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

Appellate Case No. 2016-000471

Maria Allwin.....Appellant,

v.

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

Of whom Russ Cooper Associates, Inc., and Shope Reno Wharton 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.

FINAL BRIEF OF RESPONDENT SHOPE RENO WHARTON

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STATEMENT OF THE CASE

Over 23 years ago, Defendant Shope Reno Wharton (hereinafter "SRW" or "Respondent") served as the architect of record for the original construction of the Appellant's beach house located at 133 Flyway Drive, Kiawah Island, South Carolina (hereinafter "beach house") (R. p. 38). SRW worked with Appellant to design the beach house and issued a set of plans for construction on July 21, 1992, which were later revised in final form on August 10, 1993. (R. p. 90). Construction of the beach house was completed on or about May 18, 1994. (R. p. 295, lines 8-11). However, Appellant did not bring her claim against SRW until over twenty (20) years after the last involvement by SRW on the beach house and more than twenty (20) years after construction of the beach house was entirely complete. (R. pp. 38-41).

The record in this case is replete with evidence and written documentation demonstrating that since at least 1999 Appellant has received a plethora of reports detailing deficiencies in her beach house, including, but not limited to, water intrusion into or through the exterior walls and roof, air and water intrusion at windows and doors, water intrusion into the basement, presence of mold/mildew, and resulting damage to the interior. (Resp. RCA Final Brief, pp. 1-16). Moreover, since 2004, Appellant has hired numerous design professionals and contractors to investigate, and at times repair aspects of the reported and known deficiencies with the beach house. (Id.).

SRW had no knowledge of the issues Appellant was having with her beach house, and had no involvement after original construction whatsoever with the beach house, until SRW received a letter from Appellant's attorney on February 23, 2011 contending design deficiencies in SRW's work on the beach house. (R. pp. 1469-1470, "The Letter").

The Letter alleged that design and construction deficiencies led to damages at the beach house and alleged that SRW was responsible for the same. Notwithstanding the fact that SRW had an office on Kiawah from 1993 to 1996, or that SRW worked with the Allwins from 1995 until 2001 on the design of a series of additional projects in Connecticut, the Allwins never reported to SRW any issue with the construction or design of the beach house until The Letter was sent to SRW from Appellant's counsel early in 2011. The Letter states that an investigation of the beach house "has revealed numerous and significant deficiencies" and that "[t]hese deficiencies relate to the design/installation of doors and windows, waterproofing and sealant, flashing installation and other deficiencies which have led to significant damage and which have prevented Ms. Allwin and her family from using the Home." (Id.).

The Letter was a clear expression by Appellant of design deficiencies that she alleged caused damages to the beach house. The Letter's dispositive impact on this Appeal, through the application of the applicable statute of limitations, is further discussed in the analysis section below. After receiving The Letter, SRW retained undersigned counsel and made a site visit to the beach house with counsel, but did not assist Appellant in the evaluation and repair of her home or make any representation to Appellant that SRW would assist her in performing any repairs. (R. pp. 1720-1728).

PROCEDURAL POSTURE

Appellant first filed her claim against Respondent SRW on October 8, 2014, and alleged, in part, deficiencies in the original design and construction of the beach house. (R. pp. 38-41). Respondent's Answer asserted the statute of limitations as an affirmative

defense. (R. p. 1721). In conjunction with its Answer, on November 20, 2014, SRW filed a dispositive motion based on the following three (3) primary grounds and attached The Letter to the motion as the sole exhibit: 1) Appellant is barred from any recovery against SRW pursuant to the applicable three (3) year statute of limitations (S.C. Code Ann. § 15-3-530), the applicable statue of repose (S.C. Code Ann. § 15-3-640) and relevant case law; 2) Appellant's Complaint fails to state facts sufficient to constitute a cause of action for which relief may be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCP; and, 3) Appellant failed to file an expert affidavit alleging professional negligence simultaneously with the Complaint as required by S.C. Code Ann. §15-36-100, *et seq.* (R. pp. 49-53).

SRW filed a memorandum in support of Motion for Summary Judgment on September 15, 2015. (R. pp. 89-138). The Trial Court heard oral arguments on SRW's Motion for Summary Judgment and a similar motion for summary judgment, also based on the statute of limitations, filed and argued by counsel for Respondent Russ Cooper Associates, Inc. ("RCA"), on September 15, 2015. (R. pp. 56-61). Thereafter, on December 16, 2015, the Trial Court entered its Order Granting Defendants RCA's and SRW's Motions for Summary Judgment ("Order of Summary Judgment" or "Order"). (R. pp. 7-36). In response to the Trial Court's Order of Summary Judgment, on December 29, 2015, Appellant moved pursuant to Rule 59(e), SCRCP to alter or amend the Trial Court's Order. (R. pp. 195-198). The Trial Court then entered an order denying Appellant's motion on January 28, 2016. (R. p. 37). On March 4, 2016, Appellant filed her Notice of Appeal, appealing the Order of Summary Judgment and the denial of her Rule 59(e) motion. (R. pp. 200-201).

STATEMENT OF THE FACTS

The facts of this case are undisputed. They remain the same facts, including evidence and testimony, as set forth and adopted by the Trial Court in its Order of Summary Judgment. (R. pp. 7-36). While some aspects of that Order are being challenged, the facts are uncontroverted. The facts of this case have been impeccably set forth by Respondent RCA in its Initial Brief, and any attempt to recast them herein would do little more than force the Court to review a regurgitation of the bounteous support for the Trial Court's Order and denial of this Appeal. Consequently, SRW incorporates by reference, as if set forth fully herein, the Statement of Facts as contained in Respondent RCA's Final Brief. (Resp. RCA Final Brief, pp. 1-16).

In addition to the Statement of Facts as set forth by Respondent RCA, it is crucial that SRW further identify the single most important fact distinguishing SRW's position in this case - The Letter. The importance of The Letter cannot be overstated. On its own, with consideration of no other facts, The Letter entitles SRW to affirmance of the Trial Court's Order Granting Summary Judgment, as detailed in the analysis sections below. The Letter is unchallenged and uncontroverted written evidence that supports the granting of summary judgment by the Trial Court.

The Letter is fact and the facts of the letter are as follows. The Letter, addressed and directed only to SRW, is dated February 23, 2011. (R. p. 1469). Appellant filed her first claim against SRW on October 8, 2014. (R. pp. 38-41). The Trial Court determined The Letter from Appellant to SRW was sent over three years prior to filing suit against SRW and entitled SRW to summary judgment. (R. p. 8).

The Letter was sent on behalf of Appellant through her counsel at the time, being the same counsel that has remained her attorney and has filed the current appeal. (R. pp. 1469-1470). The Letter details, in its first line, that counsel had been retained by Appellant in connection with "significant deficiencies" at the beach house. (R. pp. 1469). The Letter states that the deficiencies uncovered "relate to the design/installation" of various components of the beach house including the "doors and windows, waterproofing and sealant, flashing installation and other deficiencies". (Id.). The Letter goes on to state that at the time of the letter those deficiencies had already "lead to significant damage" to the beach house. (Id.). The Letter demonstrates a clear understanding of the causal relationship between the design deficiencies and significant damage. The Letter also contemplates additional investigation into the condition of the home in stating that "[a]s a result of these deficiencies and the damages to property resulting therefrom, Ms. Allwin faces a signification financial burden, including the cost to complete a thorough investigation of the home." (Id.).

The Letter warns that if SRW refuses to "investigate **and correct** the conditions at the project in a suitable manner" that Appellant will deal with the issues on her own and specifically "reserves any and all legal rights and remedies she may have against [SRW] as a result." (Id.) (emphasis added). The Letter next unequivocally instructs Respondent to "forward this letter to your attorney and to your insurance agent/broker and any known liability insurance carriers." (R. p. 1470). As such, the Letter places SRW on notice of a potential claim against it by Appellant and in so doing also obviously demonstrates Appellant's notice of a potential claim it has against SRW for the design deficiencies and resulting damages – as articulated in The Letter by her attorney.

In addition to the notice of a claim against SRW for design deficiencies, more than three (3) years before actually bringing a claim, Appellant was provided evidence of defects in the beach house as best detailed in Respondent RCA's Initial Brief section "Statement of the Case." Time and time again, Appellant ignored the clear counsel, advice and recommendations of several experts and consultants, waiting for over 15 years after receiving her first written notice of the existence of roof leaks, interior damage, and basement leaks within the beach house, to file her Complaint, alleging the discovery of "latent defects" in the design and construction of her beach house. (See Resp. RCA Final Brief, pp. 1-16 and R. pp. 38-41).

I. THE TRIAL COURT'S DETERMINATION THAT APPELLANT'S CLAIMS AGAINST RESPONDENT ARE TIME-BARRED IS THE LAW OF THE CASE AND DISPOSITIVE OF THIS APPEAL.

As discussed hereinabove, the Trial Court determined that The Letter sent from Appellant to Respondent SRW over three years prior to filing suit against SRW entitled Respondent to summary judgment. (R. pp. 7-36). The Letter, dated February 23, 2011, was sent on behalf of Appellant through counsel and detailed that: 1) counsel had been retained by Appellant in connection with "significant deficiencies" at the beach house; 2) deficiencies, uncovered by an investigation "relate to the design/installation" of various building components; and 3) deficiencies "have led to significant damage" to the beach house. The Letter was intended to place Respondent on notice of a potential claim and instructed Respondent to "forward this letter to your attorney and to your insurance agent/broker and any known liability insurance carriers." (R. pp. 1469-1470).

As noted in the Order and hereinafter, Appellant named Respondent as a defendant on October 8, 2014. (R. p. 33). The Trial Court concluded The Letter notified

respondent "of a potential claim against it, due to design and construction deficiencies" and "was sent more than three years and seven months before the lawsuit was filed against [Respondent] in October of 2014." Id. In consideration of The Letter, the Trial Court concluded that "[t]he clear and undisputed evidence before the Court establishes that [Appellant] was on notice of the alleged defects[. . .] in the design work performed by [Respondent] for more than three years prior to filing this lawsuit." Id.

Despite taking issue with several specific points within the Order, Appellant has failed to challenge the Trial Court's ruling that The Letter confirmed Appellant's knowledge of claims against SRW and established that prosecution of those claims was made outside the relevant statute of limitations period. It is well-settled, that "an unappealed ruling is the law of the case and requires affirmance." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). "Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case." Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 249-50, 772 S.E.2d 505, 508 (2015); See also Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating . . . , [*inter alia*,] matters that were not raised on appeal, but should have been . . . ."). Further, "[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Atl. Coast Builders & Contrs., LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

Although Appellant challenges several of the Trial Court's rulings, Appellant has failed to appeal this ruling. The failure to do so renders the Trial Court's conclusion, that The Letter is "clear and undisputed evidence" that Appellant had actual knowledge of the alleged defects more than three years prior to filing suit against Respondent SRW, the law of the case. See Shirley Iron Works. Moreover, because this issue establishes that Appellant's claims were made outside the statute of limitations period, this issue is dispositive of the instant appeal as it relates to Respondent SRW.[1] Accordingly, the Trial Court's Order should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SRW'S MOTION FOR SUMMARY JUDGMENT.

A. Appellant failed to pursue claims against Respondent SRW within the applicable statute of limitations period.

The statute of limitations period for a construction defect case is three years. S.C. Code Ann. § 15-3-530. Appellant had actual and constructive knowledge of defects with her beach house as early as 1999 and was provided with further notice continuously thereafter from a myriad of sources, yet did not pursue her claim against Respondent until October 8, 2014. (See Resp. RCA Final Brief, pp. 2-16). Appellant's assertion that the statute of limitations did not expire prior to the filing of this action is wholly without merit as will be detailed herein.[2]

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[1] Without waiving its argument that the failure to appeal the Trial Court's ruling concerning The Letter is dispositive of this appeal, Respondent will also respond to Appellant's arguments.

[2] With the primary distinction between Respondent RCA and Respondent SRW being The Letter addressed only to SRW and the timing of the litigation against each by Appellant, the arguments and analysis in opposition to this appeal, as set forth in Respondent RCA's Initial Brief, are equally applicable to SRW in its nearly identical position. Accordingly, SRW fully incorporates the arguments and analysis contained in Respondent RCA's Initial Brief as if set forth herein.

Statutes of limitations are not simply technicalities. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008). "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "One purpose of a statute of limitations is "to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights." Id. The Statute of limitations also works "to protect potential defendants from protracted fear of litigation." Id. (internal citation omitted). "Statutes of limitations are, indeed, fundamental to our judicial system." Id. (internal citation omitted).

Under the "Discovery rule," the statute of limitations period begins to run on a cause of action when it "reasonably ought to have been discovered." Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). "Under this rule, a cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that he *might* have a remedy for a harm. Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004), *citing* Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). The statute runs from 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." Rumpf, 357 S.C. at 394, 593 S.E.2d at 187. Put another way, the statute of limitations commences not simply due to knowledge, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause

of action against another. Grillo v. Speedrite Prods., Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000).

The commencement of the statute of limitations is not triggered by seeking the advice of counsel, once a full-blown theory of recovery is developed, or even when a person obtains actual knowledge of a potential claim or the facts giving rise thereto; rather, the statute of limitations commences when the party knows or should know of a claim under an objective analysis. Grillo, 340 at 503, 532 S.E.2d at 3; Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989). Moreover, "the fact that the injured party may not comprehend the full extent of the damage is immaterial." Dean, 321 S.C. at 364, 468 S.E.2d at 647 (1996).

In the case at hand, the Trial Court was presented with uncontested facts that Appellant had both actual and constructive knowledge of persistent and pervasive damage to her beach home beginning as early as 1999. (See Resp. RCA Final Brief, pp. 2-16). These known defects led Appellant to retain several experts and contractors to inspect and implement partial repairs on the beach home; however, despite having actual and constructive knowledge of said defects, Appellant did the very thing the statute of limitations seeks to guard against—she sat on her rights. Now, at this late date, Appellant is seeking to overturn the Trial Court's well-reasoned Order so that she may resurrect her claims that she was aware of for over a decade before filing suit.

B. The Trial Court applied the correct standard of review.

Appellant contends the Trial Court erred by failing to view the evidence in the light most favorable to her as the non-moving party. (App. Brief, pp. 11-14). Appellant

further argues the Trial Court selected "unfavorable" evidence for inclusion in the Order for Summary Judgment in lieu of citing evidence that was seemingly more in favor of Appellant's position. (App. Brief, pp. 11-14). Appellant cites two instances of "unfavorable" evidence in her brief and contends that inclusion of that evidence serves as proof the trial court did not apply the correct summary judgment standard, and thus, warrants reversal of the Trial Court's Order. (App. Brief, pp. 12-14). However, Appellant did not challenge the inclusion of that evidence in the Order for Summary Judgment before the Trial Court in her Rule 59 Motion. Instead, Appellant has raised this argument for the first time in her initial brief. See Prince v. Beaufort Mem. Hosp., 392 S.C. 599, 611, 709 S.E.2d 122, 128 (Ct. App. 2011) (stating it is "axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Accordingly, Appellant's argument was not preserved for appellate review and should not be considered by this Court.

In addition to the failure to preserve this argument for appellate review, Appellant has not challenged the accuracy of the two instances of "unfavorable" evidence; rather, Appellant simply contends that the evidence is not favorable to her position. In fact, Appellant has not challenged any of the evidence included in the Trial Court's detailed, twenty page findings of fact, which firmly establishes Appellant had knowledge of the alleged defects in her beach house as early as 1999. (R. p. 11-33). The mountain of evidence, discussed exhaustively in the Trial Court's Order, details Appellant's knowledge of water intrusion and other issues reported to her repeatedly by houseguests, a property manager, contractors, engineers, and experts from 1999 until initiation of this

lawsuit. Appellant has not challenged that she was informed by these individuals of the issues with her beach house and has not presented any conflicting evidence. See Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (stating "[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings."); See Ellis v. Davidson, 358 S.C. 509, 518-19, 595 S.E.2d 817, 822 (Ct. App. 2004) (stating to defeat summary judgment the nonmoving party must come forward with specific facts showing there is a genuine issue for trial). Accordingly, the facts, as set forth in the Order are not at issue in this appeal. Rather, Appellant's argument is nothing more than a challenge of the Trial Court's reliance on uncontested evidence that Appellant believes is "unfavorable." However, Appellant has not challenged the veracity of the evidence nor has she presented conflicting evidence to create a question of fact. Instead, Appellant is seeking the reversal of the Trial Court's decision because the Order cites "unfavorable" evidence.

Appellant's squabble with the Trial Court's Order of Summary Judgment is simply a by-product of a case devoid of favorable facts that leaves no question for jury determination. The Trial Court's consideration and inclusion of facts that Appellant deems "unfavorable" is not indicative of the Trial Court's disregard for the proper summary judgment standard of viewing facts in the light most favorable to the non-moving party. Rather, the Trial Court was presented with an abundance of uncontested evidence that, even when viewed in the light most favorable to appellant, failed to create a reasonable inference necessary to survive summary judgment. Moreover, viewing evidence in the light most favorable to the nonmoving party does not require a trial court

to turn a blind eye to unchallenged evidence, simply because it may not benefit the party opposing the motion. A trial court "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000).

Accordingly, Appellant's disagreement with the facts relied upon and cited by the Trial Court does not equate to an instance of the Trial Court disregarding the appropriate standard of review for a summary judgment motion. The Trial Court evaluated this case under the proper standard and correctly determined that no question of fact for a jury existed. Accordingly, this Court should affirm the Trial Court's Order for Summary Judgment.

C. The Trial Court relied on well-founded case law.

Appellant challenges the trial court's reliance on Dean and Barr[3], and contends the trial court erred in failing to consider and apply the Santee[4], Centex Homes[5], McAlhaney[6], and Holly Woods[7] cases. The Trial Court committed no error in the case law it relied upon to form the basis of the Order of Summary Judgment.

As an initial matter, Appellant has not fully preserved the arguments in Appellant's Section B for appellate review. As discussed in more detail below, the Trial Court included a discussion of the Dean and Barr opinions in its Order. Appellant did not

[3] Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998).
[4] Santee Portland Cement Co.v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989).
[5] Centex Homes v. S. Carolina State Plastering, LLC., 2010 WL 2998519.
[6] McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).
[7] Holly Woods Assoc. of Residence Onwers v. Hiller, 385 S.C. 344, 682 S.E.2d 818 (Ct. App. 2009).

challenge the inclusion of those opinions in the Order for Summary Judgment via its Rule 59 Motion. Accordingly, any argument regarding the inclusion or reliance upon Dean and Barr is a new argument and not preserved for appellate review. See Regions, 354 S.C. at 662, 582 S.E.2d at 439 (Ct. App. 2003) (stating it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Moreover, although Appellant challenges the Trial Court's perceived failure to consider or apply the Holly Woods and McAlhany opinions in her Rule 59 Motion, Appellant failed to raise a similar argument concerning the Santee and Centex opinions. Accordingly, Appellant's arguments regarding Santee and Centex are not preserved for appellate review. Id.

Additionally, Appellant's argument that Dean and Barr are inapplicable to the case at hand because they do not involve latent defects is meritless. Appellant premises her arguments on the assertion that the defects in her beach house were latent, and thus, undiscoverable until the beach house was decladded. Yet, Appellant has not presented any evidence that the alleged defects were in fact latent. Rather, Appellant has merely set forth bits of evidence that indicate the defects complained of were not fully appreciable until the beach house was decladded. This is a key distinction. As discussed more fully above, the statute of limitations begins to run once a person has notice that she *might* have a remedy for a harm. See Rumpf, 357 S.C. at 394, 593 S.E.2d at 187. The uncontested evidence leaves no room for contrary interpretation: Appellant had knowledge of construction defects in her beach house for more than three years prior to the initiation of this lawsuit. While Appellant may not have fully appreciated the extent of the damage, the cause of the damage, or even who was responsible for the damage,

under the discovery rule, those considerations are meaningless. The uncontested facts demonstrate that Appellant had knowledge of defects and was continuously informed of defects from 1999 until 2011, and her contention that the defects were latent or undiscoverable is simply not supported by any evidence.

Moreover, even assuming that said defects were indeed latent, the fact remains that Appellant had notice of those latent defects as far back as 1999. That is to say, regardless of whether the alleged defects were latent, Appellant had *actual knowledge* of possible claims for damage from water intrusion for nearly a decade before she asserted claims against Respondent, as evidenced by Appellant's own testimony and the testimony of others. Dozens of records provided to Appellant, from as far back as 1999, document Appellant's knowledge of chronic and continuous water intrusion at the roof, through and into exterior walls, at windows and doors, and into the basement, as well as extensive damage to interior finishes resulting from these longstanding leaks. Therefore, the mere fact the Dean and Barr cases, cited by the Trial Court, do not involve latent defects does not render those cases inapplicable.

In the Dean matter, Dean noticed a crack in the facade of her structure that manifested following pile driving taking place nearby in 1984. Dean, 321 S.C. at 362, 486, S.E.2d at 646-47. Dean had the building inspected and was admittedly aware that the crack was a result of the pile driving by defendant Ruscon. Id. In 1985, further pile driving occurred and the crack grew to the extent that the structure was deemed structurally unsound. Id. The trial court determined and the Supreme Court agreed that the statute of limitations began to run when Dean initially discovered the *first* crack. 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." Dean, 321 S.C. at 365, 486, S.E.2d at 647. (emphasis added). Further, the court held, "the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial." Dean, 321 S.C. at 366, 486, S.E.2d at 647.

While there are factual distinctions unique to Dean and the case at hand, the Dean opinion presents an analogous situation and an applicable analysis. In both cases, the owner of a building discovered damage which led them to investigate the problem; however, despite actual knowledge of damage and a corresponding claim, neither owner pursued their claim in a timely manner. There is no question Appellant was aware of water intrusion problems with her home for over a decade before initiating the present litigation. See Resp. RCA Final Brief pp.2-16. Simply because Appellant did not comprehend that the water intrusion was a symptom of a larger problem, despite warnings to her about the same, is immaterial. As in Dean, Appellant had notice of the problems with her beach home, and despite investigating, and further learning about those problems, Appellant did not initiate the lawsuit until well after expiration of the statute of limitations.

Appellant contends that the McAlhaney opinion, which was decided after issuance of the Trial Court Order, distinguishes Dean and further renders it inapplicable to the case at hand. Appellant is mistaken in this regard. In McAlhaney, plaintiff filed suit for property damage and a personal injury claim relating to mold found in his residence. Id., 415 S.C. at 57-62, 781 S.E.2d at 107-110. This Court overturned the trial court's granting of summary judgment finding a question of fact concerning Plaintiff's

notice of an alleged defect was created by Plaintiff's inconsistent testimony. Id., 415 S.C. at 63-66, 781 S.E.2d at 110-112. In discussing Plaintiff's personal injury claim, the Court discussed Dean and determined that the personal injury claim created enough of a factual difference to distinguish Dean. Id., 415 S.C. at 66-69, 781 S.E.2d at 112-114. The McAlhaney opinion does not discredit the analysis in Dean. Moreover, the same factual distinctions in McAlhaney and Dean also renders McAlhaney inapplicable to the present case. Accordingly, the Trial Court did not err in its reliance on Dean and did not err in refusing to alter or amend its judgment to include analysis of the McAlhaney opinion.

In Barr, this Court affirmed the granting of summary judgment for a defendant based on the statute of limitations. The Court determined several termite inspection reports noting moisture in the crawl space of plaintiffs' residence was sufficient notice of water damage to trigger the running of the statute of limitations. Barr, 330 S.C. at 645-46 640 S.E.2d at 160. Appellant contends Barr is inapplicable to the case at hand because the plaintiffs did not act upon information regarding moisture in the crawlspace whereas Appellant took action to investigate and make certain repairs to her residence. Appellant overlooks the key factual element that links Barr and the case at hand. In both Barr and the instant case, home owners were presented with information that triggered the running of the statute of limitations and both failed to timely file suit. The Trial Court did not err in its application of Barr. Accordingly, the Trial Court's Order should be affirmed.

In addition to her claim that the Trial Court relied on inapplicable case law in rendering its decision, Appellant contends the Trial Court should have relied upon the Santee and Centex Homes decisions. The Santee Cement factory was equipped with

several concrete pocket bins one of which exhibited two minor cracks in its concrete exterior. Santee, 299 S.C. at 270-74 384 S.E.2d at 693-96. The cement factory contacted the original contractor who implemented "permanent" repairs to the cracks and performed inspections of the remaining bins. Id. The contractor certified that the remaining bins were safe and that the cracks were minor and common in such structures. Id. Subsequently, a different bin collapsed killing two individuals. Id. The Court responded to arguments that the statute of limitations began running on the date the crack was discovered in the aforementioned bin. Id. However, it was determined that the collapse of the bin was a result of defective placement of steel imbedded within the concrete walls of the bin. Santee, 299 S.C. at 270-74 384 S.E.2d at 693-96. The Santee Court determined that because the issue with the steel was undetectable, a jury question existed with respect to the reasonableness of Santee's actions following discovery of the cracks. Id.

Appellant tries to paint a picture in which her situation is analogous to that of Santee. However, the facts do not comport with such a tortured comparison. Santee presents a scenario wherein the Court was asked to start the clock on the statute of limitations after the discovery of a "minor" and "common" crack in the exterior of a concrete bin, even though a different bin collapsed as the result of a latent defect within its walls. Here, Appellant was presented with instances of chronic and extensive water intrusion into her beach home for over a decade. The Santee Court determined the defect in the Concrete bin was undetectable. In this matter, the damage to Appellant's beach home was apparent to not only Appellant, but to beach house guests, property managers, contractors, engineers, and others. In Santee, the Court had to determine whether a

common and minor crack was notice of a defect that led to an unthinkable and catastrophic result. In direct contrast to Santee, the matter before this Court presents the all too predictable scenario in which a homeowner who has experienced wide-spread and pervasive water intrusion in their home has alleged construction and design defects against those responsible for designing and constructing the house. The present case simply fails to draw any parallel to the Santee case, thus, the Trial Court did not err in its treatment of the Santee decision.

Appellant also relies on a Federal District Court Order in Centex Homes to bolster her argument that her claim is not time barred. In Centex Homes, Judge Wooten denied a motion for summary judgment premised upon the statute of limitations. Centex Homes, 2010 WL 2998519. Centex discovered and repaired water intrusion damage in building 3 of a multifamily project in 2002. Id. In 2006, Building 1, constructed around the same time as Building 3, began to exhibit signs of water intrusion damage. Id. In 2008, Centex initiated litigation against its subcontractors, in part for the damage to Building 1. Id. Several subcontractors argued that since building 1 was constructed by many of the same subcontractors, and in a substantially similar method, Centex should have been on notice of a claim regarding Building 1 when the problems with building 3 were discovered in 2002. Id. The Court noted that, although it was a close question, a question of fact existed for the jury. Id.

Appellant once again seeks to bootstrap the ruling in an inapplicable case to the facts at hand. In Centex Homes, the subcontractors sought to impute Centex with knowledge of *unknown* defects in one building because a similar building had experienced problems several years prior. In direct contrast, Appellant had *direct*

knowledge of problems with her beach home for over a decade before filing suit. The Centex Homes decision has no direct correlation to the Appellant's situation as there is no question or dispute that Appellant had *actual knowledge* of defects that had clearly manifested themselves continuously and conspicuously for over a decade. Appellant's reliance on Centex Homes is a vain attempt to create a question of fact in a matter where no such question exists. The trial court did not err in its refusal to apply the reasoning of the Centex Homes Order.

Appellant further contends the Holly Woods case applies to the matter at hand and supports her contention that the Trial Court erred in its analysis. However, in Holly Woods, this Court considered evidence presented by Plaintiffs that drainage problems in a neighborhood were different than problems that were addresses several years prior. Holly Woods, 385 S.C. at 178-85, 682 S.E.2d at 791-94. In the case at hand, Appellant has not presented any evidence that the defects alleged in her Complaint differ from any of the issues known to her since well before the expiration of the statute of limitations. Accordingly, the Holly Woods case is inapplicable to the case at hand, thus the Trial Court did not err in its refusal to rely on its holding in reaching its decision.

D. The Trial Court did not err in finding Appellant chose not to act with reasonable diligence.

Appellant contends a question of fact exists with respect to the determination of whether she acted with reasonable diligence concerning the defects in her beach house. However, as an initial matter, it is important to recall that Appellant, through counsel, sent correspondence to Respondent more than three years prior to filing suit, which put Respondent on notice of a claim, and directed Respondent to place its insurance carrier

on notice of said claim. This fact, which was relied on by the Trial Court, and has been ignored by Appellant, is dispositive of this appeal and renders Appellant's arguments regarding reasonable diligence moot.

Moreover, with respect to Appellant's reasonable diligence arguments, Appellant fails to consider well-founded South Carolina concerning the exercise of reasonable diligence and are further unsupported by citations to statutory or case authority. See Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (stating issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal). Moreover, the factual considerations noted by Appellant fail to create a question of fact.

In Dean, the Supreme Court stated:

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from 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. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on ***notice*** that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Dean 321 S.C. at 363-64, 468 S.E.2d at 647 (emphasis in original) (citations omitted). The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Hedgepath v. AT&T, 348 S.C. 340, 356, 559 S.E.2d 327, 336 (Ct. App. 2001).

Reasonable diligence is intrinsically tied to the issue of notice. Id. This Court has explained: "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000) (quoting Dean, 321 S.C. at 364, 468 S.E.2d at 647). Furthermore, the statute of limitations is "not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

Adapted to suit Appellant's current needs and in hopes of bettering her chances to seek reversal of the Trial Court's Order, Appellant claims she received "conflicting" advice, sought to investigate the issues, and believed the problems related to maintenance, and, as such, based on that story, the statute of limitations did not begin to run until 2011. Such a version of events completely misconstrues and disregards the precedent concerning the discovery rule and reasonable diligence. The statute of limitations is not triggered when Appellant knew she had a claim against a particular party, when Appellant received un-contradicted advice, or when Appellant discovered the cause and extent of the damage. Instead, the law is abundantly clear that the determination of when the statute of limitations is tied to when a cause of action reasonably ***ought*** to have been discovered; not when it was discovered. See Dean 321 S.C. at 363-64, 468 S.E.2d at 647. Further, discovery of the cause of action is accomplished through the exercise of reasonable diligence, which requires an injured

party to act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party ***might*** exist. See Young v. S.C. Dep't of Corrs., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) (Stating, "[i]n other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.").

In the case at hand, Appellant was unquestionably presented with notice of a claim over three years prior to filing suit against Respondent, as evidenced by the mountain of evidence considered by the Court, and especially given The Letter from Appellant putting Respondent SRW on notice of the present claim. In addition to the unchallenged fact that Appellant sent a letter to Respondent putting it on notice of her claim over three years prior to adding Respondent to the lawsuit, for over a decade, Appellant was presented with instance after instance of explicit notice that her beach home had major problems. Appellant's arguments that she was not on notice of her claim until the home was decladded is a bold request to this Court to disregard uncontested evidence of more than a decade of actual and constructive knowledge of pervasive water intrusion issues because Appellant received contradicting advice or because she may have believed the issues were related to maintenance. Such a conclusion would be in contravention of well-settled law. The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Maher, 331

S.C. at 377, 500 S.E.2d at 207. Accordingly, Appellant's subjective mental impressions as to what she attributed the decade of damage to her beach house is immaterial.

Appellant also asserts a jury question exists as to the reasonableness of her actions because she decided not to take "unprecedented" measures "to deconstruct" her beach house until 2011. Appellant argues that despite uncontested evidence of repeated notice that her beach house had significant problems, the statute of limitations was not triggered until she determined the root cause of the problems, over a decade after first receiving notice of the alleged defects. Simply put, Appellant is arguing that the statute of limitations should not begin to run until such time as a plaintiff discovers the specific cause and full extent of the damage complained of. This is not the law. Rather, the Courts are charged with the determination of when a reasonable person ought or might have knowledge of a ***potential claim***; not when a full blown theory of recovery is developed. See Barr, 330 S.C. at 645, 500 S.E.2d at 160 (stating failure of the injured party to comprehend the full extent of damages, however, is immaterial). Appellant's argument does not comport with the law on this issue and should not be the basis for reversal of the Trial Court's order.

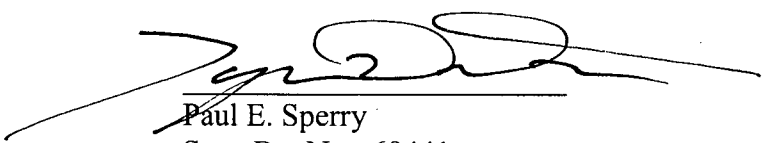
Furthermore, Appellant indicates that it is Respondents' position that the "law required" Appellant to "deconstruct" her beach house in order to exercise reasonable diligence. Such a contention is in error. Rather, Respondent contends Appellant was placed on notice of construction defects in her beach house beginning in 1999, and continuously thereafter, which would put any reasonable person on notice that a claim against the entities responsible for designing and constructing her beach house might exist. See Joubert, 341 S.C. at 190, 534 S.E.2d, p. 8 (stating the exercise of reasonable

diligence means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist). Such is the standard defining the discovery rule, a standard that Appellant failed to meet. While decladding the beach house may have been necessary to discovery the full extent of the damage, that information is irrelevant to this statute of limitations determination. See Dean 321 S.C. at 363-64, 468 S.E.2d at 647.

CONCLUSION

Therefore, for the reasons discussed herein, through all facts and arguments incorporated from the Initial Brief of Respondent RCA, and under any ground appearing in the Record the Court deems just and proper to consider, Respondent SRW submits that the Trial Court's Order should be affirmed.

Respectfully,



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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

RECEIVED
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SC Court of Appeals

Appellate Case No. 2016-000471

Maria Allwin.....Appellant,

v.

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

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

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

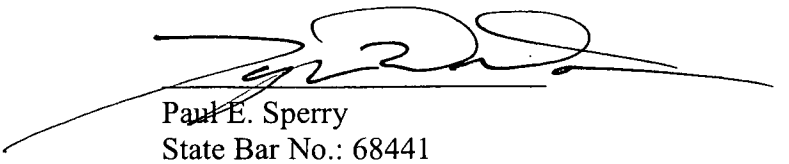
v.

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 Respondent Shope Reno Wharton's Final Brief complies with South Carolina Rule of Appellant Procedure 211(b).

[signature block to follow]



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