RECEIVED

NOV 16 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.

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 THE ..... 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 FINAL BRIEF

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
P.O. Box 773
Charleston, SC 29401
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF ISSUES ON APPEAL 1
STATEMENT OF THE CASE 1
STATEMENT OF FACTS 2
STANDARD OF REVIEW 8
ARGUMENT 9

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS BARRED MARIA ALLWIN'S CLAIMS BECAUSE CONFLICTING EVIDENCE EXISTS AND A JURY SHOULD DETERMINE THE ISSUE 9

A. THE TRIAL COURT DID NOT VIEW THE EVIDENCE BEFORE IT IN THE LIGHT MOST FAVORABLE TO AND MADE IMPERMISSIBLE FINDINGS OF FACT 10

B. THE TRIAL COURT RELIED ON CASE LAW THAT WAS INAPPLICABLE TO THE FACTS AND DID NOT ADDRESS CASES FAVORABLE TO MARIA ALLWIN 13

C. THERE IS EVIDENCE THAT MARIA ALLWIN ACTED WITH REASONABLE DILIGENCE 17

CONCLUSION 20

Cases

Barr v. City of Rock Hill, 330 S.C. 640, S.E.2d 157 (1998) ..... - 14-

Centex Homes v. S.Carolina State Plastering, LLC, 2010 WL 2998519 ..... - 15, 16-

Dean v. Ruscon, 321 S.C. 360, 468 S.E. 2d 105 (1996)..... - 13-

Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 403 S.E. 2d 157 (Ct. App. 1991)..... - 9 -

Holly Woods Assc. of Residence Owners v. Hiller, 385 S.C. 344, 682 S.E.2d 818 (Ct. App. 2009)..... - 1,10,11-

McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015)..... - 2,10,17-

Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000)..... - 9, 12 -

Murphy v. Tyndall, 384 S.C. 50, 681 S.E.2d 28 (Ct. App. 2009)..... - 9-

Santee Portland Cement Co. C. Daniel Int'l Corporation, 299 S.C. 269, 384 S.E.2d 693 (1989)..... - 16 -

Statutes

S.C. Code Ann. § 15-3-530..... - 10-

S.C. Code Ann. § 15-3-535..... - 11-

STATEMENT OF THE ISSUE

1. Did the Trial Court Err in Granting Defendant Contractor and Architect's Motions for Summary Judgment on the Basis That the Statute of Limitations Barred Maria Allwin's Construction Defect Claims When Conflicting Evidence Existed as to Whether She Acted With Reasonable Diligence?

STATEMENT OF THE CASE

This appeal arises from the trial court's order granting summary judgment to the defendants based on the statute of limitations. On August 5, 2013, Maria Allwin, a homeowner, instituted this construction defect lawsuit against general contractor Russ Cooper Associates, Inc. ("Russ Cooper" or "Contractor") and on October 8, 2014, added architect Shope Reno Wharton ("Shope Reno" or "Architect") alleging negligence, gross negligence and breach of warranty causes of action resulting from the design and construction of Maria Allwin's 11,000 square foot oceanfront home located at 133 Flyway Drive, Kiawah Island, South Carolina (the "Home") (R. pp. 000042-000048). Maria Allwin sought damages for latent and previously undiscoverable deficiencies, decay and rot. (R. pp. 000043-000044).

Architect filed a motion to dismiss on three grounds, including the statute of limitations. Contractor filed a motion for summary judgment, based on the statute of limitations. Architect and Contractor each filed a supporting memorandum. (R. pp. 000056-000061; R. pp. 000062-000088; R. pp. 000089-000138). On September 15, 2015, the Honorable J.C. Nicholson, Jr. held a hearing on Contractor's and Architect's motions (R. pp. 000233-000274), which he granted by order dated December 16, 2015 (R. pp. 000007-000036). Upon receipt of the trial court's order, Maria Allwin filed a Rule 59(e) motion on December 29, 2015, citing as grounds: (1) the Order did not consider or apply *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708

S.E.2d 787 (Ct. App. 2011) and *McAlhany v. Carter*, 415 S.C. 54, 57, 781 S.E.2d 105, 107 (Ct. App. 2015) (decided November 12, 2015, after oral arguments in this case); (2) the Order did not consider the Plaintiff's affidavit or her expert's affidavit, which taken in the light most favorable to Maria Allwin, created at least a question of fact as to what damages she knew or could have known through the exercise of reasonable diligence; (3) the Order did not consider the Contractor Russ Cooper's deposition testimony that complete declading of the siding was extreme —not required by the exercise of reasonable diligence — and the fact the Architect told Maria Allwin that her experts' scope of repair, which uncovered many of the defects, was unnecessary, both of which created a disputed issue of material fact regarding what was required in the exercise of reasonable diligence; (4) The Order made improper factual conclusions that Maria Allwin was "well aware of the alleged defects" and "failed to act with reasonable diligence" when the record presented disputed facts and a dispute as to the conclusion to be drawn from those facts; and (5) the Order improperly granted summary judgment because the facts present at least a scintilla of evidence that some of the conditions and damages for which Maria Allwin sought recovery could not have been known through the exercise of reasonable diligence. (R. pp. 000195-000199). On January 28, 2016, Judge Nicholson denied the Motion to Alter or Amend without rehearing. (R. p. 000037). Plaintiff received notice of the Order denying her Motion to Reconsider on February 1, 2016.

This appeal follows. Allwin served Respondents with notice of the appeal on March 2, 2016. (R. p. 000200).

STATEMENT OF FACTS

Maria Allwin is a resident of Connecticut who has, since 1994, owned the Home that is the subject of this lawsuit. Maria Allwin originally built the home with her husband, Jim Allwin,

who was primarily responsible for dealing with the Home until he died in 2007. (R. p. 000177 ¶ 3). After Jim Allwin's death, Maria became primarily responsible for the Home, which is a large, complex structure occupying two adjoining lots on the front beach at Kiawah. (R. p. 000177 ¶ 2).

The Home faces the ocean and is exposed to the heat, wind, and rain coming off the water and as such has required significant upkeep, repair, and maintenance through the years. (R. p. 000177 ¶ 3,4). Jim, prior to his death, and subsequently Maria retained and paid contractors over the years to perform maintenance and repairs, which were generally assumed to be a consequence of owning a large home exposed to the ocean and the weather in a hot and humid climate. (R. p. 000177 ¶ 3,4).

Because the Home was not the Allwins' primary residence, in approximately late 2001, they hired Gamble Home Services as property manager to oversee and maintain the Home. In 2003, the Allwins hired Milton Morgan, a contractor, to oversee repair and maintenance work at the Home, which Buffington Homes performed. (R. p. 00070). Morgan prepared a scope of work, which provided for the repair of localized problem areas. (R. pp. 001187-001189)[1]. Mr. Buffington of Buffington Homes, a contractor, priced the scope but expressed concern to the Allwins about whether, in some instances, more work was needed. (R. p. 000071; R. pp. 001194-001199). One concern was the roof. Although Buffington recommended a new roof, Picquet Roofing recommended a repair and repainting for an estimated cost of $35,000. (R. p. 001186). Based upon the advice of Mr. Morgan, the Allwins proceeded with the more limited Morgan scope of repair. (R. pp. 001183-001186; R. pp. 001187-001189). In summary, although Buffington recommended — *in a few areas* — a more aggressive option, the Allwins chose the conservative course of action.

[1] All Exhibits Numbers refer to the Exhibits to Russ Cooper's Memorandum in Support of Motion for Summary Judgment, which are also referenced in the Order Granting Summary Judgment.

As part of its efforts, Buffington Homes hired an engineering firm, CSA, to survey the home. (R. pp. 001155-001171, R. p. 000017). CSA noted that the purpose of its survey was to determine the sources of "isolated areas of damage and fungal growth" in the Home. (R. p. 001156). CSA surveyed the Home on two days (June 30, 2003 and July 17, 2003) and in summary concluded: "In summary, outside 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." (R. p. 001164).

As the work proceeded, Buffington found areas of damage Mr. Morgan did not anticipate and performed additional work, which increased the cost of the work Mr. Buffington performed from $238,504 to $359,728.21. (R. p. 001200; R. pp. 001285-001292). The Allwins paid for the additional work. While the work was being performed, Plaintiff made a claim with AIG under the Allwins' homeowners' policy. AIG denied the claim. (R. pp. 001343-001353).

In subsequent years, the Allwins continued to make considerable efforts to investigate and maintain the Home. In 2008, Maria Allwin hired Victoria Stein with Atlantic Builders. Ms. Stein issued a report regarding the Home, which ended with the following conclusion: "It is my opinion that major contributing factor for the high humidity that is supporting the presents [sic] of fungus growth is the installation of the 40-ton chiller system." Thus, Ms. Stein concluded the major problem with the Home was the HVAC system installed in 2001, with which Russ Cooper was not involved. (R. pp. 001440-001449).

In 2009, two years after Jim Allwin's death, Ms. Allwin met with Skip Lewis, an engineer, with the goal of discussing management of ongoing maintenance and repair costs. (R. p. 000178 ¶7). Mr. Lewis was to perform a property condition assessment and develop a life cycle repair for maintenance of the Home. That work was never done. (R. p. 000178 ¶7).

In 2011, Ms. Allwin hired Fuller Consulting Engineers ("Fuller Engineers") to perform a thorough forensic investigation into the condition of the Home, the first time such an investigation had been requested. In its preliminary report, Ross Clements, an architect with Fuller Consulting reported on a number of construction deficiencies at the Home. (R. pp. 000182-000187). While some of the problems Fuller noted were in areas the Allwins had experienced prior concerns and which had been subsequently repaired, many were not. In addition to specific repairs, and because of concern about unknown conditions, Fuller suggested a comprehensive scope of repair of the Home, to include the removal of the roof and all of the exterior siding and interior drywall and the removal of a large concrete deck on the ocean side of the Home, so that Fuller Consulting could ensure that any unexposed and unknown defects could be repaired. (R. p. 000179 ¶ 11; R. pp. 001426-001436).

At this point, Maria Allwin sought the input of the Respondent Architect Shope Reno Wharton. (R. p. 000179 ¶ 12). Shope Reno's representative agreed to travel to South Carolina to meet with Maria Allwin and discuss Fuller's recommendations. At that meeting, with knowledge of the history of repairs to the Home, Shope Reno's representative, a South Carolina licensed architect, advised Maria that he did not see evidence of systemic, pervasive problems at the Home of the sort Fuller sought to correct. (R. p. 000179 ¶ 12). Rather, he suggested, like many before him, that Maria Allwin needed to make isolated repairs to the Home and to perform routine maintenance. *Id.*

After meeting with the Architect Shope Reno's representative, Maria Allwin agreed to go forward with the scope of work recommended by Fuller Engineers, and Fuller Engineers hired Phillip Smith to implement those repairs, which included the complete removal of all exterior

siding, interior drywall, the roof and the concrete deck on the ocean side of the Home. (R. pp. 000178-000179 ¶ 13.)

As reflected in the Affidavit of Ross Clements of Fuller Consulting Engineers, Inc. (R. pp. 000189-00194), the removal of those building components exposed, for the first time, extensive and pervasive original construction deficiencies that could not have been seen, and would not have been known, absent the wholesale deconstruction of the Home. (R. pp. 000191-000192 ¶ 15, 16). According to Clements, the latent construction defects, which are the subject of the present action, were, in his opinion, unprecedented:

> Furthermore, it is my opinion that the level of destructive testing and deconstruction required at the subject residence to uncover latent defects was unprecedented in my experience as a forensic architect. It would be unreasonable for a homeowner to determine such a level of destructive testing or deconstruction was necessary based on the visual deficiencies observed. ***In my opinion, the root cause of many of the observed visual deficiencies could not have been explained without complete removal of the interior and exterior building components.*** Additionally, through the deconstruction of the current repair project, we uncovered many instances of previously unknown construction defects and defects that were more pervasive than what was observed during limited destructive testing.

(R. pp. 000192). (Emphasis Added). Mr. Clements identified at least 32 defective conditions including defects in the installation of the roof underlayment, sheathing and framing; the Tyvek weather-resistive barrier (WRB); building felt behind the stucco; windows and doors; waterproofing and flashing; and patios. (R. pp. 000192-000193). As noted in his affidavit, many of the defects *could not have been discovered* without complete removal of the exterior and interior building components. *Id.*

The Contractor Russ Cooper's deposition testimony also corroborates the testimony of Plaintiff's expert, Mr. Clements, regarding the latency of the defects and the extreme nature of the investigation. Russ Cooper acknowledges that although framing and WRB are observable

during construction, once they are covered by exterior cladding, these components are no longer observable:

Q But you would agree with me that if you are out on the site and you observe a deficiency, something that you do see and recognize as a deficiency, once that framing is covered up by drywall or exterior sheeting or siding, then you can no longer observe it?

A If you can't see it, you cannot observe it.

Q And are you comfortable that the same thing would be true with something like WRB? Is that right? It's installed on the wall by Mr. Carrigan or whoever else installed it, and it's observable by you, as the general contractor while it's installed on the walls. Is that right?

A WRB?

Q I'm sorry. Building wrap.

MR. BEST: Weather resistant barrier.

BY MR. LYLES:

Q Weather resistant barrier. Tyvek.

A Okay. Yes.

Q And then at some point that WRB or Tyvek is going to be covered up by exterior cladding, in this case I guess shingles of some sort?

A That is correct.

Q And installation defects in the WRB, once the shingles go up, are no longer observable?

A They are not.

Q Would you agree with me that if this Tyvek is covered by cedar siding, that the manner of installation of the Tyvek would not be readily observable by an owner of the house?

Q If you assume for a minute that the stucco that is shown to the left covered the balance of the chimney, would you agree with me that that flashing condition and the condition of the building felt was something that was concealed behind the stucco?

A Yes.

(R. p. 001049, line 4-p. 001050, line 5; R. p. 001067, line 7-12)

Cooper also testified as follows:

Q If we assume for a minute that this Tyvek installation is how it was installed during original construction, would you agree with me that there is no way that anybody could have observed that, absent the removal of the shingles?

A There is no way you could see through the shingles. And if I had seen that, it would never have stayed.

(R. p. 001077, lines 1-8).

Russ Cooper further testified as follows with regard to the removal of siding and interior drywall to investigate isolated water leaks:

Lyles: Would you agree with me that removal of all the siding on a house like that is an extreme measure?

Cooper: You're asking me if a 1992 system, in 2015, is an extreme measure to change what was built in 1992 to 2015, and my answer is no, it is not an extreme measure.

Lyles: I'm asking you if it would be an extreme measure for an owner to remove all the siding on his house to determine the source of water infiltration.

Cooper: That's an extreme measure.

(R. p. 001063, lines 1-24).

Clements' affidavit and Russ Cooper's deposition testimony establish that significant latent deficiencies existed at the Home, which were uncovered, for the first time, during the Fuller/Smith repair. The cost to repair the latent defects uncovered by the work of Ross Clements and Phillip Smith, incurred since 2011, is approximately $3,000,000. That is the sum Ms. Allwin seeks to recover in this lawsuit, along with loss of use.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment applying the same well-established standard as the trial court pursuant to Rule 56, SCRCP. *See McAlhany v. Carter*, 415

S.C. 54, 62, 781 S.E.2d 105, 110 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). Summary judgment should only be granted when it is clear there is no dispute concerning either the facts ***or*** the inference to be drawn from those facts. *Id.* "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." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). In evaluating a motion for summary judgment, 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 might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). Summary judgment is a "drastic remedy" that should be "cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009) (*quoting Carolina All. for Fair Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation,* 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999).

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment on the Grounds that the Statute of Limitations Barred Maria Allwin's Claims Because Conflicting Evidence Exists and a Jury Should Determine the Issue.

The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the evidence or the inference to be drawn from the evidence is conflicting, the fact finder at trial should decide the issue and not the court on summary judgment motion. The trial court's finding that the statute expired was based on its impermissible factual finding that Maria Allwin was on notice of the alleged defects in Russ Cooper's construction of her home such that the statute of limitations bars all claims for defects that she

has or could assert against Russ Cooper. (R. pp. 000007-000036). In addition, the trial court also found that Appellant failed to act with "reasonable diligence," and in a "timely fashion in response to clearly observable and known problems." (R. p. 000035). In reaching such conclusions, the trial court impermissibly weighed conflicting testimony and failed to view the evidence before it in the light most favorable to Maria Allwin as the non-moving party. Moreover, the trial court relied on cases that did not involve latent defects and were inapplicable to the facts of the instant case and also failed to explain why cases, clearly supporting the denial of summary judgment, either did not apply or were distinguishable. Based upon the record before the Court, a jury may well find that Allwin acted with reasonable diligence by investigating, making repairs, and following a conservative course and that in doing so, she would not and could not discover certain latent defects until her Home was completely deconstructed in 2011.

For these reasons, the trial court's order granting summary judgment should be reversed.

A. The Trial Court Did Not View the Evidence Before It in the Light Most Favorable to Maria Allwin and Made Impermissible Findings of Fact.

The statute of limitations applicable to the instant case is three years. S.C. Code Ann. § 15–3–530. Under South Carolina law, it is well-settled that the statute of limitations begins to run from the time that the cause of action accrues; however, it is often difficult to determine when that time arrives. The test in determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. *McAlhany v. Carter*, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). "Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (internal citation omitted). Application of the discovery rule contained in

S.C. Code Ann. § 15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence and to not only when the statute began to run but also as to which claims may be barred. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000); *McAlhany v. Carter*, 415 S.C. at 64; *Hollywoods Ass'n*, 392 S.C. at 185 (holding that whether the damages the HOA claimed in the suit were different from those experienced in the past was a question of fact for the jury).

The trial court's order finds that the Respondents are entitled to summary judgment based on factual determinations. The Order states: "The statute of limitations bars Plaintiff's claims against these Defendants because the facts establish that Plaintiff was well aware of the alleged defects in both RCA's construction of and SRW's design of the residence more than three years before she asserted claims against them." (R. pp. 000011). The trial court further determined that Plaintiff failed to act with reasonable diligence. These factual conclusions are improper because at the summary judgment stage, the evidence and all inferences must be viewed in the light most favorable to Maria Allwin, as the non-moving party. The trial court's order refers to the evidence (or select portions of documents) that is the most *unfavorable* to the Plaintiff, which taken alone may support a finding that the claim is time-barred, but fails to include evidence that supports Plaintiff's argument that the statute did not expire, and certainly did not expire as to claims which were unknown and unknowable, through the exercise of reasonable diligence, until 2011 and after.

There are a number of instances in which the evidence is not viewed in the light most favorable to Maria. For example, as part of its efforts, Buffington Home hired an engineering firm, CSA, to survey the home. (R. p. 000017; R. pp. 001155-001171). Portions of the language

of CSA's report, which are unfavorable to Maria Allwin, are included in the Order, but its ultimate conclusion and portions of the report that are favorable to Allwin are excluded. (R. p. 000017). The Order does not include that CSA identified the purpose of its survey was to determine the sources of "isolated areas of damage and fungal growth" in the Home. (R. pp. 001156). The Order does not include that CSA notes "slight interior negative pressure," which it appears to attribute to the air conditioning system, but also notes that wind can cause building envelope pressure differences particularly at ocean front locations. (R. p. 001161). The final summary is also not included in the Order. CSA surveyed the Home on two days (June 30, 2003 and July 17, 2003) and in summary concluded:

> In summary, outside 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.

(R. p. 001164).

As noted in the Order, Maria Allwin hired Victoria Stein. A detailed October 2008 report prepared by Ms. Stein after an extensive cataloging of the home's history noted that "it [was her] opinion that the major contributing factor for the high humidity that is contributing to fungal growth is the installation of the 40-ton chiller system." (R. pp. 001440-001449). While the Court's order notes that emails between Ms. Stein and Maria Allwin discussed "going down the legal road" at that time, Ms. Stein's report actually recommends in its "Considerations for the Future" that Ms. Allwin "seek legal council to recoup monetary past and future costs on chiller related issues." (R. p. 001444;R. p. 000028). Thus the reference is related to the HVAC issues, which did not involve Russ Cooper.

B. The Trial Court Relied on Case Law That Was Inapplicable to the Facts and Did Not Address Cases Favorable to Maria Allwin.

The Order granting summary judgment relied on cases that did not involve latent defects and were inapplicable to the facts of the instant case, and The Order also failed to explain why cases clearly supporting the denial of summary judgment either did not apply or were distinguishable.

In granting summary judgment, the trial court relied on *Dean v. Ruscon Corp.,* which was distinguished by this Court in *McAlhaney v. Carter* and is easily distinguished from the case here principally because *Dean* is not a case that involves latent defects. (R. pp. 000033). *See McAlhany v. Carter,* 415 S.C. 54, 67, 781 S.E.2d 105, 113 (Ct. App. 2015), reh'g denied (Jan. 28, 2016); *Dean v. Ruscon Corp.,* 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean v. Ruscon*, Dean purchased a building in September 1984 and an inspection found the building structurally sound. During October and November 1984, Ruscon Corporation performed pile driving activities at a construction site nearby. *Dean v. Ruscon*, 321 S.C. at 362. Shortly thereafter Dean observed a fine crack approximately three feet in length in the front right corner of the building and determined Ruscon's pile driving activities caused the crack. *Id.* In 1985, Ruscon resumed pile driving activities and Dean observed that the original crack had expanded and a new crack had formed on the other side of the building. *Id.* Dean was forced to close her business after inspectors found the building no longer structurally sound. The Supreme Court affirmed the trial court's order granting Ruscon's directed verdict motion on the ground that the six year statute of limitations barred Dean's claim. The Supreme Court specifically noted that the damage to Dean's building was **not latent**, and there was **no question** that Dean discovered the damage in 1984 and associated it with Ruscon's pile driving activities. *Id.* This complex case is easily

distinguished because the defects here are latent, and there are substantial questions regarding what reasonable diligence required.

In its order granting summary judgment, the trial court also relied on the decision in *Barr v. City of Rock Hill*; however, there is a significant difference between *Barr* and the instant case. (R. p. 000034, R. pp. 000233-000274). *Barr v. City of Rock Hill*, 330 SC 640, 500 S.E.2d 157 (1998). The Barrs bought a home through an urban renewal program run by the city. Starting in 1987, and for three more consecutive years, annual termite inspections noted moisture-related problems with the house. *Barr v. City of Rock Hill*, 330 SC 640 at 642. The Court noted specifically that in response, the Barrs neither investigated nor repaired. *Id.* When the Barrs attempted to refinance their mortgage, the lender refused the loan based on damage noted in those four inspection reports. *Id.* In 1992, the Barrs contacted the city and requested an inspection and report. *Id.* at 643. The city's report noted significant problems with the house, and suggested remedies. *Id.* The Barrs then filed suit against the city and the developer, both of whom raised the statute of limitations as a defense. The trial court agreed that the statute had run, and barred the claim. *Id.* The South Carolina Supreme Court upheld this ruling.

While the Barrs neither investigated nor repaired, the Allwins did both. The Barrs admittedly did nothing to address the issues raised by the four negative termite inspection reports. While the "termite inspection reports advised [plaintiffs] of water and other problems... [plaintiffs] failed to correct the problems or investigate further to determine the extent of the problems." *Id.* at 645. In the instant case, however, the Allwins went to significant lengths to address the issues as they were presented. Unfortunately, the defects were latent — hidden from even the various consulted experts and Shope Reno.

In her Memorandum to the trial court, Maria Allwin presented several cases that directly addressed the issue of the statute of limitation in latent defect cases. (R. p. 000144). One South Carolina Supreme Court case bearing directly on the issue of the statute of limitations in a case involving latent defects is *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989), overruled on other grounds. In *Santee Portland*, the owner brought suit against the general contractor responsible for the construction of a cement plant, that subsequently showed two cracks in its facade over a period of many years, and eventually collapsed, killing two people. The trial court concluded that the owner knew or should have known that it had a cause of action against the contractor when the first crack appeared in 1969, or at least when the second crack appeared in 1975. *Id.* at 695. The South Carolina Supreme Court rejected this conclusion, noting that the owner introduced expert testimony that the defects in the silos were latent because the rods were inside concrete walls. *Id.* at 696. There was evidence that repairs were performed. *Id.* The South Carolina Supreme Court concluded that the evidence introduced "went to the reasonableness of [the plaintiff's] actions, which was an issue to be decided by the jury." *Id.* (*citing Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962)).

Santee is analogous to the instant case is many ways. The owner sought out expert advice to repair a flawed structure, and years later, discovered the true nature of the structure's defects—defects that were not only unrecognizable to the owner (a lay person), but were also hidden from the consulted expert. Along similar lines, Appellant followed a reasonable course of action at the recommendation of multiple experts.

More recently, the *Santee* case is cited in support of *Centex Homes v. S. Carolina State Plastering*, LLC, No. 4:08-CV-2495-TLW, 2010 WL 2998519 (D.S.C. July 28, 2010). In *Centex Homes*, Judge Wooten held that although the question was close, the record in the case contained

questions of material fact regarding when Centex should have known, through the exercise of reasonable diligence, that a cause of action existed against several of its subcontractors for alleged construction defects associated with a condominium complex. *Id.* Centex argued that there were factual issues as to the causes of the damage; the existence of latent defects prevented discovery; and that there was evidence it took reasonable steps to investigate. *Id.* at *7. The Court found that the determination of whether Centex, through the exercise of reasonable diligence, should have discovered alleged deficiencies was an issue properly resolved by the fact finder. *Id.* at *8.

Once again, *Centex* and the instant case are analogous: the plaintiff attempted to make repairs, on the advice of experts, to latent, unobservable defects that manifested problems over many years. In Centex, the district court properly viewed the circumstances in a light most favorable to the non-moving party, and found that the issue of whether the Centex acted reasonably was a question of fact for the jury.

The trial court's order also failed to address *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). In *Holly Woods*, a homeowners' association filed suit against a developer in 2005. A trial resulted in a jury verdict, and the defendant appealed the trial judge's decision not to grant a directed verdict on the statute of limitations because it argued that the HOA was aware of problems with the development prior to 2002. Specifically, the minutes from an annual meeting of the HOA's board in 1991 indicated that the HOA was aware of problems with the development including a pool leak, drainage problems and termite issues, and that additional problems were known between 1998 and 2000. There was also testimony that an engineer corrected drainage issues and that additional drainage issues later developed. The Court of Appeals found that whether the damages the Association

claimed in 2005 were different from those it experienced in the past was a question for the jury. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. at 185. Like the case in *Holly Woods*, in the instant case, a jury should also decide what type of defect claims, if any, may be barred, and whether the damages suffered in the past were the same as those presented. Similarly, if the Court determines that any portion of the Maria Allwin's damages may be barred by the statute of limitations, a jury should make this determination as well.

Finally, as Maria Allwin raised in her Motion to Alter or Amend, the Order did not address *McAlhany v. Carter*, 415 S.C. 54, 57, 781 S.E.2d 105, 107 (Ct. App. 2015), reh'g denied (Jan. 28, 2016) (decided November 12, 2015, after oral arguments in this case).

C. There is Evidence That Maria Allwin Acted With Reasonable Diligence.

Based on the full record, a jury may find that Allwin was reasonable in pursuing a conservative but conscious course of action in response to conflicting opinions; that she reasonably believed that the problems were primarily related to the maintenance of an oceanfront home, not a defect in initial construction; and that she reasonably chose not to completely declad her 10,000 plus square foot home before she did, in 2011.

The testimony of Clements, which is supported by the testimony of Russ Cooper himself, is that many defects which were discovered and repaired as part of the 2011 repair process could not have been known without a complete de-clad of the home. Thus, in order to prevail, the defendants must establish that, as a matter of law, at some point before August 2010, the exercise of reasonable diligence required the Allwins to completely deconstruct their 11,000 square foot home — including removing the entire roof, all 11,000 square feet of siding, the entire concrete deck — as Clements and Smith did starting in 2011. The difficulty in that position is that it ignores the fact that the Allwins received a great deal of expert advice over the years about what

to do in response to isolated problems, much of which was conflicting. The position also ignores the fact that Russ Cooper acknowledged that removal of the siding was extreme — not required by the exercise of reasonable diligence — and the fact that Shope Reno told Maria Allwin in 2011 that Ross Clements' scope of repair, which uncovered many of the defects, was unnecessary, both of which create an issue of material fact regarding what the exercise of reasonable diligence required. (R. p. 001063, line 1-24; R. pp. 000177-000188).

A jury could certainly decide that Maria Allwin acted reasonably (with reasonable diligence) in following a conservative course of action. Therefore, the issue of whether Allwin was on notice or should have been on notice of Russ Cooper's defective work and Shope Reno's defective design and whether her actions were reasonable is for a jury to decide.

For example in 2003, the Allwins retained Milt Morgan, a contractor, to assess the home and prepare a scope of repair, which provided for the repair of localized problem areas. (R. pp. 0001187-0001189). Mr. Buffington, a contractor, priced the scope but expressed concern to the Allwins about whether more work was needed. (R. pp. 001194-001199). Based upon the advice of Mr. Morgan, a jury may conclude the Allwins reasonably proceeded with the more limited Morgan scope of repair. (R. pp. 001183-001186, R. pp. 001187-001189). To prevail on this motion, the Respondents must persuade the Court that the reliance of the Allwins on Buffington and Morgan in 2004 was not, as a matter of law, the exercise of reasonable diligence. Reasonable diligence, Defendants must contend, required the Allwins to direct Mr. Buffington to remove all of the siding at the home, the ocean side deck and the interior drywall, even though neither Morgan or Buffington recommended that.

As another example, in subsequent years, Maria Allwin hired Victoria Stein who attributed mold at the Home to a problem with the HVAC (the HVAC in question was not

installed by Russ Cooper) and then noted several problems requiring localized, isolated repairs. Allwin agreed to those repairs done and paid for them. Again, Russ Cooper now contends that reasonable diligence required Maria Allwin to disregard the advice she was given and to direct the removal of all of the siding, interior drywall and the ocean side concrete deck in 2008 or 2009.

As set forth in Maria Allwin's affidavit, even as late as 2011, Architect Shope Reno's representative advised Allwin that the deconstruction Mr. Clements recommended was not necessary, instead advising that the Home only needed isolated repairs for known, isolated problems. (R. p. 000179). It is the height of irony for the lawyers for Architect Shope Reno and Contractor Russ Cooper to now argue that the law required Maria Allwin to do, in 2000, 2004, 2006, or 2009 what Shope Reno recommended that Maria Allwin *not* do in 2011.

Upon examination of the totality of the record, including South Carolina case law and the latency of the Home's defects and Appellant's history of trying to repair them, it is clear that there are questions of fact as to when the statute of limitations began to run and whether Appellant acted reasonably under the circumstances. If there is any evidence presenting such questions of fact, the Court must give the non-moving party the opportunity to present those facts to a jury.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the trial court's grant of summary judgment.

Respectfully submitted,

LYLES & LYLES, LLC

By: _____

Robert T. Lyles, Jr.
S. C. Bar #10299
342 East Bay Street
Post Office Box 773 (29402)
Charleston, South Carolina 29401
T: 843.577.7730
F: 843.577.7172
Email: rtl@lylesfirm.com
COUNSEL FOR APPELLANT

November 15, 2016
Charleston, South Carolina

RECEIVED
NOV 16 2016
SC Court of Appeals

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

Case No. 2016-000471

MARIA ALLWIN .....APPELLANT,

V.

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

OF WHOM RUSS COOPER ASSOCIATES, INC., AND SHOPE RENO WARTON ARE THE 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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

November 16, 2016

Robert T. Lyles, Jr.
S.C. Bar No: 70299
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
rtl@lylesfirm.com
Attorney for Appellant