THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr.

Court of Appeals Case No.: 2020-000985
Unpublished Opinion No. 2023-UP-132 (S.C. Ct. App. Filed April 5, 2023)

MONICA BROWN-GANTT . . . . . Petitioner

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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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner's Writ of Certiorari asserts legal error in the Order of the Circuit Court and the opinion of the Court of Appeals because the decisions were based on the erroneous conclusion that Petitioner failed to present any evidence to show that Respondent 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. Respondent's Return to the Petition for Certiorari asserts that Petitioner failed to raise any special or important reasons to qualify for review. Return to Petition at 5. Respondent also revisits the statute of limitations argument that was not addressed by the Court of Appeals, and argues that Petitioner's claims are barred by the applicable statute. Return to Petition at 10. Contrary to Respondent's assertions, Petitioner showed that the decision of the Circuit Court and the Court of Appeals conflicts with prior decisions of this Court and that material facts were overlooked by both the Circuit Court and the Court of Appeals. This Reply will also address and respond to the statute of limitations issue that was part of the original appeal, but not decided by the Court of Appeals.

ARGUMENT

I. The Order of the Circuit Court and the Decision of the Court of Appeals Conflict with Controlling Precedent from this Court.

This Court has held that summary judgment is a "drastic remedy", which 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 v. Blue Cross & Blue Shield*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002); *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). Because Respondent never answered Petitioner's interrogatories and requests for production, and the Third-

Party Defendants had only recently filed responsive pleadings at the time of the motion hearing, there was no full and fair opportunity to conduct, let alone complete discovery. (R. p. 152-153).

Because the property at issue was a new construction and Petitioner was inherently without the information needed to determine what scope of work or requirements each party was to perform, further discovery was needed to determine what, if any, intentional acts or conscious failures were performed that could be considered gross negligence. Denying Petitioner the right to full and fair discovery prior to disposing of the case by summary judgment directly conflicts with prior decisions of this Court.

II. The Petition for Writ of Certiorari Should Not be Denied Based on the Statute of Limitations Because the Applicable Statute of Limitations was Equitably Tolled and Respondent was Equitably Estopped from Asserting Such a Defense.

The statute of limitations should not bar Petitioner's claims because she was not aware of many of the issues raised in the Complaint until an inspection in 2016 that uncovered many of the defects with her home. (R. pp. 149-150). The statute of limitations should begin to run based on the "discovery rule", and there is a factual dispute about when Petitioner knew or should have known that she had a cause of action against Respondent. (R. p. 148). It wasn't until the 2016 inspection that Petitioner was aware of the defective conditions created by Respondent's negligent actions. (R. p. 149). Further, Respondent continued to offer to make repairs and cure the defective issues, to include coming out to Petitioner's home as late as 2016. (R. p. 16-p. 70). "[W]hen the parties present conflicting evidence, application of the discovery rule and determination of the date the statue began to run in a particular case are questions of fact for the jury." *Allwin v. Russ Cooper Associates, Inc.*. 2019 WL 208925, at *6 (Ct. App. 2019).

Even if the discovery rule applies as asserted by the Respondent, the statute of limitations should be tolled and Respondent estopped from asserting the defense based on its own actions. (R. p. 151). "A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's

claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct." *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218, 332 S.E.2d 555, 561 (Ct. App. 1985) (quoting 53 C.J.S. *Limitations of Actions* §25 at 962-64 (1948). Critically, Petitioner's property was under warranty until November 2015 and numerous warranty claims were made, and subsequently inspected and/or repaired by the Respondent during, and even after, that time period. (R. p. 11-p. 13).

In *Dillon County*, while it was determined that the School District either discovered or could have discovered the defective conditions in November 1972 and suit wasn't filed until June 1981, the Court of Appeals found that whether some of the defendants were equitably estopped from claiming the statute of limitations as a defense based on their actions was a question for the jury. *Id*. at 219, 332 S.E.2d at 562. In that case, the correspondence between the parties and the visits by the defendants to the property to investigate the defective conditions and attempt repairs created a reasonable inference that the defendants assured the plaintiff that its problems would be corrected and litigation would not be required. *Id*. "The question of whether a defendant's conduct lulled a plaintiff into a false sense of security and thereby prevented the plaintiff from filing suit within the statutory period is ordinarily one of fact for a jury to determine." *Id*. at 219, 332 S.E.2d at 561.

As the record reflects, the Petitioner reasonably relied upon Respondent's assurances, both through correspondence and actions, that they would inspect and repair the issues with her home without the need to resort to litigation. (R. 151). On May 16, 2018, Respondent made an offer to repair some of the damage to Petitioner's home, including a list of repairs it was willing to perform, evidencing the false sense of security and assurances made by Respondent to delay Petitioner in pursuing litigation. (R. 150). Then, on May 23, 2018, Respondent sent Petitioner a letter stating

that it would no longer offer to repair any damage to her home, and it was at that point that she determined to seek redress by filing a lawsuit. (R. p. 36). Because Petitioner previously made repairs to Petitioner's home, and continued to make offers to inspect and repair through May 2018, Respondent should be estopped from asserting the statute of limitations as a defense. *See Magnolia North Property Owners' Ass'n, inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

Moreover, Petitioner's reliance on Respondent's assurances and offers to inspect and repair were reasonable given the past conduct of Respondent. (R. p. 79-80). In addition to offers to inspect and repair, Respondent also came out to the property until 2017 to inspect defective construction issues raised by Petitioner. (R. p. 70). Respondent continually promised Petitioner that it would inspect and/or repair her claims, and induced her into believing that she did not need to resort to litigation to resolve her issues. (R. p. 86-p. 236-p. 247-248-p. 257-p. 261-p. 269-270). Additionally, Petitioner's home was still under warranty until November 2015, and she was informed by Respondent that any steps she undertook to make repairs herself would void the warranty. (R. p. 293). Based on the representations and assurances made by the Respondent, it is reasonable for Petitioner to believe that it would be counterproductive to file suit before giving them an opportunity to honor their representations and warranty, especially given its efforts to investigate and make previous repairs. (R. p. 175-176).

While this issue was not decided by the Court of Appeals, the Circuit Court clearly overlooked and misapprehended these material facts in issuing its Order. Respondent's conduct should have resulted in a tolling of the statute of limitations and Respondent estopped from asserting the same as a defense based on the principle of equitable estoppel.

CONCLUSION

The order of the Circuit Court and the Court of Appeals' decision overlooked and/or misapprehended the legal errors in this case, and the material facts contained in the Record on Appeal, and are in conflict with precedent of this Court that requires that Petitioner be afforded an opportunity to conduct full and fair discovery. Accordingly, this Court should grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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