THE STATE OF SOUTH CAROLINA
In The 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 . . . . . Respondent

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 CONSTRUCTION CO., LLC a/k/a MCDANIEL CONSTRUCTION, 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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APPELLANT'S PETITION FOR REHEARING

William K. Kalivas, Esquire (S.C. Bar No. 80201)
SMITH CLOSSER, PA
P.O. Box 40578
7455 Cross County Road
Charleston SC 29423-0578
(843) 760-0220
(843) 552-2678 facsimile
wkalivas@scnlaw.com
Attorneys for Appellant
Monica Brown-Gantt

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INTRODUCTION

On April 5, 2023, the decision affirming the Circuit Court order granting summary judgment to Centex Real Estate Company, LLC and Centex Homes, a Nevada General Partnership (collectively, "Centex") was filed as Unpublished Opinion No. 2023-UP-132. Pursuant to Rule 221(a), SCACR, the Appellant, Monica Brown-Gantt, hereby respectfully petitions for rehearing. The decision warrants rehearing because this Court overlooked or misapprehended the legal errors and material facts contained in Appellant's Final Brief, the Record on Appeal and further argued below. Specifically, the Circuit Court's decision and the prior order of this Court were based on the erroneous conclusion that the Appellant failed to present any evidence to show that Centex was grossly negligent in the construction of her home and failed to show that further discovery would uncover additional relevant evidence and create a genuine issue of material fact. As stated in more detail below, this Court overlooked material facts in affirming the Circuit Court's order. For that reason, and those articulated below, the Appellant respectfully requests a rehearing pursuant to Rule 221, SCACR.

STATEMENT OF THE CASE

This is an appeal by Monica Brown-Gantt (hereinafter referred to as "Brown") of the order granting Centex's Motion for Summary Judgment on October 18, 2019. Brown filed her Complaint on August 8, 2018 alleging, among other things, construction defects for work performed by Centex. Centex filed an Answer and Third-Party Complaint on October 12, 2018 denying the allegations in the Complaint and naming all the subcontractors on the project as Third-Party Defendants. Centex then filed its Motion for Summary Judgment on March 21, 2019.

A motion hearing was held on April 11, 2019, within six (6) months of the filing of its Third-Party Complaint, in Dorchester County before the Honorable George M. McFaddin, Jr., with

the parties submitting memorandums in opposition to and in support of the motion on April 8 and April 11, respectively. After oral arguments, the motion was taken under advisement, and Brown and Centex filed additional memorandums on April 12 and April 15, respectively. On October 18, 2019, Judge McFaddin, Jr. filed the Order Granting Summary Judgment. Brown timely filed a Motion to Reconsider on October 25, 2019, and the same was denied by order on June 17, 2020. The Notice of Appeal to the Court of Appeals was filed on July 8, 2020, seeking review of the Circuit Court's decision.

On April 5, 2023, this Court filed its decision affirming the Circuit Court's order and holding that the circuit court did not err in granting summary judgment to Centex based on the statute of repose because Brown failed to file her lawsuit within eight years of the issuance of the certificate of occupancy. This Court also found that the gross negligence exception to the statute of repose does not apply because Brown failed to present any evidence to show Centex was grossly negligent in the construction of the home, and that it was not error to grant summary judgment even though discovery had not been completed because Brown failed to show further discovery would uncover additional relevant evidence and create a genuine issue of material fact. It is from that decision that the Appellant seeks rehearing pursuant to Rule 221, SCACR.

FACTS

Brown contracted with Centex for the purchase and construction of her home, located in Dorchester County. (R. p. 35). Brown's home was completed in 2005, with a Certificate of Occupancy being issued by the Town of Summerville on November 15, 2025. (R. p. 5). Shortly after moving in, and continuing until present day, Brown experienced problems with the home. (R. p. 68, lines 10-21). Among the problems experienced by Brown was water intrusion at the chimney and windows during rain events. (R. pp. 105-106). Those issues led to Brown filing an

insurance claim, which resulted in an engineer inspection to review the work performed by Centex and/or its subcontractors and a stamped engineer report being produced on January 4, 2016. (R. p. 107 -pp. 168-174).

The issues raised by Brown and the January 4, 2016 inspection report were consistently raised with Centex, and until as recently as May 2018, Centex assured Brown that they would inspect and/or repair the various issues and, in some cases, made repairs to the home. (R. p. 79, lines 9-19). However, after the last offer to assist Brown with the issues, Centex notified her by letter dated May 23, 2018 that it would no longer offer to repair the damage to the home. (R. p. 36). After Brown received the letter, and it was clear Centex was not going to cure the defects, Brown was forced to file suit. (R. p. 36).

Brown filed her Complaint against Centex on August 8, 2018, alleging causes of action for negligence/gross negligence/defective construction, breach of implied warranties, breach of contract, unfair trade practices, and negligent misrepresentation. (R. p. 5.). On March 8, 2019, after all the Third-Party Defendants had been served, Brown served discovery requests on Centex. (R. p. 164). Centex filed its Motion for Summary Judgment on March 21, 2019, two days after the final Third-Party Defendant filed its responsive pleading. (R. p. 164). Centex never responded to Brown's discovery requests. (R. p. 153, lines 3-9).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C., 116, 121-22, 708 S.E.2d 766, 769 (2011). The granting of a motion for summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCP 56(c); *Beckham v. Short*, 294 S.C. 415, 365 S.E.2d 32 (Ct.

App. 1988), *aff'd*, 298 S.C. 348, 380 S.E.2d 826 (1989). In determining if there are material issues of fact, all inferences from the facts and ambiguities must be viewed in the light most favorable to the party opposing the motion. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

Accordingly, summary judgment is inappropriate if the facts are conflicting or the inference to be drawn from the facts are doubtful. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). More importantly, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801 (2009). Furthermore, "summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 112, 114-15, 410 S.E.2d 537, 545 (1991)).

ARGUMENT

I. The Circuit Court and This Court Erred in Finding That the Statute of Repose Barred Appellant's Claims Because Appellant Failed to Present Any Evidence to Show that Centex Was Grossly Negligent in the Construction of the Home.

The statute of repose is not applicable to all of the Appellant's claims because "[t]he limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, *gross negligence*, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement…" S.C. Code Ann. § 15-3-670(A). Appellant 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. (R. p. 167). Moreover, Appellant has provided evidence of gross negligence beyond the mere allegation contained in the Complaint.

A. Appellant Presented a Mere Scintilla of Evidence of Gross Negligence.

In Appellant's deposition testimony, she points to numerous times where Centex allegedly addressed certain issues, and yet the problems persisted. (R. p. 74, lines 13-21 -p. 83, lines 1-3). The fact that Centex may have made repairs to certain of the issues complained of by Appellant and that those issues continue to exist is evidence of gross negligence. (R. p. 154, lines 8-16). Further, Appellant addressed some of the specific defects that provide further evidence of gross negligence. (R. p. 264, lines 10-16 -p. 298, lines 7-12). Appellant specifically notes that "flashing was never installed on the house" and "there's no insulation", and states that the same conditions exist with "several houses on the street". (R. p. 242, lines 8-15 -p. 282, lines 11-21). The lack of flashing and insulation, and the reference to those conditions existing throughout the neighborhood is evidence of gross negligence as that is the failure of Centex to do something which it is incumbent upon it to do in the construction of a home.

There were a number of issues uncovered and referenced in the January 2016 engineer report that further provides a mere scintilla of evidence of gross negligence. (R. pp. 168-174). Those issues include a summary of significant damages to Appellants property, which include: deteriorated sheathing in the attic, leaking windows, and buckling floors. (R. p. 171). The engineer noted that the "flashing around the chimney and windows was improperly installed with loose sections of flashing and gaps adjacent to the siding", and specifically notes that "[t]hese construction defects were the cause of the water entering the house and damaging the shutters and flooring" and "were not a result of wind damage." (R. p. 173). The engineer also found that the "pavers and the grout joints were improperly installed" and that this defect was not caused by

rainwater. (R. p. 173). The report notes "defective installation of flashing or siding around windows and around the roof" with observable damage to the sheathing in the attic that corresponds with those defects. (R. p. 173). The report specifically states that "[t]he cause of the leaks was the inadequate and improperly installed flashing around the chimney and windows." (R. p. 173).

The engineer report was stamped by the engineer, H. William Chandler, P.E., and specifically notes that "[t]he conclusions, analysis, and opinions expressed herein have been prepared within a reasonable degree of engineering certainty" and "are based on the results and interpretations of the testing and/or data collection activities performed at the site," "and the education, training, knowledge, skill, and experience of the author and licensed professional engineer." (R. p. 168 -p. 174). The conclusions and analysis contained in the engineer report, along with the supporting testimony of the Appellant presents a mere scintilla of evidence of gross negligence and enough to create a genuine issue of material fact.

It is therefore legal error for this Court to conclude that Appellant failed to present any evidence to show Centex was grossly negligent in the construction of her home. Accordingly, Appellant urges this Court to grant rehearing and reverse the decision affirming the order of the Circuit Court.

B. Appellant Showed that Further Discovery Could Uncover Additional Relevant Evidence and Create a Genuine Issue of Material Fact.

South Carolina courts have continuously held that summary judgment is a "drastic remedy", which should be cautiously invoked to avoid severing a person's right to a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. P'ship v. Edwards*, 354 S.C.

459, 581 S.E.2d 496 (Ct. App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2022); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).

Because it is such a "drastic remedy", summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 112, 410 S.E.2d 537 (1991)). See also *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). After the initial pleadings in this case, Appellant and Centex agreed to undergo brief initial discovery, to include Centex's discovery requests and a deposition of Brown, to see if this matter might settle prior to Centex serving the Third-Party Defendants. (R. p. 152, lines 10-14).

After the deposition, a settlement was not reached, and Centex began serving the Third-Party Complaint on the individual Third-Party Defendants. (R. p. 152, lines 15-18). The final Third-Party Defendant filed an Answer on March 19, 2019, two (2) days before the Motion for Summary Judgment was filed by Centex. (R. p. 152, lines 17-20). Appellant served her initial discovery requests on Centex on March 8, 2019, after she learned which Third-Party Defendants were going to be involved in the case. (R. p. 152, lines 17-24 -p. 153, lines 5-6). The discovery requests were served almost two (2) weeks before the Motion for Summary Judgment was filed, and over thirty (30) days before the hearing on the Motion. (R. p. 152, lines 18-20 -p. 153: 5-6).

South Carolina courts have definitively required "full and fair" discovery before disposing of cases. *Baird v Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) (citing *Baughman*

v. American Tel. and Tel. Co., 306 S.C. 112, 410 S.E.2d 537 (1991)). See also *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). At this point, neither party has had the opportunity to conduct full and fair discovery, as many of the Third-Party Defendants had only recently filed responsive pleadings by the time the motion hearing took place. (R. p. 152, lines 17-20). Discovery is critical to the merits of Centex's motion for summary judgment as many of the issues raised by Appellant in the Complaint may have been repaired by Centex and/or its subcontractors after the original construction, and therefore the date of any repairs or improvements would be relevant to the applicable limiting statutes. (R. p. 152, lines 1-8).

Further, there was no opportunity to conduct discovery with the subcontractors who may have firsthand knowledge of the construction of Appellant's home because they were only identified and brought into the lawsuit just before the motion was heard. (R. p. 152, lines 15-20). Critically, this was a new construction and Appellant is inherently without the information needed to determine what scope of work or requirements each party was to perform, and further discovery is needed to determine what, if any, intentional acts or conscious failures were performed that could be considered gross negligence. Appellant admits that she "can't tell you if [Centex] literally fixed anything", and "didn't know it wasn't fixed because Centex is telling me they fixed it", when asked whether she knew problems existed and whether Centex had made any repairs. (R. p. 236, lines 11-15 -p. 243, lines 12-18). Whether, and to what extent, Centex made any repairs is a question that would be answered with further discovery, specifically with Centex producing records of what, if any, repairs it made and when those repairs took place.

Moreover, if Centex actually performed repairs, which Appellant notes could have been as late as 2017, and those repairs were defective, that would be relevant to the statute of repose as

that constitute new work and improvements performed by Centex. (R. p. 237, lines 11-14). Appellant specifically notes that Centex, or one of its subcontractors, "came out at some point and said they installed the flashings around the house", which is another issue requiring further discovery and relevant to the statute of repose. (R. p. 241, lines 10-13). That Centex "came out [to the property] several times trying to patch it", and "trying to repair it" requires further discovery and will, at a minimum, uncover additional relevant facts related to the work performed by Centex and/or its subcontractors, which would constitute an improvement on real property under the statute of repose. (R. p. 251, lines 13-16).

Accordingly, it was legal error for this Court to conclude that Brown failed to show that further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

CONCLUSION

This Court's decision overlooked and/or misapprehended the legal errors in Appellant's Final Brief, and the material facts contained in the Record on Appeal. Because this Court found that the statute of repose bars Appellant's claims, it declined to address her remaining arguments on appeal. Therefore, if this Petition is granted, rehearing is warranted to consider all of Appellant's arguments regarding the statute of limitations, equitable estoppel and equitable tolling. Appellant urges this Court to grant rehearing and reverse its decision affirming the Circuit Court's Order Granting Summary Judgment.

Respectfully submitted,

s/William K. Kalivas

William K. Kalivas, Esquire (S.C. Bar No. 80201)
SMITH CLOSSER, PA
P.O. Box 40578
7455 Cross County Road
Charleston SC 29423-0578
(843) 760-0220
(843) 552-2678 facsimile
wkalivas@scnlaw.com
Attorneys for Appellant
Monica Brown-Gantt

April 19, 2023

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PROOF OF SERVICE

I certify that Appellant's Petition for Rehearing was served on the below-listed counsel of record via electronic mail on April 19, 2023. A copy of the service email is attached hereto as Exhibit "A".

Thomas C. Hildebrand, Esquire
William Greyson Land, Esquire
Parker Poe Adams & Bernstein, LLP
850 Morrison Drive, Suite 400
Charleston, SC 29423
tomhildebrand@parkerpoe.com
greysonland@parkerpoe.com

Respectfully submitted,

s/William K. Kalivas

William K. Kalivas, Esquire (S.C. Bar No. 80201)
SMITH CLOSSER, PA
P.O. Box 40578
7455 Cross County Road
Charleston SC 29423-0578
(843) 760-0220
(843) 552-2678 facsimile
wkalivas@scnlaw.com
Attorneys for Appellant
Monica Brown-Gantt

April 19, 2023

Smith | Closser

Will Kalivas <wkalivas@scnlaw.com>

2020-000985; Monica Brown-Gantt v. Centex Real Estate Company, LLC

1 message

Will Kalivas <wkalivas@scnlaw.com> Wed, Apr 19, 2023 at 3:15 PM
To: "Hildebrand, Jr., Thomas C." <tomhildebrand@parkerpoe.com>, "greysonland@parkerpoe.com" <greysonland@parkerpoe.com>

Good Afternoon,

Attached for service, please find a copy of Appellant's Petition for Rehearing, along with correspondence to the Clerk of Court enclosing the filing fee. If you have any questions, please don't hesitate to contact me.

Thanks,

Will

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SMITH | CLOSSER, P.A.

Attorneys at Law
7455 Cross County Road, Suite One
Post Office Box 40578
Charleston, South Carolina 29423-0578
843-760-0220 - Office
843-552-2678 - Fax
www.smithclosser.com

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