

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable George M. McFaddin, Jr.

Appellate Case No. 2023-000960

Case No. 2018-CP-18-01436

MONICA BROWN-GANTT,..... Petitioner

v.

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

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

**RESPONDENTS' RETURN TO THE
PETITION FOR WRIT OF CERTIORARI**

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General Partnership*

QUESTION PRESENTED

Whether the Circuit Court and the Court of Appeals properly held Petitioner Monica Brown-Gantt's claims are barred by the statute of repose, S.C. Code Ann. § 15-3-640 (Supp. 2022), because Petitioner filed her Complaint more than eight (8) years after the issuance of the certificate of occupancy and she failed to present evidence to establish the application of the statute of repose's gross negligence exception.

Respondents Centex Real Estate Company, LLC and Centex Homes, A Nevada General Partnership (collectively, “Centex”), by and through undersigned counsel, respectfully submit the following Return to the Petition for Writ of Certiorari filed by Petitioner Monica Brown-Gantt (“Brown”).

INTRODUCTION

This appeal arises out of the circuit court’s order granting Centex’s Motion for Summary Judgment on the grounds that Brown’s construction defect claims are barred by the applicable statutes of limitation and the statute of repose because Brown failed to file her Complaint within eight (8) years of the issuance of the Certificate of Occupancy and the Record in this case plainly demonstrates that Brown had knowledge of her claims more than three (3) years before filing her Complaint.

COUNTER STATEMENT OF THE CASE

For the purpose of this appeal, Brown’s relationship with Centex began when she contracted with Centex for real purchase of property and construction of a home located at 109 Catbriar Drive, Summerville, South Carolina (“Residence”). (R. 34). Construction of the Residence was substantially completed in 2005 and the Certificate of Occupancy for the Residence was issued on November 14, 2005. (R. 128).

According to Brown, she began experiencing issues related to the construction of the Residence shortly after she moved into the Residence in 2005. (R. 68). In 2009, Brown complained to Centex that water was intruding into her house through the windows. (R. 240). In 2009, Centex made repairs to the Residence. (R. 75). Centex has not made any repairs to the Residence since 2009 and that is the last time Brown recalls Centex making any repairs to the Residence. (R. 75; 244).

On September 5, 2013, Brown sent a service request email to Centex stating that she was experiencing leakage problems related to the “roofing, floors, walls, and windows” and that this request was her last attempt to have the alleged issues remedied before seeking legal representation and filing a suit against Centex. (R. 45–46; 87).

On April 30, 2015—over a year and half after emailing her service request related to the alleged issues with roofing, floors, walls and windows—Brown sent another service request email to Centex claiming issues existed related to the floors, walls, flashings, and insulation. (R. 94). Additionally, Brown’s April 30, 2015 service request email stated she had been informed Centex was not going to address further her alleged issues. (R. 94). According to Brown, the issues identified in her April 30, 2015 email existed since she first purchased the Residence in 2005. (R. 249–50).

On August 8, 2018, Brown initiated this action by filing a Complaint alleging the following claims purportedly arising out of Centex’s construction of the Residence: (1) negligence/gross negligence; (2) breach of implied warranties; (3) violation of the South Carolina Unfair Trade Practices Act; (4) breach of contract; and (5) negligent misrepresentation. (R. 34). In her Complaint, Brown alleges that construction defects exist related to the Residence’s roof, flashing, windows, siding, sheathing, and floors. (R. 35).

Brown filed her Complaint nearly thirteen (13) years after the issuance of the Certificate of Occupancy, (R. 127); almost five (5) years after making her service claim and stating that she was going to seek legal representation, (R. 87); and more than three (3) years after sending her service request email stating that she had been informed Centex was not going to address the issues, (R. 94).

Centex filed an Answer to the Complaint on October 12, 2018, and properly raised the statute of limitations and statute of repose as affirmative defenses. (R. 47).

On March 21, 2019, Centex filed a Motion for Summary Judgment on the grounds that Brown's claims are barred by the applicable statutes of limitation and the statute of repose. (R. 61).

On April 11, 2019, the circuit court held a hearing on Centex's Motion for Summary Judgment. (R. 138). On October 18, 2019, the circuit court granted Centex's Motion for Summary Judgment on the grounds that Brown's claims are barred by the statute of repose and the applicable statutes of limitation. (R. 4).

On October 25, 2019, Brown filed a Motion to Reconsider the Order Granting Centex's Motion for Summary Judgment. (R. 129). The circuit court issued an order denying Brown's Motion to Reconsider on June 17, 2020. (R. 23).

Brown filed her Notice of Appeal with the Court of Appeals on July 8, 2020. In her brief to the Court of Appeals, Brown argued the circuit court erred in granting summary judgment in Centex's favor because (1) she did not have an opportunity to engage in full and fair discovery prior to the circuit court granting Centex's Motion for Summary Judgment; (2) a genuine issue of material fact exists as to when the discovery rule should apply; (3) Centex is equitably estopped from asserting the statute of limitations as a defense; and (4) the statute of repose does not bar claims of gross negligence. Centex filed a Respondents' Brief stating its opposition to each of Brown's arguments. Brown did not file a Reply Brief.

Without holding oral argument, the Court of Appeals issued a unanimous unpublished opinion affirming the circuit court's orders granting Centex's Motion for Summary Judgment and denying Brown's Motion to Reconsider. The Court of Appeals held (1) the circuit court did not err in granting summary judgment in favor of Centex because Brown's claims are barred by the statute of repose; (2) Brown failed to present any evidence that Centex was grossly negligent in the construction of her home; and (3) Brown failed to show that additional discovery would

uncover additional relevant evidence and create a genuine issue of material fact. The Court of Appeals declined to address Brown's remaining arguments regarding the circuit court's application of the statute of limitations.

Brown filed a Petition for Rehearing on April 19, 2023. The Court of Appeals denied Brown's Petition for Rehearing on May 18, 2023. Brown filed a Petition for Writ of Certiorari on June 16, 2023.

ARGUMENTS

I. Brown's Petition for a Writ of Certiorari fails to raise any special or important reasons, required by Rule 242(b) of the South Carolina Appellate Court Rules, to qualify for review by this Court.

As Rule 242 (b), SCACR, provides, a writ of certiorari is not a matter of right. While such review is a matter of discretion for the Court, it is well settled that such review should only be granted when a petition for a writ of certiorari raises special and important reasons. Generally, as embodied in Rule 242(b), these special and important reasons should take the form of: (1) a novel question of law; (2) the existence of a dissent in the decision of the Court of Appeals; (3) a conflict between the decision by the Court of Appeals and a prior decision by the Supreme Court; (4) the direct involvement of a substantial constitutional issues; and (5) the existence of a federal question and a conflict between the decision of the Court of Appeals and a prior decision by the United States Supreme Court. Brown's Petition does not identify or raise any such special and important reason for review by this Court. For that reason alone, the Petition should be denied.

Brown's Petition seeks to have this Court substitute a new decision for that of the Court of Appeals. However, the Court of Appeals conducted a proper analysis of the law and attendant facts applicable to Centex's Motion for Summary Judgment and correctly affirmed the circuit court's decision that Brown's claims are time barred.

II. Neither the Circuit Court, nor the Court of Appeals erred in finding Brown’s claims are barred by the Statute of Repose.

The Circuit Court and the Court of Appeals correctly found Brown’s claims are barred by the statute of repose.

The South Carolina Statute of Repose, S.C. Code Ann. § 15-3-640 (the “Statute of Repose”), bars actions to recover damages arising out of the defective or unsafe condition of an improvement to real property if brought more than eight (8) years after substantial completion. The 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) (citation omitted) (internal quotation marks omitted). “Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.” *Nash v. Tindall Corp.*, 375 S.C. 36, 41–42, 650 S.E.2d 81, 84 (Ct. App. 2007) (citation omitted)). Further, the Statute of Repose cannot be defeated by estoppel, waiver, or claims of tolling. *See G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003).

The Statute of Repose was amended in 2005 to change the time limitation from thirteen (13) to eight (8) years for improvements to real property with certificates of occupancy issued after July 1, 2005. *See Ervin v. Cont'l Conveyor & Equip. Co.*, 674 F. Supp. 2d 709, 713 n.2 (D.S.C. 2009). Therefore, construction defect claims asserted more than eight (8) years after substantial completion of buildings for which the certificate of occupancy was issued after July 1, 2005 are barred by the Statute of Repose. S.C. Code Ann. § 15-3-640.

The Certificate of Occupancy for the Residence was issued by the Town of Summerville on November 14, 2005. (R. 128). 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. Brown did not file her Complaint until August 8, 2018. (R. 33). Accordingly, her claims are barred by the Statute of Repose.

Furthermore, the Statute of Repose’s gross negligence exception, S.C. Code Ann. § 15-3-670 (Supp. 2022), does not apply to Brown’s claims because she did not establish 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). The Statute of Repose’s gross negligence exception provides that the limitations imposed by the Statute of Repose are not available 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, or to a person who conceals any such cause of action.” S.C. Code Ann. § 15-3-670.

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), SCRPC (“[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.”). Brown’s position in her Memorandum in Opposition to Centex’s Motion for Summary Judgment with regard to the application of the Statute of Repose was that, “[she] *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. 167) (emphasis added).

However, this assertion was the argument of counsel and based on the pleadings. *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). Additionally, Brown attached a report prepared by H. William Chandler of SDII Global Corporation to her Memorandum in Opposition to the Motion for Summary Judgment. (R. 169). However, that report does not (1) allege or identify any violation of any applicable building code, (2) allege any gross negligence in the construction of the Residence, or (3) allege any intentional or conscious wrongdoing on the part of Centex. (R. 169). Thus, the report contains no evidence to support a *prima facie* showing of gross negligence and the gross negligence exception to the Statute of Repose is not applicable to Brown’s claims.

Accordingly, Brown’s Petition should be denied because the Court of Appeals properly affirmed the Circuit Court’s grant of summary judgment on the grounds that Brown filed her Complaint more than eight (8) years after the issuance of the Certificate of Occupancy and she failed to present a scintilla of evidence to support the application of the Statute of Repose’s gross negligence exception.

III. The Court of Appeals did not err in affirming the Circuit Court’s grant of summary judgment in favor of Centex even though discovery had not yet been completed because Brown failed to show that further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

The Court of Appeals correctly found that Brown failed to show how further discovery would uncover additional relevant evidence and create a genuine issue of material fact as to the application of the Statute of Repose.

“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 circuit 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).

Brown argues that further discovery would be relevant to the application of the Statute of Repose because evidence related to whether Centex performed repairs (potentially as late as 2017) would be relevant to the application of the Statute of Repose. (Brown’s Petition p. 14). However, Brown’s argument ignores the fact that subsequent repairs do not toll or extend the date the Statute of Repose begins to run. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 403, 822 S.E.2d 800, 802 (2019).

In *Lawrence*, 425 S.C. at 403, 822 S.E.2d at 802, the Court analyzed the application of the Statute of Repose and the legislature’s intent for the issuance of a Certificate of Occupancy to be the latest date for the Statute of Repose to begin to run. In *Lawrence*, 425 S.C. at 403, 822 S.E.2d at 802, the Court noted that there are often ongoing issues a contractor must address and the work on a project may continue for months—or even years—due to ongoing adjustments, upgrades, or repairs. However, the Court in *Lawrence* found that “the statute of repose begins to run *at the latest* on the date of the certificate of occupancy, even if there is ongoing work on any particular part of the project.” *Id.* at 403, 822 S.E.2d at 802 (emphasis added).

Based on the Court’s analysis of the Statute of Repose in *Lawrence*, additional discovery related to if and when repairs were performed on the Residence has no bearing on the application of the Statute of Repose to Brown’s claims. The Certificate of Occupancy for the Residence was issued on November 14, 2005. (R. 128). Therefore, the Statute of Repose began to run—at the latest—on November 14, 2005. *See Lawrence*, 425 S.C. at 403, 822 S.E.2d at 802. Whether

additional work or repairs were performed on the Residence does not extend or delay the start of the Statute of Repose past the date the Certificate of Occupancy was issued.

The only other argument raised in the Appellant's Brief Brown filed with the Court of Appeals was that she did not have the opportunity to identify other subcontractors who may have performed work on the Residence and who may have knowledge of the issues with her Residence. Brown raised no argument as to how identifying subcontractors and having the opportunity to bring them into the lawsuit supports her gross negligence claim against Centex.

Accordingly, the Court of Appeals correctly found that additional discovery would not create a genuine issue of material fact as to the application of the Statute of Repose and Brown's Petition for Writ of Certiorari should be denied.¹

IV. The Court should deny the Petition because Brown's claims are barred by the statute of limitations.

As an alternative basis for denying Brown's Petition for Writ of Certiorari, the Court may also find the Circuit Court correctly found that Brown's claims are barred by the applicable statutes of limitation and, therefore, any issue raised related to the application of the Statute of Repose may be rendered moot because Brown's claims remain time barred.

All of Brown's claims are subject to a three (3) year statute of limitations. *See* S.C. Code Ann. § 15-3-530(1) (2005); S.C. Code Ann. § 15-3-530(5) (2005); S.C. Code Ann. § 39-5-150 (1985). 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, 183, 708

¹ If the Court were to find that Brown made a *prima facie* showing of gross negligence so as to survive summary judgment, Brown's claims (other than her claim for gross negligence) remain barred by the Statute of Repose. *See Pier View Condo. Ass'n, Inc. v. Johns Manville, Inc.*, No. CV 2:18-22-BHH, 2022 WL 632933, at *5 (D.S.C. Mar. 4, 2022) (holding the Statute of Repose barred all of the plaintiff's claims except for its claim for gross negligence).

S.E.2d 787, 793 (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.* 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.

It is immaterial whether or not a plaintiff knows the full extent of her damages at the time the cause of action is discovered. *See 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 claim for gross negligence as it related to the community club house. *Id.* at *4.

The Record before the Circuit Court clearly evidenced that there was no genuine issue of material fact that Brown knew she had a claim prior to August 8, 2015. (R. 25; R. 18). Brown’s testimony; her September 5, 2013 service request email; and her April 30, 2015 service request email, all clearly evidence that 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. While the *Hampton Hall* court found that a plaintiff’s knowledge of one defect was enough to bar the plaintiff’s claim for even undiscovered defects, here, Brown’s testimony confirmed that the construction issues that form the basis of her Complaint are the same issues she had experienced since purchasing the Residence in 2005. (R. 68; 72–74).

Even after Centex performed limited repairs in 2008 and 2009, Brown continued to complain to Centex of the same issues relating to the roofing, floors, walls and windows in September 2013 and April 2015. (R. 26; R. 94). In fact, on September 5, 2013, Brown sent a clear message that she knew she had a claim against Centex. (R. 87). In her September 2013 service request email, Brown stated in all capital letters, “THIS IS OUR LAST ATTEMPT BEFORE WE SEEK LEGAL REPRESENTATION.” (R. 87). Brown testified that the intent of her September 2013 email was to inform Centex that if it did not fix the problems with the roofing, floors, walls and windows, then she would file suit. (R. 78–79).

Based on Brown’s own testimony no reasonable minds could disagree that she knew, or 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 Brown's claims are barred by the three year statute of limitations. Accordingly, the Court should deny Brown's Petition for Writ of Certiorari because the statute of limitations presents an alternate basis for finding that Brown's claims are time barred and summary judgment in favor of Centex was appropriate.

CONCLUSION

Based on the foregoing, the Court should DENY Brown's Petition for a Writ of Certiorari.

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