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STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

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**SC Court of Appeals**

TERRY AND SUZETTE PATTON,

CIVIL ACTION No. 2014-CP-04-2073  
COMMON PLEAS AND GENERAL SESSIONS

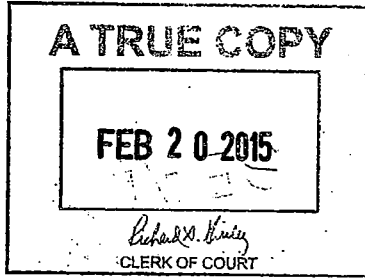
Plaintiffs,

vs.

AMERICAN LIFESTYLE HOMES, LLC,  
RUFUS G. REVIS D/B/A AMERICAN  
LIFESTYLE HOMES, AND ANDERSON  
BROTHERS CONCRETE, LLC,  
MARCUS CLINKSCALES AKA  
MARCUS ANDERSON D/B/A  
ANDERSON BROTHERS CONCRETE,  
LLC, AND SCOTT BROWN,

Defendants.

**ORDER GRANTING MOTION FOR  
RECONSIDERATION AND  
VACATING RESTORATION OF CASE  
UNDER RULE 40(J)**



Plaintiffs Terry and Suzette Patton moved to restore the above-captioned case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure after the case had been dismissed pursuant to the same rule. This Court originally restored the case without a hearing. Subsequent to the restoration, Defendant Scott Brown filed a motion for the Court to reconsider the restoration of the case or, in the alternative, a motion to vacate restoration of the case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. A hearing was held on Defendant's motion on December 16<sup>th</sup>, 2014, with counsel for Scott Brown and counsel for Terry and Suzette Patton appearing and presenting each party's respective arguments. Having heard the arguments of counsel and reviewed the record, exhibits, pleadings, orders, briefs and legal authority submitted, the Court is of the opinion and finds that Scott Brown's Motion to Vacate the Restoration of the Case should be granted.

In support of its Order, the Court makes the following findings of fact and conclusions of law:

1. Defendant Scott Brown, by counsel, filed a timely motion for reconsideration of the order restoring the case. Plaintiffs' counsel filed a Motion to Restore Case to Active Roster on September 11, 2014. The motion included a proposed order. The Court

executed the proposed order filed with the motion on September 15, 2014, and the order was filed with the Clerk of Court on September 16, 2014. Scott Brown, through counsel, filed the motion for reconsideration on September 24, 2014.

2. The Court executed the proposed order with the Motion to Restore Case to Active Roster without a hearing. The Court finds no evidence that Defendant Scott Brown consented to the restoration of the case and, rather, finds that Defendant Scott Brown contests the restoration. Therefore, the Court finds that Defendant Scott Brown was entitled to contest the motion for restoration of the case and was granted the opportunity for the Defendant's motion to be heard by full hearing, including consideration of arguments, exhibits and briefs of counsel on both sides.

3. The evidence confirms that Terry and Suzette Patton did not have any time remaining on the statute of limitations for the claim forming the basis of the litigation when the case was dismissed pursuant to Rule 40(j) by consent order executed by Judge Alexander S. Macaulay and filed with the Clerk of Court for Anderson County on August 26, 2013. A party must bring an action within three years of the date the cause of action arises. *S.C. Code Ann.* §15-3-530 (2005). The action must be commenced within three years of "when the underlying cause of action reasonably ought to have been discovered." *Martin v. Companion Health Corp.*, 357 S.C. 570, 575 (Ct. App. 2004). "[T]he three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct." *Id.* at 575-76; *S.C. Code Ann.* §15-3-535 (2005). "The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed." *Dorman v. Campbell*, 331 S.C. 179, 184 (Ct. App. 1998); *Dillon County School Dist. v. Lewis Sheet Metal Works*, 286 S.C. 207 (Ct. App. 1985). Plaintiffs' claim is based on construction defects and resulting damages associated with the construction of a garage, retaining wall and driveway at their home. Considering the evidence in the light most favorable to the Plaintiffs, the construction was contracted for in 2007 and completed in 2008. Plaintiffs

began seeing defects in the construction and made complaints to the general contractor about the construction, including a formal written complaint, by April 2009. Plaintiffs also made a complaint to the South Carolina Department of Labor, Licensing & Regulation on April 5, 2009 detailing the construction defects and damages. A site inspection was performed in June of 2009 by a representative of the Department of Labor, Licensing & Regulation and a report issued to Plaintiffs detailing construction defects and damages in July 2009. Plaintiffs retained the services of a licensed engineer, Alan Lumpkin of Professional Engineering Associates, to inspect the property on September 9, 2009, and a detailed report was issued by this engineer on September 27, 2009 detailing the defects in construction and damages resulting therefrom. The report included substantive information provided by Plaintiffs detailing their knowledge of construction defects and damages. Furthermore, Plaintiffs detailed their knowledge of the defects in their deposition testimony and relied upon this expert report as an exhibit to their Complaint, confirming their actual knowledge of their potential claim as of 2009, at the latest. Therefore, considering a three year statute of limitations, the Plaintiffs did not have any time remaining on the statute of limitations when the case was dismissed pursuant to Rule 40(j) on August 26, 2013.

4. At the hearing, Counsel for Terry and Suzette Patton conceded that Plaintiffs' did not have any time remaining on the statute of limitations for the claim forming the basis of the litigation when the case was dismissed by consent order executed by Judge Alexander S. Macaulay and filed with the Clerk of Court for Anderson County on August 26, 2013.

5. Terry and Suzette Patton did not file the Motion to Restore Case to Active Roster within the period of time the statute of limitations was stayed pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. The Consent Order Striking Case from Docket was executed by Judge Alexander S. Macaulay on August 26, 2013. The executed order was clocked in and filed with the Clerk of Court for Anderson County on August 26, 2013. In order to take advantage of the tolling of the statute of limitations after a case has been dismissed pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, a party must move to restore the case to the docket within one year after the date the case was dismissed. *See*, Rule 40(j) SCRPC ("if the claim is restored upon

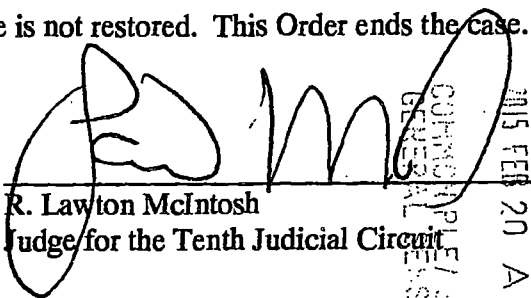


motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored.”). At the time of the dismissal on August 26, 2013, Terry and Suzette Patton did not have any remaining time on the statute of limitations. Therefore, they had up until August 26, 2014 to move to restore the case pursuant to this rule to take advantage of the tolling protection afforded them against the statute of limitations. The Motion to Restore Case to Active Trial Roster pursuant to Rule 40(j) was filed on September 11, 2014. As a result, the motion to restore violates the statute of limitations and the case should not be restored.


6. Counsel for Terry and Suzette Patton argued that the date to be considered for the tolling of the statute of limitations on a motion to restore a case previously dismissed pursuant to Rule 40(j) is one year from when the executed and filed order is actually received by counsel rather than the date the executed order is filed with the Clerk of Court. The Court disagrees. An order is final and takes effect after the order is signed when it is filed with the Clerk of Court. *See, Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999)(final and binding effective date of order allowing amended complaint was the date the order was entered by the clerk of court). Additionally, considering principles of fairness and equity, Terry and Suzette Patton had notice of the date the Consent Order Striking the Case from Docket was filed with the Clerk of Court for Anderson County over eleven months from the date the filed order was received by counsel prior to the expiration of one year from the date the case was struck pursuant to Rule 40(j). Therefore, they had substantial and sufficient time to comply with the Rule 40(j) for a motion to restore the case pursuant to the rule.

It is therefore ordered that the Defendant’s motion for reconsideration and to vacate the restoration of the case is granted and the case is not restored. This Order ends the case.

AND IT IS SO ORDERED.

  
 R. Lawton McIntosh  
 Judge for the Tenth Judicial Circuit

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