IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2013-CP-26-0488

Horry Electric Cooperative, Inc. — Appellant

vs.

South Carolina Public Service Authority and Southern Electric International, Inc., Defendants,

Of whom South Carolina Public Service Authority is the — Respondent

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

This action arises out of an underlying class action against Horry Electric Cooperative, Inc. ("HEC") titled *Ronnie Ferrell, Tammy Vance and David Montorio, on behalf of themselves and all others similarly situated v. Horry Electric Cooperative,* Civil Action No. 2011-CP-26-1266. [R. pp. 29-49] In the underlying action, the plaintiffs alleged that HEC offered a Good Cents program under which members could receive a favorable electric rate provided they complied with the requirements of the Good Cents program regarding insulation and other energy saving matters. One of the requirements for participation in the Good Cents program was installation of a vapor barrier on the interior of the exterior walls. The class representatives alleged that the vapor barrier requirement was a design defect that caused moisture to accumulate inside the walls which in turn caused mold, mildew and moisture damage to the structure. The plaintiffs alleged three causes of action against HEC: (1) design defect/breach of warranty; (2) negligence/gross negligence; and (3) breach of contract/covenant of good faith and fair dealing. [R. pp. 29-49] The underlying action was filed on or about February 9, 2011. [R. pp. 26-29] A settlement was reached in the underlying action which was preliminarily approved by an Order dated March 3, 2014. [R. pp. 130-145] A final approval hearing was set on May 30, 2014. [R. pp. 117-124]

On January 23, 2013, HEC filed this action against the South Carolina Public Service Authority ("Santee Cooper"). Santee Cooper was a developer and promoter of the Good Cents program. HEC's initial complaint sought damages by way of equitable indemnification. [R. pp. 26-28] On July 5, 2013, Santee Cooper moved to dismiss the

complaint. [R. pp. 91-400] On July 30, 2013, HEC filed and served an Amended Complaint asserting causes of action for negligence, breach of warranty, civil conspiracy and equitable indemnification. [R. pp. 29-49]

By an Order dated March 5, 2014 issued by the Chief Justice, this action was transferred to the business court and assigned to the Honorable Roger M. Young, Sr. [R. p. 5]

On August 21, 2013, Santee Cooper moved to dismiss the Amended Complaint upon the following grounds:

> "(a) the claim for equitable indemnity is barred by the statute of repose because the Complaint was filed on January 18, 2013, more than 8 years after the homes involved in the underlying action were constructed;
> (b) the other purported claims are barred by the applicable statute(s) of limitation; and
> (c) HEC has failed to state facts sufficient to constitute a cause of action against Santee Cooper."1 [R. p. 401]

No discovery took place in this action because Santee Cooper moved for a protective order but HEC was able to take a 30(b)(6) deposition of Santee Cooper in the underlying action. The 30(b)(6) deposition established that Santee Cooper knew of the vapor barrier problem before offering the Good Cents program to HEC and failed to disclose the potential problem to HEC. [R. p. 30, ¶10] On October 2, 2013, HEC filed a Motion for Partial Summary Judgment supported by the 30(b)(6) deposition. [R. pp. 441-498]

On May 16, 2014, HEC filed a motion to continue and/or stay any decision on Santee Cooper's motions on the following grounds:

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1 Judge Young, in his order filed June 13, 2014, failed to state correctly the motion which Santee Cooper made. He changed subparagraph (a) to the following: "The claims are barred by the statute of repose because the underlying action is based on construction completed in the 1980s and 1990s."

"1. Upon information and belief, Santee Cooper will argue that the equitable indemnity claim should be dismissed because the claim for equitable indemnity requires proof that the party seeking indemnity have no personal negligence of his own. Santee Cooper may also argue that the above-captioned action is premature and should be dismissed since Horry Electric has not yet suffered any damages in Civil Action No. 2011-CP-26-1266.

2. The proposed Settlement Agreement, attached hereto as Exhibit A, contains certain allegations regarding absence of personal negligence on the part of Horry Electric and Settlement Agreement, if approved, will establish the damage incurred by Horry Electric and absence of fault on the part of Horry Electric.

3. Upon information and belief, the Settlement Agreement dated February 28, 2014 will be approved by the Court on May 30, 2014 and if so, Horry Electric will ask that the Court take judicial notice of the approval of the Settlement Agreement and consider it in connection with the motion to dismiss." [R. pp. 499-500]

On May 27, 2014, Judge Young heard the above-referenced motions. By an Order filed June 13, 2014, Judge Young dismissed the claim for equitable indemnification without prejudice finding that the class action settlement had not been approved and no payments had been made pursuant to the purported settlement and, as a result thereof, the action was not ripe. Judge Young granted Santee Cooper's motion to dismiss all other claims with prejudice. Judge Young found that these claims were barred by the statute of repose and statute of limitations. (Order filed 6/13/14)

On July 2, 2014, HEC filed its Rule 59(e) Motion to Reconsider, Alter and/or Amend the Order filed June 13, 2014. [R. pp. 645-689] Judge Young summarily denied HEC's motion to reconsider by an Order dated July 14, 2014. [R. p. 25]

HEC filed its Notice of Appeal of the Order filed June 13, 2014 and the Order filed July 14, 2014. [R. pp. 690-701]

I.

DID JUDGE YOUNG ERR IN FAILING TO DELAY THE HEARING AND/OR ANY RULING ON SANTEE COOPER'S MOTIONS UNTIL AFTER MAY 30, 2014 WHEN COURT APPROVAL OF THE SETTLEMENT OF THE CLASS ACTION WAS HEARD?

Judge Young held a hearing on the motions before him on May 27, 2014. A hearing before Judge Culbertson to approve the class action settlement was scheduled for three days later on May 30, 2014.

Judge Young did not sign his written order until June 11, 2014. His order was not filed until June 13, 2014.

Judge Young's Order filed June 13, 2014 stated:

> "1. Equitable Indemnification. As stated above, the claim for equitable indemnification is not yet ripe for adjudication. The parties in the *Ferrell* action have entered into a Settlement Agreement, which will require Court approval, but as of the date of the hearing in this matter, that approval had not yet occurred. Pursuant to the Settlement Agreement, HEC and/or its insurer will pay class members to settle their damages claims and will pay class counsel their attorneys' fees and costs. In the action at bar, HEC is seeking indemnification for such payments. Counsel for HEC reported that while some class members had submitted claims and class counsel had petitioned for attorneys' fees pursuant to the Settlement Agreement, court approval of the settlement had not been granted as of the date of this hearing. More importantly, no payments had been made pursuant to the Settlement Agreement. Accordingly, this Court finds that HEC's claims for indemnification are not yet ripe. The Court makes this finding after carefully considering and rejecting all of HEC's arguments relevant to the question of ripeness, regardless of whether such arguments are expressly enumerated herein. Finding that dismissal with prejudice would be premature, this Court dismisses the claim for equitable indemnification *without prejudice.*" [R. pp. 7-8]

Judge Young dismissed the equitable indemnification claim on the ground that the class action settlement had not been approved and payments had not been made. However,

he knew before he issued his order that Judge Culbertson had already approved the class action settlement on May 30, 2014. This is undisputed. This is proved by a footnote in Judge Young's Order.

> "This settlement approval was pending before another Court. Approval was subsequently granted on May 30, 2014." [R. p. 8]

Judge Young erred in issuing an order finding that the settlement had not been approved when, by the time he signed his order, the settlement had been approved and he knew it. His order is prejudicial to HEC. If his order is affirmed, HEC will have to re-file its action, pay a second filing fee, and arrange for service. The Clerk of Court will have to set up a new file. Disposition of the action will unnecessarily be delayed. Obviously, delay and duplication is not what is needed in our judicial system. Other significant prejudice to HEC is set forth below. His order should be reversed.

II.

DID JUDGE YOUNG ERR IN ISSUING AN ORDER DISMISSING THE CAUSE OF ACTION FOR EQUITABLE INDEMNIFICATION BASED ON A FALSE PREMISE?

Judge Young granted Santee Cooper's motion to dismiss the equitable indemnity claim on the basis that the class action settlement had not been approved and no payments had been made pursuant to the Settlement Agreement. Yet at the time he signed his order, he knew this was not correct.

The hearing before Judge Young was on May 27, 2014. The approval hearing of the class action settlement was scheduled for hearing just three days later on May 30, 2014. Judge Young's order was not signed until June 11, 2014 and was not filed until June 13,

2014. The footnote in his order proves that Judge Young knew of the approval of the class action settlement prior to issuing his order on June 13, 2014, but he dismissed the equitable indemnity claim anyway. All Judge Young had to do was to take judicial notice of Judge Culbertson's order. His order states that he had "confined his decision to the amended Complaint, attachments thereto, matters of which the Court may take judicial notice, and the arguments of the parties at the hearing." Rule 201, SCRE provides that judicial notice "may be taken at any stage of the proceeding". His order dismissing the equitable indemnification claim was based on a false premise and should be reversed.

III.

WAS THE DISMISSAL OF THE EQUITABLE INDEMNIFICATION ACTION INCONSISTENT WITH THE PURPOSES OF THE BUSINESS COURT?

When Judge Young dismissed the cause of action for equitable indemnification, he found that since the class action settlement had not been approved and no payments had been made, HEC had no damage. [R. pp. 7-8]

This action had been transferred to the business court. Santee Cooper's counsel made the following argument regarding the purpose of the business court:

> "because of particular needs of the business community for a speedy, fair, and final resolution of disputes in the courts so that the businesses can get back on the job of running their businesses and not being tangled in ongoing litigation." [R. p. 77, lines 1-5]

Granting a motion to dismiss the cause of action for equitable indemnification without prejudice does nothing to facilitate "a speedy, fair and final resolution" of the dispute. Dismissing the equitable indemnification claim will have the opposite effect and

will unnecessarily delay the trial and will waste judicial time and resources. Judge Young's order dismissing HEC's action for equitable indemnification should be reversed.

IV.

DID JUDGE YOUNG ERR IN DISMISSING THE EQUITABLE INDEMNITY CLAIM BASED UPON A GROUND NOT RAISED BY SANTEE COOPER'S MOTION?

Judge Young dismissed the claim for equitable indemnification on a ground not raised by Santee Cooper in its motion. Santee Cooper's motion did not mention ripeness. Santee Cooper's counsel did not argue "ripeness" at the hearing. HEC had no notice that "ripeness" would be considered by Judge Young and no opportunity to meet and be prepared to address the issue of ripeness.

According to Rule 7(b)(1), SCRCP:

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, **shall state with particularity the grounds therefore, and shall set forth the relief or order sought.** The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." Emphasis supplied.

The particularity requirement of Rule 7(b)(1) was discussed by the Supreme Court in *Camp v. Camp,* 386 S.C. 571, 689 S.E.2d 634 (2010).

> "Rule 7(b)(1), SCRCP required that motions 'shall state with particularity the ground therefore, and shall set forth the relief or order sought.' The particularity requirement 'is to be read flexibly in 'recognition of the peculiar circumstances of the case.'' *Cambridge Plating Co., Inc. v. Napco, Inc.,* 85 F.3d 752, 760 (1st Cir. 1996) (quoting *Registration Control Sys., Inc. v. Compusystems, Inc.,* 922 F.2d 805, 808 (Fed. Cir. 1990)). **'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.''** *Calderon v. Kansas Dept. of Soc. And Rehab. Servs.,* 181 F.3d 1180, 1186 (10th Cir. 1999)

(quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* Section 1192 at 42 (2d ed. 1990))." Therefore, when a motion is challenged for a lack of particularity, the court should ask 'whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'' *Registration Control,* 922 F.2d at 807-08 (quoting 5 Wright & Miller, *Federal Practice and Procedure* Section 1192 at 42). 'The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized.' *Andreas v. Volkswagen of Am., Inc.,* 336 F.3d 789, 793 (8th Cir. 2003) (citations omitted). Emphasis supplied.

Santee Cooper moved to dismiss the claim for equitable indemnification and stated the single ground of its motion with particularity. Santee Cooper sought to have the claim for equitable indemnification dismissed upon the following ground:

"(a) the claim for equitable indemnity is barred by the statute of repose because the Complaint was filed on January 18, 2013, more than 8 years after the homes involved in the underlying action were constructed;" [R. pp. 401-414]

Santee Cooper did not move to dismiss based upon the 13 year statute of repose. At the hearing, Santee Cooper's counsel admitted that if the thirteen year statute of repose was the applicable statute rather than the 8 year statute, then HEC had claims that were not barred by the statute. Santee Cooper's counsel argued:

"On the statute of repose, the parties are actually in agreement that the statute of repose is contained in Section 15-3-640, and it applies. The only question raised by Horry Electric is whether it's an 8-year or 13-year period. We have argued for the 8-year period, Your Honor, which would totally bar the complaint. If Your Honor were to agree with HEC and find that the 13-year period applied, then the complaint would be dismissed in part." [R. p. 55, lines 1-8]

Judge Young found that the 8 year statute of repose did not apply. Once he ruled on the 8 year statute of repose, he should have stopped and denied Santee Cooper's motion on that cause of action. Instead, Judge Young, on his own, came up with a new ground for

dismissal of the equitable indemnification claim. Judge Young's new ground was that the claim was not "ripe" since, according to Judge Young, the class action settlement has not been approved and no payments had been made pursuant to the settlement agreement. This was clear error.

A circuit court judge is not and should not become an advocate for one side or the other. Instead, a circuit court judge should sit as a referee to rule on the matters that are brought before him. Had Judge Young done that, he would have denied Santee Cooper's motion that was made based on the 8 year statute of repose and stopped there. HEC had no notice that an issue of ripeness would be raised. HEC had no time to prepare for an argument on ripeness and arguing against some new theory the judge has raised is usually a hopeless task.

It was clear error for Judge Young to grant the motion on a ground not raised by the moving party. In *State v. Dicapua,* 383 S.C. 394, 680 S.E.2d 292 (2009), the Supreme Court stated:

> "We now turn to the legal issue which resolves this case – may a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question 'no' in the context of a civil proceeding in *Southern Railway Co. v. Coltex, Inc.,* 285 S.C. 213, 214, 329 S.E.2d 736 (1985) ('The sole issue is whether a trial judge *ex mero moto* can grant a new trial on a ground not raised by a party. We hold he cannot'). We hold the same result must follow in a criminal case. Moreover, to affirm the grant of a new trial on a waived issue in a criminal case would lend this Court's imprimatur to a trial court's impromptu grant of post conviction relief."

In *Standard Roofing Co., Inc. v. Dean Construction Co., Inc.*, 284 S.C. 40, 324 S.E.2d 334 (Ct. App. 1984), the Court of Appeals stated:

> "As noted, Dean asked for relief based on reformation and indemnification; it

did not seek relief under the contract documents or restitution. Therefore, the trial court erred by going beyond the scope of the pleadings and granting relief on theories not pleaded. Judgements 'not supported by the theor[ies] of action on which the pleadings [are] framed [are] fatally defective.' *Crocker v. Crocker,* 281 S.C. 154, 314 S.E.2d 343, 346 (Ct. App. 1984); *Bryan v. Bryan,* 282 S.C. 506, 319 S.E.2d 360 (Ct. App. 1984); *Glass v. Glass*, 276 S.C. 625, 281 S.E.2d 221, 222 (1981)." At page 295 of 680 S.E.2d.

These holdings should apply with equal force to a circuit court judge considering a motion to dismiss. Judge Young's order granting the motion to dismiss the cause of action for equitable indemnification should be reversed.

V.

DID JUDGE YOUNG ERR IN GRANTING THE MOTION TO DISMISS BY FAILING TO ACCEPT THE ALLEGATIONS OF THE AMENDED COMPLAINT AS BEING TRUE?

The law is clear that a judge, in considering and deciding a motion to dismiss, must accept the well pled allegations of the complaint as being true. *Gressette v. South Carolina Electric & Gas Co.,* 370 S.C. 377, 635 S.E.2d 538 (2006). Santee Cooper conceded as much in its motion:

> "A motion to dismiss pursuant to Rule 12(b)(6), however, is based solely on the allegations set forth in the complaint, and for purposes of the motion, the court accepts well-pled facts as true. *Overcash v. S.C. Elec. & Gas Co.,* 364 S.C. 569, 614 S.E.2d 619 (2005)."

It is clear that Judge Young failed to do so. Judge Young dismissed the claim for equitable indemnification, finding that since the class action settlement had not yet been approved and no payments made pursuant to the settlement agreement, the action was not ripe. In essence, Judge Young found that HEC had no damages as of the time of the hearing and as a result, the action was not ripe for determination.

Judge Young made this finding even though HEC had pled that it had damages. Actually, the Amended Complaint contained allegation after allegation of damages. These allegations of damages are as follows:

> "17. That Horry Electric has incurred attorney's fees and costs in defending Civil Action No. 2011-CP-26-1266 for which Santee Coopers are liable.
>
> 18. That, to the extent Horry Electric is exonerated from liability to HECs in Civil Action No. 2011-CP-26-1266, Horry Electric is informed and believes that Santee Coopers are or may be liable to it for the expenses including attorney's fees and costs and any settlement costs incurred by Horry Electric in protecting its interest in Civil Action No. 2011-CP-26-1266.
>
> 22. That as a direct and proximate result thereof, HEC has incurred attorney's fees and expenses and may suffer other damages.
>
> 25. That Santee Coopers, by failing to disclose the information in Exhibits B and C, breached their implied duty of good faith and fair dealing which they owed to Horry Electric as a result of their contractual relationship, all to Horry Electric's damage, and Horry Electric is entitled to recover from Santee Coopers its actual damages and punitive damages as a result thereof.
>
> 28. That Santee Coopers breached their representation and warranties as aforesaid and as a result thereof, Horry Electric has suffered actual damages for which Santee Coopers are liable.
>
> 30. That, upon information and belief, Santee Cooper, who knew the information in Exhibits B to C but failed to disclose it to Horry Electric combined and joined for the purpose of injuring Horry Electric and caused Horry Electric to suffer actual and special damages for which Santee Coopers are liable.
>
> 32. That, to the extent Horry Electric is exonerated from liability to HECs in Civil Action No. 2011-CP-26-1266, Horry Electric is informed and believes that Santee Coopers are or may be liable to Horry Electric for all expenses incurred by Horry Electric in protecting its interests." [R. pp. 31-32]

Obviously, if the foregoing allegations are accepted as being true, as required by law on a motion to dismiss, HEC had suffered damages and the action could not be dismissed on the ground that the action was not ripe because HEC had no damages. Since Judge Young failed to follow the law by failing to accept HEC's allegations as true, his Order dismissing the cause of action for equitable indemnification should be reversed.

VI.

DID JUDGE YOUNG ERR IN DISMISSING THE CLAIM FOR EQUITABLE INDEMNIFICATION BASED UPON LACK OF RIPENESS WHEN RULE 12(b), SCRCP DOES NOT PROVIDE FOR A MOTION TO DISMISS FOR LACK OF RIPENESS?

Rule 12(b), SCRCP, provides:

> "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim."

Rule 12(b) provides for a limited number of defenses which can be asserted by way of a motion to dismiss. Rule 12(b) does not provide for or authorize a motion to dismiss based upon lack of ripeness. The ripeness is frequently raised in declaratory judgment actions where there is a question involving whether there is a justiciable controversy.

> "Appellants' constitutional claim is not ripe for determination at this time. 'A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.' *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.,* 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (see also *Hitter v. McLeod,* 274 S.C. 616, 266 S.E.2d 418 (1980)."

Here, if the plaintiff did not have or allege any damages, the proper motion would be a Rule 12(b)(6) motion. A circuit court judge should not be allowed to grant a motion to dismiss for lack of ripeness when such is not permitted by Rule 12(b). Judge Young's order should be reversed.

VII.

WAS THE DISMISSAL OF THE CLAIM FOR EQUITABLE INDEMNIFICATION PREJUDICIAL TO HEC?

HEC's claim against Santee Cooper for equitable indemnification was subject to a defense of the 13 year statute of repose. Since the action was filed on January 23, 2013, HEC acknowledged that the statute of repose would bar all claims for residences that were substantially complete more than 13 years prior to this action being commenced. Santee Cooper's counsel, in argument, admitted that if the 13 year statute of repose applied, there were claims asserted that would not be barred. Counsel argued:

> "On the statute of repose, the parties are actually in agreement that the statute of repose is contained in Section 15-3-640, and it applies. The only question raised by Horry Electric is whether it's an 8-year or 13-year period. We have argued for the 8-year period, Your Honor, which would totally bar the complaint. If Your Honor were to agree with HEC and find that the 13-year period applied, then the complaint would be dismissed in part." [R. p.55, lines 1-8]

> "because of particular needs of the business community for a speedy, fair, and final resolution of disputes in the courts so that the businesses can get back on the job of running their businesses and not being tangled in ongoing litigation." [R. p. 77, lines 1-5]

This argument was binding on Santee Cooper. *Smith v. Pearson,* 210 S.C. 524, 530, 43 S.E.2d 479, 482 (1947) (a party is bound by statements of its counsel).

This action was filed on January 23, 2013. Claims in the underlying action based on substantial completion dates prior to January 23, 2000 would be barred by the 13 year statute of repose. If this action is dismissed and then has to be re-filed, then claims for residences with substantial completion dates between January 23, 2000 and whenever suit is re-filed will be barred. Obviously, dismissing this action and having to re-file it would be financially

prejudicial to HEC in addition to the prejudice to HEC in having to re-file and pay another filing fee and have a delayed trial date as set forth above. Judge Young's order should be reversed.

VIII.

DID JUDGE YOUNG ERR IN GRANTING HEC's OTHER CAUSES OF ACTION BASED ON THE STATUTE OF REPOSE WHICH WAS NOT RAISED AS A GROUND FOR DISMISSAL BY SANTEE COOPER'S MOTION?

Judge Young dismissed HEC's other causes of action on the ground that they were barred by the statute of repose. However, this ground was not raised in Santee Cooper's motion to dismiss the other causes of action. See Argument IV above and the authority referenced therein. For the reasons stated in HEC's Argument IV, Judge Young's order should be reversed as to the other causes of action.

IX.

DID JUDGE YOUNG MISINTERPRET AND MISAPPLY THE STATUTE OF REPOSE IN FINDING THAT THE STATUTE OF REPOSE BEGAN TO RUN BASED UPON THE OCCURRENCE RATHER THAN OF CERTAIN EARLIER ACTS WHEN SUBSTANTIAL IMPROVEMENT OCCURRED?

Judge Young found that the other claims asserted by HEC were barred by the statute of repose, finding as follows:

> "2. Statute of Repose. The Court finds that the statute of repose bars the remaining claims. These claims are predicated on letters written by a Santee Cooper employee in 1986 concerning, among other things, the vapor barrier design specifications for the Good Cents program. These specifications were then incorporated into construction completed as early as 1988 or, accepting for the sake of argument HEC's position asserted during the hearing, in 1991. (At the hearing, counsel for HEC stated that while the letters were written in 1986, the vapor barrier design specifications was not implemented until 1991). HEC

> further argues that HEC did not discover the existence of these Santee Cooper letters until the *Ferrell* suit was being litigated. HEC further argues that the 1986 letters demonstrate that Santee Cooper had knowledge about the vapor barrier design specification that it should have disclosed to HEC in 1986 (or 1991). Santee Cooper disputes these arguments. Reading the Amended Complaint and drawing all inferences in the light most favorable to HEC, the Court concludes that these claims are based on the theory that if HEC had been informed of the contents of the letters when they were written, HEC would not have adopted the vapor barrier design specifications and, consequently, these design specifications would not have been incorporated into the homes of its customers. As noted above, counsel for HEC argued that the operative date for incorporation of the design standards into customers' homes was 1991, rather than 1986 (the date of the letter) or 1988 (the date construction commenced according to the underlying complaint). Even if 1991 were the operative date on which the design specifications were incorporated into the construction of class members' homes, the statute of repose would bar the claims for negligence, breach of the covenant of good faith and fair dealing, breach of warranty, and civil conspiracy." [R. pp. 8-11]

The 13 year statute of repose is clear and unambiguous. A reading of the plain language of the 13 year statute of repose readily establishes that Judge Young misinterpreted and misapplied the statute of repose. The plain and unambiguous language of the statute of repose is that it begins to run "after substantial completion" of the improvement.

Section 15-3-640 provides in part as follows:

> "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after **substantial completion** of such an improvement." Emphasis supplied.

Section 15-3-640 also states:

> "This section describes an outside limitation of thirteen years after the **substantial completion** of the improvement, within which normal statutes of limitations continue to run." Emphasis supplied.

As Santee Cooper's counsel conceded, the class action consisted of claims involving homes in which substantial completion occurred within thirteen years of the commencement of the

class action. Santee Cooper's counsel conceded that those claims were not barred by the 13 year statute of repose.

> "On the statute of repose, the parties are actually in agreement that the statute of repose is contained in Section 15-3-640, and it applies. The only question raised by Horry Electric is whether it's an 8-year or 13-year period. We have argued for the 8-year period, Your Honor, which would totally bar the complaint. If Your Honor were to agree with HEC and find that the 13-year period applied, then the complaint would be dismissed in part." [R. p. 55, lines 1-8]

Judge Young disregarded this concession and ruled that all claims were barred. This Court should find that the circuit court judge misinterpreted the 13 year statute of repose as written and reverse his order dismissing the other causes of action based upon the 13 year statute of repose.

X.

DID THE CIRCUIT COURT JUDGE ERR IN FINDING THAT ALL OTHER CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS?

Judge Young stated in his order that he was not converting the motion to dismiss to a motion for summary judgment. He found that HEC's other claims were barred by the two year statute of limitations in the Tort Claims Act. He found:

> "3. Statute of Limitations. The Court notes that Santee Cooper also moved for dismissal of HEC's claims for negligence, breach of the duty of good faith and fair dealing, breach of express and implied warranties, and civil conspiracy on the basis of the two-year statute of limitations contained in the Tort Claims Act ('TCA'). See S.C. Code Ann. §15-78-110; *see also Hodges v. Rainey*, 341 S.C. 79, 91-92, 533 S.E.2d 578, 584 (2000) (recognizing TCA applies to Santee Cooper). The Court finds that the statute of limitations provides an additional reason for dismissal of these claims.2

2 It should be noted that the cause of action for breach of the duty of good faith and fair dealing and breach of express and implied warranties are not torts which are subject to the Tort Claims Act.

> In oral argument, HEC asserted that actions brought under the TCA are subject to the discovery rule, *Joubert v. S.C. Dep't of Soc. Services,* 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000), and that it did not have knowledge of the 1986 letters until discovery began in the underlying *Ferrell* case. 'According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered.' *Id. See also Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008) ('The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist.'). 'The date on which discovery should have been made is an objective rather than subjective question.' *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998). 'The critical inquiry, then, is whether [HEC] could have discovered its claim against Santee Cooper.' *See Republic Contracting Corp. v. S.C. Dep't of Highways & Public Trans.,* 332 S.C. 197, 207, 503 S.E.2d 761, 767 (Ct. App. 1998) (emphasis added).
>
> On their face, argues Santee Cooper, the 1986 letters show that HEC could have discovered the information that HEC alleges Santee Cooper should have divulged to HEC, because the letters show that this information was contained in engineering standards and a trade publication, and was the subject of some discussion in the local building community. According to this argument, the statute of limitations began to run in 1986. The Court agrees. Alternatively, argues Santee Cooper, the Amended Complaint alleges that Santee Cooper later altered the vapor barrier design specifications in 2003 and this change put HEC on notice to inquire about the reasons for the change. Thus, under this argument, the statute of limitations began to run in 2003. The Court finds that this alternative argument from HEC actually supports dismissal of the claims other than equitable indemnification. The Court so rules after carefully considering and rejecting all of HEC's arguments relevant to the statute of limitations, regardless of whether such arguments are expressly enumerated herein."

Judge Young, in so ruling, made findings that had to based upon matters outside of the four corners of the Amended Complaint. Although the letters attached to the Amended Complaint refer to ASHRAE 85' Fundamental – 21.17 and Energy Design Update, there is nothing in the Amended Complaint that shows that letters contained information regarding "engineering standards and a trade publication". Even if there were, there is simply nothing to show how, when and why the information should have been discovered by HEC. While it is true that

Santee Cooper's attorney argued that the ASHRAE '85 Fundamental -21.17 set forth "engineering standards" and that Energy Design Update is a "trade publication", but argument of counsel is not evidence. There is also nothing to show that the vapor barrier issue was the subject of some discussion in the local building community. However, even if there were, there is nothing to show what the "some discussion" consisted of and how HEC could have learned of the discussion.

Even if HEC should have learned of the vapor barrier problem in 1986 or 1991, mere knowledge of the vapor barrier problem would not start the statute of limitations begin to run.

> "The statute of limitations begins to run at the time the cause of action accrues. *Harvey v. S.C. Dep't of Corr.*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (citing *Matthews v. City of Greenwood,* 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991)). In analyzing a limitations defense, '[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it.' *Id.* (quoting *Matthews,* 305 S.C. at 269, 407 S.E.2d at 669). Thus, a particular cause of action accrues 'at the moment when the plaintiff has a legal right to sue on it.' *Id.*"

HEC had no legal right to sue until it had damage. HEC had no damage until it was sued in the underlying action. Damages are an essential element of each of the causes of action asserted in this action.3 Judge Young's order dismissing this cause of action based upon the statute of limitations should be reversed.

CONCLUSION

As then Chief Judge Alex Sanders so aptly stated "[A]ppellate courts like well

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3 Judge Young dismissed the cause of action for equitable indemnification because he found that there were no damages, but in the same order found that the statute of limitations had run on the other causes of action. While HEC denies that Judge Young was correct in his ruling on the cause of action for equitable indemnification, this demonstrates one of the glaring inconsistencies in Judge Young's order.

behaved children do not speak unless spoken to and do not answer questions they were not asked." *State v. Austin,* 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1990). This principle applies with equal force to the circuit court judge. Judge Young, who enjoys an excellent reputation, somehow went astray in this case. He answered questions which were not asked and he answered them incorrectly. He misinterpreted the clear language of the statute of repose. He dismissed causes of action based on the statute of limitations while, in the same order, he dismissed the equitable indemnification claim finding that HEC had not yet suffered any damage. His order is flawed for multiple reasons. This Court should reverse Judge Young's order.

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March 18, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2014-001685

Horry Electric Cooperative, Inc. ..... Appellant

v.

South Carolina Public Service Authority and Southern Electric International, Inc., Defendants,

Of whom South Carolina Public Service Authority is the ..... Respondent

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Appellant, Horry Electric Cooperative, Inc., complies with Rule 211(b), SCACR, and the August 13, 2007, Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings", as amended

by the April 15, 2014, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Susan J. Mondello, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served B. Rush Smith, III, attorney for Respondent, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address this 18th day of March, 2015.

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Appellant's Final Brief

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