THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr.

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SC Court of Appeals

Case No. 2018-CP-18-01436
Appellate Case No. 2020-000985

MONICA BROWN-GANTT,. . . . . Appellant

v.

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP. . . . . Defendants

And

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP. . . . . .Third-Party Plaintiff

v.

FLOORS, INC. successor by merger to RICE PLANTERS CARPETS, INC. subsequently known as CREATIVE TOUCH INTERIORS, INC. d/b/a/ HD SUPPLY INTERIOR SOLUTIONS and now known as ISI DESIGN AND INSTALLATION SOLUTIONS, INC., J.H. LEE MASONRY, INC. a/k/a JAMES H. LEE MASONRY, INC., DVS, INC., MCDANIEL CONSTRUCTION CO., LLC a/k/a MCDANIEL CONSTRUCTION, INC., and
ALL-AMERICAN ROOFING, INC. . . . . Third-Party Defendants

Of which CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP are the . . . . . Respondents

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BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Ms. Brown filed her Complaint in this action on August 8, 2018—almost 13 years after the construction of her home at 109 Catbriar Court, Summerville, South Carolina 29485 ("Residence"). On October 12, 2018, Centex Real Estate Company, LLC and Centex Homes, A Nevada General Partnership (collectively "Centex") filed their Answer and Third-Party Complaint denying Ms. Brown's allegations and alleging that Ms. Brown's claims were barred by the applicable statute of limitations and statute of repose. On December 13, 2018, Ms. Brown sat for her deposition in this action.

On March 21, 2019, Centex filed its Motion for Summary Judgment on the grounds that Ms. Brown's claims were barred by the statute of limitations and statute of repose. A hearing on Centex's Motion for Summary Judgment was held on April 11, 2019 before the Honorable George M. McFaddin, Jr. On October 18, 2019, almost six months after the hearing on the Motion for Summary Judgment, the learned Circuit Court granted Centex's Motion for Summary Judgment on the ground that Ms. Brown's claims were barred by the statute of repose and statute of limitations. On October 25, 2019, Ms. Brown filed a Motion to Reconsider the Order Granting Centex's Motion for Summary Judgment. On June 17, 2020, over seven months after Ms. Brown filed her Motion to Reconsider, the Circuit Court issued an Order denying Ms. Brown's Motion to Reconsider. On July 8, 2020, Ms. Brown filed her Notice of Appeal with the this Court.

FACTUAL BACKGROUND

Appellant Monica Brown-Gantt ("Ms. Brown") contracted with Respondents Centex Real Estate Company, LLC and Centex Homes, A Nevada General Partnership ("Centex") for the construction and purchase of the property at 109 Catbriar Drive, Summerville, SC ("Residence"). (Complaint at 1; R. 34). The Certificate of Occupancy for the Residence was issued on November 15, 2005. (Mot. for Summary Judgment, Exhibit C; R. 128).

In 2005, Ms. Brown began experiencing the same issues with the Residence that she experienced at the time of her deposition in 2018. (Mot. for Summary Judgment, Exhibit A, Depo. of M. Brown, 33:11-21; R. 68). While Centex made a few minimal repairs in 2009, Ms. Brown acknowledged that to her knowledge Centex has not made any repairs at the house since 2009. (Mot. for Summary Judgment, Exhibit A, Depo. of M. Brown, 44:13-25; R. 75). On September 5, 2013, after experiencing additional issues, Ms. Brown emailed Centex and informed it that she was experiencing leakage problems with the roofing, floors, walls, and windows, and unless Centex fixed those problems, she was going to file a law suit. (Mot. for Summary Judgment, Exhibit A, Depo. of M. Brown, 46:1-6; R. 79; Mot. for Summary Judgment, Exhibit A, Exhibit 8 to Dep. of M. Brown at 1; R. 87). On April 30, 2015, over a year and half after sending her notice that she intended to file suit if no further action was taken, Ms. Brown emailed Centex stating that she had been informed that Centex was not going to address the issues she complained of again. (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94).

Ms. Brown filed her Summons and Complaint on August 8, 2018—almost thirteen years after the Certificate of Occupancy was issued, almost five years after Ms. Brown informed Centex she was going to file a lawsuit, and over three years after Ms. Brown emailed Centex stating she had been informed Centex was not going to address the issues she complained of again. (Mot. for Summary Judgment, Exhibit C; R. 127; Mot. for Summary Judgment, Exhibit A, Exhibit 8 to Dep. of M. Brown at 1; R. 87; Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). Centex Answered Ms. Brown's Complaint on October 12, 2018 alleging, among other things, the affirmative defenses of the statute of limitations and statute of repose. (Centex's Answer at 4; R. 47). Ms. Brown responded to Centex's Interrogatories and Requests for Production on November 21, 2018. (Mot. for Summary Judgment, Exhibit A, Exhibit 13 to Dep. of M. Brown;

R. 96). Ms. Brown was deposed on December 13, 2018. (Mot. for Summary Judgment, Exhibit A, Dep. of M. Brown at 1; R. 65).

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure ("SCRCP") requires the entry of summary judgment when "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to obviate delay where there is no material issue of fact." *Loyd's Inc. by Richardson Const. Co. of Columbia, S.C. v. Good*, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (quoting *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dept. of Trans.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) (citing *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)).

ARGUMENT

I. The Circuit Court correctly found that the statute of limitations barred Ms. Brown's claims.

The Circuit Court correctly found that Ms. Brown's claims were barred by the statute of limitations. The record before the Circuit Court clearly evidenced that there was no genuine issue of material fact that Ms. Brown knew she had a claim prior to August 8, 2015. (Order Denying Plaintiff's Motion to Reconsider, p. 3; R. 25; Order Granting Centex's Motion for Summary Judgment, p. 15; R. 18).

A plaintiff must bring within three years "an action upon a contract, obligation, or liability, express or implied," S.C. Code Ann. § 15-3-530(1). Additionally, a plaintiff must bring within

three years "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law." S.C. Code Ann. § 15-3-530(5). Finally, a plaintiff must bring an action under the South Carolina Unfair Trade Practices Act within three years of the discovery of the unlawful conduct which is the subject of the suit. S.C. Code Ann. § 39-5-150. South Carolina utilizes the "discovery rule" as the doctrine to determine when a cause of action has accrued." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787, (Ct. App. 2011). The discovery rule provides that the "statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Id.* at 183. Under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* As further explained by the court in *Dorman v. Campbell*, 331 S.C. 179, 184–85, 500 S.E.2d 786, 789 (Ct. App. 1998):

> The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed. The date on which discovery should have been made is an objective rather than subjective question. Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

As discussed by the court in the *Hampton Hall* case below, it is immaterial whether nor not the plaintiff knows the full extent of her damages at the time the cause of action it discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). The plaintiff need only be on notice that a claim against another party might exist. *Id.*

In *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. 9:17-CV-1575-RMG, 2018 WL 6790308, at *3 (D.S.C. Dec. 26, 2018), the court found that the plaintiff's correspondence to the defendant general contractor expressly stating that the plaintiff and its co-venturer were aware of a potential claim for negligence arising from water damage to the community clubhouse was sufficient to prove the plaintiff had knowledge of a cause of action to start the clock on the statute of limitations. The court rejected as immaterial the plaintiff's claim that it was unaware of the full extent of the damage and design defects until several years later. *Id.* The court ruled that the time when the plaintiff "discovered the cause of action is determinative," noting that although it "may be that there was additional defective construction that was unknown in 2009, yet the letter makes clear that the Plaintiff was aware of the cause of action." *Id.* As a result, the court held that the three year statute of limitations barred the plaintiff's only remaining claim for gross negligence regarding the community clubhouse. *Id.* at *4. Additionally, the court in *Hampton Hall* held earlier that the plaintiff's other claims arising out of the allegedly defective construction were barred by the statute of repose. *See also id.* at *3.

Ms. Brown advances the theory that in applying the discovery rule the Circuit Court focused on the fact that Ms. Brown began experiencing issues shortly after the home was built as its primary basis to determine Ms. Brown's claims were barred by the statute of limitations. (Initial Brief of Appellant, p. 12). However, that is not accurate. The Circuit Court reviewed Ms. Brown's deposition testimony in conjunction with emails sent by Ms. Brown as late as 2015, seven years after the construction of the Residence, all of which clearly evidence that Ms. Brown knew, or should have known through the exercise of reasonable diligence, that she had cause of action as early as September 5, 2013 and certainly no later than April 30, 2015. (Order Denying Plaintiff's Motion to Reconsider, p. 3; R. 25). While the *Hampton Hill* court found that plaintiff's knowledge of one defect was enough to bar the plaintiff's claim for even undiscovered defects,

here, Ms. Brown confirmed that the issues she had brought suit for were the same issues she began experience since purchasing the Residence in 2005. Thus, she had always been aware of all of the defects for which she was filing suit:

> Q. [Y]ou began experiencing problems with your home virtually right after you moved into it in 2005, correct?
> A. Yes.
> Q And they're basically the same problems then that exist now. Agreed?
> A. Yes.
> All right. And they haven't been fixed by Centex. That's why you're suing them, correct?
> A. Correct.

(Mot. for Summary Judgment, Exhibit A, Depo. of M. Brown, 33:11-21; R. 68)

> Q. Actually, turn to the page before that, 0033 [of Exhibit 9]. Do you see the start of that e-mail chain? It's dated April 30, 2015, at 2:31 p.m. from you.
> . . .
> A. Yes.
> Q. And this is an email from you to Centex, dated April 30, 2015, correct?
> A. Oh, okay, I see that.
> . . .
> Q. And this is where you're writing Centex saying, These are the problems that we're having with our house. Agreed? If you look on the next page, there's a listing from you in all caps about the problems that you've had.
> A. On the next page, and you're saying page 7 out of 8?
> Q. Yes. This is your e-mail, isn't it -- is it not, Ms. Brown?
> A. Yeah, I was listing all the problems I had day one.
> Q. Right, from day one.
> A. Uh-huh.
> Q. You need to answer yes, please.
> A. Yes.
> Q. Thank you. And the third floor had no flashers and had been leaking from day one. Agreed?
> A. Yes, based on the report.
> Q. Right. Reading down, The entire room shakes when you walk into my son's room.
> A. Right.
> Q. That was never fixed?
> A. That was -- they said they never were going to address that again after I keep complaining about it.

(Mot. for Summary Judgment, Exhibit A, Depo of M. Brown, 49:18-51:9 and Exhibit 9 to Depo of M. Brown; R. 72-74)

Even after Centex performed a few limited repairs in 2008 and 2009, Ms. Brown continued to complain to Centex of the same issues relating to the roofing, floors, walls and windows in September 2013 and April 2015. (Order Denying Plaintiff's Motion to Reconsider, p. 4; R. 26; Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). In fact, on September 5, 2013, Ms. Brown sent a very clear message that she knew she had a claim against Centex. (Mot. for Summary Judgment, Exhibit A, Exhibit 8 to Dep. of M. Brown at 1; R. 87). In her September 5 email Ms. Brown stated in all caps, "THIS IS OUR LAST ATTEMPT BEFORE WE SEEK LEGAL REPRESENTATION." (Mot. for Summary Judgment, Exhibit A, Exhibit 8 to Dep. of M. Brown at 1; R. 87). In her deposition Ms. Brown confirmed that the intent of her September 5, 2013 email, which she sent almost five years before filing suit, was to inform Centex that if it did not fix the problems with the roofing, floors, walls and windows she would file suit. (Mot. for Summary Judgment, Exhibit A, Dep. of M. Brown 45:5-46:6; R. 78-79).

Q. Here's a document that we got from your files. It's Bates stamped number 36, and I've marked that as Exhibit 8. And in the middle of it, do you see that you wrote -- or you sent an e-mail to Jean Barraclough at Pulte on September 5, 2013?
A. It's to customer care, yes.
Q. But anyway, this -- you sent an e-mail to Centex on September 5, 2013, correct?
A. Uh-huh, yes.
Q. You need to answer yes.
A. Yes.
Q. All right. And what you are complaining of is roofing, floors, walls, and windows, agreed?
A. Yes.
Q. And that's in all caps. And then it says, This is our last attempt before we seek legal representation. That's what you wrote, correct?
A. Right.
Q. So you're saying, Centex, we're having problems, leakage problems with roofing, floors, walls, and windows, and unless you fix them, as of 2013, this is our last notice to you, or we're going to file suit, correct?
A. That's what I said.

(Mot. for Summary Judgment, Exhibit A, Dep. of M. Brown 45:5-46:6; R. 78-79). Confirming through her own words that Ms. Brown knew, or at the very minimum reasonably should have known through the exercise of reasonable diligence, that she had a cause of action against Centex in September 2013—five years before she filed suit.

Based on Ms. Brown's own testimony no reasonable minds could disagree that Ms. Brown knew, and at a minimum should have known, that she had a cause of action against Centex prior to August 8, 2015. Therefore, the Circuit Court correctly found that Ms. Brown's claims are barred by the statute of limitations.

II. The Circuit Court correctly found that Centex was not equitably estopped from asserting the statute of limitations as a defense.

Ms. Brown has asserted that "the statute of limitations should be tolled and Centex estopped from asserting the statute of limitations as a defense based on the actions of Centex." (Initial Brief of Appellant, p. 14). Equitable estoppel and equitable tolling are two separate concepts. *See generally*, *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) (discussing equitable tolling); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001) (discussing equitable estoppel). As the Circuit Court found, neither of these principles are appropriate in this case and each is addressed in turn below. (Order Denying Plaintiff's Motion to Reconsider, p. 6-7; R. 28-29).

A. The Circuit Court correctly found that the statute of limitations should not be equitably tolled.

Equitable tolling is a doctrine that is rarely applied in South Carolina. *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33. "[E]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* (internal citations

omitted) (tolling the statute of limitations when the defendant failed to properly list its registered agent for service of process with the Secretary of State).

As noted by the Circuit Court, none of Centex's actions precluded Ms. Brown from filing suit. (Order Denying Plaintiff's Motion to Reconsider, p. 7; R. 29). In fact, Ms. Brown expressly acknowledged in 2013 that she had the ability to file suit when she informed Centex that if they did not take action she would "SEEK LEGAL REPRESENTATION." (Mot. for Summary Judgment, Exhibit A, Exhibit 8 to Dep. of M. Brown at 1; R. 87). Ms. Brown had the unquestionable ability to file suit at any point in time and she chose not to do so until August 8, 2018. (Summons and Complaint at 1; R. 33). Nothing Centex did or didn't do prevented Ms. Brown from filing suit, and thus, the Circuit Court correctly found that the statute of limitations should not be equitably tolled.

B. The Circuit Court correctly found that Centex should not be equitably estopped from asserting the statute of limitations as a defense.

Equitable estoppel is only appropriate when some conduct or representation by the defendant has induced the plaintiff to delay in filing suit. *Hedgepath*, 348 S.C. at 360, 559 S.E.2d at 338. "An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary." *Id.*

Ms. Brown cites *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), in support of her argument that Centex should be estopped from asserting the statute of limitations as a defense. However, the facts of *Dillon* vary greatly from those in the instant case. Dillon involved a leaking roof that was installed in 1970 during the construction of a new high school being built for Dillon County School District Number Two. *Id.* at 209-10. Shortly after construction, the roof began experiencing leaks. *Id.* The construction team comprised of the contractors and architect was consistently engaged in the

investigation and repair of the leaking roof from the time it was installed in 1970 until suit was filed in 1981. *See id.* at 210-14 (employment of a roofing expert to investigate the leaks in 1973, 1st attempted repair in spring 1974, employment of a second roofing expert in fall 1974, 2nd attempted repair in spring 1975, 3rd attempted repairs in fall 1975, 4th attempted repairs in summer 1976, 5th set of attempted repairs in summer 1978). After the final attempted repair in summer 1978, the roof continued to leak and the project architect wrote to the school district recommending that additional repairs be attempted and law suit instituted against the contractor. *Id.* at 213. At that point the construction team via the project architect made a settlement offer to pay a portion of the costs required to re-roof the building, but the offer was rejected. *Id.* at 213-14. A second offer was then made to "provide the school with a new roof." *Id.* at 214. However, the offer to provide a new roof was never concluded. *Id.* The school district filed its law suit within five months of the offer to provide a new roof and within three years from the time the project architect suggested a law suit be initiated. *Id.*

Unlike in *Dillon*, Centex made no such inducements and performed only minimal repairs in 2008 and 2009—nine years before this action was filed. In fact, Ms. Brown herself acknowledged that Centex had only made minimal repairs and would not be addressing the issues she complained of again. (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). In an April 30, 2015 email to Centex Ms. Brown's wrote, "WE HAVE SENT YOU THIS COMPLAINT SEVERAL TIMES AND NO ONE HAS BOTHER [sic] TO ADDRESS AND WAS TOLD . . . THAT [CENTEX] WAS NOT GOING TO ADDRESS THE ISSUES AGAIN." (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). This email as well as other portions of the record indicate that Ms. Brown was fully aware that Centex had stated it "was not going to address the issues again." (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). This express acknowledgment by Ms.

Brown evidences there was no inducement or representation by Centex to delay Ms. Brown in filing suit. Moreover, unlike in *Dillon* where there was a consistent back and forth of repairs and investigations by subject matter experts, Centex only made minimal repairs with the last repair occurring nine years before Ms. Brown filed suit. (Order Granting Centex's Motion for Summary Judgment, p. 13; R. 16; Mot. for Summary Judgment, Exhibit A, Dep. of M. Brown 44:15-18; R. 75). As shown above, the Circuit Court correctly found that Centex should not be equitably estopped from asserting a statute of limitations defense.

III. The Circuit Court correctly found that the statute of repose barred Ms. Brown's claims and, even if the Circuit Court erred in apply the statute of repose to the gross negligence claims, it was harmless error.

The Circuit Court correctly found that Ms. Brown's claims were barred by the statute of repose. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993) (emphasis added) (citation omitted) (internal quotation marks omitted). As the South Carolina Supreme Court explained:

> A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. A statute of repose is a statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury. Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists.

Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citations omitted) (internal quotation marks omitted). Further, a statute of repose, unlike a statute of limitations, cannot be defeated by estoppel, waiver, or claims of tolling. *See, e.g., G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003).

A. The Circuit Court correctly found that the statute of repose barred Ms. Brown's claims.

The statute of repose applicable to allegations of constructions defect claims is eight years. S.C. Code Ann. § 15-3-640. The eight year statute of repose applies to all homes where substantial completion occurs after July 1, 2005. Issuance of a certificate of occupancy by a municipality is proof of the date of substantial completion. *Id.*

The Town of Summerville issued a Certificate of Occupancy for the Residence on November 14, 2005. (Mot. for Summary Judgment, Exhibit C; R. 128). As a result, the Residence was substantially complete after July 1, 2005 making the eight-year statute of repose applicable to the property. Thus, any action brought after November 14, 2013—eight-years after the issuance of the Certificate of Occupancy—is barred by the statute of repose. This action was not brought until August 8, 2018, and thus is barred by the statute of repose.

Furthermore, the gross negligence exception does not apply to Ms. Brown's claims because Ms. Brown did not show a *prima facie* case of gross negligence. *See Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (at the summary judgment stage a plaintiff must establish a prima facie case to each element of her claim); *see also Faile v. S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 331–32, 566 S.E.2d 536, 544 (2002) ("Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. It is the failure to exercise even the slightest care.").

Ms. Brown presented no evidence to establish a *prima facie* case of gross negligence, and therefore she presented no evidence that the gross negligence exception to the statute of repose might be applicable to her claim. *See* Rule 56(e), SCRCP ("[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts

showing there is a genuine issue for trial.") Ms. Brown's position in her Motion in Opposition to Centex's Motion for Summary Judgment with regards to the statute of repose was that, "Plaintiff *alleges* gross negligence in her first cause of action against Centex, and therefore the statute of repose is not an available defense in this action." (Plaintiff's Memo In Opposition to Centex's Mot. for Summary Judgment at 7; R. 167) (emphasis added). However, this assertion was the argument of counsel, based on the pleadings, and was unsupported by any evidence. *Gilmore v. Ivey*, 290 S.C. 53, 58-60, 348 S.E.2d 180, 184 (Ct. App. 1986) (without supporting evidence the court may not consider the mere argument of counsel).

Ms. Brown did attach an "expert report" to her Motion in Opposition to Centex's Motion for Summary Judgment. That report, however, while documenting the condition of the house and identifying some alleged "construction defects", does not allege any violation of any applicable building codes, any negligence, any gross negligence, or any intentional or conscious wrongdoing on the part of Centex. Thus the report has no evidence to support a *prima facie* case of gross negligence. Ms. Brown had the opportunity to supply an affidavit or some other form of evidence to establish her claim, but she did not. Thus, the gross negligence exception to the statute of repose is not applicable and Ms. Brown's claims are barred by the statute of repose.

B. Even if the Circuit Court erred in applying the statute of repose to Ms. Brown's gross negligence claim it was harmless error because her claims are barred by the statute of limitations.

An error not shown to be prejudicial does not constitute grounds for reversal and is a harmless error. *JKT Co., Inc. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980); *see also Baker v. Town of Sullivan's Island*, 279 S.C. 581, 310 S.E.2d 433 (Ct. App. 1983) (holding that a finding by the trial court that did not have an impact on the overall outcome on the trial court's order on plaintiffs' motion for summary judgment was not prejudicial and thus harmless error).

Here, even assuming, *argueno*, that the Circuit Court erred in finding that the statute of repose barred Ms. Brown's gross negligence claims, such a finding does not constitute grounds for reversal of the Circuit Court's grant of summary judgment because Ms. Brown's claims are still barred by the statute of limitations. (Order Denying Plaintiff's Motion to Reconsider, p. 3; R. 25; Order Granting Centex's Motion for Summary Judgment, p. 15; R. 18). In other words, the Circuit Court's finding that the statute of limitations bars all of Ms. Brown's claims makes the Circuit Court's findings as to the statute of repose irrelevant and any improper findings, harmless error. This Court should affirm the Circuit Court's grant of summary judgment regardless of any error with respect to the statute of repose.

IV. The Circuit Court correctly found that further discovery would not change Ms. Brown's admission that she knew she had claims more than three years before she filed her lawsuit.

The Circuit Court correctly found that additional discovery would be a futile effort because the fact that Ms. Brown's claims were barred by the statute of limitations and/or statute or repose had been established by Ms. Brown's own deposition testimony. "A party claiming that summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009). Summary judgment is proper if the trial court finds that further discovery is unlikely to create any genuine issue of material fact. *See Dawkins v. Fields*, 354 S.C. 58, 70, 580 S.E.2d 433, 440 (2003).

As to the statute of limitation, the main question before the trial court was whether Ms. Brown knew or should have known she had a cause of action against Centex before August 8, 2015—three years before the date she filed suit. As discussed above, the record is clear that Ms.

Brown knew she had a claim before August 8, 2015. Thus, the Circuit Court found there is no way that further discovery could uncover additional relevant evidence and create a genuine issue of material fact as to when Ms. Brown knew she had a claim. (Order Denying Plaintiff's Motion to Reconsider, p. 8; R. 30).

Ms. Brown also argues that further discovery could uncover the dates when Centex or its subcontractors performed repairs or provide insight into what, if anything, Centex's subcontractors know about the Residence and that that information would be relevant to the applicable limiting statutes. (Initial Brief of Appellant, p. 11). However, when or if a repair was performed has no bearing on the facts underlying when Ms. Brown knew or should have known she had a claim against Centex. Indeed, the record establishes that by April 30, 2015, at the latest, Ms. Brown unequivocally knew that Centex was "not going to address the issues again." (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). Indeed, Ms. Brown stated in all caps:

> "LIVES ARE IN DANGER FROM [CENTEX'S] NEGLIGENCE" and "[THEY] HAVE SENT [CENTEX] THIS COMPLAINT SEVERAL TIMES AND NO ONE HAS BOTHER TO ADDRESS AND WAS TOLD . . . THAT [CENTEX] WAS NOT GOING TO ADDRESS THE ISSUES AGAIN."

(Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). In other words, almost three years and four months before filing suit, Ms. Brown reiterated her knowledge that she knew she had a claim against Centex and that Centex had informed her that it was not going to address "the issues again." (Mot. for Summary Judgment, Exhibit A, Exhibit 9 to Dep. of M. Brown at 7; R. 94). There is no way that additional discovery could create a genuine issue of fact that would change the fact that Ms. Brown knew or should have known she had a claim before August 8, 2015.

CONCLUSION

This Court should affirm the Circuit Court's grant of summary judgment in favor of Centex Ms. Brown's claims are barred by the statute of limitations and further discovery on her claims would be futile. Additionally, Ms. Brown's claims are barred by the statute of repose. However, to the extent this Court finds that the Circuit Court improperly applied the statute of repose, it was harmless error. Furthermore, this Court should affirm the Circuit Court's grant of summary judgment for any ground appearing on the record as provided by Rule 220(c), SCACR.

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January 11, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 11 2021
SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr.

Case No. 2018-CP-18-01436
Appellate Case No. 2020-000985

MONICA BROWN-GANTT,. . . . . Appellant

v.

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP. . . . . Defendants

And

CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP. . . . . .Third-Party Plaintiff

v.

FLOORS, INC. successor by merger to RICE PLANTERS CARPETS, INC. subsequently known as CREATIVE TOUCH INTERIORS, INC. d/b/a/ HD SUPPLY INTERIOR SOLUTIONS and now known as ISI DESIGN AND INSTALLATION SOLUTIONS, INC., J.H. LEE MASONRY, INC. a/k/a JAMES H. LEE MASONRY, INC., DVS, INC., MCDANIEL CONSTRUCTION CO., LLC a/k/a MCDANIEL CONSTRUCTION, INC., and
ALL-AMERICAN ROOFING, INC. . . . . Third-Party Defendants

Of which CENTEX REAL ESTATE COMPANY, LLC and CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP are the . . . . . Respondents

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of Respondents complies with Rule 211(b) SCACR.

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