THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G.D. Morgan, Circuit Court Judge

Case No.: 2024-002011

Steven Maness,……..……Appellant,

v.

Gunter Heating & Air, LLC and Teddy L. Gunter,…..…….....Respondents.

FINAL BRIEF OF RESPONDENTS

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III. Whether the appellant may raise an issue on appeal for the first time.

INTRODUCTION

Respondents assert a brief history relating to the construction of Appellant's home, along with a discussion of prior litigation involving the home and prior water-damage claims involving the home, is helpful to understand this case.

Appellant contracted with Hogan Builders to construct this home, located at 305 Kilgore Farms Circle, Simpsonville, SC. Respondents are licensed mechanical subcontractors in South Carolina (S.C. License # 111940). Hogan Builders hired Respondents to install the HVAC system and related ductwork on the home. On December 7, 2005, County of Greenville inspector Stan Cleveland inspected and approved the mechanical building inspection for Appellant's home. On December 12, 2005, County of Greenville inspector Jim Dickson performed the final building inspection for Appellant's home and issued a final Certificate of Completion for the home.

Approximately three (3) years later, on December 17, 2008, Appellant filed a lawsuit against Hogan Builders, alleging multiple defects in workmanship and overall quality, including defects with (1) the front door; (2) the rear patio door; (3) the garage door; (4) the driveway; (5) the deck railing and steps; (6) the front porch posts; (7) kitchen plumbing and fixtures; and (8) **HVAC ductwork**. (emphasis added). This lawsuit resulted in a non-jury trial on December 7, 2009 before Magistrate Robert F. Simms, and an Order from Judge Simms in 2010. Notably, this lawsuit

contained complaints about, and a discussion of the HVAC ductwork that was installed by Respondents.

On August 8, 2008, Appellant made a water-damage claim to State Farm, his homeowners' carrier. This claim alleged a defective/leaking dishwasher caused damage to Appellant's kitchen cabinets, kitchen countertops and damaged wood flooring throughout the home. As part of its investigation, State Farm hired ServPro and Paul Davis Restoration to inspect the insulation in the crawlspace under wood flooring and dry out the property. State Farm's file indicated that 409 square feet of batt insulation within the crawlspace should be removed and replaced because of moisture intrusion from the dishwasher leak. The claim file also called for 20 linear feet of HVAC ductwork to be removed and replaced, and at least 1 ductwork register boot to be replaced. Pictures from State Farm's file show damage to wood flooring and the removal of cabinetry in Appellant's kitchen to access the subfloor, ductwork and register boot. Notably, many of the pictures in the claim file appear to show similar damage to wood flooring that Appellant claims in the instant case. Appellant ultimately resolved this claim with State Farm for $31,104.58, per that file.

On February 11, 2009 Appellant made a second water-damage claim with State Farm related to an overflowing toilet in the upstairs of the house. Per that file, water flowed downstairs through the floor and caused damage to a downstairs bedroom and bathroom. Again, State Farm contracted with ServPro to dry out and dehumidify both floors of Appellant's house. That claim was resolved for $6,915.00, per that file.

Respondents assert the timeline of prior legal actions and insurance claims is important to Respondents' brief because these prior actions and events involve investigations that included Respondents' work, and indicated repairs may be necessary for portions of Respondents' work, years before Appellant filed the present action. These prior actions and events also demonstrate

that third parties investigated Respondents' work, and apparently called for repairs to portions of Respondents' work after Respondents left the property, and years before Appellant filed the present action. Further, the damage the Appellant now claims appears to be consistent with damage that was claimed in Appellant's prior insurance claims, including damage to portions of Appellant's kitchen, including his kitchen floor. Lastly, these prior claims and losses show that Appellant is seeking recovery or repair for damages to various elements of his property that were claimed in prior proceedings and/or losses, including his kitchen floor, kitchen cabinets and front door.

At some point in September 2018, Appellant initiated a claim for water damage with State Farm for the present claim. State Farm again engaged ServPro to come to Plaintiff's home and apparently to remove damp insulation in the crawlspace and attempt to dry that area. During that claim with State Farm, Appellant also put Respondents on notice of a potential claim involving the HVAC system.

Appellant filed suit against Respondents on September 24, 2021, alleging simple negligence. Respondents timely filed their Answer, and the parties began discovery. In its discovery requests, Respondents specifically asked Appellant to identify any remedial work performed on the house, including the names of the companies performing that work. Separately, Respondents asked Appellant to identify all contractors who performed work at the home since 2005, including but not limited to, work on the HVAC system and related ductwork. Appellant essentially denied that any such work had been performed, aside from refinishing his floors in 2009. Appellant did not disclose the lawsuit against Hogan Builders, nor did Appellant disclose the prior water-damage claims he made through State Farm.

STATEMENT OF THE CASE

Appellant Steven Maness ("Appellant") filed suit on September 24, 2021, in Greenville County for issues allegedly involving his home, located at 305 Kilgore Farms Circle, Simpsonville, South Carolina. Appellant sued State Farm Fire and Casualty Co. ("State Farm"), Phenix Mutual Fire Ins. Co. ("Phenix") and Gunter Heating & Air, LLC and Teddy Gunter, individually, ("Respondents") as named defendants. Phenix was subsequently dismissed and State Farm later settled with Appellant.

Appellant alleged in his Complaint that this was a new construction project completed on or about December 2005 with the residential builder/general contractor Hogan Builders serving as general contractor. (R. p. 137). Respondents were first-tier mechanical subcontractors to Hogan Builders. Appellant alleged that on September 25, 2018, nearly 13 years after the completion of construction, the "lower-level unit suddenly presented as completely engulfed in water including all duct work and at least seventeen points of connection with the house." In the prayer of his Complaint, Appellant merely alleged simple negligence against Respondents. (R. p. 140) Respondents filed their Answer to Plaintiff's Complaint on February 16, 2022, denying Plaintiff's claims and asserting numerous affirmative defenses, including the Statute of Repose, *S.C. Code Ann. Section 15-3-640*, and the Statute of Limitations, *S.C. Code Ann. Section 15-3-530.*

Respondents filed a Motion for Summary Judgment with the Greenville County Circuit Court on April 25, 2024. (R. p. 121) Respondents timely filed a Memorandum in Support of Summary Judgment on August 30, 2024, consistent with the filing preferences of Judge G.D. Morgan. (R. p. 124) Judge Morgan granted Summary Judgment in Respondents' favor on September 18, 2024, stating Appellant's action was barred because of the Statute of Repose, *S.C. Code Ann. Section 15-3-640*, and the Statute of Limitations, *S.C. Code Ann. Section 15-3-530*. (R.

p. 2) Judge Morgan directed Respondents' counsel to prepare a formal Order. Appellant filed a Motion for Reconsideration on October 3, 2024, which was subsequently denied by Judge Morgan on October 29, 2024. (R. p. 66) Appellant filed a Notice of Appeal on November 21, 2024.

STANDARD OF REVIEW

The trial court granted Respondents' Motion for Summary Judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. "Appellate courts apply the same standard of review applied by the trial court to review the grant of summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure." *Williams v. Jeffcoat*, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024) (citing *Knight v. Austin*, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012)). Summary judgment is proper when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *See* Rule 56(c), SCRCP; *Knight*, 396 S.C. at 521-22, 722 S.E.2d at 804; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (eliminating the "mere scintilla" standard and holding the proper standard is the "genuine issue of material fact" standard set forth in the text of Rule 56(c), SCRCP). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *Willams*, 444 S.C. at 233-34, 906 S.E.2d at 593 (citing *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E. 2d 791, 796 (2008)).

ARGUMENT

I. This Court should affirm the trial court's decision based on the grounds appearing in the Record of Appeal.

For the reasons outlined below and pursuant to SCACR Rule 220(c), the trial court's order was proper and should be affirmed.

II. The trial court properly granted summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure based on the Statute of Repose, Section 15-3-640 of the South Carolina Code.

Appellant's Complaint fails as a matter of law because the Statute of Repose ran years before Appellant filed his Complaint against Respondents. The South Carolina Statute of Repose dictates that a Plaintiff may not bring actions to recover damages arising out of the defective or unsafe condition of an improvement to real property more than eight (8) years after substantial completion of the improvement. *See S.C. Code Ann. Section* 15-3-640 (2005). Per the statute, a Certificate of Occupancy issued by a county or municipality, in the case of new construction…shall constitute proof of substantial completion of the improvement under the statute. An action based upon or arising out of the defective condition of an improvement to real property includes, *inter alia*:

(2) an action to recover damages for the negligent construction or repair of an improvement to real property;

(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise; [and]

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(9) an action…against any person…who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

S.C. Code Ann. Section 15-3-640.

A statute of repose represents "an absolute time limit beyond which liability no longer exists." *Langley v. Pierce*, 313 S.C. 401,404, 438 S.E.2d 242, 243 (1993) (quoting *First United*

Methodist Church v. United States Gypsum Co., 882 F. 2d 862, 865-66 (4th Cir. 1989)). The statute's purpose "is to provide a substantive right to developers to be free from liability after a certain time period." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 182, 708 S.E.2d 787, 793 (Ct. App. 2011). "When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission." *Langley* at 404. Further, "statutes of repose are based upon consideration 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." *Id*.

Here, the County of Greenville completed and approved the final building inspection on December 12, 2005. (R. p. 177) The County of Greenville completed and approved the mechanical work on December 7, 2005. (R. p. 175) Thus, the latest possible end date for the Statute of Repose for Appellant's home was December 12, 2013. However, Appellant did not file suit against Respondents in the present case until September 24, 2021, **nearly eight (8) years after the end date for the Statute of Repose**. (emphasis added). Moreover, because Appellant only alleged a simple negligence claim against Respondents, his claims are barred by the Statute of Repose.

As explained in *Langley*, the purpose of the Statue of Repose is peace without worry that a cause of action may arise because of a long-forgotten act or omission. The doctrine also considers what can happen during the ownership of a home during that 8-year period, including wear and tear, accidents and damages, and the interaction of third parties with the home. Appellant's prior suit against Hogan Builders, and prior water-damage claims that were adjusted through State Farm, demonstrate that Respondents' work had been inspected and touched by third-parties multiple

times prior to this alleged incident. Moreover, the water-damage claims indicate that third-party investigators called for modifications to Respondents' HVAC system, including the replacement of a portion of ductwork and at least one register boot. In his filings and oral argument, Appellant appears to contend this repair work was never done. If third-party investigators called for this repair work during their inspections, due to water-related damage, and Appellant chose *not* to perform that work, that is equally troubling, and potentially damaging to Respondents' work. Respondents cannot control how a homeowner chooses to maintain or not maintain his home for sixteen years. Respondents cannot control whether a homeowner chooses to make repairs that are called for by third-party experts and consultants. Respondents cannot control who or what touches their work product over the course of 16 years. This is why the Statute of Repose exists. Appellant cannot sustain a simple negligence claim against Respondents when the unit in the household is not an untouched version of Respondents' work. Additionally, the prior water-damage claims appeared to affect the same flooring, cabinetry and other household items that Appellant now claims are damaged.

Therefore, the trial court did not err in ordering a dismissal pursuant to *S.C. Code Ann. Section* 15-3-640 because the Statute of Repose barred Appellant's claims long before Appellant filed suit on September 24, 2021. The plain language of the statute shows the clear intent of the S.C. General Assembly to allow a defendant the substantive right to be free from liability after a certain period of time. "The goal of statutory construction is to ascertain and give effect to the legislature's intent." *Allstate Ins. Co. v. Estate of Hancock*, 345 S.C. 81, 86, 545 S.E.2d 845, 847 (Ct. App. 2001). Courts are required to determine intent primarily through the plain language of statutes, id., and it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The unambiguous

language of Section 15-3-640 demonstrates the S.C. General Assembly's intent not to allow causes of action for simple negligence, breach of contract or breach of warranty to be asserted outside the statute of repose.

In his brief, Appellant raised several of the same issues that he raised in written filings to the trial court, during oral argument, and in his Motion to Reconsider, in an attempt to argue the Statute of Repose should not apply to an HVAC system. First, Appellant argued the HVAC system was merely an appliance, and therefore, is exempt from application of the Statute of Repose. Second, in Appellant's Brief, he also appeared to argue for the first time that an HVAC system did not constitute an improvement to real property. As noted during oral argument before Judge Morgan, Respondents were licensed mechanical subcontractors to the original homebuilder, Hogan Builders. Respondents' work required a separate inspection and approval from Greenville County Building Codes officials prior to the final certificate of completion being provided for the house. Those facts alone illustrate that the HVAC system is not a simple household appliance like a refrigerator or blender.

Appellant now contends the HVAC system does not constitute an improvement to real property because it is not permanent and is removable.[1] As Respondents noted in oral arguments, the HVAC units themselves are embedded in a concrete pad outside the house in question. Those HVAC units are connected to ductwork that runs underneath the house and behind walls within the house. The idea that someone who is selling a home could simply pull an HVAC unit out of a concrete bed in which it sits, tear out the connected ductwork that is bolted to subflooring, tear away drywall and remove ductwork, in the same way that one could move a refrigerator out of a

[1] Appellant did not appear to make this argument during oral arguments before Judge Morgan, nor did Appellant refer to any case law in support of this argument.

house is the height of absurdity. In his brief, Appellant refers to *Ervin v. Continental Conveyor & Equipment Co.*, 674 F. Supp. 2d 709 (D.S.C. 2009) for the proposition that an HVAC system is not a permanent improvement to real property. In *Ervin*, the Court determined a conveyer belt system in a manufacturing facility was removable, and therefore, non-essential to the building's structural purpose. In fact, the Court found the conveyor system in question had actually been removed at one point and installed in a different facility.

Respondents assert Appellant's reference to *Ervin* is misguided, as the correct test was set forth in *S.C. Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C.151, 546 S.E.2d 654 (S.C. 2001). In *S.C. Pipeline Corp*., the South Carolina Supreme Court created a three-factor test in determining whether something is an improvement under Section 15-3-640. Specifically, the Supreme Court looked at whether an alleged improvement makes property (1) "more valuable", (2) "involve[s] the investment of labor and money", and (3) is "permanent." *Id* at 657. The Court concluded that "whether an addition to real property constitutes an improvement requires a case-by-case determination." *Id*. Here, prongs one and two of the three-factor test are met without question. An HVAC system clearly makes a home more valuable, and the installation of the HVAC system requires the investment of labor and money. One could argue a home in South Carolina that lacks an HVAC system creates a life/safety issue due to the extreme heat that faces South Carolina in the summer. Additionally, while an HVAC unit may not be permanent in the sense that it never needs to be replaced, an HVAC system does have a long-life span and is not something that a homeowner will constantly replace throughout their tenure in a particular home. Therefore, an HVAC system clearly constitutes an improvement under the statute of repose as defined by the South Carolina Supreme Court. Thus, the statute of repose is applicable in this case.

Similarly, the South Carolina Supreme Court has examined the work performed by subcontractor on a structure within the context of the Statute of Repose in *Ocean Winds v. Lane,* 347 S.C. 416, 556 S.E.2d 377 (2001). In *Ocean Winds*, the Court examined when to "start the clock" on the Statute of Repose for Defendant Andersen Windows. Andersen contended the clock should start when they finished the installation of the windows on a structure, not when the Certificate of Occupancy was issued for that structure. In *Ocean Winds*, Andersen completed its work several years before the Certificate of Occupancy was issued. Judge Pleicones, authoring the unanimous opinion, also commented on how this issue could affect similarly situated subcontractors, "The legislature could not have intended that the date upon which a subcontractor-clearly a "person involved in improvements to real property"-becomes free from liability with regard to a particular job hinges upon the diligence of the general contractor and/or developer in completing construction. To so hold would subject the subcontractor to "the economic and emotional burdens of litigation and liability for an indefinite period of time." *Id*.

Likewise, the applicability of the Statute of Repose to subcontractors was discussed in *Lawrence v. General Panel Corp*, 425 S.C. 398, 822 S.E.2d 800 (2019). In *Lawrence*, the South Carolina Supreme Court resolved a certified question presented by the Unities States District Court. Specifically, the Supreme Court analyzed when the clock should start on the Statute of Repose for subcontractors, following the 2005 revisions to the statute. The Court reached a similar conclusion to *Ocean Winds*, that a subcontractor can rely on the date it finished its work, not the date the Certificate of Occupancy was issued. In reaching this conclusion, *Lawrence* discussed the role of subcontractors on a project, "When a project is nearing completion, there are often ongoing issues the contractor or a subcontractor must address. For example, the installation of a sprinkler system, a sound system, **or even the heating and air conditioning system**, is frequently followed

up by months—even years—of adjustments, upgrades or repairs." (emphasis added). Here, *Lawrence* specifically included a heating and air subcontractor in the group contractors who would fall within the protection of the Statute of Repose.

Next, Appellant appears to argue that Respondents' work violated buildings codes, which could be considered evidence of gross negligence. However, Appellant did not plead gross negligence in his Complaint, and never attempted to amend his Complaint to add a cause of action for gross negligence, even though Respondents asserted the Statue of Repose as an affirmative defense. Plaintiff never sought to amend his Complaint via consent or leave of court. Plaintiff never moved to amend his Complaint following the filing of Defendants' Motion for Summary Judgment or during oral argument. Therefore, to the extent Appellant now asks the Court to amend his Complaint to add a new cause of action for gross negligence, that issue is raised for the first time on appeal and is not properly before the Court. Moreover, it is not the role of the Court to "fix" a defect in Appellant's pleading. "A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." *State v. Burton*, 356 S.C. 259, 589 S.E.2d 6, 9 n.5 (2003).

In South Carolina, negligence and gross negligence are distinct causes of action with different elements. "Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." *Clyburn v. Sumter Cnty. Sc. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). Gross negligence is "the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do." *Hollins v. Richland County Sch. Dist. One*, 310 S.C. 486, 427 S.E.2d 654 (1993).

Despite the failures of his pleading, Appellant attempts rely on inspections from two experts, Jeff Jaco and Warren Maddox, who investigated Respondents' HVAC system and

ductwork 13 years and 19 years after installation of that work, respectively, for the proposition that there were problems with Respondents' 2005 installation. Neither expert indicated that Appellant disclosed his prior water-damage claims or his prior action against Hogan Builders.

Expert Jaco expressly *limited* the application of his inspection in an affidavit dated May 2, 2024. (R. p. 302-304) In that affidavit, Jaco stated "I cannot state to a reasonable degree of engineering certainty, that there were issues with the Gunter Heating & Air Conditioning's installation of the HVAC duct insulation considering that my inspection occurred more than 13 years after that initial installation." Jaco added, "I have reviewed the inspection reports from the original construction of the residence by Greenville County, including the mechanical inspections, all of which passed. In my opinion, the County inspector would not pas the mechanical portion of the construction if there had been tears and openings in the vapor barrier of the ducts of the HVAC system." Importantly, one of Jaco's primary findings following his 2019 inspection was multiple tears that he saw to the vapor barriers of the ductwork. His original report notes, "it is unknown when or how the foil vapor barrier was torn…" Jaco inspected Appellant's home months *after* Appellant made his claim to State Farm and *after* ServPro worked on the home. While Jaco's initial report indicated it was unknown why the vapor barrier was torn, Appellant later admitted that the tears were caused by ServPro and himself during/after the 2018 State Farm claim. Apparently, Appellant did not share those facts with Jaco during Jaco's 2019 inspection. As a result of the damage caused to Respondents' ductwork following this 2018 incident, it is simply impossible for any expert to opine on Respondents' 2005 installation.

Likewise, Respondents assert the report of expert Maddox cannot be considered since it occurred 19 years after Respondents completed their work, and over five (5) years after Jaco's inspection. Maddox cannot testify to how the system appeared at the time of installation in 2005,

especially considering the access third parties had to the system over that 19-year period, as well as the damage that was caused to Respondents' work following the 2018 claim.

Moreover, Respondents also note that expert Jaco made several findings that demonstrate the HVAC system was performing properly. Jaco determined that the HVAC system had sufficient air flow. Jaco noted, "The air flow rate in the supply and the return duct systems of the downstairs HVAC system is sufficient for efficient operation…" (R. p. 303) Jaco also noted, "The air flowing to the evaporator coil was measured at 71 degrees Fahrenheit (F) and the air flowing from the evaporator coil was measured at 52 degrees F…The temperature of the air was lowered 19 degrees F…The HVAC system is functioning normally…" (R. p. 303). So, in summary, the primary issue Jaco found in the HVAC system, including the ductwork, were the tears in the foil vapor barrier that were admittedly made by Appellant and ServPro.

Accordingly, Respondents assert Appellant simply cannot provide any evidence that Respondents failed to use reasonable care in 2005 when the subject HVAC system was installed. Not only does Appellant fail to plead gross negligence, but he has failed to present reliable evidence to support a claim for gross negligence.

In summary, Appellant chose to plead simple negligence in his Complaint. Appellant never sought to amend his Complaint to assert gross negligence, even after Respondents asserted the Statute of Repose as an affirmative defense. The applicable Statute of Repose for this house expired in December of 2013, nearly eight (8) years prior to the filing of Appellant's Complaint. At no point in any of his filings, or during the summary judgment hearing, does Appellant contest the fact that he missed the Statute of Repose by nearly eight (8) years. Therefore, Appellant's claim for simple negligence against Respondents must fail.

III. The trial court properly granted summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure based on the Statute of Limitations and the Discovery Rule.

Appellant's Complaint also fails as a matter of law because Appellant brought this action outside the applicable Statute of Limitations. Appellant's Complaint is subject to the Discovery Rule and fails because Appellant's Complaint was filed years after the cause of action ought to have been discovered.

A. Discovery Rule

Appellant's Complaint fails as a matter of law because Appellant brought this action outside the Statute of Limitations, subject to the Discovery Rule. All issues raised by Appellant are subject to a three (3) year Statute of Limitations per *S.C. Code Ann. Section* 15-3-530. Generally, a cause of action accrues under South Carolina law the moment the defendant breaches a duty owed to the Plaintiff. This standard is subject to the Discovery Rule, which allows for the statute of limitations to run not when evidence of injury first appears, but rather, when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp*., 321 S.C. 360, 468 S.E.2d 645 (1996).

For Appellant's theory of liability to succeed, he must prove Respondents alleged faulty work was present since December of 2005 when Greenville County building inspectors approved Respondents' work, and the Certificate of Occupancy was issued. Likewise, Appellant's negligence cause of action against Respondents reasonably should have been discovered in 2008, when Appellant sued Hogan Builders. In that prior action, according to documents on file with Greenville County, Appellant complained of numerous construction issues, including issues relating to the HVAC system and ductwork. The presiding Magistrate, Judge Simms, authored an Order on December 8, 2009 that stated, "At trial, [Appellant] presented testimony and exhibits outlining claimed defects in the following areas…(8) ductwork." (R. p. 240) In Judge Simms'

"Finding of Fact," he noted "[Appellant] complained of snack food refuse in the ductwork. Defendant Hogan Properties submitted evidence that Hogan Properties was a 100% energy star builder. As a result, the HVAC system installed by Respondents was inspected at rough-in by a third-party inspector, at rough-in by Greenville County Inspectors, at completion by a third-party inspector, and by Appellant's home inspector prior to closing. Accordingly, per evidence submitted by Hogan Builders, four (4) different entities inspected Respondents' HVAC system. As a result of the evidence submitted in that trial, Judge Simms made a specific finding of fact regarding prior inspections of the HVAC ductwork as part of the action against Hogan Builders, the same ductwork that Appellant complains of in the present action. If the issues Appellant now complains of were present during that prior litigation, as Appellant contends, those issues should have been discovered in the prior litigation.

The Discovery Rule dictates the three-year window for suing Respondents started at the latest, in December of 2008, when Appellant sued Hogan Builders. Construing the allegations in the complaint in a light most favorable to Appellant, Appellant's window for bringing any claims against Respondents would have closed, at the latest, in December of 2011. Therefore, Appellant's current action is nearly ten (10) years outside the applicable statute of limitations.

Additionally, Appellant made two (2) separate water-damage claims with his homeowners' carrier, State Farm, in 2008 and 2009, respectively. Appellant's 2008 claim involved a defective/leading dishwasher that damaged Appellant's kitchen and per the State Farm claims' file, impacted portions of Appellant's HVAC system. (R. p. 247-270) That file indicated ServPro and Paul Davis Restoration separately sent crews to inspect water damage in the insulation and crawlspace underneath wood flooring in Appellant's kitchen. ServPro and Paul Davis Restoration also dried out Appellant's home to prevent mold and mildew. Further, State Farm's claim file

included line items to replace 409 square feet of batt insulation that was removed from the crawlspace, to replace 20 linear feet of ductwork, and to replace at least one (1) ductwork register boot. This claim was resolved for $31,104.58 per the claim file.

Appellant's second water-damage claim with State Farm occurred in 2009 and appeared to involve an overflowing toilet in the second story of Appellant's home. (R. p. 271-282) Once again, ServPro came to Appellant's house to dry out and dehumidify the house. Appellant resolved this claim for $6,915.00 per the claim file.

While Appellant second claim with State Farm may not have exposed Respondents' HVAC ductwork, Appellant's first State Farm claim, in 2008, certainly did per the claim file. Appellant's action against Hogan Builders in 2008 and his water-damage claim against State Farm in 2008 involved professional inspections of Appellant's HVAC system, specifically the ductwork. Both of these matters must trigger the Discovery Rule, which would have required Appellant to bring an action in 2011 at the latest. Instead, Claimant filed the present action nearly 10 years too late, in 2021.

In his Brief, Appellant argues the trial court misapplied or was misled by the prior action against Hogan Builders. Respectfully, Respondents assert they merely presented the trial court a copy of Appellant's Complaint against Hogan Builders, pictures submitted by Appellant to the court in support of the action against Hogan Builders, and the Order from Judge Simms that discussed the evidence that was presented to the Court by the parties, his findings of fact, and his ultimate ruling. Appellant's own words and allegations reference the HVAC ductwork. Respondents assert the trial court in the present action correctly determined the prior lawsuit involved complaints about the HVAC ductwork and properly triggered the Discovery Rule.

Likewise, at nearly the same time that Appellant sued Hogan Builders, he filed a claim with State Farm for water-damage due to a defective dishwasher. Again, State Farm's claims file clearly shows an investigation of insulation beneath Appellant's kitchen, an investigation of the HVAC ductwork and a register boot. State Farm's file literally calls for the replacement of Respondents' work. This investigation and any subsequent work may have altered Respondents' prior work product and most certainly would have exposed portions of the HVAC system to the professionals who were prescribing and/or performing this repair work.

In his Section I of Appellant's Brief, Appellant appears to present an entirely new theory, while discussing the 2008 dishwasher claim with State Farm.[2] Appellant contends a picture from the State Farm file (R. p. 268), showing ductwork entering Appellant's subfloor from the crawlspace, depicts the same ductwork as is shown in Figure 25 of the Jaco Report.[3] (R. p. 299) Appellant appears to concoct a new theory that some of the water damage from the 2008 claim was actually related to the HVAC system, not his dishwasher. Respondent states, "One can see now in retrospect what was happening, but every single expert missed it; ServPro, State Farm adjusters, flooring contractor…these experts completely missing this early condensation." (p. 15 Appellant's Brief)[4]

Ironically, (if one chooses to follow this argument) Appellant admits multiple experts inspected, but missed, what should have been caught in 2008—condensation from the HVAC system—thereby admitting that the Discovery Rule should have been triggered. Yet, Appellant

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[2] This appears to be another novel issue raised for the first time on appeal and never raised during oral argument before Judge Morgan.

[3] Respondent contends this is not the same section of ductwork, as the surrounding wood members are not the same.

[4] Notably, nowhere in State Farm's 2008 Claims file is there an indication that condensation from the HVAC system contributed to this loss. In fact, the first page of the Claim document states "Facts of Loss: water coming from dishwasher"

waited until 2021 to file suit. Elsewhere in his filings, Appellant claims he could not possibly have discovered this issue until 2018, when it manifested in his home. Yet, in his latest brief he now theorizes for the first time that it was present in 2008, and was missed by multiple experts who inspected that condition. Further, at the same time experts were addressing his 2008 water-damage claim, Appellant was also suing Hogan Builders for alleged defects in workmanship and overall quality with, among other things, his HVAC ductwork.

Respondents reiterate what was stated during the hearing on this matter. The picture in question from the State Farm file shows the wood floor surrounding Respondents' work to be wet from the malfunctioning dishwasher. The picture also shows that Respondents' work was exposed to experts for investigation during that 2008 incident, thus triggering the Discovery Rule. Further, this picture also shows Respondents' work is neither sagging nor torn, as reported in Jaco's Report. Appellant has provided no photographs showing defects in Respondents' work at any time prior to 2019—nearly 14 years after installation and nearly 6 years after the expiration of the Statute of Repose. Further, Appellant admits he himself, along with ServPro, cut the insulation on the ductwork following the 2018 incident, although that fact was apparently not disclosed to expert Jaco during his inspection, where he attributed condensation to those tears. The 2019 and 2024 expert inspections cannot possibly provide accurate descriptions of Respondents' 2005 installation. Echoing Jaco's affidavit again, "[he] cannot state to a reasonable degree of engineering certainty, that there were issues with the Gunter Heating & Air Conditioning's installation of the HVAC duct insulation considering that my inspection occurred more than 13 years after that initial installation." (R. p. 304)

Therefore, the trial court did not err in ordering a dismissal pursuant to *S.C. Code Ann. Section* 15-3-530 because the Statute of Limitations and Discovery Rule barred Appellant's claims at the latest in December of 2011.

IV. Appellant may not raise an issue on appeal for the first time.

In his brief, Appellant appears to raise new issues that were not raised at the trial court level of litigation. Appellant cannot raise "facts" or legal issues that were not raised and/or ruled upon by the trial court. The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (internal quotations omitted). *See Also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) the circuit court must have had the opportunity for each theory advanced by Appellant "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Where a party raises an issue, but he issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 544 S.E.2d 870 (Ct. App. 2001). Appellant appeared to raise the following issues for the first time on appeal:

- Gross Negligence Cause of Action—To the extent Appellant requests the Court to amend his Complaint and add a new cause of action for Gross Negligence, when Appellant did not originally plead Gross Negligence, that issue was never raised during oral argument. Further, as noted above, it is not the province of the Court to repair Appellant's defective pleading.

- Concealment of a Cause of Action—Appellant appears to argue the HVAC ductwork was hard to access since it was in the crawlspace of his home and therefore should be considered "concealed."
- Late field memoranda—Appellant incorrectly refers to Rule 56(c) of the *South Carolina Rules of Civil Procedure* for the proposition that a memorandum in support of a summary judgment motion should be served 10 days before the hearing. In fact, Respondents' Motion for Summary Judgment was filed on April 25, 2024, months before the ultimate hearing on this matter. Respondents also specifically cited the Statute of Repose and Statue of Limitations in that April filing. Appellants' memorandum in support of their Motion was filed in accordance with the filing requirements of Greenville County and Judge G.D. Morgan.
- Res judicata and collateral estoppel—Appellant appears to argue that Respondents relied on the doctrines of res judicata and collateral estoppel by referencing Appellant's prior action against Hogan Builders. However, Respondents referenced this prior action to assert that it triggered the Discovery Rule for purposes of the Statute of Limitations.
- New theory that 2008 dishwasher leak may have been related to HVAC ductwork condensation—Appellant appears to argue, for the first time, that his 2008 claim with State Farm for a defective dishwasher may have also been related to issues with this ductwork. This is a novel theory that Appellant raised for the first time in his Appellant's brief.

For the reasons argued above, Respondents assert Appellant cannot raise these issues for the first time on appeal.

CONCLUSION

For the foregoing reasons, Respondents request that the Court deny the appeal and affirm the decision of the trial court. Appellant's Complaint fails as a matter of law because the Statute of Repose ran eight (8) years before Appellant filed his Complaint against Respondents. Appellant's Complaint also fails as a matter of law because Appellant brought this action outside the applicable Statute of Limitations. Appellant's Complaint is subject to the Discovery Rule and fails because Appellant's Complaint was filed nearly ten (10) years after the cause of action ought to have been discovered. Accordingly, Respondents respectfully request this Court affirm eh circuit court's order in full.

Respectfully submitted,

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