THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2013-CP-10-4592
Appellate Case No. 2016-000471

Maria Allwin, ...Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P.,
and Shope Reno Warton, Defendants,

Of whom, Russ Cooper Associates, Inc. and Shope Reno Warton are .....Respondents.

Buffington Homes, L.P., ...Third-Party Plaintiff,

v.

Albrecht Environmental, Inc., All Points Construction, Inc.,
Patriots Drywall, Inc., Picquet Roofing, Inc., Sprayseal Foam
Insulation, and Tischler Und Sohn (USA) Limited, ...Third-Party Defendants.

INITIAL BRIEF OF RESPONDENT RUSS COOPER ASSOCIATES, INC.

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COUNTER-STATEMENT OF THE ISSUE ON APPEAL

1. Did the Circuit Court err in granting summary judgment to Respondent Russ Cooper Associates, Inc. based on the statute of limitations?

COUNTER-STATEMENT OF THE CASE[1]

On August 5, 2013, Appellant Maria Allwin ("Owner") filed this construction defect action against Respondent Russ Cooper Associates, Inc. ("RCA"), the general contractor that built the house that is the subject of this lawsuit. (Compl.). On December 12, 2013, RCA answered Owner's complaint and raised the statute of limitations as an affirmative defense. (RCA Answer to Compl. ¶ 11).

Owner amended her complaint on October 8, 2014, to assert claims against Shope Reno Wharton ("SRW"), the architectural firm that provided design services for the original construction of the house. (Am. Compl.). On November 6, 2014, RCA answered the amended complaint and, again, raised the statute of limitations as an affirmative defense. (RCA Answer to Am. Compl. ¶ 15).

On April 27, 2015, RCA moved for summary judgment on the ground that Owner's claims are barred by the statute of limitations. (RCA Mot. for Summ. J.) After briefing and oral arguments, on December 16, 2015, the Circuit Court entered its order granting RCA's motion for summary judgment ("Summary Judgment Order"). (Summ. J. Order).

On December 29, 2015, Owner moved under Rule 59(e), SCRCP to alter or amend the Summary Judgment Order. (Mot. to Alter or Am. J.). On January 28, 2016, the Circuit

[1] Respondent does not consent to be bound by the Statement of the Case and the Statement of Facts contained in Appellant's brief, and, pursuant to Rule 208(b)(2), SCACR, submits its own Counter-Statement of the Case and Facts.

Court entered an order denying Owner's motion. (Order Den. Mot. to Alter or Am. J.). Owner filed her Notice of Appeal on March 4, 2016, appealing both the Summary Judgment Order and the January 28, 2016 order denying Owner's Rule 59(e) motion. (Not. of Appeal).

COUNTER-STATEMENT OF THE FACTS

Owner is the absentee owner of an approximately 11,000 square-foot oceanfront home, located at 133 Flyway Drive, Kiawah Island, South Carolina (the "House"). (Compl. ¶ 1; Appellant Br. at 3). RCA served as the general contractor for the original construction of the House pursuant to a contract with Owner and her late husband. (*See* Compl. ¶ 5; Mem. in Opp'n to RCA Mot. for Summ. J. at 1; Allwin Aff. ¶ 3). RCA completed construction of the House in May 1994. (Allwin Dep. 21:8-11). It is undisputed that, during the following 19 years, Owner steadily accumulated both actual and constructive knowledge of defects in the House from numerous sources.

Owner's Knowledge of Defects in Roofs and Chimneys

Robert Cowan ("Guest") lived in the House as Owner's guest in the late 1990's and early 2000's. (Cowan Dep. 8:11-9:9). While living in the House, Guest observed numerous and continuous roof leaks, including leaks at roof valleys, in the master suite, and at chimneys. (*Id.* at 14:19-15:4, 16:8-12). From 1999 to 2002, Guest repeatedly informed Owner of numerous roof leaks on at least 12 separate occasions, (Ex. 3 at 2, Ex. 4 at 1-2; Ex. 6 at 1-2; Ex. 12 at 2, 5-6; Ex. 14 at 1; Ex. 16 at 1-2; Ex. 18 at 1; Ex. 20; Ex.

24; Ex. 25; Ex. 28 at 2; Ex. 593 at 2. See also Ex. 595),[2] and of leaks at chimneys/fireplace flues at least twice. (Ex. 16 at 2; Ex. 18 at 2). In March 2001, Guest informed Owner that roof leaks were one of "the most important problems" with the House. (Ex. 12 at 6; Cowan Dep. 27:4-10).

In 2001, Owner retained Gamble Home Services ("Property Manager") to serve as property manager for the House. (Allwin Dep. 95:10-15). In 2001 and 2002, Property Manager notified Owner of roof leaks on at least two occasions. (Ex. 30 at 2; Ex. 596 at 2).

In 2003, Owner hired Milton Morgan ("Repair Supervisor") to serve as project manager for repair work to address known defects in the House. (Allwin Dep. 130:1-4, 164:21-165:10, 165:22-166:6). In 2003, Repair Supervisor notified Owner of roof defects on at least three occasions, (Ex. 41 at 2, 4-6; Ex. 44 at 4; Ex. 45 at 3. See also Ex. 42), and proposed roof repairs at a cost of $15,000-$35,000. (Ex. 44 at 4). To address the known defects in RCA's construction, on November 13, 2003, Repair Supervisor issued a written scope of repair that included instructions for the repair contractor to, among other things, "correct defects in roof valleys." (Ex. 45 at 3. *See* Allwin Dep. 164:21-165:10, 165:22-166:1).

Owner also requested the assistance of Defendant Buffington Homes, L.P. ("Repair Contractor") to diagnose and repair the defects in the House in 2003. (Allwin Dep. 125:22-126:3. *See* Ex. 31). In July 2003, Repair Contractor informed Owner of a multitude of roof

[2] All citations to exhibits in this Brief refer to the numbered exhibits to RCA's Memorandum in Support of Motion for Summary Judgment. The Summary Judgment Order also refers to these exhibits.

leaks and roof defects, (Ex. 32 at 1-2), and recommended the complete replacement of the roof. (*Id.* at 2). In January 2004, Repair Contractor informed Owner of roof defects and recommended more aggressive roof repairs than those suggested by Repair Supervisor. (Ex. 51 at 1-2). Ultimately, Owner paid Repair Contractor $359,728.21 for the 2004-05 repairs to address known defects in RCA's construction, including defects in the roof. (Ex. 213. *See* Allwin Dep. 164:21-165:10, 165:22-166:1).

Owner's Knowledge of Defects in Exterior Walls

In 2001 and 2002, Guest informed Owner of numerous and repeated leaks at wall vents/louvers or within exterior walls on no less than six occasions. (Ex. 12 at 2, 6; Ex. 14 at 1; Ex. 15 at 2; Ex. 16 at 1; Ex. 20 at 1-2; Ex. 28 at 2. See also Ex. 4 at 1). Leaks in the exterior walls included water intrusion into the kitchen and breakfast room walls. (Ex. 16 at 1; Ex. 28 at 2. See also Ex. 4 at 1; Ex. 18 at 2; Ex. 20 at 1; Ex. 593 at 3; Ex. 595 at 1). On September 4, 2001, Guest prepared a moisture detection report for Owner and noted numerous unacceptable moisture meter readings. (Ex. 20 at 1). Guest wrote, "If my test[s] are accurate, we could have a major problem inside the exterior walls, such as wood rot." (*Id.* at 2 (emphasis added)). At this time, Guest researched at least two local moisture intrusion consultants (engineer Robert Sisnroy and contractor Robert Hedgepath) due to the leaks into the House. (*Id.*; Ex. 595 at 2-3).

Repair Contractor informed Owner of exterior trim rot in 2003. (Ex. 32 at 2). In 2004, Repair Contractor informed Owner of defects in the exterior walls, including rotten studs and sheathing requiring the replacement of exterior siding and trim. (Ex. 165 at 1; Ex. 172 at 1). In November 2005, following the completion of the $359,728.21 repairs by Repair Contractor, Property Manager invoiced Owner $979 for repair work, including caulking

the bottom of the exterior cladding at the rear patio to prevent leaks into the subfloor. (Ex. 212).

Owner's Knowledge of Defects in Windows and Doors

From 2000 to 2002, Guest informed Owner of window leaks on at least three occasions, Ex. 12 at 6; Ex. 20 at 1-2; Ex. 28 at 2. See also Ex. 595 at 1), and of leaks at the ocean-side doors no less than twice. (Ex. 8; Ex. 28 at 2). In July 2003, Repair Contractor informed Owner of window leaks and recommended destructive testing to determine their source. (Ex. 32 at 2). On November 13, 2003, Repair Supervisor gave Owner a proposed scope of repair to address the known defects in RCA's original construction, in which he instructed Repair Contractor to investigate and correct window and door leaks. (Ex. 45 at 3. See Allwin Dep. 164:21-165:10, 165:22-166:6). In January 2004, Repair Contractor proposed additional investigation of air/water intrusion at windows. (Ex. 51 at 4).

Owner's Knowledge of Defects in the Oceanfront Patio/Basement

From 1999 to 2002, on at least seven occasions, Guest informed Owner of numerous and repeated leaks in the basement, particularly where the patio connects to the House. (Ex. 3 at 2; Ex. 12 at 3-4; Ex. 14 at 1; Ex. 15 at 1-2; Ex. 16 at 2; Ex. 25; Ex. 28 at 2. See also Cowan Dep. 18:15-21, 19:10-20:12 (testifying as to Exs. 360, 362, 366)). In July 2003, Repair Contractor informed Owner of leaks into the basement caused by water intrusion at the patio above. (Ex. 32 at 1). Repair Contractor recommended removing the patio tile, installing waterproofing where the patio connects to the House, and replacing the patio tile with a slope away from the structure. (*Id.* at 3). On November 13, 2003, Repair Supervisor proposed repairs to address the known defects in RCA's original construction and instructed Repair Contractor to investigate/correct patio leaks into the basement. (Ex.

45 at 3. See Allwin Dep. 164:21-165:10, 165:22-166:6). In January 2004, Repair Contractor recommended further investigation of basement leaks. (Ex. 51).

In addition to leaks from the patio above, in July 2004, Repair Contractor informed Owner of water intrusion into the basement caused by storm water and proposed repairs to remedy the problem. (Ex. 178). In September 2004, Repair Supervisor notified Owner of leaks in the basement from storm water intrusion and informed her the repair would cost $34,781. (Ex. 182).

Owner's Knowledge of Interior Damage

From 1999 to 2002, on at least nine occasions, Guest informed Owner of numerous and repeated instances of interior water damage at multiple locations, including damage to hardwood floors, mold/mildew, peeling paint, water stains, drywall/wallpaper damage, and saturated subfloor framing. (Ex. 4 at 1-2; Ex. 12 at 5; Ex. 16 at 1-2; Ex. 18 at 2; Ex. 20 at 1-2; Ex. 24; Ex. 25; Ex. 28 at 1-2; Ex. 593 at 2-3; Ex. 595 at 1).

In September and October 2003, Repair Supervisor twice notified Owner of mold/mildew within the House, (Ex. 38 at 2; Ex. 41 at 2), and recommended mold testing at a cost of $2,500-$5,000. (Ex. 41 at 2). On November 13, 2003, Repair Supervisor issued a scope of repair to address defects in the RCA's original construction that instructed Repair Contractor to investigate and correct mold/mildew and water-damaged drywall. (Ex. 45 at 2). In 2003 and 2004, Repair Contractor informed Owner of damage to interior finishes as a result of construction defects, including drywall damage, buckling/damaged hardwood floors, mold/mildew, and peeling paint. (Ex. 32 at 1-2; Ex. 51 at 4-5).

From 2001 to 2008, Property Manager notified Owner of numerous and repeated instances of interior water damage at multiple locations within the House, including

mold/mildew, caulking/trim cracks at windows, drywall/wallpaper damage, ceiling damage/stains, condensation in the basement, and warped hardwood flooring. (Ex. 19 at 1-2; Ex. 229; Ex. 230; Ex. 249; Ex. 258; Ex. 596 at 1-2; Ex. 597; Ex. 598; Ex. 599). In 2006, Property Manager also suggested to Owner that she have the cause of interior mold investigated by mold remediation experts. (Exs. 220-21).

Evidence of Defects Discovered By Owner's Experts/Realtor/Insurer

In August 2003, Repair Contractor retained the services of an engineering firm, Campbell, Schneider and Associates, LLC ("CSA"), to survey the house and determine the sources of moisture intrusion that had caused areas of damage and fungal growth. (Ex. 37 at 1-2). As stated in its August 15, 2003 report, CSA observed water damage/mildew throughout the House and opined that the damage was the direct result of, among other things, numerous sources of unconditioned air infiltration and active water intrusion at windows, roof valleys, and sub-grade locations. (*Id.* at 3-7). CSA also recommended that the source of water leaks be investigated from the exterior, to include the removal of certain windows and roof sections. (*Id.* at 10).

In September 2003, Repair Supervisor retained architect Roy Davis Smith, who recommended water testing to determine the source of basement, window, and door leaks, and taking humidity readings throughout the House to address the presence of mold. (Ex. 38 at 2; Ex. 39 at 1-2).

In March 2004, Owner submitted a property damage claim to her hazard insurance carrier ("AIG") and reported active water intrusion through the roof, windows, and doors. (See Ex. 58 at 1; Allwin Dep. 157:23-158:7). In April 2004, AIG's engineer inspected the House and photographed open and obvious defects in the roof system, (Exs. 62-63, 109-

14, 135-39, 141-43, 150), window leaks, (Exs. 72-75, 82-86), leaks in the basement, (Exs. 146-47), and mold growth/water-damaged drywall in the interior (Exs. 69-77, 81-92, 94-95, 97-100). AIG's engineer ultimately opined that the mold and moisture damage in the House "resulted from long-term conditions of elevated moisture associated with the construction of the [H]ouse." (Ex. 163 at 6 (emphasis added)). In June 2004, AIG declined Owner's property damage claim, referring to the longstanding construction defects noted in both the August 2003 CSA report (Ex. 37) and the report prepared by AIG's engineer (Ex. 163). (Ex. 174 at 1).

In April 2004, Repair Contractor retained Albrecht Environmental to perform a mold inspection at the House. (See Ex. 167 at 1). Albrecht Environmental discovered mold in exterior walls and recommended remediation by a certified mold contractor. (*Id.* at 3).

In 2006, Plaintiff wanted to sell the House, (Allwin Dep. 174:11-17; Noble Dep. 16:24-17:4, 18:8-12), and retained Cynthia Noble with Kiawah Island Real Estate ("Realtor") as her real estate agent. (Allwin Dep. 169:4-8; Noble Dep. 20:24-25). In advance of listing the House for sale, Realtor procured a home inspection report from Complete Inspection Services ("Home Inspector"). (Noble Dep. 19:9-24, 21:3-7). In its July 11, 2006 report, Home Inspector noted numerous construction deficiencies, including roof leaks, prior termite activity, damaged wood cladding, water infiltration at rear doors, water stains at rear basement walls, damaged hardwood flooring, water stains, mildew, and damaged drywall. (Ex. 215 at 3-4, 8-10). Home Inspector recommended roofing repairs, investigation of the termite activity, and inspection of the flashing and subflooring at the rear doors. (*Id.* at 3).

At Realtor's request, Albrecht Environmental inspected the House and issued a July 24, 2006 report proposing mold remediation at an estimated cost of $19,150. (Ex. 217 at 1, 3-4). In July/August 2006, Owner wrote to Realtor and stated it was, "hard to believe that there is still moisture/humidity/mold after we spent so much $$$" on the 2004-05 repairs performed by Repair Contractor. (Ex. 590; Noble Dep. 164:6-11). Owner also authorized Realtor to obtain a proposal from Repair Contractor to address the construction defects listed in Home Inspector's July 2006 report. (Noble Dep. 165:7-12. See Exs. 583, 591).

At Realtor's request, Repair Contractor prepared a September 11, 2006 estimate for repairs necessary to address the ongoing problems with the House. (Ex. 222. See Exs. 583, 591; Noble Dep. 165:7-12). Repair Contractor's estimate totaled $282,850 and proposed repairs to the roof, certain exterior walls, certain windows and doors, the basement, damaged flooring, and to remedy mold. (Ex. 222 at 1-2). Repair Contractor informed Realtor the proposed roofing repairs were merely temporary fixes and, again, recommended the complete replacement of the roof. (*Id.* at 2). According to Repair Contractor, "The single most significant concern is the roof." (*Id.*).

In July 2007, after inspecting the House, AIG informed Owner of several indications of high moisture levels, and suspected window and roof leaks. (Ex. 228 at 1). Further, AIG required Owner to, "have you (sic) home checked by a qualified water remediation engineer to investigate why water continues to enter these areas of your home. Once the cause is identified, the necessary repairs should be made." (*Id.* (emphasis added). See also *id.* at 3). In June 2008, Owner forwarded the July 2007 AIG inspection report (Exhibit 228) to Repair Contractor and expressed her frustration about ongoing problems after

paying Repair Contractor $359,728.21 to remedy these defects. (*See* Exs. 213, 235, 236). Owner also wrote to Victoria Stein with Atlantic Builders ("Consultant"), and stated:

> I do not understand how the mold around fixtures etc. escaped inspection until this point. [Repair Contractor] understood my – irritation??? – in 2004 and 05 we did a complete overhaul of the house – several hundred thousand $$ later and the problem is still there. Kiawah is an ongoing saga . . .

(Ex. 236).[3]

Consultant first visited the House in the spring of 2008 at the request of Property Manager. (Stein Dep. 52:7-53:20). During her initial visit, Consultant observed numerous telltale indications of construction defects and air/water intrusion, and pointed out these problems to Property Manager. (Stein Dep. 41:11-43:3, 52:7-53:20, 108:9-109:14). From July to October 2008, Owner paid Consultant $6,978.14 to investigate ongoing problems with the House. (Exs. 244, 254. See Stein Dep. 27:21-28:2, 65:3-6; 75:8-12). The scope of Consultant's investigation included reviewing the long history of water intrusion and damage, prior repairs, and "anything that would be in those reports by [CSA and] Albrecht [Environmental]" (referring to Exhibits 37, 167, and 217). (Stein Dep. 30:23-31:11, 68:14-69:9). Additionally, Owner gave Consultant a box of documents relating to past problems with the House and instructed Consultant to review them. (*Id.* at 43:17-22).[4] Consultant

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[3] Consultant testified there were many water intrusion issues in the House in June 2008. (Stein Dep. 61:8-11). Further, on June 23, 2008, Owner wrote to Consultant and inquired whether poor window performance could be contributing to the mold problems in the House. (Ex. 237).

[4] The documents Owner provided to Consultant included, but were not limited to, Ex. 3 – February 4, 1999 correspondence from Guest to Owner regarding continued roof and basement leaks (Stein Dep. 22:21-23:12); Ex. 8 – May 3, 2000 Guest correspondence regarding leaks at rear/ocean-side doors (see Ex. 604 at 1); March 21, 2001 Guest correspondence regarding multiple roof leaks, basement wall leaks, chiller room leaks, and structural settlement (see Ex. 604 at 1); Ex. 12 – March 23, 2001 Guest correspondence re

also spoke with contractors and consultants regarding past problems with and repairs performed to the House.[5]

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roof leaks (see Ex. 604 at 1); Ex. 16 – June 1, 2001 Guest letter to RCA regarding, among other things, ongoing roof leaks, leak at a fireplace flue, leaks at wall vents/louvers, moisture intrusion into the kitchen wall, and chiller room leaks (see Ex. 604 at 1); Ex. 19 – August 2001 Property Manager report regarding mildew, leaking windows, and water stains (see Ex. 604 at 1); Ex. 20 – September 4, 2001 Guest moisture detection report evidencing high moisture meter test readings (see Ex. 604 at 1); Ex. 22 – October 24, 2001 Guest correspondence regarding unresolved construction issues and warning about the statute of limitations (see Ex. 604 at 1); August 2002 Guest correspondence regarding roof leaks, basement leaks, moisture in exterior wall, leaking louvers, and rear door leaks (see Ex. 604 at 2); Ex. 37 – August 15, 2003 CSA report regarding water intrusion, including roof leaks and leaks at sub-grade locations (see Ex. 604 at 2; Stein Dep. 34:7-35:21); Ex. 39 – September 12, 2003 correspondence from Repair Architect to Repair Supervisor proposing testing to determine the source of water intrusion at various locations (Stein Dep. 37:15-38:7); Ex. 41 – October 2003 Picquet Roofing roof inspection report and repair estimate (see Ex. 604 at 2); Ex. 51 – January 2004 Repair Contractor correspondence referencing expiration of the statute of limitations (see Ex. 604 at 2); Repair Supervisor correspondence concerning the 2004-05 repairs performed by Repair Contractor (Stein Dep. 36:24-37:14, 66:20-22); Ex. 54 – February 19, 2004 contract between Owner and Repair Contractor to repair defects in the House (see Ex. 604 at 2; Stein Dep. 39:24-40:7); Repair Contractor's invoices for the 2004-05 repair work (see Ex. 604 at 2-3; Stein Dep. 66:13-15); Exhibit 163 – April 27, 2004 ED&T report outlining construction defects as the source of moisture intrusion (see Ex. 604 at 2; Stein Dep. 43:4-10); April 19, 2004 Albrecht Environmental report regarding mold growth and ground-level moisture (see Ex. 604 at 2); Ex. 165 – May 7, 2004 Repair Contractor progress report regarding discovery of rotten studs and sheathing (see Ex. 604 at 2); Ex. 167 – May 10, 2004 Albrecht Environmental report noting elevated mold readings and recommending mold remediation (Stein Dep. 43:11-16); May 24, 2004 flood-relief design by Albrecht Environmental to address moisture in basement (see Ex. 604 at 3); Ex. 172 – May 28, 2004 Repair Contractor correspondence regarding cost overruns due to discovery of wood rot and engineering report costs (see Ex. 604 at 3); Ex. 174 – June 7, 2004 AIG report referencing original construction defects (see Ex. 604 at 3; Stein Dep. 44:4-11, 56:23-57:20); Ex. 217 – July 24, 2006 Albrecht Environmental report noting elevated mold readings and recommending mold remediation (see Ex. 604 at 3; Stein Dep. 46:6-16); and Ex. 228 – July 29, 2007 AIG correspondence regarding suspected water intrusion and requiring water remediation testing. (Stein Dep. 47:24-48:22, 64:11-65:2).

[5] Consultant's contact with former inspectors and contractors included, at a minimum, a meeting at the House with engineer Larry Elkin of CSA (Stein Dep. 65:11-19, 65:24-66:4); a meeting with Aero Service (HVAC contractor) (Stein Dep. 65:20-23); a conference with John Albrecht with Albrecht Environmental (Stein Dep. 66:5-12); a conference with Repair Contractor employee Robbie Diamond regarding the 2004-05 repairs (Stein Dep. 32:6-

On October 13, 2008, Consultant prepared a report summarizing her investigation of water intrusion issues at the House and offering suggestions for future action. (Stein Dep. 72:15-17, 74:12-22. See Exs. 254, 592, 604). Consultant's report also included a timeline that chronicled the history of longstanding water intrusion, prior attempts at repair, and the findings of prior consultants. (Stein Dep. 72:4-11. See Ex. 604). Further, Consultant's report noted numerous existing defects in the House. (Ex. 592 at 4-5). Although Consultant opined that the HVAC system was the primary cause of mold/mildew,[6] she expressly noted that several existing defects were unrelated to the HVAC issue, including drywall damage under roof valleys, buckled hardwood flooring, and moisture in the basement area under the pool deck. (Ex. 592 at 4-5). Consultant suggested Owner make repairs to the structure and seek the advice of legal counsel. (*Id.* at 5). Moreover, Consultant provided a list of defects for which she believed RCA was responsible, including roof defects/leaks, moisture/leaks in the basement, and window and door defects/leaks – all of which "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (*Id.* at 10 (emphasis added)).

On October 17, 2008, Consultant and Owner discussed Owner's "frustrations and anger" and going down the "legal road." (Ex. 257). Consultant also informed Owner that she would be forwarding proposals for various repairs to address roof leaks, damaged drywall, air/water infiltration at windows and doors, and moisture concerns in the

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33:1); and a conference with Repair Supervisor, during which the 2003 CSA report was discussed (Ex. 604; Stein Dep. 33:14-25). Consultant also attempted to speak with architect Roy Davis Smith, who recommended water testing in 2003. (Stein Dep. 66:17-67:13).

[6] Owner concedes that HVAC problems are not RCA's responsibility. (Hr'g Tr. at 30:22-23).

basement. (*Id.*). On November 24, 2008, Consultant presented to Owner a $185,480.62 proposal to repair two roof valleys to stem continuing leaks; to seal 345 outlets/switches/wall penetrations, 160 windows, and 8 exterior doors to prevent mold/mildew/condensation; and to repair ongoing moisture problems in the basement. (Exs. 260-61; Stein Dep. 81:1-82:4, 83:21-85:15).[7] At this time, the basement ceiling was leaking "all over the place." (See Stein Dep. 77:19-78:15). On February 27, 2009, Consultant presented Owner with a $64,350.24 proposal for additional roof repairs. (Ex. 280 at 1).[8]

In a May 14, 2010 CL-100 termite inspection report produced by Property Manager, the termite inspector noted evidence of termites, evidence of active wood-destroying fungi, and visibly damaged wood members. (Ex. 336 at 1-2). Further, the termite inspector recommended a "complete and thorough evaluation by a qualified building expert to determine what repair if any is necessary to this property." (*Id.* at 2). Consultant saw the

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[7] On March 24, 2009, Consultant submitted the final invoice for the $185,480.62 worth of repairs outlined in the November 2008 proposal and reported that "[a]ll outlets/switches/baseboards/windows have been sealed." (Ex. 600).

[8] In March 2009, Consultant again recommended that Owner consult with an attorney about the continued problems, damage, and water intrusion at the House despite previous repairs. (Allwin Dep. 210:14-211:15; Stein Dep. 96:13-14, 98:4-99:20, 100:20-101:2. See Ex. 282). Owner retained counsel, who made arrangements for an engineer to survey the House for structural issues, including evaluating the roof and windows. (Allwin Dep. 226:20-227:2, 227:14-228:4, 229:16-20; Stein Dep. 95:16-18. See Exs. 282, 284, 287, 290). According to Consultant, the purpose of the engineer's inspection was to investigate the source of continued water intrusion despite the repairs performed by Repair Contractor in 2004-05. (Stein Dep. 118:16-119:15). On May 26, 2009, engineering firm H2L presented, at the request of Owner's counsel, a $45,000 proposal to conduct a building condition survey, including a visual inspection of the building envelope, windows, and cladding. (Ex. 294). Despite her counsel's recommendation for H2L to inspect the house, Owner failed to conduct a forensic analysis of the House until Ross Clements, Owner's present expert, performed his 2011-12 investigation. (Stein Dep. 137:1-138:1).

CL-100 report in 2010. (Stein Dep. 132:3-4).

Also on May 14, 2010, Home Inspector inspected the House a second time and prepared a report. (Ex. 337). Home Inspector again noted numerous construction deficiencies, including indications of roof leaks, deterioration of roofing components, signs of prior termite activity, damage to the siding, water infiltration at windows, water infiltration and damaged flooring at windows and doors, leaks into the basement, cupped hardwood flooring, and water stains/mildew at numerous locations. (*Id.* at 4, 7-9). Home Inspector recommended checking the flashings and subfloor in the area of the rear doors, and having a contractor evaluate the water intrusion at windows. (*Id.* at 4). In an email to Property Manager concerning Home Inspector's 2010 report, Consultant wrote:

> [I f]ound [the report] and will address possible issues in an email to [Owner]. As noted to [Owner] – the inspection report is incomplete mainly because the inspector only had 3 hours to walk the house before he had to get out. . . . We did not have enough time to do a thorough inspection so many items are not noted. But I will stick to the report and we'll deal with the new one since [Owner] does not want "to know." Perhaps I will drop a couple of the issues like the back doors on [Realtor] too although she's another person who likes to stick her head in the sand.

(Ex. 602).

Owner's Admitted Knowledge of Defects

Owner has admitted that Repair Contractor's 2004-05 repair efforts were intended to address defects in RCA's original construction, including defects in the roof, windows and doors, and patio/basement leaks. (Allwin Dep. 164:21-165:10, 165:22-166:6).[9] Owner has also admitted she was aware of a long history of roof and basement leaks dating back to

[9] Again, Owner paid Repair Contractor $359,728.21 for the 2004-05 repairs. (See Ex. 213).

the 1990's (*Id.* at 43:13-21, 56:16-19, 57:14-25); of numerous leaks in the roof, at a kitchen wall, in the chiller room, at vents/louvers, and at windows in 2001 (*Id.* at 68:5-10, 76:2-9, 81:2-18, 86:15-19, 87:17-24, 89:7-8, 93:25-94:5, 100:17-21, 104:12-16); of interior mildew problems in 2001 (*Id.* at 100:17-21, 104:12-16); that Repair Contractor retained the services of an engineering firm (CSA) in 2003 in an effort to identify and diagnose problems with the House (*Id.* at 138:25-139:12); of water infiltration at the rear doors, basement leaks from the pool deck, and cupped/discolored hardwood floors in 2006 (*Id.* at 170:2-14, 171:1-5); and of problems with the House that needed repair in 2009, including the roof, mold, and damaged/cupped hardwood floors. (See *id.* at 212:24-213:3).

Owner's Knowledge of Claims Against RCA

After researching at least two local moisture intrusion consultants due to the leaks at the House, (Ex. 20 at 2; Ex. 595 at 2-3), on October 24, 2001, Guest informed Owner's late husband of numerous construction issues and warned "the 'Statute of Limitations' will end soon." (Ex. 22 at 2 (emphasis added)).[10] Guest made this warning because of the numerous leaks and problems with the House. (Cowan Dep. 41:3-6).

In January 2004, Repair Contractor informed Owner that:

> "South Carolina has a 13-year statute of limitation (sic) for water intrusion. Your home is approaching that deadline. . . . I strongly urge you to contact the builder/roofer who installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel."

(Ex. 51 at 2. (emphasis added)).[11]

[10] Note that Owner gave Exhibit 22 to Consultant in July 2008. (See Ex. 604 at 1).
[11] Note that Owner gave Exhibit 51 to Consultant in July 2008. (See Ex. 604 at 2).

As stated above, in October 2008, Consultant provided a list of defects for which she believed RCA was responsible and stated these defects, "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (Ex. 592 at 10 (emphasis added)).

Defects Observed By Owner's Present Expert and Owner's Complaints

In 2011, Owner retained architect Ross Clements "to investigate the root cause of problems at the [House], some of which were similar to those previously identified and repaired . . . ". (Allwin Aff. ¶ 8). In his March 16, 2012 investigative report, Clements identified numerous deficiencies in the House allegedly resulting from RCA's original construction, and grouped the defects into the following relevant categories: (1) Roof and Stucco at Chimneys, (2) Exterior Walls, (3) Windows and Doors, (4) Oceanfront Patio/Basement, and (5) Interiors. (Ex. 549 at 4-9).[12]

Despite overwhelming evidence of longstanding defects in the House, and ignoring the advice and suggestions of several experts and consultants, Owner waited until August 5, 2013 (14 years after Guest first gave her written notice of the existence of roof leaks, basement leaks, and interior damage within the House (See Ex. 3), and nearly 5 years after Consultant informed Owner that her claims against RCA were time-barred (See Ex. 592 at 10)), to file her complaint, alleging the discovery of, "latent and previously undiscoverable deficiencies, decay and rot." (Appellant Br. at 1. See also Compl. ¶ 6).

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Wells v. City of Lynchburg,* 331

[12] Clements also issued preliminary reports on May 10, 2011, (Ex. 529), and on December 29, 2011. (Ex. 545).

S.C. 296, 301, 501 S.E.2d 746 (Ct.App. 1998). "Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct.App. 2014). Summary judgment should be granted when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000) (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Id.* "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct.App. 2004). When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that she had a claim becomes a matter of law to be decided by the trial court. *Johnston v. Bowen*, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim); *Knox v. Greenville Hospital System*, 362 S.C. 566, 571-72, 608 S.E.2d 459 (Ct.App. 2005) (holding trial court viewed evidence objectively and properly determined when plaintiff's claim should have been discovered).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED RCA'S MOTION FOR SUMMARY JUDGMENT.

A. The Statute of Limitations Has Run on Owner's Claims Against RCA.

The applicable statute of limitations of Owner's claims against RCA (negligence/gross negligence and breach of implied warranty of service) is three years. (S.C. Code Ann. §§ 15-3-530, -535 (2005)). Owner had actual and constructive knowledge of alleged defects in the House as early as February 1999, (See Ex. 3), yet did not file suit against RCA until August 5, 2013. (Compl.) However, notwithstanding the undisputed fact that she was aware of these defects and their increasing severity for 14 years before she filed suit, Owner argues the statute of limitations on her claims did not begin to run until 2011-12, when Clements issued his investigative reports. (Appellant Br. at 14-17). Owner's argument is not only incredible given the facts in the Record, it flies in the face of settled South Carolina legal precedent.

As recognized by the South Carolina appellate courts, "[s]tatutes of limitations are . . . fundamental to our judicial system," *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175-76, 609 S.E.2d 548 (Ct.App. 2005) (internal quote and citation omitted), and, "promote justice by forcing parties to pursue a case in a timely manner." *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000). "Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hauled into court to defend time-barred claims. . . . Moreover, limitations periods discourage plaintiffs from sitting on their rights." *Carolina Marine*, 363 S.C. at 176.

To determine when a cause of action arose, South Carolina courts employ the "discovery rule." See *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989). Under the discovery rule, the statute of limitations begins to run 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); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001). The applicable limitations period for a claim begins to run when a plaintiff "knew or by the exercise of reasonable diligence[13] should have known that [s]he had a cause of action." S.C. Code Ann. § 15-3-535 (2005). See *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C.254, 692 S.E.2d 510, 513 (2010); *Hedgepath*, 348 S.C. at 355-56, 559 S.E.2d at 336; *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App. 1999).

For purposes of this case, it is important to note that the statute of limitations began to run from the point Owner had notice of an injury or claim. Indeed, a key element in the reasonable diligence test is "notice." *Snell*, 276 S.C. at 303, 278 S.E.2d at 334. See also *Hedgepath*, 348 S.C. at 356, 559 S.E.2d at 336; *Bayle*, 344 S.C. at 126, 542 S.E.2d at 741. A cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that she might have a remedy for a harm. *Rumpf v. Massachusetts Mut. Life Ins.*

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[13] "The exercise of reasonable diligence means simply that an injured party must act with some promptness when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of . . . has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). See also *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989).

Co., 357 S.C. 386, 394, 593 S.E.2d 183 (Ct.App. 2004) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996)). It is immaterial that an injured party may not comprehend or appreciate fully the potential extent of the damage as the statute is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. *Snell*, 276 S.C. at 303, 278 S.E.2d at 334. This is an objective test governed by when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist, not an examination of whether a plaintiff knew with certainty that she had a claim or when she sought the advice of counsel, developed a full-blown theory, or identified the wrongdoer. See *Wiggins*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); *Snell*, 276 S.C. at 303, 278 S.E.2d 333, 334 (1981); *Rumpf*, 357 S.C. at 395 (citing *Young*, 333 S.C. at 719, 511 S.E.2d at 416); *Hedgepath*, 348 S.C. at 356, 559 S.E.2d at 336; *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App. 2000); *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799 (Ct.App. 1997); *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989). South Carolina courts have consistently held that once a reasonable person has reason to believe that a right has been invaded or that she may have a claim against another, the requirement to investigate takes precedence over the person's inability to ascertain the extent of her damages or even the possibility that damages may be recoverable. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 680 S.E2d 778 (Ct.App. 2009) (holding reasonable person would direct an inquiry into cause of account shortfall); *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838 (Ct.App. 2002) (holding plaintiffs had responsibility to investigate their claim once they had information that would place a

reasonable person on notice that they had a possible cause of action); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989) (noting that statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). Finally, once a person knows or should know that she has some claim against another, the statute of limitations begins to run for all claims against all parties based on that injury. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). See also *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27 (Ct.App. 2004).

Owner was put on notice of her claims against RCA as early as February 1999. Indeed, as the undisputed facts reveal, and in recognition of the known problems with the House, Owner engaged numerous experts and professionals to both investigate and remedy the defects in the structure. Yet, despite having knowledge of the defects which she had been unable to remedy over a 14-year period, Owner waited until August 2013 to bring this suit.

Owner had actual notice of problems with the House in February 1999, when Guest informed her of roof and basement leaks, (See Ex. 3 at 2) – meaning the statute of limitations ran in February 2002. Owner admitted that Repair Contractor's 2004-05 efforts were intended to remedy defects in RCA's original construction (Allwin Dep. 164:21-165:10, 165:22-166:8) – meaning the statute of limitations ran in 2007 or 2008. At worst, Owner was put on notice in October 2008, when Consultant made her aware of both defects in RCA's construction and the existence of expired claims against RCA (Ex. 592) – meaning the statute of limitations ran in October 2011. Even when construing the evidence in the light most favorable to Owner, the Record is replete with evidence establishing

Owner's knowledge of defects and claims against RCA. Therefore, Owner's claims are time-barred as a matter of law and summary judgment was proper.

B. The Alleged Construction Defects Were Not Latent.

In an attempt to evade the limitations period, Owner argues that the alleged defects in the House were latent and, therefore, the statute of limitations did not begin to run until she and Clements discovered the exact cause of the alleged defects in 2011-12 – at least 12 years after she first had actual knowledge of the defects. (See Appellant Br. at 1, 5-9, 14-18). Not only does Owner misapprehend and misconstrue the meaning of the term "latent,"[14] the facts reveal that the alleged defects were open, obvious, and known to Owner. Furthermore, Owner's arguments are contrary to established South Carolina precedent on these issues.

South Carolina courts have held repeatedly that the statute of limitations can be triggered even if a plaintiff does not know the exact cause of her injury or has not developed a full-blown theory as to the cause of her injury. See, *e.g.*, *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). All that is required to trigger the statute of limitations are "facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right of [hers] has been invaded or that some claim against another party might exist." (*Id.*).

In her affidavit presented in opposition to RCA's motion for summary judgment, Owner admits that she retained Clements as her causation expert in 2011, "to investigate

[14] Throughout her brief, Owner attempts to redefine "latent defect" to mean something akin to a "defect not yet diagnosed with precision." Owner's definition is incorrect. "Latent" is more correctly defined as, "hidden; concealed; that does not appear upon the face of a thing." *Black's Law Dictionary*, (West 2nd Edition).

the root cause of problems at the [House] . . ." (Allwin Aff. ¶ 8 (emphasis added)). At most, Owner's affidavit establishes only that the exact cause of the defects in and damage to the House was unknown to her at that time. Owner's affidavit fails to establish that the defects and damager were anything other than open and obvious or that she did not have notice of the alleged defects and damage prior to 2011.

Similarly, in his affidavit presented in opposition to RCA's motion for summary judgment, Clements testified, "In my opinion, the root cause of many of the observed visual deficiencies could not have been fully explained without complete removal of the interior and exterior building components." (Clements Aff. ¶ 16 (emphasis added)). However, as he must, Clements acknowledged that only the root causes of the alleged defects were "latent" prior to his 2011 forensic investigation. Correctly, Clements expressly recognizes the existence of "observed visual deficiencies" prior to his 2011 forensic investigation. (*Id.*). Therefore, the testimony of both Owner and Clements fails to create a question of fact with regard to the argued latency of the defects/damage, or when Owner was put on notice of claims against RCA, or when the statute of limitations on those claims began to run. At most, these affidavits do no more than suggest that, until 2011, Owner was unaware of the "root cause" of the defects and damage she knew about since 1999.

Even if RCA were to concede that the root causes of the alleged defects were latent, Owner cannot refute the fact that the damage stemming from these root causes was patently obvious and known to her since 1999. As the Circuit Court found, the Record is replete with evidence of Owner's admitted knowledge of defects in the House and repeated

instances from 1999 to 2008, when Guest and professionals[15] informed Owner about defects in RCA's construction, damage to the House, the need to investigate the defects and damages, and the existence of claims against RCA.

Consider, for example, Owner's admission that she engaged Repair Contractor in 2004-05 for the purpose of addressing and correcting identified defects in RCA's original construction, including defects in the roof, leaks at windows and doors, and patio/basement leaks. (Allwin Dep. 164:21-165:10, 165:22-166:6). There is absolutely no question that Owner knew of extensive defects in RCA's work in 2004-05 and paid Repair Contractor $359,728.21 to repair these defects. (See Ex. 213). These undisputed facts, standing alone, establish that the statute of limitations on Owner's claims began to run no later than 2004-05.

Also contrary to Owner's contention that the defects were latent are her admissions that she was aware of a long history of roof and basement leaks dating back to the 1990's (Allwin Dep. 43:13-21, 56:16-19, 57:14-25); of numerous leaks in the roof, at a kitchen wall, in the chiller room, at vents/louvers, and at windows in 2001 (*Id.* at 68:5-10, 76:2-9, 81:2-18, 86:15-19, 87:17-24, 89:7-8, 93:25-94:5, 100:17-21, 104:12-16); of interior mildew problems in 2001 (*Id.* at 100:17-21, 104:12-16); that Repair Contractor retained the services of an engineering firm (CSA) in 2003 in an effort to identify and diagnose problems with the House (*Id.* at 138:25-139:12); of water infiltration at the rear doors, basement leaks from the pool deck, and cupped/discolored hardwood floors in 2006 (*Id.* at

[15] Property Manager, Repair Contractor, Repair Supervisor, AIG, Realtor, and Consultant.

170:2-14, 171:1-5); and of problems with the House that needed repair in 2009, including the roof, mold, and damaged/cupped hardwood floors. (See *id.* at 212:24-213:3).

Additionally, the Record indicates the statute of limitations began to run as early as 1999, when Guest began to warn Owner of defects in House. (See Ex. 3). In March 2001, Guest informed Owner that roof leaks were one of "the most important problems" with the House. (Ex. 12; Cowan Dep. 27:4-10). In September 2001, Guest informed Owner that he had researched at least two local moisture intrusion consultants due to the leaks at the House. (Ex. 20 at 2; Ex. 595 at 2-3). Most notably, on October 24, 2001, Guest informed Owner's late husband of numerous construction issues and warned him that "the 'Statute of Limitations' will end soon." (Ex. 22 (emphasis added)). Taking Guest's warnings in sum, the statute of limitations on Owner's claims began to run no later than 2002.[16]

This is not the only warning Owner received about defects in the home and the running of the statute of limitations. In January 2004, Repair Contractor wrote to Owner recommending more aggressive repairs to the roof and the investigation of window and basement leaks. (Ex. 51). At this time, Repair Contractor informed Owner that "South Carolina has a 13-year statute of limitation (sic) for water intrusion. Your home is approaching that deadline. . . . I strongly urge you to contact the builder/roofer who

[16] From 1999 through 2002, Guest informed Owner of a multitude of open and obvious defects and damage in the House. Guest notified Owner of numerous and repeated leaks throughout the House, including leaks in the roof; at chimneys/fireplace flues; at wall vents/louvers; within exterior walls; at windows; at ocean-side doors; and in the basement where the pool deck/patio connects to the House. During this time period, Guest also informed Owner of numerous and repeated instances of interior water damage at multiple locations, including hardwood flooring separation, mold/mildew, peeling paint, water stains, drywall/wallpaper damage, saturated subfloor framing, water intrusion into a kitchen wall, at water intrusion in the breakfast room wall. See Exs. 3, 4, 6, 8, 12, 14, 15, 16, 18, 20, 24, 25, 28, 360, 362, 366, 593, 595.

installed the roof. If he is unwilling to accept responsibility and replace the roof, I would suggest enlisting legal counsel." (*Id.* (emphasis added)).

On October 13, 2008, Consultant prepared a report summarizing her investigation of water intrusion issues at the House and offering suggestions for future action. (Stein Dep. 72:15-17 and 74:12-22; see Ex. 254). Consultant's report included a timeline that chronicled the history of longstanding water intrusion, prior attempts at repair, and the findings of prior consultants. (Ex. 592; Stein Dep. 72:4-11). Consultant's report also noted numerous existing defects in the House. (Ex. 592). Consultant suggested Owner make repairs to the structure and seek the advice of legal counsel. (*Id.*) Moreover, Consultant provided a list of items for which she believed RCA was responsible, including roof defects/leaks, moisture/leaks in the basement, and window and door defects/leaks – all of which "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (*Id.* at 10 (emphasis added)).

Owner's contention that the defects in the House were "latent" prior to 2011 is wholly unsupported by the facts and absolutely incorrect. From 1999 to 2008, Owner received many more warnings of defects and damage.[17] Owner's admissions, information relayed

[17] For example, from 2001 through 2008, Property Manager notified Owner of numerous, repeated, and worsening problems, including roof leaks (See Exs. 30, 596), leaks at windows (Exs. 19, 30), leaks at doors (Ex. 19), air intrusion through unsealed penetrations in the building envelope (Ex. 21), and a patio leak causing subfloor damage. (Ex. 212). Property Manager also informed Owner of numerous and repeated instances of interior water damage at multiple locations within the House, including mold/mildew, caulking cracks at windows, drywall/wallpaper damage, trim cracks at windows, ceiling damage/stains, condensation in the basement, and warped hardwood flooring. (See Exs. 19, 230, 243, 229, 249, 258, 596, 597, 598, 599). In 2006, Property Manager also suggested to Owner that she have the cause of interior mold investigated. (Exs. 220-21). From 2003 through 2005, Repair Contractor informed Owner of a multitude of open and obvious defects, including roof leaks and roof defects (Ex. 32); rotten studs and sheathing within

to Owner by her agents, and knowledge imputed to Owner through her agents establish, without question, that Owner has been aware of the alleged defects in RCA's work since at least 1999 – at the absolute latest, 2008. Yet, despite this, Owner did not bring this action until August 5, 2013, long after the statute of limitations had expired. Owner's repeated reference to these known defects as "latent" is not only incorrect, it is a patent attempt to avoid the application of established precedent to the facts of this case. Therefore, the Circuit Court was correct in ruling that Owner's claims are time-barred.

C. The Record Is Devoid of Conflicting Evidence.

The Circuit Court found that the statute of limitations began to run more than three years before Owner initiated the present action. (Summ. J. Order at 4, 28-29). Owner contends the Circuit Court failed to address conflicting evidence that supports her position that the statute of limitations did not begin to run until 2011. (Appellant Br. at 10-14, 18-21). Although she has attempted to create conflicts in the evidence as to irrelevant matters, Owner has failed to present any conflicting evidence as to when she discovered her damages or when the statute of limitations began to run.

In order to defeat a motion for summary judgment based on the statute of limitations, a plaintiff must establish the existence of a question of fact through the introduction of

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exterior walls requiring the replacement of exterior siding and trim (Ex. 165; see Ex. 172); exterior trim rot (Ex. 32); leaks into the basement caused by water intrusion at the patio above and by storm water (Exs. 32, 178); and damage to interior finishes. (Exs. 32, 51, 598, 599. *See also* CSA's August 2003 observations and recommendations (Ex. 37); Albrecht Envtl. May 2004 Recommendations (Ex. 167)). To address known defects in RCA's original construction work, in July 2003 Repair Contractor recommended the complete replacement of the roof, destructive testing to determine the source of window leaks, removing the patio tile and installing waterproofing where the patio connects to the House, and replacing the patio tile with a slope away from the structure. (Ex. 32). See also Repair Supervisor Recommendations (Exs. 41, 44, 45, 182).

conflicting evidence. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) ("When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide."); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct.App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."). When there is no conflicting evidence, or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that she had a claim is a matter of law to be decided by the trial court. *Cf. Johnston v. Bowen*, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim); *Knox v. Greenville Hosp. System*, 362 S.C. 566, 571-72, 608 S.E.2d 459 (Ct.App. 2005) (holding trial court viewed evidence objectively and properly determined when plaintiff's claim should have been discovered).

1. Owner Attempts to Create Conflicts in Immaterial Facts.

Owner contends the Circuit Court failed to consider excerpts from the 2003 CSA report (Exhibit 37) and the 2008 Consultant report (Exhibit 592) that suggest certain problems with the House are the responsibility of someone or something other than RCA and its construction. (Appellant Br. at 12-14). In her brief, Owner complains that the Circuit Court's Order (1) did not state the purpose of CSA's survey was to determine the sources of isolated areas of damage and fungal growth, (2) did not include CSA suspicions that the HVAC system and environmental forces may be contributing to the air/water intrusion,

and (3) did not include CSA's summary stating, "[O]utside air infiltration is the dominant source of moisture in the home and can be resolved by sealing air leakage paths and pressuring the home. Isolated cases of water damage can be investigated and repaired on an individual basis." (*Id.* at 12-13).

Owner fails to recognize, however, that the purported "conflicts" in this evidence do not relate to the key issue in this case, which is, "When was Owner on notice of the existence of a claim against RCA?" While RCA acknowledges that the CSA report does refers to concerns with the HVAC system (which is not RCA's responsibility), the fact remains that the CSA report also puts Owner on notice of defects in the House that a reasonable person would objectively attribute to RCA. For example, the CSA reported references "ongoing water intrusion around windows, at roof valleys, and at several sub-grade locations" and recommends the removal of certain windows and roof sections to investigate the source of water leaks. (Ex. 37 at 3-7, 10). These problems clearly are attributable to RCA. This evidence was sufficient to put Owner on notice of defects in the House in 2003.

Even assuming, for the sake of argument, that Owner was not aware of a claim against RCA when CSA issued its August 2003 report, Owner's admission that Repair Contractor's 2004-05 repair efforts were intended to address defects in RCA's original construction work, including defects in the roof, exterior walls, windows and doors, and patio/basement leaks, belies all of Owner's contentions that she did not know she had claims against RCA or that the defects were latent. (Allwin Dep. 164:21-165:10, 165:22-166:8).

Owner also complains that the Circuit Court failed to consider excerpts from Consultant's October 2008 report in which Consultant opined that the major contributor to mold was the HVAC system (which is not RCA's responsibility) and recommended that Owner pursue legal action related to problems with the HVAC system but not claims for defects in RCA's work. (Appellant Br. at 13-14). This is, however, irrelevant. Owner cannot refute the portions of the 2008 Consultant report that give Owner a list of defects for which RCA was responsible and stated those defects, "are numerous but bottom line is that the Statute of Limitations ran out in May 2007." (Ex. 592 at 10 (emphasis added)).

Owner also asserts that her election between "conflicting" advice as to the scope of necessary repairs creates a question of fact for the jury. (Appellant Br. at 18-21). However, Owner's election between conflicting advice from her professionals regarding the scope of repairs is irrelevant to the issue in this case. The issue is when Owner was put on notice of a claim against RCA such as to trigger the running of the statute of limitations. Both CSA and Stein (and others) informed Owner that there were original construction defects. Stein (and Repair Contractor) went beyond that and informed Owner that she had claims against RCA; although, Stein informed Owner that the statute of limitations had already expired as to those causes of action.

In order to establish the evidentiary conflict necessary to create an issue of fact for the jury under these circumstances, Owner must, at a minimum, present evidence that her advisors informed her that construction defects did not exist and that she did not have claims against RCA. This evidence does not exist. The only evidence in the Record regarding the running of the statute of limitations is that numerous persons repeatedly notified her of the existence of construction defects and of claims against RCA. In the face

of these repeated notifications, Owner elected to take no action and the statute of limitations expired years before she chose to file this lawsuit. Therefore, the Circuit Court's grant of summary judgment to RCA based on the statute of limitations was proper.

2. Owner Fails to Create a Question of Fact as to the Need to "Deconstruct" the House and the Nature of the Damage.

Owner's failure to timely file suit was not reasonable under the circumstances and does not give rise to a jury question. Owner contends a jury question exists with respect to whether she acted reasonably under the circumstances. (Appellant Br. at 18-21). Specifically, Owner contends a jury question exists as to (1) whether she acted reasonably given the fact that it was only in 2011 when someone recommended that she "deconstruct" the House to assess defects and (2) whether she reasonably believed the damage suffered by the House was merely routine maintenance items, rather than construction defects. (*Id.*).

As discussed herein, South Carolina applies an objective standard when determining when a plaintiff is on notice of a claim. See, *e.g.*, *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct.App. 2000). Aside from her self-serving claim that she acted reasonably under the circumstances, Owner has failed to present any conflicting evidence giving rise to a question of material fact for the jury. If the Court were to accept Owner's bald statement that she acted reasonably under the circumstances here, the objective standard requirement would be abrogated and summary judgment would never be available on the issue of the statute of limitations. Owner must present a question of material fact to defeat summary judgment, and she has failed to do so.

Owner also argues that a jury question exists as to whether she acted reasonably in choosing not to "deconstruct" her home prior to the "unprecedented" forensic

deconstruction by Clements in 2011. Owner's argument appears to suggest that this State's statute of limitations jurisprudence does not apply if complying with South Carolina law proves burdensome. Again, the law imposes an object standard under which a reasonable person in Owner's situation would or should have known of claims against RCA as early as 1999. If the statute of limitations was not triggered in 1999, it surely began to run in 2004-05 when Owner admitted she knew that Repair Contractor's efforts were intended to remedy known defects in RCA's construction.

In support of her argument, Owner relies upon the testimony of Russ Cooper. (Appellant Br. at 7-9, 20). In his deposition, Mr. Cooper agreed that once a defect is covered by another building component (for example, exterior siding) it cannot be seen by the human eye (see Cooper Dep. At 50:4-51:5, 68:7-12), and that removing all the siding to determine the source of water intrusion is an extreme measure. (*Id.* at 64:1-24). First, this testimony is wholly irrelevant to the issue of when Owner was put on notice of claims against RCA or when the statute of limitations began to run; therefore, it is immaterial and of no consequence. Second, Russ Cooper gave this testimony on August 26, 2015 – years after that statute of limitations had run. Therefore, any claim that Owner somehow relied upon these statements so as to toll the running of the statute of limitations is meaningless.

Similarly, Owner contends that Respondent SRW advised her in 2011 that she should not deconstruct the House and should perform isolated repairs only. (Appellant Br. at 20). Again, this evidence is irrelevant to the issue of when the statute of limitations began to run. Further, the alleged advice from SRW was given in 2011 – years after the statute of limitations had run. Moreover, Owner did not follow SRW's alleged 2011 advice.

The issue at hand is not what Owner believed or knew or thought to be reasonable. The law imposes an objective standard upon her actions and the evidence proves that, in the light of repeated warnings and her admitted knowledge of construction defects, Owner failed to act with reasonable diligence with respect to pursuing claims against RCA. She elected to wait until 2011 to identify the "root cause" of the defects in the House and, in the meantime, the statute of limitations on Owner's claims expired.

3. The Affidavits Relied Upon by Owner Do Not Create a Question of Material Fact and Should Be Disregarded.

In *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct.App. 2014), this Court held that a plaintiff "cannot manufacture a genuine issue of material fact ... by submitting conflicting statements of fact ... either by affidavit or within one's own deposition testimony." (*Id.* at 141, 767 S.E.2d at 452). *McMaster* involved a medical malpractice claim brought against a doctor for overprescribing the drug Adderall to the plaintiff. The trial court granted summary judgment to the doctor, finding the statute of limitations barred plaintiff's claims. (*Id.*). On appeal, the plaintiff argued summary judgment was improper because, although the plaintiff's deposition testimony indicated he failed to file his action within the limitations period, the trial court erred in not considering his affidavit, which contained evidence that contradicted his deposition testimony. (*Id.* at 148–49, 767 S.E.2d at 456). This Court concluded the trial court did not abuse its discretion in excluding the plaintiff's affidavit as a "sham affidavit." (*Id.* at 149–51, 767 S.E.2d at 456–58). Specifically, the *McMaster* court noted the statements in the affidavit differed greatly from the plaintiff's deposition testimony, the plaintiff failed to explain his contradictory

statements, and "[t]he last-minute submission of the affidavit indicate[d] [he] was attempting to create an issue of fact for purposes of summary judgment." (*Id.*).

In the present case, the affidavit of Clements was executed on September 9, 2015, and Owner's affidavit was executed on September 10, 2015 – six and five days, respectively, before the hearing on RCA's motion for summary judgment. (See Hr'g Tr. (Sept. 15, 2015)). Owner's affidavit differs greatly from her deposition testimony, in which she admitted knowledge of numerous defects and that she was aware of defects in RCA's construction work in 2004-05, and from the undisputed facts in the Record. As shown above, the evidence overwhelmingly supports the conclusion that Owner's claims against RCA were time-barred for years before she filed this action. Owner has failed to explain her contradictory statements that she believed the defects and damage she observed, or was informed of, prior to 2011 were simple maintenance issues. Aside from the fact that neither the affidavit of Owner nor Clements creates a question of material fact,[18] both affidavits should be disregarded according to the principles set forth in *McMaster*.

D. The Circuit Court's Grant of Summary Judgment to RCA Is Consistent With Established Jurisprudence.

Owner incorrectly contends the Circuit Court should have denied RCA's motion for summary judgment based on the holdings in *Santee Portland Cement Co. v. Daniel International Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), *Holly Woods Association of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011), *Centex Homes*

[18] A careful reading of the affidavits of both Owner and Clements establish that Clements' 2011-12 investigation was intended to determine the "root cause" of defects in the House that Owner had been aware of for years. Neither affidavit creates a question of fact as to when Owner was put on notice of claims against RCA or as to when the statute of limitations began to run.

v. South Carolina State Plastering, LLC, No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010), and *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct.App. 2015).

In *Santee*, our Supreme Court reversed the grant of summary judgment based on the statute of limitations because the plaintiff in that case presented evidence that the defects in the structures were latent. (299 S.C. at 274, 384 S.E.2d at 696). Specifically, the allegedly defective metal reinforcing rods were located within concrete walls and were not readily observable. (*Id.*). Owner's reliance on *Santee* is misplaced because, as shown above, the alleged defects in the House were not latent; rather, Owner was aware of the defects as early as 1999. (See Ex. 3). Even if the Circuit Court agreed that the exact cause of the alleged defects could not have been discovered until Clements' destructive testing in 2011, the mountain of evidence presented by RCA establishes that the defects were not latent and Owner had longstanding knowledge of them since 1999. Therefore, *Santee* is inapplicable to the facts of the present case.

In *Holly Woods*, this Court affirmed the trial court's refusal to grant the defendants' directed verdict motion based on the statute of limitations because the plaintiff presented evidence that the drainage problems identified in 2002, which formed the basis of their suit, were different from drainage problems that occurred in 1991, 1998, and 2000 at other areas within a neighborhood. (392 S.C. at 185, 708 S.E.2d at 794). In contrast, Owner has failed to present any evidence that the defects she claims to have discovered in 2011 are different from the host of defects suffered by the House and known to her since 1999. Therefore, the holding in *Holly Woods* is inapplicable to the evidence presented in this case.

In *Centex Homes*, a general contractor discovered water intrusion in Building 1 in 2006 and, after making repairs, brought suit against its stucco applicator in 2008. The stucco applicator asserted that the general contractor knew or should have known that it had a claim against stucco applicator in 2002, when the general contractor discovered water damage in Building 3. Notably, however, the general contractor used a different subcontractor to install the stucco on Building 3. The general contractor presented evidence that it had experts inspect Building 1 in 2002 and, based on their findings, concluded that corrective action was not warranted. Based on these facts, the federal district court denied the stucco applicator's motion for summary judgment because the general contractor presented conflicting evidence that created a question of fact for the jury to decide. However, *Centex Homes* does not apply in the present case because Owner has failed to present conflicting evidence as to when she was put on notice of defects in RCA's construction work. Therefore, Owner's reliance upon *Centex Homes* is misplaced.

Finally, Owner complains that the Circuit Court failed to address this Court's holding in *McAlhany*. In that case, the trial court granted the defendants' motions for summary judgment based on the statute of limitations. (415 S.C. at 54, 781 S.E.2d at 107). The defense motion was based on plaintiff's deposition testimony that he discovered mold within his residence in 2007. (*Id.* at 59, 781 S.E.2d at 108). However, the plaintiff later testified in his deposition that he discovered the mold in 2008, and then stated he did not discover the mold until 2009. (*Id.* at 61, 781 S.E.2d at 109). This Court reversed the grant of summary judgment because plaintiff's testimony was conflicting with regard to when he discovered mold in his house; thus, a jury could find the plaintiff was confused about the dates he discovered the mold, rather than intentionally contradicting his earlier

testimony. (415 S.C. at 64, 781 S.E.2d at 111.) In the present case, again, Owner has failed to present conflicting evidence with respect to when she discovered the defects in the House.[19] Therefore, *McAlhany* has no application to the facts of this case.

Owner contends the Circuit Court's grant of summary judgment was improperly based upon inapplicable case law. The Circuit Court relied heavily on *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996), and *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), both of which are applicable to the facts of the present case and support the Circuit Court's grant of summary judgment.

In *Dean*, Dean purchased a building in September 1984 after a contractor inspected and deemed it structurally sound. (321 S.C. at 362, 468 S.E.2d at 645). Two months later, Dean noticed a fine crack in the building façade, which she thought might be related to nearby pile driving performed by Ruscon. (*Id.*). Dean immediately hired expert consultants to examine the crack. (*Id.*). Several months later, Dean noticed that the original crack had expanded and the façade was beginning to bulge and buckle at that location. Further, a second crack had appeared at another location. (*Id.*, 468 S.E.2d at 646-47). After being informed that the building was no longer structurally sound, Dean brought suit against Ruscon in 1991. (*Id.*, 468 S.E.2d at 647). At trial, the court directed a verdict against Dean, finding as a matter of law that the statute of limitations had expired prior to the filing of her lawsuit. (*Id.* at 363)

On appeal, our Supreme Court affirmed, holding that the statute of limitations began to run in November 1984 when Dean initially discovered the first crack. (*Id.* at 364-65, 468

[19] Again, the affidavits of Owner and Clements establish only that the "root cause" of known defects was discovered in 2011-12.

S.E.2d at 648). The court held, "Because Dean had notice in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date." (*Id.* at 366, 468 S.E.2d at 647). Further, the court stated, "Dean's subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved." (*Id.*). Moreover, the "fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial." (*Id.*).

In *Barr*, the Barrs purchased a house in February 1985. (330 S.C. at 642). From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the Barr's house. (*Id.*). The termite inspectors also suggested repairs to alleviate the moisture problem. (*Id.*). In August 1992, the Barrs received a structural engineering report that disclosed numerous defects in the house, several of which were unrelated to the moisture problem. (*Id.* at 643). The Barrs filed suit in March 1994. (*Id.*). This Court upheld summary judgment for the defendant based on the statute of limitations. (*Id.* at 645-46). The court held a termite inspection report noting moisture in the crawl space of the Plaintiffs' house was sufficient notice of water damage to trigger the running of the statute of limitations. (*Id.* at 645).

Owner contends the holdings in *Dean* and *Barr* are inapplicable to the present action because *Dean* and *Barr* did not involve latent defects. As pointed out above, the present case does not involve latent defects either. Again, the overwhelming evidence, including Owner's admissions, provides no question that Owner was well aware of defects in the House prior to August 2010 – three years before she brought this suit. Therefore, Owner's

attempt to distinguish *Dean* and *Barr* through the purported existence of latent defects must fail.

Owner also contends that *Barr* is inapplicable because the plaintiffs in that case neither investigated nor repaired their house upon receiving notice of defects, while Owner did both. Owner's attempt to distinguish *Barr* from the facts of this case provides nothing more than a distinction without a difference. The obvious and relevant similarity between Owner and the *Barr* and *Dean* plaintiffs is that they all had knowledge an injury sufficient to put them on notice of possible causes of action, and all of them failed to prosecute their claims with "reasonable [and timely] diligence." The fact that Owner investigated defects (that she claims were latent and unknowable) and attempted repairs through Repair Contractor, Repair Supervisor, and Consultant is of no consequence given the undisputed fact that she took no action to preserve or prosecute her claims until filing this lawsuit on August 5, 2013 – years after the statute of limitations had already expired.

II. AFFIRMANCE IS PROPER ON ANY GROUND(S) APPEARING IN THE RECORD.

In accordance with Rules 208(b)(2) and 220(c), SCACR, RCA requests that this Court affirm the Circuit Court's decision on any grounds appearing in the Record.

CONCLUSION

For the foregoing reasons, RCA respectfully submits that the Circuit Court's grant of summary judgment should be affirmed.

BEST HONEYCUTT, P.A.

By: _____

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August 22, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2013-CP-10-4592
Appellate Case No. 2016-000471

Maria Allwin, ...Appellant,

v.

Russ Cooper Associates, Inc., Buffington Homes, L.P.,
and Shope Reno Warton, Defendants,

Of whom, Russ Cooper Associates, Inc. and Shope Reno Warton are .....Respondents.

Buffington Homes, L.P., ...Third-Party Plaintiff,

v.

Albrecht Environmental, Inc., All Points Construction, Inc.,
Patriots Drywall, Inc., Picquet Roofing, Inc., Sprayseal Foam
Insulation, and Tischler Und Sohn (USA) Limited, ...Third-Party Defendants.

PROOF OF SERVICE

I certify that I have served Respondent Russ Cooper Associates, Inc.'s *Initial Brief and Designation of Matters to be Included in Record on Appeal* by depositing a copy in the U.S. Mail, postage paid, on August 22, 2016, and via electronic mail to counsel of record as follows:

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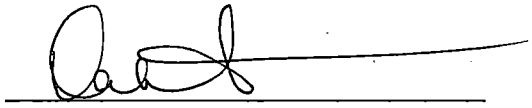

Dani Knecht, Paralegal

August 22, 2016
Charleston, South Carolina

BEST HONEYCUTT, PA
ATTORNEYS AT LAW

August 22, 2016

The Honorable Jenny Abbott K.itchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Allwin vs. Russ Cooper Associates, Inc., et al.
Appellate Case No.: 2016-000471
HB File No.: 0001-048

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy each of Respondent Russ Cooper Associates, Inc.'s Initial Brief, Designation of Matters to be Included in Record on Appeal, and Proof of Service. Please file the original and return the clocked copies to me in the envelope provided. Should you have any questions regarding the enclosed, please give me a call.

Respectfully submitted,

L. Dean Best

LDB/dlk
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cc: All Counsel of Record (w/enc)

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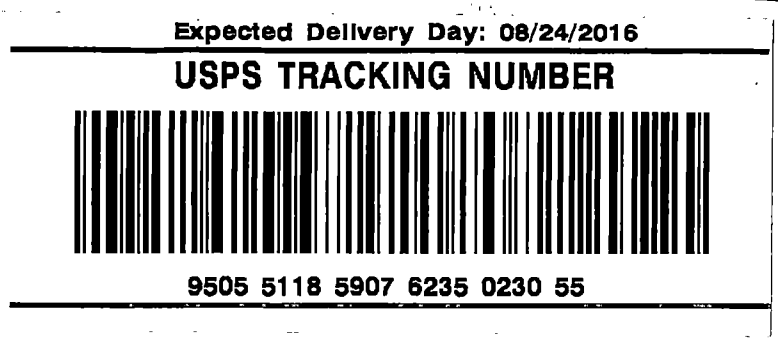

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SC Court of Appeals

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