THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell
Circuit Court Judge

Appellate Case No. 2019-001375
Circuit Court Case No. 2018-CP-23-3382

John W. Hine and Maria W. Hine..... Appellants,

v.

Timothy M. McCrory, individually and as agent, Michael P. McCrory, Seabrook L. Marchant, and The Marchant Company, ... Respondents.

PETITION FOR REHEARING

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellants John and Maria Hine

Columbia, South Carolina
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INTRODUCTION

The panel should reconsider its decision because it has improperly usurped the jury's role in assessing whether the Hine Family's response to finding a minor amount of termite damage in one portion of their home in 2012 should bar subsequent claims arising out of other termite damage found in a different location in their home. The panel's decision limited the Hine Family to only two options when they discovered isolated termite damage in one part of their house: either (1) immediately sue the Respondents, or (2) undertake destructive testing of their home to figure out if there was additional termite damage anywhere else. But these options were unrealistic under the facts of this case, and the ruling is directly contrary to the very case law cited by the panel.

Any suit against the Respondents in 2012 would have been a magistrate's court-level claim, as the entirety of termite damage at issue then was only $4,000. What's more, that minor damage was entirely separate from the termite damage the Hine Family discovered in a different part of their home several years later that cost over $100,000 to repair. That later-discovered damage alone forms the basis of this suit. On this, the record is clear: "[T]his [damage in 2012] came and went, and this isn't part of the current litigation. . . . I am saying that I have found two separate instances of termite damage that were not contiguous." (R. p. 168.) In other words, even if the Hine Family had filed suit in 2012, this case would still be necessary.

Nor did the law require the Hine Family to selectively destroy other parts of their home in 2012 to figure out if the isolated termite damage actually existed anywhere else on their property. Instead, South Carolina jurisprudence has always held that discovery of damage in one location on property does ***not*** preclude subsequent claims for the exact same type of damage in other locations on the same property. (*See* Table *infra* on Page 5 (collecting cases).) The panel's decision, however, upends this established point of state law.

The Hine Family is asking for a jury to hear the evidence and assess whether they acted reasonably. Instead, Mr. and Mrs. Hine have been put out of court on claims arising out of damage discovered in 2018 because they did not bring a magistrate's court claim for other, unrelated damage in 2012.

The panel's decision stands alone within the state's jurisprudence. This case marks a full departure from a previously unbroken line of South Carolina case law requiring a jury—not a court—to assess whether a limitations period has expired for claims arising from property damage.

Worse, the Respondents had actual knowledge of the massive amount of termite damage that they intentionally concealed from the Hine Family, which should toll any conceivable limitations period. Such intentional deception is the paradigm for when a court should equitably toll a limitations period. But the panel not only rejected this legal doctrine's application here, it did so without a trial judge having the opportunity to hear all the evidence, assess witness credibility, and decide in the first instance whether equitable tolling should apply (assuming *arguendo* a jury found that the limitations period started running in 2012).

Because it is inconsistent with every prior decision from both this Court and the Supreme Court involving subsequent claims for property damage when damage of a similar type was previously discovered elsewhere on the property, the Hine Family respectfully requests that the Court reconsider its decision, reverse the order below, and remand this matter for a jury trial.

STATEMENT OF POINTS OVERLOOKED OR MISAPPREHENDED

1. Similar Damage Elsewhere Does Not Trigger a Limitations Period. The Court held that because both the 2012 situation and the 2018 situation involved termite damage, discovery of the former necessarily started the limitations period for the latter, even though the subsequent damage was "in another area of the home." (Op. at 7.) This has never been the law in South

Carolina. Instead, the law of this state requires a jury to decide whether the plaintiff's response to similar damage in a different location is sufficient to trigger a limitations period.

2. Premature Ruling on Equitable Tolling. The Court held that the limitations period could not be equitably tolled, but there has never been an evidentiary presentation on the issue. The Hine Family simply seeks an opportunity to present all evidence on this issue at trial. By holding equitable tolling inapplicable despite not having heard the evidence on this issue, the Court has prematurely decided this issue instead of leaving it to the trial court's determination at the close of all proof.

ARGUMENTS AND AUTHORITIES

I. South Carolina law entitles the Hine Family to a jury trial on the question of whether the limitations period has expired.

There is no dispute that the termite damage the Hines discovered in an upstairs corner bedroom in 2012 was isolated and relatively minor—approximately $4,000 of damage to their home. (R. p. 165.) There is also no dispute the Hines fully investigated that damage and found its outer boundaries to ensure they could fully remediate that problem. (*See* R. p. 169 ("[A]s they took down the wall in the bedroom upstairs, whatever we discovered, they repaired, and then when they stopped, you know, uncovering termite damage, they stopped tearing down the walls.").) And there is no dispute the termite damage they discovered in 2018 was "in another area of the home"—the panel acknowledged as much on Page 7 of its order.

Despite the coincidence of being a similar type of damage, awareness of the first damage did not put the Hine Family on notice of the later damage. A modest amount of damage contained in an upstairs corner bedroom is different from a massive amount of damage in the center of the basement.

In South Carolina, if there is any doubt as to whether awareness of a prior problem is sufficient to put a plaintiff on notice of a subsequent problem, a jury must resolve the reasonableness of the plaintiff's actions after hearing a fully evidentiary presentation. In fact, South Carolina case law is replete with on-point examples that match this case's exact fact pattern: a plaintiff discovers a type of damage on one part of his or her property but does not sue within three years, but then subsequently discovers a similar type of damage on a different part of the property and brings suit. Before this case, this Court and the Supreme Court had always confirmed that the reasonableness of the plaintiff's response to discovering the first damage was for the jury to decide:

Table of South Carolina Cases Assessing When the Limitations Period Begins Running for Claims Involving Property Damage that is Similar to Previously-Discovered Damage on Following Page

Table: Cases Involving Claims for Property Damages Similar to Previously-Discovered Damage

Case	**Type of Property Damage**	**New Damage in Different Location from Earlier Damage?**	**Limitations Period is a Jury Question?**
Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., 435 S.C. 176, 866 S.E.2d 577 (2021)	damage caused by water intrusion	Yes	Yes
Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996)	crack in building façade	No	No
Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989), *vacated in unrelated part by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 559, 462 S.E.2d 858, 860 (1995)	cracked silos	Yes	Yes
Allwin v. Russ Cooper Assocs., 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019)	water damage caused by defective roof and roof design	No	No
Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011)	damage caused by water intrusion	Yes	Yes
Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998)	excessive moisture under house	No	No
This Case	termite damage	***Yes***	***No***

The fact that the damage occurred in a different location has always been the distinguishing, dispositive fact within this line of cases. *Dean*, *Allwin*, and *Barr* all highlighted this exact point when holding that a jury was not required to resolve questions involving the discovery rule. *See Dean*, 321 S.C. at 364–65, 468 S.E.2d at 647 (explaining that the claim was time-barred because the damage was in "the same location and of the same nature as the original harm"); *Allwin*, 426 S.C. at 19–20, 825 S.E.2d at 717 (holding that a claim was time-barred and distinguishing *Holly Woods Association* by explaining that the damages in that case "involved a different location within the neighborhood"); *Barr*, 330 S.C. at 642–45, 500 S.E.2d at 158–60 (explaining that a series of annual reports previously put the plaintiffs on notice of problems "under the house," so a subsequent suit filed for damage "under the house" was untimely).

Respectfully, the panel's decision here disregarded the controlling effect of these authorities. In so doing, it incorrectly equated this case with *Dean* and held that the Supreme Court "rejected a similar 'two distinct harms' argument in *Dean*" (Op. at 7), but the cases are fundamentally different ***according to the panel's own review of the facts***.

In *Dean*, the plaintiff noticed a crack in the façade of her building in 1984, but then sued in 1991 to recover for damages associated with that same harm. 321 S.C. at 362, 468 S.E.2d 646–47. Ms. Dean argued that the harm had worsened through the years, and the limitations period should have started in 1985 when the crack turned into bulges and the building began to buckle. The Supreme Court rejected that argument and held the claim untimely under the then-existing six-year limitations period.

The fact that the harms occurred in the exact same spot was controlling. As the *Dean* Court recited: "In August 1985, Dean noticed that the original crack had expanded and the façade of the building as bulging and buckling ***at the location of the original crack***." *Id.* (emphasis added). And

because the damages were traceable to the original damage, Ms. Dean had been on notice of the harm since 1984, rendering her claim untimely:

> Moreover, Dean acknowledged that the initial crack appeared in the right front corner of the building and that the subsequent enlargement of the crack and bulging of bricks ***appeared in the same location***. We find this case distinguishable from *Benton* [*v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994),] in that the resulting harm to Dean's building in 1985—enlarged crack and bulging bricks—by being ***in the same location***, and of the same nature as the original harm, evolved from Ruscon's 1984 pile driving activities. Therefore, because the subsequent harm was not separate and distinguishable, it was discoverable in 1984.

Id. at 364–65, 468 S.E.2d at 647 (emphasis added).

The facts in this case are obviously different, and the panel even said so: "Here, Appellants discovered a relatively minor amount of unrepaired termite damage in 2012, and six years later discovered more significant unrepaired termite damage ***in another area of the home***." (Op. at 7 (emphasis added).) There is no way to square the panel's recognition that the Hine Family is not suing for the same damage it discovered in 2012 with the panel's reliance on *Dean*. *Dean* unquestionably requires reversal and remand here.[1]

Nor is *Dean* an isolated case or an outlier on this issue. In fact, the panel's decision breaks with every other on-point South Carolina case identified in the chart on the preceding pages.

For instance, in *Santee Portland Cement*, the Supreme Court reversed a trial court's application of a limitations period to claims arising out of a collapsed silo. There, a crack appeared in the cement of "Bin #12" in 1969 and again in 1975, which the plaintiff repaired, characterizing

[1] This outcome is especially so in light of the fact that the Hine Family is entitled to every reasonable inference at this stage of litigation. *See, e.g.*, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009) ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.").

the cracks as "relatively minor in nature." 299 S.C. at 270, 384 S.E.2d at 693–94. Later, in 1980, Bin #13 "ruptured causing extensive damage." *Id.*

When the plaintiff sued its contractor to recover *inter alia* "loss of capacity and the cost of construction to correct the remaining silos," the trial court held the claim was time-barred due to the plaintiff's awareness of cracks in Bin #12 in 1969 and 1975. *Id.* at 271, 384 S.E.2d at 694. The Supreme Court reversed, holding the repairs for Bin #12 "were characterized as relatively small" and the problems with Bin #13 were "not detectable" because the defective issues "were inside the concrete walls." *Id.* at 274, 384 S.E.2d at 696. Instead of rigidly applying the statute of limitations, the "reasonableness of [the plaintiff's] actions" in response to identifying the cracks in Bin #12 "was an issue to be decided by the jury." *Id.*

This is exactly the same fact-pattern as the Hine Family experienced: they discovered a relatively small amount of termite damage in one part of their house, while the bigger issues were in a totally separate part of their home and hidden behind sheetrock. There is no dispute that the harms that form the basis of this litigation are different from the termite damage discovered in 2012, and there is nothing that required the Hine Family to completely demolish the interior of their home in 2012 to see if there may be other termite damage anywhere else in the house. And if there is any doubt on the point, it becomes a "jury question as to whether it was reasonable for the homeowners to know, or by reasonable diligence discover, there were issues with their construction." *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.*, 425 S.C. 268, 275–76, 821 S.E.2d 504, 508 (Ct. App. 2018), *aff'd* 435 S.C. 176, 866 S.E.2d 577 (2021); *see also id.* (explaining that whether the plaintiffs should have undertaken "destructive testing" was for the jury to decide).

Because the panel improperly assumed the jury's role in determining that the Hine Family should have done more in 2012 to discover termite damage in other places within the house, the Hine Family respectfully requests that the Court reconsider the panel's decision; reverse the summary judgment ruling; and remand this case for trial consistent with *Dean*, *Santee Portland Cement*, and the rest of South Carolina jurisprudence that requires a trial under these facts.

II. The Court should not make a determination regarding equitable tolling without a complete factual record developed at a trial.

The Hine Family presented an alternative argument that the statute of limitations should be equitably tolled due to the Respondents' active deception. In rejecting this argument, the panel decided for itself that the Hines "have not shown the existence of any extraordinary circumstance preventing them from filing a lawsuit within three years after discovering the caulking and termite damage in 2012." (Op. at 9.) But this statement reflects several errors by the panel that should be revisited and reconsidered.

First, as discussed at length above, the 2012 damage has nothing to do with this case. As a matter of law—as established by *Dean* in particular—the 2012 damage is irrelevant to the claims in this case. Accordingly, it cannot possibly serve as the basis for rejecting an equitable argument.

Second, the panel faults the Hine Family for not "exercis[ing] reasonable diligence" after discovering the (irrelevant) 2012 damage. (Op. at 9.) But the reasonableness of the Hines' conduct upon discovering the earlier damage (in a different part of their home) is a question for the jury upon a full factual record. *E.g.*, *Stoneledge at Lake Keowee Owners' Ass'n*, 425 S.C. at 275–76, 821 S.E.2d at 508.

Third, the panel presents an incomplete statement as to when a court may equitably toll a statute of limitations. The panel's decision indicates that this equitable theory is only available

when a plaintiff is actively prevented from filing suit because of an "extraordinary event." (Op. at 9.) But this doctrine is not so limited.

The Supreme Court has been clear: "Equitable tolling may be applied where it is justified under all the circumstances." *Hooper v. Ebenezer Senior Servs. & Rehabilitation Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). And it has identified exactly the situation presented here as a paradigm for equitable tolling: "Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014).

The facts here readily meet the *Doe* standard, as the McCrory brothers deceptively used fresh lumber to hold together a badly-damaged house frame and then hid their deception behind sheetrock. (R. p. 70.) Enforcing the statute of limitations against the Hine Family under these circumstances only rewards the skill of their deception; if the McCrory brothers had been sloppier in hiding their patchwork behind sheetrock, then perhaps the Hines could have spotted the problem much earlier. That is the precisely the reason why equitable tolling exists. *See Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it."). The panel's decision should be reversed on this basis alone.

But if the Court is disinclined to affirmatively invoke the doctrine at this point, it should defer to a trial judge to decide this equitable issue after hearing all evidence and assessing witness credibility—and that analysis only happens if a jury first decides the Hines triggered the discovery rule about termite damage downstairs in the center of their house when they earlier discovered termite damage upstairs in a corner of their house.

* * * * *

At bottom, the panel wrongly pegged the equitable tolling analysis to legally irrelevant information from 2012; it wrongly took from the jury the question of whether the Hine Family exercised "reasonable diligence" when it discovered termite damage in 2012 that is unrelated to the claims in this case; and it wrongly restricted the circumstances under which the equitable doctrine can be applied. Accordingly, the Hine Family respectfully requests that the Court reconsider this portion of its decision and either hold that the doctrine is applicable here or, alternatively, remand the issue to the circuit court to resolve at trial.

CONCLUSION

Just as termite damage in a leg of counsel's table in Courtroom I at the Court of Appeals would obviously be different from termite damage in the entire dais of Courtroom II, and just as a small crack in Santee's Bin #12 was different from a catastrophic defect in Bin #13, so too it is for the Hine Family. As a matter of established South Carolina law, the family's discovery of termite damage in a remote corner of one part of their house in 2012 did not trigger the statute of limitations on claims arising out of termite damage elsewhere in their house. And if there is any doubt on the point, it is for the jury to resolve at trial, not a judge in a summary judgment setting.

Because the panel's decision breaks with long-settled South Carolina law, the Hine Family respectfully moves for rehearing.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellants John and Maria Hine

Columbia, South Carolina
June 29, 2023

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Appellants, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

Pleading: Petition for Rehearing

Parties Served:

David A. Anderson
danderson@richardsonplowden.com
Carmen Ganjehsani
cganjehsani@richardsonplowden.com
Richardson, Plowden & Robinson, P.A.
Post Office Drawer 7788
Columbia, SC 29202

Attorneys for Respondents Timothy M. McCrory, Seabrook L. Marchant, and The Marchant Company

H. Chase Harbin
teresapilgrim@chaseharbin.com
chase@chaseharbin.com
Law Office of H. Chase Harbin, P.A.
419 Vardy Street
Greenville, SC 29601

Attorneys for Respondent Michael P. McCrory

By: /s/ M. Todd Carroll
Counsel for Appellants

June 29, 2023