

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2016-000471

MARIA ALLWIN.....APPELLANT

V.

RUSS COOPER HOMES, INC., BUFFINGTON HOMES, L.P., AND SHOPE RENO
WHARTON, 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

APPELLANT'S REPLY BRIEF

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ARGUMENT

Though the parties have addressed the issues on appeal in detail in their previous submissions, Appellant Maria Allwin submits this Reply Brief to briefly address arguments of Respondent Russ Cooper Associates, Inc. (Russ Cooper), the general contractor and Respondent Shope Reno Wharton (Shope Reno), the architect.

I. South Carolina's applicable statutes of limitation were not intended to provoke the premature commencement of claims.

Allwin, the appellant, has stated a claim against the general contractor, Russ Cooper, for negligent construction and breach of the implied warranty of workmanlike service. To establish negligent construction, the plaintiff must allege and prove four elements: 1) an undertaking to construct a building by the defendant; 2) negligence in the performance of that work, or, stated another way the failure to perform the work in a good workmanlike manner; 3) proximate cause of damages sustained by the plaintiff; and 4) resulting damage. § 11-1 BUILDER NEGLIGENCE - ELEMENTS OF NEGLIGENT CONSTRUCTION, Anderson, S.C. Requests to Charge - Civil, § 11-1 (2009).

Subsection 15-3-530(3) of the South Carolina Code (2005) provides for a three-year statute of limitations for "an action for trespass upon or damage to real property." The three-year limitation period begins to run at the time the cause of action accrues.

The fundamental test ... in determining whether a cause of action has accrued[] is whether the party asserting the claim can maintain an action to enforce it. Stated differently, [a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502, 532 S.E.2d 1, 3 (Ct.App.2000)
(citations and internal quotation marks omitted).

It is axiomatic that a plaintiff does not have a legal right to sue unless she can allege all elements of a claim. In fact, under Rule 11(a), a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, and the South Carolina Frivolous Civil Proceeding Sanction Act requires an attorney to reasonably believe that under the facts his claim is valid. An essential element of a claim for negligent construction is causation. S.C. Ann. § 15-36-10.

If Ms. Allwin had filed an action upon notice of the problems that Respondents argue gave her notice, her claim may well have been dismissed as frivolous. *See Grillo*, 340 S.C. at 506. A plaintiff is entitled to wait until the cause has been rationally identified; this is especially true in the case of latent defects. *See id.* To hold otherwise would promote the filing of premature or frivolous lawsuits to avoid potential loss of a claim based on the statute of limitations.

II. When the record is viewed in the light most favorable to Maria Allwin, the nonmovant, her claims are not barred.

An appellate court is required "to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that reasonably drawn therefrom." Maria Allwin's appellate brief sets forth several examples demonstrating issues of fact regarding what Ms. Allwin should have known through the exercise of reasonable diligence she had a cause of action. (See Allwin Brief)

A. There are issues of fact as to whether the defects are latent.

Russ Cooper argues the alleged construction defects are not latent¹; however, there are genuine issues about whether and what defects are latent that preclude summary adjudication.

¹ Russ Cooper, in its brief, defines latent as "hidden; concealed; that does not appear upon the fact of a thing, Black's Law Dictionary defines the term "latent defect" as a hidden defect or "product imperfection that is not discoverable by reasonable inspection..."

See e.g. Bella Investments, Inc. v. Multi Family Servs., Inc., 97 So. 3d 787, 796-797 (Ala. Civ. App. 2012) (holding that there was a genuine issue of material fact “as to when the claims regarding buckling floors and walls, improper installation of the fiber cement siding, and improper grading of the project site accrued.”). As Ross Clements states in his affidavit: “Complete removal of interior and exterior building envelope components was required in order to uncover latent construction defects and damages...” (See Affidavit of Ross Clements, p. 4). This testimony, along with a variety of other evidence, creates at least an issue of fact as to whether the defects were latent and whether Ms. Allwin’s actions were reasonable.

III. The affidavits of Maria Allwin and Ross Clements are not sham and Russ Cooper cannot argue as such for the first time on appeal.

Russ Cooper cannot now argue, for the first time on appeal, that Maria Allwin’s affidavit and the affidavit of her expert architect Ross Clements are sham affidavits. Russ Cooper never argued that the affidavits were sham before the trial court and did not raise *McMaster v. Dewitt* in any of its briefing. (See Transcript; Russ Cooper’s Memo in Support of Motion for Summary Judgment). For these reasons, this argument should not be considered.

Even if the argument is considered, it is without merit. Russ Cooper now asks us to disregard the affidavits of both Maria Allwin and her expert Ross Clements “according to the principles set forth in *McMaster*.” (Russ Cooper’s Appellate Brief, p. 34). An affidavit can be excluded as “sham” when it was submitted “to contradict that party’s own prior sworn statement” in “an attempt to create a sham issue of material fact.” *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014), reh’g denied (Jan. 27, 2015), cert. denied (July 2, 2015) (quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). Clements was disclosed as Maria Allwin’s expert, and the Respondents chose not to take Clements’ deposition.

(See Plaintiff's Response to Discovery Requests). Thereafter, Appellant submitted his affidavit prior to a hearing on Respondent's summary judgment motion to set forth additional material facts related to the statute of limitations defense. Russ Cooper fails to demonstrate how Maria Allwin's affidavit contradicts her deposition testimony. It does not. Instead Ms. Allwin's affidavit was submitted to provide additional facts that were not brought forward during her deposition.

IV. Maria Allwin's arguments were preserved because those arguments were raised to the trial court and ruled on and have been presented to the Court of Appeals.

A. The evidence before this Court must be viewed in the light most favorable to Maria Allwin.

Shope Reno argues Maria Allwin failed to preserve her argument that the evidence and all reasonable inferences must be viewed in her favor as the non-moving party. This argument is a part of the record because it was raised, and ruled on by the trial court in its Order Granting Motion for Summary Judgment. (See Plaintiff's Memo in Opp, p. 5; Order Granting Motion for Summary Judgment, p. 2). The standard for summary judgement was cited in Allwin's Memorandum and the Court's order. (*Id.*)

Further, on December 29, 2015, Maria Allwin filed a Motion to Alter or Amend. (*See* Motion to Alter or Amend). In the motion, Allwin argued that based on the evidence before the trial court, it made improper factual conclusions including that Allwin was "well aware of the alleged defects" and "failed to act with reasonable diligence." She further argued that material facts were disputed as was the conclusion to be drawn from those facts and that the trial court failed to consider affidavits, which taken in the light most favorable to Maria Allwin, created at least a question of fact on the statute of limitations issue. (*See* Motion to Alter or Amend). On January 28, 2016, Judge Nicholson issued a Form 4 order denying the motion without a hearing

or the opportunity to submit additional briefing. (*See* Form 4 Order Denying Motion to Alter or Amend).

Moreover, whether raised or not, the appellate court is required to liberally construe the record and give Ms. Allwin the benefit of all favorable inferences. In her Initial Brief, Maria Allwin argued the trial court impermissibly weighed conflicting evidence and that by failing to view the evidence in the light most favorable, it made impermissible factual findings. She cites, as an example, that the order references portions of reports that are not favorable to Ms. Allwin and fails to include portions that are favorable. (*See* Appellant's Brief, p. 12-13). In addition, as Ms. Allwin argues, the court failed to consider Maria Allwin's affidavit, architect Ross Clements' affidavit, and the testimony of Russ Cooper (*See* Appellant's Brief, p. 18-21), which if viewed in the light most favorable to Maria Allwin create an issue of fact that should be presented to a jury.

B. Shope Reno's argument regarding what it terms The Letter are misplaced.

Shope Reno states that the trial court specifically determined that The Letter sent from Appellant to Respondent Shope Reno entitled Shope Reno to summary judgment. (Shope Reno Brief, p. 7). This is simply not what the Order holds. (*See* Order Granting Motion for Summary Judgment). The Order includes a catalog of the documents or portions of documents argued in Russ Cooper's Motion for Summary Judgment and then summarily draws factual conclusions.

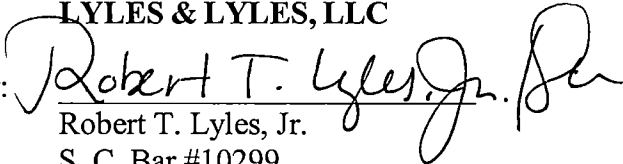
Appellant has clearly argued to the trial court and to the Court of Appeals that when viewed in the light most favorable to Maria Allwin, the evidence on the statute of limitations is conflicting and the trial court's conclusion that "[t]he clear and undisputed evidence before the Court establishes that [Appellant] was on notice of the alleged defects..." is in error. The Order does not state that one piece of evidence, specifically The Letter, was dispositive of its ruling.

Moreover, the law does not require the Appellant to specifically dispute each and every document identified by the movant or the Order to reserve its argument that the evidence is conflicting.

CONCLUSION

For the reasons stated in Appellant's Brief and those stated above, Maria Allwin respectfully submits that the trial court's grant of summary judgment should be reversed.

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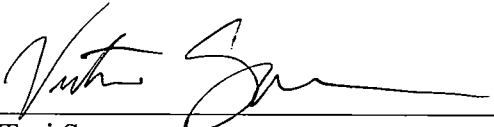
PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on September 12, 2016 to the counsel below:

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September 12, 2016

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SC Court of Appeals

Re: *Maria Allwin v. Russ Cooper Associates, Inc. and Shope Reno & Walker*
Appellate Case Number: 2016-000471

Dear Ms. Kitchings:

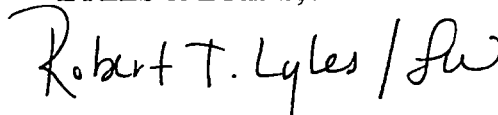
Enclosed for filing with regard to the above-referenced matter, please find two (2) copies of Appellant Maria Allwin Reply Brief with Proof of Service. Please return a clocked copy to me in the envelope provided.

By copy of this letter, I am providing the enclosure to counsel for the Respondents by mail as set forth in the Proof of Service included with the Brief.

Thank you, and with kindest regards, I remain

Very truly yours,

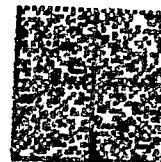
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Enclosures (as stated above)
cc: Dean Best
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