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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert Bonds, Circuit Court Judge

_____

Case No. 2023-CP-1003278

Appellate Case No. 2024-000210

_____

Kathy Kennedy, Appellant

v.

Bernard Myatt, III and Myatt Air Conditioning, LLC, Respondents

_____

INITIAL REPLY BRIEF OF APPELLANT

_____

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STATEMENT OF THE CASE IN REPLY

The Statement of the Case provided by Respondents Myatt Air Conditioning and Bernard Myatt III (hereinafter "Respondent Myatt") is flawed to the extent he suggests a Judge does not err when that Judge relied on conjecture as evidence; failed to consider all evidence, failed to consider all evidence in light most favorable to Appellant Kennedy, failed to provide legal analysis; and misinterpreted and misapplied SC Code of Law and case law.

The Supreme Court held that the most important rule for summary judgment is that **all inferences**, the weight of **all evidence**, and each credibility determination are to be made in favor of the non-moving party. This is what the Supreme Court calls the "axiom" of summary judgment - the judge's function on summary judgment is not to weigh the evidence but to view it in the light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650 (2014).

The lower courts have failed to consider all of the evidence and therefore, failed to consider all of the evidence in the light most favorable to Appellant Kennedy. Some of the evidence provided by Appellant Kennedy that was not considered by the lower courts includes, but is not limited to, the latent (hidden) defect; the date the latent (hidden) defect was discovered; all of the violations of code committed by Respondent Myatt; and the delay caused by the Covid-19 pandemic.

Respondent Myatt provided a number of dates between 2018 and 2020, of which he alleges might possibly be considered as the statute of limitations accrual date in Appellant Kennedy's case; however, failed to prove an actual accrual date. Respondent Myatt has also failed to provide any evidence to dispute Appellant Kennedy's evidence

that the accrual date was June 2021; the date she discovered the latent defect that caused the damage to her other property and that Respondent Myatt was responsible. "*When a defendant moves for summary judgment on the basis of limitations and the plaintiff pleads the discovery rule, the defendant must conclusively prove the date of accrual and must negate application of the discovery rule*." Tenet Healthcare Ltd. v. Unicare Health Plans of TX, CIVIL ACTION NO. H-07-3534, 24 (S.D. Tex. Nov. 26, 2008).

The court held in Gentry v. Mangum, 195 W. Va. 512, 521, 466 S.E.2d 171, 180 (1995):

> *" a circuit court must review all of the evidence and on summary judgment, a circuit court must make factual findings sufficient to permit meaningful appellate review. ... Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed. ... In doing so, the trial court should "provide clear notice to all parties and the reviewing court as to the rationale applied in granting . . . summary judgment."*

The lower courts have neither considered all of the evidence, nor provided legal analysis as to all of that evidence. At the conclusion of the Circuit Court Appeal Hearing, Appellant Kennedy asked Judge Bonds if he was going to provide a written decision on the issues raised in her Brief (Apt. C.C. Br. p. 3) to which Judge Bonds responded no. (Tr. 20, lines 3-25). The extent of the Circuit Court's analysis in Appellant Kennedy's case consists of: "This matter came before the Court on January 31, 2024. The Court affirmed the decision of the magistrate and dismissed the appellant's appeal." (Circuit Court Order).

Respondent Myatt asserts that Magistrate Judge Beck did not err because "Judge Bonds stated that he reviewed the Magistrate's Return, which was quite detailed and well-written as to her findings." (Resp. Br. 3). First, Judge Bonds, it appears, contrary to Magistrate Judge Beck's determination, determined Appellant Kennedy did

not know about the latent defect prior to June 2021, however, could have known if she had not relied on the wrong people (the Town of James Island Inspector and the SC LLR Inspectors); however, Judge Bonds fails to state how Appellant Kennedy could have known about the latent defect prior to June 2021 and who the right people might have been. (See Tr. 19, lines 10-18). Second, Judge Bonds should have actually verified the accuracy of Magistrate Judge Beck's Order and Return, before making such a statement, because there are a number of errors of law in both.

1) Errors contained in Magistrate Judge Beck's Order dated June 26, 2023:
    a) Magistrate Judge Beck erroneously contends that "*The Statute of Repose under SC Code Sections 15-3-670 is not applicable as this is not new construction*." (M.J. Ord. p.1). First, the Statute of Repose is not limited to new construction. Next, the Statute of Repose is found at SC Code § 15-3-640 and not SC Code § 15-3-670.
    b) Magistrate Judge Beck states that Appellant Kennedy knew she had a claim January 2020, because Appellant Kennedy filed a complaint with SC LLR; however, Magistrate Judge Beck fails to state just exactly what Appellant Kennedy knew that showed she had a claim or why Appellant Kennedy's discovery of the latent defect was not considered. (M.J. Ord. p. 2, line 8).
    c) Magistrate Judge Beck erroneously determines "*As a matter of law, there is no valid claim for gross negligence as the elements for gross negligence cannot be met*." (M.J. Ord. p. 1, lines 9-10). Magistrate Beck provides no legal basis for her decision and more importantly, the function of a Judge on summary judgement is not to weigh the evidence. Dickinson v. Acadia Par. Jail, 6:21-CV-1941 (W.D. La. Aug. 18, 2021)

d) Magistrate Judge Beck inappropriately removed Bernard Myatt III as a party to the case. (M.J. Ord. p. 1, lines 5-7). Magistrate Judge Beck's decision was arbitrary and made absent a proper claim, cause of action or motion raised by either party and absent notice, hearing and/or any evidence. As our SC Supreme Court held, *"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."* Kurschner v. City of Camden Planning Comm'n 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

2) Errors contained in Magistrate Judge Beck's Return, dated August 7, 2023:

a) Magistrate Judge Magistrate Judge Beck states, ("She" being Appellant Kennedy), "*She states this is gross negligence because of code violations determined by LLR. Myatt knew or should have known and failed to pull permits … and therefore her position is this action was illegal and therefore grossly negligent*."(M.J. Ret. p. 2). Magistrate Judge Beck knowingly ignores the fact that there were multiple code violations, as she states, "*code violations*"; however, she refers to only one minor code violation "*failed to pull permits*" in order to justify her decision regarding gross negligence; thereby failing to view all evidence in the light most favorable to Appellant Kennedy. SC Code § 15-3-670 provides that violations of building codes can be evidence of gross negligence, which Magistrate Judge Beck completely ignores.

b) Magistrate Judge Beck inappropriately determined that the Court in Allwin, changed the South Carolina Code of Laws regarding the statute of limitations and gross negligence. Contrary to Magistrate Judge Beck's assertion, SC Code §15-3-670 has not changed and still clearly states that the statute of limitations is

not available as a defense to a person guilty of gross negligence. Magistrate Judge Beck inappropriately alleges:

> *"In Allwin v. Russ Cooper Association, Inc., 426 S.C. 1, 825 SE2d 707 (S.C. Ct. App. 2019), the Court held that the three-year statute of limitations is applied in a property owner's suit against an architectural firm and general contractor for negligence, gross negligence, and breach of warranty stemming from alleged construction defects in a house built for the property owner."* (M.J. Ret. 4)

Respondent Myatt erroneously asserts that Appellant Kennedy's case is solely one of "breach of contract" (Resp. Br. 5). Appellant Kennedy's case is one of Construction Negligence. Respondent Myatt was grossly negligent in the fabrication and installation of the partial duct system in the crawl space under Appellant Kennedy's residence. Respondent Myatt's gross negligence consisted, in part, of a latent (hidden) defect which subsequently caused damage to Appellant Kennedy's other property. The Court, in Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (S.C. Ct. App. 2003), found an appellant in a negligence case must show:*"(1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages."* Appellant Kennedy shows each of those elements in her Magistrate Court Appeal Attachment (Apt. M.J. Apl. Atch. p. 2).

Respondent Myatt erroneously asserts the work was completed and Appellant Kennedy filed a complaint with the South Carolina Department of Labor, Licensing and Regulation (SC LLR) when she became "unsatisfied". (Resp. Br. 2). The work was never completed and it was not a matter of being "unsatisfied"; rather, Appellant Kennedy initially filed a complaint with the Town of James Island in June 2019, after she discovered the work had not been completed, part of the supply duct was resting on a

gas line and the major part of the supply and return ducts were not replaced and still on the ground and multiple phone calls to Respondent Myatt went unanswered. The complaint filed by Appellant Kennedy with the Charleston County Magistrate Court (CCMC), 4/10/2023, is for construction negligence and was filed when she became aware that a latent (hidden) defect caused the damage to her other property and Respondent Myatt's gross negligence was responsible for the latent defect. Appellant Kennedy's CCMC complaint states, in part, "*Because the duct system installed by Myatt was not within code, it has caused and continues to cause damage to my house*.", (Org. Comp. Atch. p. 1), which is, in essence, the definition of construction negligence.

Contrary to Respondent Myatt's assertion (Resp Br. p. 3), the issues Appellant Kennedy raised in this appeal are that the Circuit Court erred in upholding Judge Beck's grant of summary judgment; did not consider all of the evidence, nor provide legal analysis as to any of that evidence with respect to establishing a triable issue of fact; and did not consider equitable tolling and Covid-19.

ARGUMENT IN REPLY

Without restating the issues and arguments set forth in its initial brief, Appellant Kennedy offers the following points of clarification and rebuttal to the arguments raised by Respondent Myatt:

"I. The Circuit Court correctly upheld the Magistrate's grant of summary judgment in favor of Respondents because Appellant failed to file her claim within the statute of limitations."

The Supreme Court held "*The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy.*"

Urie v. Thompson, 337 U.S. 163, 170, 69 S.Ct. 1018, 1025, 93 L.Ed. 1282, 1292 (1949). As our SC Supreme Court held "*In sum, the discovery rule exists to avoid the harsh and unjust result of closing the courtroom doors to a plaintiff whose "blameless ignorance" resulted in a failure to pursue a cause of action within the limitations period*. ." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (S.C. 2000).

Appellant Kennedy provided evidence discovered by destructive means, of a latent (hidden) defect June 2021. Appellant Kennedy further found that the latent defect was what caused the damage to her other property and that Respondent Myatt was responsible. "*Constructive notice will not be imputed where the defect is latent, i.e., where, as here, the defect is of such a nature that it would not be discoverable even upon a reasonable inspection."* Ferris v County of Suffolk, 174 AD2d 70, 76 (1992). "*If a defect could not have been discovered by a layman, even by a reasonable inspection, it is considered a latent defect*." Rapino v City of New York, AD2d 470 (2002). Appellant Kennedy filed her complaint April 2023 – within the three years provided by the applicable statute of limitations.

Respondent Myatt has provided no evidence to negate Appellant Kenney's discovery of the latent defect. Respondent Myatt did not prove the date of accrual, rather he speculates as to possible accrual dates, where he states: "…which clearly would have occurred on or before January 19, 2020…" and "The statute began running during installation of the duct work." (Installation of partial duct system was 2018). (Resp Br. p. 6). Respondent Myatt can't even make up his mind regarding the accrual date; therefore, it is clearly obvious that the accrual date has not been proven. "*When a defendant moves for summary judgment on the basis of limitations and the plaintiff pleads the*

discovery rule, the defendant must conclusively prove the date of accrual and must negate application of the discovery rule." Tenet Healthcare Ltd. v. Unicare Health Plans of TX, CIVIL ACTION NO. H-07-3534, 24 (S.D. Tex. Nov. 26, 2008).

Respondent Myatt, it appears, anticipates that logic is lost on this Court; that this Court either does not have the ability or desire to exercise rational thought. Respondent Myatt expects this Court to disregard chronology and believe events that occurred during 2021 precede events that occurred during 2018 and 2020 or can somehow be known prior to their occurrence. In order to provide what was an erroneously accepted, although unproven, accrual date, Respondent Myatt relies upon theories of clairvoyance and time reversal in an attempt to show Appellant Kennedy's case is time barred.

Respondent Myatt expects this Court to believe Appellant Kennedy knew about a hidden defect either in 2018 or prior to January 2020, based on the discovery of a hidden defect AFTER a March 19, ***2021*** SC LLR inspection at her residence. Respondent Myatt alleges:

> "*The above quotes from the inspection report show that Appellant was aware of the alleged breaches at least prior to January 19, 2020, when she filed a complaint with the LLR*." (Resp. Br. 6).

First, Respondent Matt expects this Court to believe Appellant Kennedy knew about the hidden defect in 2018, when the partial ductwork was installed, before the damage to her other property and based on an erroneous statement contained in the SC LLR inspection report. Respondent Myatt quotes from the SC LLR inspection report,

> "*Complainant advised the reporting investigator that she personally observed the installation of the ductwork and contends the respondent did not seal the concealed connections of the metal ductwork and the insulation wrap with an approved UL 181 tape."* (Resp. Br. 6)

In order to believe Appellant Kennedy knew about the hidden defect in 2018, Respondent Myatt expects this Court to believe that Appellant Kennedy (1) is clairvoyant and knew her floors were going to buckle prior to the actual occurrence; (2) is an expert in HVAC Duct Systems and applicable SC Building Codes and Standards; (3) is fatuous and paid Respondent Myatt even though she knew he did not complete the job, which she is not and did not, respectively; and (4) was in the approximate 24" crawl space, under her residence observing the installation of the ductwork, even though she was recovering from and still undergoing treatment for bi-lateral breast cancer, which is ludicrous. (See Tr. p. 19, lines 1-6)

Second, Respondent Myatt expects this Court to believe Appellant Kennedy knew prior to or January 2020 about a defect that was not discovered until June 2021 (although suspected in March 2021), based on a statement contained in the SC LLR inspection report, dated March 29, 2021, regarding an inspection that took place March 19, 2021, that was based on an email dated March 27, 2021. Respondent Myatt quotes,

> *"Complainant indicated the respondent's failure to seal the metal ductwork caused condensation issues that resulted in damaged hardwood and tile flooring …".* (Resp. Br. 6)

The quote on which Respondent Myatt relies is from an SC LLR inspection report that is referencing an email dated March 27, 2021, from Appellant Kennedy to the SC LLR Inspector and which is identified as Exhibit B in the SC LLR Inspection Report. Respondent Myatt expects this Court to believe an event that occurred in 2021 preceded an event that occurred in 2020. (SC LLR Exh. B).

Respondent Myatt failed to prove the accrual date and provided no evidence to negate discovery. "*To be entitled to summary judgment, the burden is on the movant,*

defendant here, to negate the pleading of the discovery rule by proving as a matter of law that there is no genuine issue of fact concerning the time when the plaintiff discovered or should have discovered the nature of the injury." Weaver v. Witt, 561 S.W.2d 792, 793-94 (Tex 1977).

The lower courts clearly failed to view all of the evidence and all inferences which could reasonably be drawn therefrom in the light most favorable to the Appellant Kennedy. The evidence provided by Appellant Kennedy shows there are triable issues of material facts; such as, the date of discovery of the latent (hidden) defect, whether or not the defect was hidden, whether or not the hidden defect could be discovered by reasonable diligence. Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010); Hackworth v. Greenville County, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct. App. 2006).

"II. The Circuit Court correctly upheld the Magistrate's finding that there was no valid claim for gross negligence because Appellant could not show gross negligence."

The Circuit Court incorrectly upheld the Magistrate's findings because Magistrate Judge Beck did not consider all of the evidence (code violations committed by Respondent Myatt) and therefore could not view all of the evidence in the light most favorable to Appellant Kennedy. Further, whether or not Appellant Kennedy could prove gross negligence was not a matter for summary judgement, per se. The Supreme Court held that a judge's function on summary judgment is not to weigh the evidence but to view it in the light most favorable to the non-moving party. See Tolan v. Cotton, 572 U.S. 650 (2014). As the Court held in Tucker v. University Specialty Hospital, 166 Md. App. 50, 887 A.2d 74 (Md. Ct. Spec. App. 2005), "*The*

procedure is not a substitute for a trail, and the motions judge deciding a motion for summary judgment is not to weigh the evidence."

Magistrate Judge Beck first inappropriately justified her decision by misapplying S.C. Code Ann. §15-3-670(B), where Magistrate Judge Beck states, "*As a matter of law, there is no valid claim for gross negligence as the elements for gross negligence cannot be met*.". (M.J. Ord. 1). S.C. Code Ann. §15-3-670(B), in part,

> *"For the purposes of subsection (A), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness,* ***but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness****."*

Magistrate Judge Beck obviously missed the second part of the SC Code.

Magistrate Judge Beck next inappropriately justified her decision regarding gross negligence by failing to consider ALL of the evidence (code violations committed by Respondent Myatt). Magistrate Judge Beck specifies only one (minor) code violation, out of the many violations of SC Building Codes and Standards of which Respondent Myatt was found guilty by the SC LLR (Myatt Consent Agreement p. 2), to justify her decision; thereby, at the very least, failing to consider all evidence in light most favorable to Appellant Kennedy. Magistrate Judge Beck states, ("She" being Appellant Kennedy), "*She states this is gross negligence because of code violations determined by LLR. Myatt knew or should have known and failed to pull permits … and therefore her position is this action was illegal and therefore grossly negligent*." (M.J. Ret. p. 2) and "*A mere violation of the law does not rise to the level of gross negligence*." (M.J. Ret p. 4). Magistrate Judge Beck ignored the second half of S. C. Code § 15-3-670(B) and failed to view the evidence and all reasonable inferences therefrom in the light most favorable to the

Appellant Kennedy. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005).

The Circuit Court Judge erred when he upheld Magistrate Judge Beck's decisions, because Magistrate Judge Beck's decisions, as shown above, are inappropriate.

"**III. The Circuit Court did not err in upholding the Magistrate's dismissal of Bernard Myatt III as a party to the action because Appellant did not raise a cause of action for Piercing the Corporate Veil**."

Although Appellant Kennedy did not raise this issue on appeal to this Court, the Circuit Court erred in upholding the Magistrate's decision. Magistrate Judge Beck made an arbitrary decision to remove Bernard Myatt III as a party in this case, absent any cause of action, claim or motion from either party and absent any notice, hearing, testimony or evidence. *"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."* Kurschner v. City of Camden Planning Comm'n 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant Kennedy's Initial Brief of Appellant, Appellant Kennedy respectfully requests the Court reverse the decisions of the Circuit Court.

April 29, 2024

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PROOF OF SERVICE

I certify that I have served the Initial Appellant Reply Brief on the individual specified below by email on April 29, 2024, addressed as follows:

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