

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Nov 16 2023

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Robin B. Stilwell
Circuit Court Judge

Appellate Case No. 2023-001447
Circuit Court Case No. 2018-CP-23-3382

John W. Hine and Maria W. Hine..... Petitioners,

v.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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 Petitioners John and Maria Hine

Columbia, South Carolina
November 16, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI..... 1

ARGUMENT 2

 I. The decision below breaks with longstanding South Carolina precedent, and the Respondents’ attempt to rewrite the facts of this case to justify that ruling underscores why summary judgment is improper. 2

 Table: Cases Involving Claims for Property Damages Similar to Previously-Discovered Damage 3

 II. There is a clear factual dispute regarding whether the statute of limitations should be equitably tolled—the Respondents specifically say so. 7

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

Allwin v. Russ Cooper Assocs., 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019)..... 3, 4

Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998) 3, 5

Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996)..... 3, 4

Doe v. Bishop of Charleston, 407 S.C. 128, 754 S.E.2d 494 (2014)..... 8

Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009) 7

Holly Woods Ass’n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011)
..... 3, 6

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297, Op. No. 28173 (S.C.Sup.Ct.
Aug. 23, 2023) (Howard Adv.Sh. 33)..... 8

Santee Portland Cement Co. v. Daniel Int’l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989)..... 3, 5

Stoneledge at Lake Keowee Owners’ Ass’n v. IMK Dev. Co., 425 S.C. 268, 821 S.E.2d 504 (Ct.
App. 2018) 6

Stoneledge at Lake Keowee Owners’ Ass’n v. IMK Dev. Co., 435 S.C. 176, 866 S.E.2d 577
(2021)..... 3, 5

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Having successfully concealed a massive amount of unrepaired termite damage from the Hine Family when flipping a house, the Respondents are now attempting a sleight-of-hand with this Court to dodge accountability for their actions at a jury trial.

In seeking a writ of certiorari, the Hine Family catalogued South Carolina jurisprudence that conflicts with the Court of Appeals' opinion here. But while the Court of Appeals erred in applying the law, it was correct as a factual matter when it recognized that the previously-discovered termite damage, which the court held started the limitations period, was "in another area of the home" from the hidden termite damage on which this lawsuit is actually based. (Appx. 370.) That fact is dispositive here, and it requires reversal of summary judgment and a remand for the case to proceed to a jury trial.

Yet, in their opposition, the Respondents pretend that the Hine Family's claims in this case are somehow traceable to that earlier discovery of different termite damage in a different area of the house. As a matter of undisputed fact, they aren't. Mr. Hine specifically testified to this point:

Q: Are you recovering or attempting to recover damages for this work [related to termite damage discovered in 2012]?

A: No.

Q: And why not?

A: Because I don't—this came and went, and this isn't part of the current litigation.

(Appx. 168 (Mr. Hine Dep. 23:25–24:5).)

Despite this clear, unambiguous testimony, the Respondents construct their entire opposition argument around the notion that the Hine Family is seeking to recover for a single harm,

misleadingly blending distinct and unrelated instances of damage together as “the termite damage.” (*E.g.*, Return to Pet. at 3, 12, 18, 22.)

The Court should not be misled. This case seeks to hold the Respondents accountable for a single instance of termite damage that they obviously knew about (as there were 2x4s in the wall holding the termite-damaged foundation together that were manufactured on the very same day the Respondents bought the house to flip) and that they hid behind sheetrock until its discovery in 2018. It is a question for the jury, not a court on summary judgment, to resolve whether the Hine Family acted reasonably to discover this damage. Certiorari should be granted, and summary judgment should be reversed.

ARGUMENT

I. The decision below breaks with longstanding South Carolina precedent, and the Respondents’ attempt to rewrite the facts of this case to justify that ruling underscores why summary judgment is improper.

The Hine Family’s primary argument in support of certiorari is that the Court of Appeals’ decision breaks with established jurisprudence: when a plaintiff sues for property damage discovered in a different location from a previously-known instance of damage, the jury must decide if the plaintiff acted reasonably with regard to the timeliness of his or her a claim for the newly-discovered damage. Whether the instances of damage are of a similar type is irrelevant; the dispositive fact needed to trigger a jury trial is whether the subsequent instance of damage occurred in ***different location*** from the prior instance. If it did, then the question goes to a jury; if it did not, then a court can resolve the issue via a dispositive motion.

The table below summarizes the case law on this point, and it illustrates the fundamental legal error in the opinion below. It appeared in the Hine Family’s petition, and it’s worth reiterating in reply because it makes the Court of Appeals’ misapplication of South Carolina law evident:

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

<u>Case</u>	<u>Type of Property Damage</u>	<u>New Damage in Different Location from Earlier Damage?</u>	<u>Limitations Period is a Jury Question?</u>
<i>Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.</i> , 435 S.C. 176 (2021)	damage caused by water intrusion	Yes	Yes
<i>Santee Portland Cement Co. v. Daniel Int'l Corp.</i> , 299 S.C. 269 (1989)	cracked silos	Yes	Yes
<i>Holly Woods Ass'n of Residence Owners v. Hiller</i> , 392 S.C. 172 (Ct. App. 2011)	damage caused by water intrusion	Yes	Yes
<i>Allwin v. Russ Cooper Assocs.</i> , 426 S.C. 1 (Ct. App. 2019)	water damage caused by defective roof and roof design	No	No
<i>Dean v. Ruscon Corp.</i> , 321 S.C. 360 (1996)	crack in building façade	No	No
<i>Barr v. City of Rock Hill</i> , 330 S.C. 640 (Ct. App. 1998)	excessive moisture under house	No	No
<u>This Case</u>	<u>termite damage</u>	<u>Yes</u>	<u>No</u>

In opposing certiorari review, the Respondents attempt to sidestep this straightforward rule of law by suggesting that the Hine Family's suit should have been filed in 2012 because of a previously-discovered instance of termite damage located elsewhere in their house. As the Respondents put it: "The undisputed evidence before the Trial Court established the Hines were aware of their claims for alleged undisclosed termite damage by April 27, 2012." (Return to Pet.

at 12.) They continue: “On April 27, 2012, the Hines not only could or should have known through reasonable diligence that they had a potential cause of action against the Defendants; the Hines in fact **did know** they had a potential cause of action as evidenced by their very letters on May 14, 2012, and July 9, 2012, demanding damages from the Defendants.” (*Id.* (emphasis in original).)

What the Respondents omit from their discussion, though, is that the termite damage on which this suit is based was **not** the subject of the 2012 correspondence, and it is **not** located in or even contiguous to the same part of the house as the damage found in 2012. (Appx. 168 (Mr. Hine Dep. 23:25–24:5).)¹ As Mr. Hine unambiguously testified: “I am saying that I have found two separate instances of termite damage that were not contiguous. So just because I discovered one didn’t mean that I knew about the other one.” (*Id.* at 25:5–:8.)

For the Respondents’ position to be correct, the Court would have to find that a suit filed in 2012 for the damage discovered at that point would have obviated the need for this case. This is the very point of the *Dean*, *Allwin*, and *Barr* cases, all of which barred plaintiffs who watched a known problem continue to grow in magnitude from belatedly bringing suit. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 364–65, 468 S.E.2d 645, 647 (1996) (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 v. Russ Cooper Assocs.*, 426 S.C. 1, 19–20, 825 S.E.2d 707, 717 (Ct. App. 2019) (holding that a claim was time-barred and distinguishing *Holly Woods Association* by explaining that the damages in *Holly Woods Association* “involved a different location within the neighborhood”);

¹ The same is true with respect to the active termites that the Hine Family had treated in 2013. The Respondents make much of those termites in their return, but the trial court never even mentioned them when granting summary judgment. They are irrelevant because they have nothing to do with the Respondents hiding known termite damage behind sheetrock. And the 2013 termites were also in a different part of the house from the damage on which this suit is based. The Court should not credit the Respondents’ attempted diversion.

Barr v. City of Rock Hill, 330 S.C. 640, 642–45, 500 S.E.2d 157, 158–60 (Ct. App. 1998) (explaining that a series of annual reports previously put the plaintiffs on notice of problems “under the house,” so a subsequent suit for damage “under the house” was untimely).

But those are not the facts here. If the Hine Family had sued the Respondents in 2012 for the then-discovered termite damage, that case would have been for \$4,000 of termite damage found in a corner of an upstairs bedroom. (Appx. 155; Letter from Mr. Hine (May 14, 2012); Appx. 165; Letter from Mr. Hine (July 9, 2012).) That would clearly have had nothing to do with the termite damage that the Hine Family discovered in 2018 that was hidden behind sheetrock lining their basement, holding up their house, and requiring approximately \$100,000 worth of repairs. Simply put, a 2012 suit would have been independent of the Hine Family’s claims here, as the later-discovered termite problems were not in the same part of the house and are unrelated to the previously-discovered damage.

Because the 2012 damage and the 2018 damage are not proximate to one another—again, the Court of Appeals rightly acknowledged that the 2018 damage was “in another area of the home” from the 2012 damage (Appx. 370), and the Hine Family is entitled to every reasonable inference at the summary judgment stage—it is a jury question as to when the Hine Family knew or should have known that it had a claim against the Respondents for the 2018 damage. *See, e.g., Stoneledge at Lake Keowee Owners’ Ass’n v. IMK Dev. Co.*, 435 S.C. 176, 177, 866 S.E.2d 577, 578 (2021) (holding that limitations is a jury question when damages caused by water intrusion were in a different location on the property from previously discovered water intrusion); *Santee Portland Cement Co. v. Daniel Int’l Corp.*, 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989) (holding that limitations is a jury question when a crack in a silo on which the case was based was in a different location than a previously discovered crack in a different silo, and concluding “[a]ll of

the evidence introduced went to the reasonableness of Santee’s actions, which was an issue to be decided by the jury”), *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); *Holly Woods Ass’n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011) (“We find it is a jury question as to whether the damages the Association claimed in 2005 [regarding water problems on the property] were different from those it experienced in the past [in other locations on the property].”).

By failing to apply this unbroken line of authority to the facts of this case, the Court of Appeals departed from South Carolina precedent and wrongly denied the Hine Family their right to a jury trial. Certiorari review and reversal are needed here.

What’s more, the Respondents highlight exactly why summary judgment was wrongly entered by arguing about the “reasonableness” of the Hine Family’s investigation of potential termite damage to their house. On Pages 18 through 20 of their return, the Respondents argue that the Hine Family had “sufficient information” in 2012 and 2013 to consider inspecting for additional termite damage, but they chide the Hine Family for not undertaking any “exploratory testing” for additional damage.

The Respondents’ argument proves the Hine Family’s point and confirms summary judgment was improper: such questions about the “reasonableness” of a plaintiff’s investigation are always reserved to a jury for resolution. *See, e.g., 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) (holding that it is 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,” including whether the plaintiffs should have undertaken “destructive testing”), *aff’d* 435 S.C. 176, 866 S.E.2d 577 (2021).

The Hine Family is confident a jury would disagree with the Respondents' position, as the Respondents themselves testified the Hine Family acted reasonably upon discovering the 2012 damage. (Appx. 223–24; Dep. M. McCrory 34:1–4, 46:11–13; Appx. 229–31; Dep. T. McCrory 82:14–23, 83:4–15, 85:16–25; R. pp. 236–39; Dep. Marchant 91:1–11, 97:12–99:13.)

But the law requires such a dispute about the reasonableness of a plaintiff's conduct to be resolved by a jury, not by a court via dispositive motion. And the law also requires all inferences about the reasonableness of their conduct to be viewed in the light most favorably to the Hine Family at this pretrial 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.”).

Summary judgment was therefore improper, and the Court of Appeals erred by affirming the trial court's order. Accordingly, certiorari review is appropriate and necessary to realign this case with controlling South Carolina precedent.

II. There is a clear factual dispute regarding whether the statute of limitations should be equitably tolled—the Respondents specifically say so.

Just as the Respondents confirm why summary judgment was improper through their argument in response to Issue 1, they also fully demonstrate why a trial is necessary to assess whether the limitations period should be equitably tolled (assuming *arguendo* that a jury first finds that the Hine Family acted unreasonably when it did not destroy the house in 2012 looking for other termite damage).

In seeking certiorari, the Hine Family explained that equitable tolling is appropriate when a case presents “[d]eliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action.” *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d

494, 500–01 (2014). And this case presents a classic “deliberate act of deception,” as the Hine Family discovered the massive amount of termite damage in 2018 hidden behind sheetrock, but sistered together with fresh 2x4s to mask the damage. The 2x4s were manufactured on the same day the Respondents bought the house to flip, meaning that the Respondents had to be the ones who failed to actually repair the damage but, instead, hid it behind sheetrock. (Appx. 70.)

In their return, the Respondents dispute these circumstances as being “an unproven allegation,” and they challenge the Hine Family’s position as “an allegation central to the merits of the lawsuit which the Defendants strongly deny.” (Return to Pet. at 22.) The Respondents then summarize that allowing the Hine Family a chance to prove their case “would deny the Defendants the opportunity to contest these dubious allegations,” which is a puzzling position to take. (*Id.* at 23.)

The Hine Family is begging the Court to allow it to present its case at trial. The Respondents would obviously not be “denied the opportunity to contest” the Hine Family’s case; they would be able to present whatever evidence they have to show that they did not prop up termite-riddled studs with 2x4s and that they did not then cover up their work with sheetrock, just as any defendant would who participates in a trial.

The fact that the Respondents so loudly contest this key factual issue in their return brief underscores why summary judgment was improper. Summary judgment is only available when there is no disputed material fact. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, ___, 892 S.E.2d 297, ___, Op. No. 28173 (S.C.Sup.Ct. Aug. 23, 2023) (Howard Adv.Sh. 33 at 14–17). But the Respondents’ return brief highlights that the material fact is heavily disputed. Accordingly, the Court of Appeals erred in affirming summary judgment against the Hine Family, and certiorari should be granted in order to correct this error below.

CONCLUSION

The core legal error of the Respondents' position is found in the last sentence of their Section I argument:

The cause of action accrues, in its entirety, at the initial discovery of **termite infestation** and not when the full magnitude of the problem is realized and for that reason, the Trial Court properly ruled that the three-year statute of limitations barred the Hines' action against the Defendants.

(Return to Pet. at 21 (emphasis added).)

If this were true, then the defendants in *Santee Portland Cement* could have successfully argued as follows:

The cause of action accrues, in its entirety, at the initial discovery of **a crack in a silo** and not when the full magnitude of the problem is realized and for that reason, the Trial Court properly ruled that the three-year statute of limitations barred the plaintiff's action against the Defendants.

And the defendants in *Stoneledge* and *Holly Woods Association* could have successfully argued as follows:

The cause of action accrues, in its entirety, at the initial discovery of **water intrusion** and not when the full magnitude of the problem is realized and for that reason, the Trial Court properly ruled that the three-year statute of limitations barred the plaintiff's action against the Defendants.

But *Santee Portland Cement*, *Stoneledge*, and *Holly Woods Association* all rejected this exact same argument. Instead, each case held that when the "initial discovery" of a problem occurs in a different location from the damage on which a suit is based, it is a jury question as to whether the plaintiff diligently and timely pursued its claim. That is all that the Hine Family seeks through this appeal: the chance to present its case to a jury and let a jury (or a judge, for equitable tolling) evaluate the situation when it hears all the evidence and assesses the credibility of the witnesses. The alternative would wrongly reward the Respondents for how well they concealed their fraud.

Because the Court of Appeals failed to follow established South Carolina jurisprudence when reviewing this case, and because the Respondents themselves have confirmed that there are factual disputes that make summary judgment improper as a matter of law, the Hine Family respectfully requests that the Court grant the petition, issue a writ of certiorari to review this matter, reverse the decision below, and remand the case for trial.

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
November 16, 2023