Circuit Court for Wicomico County
Case No. C-22-CV-17-000215

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 654

September Term, 2018

CEC SURGICAL SERVICES, LLC, ET AL.

v.

FISHER ARCHITECTURE, LLC, ET AL.

Fader, C.J.,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 20, 2019

The Circuit Court for Wicomico County entered judgment against the appellants, Chesapeake Surgical Services, LLC, Chesapeake Eye Center, P.A., and Cabura, LLC (collectively, "Chesapeake"), as to all counts of a complaint for negligence and breach of contract filed against appellees Fisher Architecture, LLC, and Keith P. Fisher (collectively, "Fisher") and Ruark Building Contractors, Inc. ("Ruark"). The court concluded, based on facts it determined were not subject to genuine dispute, that the complaint was filed after the statute of limitations for bringing the claim had expired. Chesapeake contends that the circuit court erred in (1) referring to matters outside the pleadings while resolving a motion to dismiss, (2) resolving factual disputes, and (3) determining that the "continuation of events" theory did not apply to their claims.

We conclude that the court properly considered evidence submitted by the parties that was not subject to genuine dispute in awarding summary judgment against Chesapeake, and that it properly followed binding precedent in declining to apply the continuation of events theory to this case. Finding no reversible error, we will affirm.

BACKGROUND

The critical issue in this case is whether Chesapeake filed its claims against Fisher and Ruark before the expiration of the three-year statute of limitations. Chesapeake filed its complaint against Fisher on May 16, 2017, and an amended complaint—in which it added claims against Ruark—on August 24, 2017. Thus, to be timely, Chesapeake's claims against Fisher must have arisen no earlier than May 16, 2014, and its claims against Ruark must have arisen no earlier than August 24, 2014.

The Summary Judgment Record: Events Preceding May 16, 2014

In February 2013, Chesapeake entered into a contract with Fisher under which Fisher agreed to provide architectural services for the design and construction of Chesapeake's new eye care surgical center. Chesapeake also contracted with Ruark to build the center according to the design plans created by Fisher. In turn, Ruark subcontracted the build and installation of the HVAC system to Wilfre Company, Inc. ("Wilfre"); and Fisher subcontracted the engineering firm Blake and Vaughan Engineering, Inc. ("Blake & Vaughan") to provide mechanical engineering services for the HVAC system.

The contractors completed the construction and installation of the HVAC system in late 2013 and the surgical center itself was completed and operational by April 2014. By January 2014, at the latest, Dr. Catherine Smoot-Haselnus, Chesapeake's managing member and president, began to complain about deficiencies in the HVAC system. On January 14, she sent an e-mail to representatives of Fisher, Ruark, and Wilfre expressing a number of concerns about the design and operation of the system. Two days later, she sent another e-mail to the same group in which she stated that "[t]he HVAC issues are getting uglier." She identified temperature and humidity problems in at least two different rooms of the facility and stated that "[w]e cannot operate in this condition!" Over the ensuing months, the parties engaged in further correspondence, discussions, and attempts to solve the problems. On February 5, Dr. Smoot-Haselnus met with representatives for Fisher, Blake & Vaughan, and Wilfre and discussed making alterations to portions of the HVAC

system "to address concerns raised by Dr. Smoot-Haselnus." As a result of the meeting, Wilfre made repairs, which it completed in late March.

The repairs did not resolve the problems. In early April, still 2014, Dr. Smoot-Haselnus met with Martin Harrison, Wilfre's Senior Project Manager, and expressed that she had lost confidence in Fisher and Blake & Vaughan to fully address the problems with the HVAC system. Dr. Smoot-Haselnus asked Mr. Harrison for the name of an engineer who could fix the problems, and Mr. Harrison suggested David Hoffman of Gipe Associates, Inc. On April 14, Dr. Smoot-Haselnus emailed Mr. Fisher to ask that he meet with her to discuss "the HVAC challenges we have had." When the two met on April 18, Dr. Smoot-Haselnus "expressed her extreme dissatisfaction at the ongoing HVAC issues" and "indicated that she wished to bring legal action against Blake as a result of the HVAC issue." Mr. Fisher conveyed that threat in a May 14 e-mail to Jeffrey C. Vaughan, a principal owner of Blake & Vaughan, in which Mr. Fisher stated that Dr. Smoot-Haselnus had been in his office "multiple times exploding over the Mechanical issues" with the HVAC system. Indeed, explained Mr. Fisher, the only reason "[s]he ha[d] not sought legal action [against Blake & Vaughn was] because as I explained to her that would mean she would need to make her claim at me first and then I would need to bring you in."

In an affidavit, Dr. Smoot-Haselnus contends that by April 2014, "the HVAC system appeared to be functioning adequately and [Chesapeake] had no knowledge of fatal design defects." But Dr. Smoot-Haselnus does not dispute the statements in affidavits by Messrs. Harrison and Fisher that, in April 2014, she (1) expressed a lack of confidence in Fisher's and Blake & Vaughan's ability to fix deficiencies in the HVAC system, (2) asked

Wilfre for the name of an engineer who could fix those deficiencies, and (3) expressed a desire to bring legal action against Blake & Vaughan based on deficiencies in the HVAC system.

The Summary Judgment Record: Events Between May 16, 2014 and August 24, 2017

On May 22, 2014, Dr. Smoot-Haselnus again wrote to Mr. Harrison to request Mr. Hoffman's contact information, explaining that she had "lost the name of the engineer you suggested for a second opinion." Wilfre provided Mr. Hoffman's name and phone number again the following day. On May 28, Dr. Smoot-Haselnus spoke with Mr. Hoffman and followed up with an e-mail, on which she copied representatives of Fisher, Wilfre, and Ruark, that asked Mr. Hoffman to perform "a second opinion assessment of the significant mechanical HVAC issues we are experiencing with our new ambulatory surgery center." Dr. Smoot-Haselnus stated that she looked forward to hearing Mr. Hoffman's assessment of "what steps we will need to take next to resolve our ongoing problems," which included "horrific humidity issues." In an e-mail to Mr. Fisher explaining her decision to hire Mr. Hoffman's firm, Dr. Smoot-Haselnus stated that she had "totally lost confidence in" Blake & Vaughan and wanted to leave that firm out of the discussions.

Through at least June, July, and early August, Mr. Hoffman reviewed and analyzed the system while obtaining information from Fisher, Ruark, and Wilfre. According to the certificate of qualified expert that Mr. Hoffman submitted during the litigation, he determined from his analysis that the Chesapeake HVAC "systems have been problematic

since the original installation," due to a number of issues including, among other problems, "poor performance related to temperature and humidity control."

The Summary Judgment Record: Events After August 24, 2017

According to Dr. Smoot-Haselnus, for years following completion of the surgery center in April 2013, including at least "throughout 2015," representatives of Fisher and the other appellees "continued to communicate and meet with [Chesapeake] and their agents/employees in order to develop solutions to the HVAC problems." Fisher and the others provided those services without any charge to Chesapeake.

In March 2017, an entity called "The Joint Commission"[1] conducted an inspection that identified problems with humidity, air flow, and temperature control throughout the surgical center. The Joint Commission informed Chesapeake that it would risk losing its accreditation if it did not fix the problems within 45 days.

Procedural History

Chesapeake filed a complaint against Fisher on May 16, 2017 and an amended complaint against Fisher and Ruark on August 24, 2017. In its amended complaint, Chesapeake includes claims for negligence and breach of contract against both defendants. Both defendants filed motions to dismiss or, in the alternative, for summary judgment, which the court denied without a hearing. A flurry of third-party practice, cross-claims,

[1] As described on its website, the Joint Commission is "[a]n independent, not-for-profit organization" that "accredits and certifies over 22,000 health care organizations and programs in the United States." *See* https://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx (last visited Sept. 20, 2019).

and counterclaims followed the denial of the motions, including: (1) Ruark filed a third-party complaint against Wilfre for indemnity and contribution, which Wilfre moved to dismiss; (2) Fisher filed a third-party complaint against Blake & Vaughan for breach of contract, negligence, indemnification, and contribution, which Blake & Vaughan moved to dismiss; and (3) Ruark and Fisher filed cross-claims against one another, each seeking indemnification and contribution from the other if Chesapeake were awarded damages against it.

After some initial discovery, Fisher and Ruark moved the court to reconsider its denial of their motions to dismiss or for summary judgment on statute of limitations grounds. Wilfre and Blake & Vaughan adopted the same arguments with respect to their motions to dismiss or for summary judgment regarding the third-party claims against them. Chesapeake opposed the motions, arguing that its claims were not time-barred because Fisher "continued to provide services . . . well after May 2014." Chesapeake argued that the "continuation of events" theory applied to this case and, therefore, the statute of limitations did not start running until the contractors stopped performing under the contracts. Fisher, by contrast, argued that the discovery rule applied and, therefore, that the statute of limitations began running no later than April 2014.

In a memorandum opinion issued in May 2018, the circuit court concluded that the complaint was barred by the statute of limitations. Relying on *Hilliard & Bartko Joint Venture v. Fedco Systems, Inc.*, 309 Md. 147 (1987), the court determined that the discovery rule, and not the continuation of events theory, applied to Chesapeake's claims. The court concluded that "both prongs of the discovery rule [were] met," because

Chesapeake "knew, and/or certainly should have known" of the alleged harm no later than "March or April of 2014," and a reasonable investigation at that time would have uncovered the causal connection between the harm and the alleged wrongdoing. The court determined that there was "no credible, genuine dispute of the causal connection of the Plaintiffs' injury—the malfunctioning HVAC system—to the Defendants Fisher and Ruark, who were tasked by Plaintiffs to design and construct the surgical center, including the HVAC system." Having concluded that the primary liability claims were time-barred, the court also dismissed the dependent third-party complaints and cross-claims. Chesapeake appealed.

DISCUSSION

When reviewing "the trial court's grant of a motion for summary judgment, the standard of review is de novo." *Beka Indus., Inc. v. Worcester County Bd. of Educ.*, 419 Md. 194, 227 (2011) (quoting *Dashiell v. Meeks*, 396 Md. 149, 163 (2006)). "[W]e independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law. We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Bank of New York Mellon v. Georg*, 456 Md. 616, 651 (2017) (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)). "So long as the record reveals no genuine dispute of material fact 'necessary to resolve the controversy as a matter of law . . . the entry of summary judgment is proper.'" *Appiah v. Hall*, 416 Md. 533, 547 (2010) (quoting *O'Connor v. Balt. County*, 382 Md. 102, 111 (2004)).

I. THE CIRCUIT COURT AWARDED SUMMARY JUDGMENT AGAINST CHESAPEAKE.

Chesapeake first argues that the circuit court treated Fisher's and Ruark's motions as motions to dismiss and, therefore, erred in considering matters outside the four corners of the complaint. The court's opinion does superficially suggest that the circuit court treated the motions as motions to dismiss—for example, the court only recited the standard of review for a motion to dismiss; it referred to the motions several times as "motions to dismiss"; and it entered an order dismissing the claims. Nevertheless, in substance, the court treated the motions as motions for summary judgment. The circuit court (1) considered materials outside the four corners of the complaint that were submitted by all parties, including Chesapeake, (2) discussed the lack of evidence refuting certain evidence submitted by Fisher and Ruark, and (3) referred to the "undisputed facts" evidencing notice and the absence of any "credible, genuine dispute" regarding the causal connection between the alleged injury and the alleged wrongdoing.

Under Rule 2-322(c), whether a motion is treated as a motion to dismiss or one for summary judgment depends not on what the motion is named, but on what the court considers in connection with it. Indeed, even a motion that is labeled only as a motion to dismiss will be converted automatically into a motion for summary judgment if "matters outside the pleading are presented to and not excluded by the court." Md. Rule 2-322(c). The Rule thus "gives the trial court discretion" to treat a motion as one to dismiss or for summary judgment; discretion that the court exercises by either "considering matters outside the pleading" or not. *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772,

784-85 (1992); *see also Vito v. Grueff*, 453 Md. 88, 103-04 (2017) ("We treat the circuit court's grant of the motion to dismiss and/or for summary judgment as a motion for summary judgment, as the circuit court considered materials outside of the pleadings . . . ."). Here, as Chesapeake points out, the court considered materials outside the pleadings. We therefore treat its grant of the motion as a grant of summary judgment. *Ademiluyi v. Md. State Bd. of Elections*, 458 Md. 1, 29 (2018).

We also observe that, although it would have been far preferable for the court to have stated expressly that it was treating the motions as motions for summary judgment, and to have expressly articulated the correct standard in its opinion, its failure to do so here did not cause any party to suffer unfair prejudice. All "parties had the opportunity to fully brief the issues" and "to submit materials pertinent to the court's decision." *Heneberry v. Pharoan*, 232 Md. App. 468, 478 (2017). Fisher's and Ruark's motions were filed expressly as motions to dismiss or, in the alternative, for summary judgment, which put all parties on notice that summary judgment was requested. The parties then acted accordingly: Chesapeake, Fisher, and Ruark all submitted evidence outside the four corners of the complaint in support of their respective positions on the motions, and they discussed such evidence during the hearing on the motions.

II. THE CIRCUIT COURT DID NOT RESOLVE ANY GENUINE DISPUTES OF MATERIAL FACT.

Chesapeake next contends that the circuit court erred in resolving two disputes of material fact against Chesapeake: (1) that Chesapeake knew or should have known of the alleged HVAC issues by May 2014, and (2) that the HVAC issues Chesapeake raised in

January 2014 were the same issues that it raised in the May 2017 complaint. Viewing the record in the light most favorable to Chesapeake, *Georg*, 456 Md. at 651, we agree with the circuit court that no genuine disputes of material fact precluded the award of summary judgment on statute of limitations grounds.

On the summary judgment record submitted to the circuit court and now before us, it is undisputed that Ruark and Wilfre completed installation of the HVAC system by late 2013, that Chesapeake expressed dissatisfaction with the system in January 2014, and that Chesapeake was sufficiently convinced by April 2014 that severe deficiencies existed for Dr. Smoot-Haselnus to (1) solicit the name of an expert to investigate the problems and (2) openly discuss the prospect of litigation over the deficiencies. All that preceded by weeks the relevant date of May 16, 2014.

Chesapeake nonetheless attempts to generate a dispute of material fact as to whether it had notice of severe deficiencies in the HVAC system before that date by asserting speculatively that the problems about which Dr. Smoot-Haselnus complained from January through April of 2014 may be different from the problems that are the subject of this litigation. To support its contention, Chesapeake points to the following two paragraphs in Dr. Smoot-Haselnus's affidavit opposing summary judgment:

> 4. Full operation of the Surgical Center commenced in April 2014. In the months leading up to the opening of the Surgical Center, [Chesapeake], the Fisher Defendants and Ruark (through their subcontractors) instituted a series of tweaks and adjustments which were intended to ensure that the HVAC system within the Surgical Center was running with maximum efficiency. These adjustments were relayed to me as customary and part of the normal process of configuring a HVAC system to a newly constructed space. At the time the Surgical Center opened in April 2014, the HVAC

> system appeared to be functioning adequately and [Chesapeake] had no knowledge of fatal design defects.
>
> 5. During the Summer of 2014, I began noticing problems with the HVAC system in the Surgical Center with respect to humidity and temperature control. As a result of worsening HVAC conditions in the Surgical Center, [Chesapeake] hired a consultant to analyze the system and develop appropriate remedial action. The consultant confirmed widespread systematic deficiencies with the design of the HVAC system, and opined that repairs and/or replacement of the system and infrastructure are needed in order to make the system operational.

Giving full weight to this testimony and all inferences favorable to Chesapeake that can be drawn from it, however, we cannot identify any dispute of material fact as to whether Chesapeake was on notice of the deficiencies in the HVAC system before May 16, 2014, for two reasons. First, any respite in the problems Chesapeake experienced with the HVAC system must have lasted only for some brief period between April 18, 2014 (the date on which Dr. Smoot-Haselnus "expressed her extreme dissatisfaction at the ongoing HVAC issues" in a meeting with Mr. Fisher) and May 22, 2014 (the date on which she again asked Mr. Harrison for "the name of the engineer [he] suggested for a second opinion"). Even if we assume—as, at this stage, we must—that the HVAC problems briefly abated, the undisputed material evidence still establishes beyond any genuine dispute that the issues that existed as of May 22, 2014 and thereafter were a continuation of those about which Dr. Smoot-Haselnus complained in April 2014. For example:

- The certificate of qualified expert that Chesapeake filed in support of its claims against Fisher was provided by Mr. Hoffman, the same expert whom it hired in May 2014 to evaluate deficiencies in the HVAC system. In the certificate, Mr. Hoffman, Chesapeake's own expert, traces the problems he attributes to Fisher to "the original installation" of the HVAC system, which occurred in 2013;

- Dr. Smoot-Haselnus's May 28, 2014 email to Mr. Hoffman seeking his evaluation of the HVAC system referred to the "horrific humidity issues" that Chesapeake was experiencing as "ongoing problems";

- The descriptions of the problems of which Dr. Smoot-Haselnus complained between January and April 2014 are, in substance, identical to those of which she complained in and after late May 2014 and to those that support Chesapeake's 2017 complaint; and

- The claims against Fisher and Ruark are premised on their design and construction, respectively, of the HVAC system, which was completed in late 2013.

Thus, even giving full credit to Dr. Smoot-Haselnus's testimony that there was a brief break in the occurrence of problems with the HVAC system, the undisputed evidence in the summary judgment record establishes that the reprieve was, at most, temporary.

Second, Chesapeake points to no evidentiary support of any kind to support its entirely speculative contention that the problems that Dr. Smoot-Haselnus noticed after May 16, 2014 might possibly be different from those that arose before that date. When a party seeks summary judgment based on evidence that, if credited, would support its claim for judgment as a matter of law, it is not enough for the other party simply to state that it disagrees. Nor is it enough to speculate that a different set of facts might possibly be true. *See Windesheim v. Larocca*, 443 Md. 312, 330 (2015) ("The facts offered by a party opposing summary judgment 'must be material and of a substantial nature, not fanciful, frivolous, . . . nor merely *suspicions*.'" (quoting *Carter v. Aramark Sports & Entm't, Servs., Inc.*, 153 Md. App. 210, 225 (2003))). A party opposing summary judgment must present *evidence* sufficient to create a genuine dispute of material fact. *George v. Balt. County*, 463 Md. 263, 273 (2019) ("[M]ere allegations neither establish facts, nor show a genuine

dispute of fact." (quoting *Vanhook v. Merchants Mut. Ins.*, 22 Md. App. 22, 27 (1974))). A response to a motion for summary judgment must identify facts in genuine dispute and,

> as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

Md. Rule 2-501(b).[2]

Fisher's and Ruark's motions for summary judgment were based on evidence that overwhelmingly establishes that Chesapeake was on notice of deficiencies in the design and construction of the HVAC system before May 16, 2014. Chesapeake's speculation that those problems differed from the ones it encountered later that same month and after does not suffice to create a genuine dispute of material fact. We therefore agree with the circuit court that there were no genuine disputes of material fact as to Chesapeake's notice of the relevant deficiencies in the HVAC system before May 16, 2014.[3]

[2] Another option available to a party that believes summary judgment has been requested before it has had the opportunity to obtain facts necessary to defend such a motion is to file an affidavit averring "that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit." Md. Rule 2-501(d). If the court is satisfied by such an affidavit, it "may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires." *Id.* Although Chesapeake now complains that it should have been permitted the opportunity to take discovery, it did not file the affidavit required to defend the motion on that ground.

[3] We pause briefly to observe that Chesapeake correctly identifies one error in the circuit court's opinion, namely, the court's mistaken reference to The Joint Commission's report of deficiencies in the HVAC system as support for the court's determination that Chesapeake was on notice of the deficiencies by May 2014. The circuit court erroneously indicated that The Joint Commission's inspection occurred in March 2014, when the

III. THE COURT CORRECTLY FOUND THAT CHESAPEAKE'S CLAIMS ARE BARRED BY LIMITATIONS.

Chesapeake's final argument is that the circuit court erred in its application of the discovery rule. Specifically, Chesapeake contends that the circuit court erred by declining to apply the continuation of events theory to suspend the running of the statute of limitations until after Fisher and Ruark ceased all work on the surgical center.

Section 5-101 of the Courts Article provides generally that, "unless another provision of the Code provides a different period of time within which an action shall be commenced," "[a] civil action at law shall be filed within three years from the date it accrues." Md. Code Ann., Cts. & Jud. Proc. § 5-101 (Repl. 2013; Supp. 2018). Section 5-108 of the Courts Article provides a more specific statute of repose, stating that "[u]pon accrual of a cause of action" against an architect, professional engineer, or contractor, "an action shall be filed within 3 years." *Id.* § 5-108(c).

Maryland typically applies the discovery rule, which provides that a claim "accrues when the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). The discovery rule has two prongs. First, "a plaintiff must have notice of the nature and cause of his or her injury" before the cause of action can accrue. *Windesheim*, 443 Md. at 327 (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 96 (2000)). Notice, for purposes of the discovery rule,

inspection actually occurred in March 2017. For two reasons, that error does not affect our analysis. First, that was just one of several reasons why the circuit court concluded Chesapeake was on notice of the deficiencies. Second, and more importantly, we review the record without deference to the circuit court's analysis, and so we have not considered The Joint Commission's 2017 findings in our assessment.

includes (1) actual notice, which "embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated," *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 636-37), and (2) implied or inquiry notice, which is "circumstantial evidence from which notice may be inferred." *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 636); *see also Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 452 (2000) (noting that the limitations period begins "when claimants gain knowledge to put them on inquiry notice generally when they know, or should know, that they have been injured by a wrong").

The second prong of the discovery rule implicates "the nature of the knowledge the injured party must possess before the cause of action accrues." *State v. Copes*, 175 Md. App. 351, 375 n.12 (2007). This prong examines whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing." *Id*. (quoting *Ga.-Pac. Corp. v. Benjamin*, 394 Md. 59, 90 (2006)).

Here, assuming the discovery rule applies—a question to which we turn next—we have no trouble concluding that both prongs are satisfied. Dr. Smoot-Haselnus's complaints from January through April 2014 confirm that Chesapeake had actual notice of serious problems with the HVAC system, and it is not subject to genuine dispute that a reasonable investigation would have demonstrated the causal connection between those problems and the alleged wrongdoing. Indeed, Chesapeake itself contends that the investigation Mr. Hoffman undertook in the spring and summer of 2014 did just that.

Chesapeake, however, asserts that we should instead analyze the applicability of the statute of limitations based on the continuation of events theory, which—in cases where it applies—suspends the running of the statute until the completion of all services. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 714 (2003). In such cases, the statute of limitations "begins to run only from the time the services can be completed or from the time the event happens." *Id.* (quoting *Frederick Rd. Ltd. P'ship*, 360 Md. at 97). Chesapeake's argument, however, runs into a brick wall because the Court of Appeals has already decided that the continuation of events theory cannot save untimely claims against architects, engineers, and contractors, such as the appellees here. *Hilliard & Bartko Joint Venture v. Fedco Sys., Inc.*, 309 Md. 147, 159 (1987).

In *Hilliard*, owners of a building brought claims against both an architect and a contractor for, among other things, breach of contract and negligence arising from alleged leaks in the building "that were observed before construction was completed." *Id.* at 152. The Court of Appeals concluded that the owners were "on notice that a design defect might be causing the leaks," but did not file their lawsuit within three years of having notice. *Id.* at 159. In considering whether the claims were timely, the Court rejected the owners' continuation of events argument "that limitations did not begin to run . . . against the architect until [the architect] had completed rendering all of the services which it had promised." *Id.* at 157-59. Instead, the Court determined that § 5-108 of the Courts Article, "the special statute of repose for claims against architects, professional engineers, and

contractors, does not permit use of the continuation of events theory."[4] *Id.* at 159. The Court held that § 5-108 "does not accommodate further postponing of the time for accrual . . . beyond the time of discovery" of the injury. *Id.* at 162.

Chesapeake attempts to distinguish *Hilliard*, arguing that there "the construction of the building . . . was substantially complete" before the leaks were discovered, whereas here Fisher and Ruark continued to attempt to make repairs after the completion of the surgical center. But the Court of Appeals's holding that the continuation of events theory does not apply to claims covered by the statute of repose in § 5-108 is not dependent on that distinction. Moreover, in *Booth Glass Co., v. Huntingfield Corp*., a case in which § 5-108 was not at issue, the Court declined to toll the statute of limitations even though the defendant made ongoing efforts to repair an allegedly negligent installation. 304 Md. 615, 622-23 (1985). The Court noted that "the legislature has not expressly provided for an exception in [the] statute of limitations . . . in cases where a party is assured that a defect will be corrected and attempts at repair are made by a defendant." *Id.* at 623-24. Rejecting the continuation of events theory, the Court instead applied the discovery rule and held that

[4] The Court's conclusion implicitly relies upon the difference between a statute of limitations and a statute of repose. The former "is 'a procedural device that operates as a defense to limit the remedy available from an existing cause of action,'" whereas the latter "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Carven v. Hickman*, 135 Md. App. 645, 652 (2000) (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989)), *aff'd sub nom. Hickman, ex rel. Hickman v. Carven*, 366 Md. 362 (2001). "Unlike a statute of limitations," a statute of repose "typically . . . is not tolled for any reason." *Hickman*, 135 Md. App. at 652 (quoting *First United Methodist Church of Hyattsville*, 882 F.2d at 866).

the statute of limitations began to run on the date when the negligent work was first discovered. *Id.* at 623.

In summary, we conclude that the circuit court properly ruled on Fisher's and Ruark's alternative motions for summary judgment; that it did not resolve any genuinely disputed questions of material fact; that it correctly rejected the continuation of events theory; and that it properly applied the discovery rule to conclude, based on the undisputed material facts in the summary judgment record, that Chesapeake's claims against Fisher and Ruark were time-barred. Because those claims were time-barred, we also agree that the circuit court properly dismissed the derivative claims against and among Fisher, Ruark, and their subcontractors.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.