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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 REPLY BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

The Appellant filed its Opening Brief on Appeal on October 12, 2015. Thereafter, on November 16, 2015, the Appellants filed their respective Reply Briefs on Appeal.

This represents Appellant's Reply Brief on Appeal.

The Appellant withdraws its argument, set out in its Opening Brief on Appeal on page 32, that 10 DEL. C. § 8127 may be tolled by equitable estoppel.

ARGUMENT

I. The Trial Court Improperly Concluded That Dryvit's Warranty Was A Repair Or Replacement Warranty

Dryvit's only argument, packaged different ways, is that the Trial Court correctly interpreted the warranty language. Despite that Dryvit does yeoman's work hiding from its own warranty language. Not once within its footnote-fattened response does Dryvit quote it, or compare against it, or word parse that warranty language. This omission is all the more remarkable considering the outcome here, as Dryvit concedes, turns entirely on that language.

While avoiding focus on that critical language, Dryvit instead churns case law verbiage to support a convenient conclusion: " . . . it is well settled that a warranty merely providing that goods will be repaired or replaced if a defect or failure is identified within a fixed time in the future does not constitute a warranty for future performance." *Dryvit's Answering Brief* at 11. The problem with this conclusion is simple – Dryvit turns a blind eye to its own performance guarantee in favor of its repair remedy.

To restate, Dryvit "***warrants*** for a period of 10 years . . . that the [product] . . . shall be free from manufacturing defects and will not . . . lose their bond, peel, flake or chip . . . [be] fade resistant . . . and be water resistant." (**AR: 14**).

Not a single case Dryvit cited considers the kind of warranty language

presented *sub judice*.[1] This is critical because Dryvit's warranty is qualitatively

[1] Remarkably, on page 12 of Dryvit's response, it makes the confused claim that the warranties in cases it and Janosik cite are "similar to the one here." They are not and Dryvit does nothing to support that assertion. As reflected below, none of the cases cited by Dryvit reflect warranty language that specifically and explicitly warrant future performance:

Case	Warranty Language
Addison v. Emerson Electric Co., 1997 WL 129327 (D. Del) at p. 4	"Plaintiffs cite to a catalog advertisement of the ladder which states that the ladder is designed "for a 300 lb. workload when set at the proper working pitch."
Jakotowicz v. Hyundai Motor America, Del. Super., C.A. No: 04C-05-298, Cooch, J. (Aug. 17, 2005) at pp 2-3.	"The Accent came with a five-year/60,000 mile express manufacturer's new vehicle limited warranty, which stated that Hyundai would "repair or replace[] . . . any component originally manufactured or installed by Hyundai Motor Corporation The car's powertrain had a ten-year/100,000 mile warranty, which also explicitly stated that the warranty was a "repair or replace" warranty that covered the car's engine, transmission."
Joswick v. Chesapeake Mobile Homes, Inc., 765 A.2d 90, 91 (Md App. 2001)	"Brigadier warranted the mobile home "when purchased new, to be free from substantial defects of material and workmanship under normal use and service for a period of twelve (12) months from the date of delivery to the first retail purchaser." The warranty expressly stated, however, that "[t]he exclusive remedy for any such defect is the Manufacturer's obligation to repair or replace, at its option without cost to the purchaser . . ."
Murray v. Am. Suzuki Motor Co., 2010 WL 323506 (Del. Super.) at p. 3.	"Defendant Suzuki, issued a 3-year/36,000-mile express limited warranty and a 7-year/100,000-mile powertrain warranty. Pursuant to this coverage, Suzuki agreed to repair or replace any defective parts or workmanship during the warranty periods."
Nebraska Popcorn, Inc. v. Wing, 602 N.W.2d 18, 21(Neb. 1999)	"Cardinal warranted that "it will repair or replace, at its option, any part of a Cardinal product which, in Cardinal's judgment, is defective in material or workmanship for a period of one (1) year from date of shipment." In addition to the standard one (1) year limited warranty, . . . Cardinal Scale warrants to the original purchaser that it will repair or replace, at its option, any load cell supplied with a motor truck scale which, in Cardinal's judgment, is defective in material or workmanship for a period of two (2) years from the date of original shipment."

different from the warranty language in those cases. Specifically, every case analyzes a combination of a repair or replacement language that survives for a set time period. In each case, the respective courts refused to treat the warranty as one for future performance despite the fact that language seemingly provided for extended protection.[2] The common thread in every one of those cases is that product performance was not warranted. Rather, those warranties offered no more than a remedy in the event of defect or failure. That is not true of Dryvit's warranty. Dryvit warrants that the product will be free from manufacturing defect and will not for 10-years lose certain performance qualities. This is the prototypical language defining a warranty for future performance.[3]

Ontario Hydro v. Zallea Systems, Inc., 569 F. Supp. 1261, 1264 (D. Del. 1983)	"If at any time up to twelve (12) months after the date of Acceptance . . . 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."
Pender v. Daimler Chrysler Corp., 2004 WL 2191030 (Del. Super.) at p. 3.	"A standard warranty providing that Defendant promised to cover the cost of parts and labor to repair components defective in material, workmanship or factory preparation for three years or 36,000 miles, whichever occurred first."
S&R Assoc., L.L. v. Shell Oil Co., 725 A.2d 431, 436 (Del. Super. 1998)	Shell did not provide any information stating polybutylene piping would last for a specific number of years. Although Shell did represent, via literature, that polybutylene pipe was freeze safe, corrosion resistant and comparable to copper pipe . . .

[2] At least on commentator is critical of this result. He argues that it "creates the nonsensical result that the cause of action for breach of that repair promise accrues before the seller has failed to perform its promise to repair or replace defective goods." 2 HAWKLAND UCC SERIES § 2-725:2 (2015).

[3] There is an unsavory quality to Dryvit's position here that should not be ignored.

The litmus test for a future performance warranty was set out in *Ontario Hydro v. Zallea Systems, Inc.*:

> 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...."

Ontario Hydro, at 1264.

This language is cited with approval in *Pender v. Daimler Chrysler Corp*. and *Jakotowicz v. Hyundai Motor America*. *See Pender v. Daimler Chrysler Corp*., 2004 WL 2191030, at *4 (Del. Super.); *Jakotowicz v. Hyundai Motor America*, Del. Super., C.A. No: 04C-05-298, Cooch, J. (Aug. 17, 2005) at p. 8

Herein lies Dryvit's problem. Dryvit's warranty does exactly as *Ontario, Pender* and *Jakotowicz* require as to future performance– it explicitly warrants for 10 years that the product shall not bond, peel, flake or chip . . . [be] fade resistant . . . and be water resistant." This language is, as a matter of law, an express

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One the one hand Dryvit sells warranties that, to the unwary, seemingly provide warranty coverage for well more time/coverage than the 4-year limitation set out in 6 DEL. C. § 2-725. Yet when pressed to honor that warranty, Dryvit raises § 2-725.

Ironically, Dryvit currently offers a 30-year warranty to, of all groups, unwary homeowners. http://www.dryvit.com/residential/warranties.asp. Remarkably, it appears that Dryvit relies upon the same language when selling the 30-year warranty. That 30-year warranty appears under the heading "Outsulation® RMD System™ and Outsulation® SMD System™."

guarantee of future performance. Just as importantly, as a matter of law, this language is not simply a remedy to address defects.

The flaw with Dryvit's argument is it presumes that the mere presence of "repair or replace" language is dispositive on the issue of warranty type. It is not. Indeed, none of the cases Dryvit cited support that conclusion.[4] Notably, Janosik raised this argument in its opening brief. AOB at 25. Dryvit ignored it.

1. *Janosik Provided Notice and Waived Nothing*

In bloated footnote 12, Dryvit argues that Janosik failed to provide notice of the defects. Dryvit was well aware and informed of problems with the Building. According to Robert Wheatley and Sean Palmer, the authorized Dryvit installer, Dryvit representatives were on notice of problems with the Building. *Deposition of Robert Wheatley* at **(AR:20/lines 6-10**; **22/lines 3-20)**; *Deposition of Sean Palmer* at (**AR:5 - 48/line 21 to 49/line 9**); (**AR:9 - 83/line 24 to AR:10 - 85/line 13**. Dryvit representatives visited the Building to discuss potential causes, remedies and destructive testing.

Notably, Dryvit has never denied it had notice of the Building problems. Nor could it. In first year the Building was open for business, either AWS and/or a Dryvit's representative were present at the Building at least 10 times addressing

[4] The obvious reason those cases do not support that conclusion is simple – none confronted future performance language of the type in Dryvit's warranty.

leak issues. (**AR: 9 - 84/line 24 to AR: 10 - 85/line13**). Thereafter, Dryvit's regional representative, Dale Serroka[5], was present at the Building at least twice within the first two years specifically to address the water problems. Notably, Mr. Serroka was called in because AWS "reached a point where [Dryvit's sales representative and technical resource] and I felt strongly that there was something going on with the building other than the Dryvit cracking." ((**AR:10 - 88/lines 16-23**); *see also* **AR:11- 91/lines 20-24**)).

Finally, by all appearances it took Dryvit 4 years to mail Janosik a warranty;[6] it also claims, remarkably, that it sent the wrong one.[7] Only big

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[5] Mr. Serroka was identified by AWS as Dryvit's regional representative. (**AR:10 - 87/lines 16-19**).

[6] **AR:6 - 50/line 7 to 52/line 2** referring to **AR:17**. Exhibit 43 was produced by AWS in response to a subpoena for documents relating to the Building.

[7] Advanced Wall Systems ("AWS") installed the Dryvit product. (AR:42(10/9-12). AWS was an approved Dryvit installer. (**AR:8 - 67/lines 10-19**). When AWS completed work on the Building, it submitted a Dryvit Warranty Request to Dryvit. (**AR:13)**. Notably, AWS indicates that "coatings base coat/finish" were applied over a "Cortec (sic) Panels." *Id.* That form describes the Dryvit products AWS used on the Janosik Building. The form was faxed directly to Dryvit's regional supplier. (**AR:4 - 25/line 24 to 26/line 6**). The Dryvit regional supplier took AWS' handwritten form, re-typed it and thereafter submitted it to Dryvit. (**AR:5 - 47/lines 6-21**). AWS confirmed that its handwritten Warranty Request was accurately re-typed by the regional supplier. (**AR:5 - 48/lines 6-15**).

According to AWS, "there's [sic] strict requirements to get a warranty from Dryvit. All material must be purchased and installed by a certified applicator, and the [Dryvit salesman] would come out periodically and take a look at the project and make sure all of the products were being used on the site." (**AR: 5 – 45/lines 3-10**). Indeed, before issuing a warranty Dryvit requires a "final job review." (**AR:6 - 49/lines 11 to 50/1** and **AR:7 - 61/8-19**). The same person that undertook Dryvit's final job review had, during the course of AWS' work, visited the

chutzpah stands righteous when arguing Janosik failed to comply with a notice provision that was AWOL for four years. Yet that is Dryvit's position. In any event, a notice provision must be reasonable. *See* R.I. STAT §6A-2-607 and 6 DEL. C. §2-607.[8] That reasonableness is a fact question ordinarily left to the jury. *Lariviere v. Dayton Safety Ladder Co.*, 525 A.2d 892, 898 (RI Supr. 1987); *Speakman Co. v. Harper Buffing Mach. Co., Inc*. 583 F.Supp. 273, 277 (D. Del. 1984).

Finally, in another series of footnotes Dryvit asserts that - warranty notwithstanding - Janosik nonetheless waived its defenses to the statue of limitations. Nothing could be further from the truth. The complaint asserts a series of tolling theories - none considered by the Trial Court.[9]

Janosik Building 10 to 12 times. (**AR: 7 - 63/lines 23 to 64/line 14**).

When Dryvit processed the warranty request it did so based upon information supplied by AWS and gleaned during the final job review. It was Dryvit – not Janosik, not Whayland, not AWS - that issued the warranty.

[8] By its own terms, Dryvit's warranty "shall be interpreted under to the laws of the State of Rhode Island." **A:242.**

[9] Discovery was truncated by the Trial Court to allow the defendants to file early summary judgment motions focusing on the statutes of limitations and repose. *See* Exhibit A to Janosik's Appendix in Support of its AOB DK 37 on page 29.

II. Butler's Response Ignores That On A Summary Judgment Motion the Trial Court is Obligated to View the Facts In The Light Most Favorable to The Non-Moving Party

As it did at the Trial Court level, Butler plods down a well-worn muddy road to make a point.[10] A fair reading of Janosik's Opening Brief does NOT suggest, as Butler argues, that Butler supplied no more than generic construction materials. *See Butler's Answering Brief* (hereafter "BAB") at p. 16. Nor did Janosik focus, as Butler asserts, on generic fasteners. BAB at p. 16-17. Nor did Janosik ignore, as Butler accuses, that Butler buildings are different due to design and location specific load requirements. BAB at 17.

Janosik's argument is exceedingly simple. Butler is a supplier. It supplied its own pre-engineered, stock, patented parts. To re-frame that argument, Butler's product is akin to a box of Legos. Lego models are, for the most part, comprised of red and white blocks. Those same red and white blocks appear in every Lego model. What differs from one Lego model to the next is where those blocks appear, how many are used, the color scheme and, of course, the assembly instructions – which like Butler's product are numbered. This is precisely what

[10] A map of the muddy road forged by Butler - several motions to compel, a month long debacle over a patently deficient privilege log, a refusal to provide deposition dates, a refusal to agree to an amendment to the complaint, a refusal to agree on a briefing schedule, a refusal to agree to deposition locations, requiring Butler's local counsel to attend along witness deposition with Butler's *pro hac* counsel, the Trial Court refusing to release the counsel from the courthouse until they worked out, on their own, a deposition schedule, and at least one threat by the Trial Court to revoke Butler's *pro hac* – all with 4 months and all of which involved the Trial Court.

Butler sells - a real building equivalent of a box of Legos. Butler takes its pre-engineered, stock, patented parts and tells the installer how to assemble them. If the building happens to be in Alaska, then Butler adds more of its pre-engineered, stock, patented parts (*i.e.*, the equivalent of the Legos red blocks) to reinforce other Butler pre-engineered, stock, patented parts (*i.e.*, the equivalent of the Legos white blocks).

Nothing Butler argues, nor any of the testimony it cites, is inconsistent with the Lego analogy. Moreover, when Janosik cites the testimony of Butler's engineer for the proposition that "what changes from one building to the next is the placement or number of those parts," that is both accurate and consistent with testimony that Butler cites. AOB at p. 6 (citing **A:16/line7 to A:20/line2**)

Butler works to avoid any appearance that its product is stock or standard. Hence, it focuses on the differences between buildings (*i.e.,* load tolerances, unique geometry) and not on the undeniably identical parts used in every Butler buildings. The approach is simple. Butler argues that it engineers a building by calculating load requirements in combination with building geometry. Undoubtedly true. But it's also true that every other material used to construct a building undergoes the same type of engineer processing. Where wooden/steel beams are placed is subject to engineering decisions that are likewise driven by load and geometry considerations. The distance those beams can safely span is subject to engineer

processing. The use, placement, strength and capacity of concrete/brick/block likewise require engineer processing. Yet the lumber, steel, concrete, brick or block suppliers are excluded from protection under 10 DEL. C. § 8127. *Becker v. Hamada, Inc*., 455 A.2d 353, 356 (Del. 1982).

Butler buttresses the argument repeatedly claiming that it fabricates those pre-engineered, stock, patented parts specifically for each customer. BAB at 21-22. The argument is belied by the fact that Butler's product is patented which, by definition, is incontrovertibly contrary to the kind of special fabrication that Butler insists protects it under § 8127.

At bottom, these facts readily support the conclusion that Butler supplied a stock product that, when assembled, became the Janosik Building. Peeling away the sophistry, however, reveals the Butler Manufacturing Company to be no more than a product supplier much like any other material supplier.

Butler's entire argument, however, obscures the fundamental issue on appeal. The Trial Court was confronted with a summary judgment motion. Whether a fact finder ultimately accepts Butler's factual description as consistent with furnishing construction or not as Janosik asserts is immaterial at this juncture. The Trial Court was duty bound to give Janosik the benefit of all reasonable doubt. It did not do so. Instead, the Trial Court accepted Butler's description over Janosik's. For that reason the Trial Court committed reversible error.

1. *Improvement to Real Property*

Butler never directly confronts Janosik's argument that "improvement to real property" under § 8127 be tied to the party that made the improvement. Instead, Butler argues that Janosik confuses the improvement concept with the furnish construction concept. BAB at 23-26. This position, as Janosik argued, is fundamentally flawed. Absent such linkage, under the appropriate factual setting, a material supplier could easily qualify for protection under § 8127.[11] It is for this reason that the statute logically ties "furnish construction" to "improvement to real property." It's simply not enough to furnish construction if that construction activity does not amount to an improvement to property.

[11] As one example, a brick manufacturer that supplies the exterior skin of a building could argue, as Butler does, that its own designation as specially engineered brick product is an improvement to real property. No one doubts that the brick supplier is excluded from coverage under § 8127.

III. **This Court Should Not Affirm the Butler's Summary Judgment On the Statute of Limitations Because The Issues Was Not Properly Presented to the Trial Court**.

A. *Question Presented*

Whether this Court should affirm the Trial Court on an issue not fairly presented to the trial court.

B. *Scope of Review*

SUPREME COURT RULE 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." This Court may waive of RULE 8 "if it finds that the trial court committed plain error requiring review in the interests of justice." *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995). Plain error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Plain error is a material defect that is apparent on the face of the record and is "basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Id.*

C. *Merits of Argument*

Butler asks the Court to decide whether Janosik's claims are barred by 6 DEL. C. §2-2725. In doing so, Butler acknowledges that the Trial Court did not

consider the issue even though Butler raised it in their summary judgment motion.

Butler did not, however, tell this Court that Janosik requested that the Trial Court reserved the right to further brief the issue. As explained to the Trial Court, Janosik's interrogatories/document requests asked Butler to identify other third-party "claims" against it relating to product defect claims. Butler denied such claims existed. (**A:267**). Nonetheless, during deposition of Butler's witnesses, it was revealed that at least one such claim existed. Following those depositions, Janosik asked Butler to review and update its discovery responses. Butler refused because the prior third-party claim was not, in fact a "claim." **(A:271)**.

Under these circumstance, Butler's statute of limitation issue was not properly raised for RULE 8 purposes.

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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