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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| LTL ACRES LIMITED PARTNERSHIP,<br><br>Plaintiff Below, Appellant,<br><br>v.<br><br>BUTLER MANUFACTURING COMPANY, a Delaware corporation, and DRYVIT SYSTEMS, INC., a Rhode Island corporation,<br><br>Defendants Below, Appellees. | ) | C.A. No. 468, 2015<br><br>Appeal from the July 30, 2015 Decision of the Superior Court in and for Sussex County in C.A. No. SC13C-07-025 ESB |

# APPELLEE DRYVIT SYSTEMS, INC.'S ANSWERING BRIEF

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## NATURE OF THE PROCEEDINGS

On July 17, 2013, Plaintiff Below/Appellant LTL Acres Limited Partnership ("LTL") filed its Complaint against Defendants Below/Appellees Butler Manufacturing Company ("Butler") and Dryvit Systems Inc. ("Dryvit") seeking damages for water infiltration afflicting a Johnny Janosik Furniture Store owned by LTL (the "Store") purportedly caused by defective Butler and Dryvit materials. From the Store's opening on October 27, 2006, it experienced water infiltration so significant that "customers dodged their way around water falling from the ceiling, catch buckets and floor puddles around the store."[1] The water infiltration issues at the Store continued frequently after its opening.

The fact that its customers were weaving between catch buckets and evading water as it fell from the ceiling as early as October 27, 2006 clearly put LTL on notice that something was amiss at the Store. Moreover, by 2008 at the latest, LTL's construction manager and agent, the Whayland Company, Inc. ("Whayland"), proposed that the water infiltration issues were potentially caused by Butler's Koreteck Panelized Building System (the "Koreteck System") or problems related to the Dryvit materials. Despite being keenly aware of the water infiltration issues and the theories of causation upon which it based its Complaint, LTL failed to file its lawsuit until nearly seven years after opening its Store.

[1] LTL's Motion to Compel Butler's Complete Responses to Interrogatories and Request for Production of Documents ("Mot. Compel"), at ¶ 1, B91.

The Superior Court (the "Trial Court"), recognizing the obvious statute of limitations and statute of repose issues, bifurcated discovery for the purpose of hearing motions for summary judgment on those issues. Discovery confirmed what was known at the very beginning of the case – that, as to Dryvit, LTL's Complaint was well outside of the applicable statute of limitations. On that basis, Dryvit moved for summary judgment. On July 31, 2015, the Trial Court granted Dryvit's motion, finding that the warranty for Dryvit materials purportedly used at the Store (the "Warranty")[2] was a repair or replacement warranty, and therefore, LTL's claim was barred by the four-year statute of limitations pursuant to 6 *Del. C.* § 2-725 (the "Opinion").[3]

On August 28, 2015, LTL filed its Notice of Appeal. On October 12, 2015, LTL filed its opening brief, and on October 26, 2015 and November 13, 2015, LTL filed its Amended Opening Briefs. In response, Dryvit submits this answering brief. For the reasons set forth herein, Dryvit respectfully requests that the Opinion of the Trial Court barring LTL's stale claims be affirmed.

[2] A241-243.

[3] The Opinion is attached to Appellant's Second Amended Opening Brief ("Amend. Op. Brief") as Exhibit A.

## SUMMARY OF ARGUMENT

**APPELLANT'S 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.

**NOT APPLICABLE TO DRYVIT.**

**APPELLANT'S ARGUMENT**

2. On Pages 12 to 14 of the Opinion, 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.

**DENIED**. A plain reading of the unambiguous Warranty establishes that it is a repair or replacement warranty because LTL's sole remedy is the repair or replacement of Dryvit materials under defined and limited circumstances, such as if the materials chip or fade due to a defect. Pursuant to 6 *Del. C.* § 2-725, the statute of limitations on a warranty claim begins to run upon the delivery of the goods. Here, the Dryvit materials were delivered from late 2005 through early 2006, prior to the Store's opening on October 27, 2006. Thus, the limitations period began to run, at the latest, when the Store opened on October 27, 2006. Therefore, the Trial Court correctly concluded that LTL's lawsuit against Dryvit – filed almost seven years later – is time-barred. Notably, even if there were merit to LTL's hollow argument that the Warranty is for future performance and tolled the statute of limitations until LTL discovered or should have discovered the purported

defects, the statute of limitations has *still* expired. Under the time of discovery rule, LTL knew or should have known of the alleged defects in 2006 or, at the latest, in 2008 when its own construction manager and agent speculated that the water infiltration was caused by the Dryvit materials. Thus, there is no merit to LTL's arguments or its appeal.

**APPELLANT'S ARGUMENT**

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.

**DENIED**. LTL raises no disputed material facts – or any facts at all – that provide a basis for the reversal of the Opinion. Significantly, LTL did not dispute the facts established by Dryvit below and does not dispute them here. For example, LTL does not dispute – nor could it – that the Store leaked upon its opening in 2006 or that there was speculation that Dryvit materials may be a cause of the water infiltration, at the latest, in December of 2008. Rather, LTL simply concludes – with no substance – that the Warranty is for future performance, and therefore, the Trial Court should be reversed. A plain reading of the Warranty, however, establishes that it is solely for repair or replacement and that the statute of limitations has run. Thus, LTL provides no basis for a reversal of the summary judgment entered by the Trial Court given the undisputed material facts.

**APPELLANT'S ARGUMENT**

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.

**NOT APPLICABLE TO DRYVIT.**

## COUNTER-STATEMENT OF FACTS

### A. Construction Of The Store

The Store was constructed during the period of 2005 to 2006 and was opened to the public on October 27, 2006. (A259, A277) The Store was built using the Koreteck System, which are steel wall panels designed by Butler.[4] (Amend. Op. Brief., at pp. 3-4) LTL contracted with Advanced Wall Systems ("Advanced Wall") on August 4, 2005 to apply an Exterior Insulation and Finishing System ("EIFS")[5] to the Koreteck System to provide an aesthetic finish for the wall panels.[6] (Second Amend. Compl., ¶ 3, B98; *id.*, at Ex. A, 119-140)

### B. Dryvit Materials Are Applied To The Koreteck System

Despite contracting for a Synergy Surfacing System EIFS to be installed at the Store, LTL has alleged that Advanced Wall installed a Dryvit Outsulation system to the Store's exterior walls. (Second Amend. Compl. ¶ 3, B98; *id.*, at Ex. A, B140) Yet neither a Synergy Surfacing System EIFS nor an Outsulation system

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[4] The Koreteck System consists of a steel wall panel surrounded by expanded polystyrene foam ("EPS"). *See* Second Amend. Compl., at Ex. D, B170.

[5] Emblematic of the disarray in coordinating and constructing the Store, the Advanced Wall contract stated that an EIFS manufactured by a Dryvit competitor – Synergy Surfacing System – would be used. Second Amend. Compl., at Ex. A, B140. Dryvit materials were ultimately installed at the Store; however, those materials, as discussed below, do not constitute an EIFS or Outsulation system. *See* Dryvit Motion for Summary Judgment ("Mot. S.J."), Ex. 2, Deposition of Sean Palmer of Advanced Wall ("Palmer Dep."), 131:4-18, B13.

[6] Second Amend. Compl. at ¶¶ 3, 5, B98-99. EIFS Supply, a Dryvit supplier, delivered the Dryvit materials to Advanced Wall from August to November 2005 Mot. S.J., Ex. 3, B18-21.

were installed at the Store. (Palmer Dep., 131:4-14, B13; Mot. S.J., Ex 10, Affidavit of Linda Nolin ("Nolin Aff."), ¶¶ 10-11, B70)

A Dryvit Outsulation system consists of six components installed from the building's sheathing or substrate (which must be Dryvit approved) outward: flashing system, air/water resistive barrier, adhesive/drainage medium, EPS insulation board, base coat and reinforcing mesh, and finish coat. (*See* Second Amend. Compl., Ex. F, B178-79) The Koreteck System, however, is a series of connected panels made with a solid steel core surrounded by *EPS insulation*. (*See* Second Amend. Compl., Ex. D, B170) The EPS applied to the Koreteck System used at the Store is not a Dryvit material and not manufactured, applied, or approved by Dryvit. (Nolin Aff., ¶¶ 10-11, B70) Thus, the Dryvit materials ultimately applied to the Koreteck System at the Store were neither EIFS nor Outsulation system, but merely Dryvit supplied base coat, reinforcing mesh, and finish coat. (Dryvit Opposition to LTL's Motion to Compel, Ex. 8, B198-99) Such materials do not and cannot constitute an Outsulation system. (*id.*; Palmer Dep., B13; Nolin Aff., B70) The warranty and product information relied on by LTL, however, all relate to Outsulation systems. *See* A241-243.

## C. The Store Experiences Water Infiltration From Its Inception

Water infiltration issues "plagued" the Store since it opened in October 2006.[7] Indeed, LTL's customers had to dodge water falling from the ceiling, catch buckets, and floor puddles throughout the Store as early as opening day. (Mot. Compel., ¶ 1, B91) LTL, through Whayland, took repeated steps to remediate the water infiltration, but those efforts were ultimately unsuccessful. (Second Amend. Compl., ¶ 5, B99) During this process, Whayland[8] stated, at the latest in September 2008, that there were cracks in the Dryvit façade possibly caused by deflection in the Store's walls.[9] Whayland also proposed, at the latest in December

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[7] *See* Mot. S.J., Ex. 3, July 12, 2012 letter from LTL's CEO David Kohler, B16 (stating that "water penetration issues have plagued us"); Mot. S.J., Ex. 4, Deposition of former LTL CEO, Frank L. Gerardi, Sr. ("Gerardi Dep."), 28:19-23, 29:1-12, B28-29 (discussing the fact that the brand new building was leaking). *See also* Mot. S.J., Ex. 3, March 6, 2007 letter from Robert Wheatley of Whayland, B15 (noting roof and wall leaks in 2007); Mot. S.J., Ex. 5, LTL's Responses and Objection to Dryvit's First Set of Interrogatories Directed to LTL ("LTL ROGs"), at Resp. 4, B42 ("water infiltration problems were noticed upon occupancy"); Mot. S.J., Ex. 7, Deposition of Robert Wheatley of Whayland ("Wheatley Dep."), 130:5-25, B53 (noting that David Koehler complained about leaks in September of 2008); Mot. S.J., Ex. 6, September 25, 2008 Whayland email chain (the "Sept. 2008 Email"), B48-49 (noting cracks in the Dryvit materials and deflection in the walls and that the Store "has had intermittent wall leaking problem . . . almost since it was first erected").

[8] Whayland acted as LTL's agent and construction manager. *See* Wheatley Dep., 205:2-25, B56 (explaining that, typically, LTL only received information regarding repair efforts at the Store through Whayland); Gerardi Dep., 10:16-24, 11:1-7, B25-26 (explaining that Whayland handled the work performed at the Store); Mot. S.J., Ex. 8, Deposition of David A. Koehler ("Koehler Dep."), 12:9-24, 13:1-15, B62-63 (explaining that everything related to the construction of the Store and water infiltration issues went through Whayland representatives and that Whayland negotiated with contractors on LTL's behalf). *See also* Standard Form of Construction Management Agreement Between Owner and Construction Manager, A280-302, at A283 (stating that Whayland "shall be [LTL's] agent").

[9] *See* Sept. 2008 Email, B48-49 (noting cracks in the Dryvit materials and deflection in the walls).

2008, that the water infiltration issues were caused by the Koreteck System or an application problem related to the Dryvit materials at the Store.[10] Notably, Whayland stated at that time that "this is the stuff lawsuits are made of." (Dec. 2008 Email, B50) Yet, despite being on notice that the Store began experiencing water infiltration as early as 2006 and discussing the suspected causes in 2008, at the latest, LTL failed to bring its action until July of 2013. (LTL ROGs, at Resp. 4, B42; Sept. 2008 Email, B48-49; Dec. 2008 Email, B50)

[10] *See* Mot. S.J., Ex. 6, December 14, 2008 email from Bob Wheatley of Whayland (the "Dec. 2008 Email"), B50 (stating that LTL has "been patient over the last two years" and stating potential cause of the leak may be a "Dryvit application problem").

## ARGUMENT

## I. THE TRIAL COURT PROPERLY CONCLUDED THAT DRYVIT'S WARRANTY WAS A REPAIR OR REPLACEMENT WARRANTY

### 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. Scope Of Review

On appeal, the scope of review of a grant or denial of a motion for summary judgment is *de novo*. *Fed. Deposit Ins. Corp. v. Cramer*, 593 A.2d 589, at *1 (Del. 1991) (Table). If there is no dispute as to material facts, "the matter is ripe for summary judgment." *Id.* If the issue on appeal is a matter of law, the "Court must decide whether the trial court erred in formulating or applying legal precepts." *Id.*

### C. Merits Of The Argument

Before the Trial Court below, LTL failed in its attempt to avoid the statute of limitations by asserting that the Warranty is for future performance.[11] LTL

[11] LTL's Second Amended Complaint raised several purported reasons why the four-year statute of limitations should be tolled, including estoppel, fraud, waiver, and duty to warn allegations. Second Amend. Compl., ¶¶ 49-83, B110-116. Dryvit disposed of those hollow claims in its motion for summary judgment. Mot. S.J., p. 4, B6. LTL failed to address, much less dispute, Dryvit's arguments in its answering brief and failed to raise them as an issue on appeal. *See* Dryvit's Reply in Support of Its Motion for Summary Judgment "Dryvit Reply"), p. 3, B205. Therefore, LTL has abandoned those claims. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("[i]ssues not briefed are deemed waived."); *see also Eppley v. Univ. of Del.*, 2015 WL 156754, at *1 n.1 (D. Del. Jan. 12, 2015) (plaintiff waived claims by failing to address them in its answering brief).

continues to press this mistaken position on appeal.[12]

### 1. A Warranty Providing That Goods Will Be Repaired or Replaced If a Defect Or Failure Is Identified Is a Repair or Replacement Warranty

A warranty "cannot be both a repair or replace warranty and a future performance warranty." *Jakotowicz v. Hyundai Motor Am.*, 2005 Del. Super. LEXIS 283, at *9 (Del. Super. Aug. 17, 2005) (internal quotations omitted). In distinguishing between the two, it is well established 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. *Id.* (noting that in order for a warranty to be for future performance, it must explicitly so state – future performance "cannot be inferred"); *see also Pender v. DaimlerChrysler Corp.*, 2004 WL 2191030, at *4-5 (Del. Super. July 30, 2004) (a repair or replace warranty "merely provides that if a product fails or becomes defective, the seller will repair or replace the product.") (internal quotation omitted); *Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1266 (D. Del. 1983) (same). Thus, Delaware has "consistent" and "longstanding

[12] LTL's Opening Brief offers scant explanation as to why the Trial Court purportedly committed reversible error in determining that the Warranty is a repair or replacement warranty. It appears that LTL takes issue with the Trial Court's conclusion "without discussion or citation" (Amend. Op. Brief, at p.22) that the Warranty is a repair or replacement warranty. A review of the Opinion, however, shows that the Trial Court concluded that the Warranty is "what is known as a 'repair or replacement warranty'" only after a fulsome discussion of the Warranty's unambiguous terms. Opinion at p.13.

precedent" rejecting arguments that repair or replace warranties fall within § 2-725's narrow future performance exception to the four-year statute of limitations. *Murray v. Am. Suzuki Motor Corp.*, 2010 WL 323506, at *5 (Del. Super. Jan. 25, 2010). Here, the Warranty is clear and unambiguous – indeed, LTL makes no argument otherwise – it limits LTL's remedy to repair or replacement under certain defined circumstances. Therefore, a plain reading of its terms establishes that it is a repair or replacement warranty.[13]

### 2. LTL Misconstrues the Warranty in an Effort to Avoid the Statute of Limitations

The Trial Court properly concluded that the Warranty[14] is one solely for repair and replacement. Even the case law upon which LTL relies demonstrates the flaws in its position, as the majority of the cases that it cites[15] not only found

[13] The construction of an unambiguous contract is a question of law to be determined by the court. *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012).

[14] Although not before this Court on appeal, as noted in Dryvit's Motion for Summary Judgment, Dryvit has no obligations under the Warranty because LTL failed to provide notice of the alleged defects within 30 days of discovery, as required by the Warranty. Mot. S.J., p. 2, n.8, B4. The Warranty expressly required LTL to provide written notice to Dryvit's *home office* in Rhode Island within 30 days of the alleged defect. *Id.* ***No such notice was ever given***. *See* Nolin Aff., at ¶¶ 5-8, B70. Significantly, the Warranty is also void due to the intermixing of Butler and Dryvit products. *See id.* at ¶¶ 9-11, B70; A41. LTL has admitted as much by stating that Butler provided the EPS board for the exterior walls, thus making the Warranty inapplicable and unenforceable. Second Amend. Compl., ¶¶ 12-14; Amend. Op. Brief, at p. 5. *See also* Dryvit Reply, at p.5, B207.

[15] LTL's reliance on *Pack & Process, Inc. v. Celotex Corp.* is misplaced because the warranty language and circumstances of this case materially differ from those considered in *Pack & Process*. 503 A.2d 646 (Del. Super. 1985). There, the court found a material issue of fact

that the warranties – similar to the one here – were repair and replace warranties, but also held that the statute of limitations barred the claims.[16]

For example, in *Jakotowicz*, the Superior Court granted Hyundai's motion to dismiss based on the expiration of the statute of limitations because the court found that there was no evidence to show that either a five-year/60,000 mile warranty or a ten-year/100,000 mile powertrain warranty on a vehicle purchased by Jakotowicz were for future performance. *Jakotowicz*, 2005 Del. Super. LEXIS 283, at *10-11.

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existed as to whether a roofing manufacturer's promise to repair "wear and tear" after installation that was supported by a bond and coupled with a *replace-or-repair* guarantee that the "repairs would absolutely solve the problems and that the cause of the problems were . . . ordinary wear and tear rather than a defect" constituted a guarantee of future performance. *Id.* at 655-56. Here, the warranty explicitly limits Dryvit's liability to repair or replacement in the event of a defect, and further, Dryvit has made no post-repair representations of any kind, much less those promising future performance or the absence of a defect.

[16] *See Jakotowicz*, 2005 Del. Super. LEXIS 283 (granting motion to dismiss because the "future performance" exception to the expiration of the statute of limitations does not apply to "repair or replace" warranties that simply provide that "if a product fails or becomes defective, the seller will repair or replace within a stated period"); *Pender*, 2004 WL 2191030 (granting defendant's motion to dismiss because plaintiff brought suit after the applicable statute of limitations, noting that the warranties were for repair or replacement despite being extended service contracts); *S & R Assoc., L.P., III v. Shell Oil Co.*, 725 A.2d 431 (Del. Super. 1998) (granting, in part, defendant's motion for summary judgment because plaintiff's warranty claim was outside the statute of limitations, noting that the "'future performance' exception . . . is construed narrowly"); *Addison v. Emerson Electric Co.*, 1997 WL 129327 (D. Del. Feb. 24, 1997) (granting summary judgment on the grounds that the statute of limitations expired and the future performance exception did not apply); *Ontario Hydro*, 569 F. Supp. at 1266-67 (holding the warranty was for repair and replacement, not future performance, and therefore, plaintiff's claim was time-barred); *Joswick v. Chesapeake Mobile Homes, Inc.*, 765 A.2d 90, 94 (Md. App. 2001) (finding that the defendant's only commitment with respect to that warranty was its promise to repair or replace any defective parts and that the defendant was not asked, within the applicable period, to make any repairs or replacement, and thus it could not be held to have violated that undertaking); *Nebraska Popcorn, Inc. v. Wing*, 602 N.W. 2d 18 (Neb. 1999) (holding the defendant was entitled to judgment as a matter of law because the warranties at issue were to repair or replace and were not warranties of future performance, and therefore, the four-year statute of limitations controlled).

There, the plaintiff brought, in essence, a lemon law claim based on Hyundai selling her a defective vehicle. The vehicle in question came with a warranty, which stated that the defendant would "repair or replace[] . . . any component originally manufactured or installed . . . that is found to be defective in material or workmanship under normal use and maintenance."[17] *Id.* at *2.

Similar to LTL, Jakotowicz attempted to avoid the statute of limitations by arguing that the warranties were for future performance based on the fact that the warranty periods extended beyond the four-year statute of limitations. *Id.* at *12. The Superior Court, however, rejected that argument, noting the well-settled precedent that the future performance exception is inapplicable to an extended repair or replace warranty. *Id.* at *11-13 (citing *Pender*, 2004 WL 2191030).

The Supreme Court of Nebraska also provides persuasive guidance on this issue under nearly identical facts. In the *Grand Island*[18] case, the plaintiff sued the manufacturer of a roof that began leaking approximately one year after the building was constructed. *Id.* at 606. The plaintiff alleged that there was "a cycle of complaints by the plaintiff to the defendants and independent parties, repairs to the roof which alleviated the leaks . . . and then the appearance of new leaks." *Id.*

[17] Additionally, the car's powertrain had a ten-year/100,000 mile warranty, which also limited Jakotowicz's remedies to repair or replacement. *Id.*

[18] *Grand Island Sch. Dist. No 2 of Hall Cnty. v. Celotex Corp.*, 279 N.W. 2d 603 (Neb. 1979), B82-88.

This cycle continued until the plaintiff finally hired an engineer who determined that there were defects with the insulation board beneath the roofing membrane. *Id.* The plaintiff then brought the suit almost nine years after the building was constructed. *Id.* at 606, 609.

In affirming the trial court's grant of summary judgment in favor of the defendants, the Nebraska Supreme Court held that the four-year statute of limitations under Section 2-725 of Nebraska's version of the U.C.C. clearly barred the action. *Id.* at 609. The court also held that the limitation period was not tolled by a 20-year guaranty bond because the bond was not for future performance, but rather was limited to guarantying payment for repair or replacement. *Id.* Moreover, the court noted the plaintiff's "long and exasperating experience" with the leaks and found that, while the plaintiff "attempted to solve the problem . . . ***it did not, as the law requires***, commence [the] action in time." *Id.* (emphasis added).

Like those cases – and as recognized by the Trial Court – the Warranty here provides that the ***sole*** remedy available to LTL is that Dryvit will "provide labor and materials necessary to ***repair or replace*** the Dryvit materials described herein. . . ."[19] Thus, a plain reading of the Warranty[20] establishes that it makes no

[19] A41 (emphasis added). Dryvit's obligations under the Warranty are contingent on LTL fulfilling its obligations. *Id.* As noted above, LTL has voided the Warranty for multiple reasons (failure of notice, intermingling non-Dryvit products, and not being a warranty for the products

guarantees for future performance, but merely provides that Dryvit will repair or replace certain Dryvit materials in a set timeframe if those materials have certain failures or defects.[21] Thus, the Warranty, on its face, is not a guarantee of future performance. *Ontario Hydro*, 569 F. Supp. at 1266 (stating that a repair or replace warranty "simply provides that if a product fails or becomes defective, the seller will replace or repair within a stated period").

Based on the foregoing, the Trial Court properly concluded that the Warranty was a repair and replace warranty. Accordingly, because the materials were delivered in late 2005 and because water infiltration appeared before and during the opening of the Store on October 27, 2006, LTL's claims accrued, at the latest, by October 2006 and are extinguished by the four-year statute of limitations.

### 3. The Future Performance Exception Does Not Save LTL's Complaint

Even entertaining LTL's strained argument that the Warranty is for future performance, LTL's claims are still time-barred because warranties for future

actually installed at the Store), and therefore, Dryvit has no obligations under the void Warranty. The Trial Court, however, did not need to reach these issues because the statute of limitations clearly bars LTL's claims.

[20] Because the Warranty is clear and unambiguous, its proper construction is a question of law to be determined by the court. *GRT, Inc., Ltd.*, 2012 WL 2356489, at *4.

[21] *See Jakotowicz*, 2005 Del. Super. LEXIS 283, at *12 (the language of the warranty is the controlling factor in determining whether the warranty is for future performance).

performance merely toll the statute of limitations until the time the defect was or ***should have*** been discovered. *See Jakotowicz*, 2005 Del. Super. LEXIS 283, at *1.

Here, it is undisputed that the Store leaked immediately on its opening.[22] Additionally, Whayland stated in September 2008 that the Dryvit materials had cracks and that the walls were deflecting more than they should. Significantly, Whayland explicitly stated in December 2008 that the leaks might be caused by the Koreteck System or application problems involving the Dryvit materials.[23] LTL has not disputed these facts (nor could it do so).[24]

Thus, the uncontroverted evidence establishes that LTL discovered or should have discovered the defects at the time that the Store opened. *See Pender*, 2004 WL 2191030, at *4 (noting that "repeatedly returning to the car dealer undeniably establishes that plaintiff was aware of the nonconformity"); *Burrows v. Masten Lumber and Supply Co.*, 1986 WL 13111, at *2-3 (Del. Super. Oct. 14, 1986) (stating "time-of-discovery" was when the plaintiff should have known, *i.e.*, when the leaks began after the roof was installed, "not when plaintiffs could pinpoint the

[22] *See* Gerardi Dep., 28:19-23, 29:1-12, B28-29; LTL ROGs, Resp. 4, B42. Indeed, LTL *touted* this fact in its Motion to Compel directed to Butler stating, that the Store "opened on October 27, 2006" and that the "***customers dodged their way around water falling from the ceiling***, catch buckets and floor puddles ***about the store***." Mot. Compel, ¶ 1, B91 (emphasis added).

[23] Dec. 2008 Email, B50.

[24] Indeed, LTL failed to respond to Dryvit's argument that LTL's claims accrued, at the latest, October 2006. Mot. S.J., pp. 2-3, B4-5. *See Emerald Partners*, 726 A.2d at 1224 ("[i]ssues not briefed are deemed waived."); *see also Eppley*, 2015 WL 156754, at *1 n.1. Accordingly, LTL waived any argument in the court below that the statute of limitations has not expired.

exact cause of the leaks."). Even giving LTL every possible favorable inference, it discovered or should have discovered the defect, at the latest, in December of 2008.[25] Thus, LTL's claim is time-barred regardless of the characterization of the Warranty.

[25] It is notable that LTL has not disputed this fact; rather, it merely argues that the Warranty is for future performance.

## II. THE TRIAL COURT PROPERLY HELD, AS A FACTUAL MATTER, THAT DRYVIT'S WARRANTY IS A "REPAIR OR REPLACE" WARRANTY

### A. Question Presented

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

### B. Scope Of Review

On appeal, the scope of review of a grant or denial of a motion for summary judgment is *de novo*. *Fed. Deposit Ins. Corp.*, 593 A.2d 589, at *1. The Court may draw its "own conclusions with respect to the facts only if the findings of the trial court are clearly wrong." *Id.* If there is no dispute as to material facts, "the matter is ripe for summary judgment." *Id.*

### C. Merits Of The Argument

#### 1. Summary Judgment Was Appropriate to Determine Whether the Warranty Was a Repair or Replacement Warranty

The language of the warranty is the controlling factor in determining whether the warranty is for repair or replacement or future performance. *See Jakotowicz*, 2005 Del. Super. LEXIS 283, at *12. Interpretation of an unambiguous contract is a matter of law and for the court to determine. *See GRT, Inc.*, 2012 WL 2356489, at *4; *United Servs. Auto. Ass'n Properties Fund, Inc. v. Burns*, 640 A.2d 655 (Del. 1994). In *Addison v. Emerson Elec. Co.* – cited by LTL – the Superior Court explicitly rejected the argument that summary judgment

should be denied because the question of whether a warranty is for future performance is a question of fact for the jury. 1997 WL 129327, at *4. Rather, the court held that "summary judgment is appropriate for determining whether a warranty extends to future performance under § 2-725." *Id.*

**2. LTL Fails to Raise Any Material Facts That Are in Dispute**

Despite being a matter of contract interpretation, LTL seeks reversal based on unstated and unknown material disputes of fact. *See* Amend. Op. Brief, at pp. 26-27. A plain reading of the Opinion, however, demonstrates that the Trial Court reviewed the Warranty and interpreted its provisions. Opinion at pp. 12-13. Indeed, the Trial Court restates and relies upon the terms of the Warranty. *Id.* at p. 12. Interpreting the Warranty, the Trial Court aptly concluded that "the Dryvit warranty in this case is what is known as a 'repair or replacement warranty.' Such warranties have long been held in Delaware not to implicate the 'future performance exception.'" Opinion at p. 13.

Significantly, before the Trial Court below, LTL failed to dispute any of the material facts discussed above. LTL does not dispute those facts here, but rather appears to take issue with the Opinion's brevity. Ironically, LTL condemns what it calls the Trial Court's "conclusory result" while itself conclusorily pronouncing that the Trial Court erred and that material facts – none of which LTL can point to – *may* have been in dispute. Such speculative assertions provide no basis for a

reversal of the summary judgment entered by the Trial Court. *See Standard Acc. Ins. Co. v. Ponsell's Drug Stores, Inc.*, 202 A.2d 271, 276 (Del. 1964) (holding that summary judgment against the plaintiff would not be withheld because the plaintiff failed to present any relevant evidence other than mere assertions in its brief).

LTL also argues that reversal is appropriate because, as the non-moving party, the standard of review required the Trial Court to view the facts in a light most favorable to it. In absence of identifiable and material factual disputes, however, that standard does not alone entitle nonmoving parties to victory. *See Addison*, 1997 WL 129327, at *5 (holding that, even viewing the facts in the light most favorable to the plaintiffs, "this court still finds that plaintiffs' breach of warranty claim was time barred by § 2–725").

Ultimately, LTL provides neither facts nor substance and, therefore, no basis to reverse the Trial Court's Opinion. Where, as is the case here, the pleadings and evidence presented conclusively show that the statute of limitations has run, summary judgment is warranted. *See Grand Island Sch. Dist. No 2 of Hall Cnty.*, 203 N.W. 2d at 608 (noting that when the "evidence presented to the trial court . . . was so replete with evidence that the plaintiff could have discovered the defects prior to [the expiration of the statute of limitations that] we feel no real issue of fact could be said to exist.").

### 3. The Trial Court's Statement Regarding the Limitation of Remedies Was *Dicta*

As mentioned in the Opinion, the Warranty clearly limits LTL's remedy to repair or replacement of defective Dryvit products under certain circumstances. Opinion at p. 14. While this is relevant to determining that the Warranty is a repair or replacement warranty, the Trial Court's remark that LTL would ultimately be limited to such a remedy appears to be nothing more than *dicta*.[26] The only issue before the Trial Court as to Dryvit was whether the statute of limitations ran, and because the statute of limitations had expired, LTL is not entitled to the remedies that it seeks in its Complaint – repair, replacement, or otherwise. Therefore, there is no reason to reach a decision as to whether the warranty failed its essential purpose.

[26] Although *dicta*, the Trial Court's remark is nonetheless supported by the language of the Warranty and the uncontested facts. Notably, as stated in the uncontested affidavit from Dryvit's representative, Linda Nolin, Dryvit was not put on notice regarding the purported defects until it received LTL's Complaint. Nolin Aff., at ¶¶ 5-8, B70. Thus, putting aside Dryvit's numerous defenses, it cannot be said that the remedy failed of its essential purpose when Dryvit had no knowledge and, therefore, no opportunity to provide such remedy.

## CONCLUSION

For the foregoing reasons, LTL's appeal should be denied and the Superior Court's grant of summary judgment should be affirmed.

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