *See* **Exhibit 5** at BLUE_00736 for a schematic of the standard panel corrugations.

[5] "EPS" is an acronym for "expanded polystyrene" foam.

[6] The quoted deposition testimony refers to a schematic drawing that appears as page 4 (**A:52**) of one of Butler's marketing brochures. That brochure appears here as **Exhibit 2**.

components); (**A:27/lines 11-21**) and (**A:29/line 24 –A:30/line 24)** (relating to building corner components); (**A:31/lines 15-22**) (relating to stud reinforcing components).[7]

What varies from one building to the next is nothing more than the number and placement of the Koreteck component parts. *Id*. at (**A:16/line 7 to A:20/line 2**). The physical characteristics of the Koreteck components, however, remain constant. *Id*. According to Bryan Lightfoot, whose affidavit supported Butler's summary judgment motion, the only characteristic distinguishing one Koreteck building from another is where the components are placed, how many of them are placed, and how they are attached. *Id*. at (**A:46/lines11-22**).

Whayland's Role Constructing the Building

Janosik contracted with Whayland Company, Inc. to serve as the construction manager on the Building project. (**A:35**)**.** In that capacity, Whayland was tasked with overseeing the construction of the Building. *Id*.

In addition, Whayland served as the "Butler Builder" on the project. A Butler Builder is a designation given qualified contractors. *Butler Builder's Agreement* at **Exhibit 36 (A:302-319**). Per Butler's procedure, end users cannot purchase the Koreteck product directly from Butler. Instead they must purchase it

[7] Finished Koreteck panels may contain reinforcing that can vary from one building to the next. That reinforcement is buried within the EPS.

through a Butler Builder. *Id*.

Problems with the Building

The Janosik store opened to the public on or about October 27, 2006. *See Deposition of Frank Gerardi* at (**A:277/lines 15-22**). The Building is plagued with two distinct problems:

1. *Water Infiltration*: The Building leaked water only intermittently. Those leaks occurred usually, but not always, during heavy, wind-driven rain events. *Deposition of Robert Wheatley* at (**A:105/lines1-12**).[8] Despite efforts to reproduce the leaks, the source of the leaking was undetermined until March 2012

2. *EPS Delamination/Separation*. In February 2012, several areas of the Building exterior wall appeared to be buckling. *Exhibit 7*. Upon investigation in March 2012, it was discovered the Koreteck EPS had delaminated, or separated from the steel core.

Dealing with the Water Infiltration

Since completing the building, Whayland made at least 40 visits to the Janosik Building - all in an attempt to address the water infiltration. *Deposition of Robert Wheatley* at (**A:113/lines 6-10**). On many occasions, representatives of Butler, Dryvit, Merit and others accompanied Whayland. *Id* at (A:115/lines 3-20) (discussing his affidavit, appearing herein as **Exhibit 10**).[9] During that time windows were replaced, doors were replaced, and caulking was re-applied. Nothing, however, stopped the water infiltration. (**A:110/lines14-24**).

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[8] *See also Wheatley* at (**A:106/10 to 107/line17**).

[9] Butler vests the Butler Builder with the responsibility of dealing with warranty claims. **(A:182)**; *see also Lightfoot* at (**A:25/line 6 to 26/line18**).

The Delamination Appears

On February 8, 2012, Whayland emailed Mr. Mansour telling him "several areas of the Koreteck panels on the lower part of the building (sic) the foam appears to be delaminating (or shrinking)." **(A:113/lines 11-17)**. Two weeks later Mr. Mansour forwarded that email to Mr. Lightfoot and others. (**A:225**). Mr. Lightfoot's affidavit and deposition confirm that Whayland's February 8 email was Butler's first awareness of the delamination defect. (**A:331/at ¶ 19**) and *Lightfoot* at (**A:47/lines 9-24**). At Whayland's deposition, Robert Wheatley was asked about delamination. He confirmed the delamination as revealed by Wiss Janney was new to him, adding, "I don't remember anyone saying that the [foam was] coming apart on the inside. There was no way to know that until you open [the wall]." *Wheatley* at (**A:114/lines 2-9**).

No One Understands the Water Infiltration

Over the course of several years Butler sent several groups of engineers and others to investigate and evaluate the cause of the water infiltration. Despite that, Butler never established a causal link to explain the water leaks.[10]

In June 2011, upon Butler's recommendation, conveyed by Whayland,

[10] *Deposition of Hazem Mansour* (hereafter "Mansour") at (**A:130/lines 8-12 and, 131/lines 5-8, and A:132/line 24 to A:133/line 9**). Mr. Mansour testified there were at least three sets of engineers that visited the Building. Those visits occurred in 2006, 2009 and 2011. Butler's documents, however, suggest that a fourth visit occurred. (*A:237*).

Janosik retained Roofing Resources[11] to investigate, replicate[12] and repair the problem." *See* **Exhibit 5** at (**A:86 and 98**). Roofing Resources noted cracks in the Dryvit surface but reached no definitive conclusion as to the leak causes. (**A:98**).

Following a series of communications between Whayland and Butler, where litigation was threatened, Butler agreed to send another engineer to evaluate the Building. (**A:333-334**). On December 1, 2011, Butler sent their engineer, Bryan Lightfoot, to ascertain the source of the water leaks. His investigation focused around the second floor wall and first floor transition area. *Id.* In a December 16, 2011 report, Mr. Lightfoot outlined his findings. (**A:178-180**). In a nutshell, there was no evidence of Koreteck panel failure in manufacturing or installation.[13] *Id.*

Within weeks of his report Mr. Lightfoot emailed several Butler employees. suggesting possible causes, concerns and repairs to address the water leaks. *See* **Exhibits 8, 9** and **11**. Two things are remarkable about those emails. First, none of the potential causes identified by Mr. Lightfoot are reflected in his report to Whayland. Second, none of it was ever conveyed to Janosik. Why? Hazem Mansour explained:

Q. So on December 1st three Butler representatives go out to the

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[11] (**A:233**).

[12] *Wheatley* at (**A:105/lines 6-12**). The testimony is unclear. Roofing Resources tried to replicate leaks.

[13] This finding was important as it effectively eliminated Merit Builder's workmanship as a cause of the leaking.

Janosik site. You do some inspections, some evaluation and a report comes out of that process; correct?

A. Yes.

Q. There are two recommendations that we have seen, one of which is to put butterfly flashing up or butterfly patches up around the openings and the other is to deal with the parallel flashing; correct?

A. Yes.

Q. Neither one of those suggestions was ever put into place, it was never done, was it, to your knowledge?

A. Because we are not 100 percent sure that this will fix the issue.

Q. What is your reluctance? When you say you are not 100 percent sure what do you mean?

A. That we want to know exactly what is causing this problem to fix it, we don't want to put a Band-Aid.

Q. Okay. So at this point, December of 2011, after the site visit, you are still not sure what is causing the leaking; is that correct?

A. Yes.

Mansour at pp. (**A:137/line 24 to A:139/line 3**).

Finally an Explanation

Regrettably the water leaks persisted.[14] In March 2012, Janosik retained Wiss, Janney, Elstner Associates, Inc. (hereafter "Wiss Janney") to evaluate the Building.[15] Butler and Dryvit representatives were present for that testing. *Deposition of David Koehler* (hereafter "Koehler") at (**A:189/line13 to A:190/line 9**). Those testing revealed, for the first time, two distinct problems.

Following testing, Wiss Janney issued a report (hereafter "WJR"). Attached

[14] Windows were replaced, doors were replaced, and caulking was re-applied. Nothing, however, stopped the water infiltration. *Wheatley* at (**A:116/line12 to A:117/line 4**).

[15] Wiss Janney is an "interdisciplinary firm relying on engineers, architects, and materials scientists." *See* http://www.wje.com/about/index.php. (Last reviewed 10/10/15).

hereto as (**A:191-208**). Their May 15, 2012 report described those problems:

> 1. *Butler's Design*. Butler's design placed the bottom of second floor wall below the first floor roof. This created a "short-circuit" that allows water that is traveling within the second floor wall system to bypass the surface-applied roof-to-wall flashing system. This water then has a clear path to the finished interior space when it drains out of the unsealed bottom edge of the panel that rests on the exposed steel beam above the showroom." *WJR*. at (**A:197**).

In response to Wiss Janney's report, and only three months after their own investigation, Butler concedes that the "panels extending below the roof line were a short circuit for water entering the panels to reach the inside of the building." *Butler's Response to Wiss Janney Report* at (**A:210-215**).[16]

> 2. *Delamination*. Shrinkage of the EPS embedded in the R-Steel and Outsulation Plus. In effect, the R-Steel EPS had separated from the steel substrate. Wiss Janney opined that the separation compromised the exterior cladding surface, allowing water to infiltrate the Building. *WJR* at (**A:197**). In addition, Wiss Janney determined that localized cracks in Outsulation Plus also were contributing to the water infiltration. *Id*. at (**A:195-97**). The report went on to conclude that the "cladding deficiencies seem to be limited to the EPS shrinkage phenomenon and do not appear to be related to the installation of the panels themselves. *Id*. at (**A:196**).

Butler concedes the delamination issue is a defect. *Lightfoot* at (**A:40/line 3 to A:41/line 19**). A Butler engineer confirmed the EPS foam was broken, shifted upward, loose and easily removed. (**A:217-18**). Indeed, Mr. Mansour described Wiss Janney's findings as "bad." (**A:235**).

[16] As it turns out, the Janosik Building was the first time that the Koreteck wall system was matched up with Butler's roof product MR-24. (**A:221**).

ARGUMENT

1. The Trial Court Committed Reversible Error When, In The Face Of Contested Material Facts, It Granted Butler Summary Judgment Pursuant §8127 Of The Builder's Statute

A. Question Presented

Did the Trial Court err, on pages 5 to 10 of the Opinion, by granting Butler summary judgment in the face of genuine material fact issues?

B. Scope of Review

On appeal from a Trial Court's decision to grant summary judgment, the Court's scope of review is *de novo,* not deferential, as to both the facts and the law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del.1996) (*citing Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del.1994)); *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992). Appellate review of that decision implicates a determination of whether the record shows there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1061–62 (Del. 1988) (interpreting CH. CIV. R. 56(c)); *Bershad v. Curtiss–Wright Corp*., 535 A.2d 840, 844 (Del. 1987)

C. Merits of Argument

i. Furnished Construction (Factual)

The Trial Court concluded that Butler "furnished construction" as used in 10 DEL. C. § 8127. The court expressed this conclusion as follows:

> I conclude that Butler "furnished construction" because the products that it supplied were specifically manufactured by Butler in accordance with the design criteria and specifications for the Janosik Building submitted to Butler by Whayland. These products were, by and large, suitable for the Janosik Building and no other building. As such, this distinguishes the Butler products from the generic construction materials that are suitable for practically any building without being specifically manufactured for those buildings.

Opinion at 8-9. From this the Trial Court concluded that Butler was protected from Janosik's claim under §8127 because Janosik's claim was untimely. *Id.* at 9-10.

To reach this conclusion the Trial Court accepted factual assertions set out in two affidavits attached to Butler's summary judgment motion. **A: 320-325** (Affidavit of Hazem Mansour); **A: 326-331** (Affidavit of Bryan Lightfoot). Those affidavits recited that, without elaboration or explanation, Butler's parts were specially engineered solely for the Building. To be sure, it was Butler's assertion its parts were "specially engineered" or "specially fabricated" for the Building that anchored the Trial Court's reasoning and ultimate conclusion. *Id*. at 8-9.

Both affiants were deposed.[17] Their testimony made clear the Building was constructed using *stock* Butler parts. For example, during his deposition, Bryan Lightfoot, a Butler engineer, was asked to distinguish the standard Koreteck parts that appear in Butler's marketing material from parts used in the Janosik Building.

[17] Butler's other supporting affidavit was signed Hazem Mansour. In that affidavit, he describes the Koreteck design, load, building code, and specific parts. (**A:321-325**). He asserts, as did Mr. Lightfoot, that those parts were specially engineered. At his deposition, however, he repeatedly testified that he was completely unfamiliar with the Koreteck product.

He could not. (**A:15/lines 20-24**).

He went on to testify that the Koreteck parts are standard and what changes from one building to the next is the placement or number of those parts. (**A:16/line7 to A:20/line2**). His articulation of "specially engineered" has absolutely nothing to do with the actual design of the Koreteck parts. Rather, "specially engineered" in Mr. Lightfoot's view means a building meets the unique building code requirements for the specific location. (**A:12/line15 to A:14/line 23**). When asked to explain Butler's concept of specially engineered, Mr. Lightfoot responded:

> Each building has a specific location in the country. And those locations have jurisdictions that are responsible for ensuring their safe construction. And so each jurisdiction requires that each building be designed to a particular code. So you have to take the code into account.

Id. Mr. Lightfoot explained that in a geographic area where wind or snow load requirements are higher, Butler simply adds more of the standard support parts. Butler does not, however, specially engineer the Koreteck parts to meet those code requirements. Indeed, the thought that Butler would specially design each building cuts against the need to patent the Koreteck product. Ultimately, Mr. Lightfoot conceded the Koreteck parts, as reflected in Butler's marketing material, did not change from one building to the next. *Id.* at (**A:21 to A:22**).

At bottom, the Trial Court ignored material factual discrepancies, or

resolved those discrepancies in Butler's favor, or failed to view the facts and reasonable inferences in a light most favorable to Janosik. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996). No matter the reason, all amount to reversible error.

ii. Furnished Construction (Legal)

The Trial Court concluded that Butler "furnished construction" as that concept is expressed in 10 DEL. C. §8127. That conclusion is supported by the Trial Court's legal determination that Butler supplied specially manufactured products that were not "generic construction materials." *Opinion* at 9-10. The fundamental flaw underlying this conclusion is that it equates the act of "supplying specially engineered parts" with the statutorily required obligation to "furnish construction." In effect, the Trial Court provides a material supplier with repose protection even though §8127 was never intended to reach such suppliers.

The Trial Court decision effectively collapses the statutory obligation to "furnish" into the "construction" element. The result being that, for purposes of §8127, there is no need to construct.

1. The Evolution of "Furnish Construction" under § 8127

Section 8127 provides protection to parties that furnish construction. Construction is defined as:

> Construction" shall include construction, erection, building, alteration, reconstruction and destruction of improvements to real property.

Id. at §8127(a)(2).

In *Becker v. Hamada, Inc*. the court confirmed that §8127 as "intended to limit the duration of liability for construction professionals." *Becker v. Hamada, Inc*., 455 A.2d 353, 355 (Del. 1982). There the court declined to extend §8127 to a roofing material supplier because the supplier did not furnish construction. *Id.* at 356 (1982). The *Becker* court concluded that the roofing supplier simply did "not engage or furnish 'construction.'" *Id. Becker* is notable for three reasons. First, it confirms that Delaware's Builder's Statute does not protect materialmen. *Id*. Second, for reasons that are neither clear nor explained, the *Becker* court chose to rely upon a dictionary definition of "construction" even though §8127 defines construction. *Id*.[18] The court noted:

> Celotex supplied Hamada, Inc. with construction materials but did not engage in or furnish "construction", which is defined as the act of building; erection; act of devising and forming; fabrication; composition. Webster's *supra* at 572

Id. Third, *Becker* rejected the contention that a construction material supplier was protected by the Builder's Statute. *Id.* As to this point, the *Becker* court cited *Howell v. Burk,* 568 P.2d 214 (NM Ct. App. 1977) when it rejected the suggestion that a supplier should be protected "based upon a determination as to whether the product was necessary for the improvement to function as intended." *Id*. at 355. Notably, *Howell* likewise rejected a supplier's argument that it was covered under

[18] According to legislative history, §8127 is unchanged since enactment. 57 DEL. LAWS, c. 568, § 1. This makes *Becker's* recitation of a dictionary definition of "construction" all the more puzzling.

New Mexico's statute. It did so because the "statutory language requires an activity analysis," *i.e.,* the supplier had to either design or install. That lack of actual construction by the supplier was echoed in *Becker* when the court summarily denied the supplier's position. *Id.* at 356. *See also, Cheswold Volunteer Fire Co. v. Lambertson Construction Company*, 462 A.2d 416, 420 (Del. Super. 1983)(citing *Becker* and, *in dicta*, noting the Builder's Statute "does not protect suppliers who do not perform or furnish construction"), *aff'd* 489 A.2d 413 (1985).

Shortly after *Becker*, the Superior Court addressed construction under §8127. In *Hiab Cranes and Loaders, Inc. v. Service Unlimited, Inc.*, the court, citing *Becker*, granted repose protection to a manufacturer because it "*fabricated* the furnaces to be incorporated into the building then under construction, as per the mechanical specifications of [a co-defendant]. *Hiab Cranes and Loaders, Inc. v. Service Unlimited, Inc.,* 1983 WL 875126 at 2-3 (Del. Super.)(emphasis original). In footnote 11, *Hiab* explains that, contrary to *Becker,* "the materialman in *Becker* did not participate in fabrication or composition but merely delivered raw materials used by its co-defendant" *Id*. at 3, n 11. Rather, the *Hiab* manufacturer was protected by §8127 because it *fabricated* a finished product and "[contributed] to the construction vis-a-vis the definition of furnishing construction under the statute." *Id*. Nothing in *Hiab* suggests the manufacturer ever stepped foot on the construction site or engaged in construction activity at the site. *See also, Porter v.*

Delmarva Power & Light Co.,1985 WL 1219231 (Del. Super.) *aff'd sub nom*, *City of Dover v. IT&T*, 514 A.2d 1086, 1089 (Del. 1986)(the *Porter* manufacturer never stepped foot on the construction site, let alone engaged in any construction activity there.)

From *Hiab* forward Delaware courts continued to extend §8127 to fabricators of finished product. *See, e.g.*, *Schermerhorn v. Anchor Electric. Co*., 1992 WL 301636 at 2 (Del. Super.)(denying protection because meter pan and receptacle not specially fabricated); *Standard Chlorine of Delaware v. Dover Steel*, 1988 WL 32044 at 1 (Del. Super.)(protecting a specially fabricated massive liquid storage tank); *Kirkwood Dodge v. Krapf*, 1989 WL 48639, at 3 (Del. Super.) (denying because a circuit breaker box was not fabricated to specifications).

From the outset, §8127 was enacted to "limit the duration of liability for construction professionals." Early case law emphasized the need to actually perform construction at the site – a requirement in harmony with legislative intent. That requirement was broadened to include those that fabricated to specifications. Despite that evolution, however, two facts are present in every case extending §8127 to manufactures: (1) the product was largely completed when the manufacturer delivered it to the construction site; and (2) the manufacturer fabricated the product to specifications provided by the owner or their agent.

In this instance, the Trial Court decision exenterates the statutory obligation

to furnish construction. It does so by extending §8127 to Butler - a manufacturer that neither delivered a completed product nor fabricated one to specification, *i.e.,* it dumped over 280,000 design patented, stock parts to the construction site, unassembled, providing a one year product warranty, that required an actual contractor to assemble and install. This is NOT what the legislature intended. At some point the act of furnishing construction must have a legally sufficient nexus to the construction site. Otherwise, any product, if it makes up enough of a completed building, satisfies the definition.[19]

iii. Improvement to Property (Legal)

Butler plunked down over 280,000 parts on the construction site. Without the construction efforts of Merit those parts, by themselves, are hardly an improvement to property. The statutory requirement to provide an improvement to property is implicitly limited to those parties that actually complete the improvement. Virtually every Delaware case addressing §8127's improvement to property requirement was considered with a product that, but for some mechanical connections, was complete. *Hiab, supra*, at 1-2; *Porter, supra,* at 3; *Standard Chlorine, supra*, at 3. Why is that important? Because as *Hiab* noted, common

[19] As an example, the following products meet the Trial Court's standard of furnishing construction: hand made brick to specification. https://www.glengery.com/images/brick/technicalinfo/profiles/GG_Handmade_Brick-Guide_Specification.pdf (last checked 10/2/15); custom windows. http://www.andersenwindows.com/product/custom-size-windows/ (last checked 10/2/15); or engineered wood beams http://www.buildgp.com/wood-i-beam-joists (last checked 10/2/15).

sense suggests "improvement" is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Hiab, supra* at 2 (*citing Pacific Indem. Co. v. Thompson–Yaeger, Inc.*, 260 N.W.2nd 548, 554 (Minn. 1977). An improvement to property is *not* a heaping pile of parts left for another to construct. Indeed, it is only an improvement to property, if at all, when and if those parts are assembled. Moreover, failing to so limit the definition opens the door to materialmen to argue that every specialty brick, block, window, *etc*., constitutes an improvement under §8127.

Finally, the Trial Court buttressed its conclusion by equating its own §8127's "furnish construction" analysis to an "improvement to property." *Opinion* at 10. This misses the mark. The improvement to property requirement stands on its own and is the legislatively defined means of segregating those that furnish construction from those that furnish construction that makes the property more useful or valuable as distinguished from ordinary repairs. *Hiab, supra* at 3.

ARGUMENT

1. The Trial Court Committed Reversible Error of Law By Concluding That Dryvit's Warranty Was A "Repair Or Replacement" Pursuant To 6 DEL. C. § 2-725

A. Question Presented

Did the Trial Court err by concluding on pages 12 to 14 of the Opinion, as a matter of law, that Dryvit offered no more than a "repair or replacement" warranty under 6 DEL. C. § 2-725?

B. Standard of Review

Conclusions of law are reviewed de novo. *Mundy v. Devon*, 906 A.2d 750, 752 (Del. 2006); *General Motors Corp. v. New Castle County*, 701 A.2d 819, 822 (Del. 1997).

C. Merits of Argument

i. Repair of Replace Warranty (Legal)

The Building's exterior wall finish is covered with a Dryvit product. That wall: (1) covers, protects and seals Butler's product from exterior environmental conditions; and (2) it is the Building's most prominent aesthetic feature – the exterior finish. Dryvit warranted that product. That warranty provides:

> Dryvit Systems, Inc., hereinafter referred to as "DRYVIT" hereby warrants for a period of ten years from the date of substantial completion of the project that the Exterior Insulation and Finish System material manufactured and sold by Dryvit . . . shall be free from defects in the manufacture of the material and will not, as a result of such defects, when installed in accordance with the current

> published Dryvit Specifications, within said period of 10 years, under normal weather conditions and excluding unusual air pollution, lose their bond, peel, flake or chip, and further that the finish will be fade resistant, . . . and will be water resistant so long as the surface integrity is retained . . .

(**A:241**). The Dryvit remedies are described as follows:

> The sole responsibility and liability of Dryvit under this warranty shall be to provide labor and material necessary to repair or replace the Dryvit material described herein shown to be defective during the warranty period . . .

Id. The Trial Court reviewed Dryvit's warranty and concluded, without discussion or citation, that it was a "repair or replacement" warranty. From that conclusion the Trial Court held, apparently as a matter of law, that Janosik's warranty claims were limited to four years as set out in 6 DEL. C. § 2-725.

Section 2-725(2) provides:

> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.* (*emphasis added*)

The critical question here is whether Dryvit's warranty is a repair or replace or "future performance" warranty under §2-725(2). The difference between these two was described in *Pender v. Daimler Chrysler Corp*. as set out below:

> Essentially, a future performance warranty must "expressly provide some form of guarantee that the product will perform in the future as promised." Conversely, a repair or replacement warranty merely

> provides that "if a product fails or becomes defective, the seller will replace or repair" the product. Distinguishing between the two, a repair or replacement warranty "merely provides a remedy if the product becomes defective," while a future performance warranty "guarantees the performance of the product itself...."

Pender v. Daimler Chrysler Corp., 2004 WL 2191030 (Del. Super.)(citing *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261, 1266 (D. Del. 1983)). Later in *Jakotowicz v. Hyundai Motor America* the court restated the defining element of future performance warrantees noting that "[a] "future performance" warranty is different from a "repair or replace" warranty in that a "future performance" warranty "expressly provide[s] some form of guarantee that the product will perform in the future as promised." *Jakotowicz v. Hyundai Motor America*, Del. Super., C.A. No: 04C-05-298, Cooch, J. (Aug. 17, 2005) slip op 7 (also quoting *Ontario Hydro* at 1266). Hence, the critical defining element of a future performance warranty is that the seller expressly guarantees the product will perform in the future as promised.[20]

Boiled down to its essential elements, the Dryvit warranty expressly

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[20] Case law disagrees over what must be "expressly provided" in order to constitute a future performance warranty. *Pender, Jakotowicz* and *Ontario Hydro* all require explicit language set out in the warranty itself. That rigid approach was rejected in *Pack & Process, Inc. v. Celotex Corp.,* 503 A.2d 646, 654-55 (Del. Super. 1985) and *S & R Associates, L.P. v. Shell Oil Company*, 725 A.2d 431, 436 (Del. Super. 1998). *Pack & Process* and *S&R* take "a somewhat flexible view . . . provided there is a factual basis to believe a warranty was intended to live beyond the traditional four-year statute of limitations." *S&R* at 436.

The disagreement is inconsequential here as Dryvit's warranty meets the "explicit" standard set out in *Pender, Jakotowicz and Ontario Hydro.*

warrants, for 10 years, that the product shall be free from defects, and as a result shall not lose its bond, peel, flake or chip, and further that the finish will be fade resistant, . . . and will be water resistant so long as the surface integrity is retained. Dryvit's warranty explicitly and unequivocally satisfies the standard described in *Pender, Jakotowicz* and *Ontario Hydro.*

A case law review reveals the unmistakable substantive and qualitative nature of Dryvit's future performance warranty. In *Pender* and *Jakotowicz*, for example, both plaintiffs asserted that a warranty for a certain number of years/or miles, whichever occurred first, and an additional contract for additional years/or miles, whichever came first, amounted to a future performance warranty. *Pender, supra,* at 1. Both courts disagreed, noting the "warranties do not include performance assurances by Defendant or guarantees that repairs will be unnecessary." *Id*. at 4. Likewise in *Ontario Hydro*, a District of Delaware case, the court was presented with the following language:

> If at any time up to twelve (12) months after the date of Acceptance of the Equipment by the Engineer, any defect or deficiency should appear due to faulty workmanship, material or design, or if the Equipment or any part thereof fails to meet the requirements of the Contract, the Company shall restore the Equipment to satisfactory operating condition by making good every such defect, deficiency or failure without cost to the Commission.

Ontario Hydro, supra, at 1264. The court determined the warranty to be no more than a repair or replace. *Id*. at 1266.

1. Repair or Replace Language is not the end of the Analysis

The fact that Dryvit limits warranty remedies to repair or replace does not, of itself, preclude a finding that the warranty itself provides for future performance of the product. *See R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983) ("[w]e do not believe that the presence of language limiting the remedy to replacement of defective materials, by itself, is determinative of the exact nature of the warranties in question"); *see also Nebraska Popcorn v. Wing*, 602 N.W. 2d 18, 24 (Neb. Supr. 1999) ("a warranty to repair or replace, without more, is not an explicit warranty of future performance"). Courts rightfully note the difference between a warranty of a product's future performance and the limitation of remedy in the event of a breach of that warranty. *Shatterproof, supra*; *Joswick v. Chesapeake Mobile*, 765 A.2d 90, 94 (Md. App. 2001)("a commitment to repair or replace defective parts" does not "convert a warranty that does extend to future performance into one that does not do so"). Thus, the presence of repair and replace language will not foreclose a finding that a warranty extends to future performance. *Id*. *See also Standard Alliance Ind. v. Black Clawson Co*., 587 F.2d 813 (6th Cir. 1978), *cert. denied* 441 U.S. 923 (1979); *Executone v. IPC Communications*, 442 N.W.2d 755 (Mich. App 1989).

ARGUMENT

1. The Trial Court Committed Reversible Error When It Held, As A Factual Matter, That Dryvit's Warranty Is A "Repair or replace" Warranty

A. Question Presented

Did the Trial Court err on page 12 to 14 of the Opinion by relying or drawing on factual inferences against Janosik?

B. Standard of Review

This Court is "free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence." *Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's, London*, 656 A.2d 1094, 1099 (Del. 1995). Of course, the facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Bershad, supra*, at 844.

C. Merits of Argument

i. *Facts of Record Do Not Support the Trial Court's Conclusions*

The Trial Court's reasoning is fundamentally flawed in that it offers no more than a conclusory result. It is unclear, for example, what facts support its conclusions regarding Dryvit's warranty. It is also unclear how or why the Trial Court determined the warranty was not one for future performance. Instead, the Trial Court seemingly treats the entire warranty issue as one of law without

actually saying so. The fundamental problem, however, is that the Trial Court, of necessity, had to rely upon certain facts to reach any conclusion.

Under Delaware case law, determining whether a warranty is for future performance or not presents a mixed question of law and fact. *Pack & Process, supra,* at 652*; S&R, supra,* at 436*; Jakotowicz, supra,* at 9 ("There is *no evidence* that the Plaintiff and Defendant explicitly bargained for or intended that either warranty . . . was to by a "future performance" warranty. . . (emphasis added))"; *see also, Addison v. Emerson Electric Co.*, 1997 WL 129329, slip at 5 (D. Del.)("In viewing the facts in the light most favorable to plaintiffs . . ."); *see also, Gail Francis, Inc. v. Alaska Diesel Electric, Inc.,* 62 F.Supp.2d 511, 516 (D. Rhode Island 1999)(decided under Rhode Island law).

To the extent the Trial Court relied upon facts to support its decision, Janosik was entitled to the benefit of all reasonable inferences therefrom. *Health Solutions Network, LLC v. Grigorov*, 12 A.3d 1154, 2011 WL 443996, at *2 (Del.) (*quoting Deuley v. DynCorp Int'l, Inc*., 8 A.3d 1156, 1160 (Del. 2010)). Likewise, if material facts relied upon by the Trial Court were in dispute, then summary judgment was inappropriate. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (quoting SUPER. CT. CIV. R. 56(c)). The Opinion, however, answers none of these questions. Given the plain language of Dryvit's warranty, the only reasonable inference to draw is that it warranted future performance. To do otherwise

amounts to reversible error.

ii. *Money Damages Not Prohibited (Legal)*

The Trial Court noted Dryvit's warranty is limited to the repair and replacement of materials provided by Dryvit." *Opinion* at 14. As such, the court noted Janosik's request for money damages was inconsistent with the warranty. *Opinion* at 14. To the extent this consideration supports the Trial Court's decision, it likewise amounts to a reversible error. *Id.*

Janosik's claim is based upon allegations that Dryvit failed or otherwise refused to repair or replace the Building. As such, Janosik is permitted to pursue all breach of contract remedies available to it when, as here, the limited warranty remedy fails. *United States ex rel. Metal Bldg. Components, Inc. v. Angelini*, 2000 WL 1728287, at *4 (D. Del.); *see also S.F. Bay Area Rapid Transit v. GE Transp. Sys. Global Signaling LLC*, 2010 WL 2179769, at *6 (N.D. Cal.)(may "pursue all of the remedies available for breach of contract if its exclusive or limited remedy fails of its essential purpose," especially if "enforcement of the limited remedy would essentially leave plaintiff with no remedy at all").

ARGUMENT

1. **The Trial Court Committed Reversible Error When, In The Face Of Contested Material Facts, It Denied that Equitable Estoppel was Not Supported By the Facts**.

A. Question Presented

Did the Trial Court err when, relying upon contested material facts described on pages 10 to 12 of the Opinion, it concluded that Whayland was not Butler's agent and that Butler never promised to fix the leaks?

B. Scope of Review

A Trial Court's decision granting summary judgment is subject to *de novo* review. *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co*., 925 A.2d 1255, 1261 (Del. 2007). The Court is "free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence." *Hoechst Celanese, supra,* at 1099. Of course, the facts of record, including any reasonable inferences drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Bershad, supra*, at 844.

C. Merits of Argument

i. Whayland Had Butler's Apparent Authority on Warranty Matters

The Trial Court held that Whayland was not Butler's agent. *Opinion* at 11. As such, Whayland did not speak for Butler. *Id*. Hence, Whayland's statements to Janosik could not form the basis of an equitable estoppel claim because, absent

Whayland, Butler did little that Janosik could have detrimentally relied upon. *Id.*

That conclusion relies solely upon Butler's Builder Agreement. It declares that Whayland is an independent contractor. (**A:310**). While the Agreement surely says as much, the Trial Court failed to appreciate that Butler explicitly vested Whayland with authority to facilitate warranty claims with customers, including Janosik. Hence, Butler written policy and practice was to invest Whayland with warranty responsibility, *i.e.*, authority and responsibility to deal with customers in handling warranty claims. From Janosik's perspective, Whayland had Butler's apparent authority to address warranty claims. (**A:188/lines 9-19**)

Notwithstanding the Trial Court's conclusion, the record is replete with examples where Janosik asked Whayland for warranty help and Butler provided it. Indeed, in July 2006, when Whayland notified Butler there was water infiltration, Butler sent engineers. **(A:259-60)**. When Butler identified other potential water sources, Whayland addressed them. (**A:107/line 21 to A:108/line 21; A:111/line7-24**). When Whayland requested that Butler send engineers, they came. All the while, Butler told Whayland, "We want to help you with this. We want to get this resolved. We'll come down and take a look."[21] Whayland conveyed Butler's willingness to address the water problem and Butler's history to Janosik.[22]

[21] *Id.* at (**A:112/lines 21-22**).

[22] *Koehler* at (**A:186/line19 to A:187/line 3**).

Consistent with Whayland's experience, Butler worked with Janosik by sending least three sets of engineers, recommending Roofing Resources, attending Wiss Janney's investigation, frequent email communication, and a letter re-affirming their willingness to work on the problem[23] – all long after the leaks started.[24] As Janosik's witnesses testified they understood, because Whayland specifically told them so, that Butler "would continue to try to resolve the problem."[25]

Janosik relied upon Whayland as Butler's agent.[26] That reliance was reasonable because throughout the Building's construction, it was Whayland that consistently interfaced and acted at Butler's behest. Actions by a principal that give rise to a reasonable belief in a third party that the alleged agent is authorized to act on behalf of that principal thereby establish an apparent agency from which flow the same legal consequences as those which result from an actual agency. *Finnegan v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. 1976). "A principal is bound by an agent's apparent authority which he knowingly permits the agent to assume [or] which he holds the agent out as possessing." *Crumlish v. Price*, 266 A.2d 182, 183–84 (Del.1970); *Dweck v. Nasser*, 959 A.2d 29, 40 (Del. Ch.

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[23] *Letter from H Mansour to D. Koehler, July 24, 2012* appearing as (**A:279**).

[24] It's worth noting that Butler's warranty was, from the outset, an illusion. The one-year warranty began running when Butler shipped goods. The last shipment was on August 19, 2005 meaning that, the Butler warranty expired even before Janosik took occupancy. (**A:363 at ¶ 7**).

[25] *Koehler* at (**A:188/lines 18-19**).

[26] *Id.* at (**A:188/lines 16-19**)

2008)("apparent authority is such power as a principal holds his [a]gent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence."). Despite the record, the Trial Court gave Butler the benefit of the doubt by rejecting facts supporting Whayland's apparent authority.[27]

ii. Section 8127 is Subject to Tolling Under Equitable Estoppel

The Trial Court held that equitable estoppel cannot toll §8127. *Opinion* at 11. In other contexts, Delaware courts refused to toll the repose period. *Fountain v. Colonial Chevrolet, Co.*, 1988 WL 40019 (Del. Super.); *Scott v. Delaware Technical and Community College*, 1985 WL 22033, (Del. Ch.). While a statute of repose is fundamentally different than a statute of limitations, conduct supporting fraud, estoppel and similar acts cannot be encouraged by an absolute wall to redress. DEL. CONST. of 1897, art. I, § 9.

iii. The Trial Court Failed To Give Janosik The Benefit Of Reasonable Inferences That Butler Promised to Fix The Leaks

Pursuant to Butler's policy, the "Butler Builder" is responsible for Koreteck warranty claims.[28] Whayland was designated the Butler Builder. At the time, Whayland had 35 years of experience working with Butler.[29] Describing Butler's

[27] At a minimum, the Trial Court should have denied summary judgment as questions on apparent authority are factual and the province of the ultimate fact finder. *Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. 1978)(citing *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir. 1960)).

[28] **(A:182)**; *see also Lightfoot* at (**A:25/line 6 to A;26/line18**).

historical handling of problems, Robert Wheatley declared, "if there's an issue, [Butler will] jump in and resolve it.[30]

Indeed, in July 2006, when Whayland notified Butler of water infiltration, Butler sent engineers. (**A:259-60**). When Butler identified other potential water sources, Whayland addressed them.[31] When Whayland requested Butler send engineers, they came. All the while, Butler told Whayland, "We want to help you with this. We want to get this resolved. We'll come down and take a look."[32]

Whayland conveyed Butler's willingness to address the water problem and Butler's history to Janosik.[33] Consistent with Whayland's experience and Butler's own representations, Butler worked with Janosik by sending least three sets of engineers, recommending Roofing Resources, attending Wiss Janney's investigation, frequent email communications, and a letter re-affirming their willingness to work on the problem[34] – all long after the leaks started. Janosik relied upon Whayland as the conduit to Butler.[35] Janosik understood that Butler

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[29] *Wheatley* at (**A:104/lines 2-20**).

[30] *Id*. Robert Wheatley was Whayland's 30(b)(6) representative.

[31] *Id*. at (**A107/line 21 to A:108/line 21; A228/7; A:111/line 7**).

[32] *Id.* at (**A:112/lines 21-22**).

[33] *Koehler* at (**A:186/line19 to A:187/line 3**).

[34] *Letter from H Mansour to D. Koehler, July 24, 2012* appearing as (**A:279**).

[35] *Koehler* at (**A:188/lines11-13**).

"would continue to try to resolve the problem."[36]

The record reflects and/or supports the reasonable inference that, by their words and deeds, BOTH Whayland and Butler repeatedly conveyed to Janosik that the leaks would be repaired.

Having anointed Whayland as their warranty agent, having told Whayland they would address the leak problem, having confirmed Whayland's authority by their own conduct, having investigated without yielding useable results, and Janosik having reasonably relied upon Whayland's authority and representations, Butler cannot now hide behind the statute of limitations. The doctrine of equitable estoppel is properly invoked "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment."[37] To establish estoppel it must be shown that the party claiming estoppel lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of its reliance. *Id.*

[36] *Id*.

[37] *Wilson v. American Ins. Co.,* 209 A.2d 902, 903-04 (Del. 1965).

VI. CONCLUSION

The Appellant, LTL Acres Limited Partnership, respectfully requests that this Honorable Court reverse, in its entirety the July 30, 2015 judgment of the Trial Court.

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