THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2018-001089

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SC Court of Appeals

Gwendolyn Brown, individually, and as natural guardian of Quintez Lee Sapp, Deville Kiez Simmons, Haroldett Uneke Simmons, and Glenn Simmons, Plaintiffs,

Of whom Gwendolyn Brown, Deville Kiez Simmons, and Haroldett Uneke Simmons are.....Appellants,

vs.

Housing Authority of the City of Charleston, South Carolina.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR WHEN IT APPLIED THE TWO-YEAR STATUTE OF LIMITATIONS FOUND IN THE SOUTH CAROLINA TORT CLAIMS ACT TO THIS TORT CLAIM AGAINST A GOVERNMENTAL ENTITY?

II. EVEN IF THE CLAIMS ARE NOT TIME BARRED, IS RESPONDENT NONETHELESS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE INSUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIMS?

III. EVEN IF THE CLAIMS ARE NOT TIME BARRED, IS RESPONDENT NONETHELESS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE PLAINTIFFS DID NOT GIVE NOTICE TO DEFENDANT AS REQUIRED BY THE RESIDENTIAL LANDLORD TENANT ACT?

STATEMENT OF THE CASE

The Appellants filed the Summons and Complaint on August 4, 2010 and filed the Amended Summons and Complaint on August 17, 2010. This action was dismissed pursuant to SCRCP Rule 40(j) and then reinstated on November 15, 2013. The Appellants then filed a Second Amended Complaint on August 14, 2017, which alleges that from 2003 to 2009, the Plaintiffs resided in a housing unit owned and operated by the Respondent, Housing Authority of the City of Charleston ("Housing Authority").

Gwendolyn Brown ("Ms. Brown") alleges that she fell through the floor located in the foyer area of her home upon entering the front door on August 9, 2007. She further alleges that this fall resulted in a loss of consciousness and a strained ankle. Ms. Brown and her four children all allege that they have suffered various "irritations, discomfort, and restrictions" as a result of their exposure to mold that allegedly existed in the housing unit. Ms. Brown and her children further allege in their Second Amended Complaint that they first became aware of the mold and the connected problems therewith upon the diagnosis of Quintez Sapp, in or about the month of February 2008. Subsequently, Ms. Brown and all four of her children allegedly developed symptoms they connect to the presence of mold. They have brought causes of action for breach of promise, violations of S.C. Code 27-40-10 et. seq., negligence, and gross negligence.

Housing Authority brought a motion for summary judgment under multiple theories, including that the claims were time barred because they were filed outside the proscribed statute of limitations. Oral arguments were heard

February 7, 2018, and on May 7, 2018 the trial court entered an order granting in part Housing Authority's motion for summary judgment as to claims brought by Ms. Brown and two of her children, Deville Simmons and Haroldlett Simmons, concluding that they were barred by the statute of limitations. Housing Authority was served with a notice of appeal on June 11, 2018.

ARGUMENTS

I. The statute of limitations set forth in the South Carolina Tort Claims Act controls in this case.

The issue before the Court is whether, in a suit alleging a tort arising from a landlord/tenant relationship against a governmental entity, the Court should apply the two-year statute of limitations set forth by the South Carolina Tort Claims Act ("TCA") or the three-year statute of limitations set forth by the South Carolina Residential Landlord Tenant Act ("RLTA").

The TCA "restores the tort immunity of governmental entities except as waived by the Act itself." *Benton v. Robert C. Peace Hosp.*, 313 S.C. 520, 523, 443 S.E.2d 537, 538, rehearing denied (1994). The TCA provides the exclusive means of relief for all tort claims against governmental entities. *See Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998). The statute itself explicitly provides that "[t]he remedy provided by [the Tort Claims Act] is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents . . . ." S.C.Code Ann. § 15–78–20(b) (Supp.2002).

Later, the statute again reinforces that "[the Tort Claims Act] constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C.Code Ann. § 15–78–70(a) (Supp.2002).

When interpreting the TCA with other statutes, the TCA controls. This principle was exemplified in *Benton v. Robert C. Peace Hosp.*, where a negligence action against a rehabilitation hospital that was both a government health care facility and a charitable organization was found to be governed by the Tort Claims Act (§§ 15-78-10 et seq.), rather than the liability statute for charitable organizations (§ 33-55-200), because the Tort Claims Act clearly states that it provides the *exclusive remedy* for governmental torts such as those at issue. *See Benton, supra*, 313 S.C. at 523.

Ms. Brown and her children have brought their claims under the RLTA, codified at S.C. Code Ann. §§ 27-40-10, et seq. (while Ms. Brown frames one of her claims as a "breach of promise," any alleged promise to her in this landlord/tenant context would arise under the RLTA). This Court held in *Watson v. Sellers* that "the RLTA explicitly creates a cause of action **in tort** . . . ." 299 S.C. 426, 436, 385 S.E.2d 369, 373 (Ct.App. 1989) (emphasis added). Again, the *exclusive* remedy for an action in tort against a governmental entity is the TCA. Appellants cite a number of cases in an attempt to reconcile the different statute of limitations provisions provided by the TCA and the RLTA in their favor. However, none of those cases deal with a tort claim brought against a state actor, which is the heart of this case. Because they are suing a governmental entity in tort, Ms. Brown and her children must comply with the TCA; it is the

identity of the defendant as a state actor, and not the statutory source of the tort claim, that controls.

Any action brought pursuant to the TCA is forever barred unless commenced within two years after the date the loss was or should have been discovered. S.C. Code Ann. § 15-78-110. According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (citing *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989)). 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. *Id.* (citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)).

Here, Ms. Brown knew or should have known that her cause of action arose as a result of her fall on August 9, 2007. Therefore, when she filed her claim on August 4, 2010, the two year statute of limitations imposed by the TCA had already expired. Ms. Brown and her children who are party to this appeal, Deville Simmons and Haroldlett Simmons, had notice of their cause of action at least as early as October 4, 2007, when attorney Anne L. Peterson-Hutto wrote a letter on their behalf addressing medical conditions they "suffered as a result of mold exposure since they moved in their residence." (Letter to the City of Charleston Housing Authority dated October 4, 2007). Again, when the claim was filed on August 4, 2010, the two year statute of limitations had already expired. This is true even if, arguendo, we were to accept as true the allegation

that Ms. Brown and her children first became aware of the alleged effects of the mold in or about February 2018, two and one-half years before they filed their claim.

II. EVEN IF THE CLAIMS ARE NOT TIME BARRED, RESPONDENT IS NONETHELESS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFFS HAVE INSUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIMS.

Relying on *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), Housing Authority respectfully submits the following alternative theories for why, even if the Court concludes that the claims of Ms. Brown and her children are not time barred, Housing Authority is nonetheless entitled to summary judgment. In addition to the statute of limitations barring the claims, the Housing Authority submits that Ms. Brown and her children have failed to establish any material fact upon which a jury could conclude the Housing Authority is liable to them.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. *State v. White,* 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The qualification of a witness as an expert is within the discretion of the circuit court, and the Court of Appeals has refused to reverse a trial court's determination absent an abuse of that discretion. *Watson v. Ford Motor Co.,* 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010).

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson,* 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* It is this final requirement of reliability which is the central feature of the inquiry. *White,* 382 S.C. at 270, 676 S.E.2d at 686.

Housing Authority submits that the allegations regarding injury as a result of exposure to mold are beyond the ordinary knowledge of a jury, thus requiring expert testimony. Ms. Brown and her children have named Dr. Patricia Gerber as an expert witness. Accordingly, Dr. Gerber was deposed on January 24, 2017 and February 20, 2017, regarding her care and treatment of Ms. Brown and her children for their allergies. For the various reasons outlined below, Dr. Gerber did not treat any of them for mold-related allergies.

1. Dr. Gerber Testimony

a. Treatment of Gwendolyn Brown

Dr. Gerber testified that she first treated Ms. Brown on June 20, 2008. (Deposition of Patricia S. Gerber p. 17). Ms. Brown informed Dr. Gerber that she lived in a moldy apartment, and Ms. Brown attributed her allergy symptoms to mold exposure. (Deposition of Patricia S. Gerber p. 20). Dr. Gerber testified that per the 2008 and 2011 ImmunoCap testing results, Ms. Brown suffered little mold

sensitivity but did note issues with dust mites and cockroaches. (Deposition of Patricia S. Gerber p. 48, 56-58). Dr. Gerber testified that dust mites are the materials that are most probably causing Ms. Brown's allergy symptoms to a reasonable degree of medical certainty. (Deposition of Patricia S. Gerber pp. 56 - 58). Thus, Ms. Brown's own treating physician does not associate Ms. Brown's symptoms with mold exposure. There is no evidence on the record to support that Ms. Brown suffered injuries related to mold exposure. Thus, there is no genuine issue of material fact and this Court must grant summary judgment in favor of Housing Authority against Ms. Brown.

b. Treatment of Deville Kiez Simmons

Dr. Gerber testified that she did not treat Deville Simmons. (Deposition of Patricia S. Gerber p. 17). To date, Deville Simmons has failed to submit any evidence linking his alleged mold exposure to any injuries. Because there is no genuine issue of material fact upon which a jury could decide, this Court must grant summary judgment in favor of Housing Authority against Deville Simmons.

c. Treatment of Haroldlett Uneke Simmons

Dr. Gerber testified that she first encountered Haroldlett Uneke Simmons on June 27, 2008. (Deposition of Patricia S. Gerber p. 78). On that encounter, Dr. Gerber was unable to test Haroldlett. Simmons and recommended she come back for a Southeast allergy panel, food and mold testing. (Deposition of Patricia S. Gerber pp. 78, 79). However, Haroldlett Simmons never returned for a follow-up appointment. (Deposition of Patricia S. Gerber pp. 79, 84). Additionally, Haroldlett Simmons has failed to submit any evidence that she suffered injuries

as a result of alleged exposure to mold. Thus, there is no genuine issue of material fact and this Court must grant Housing Authority summary judgment against Haroldlett Simmons.

2. Presence of Mold is Not Negligent

a. Cyrus Higgs Testimony

Written discovery revealed that Mr. Cyrus Higgs with Mold Detector of Mount Pleasant was hired to conduct a mold analysis of the potential mold levels in the apartment at issue. Mr. Higgs testified in his deposition that he conducted a spore trap sample of Ms. Brown's apartment on September 2, 2008. (Deposition of Cyrus Higgs pp. 5, 9). Mr. Higgs testified that he took two samples: one from the upstairs hallway near the bedrooms and one from outside the house in order to cross-reference the samples. (Deposition of Cyrus Higgs pp. 9, 10). Once Mr. Higgs collected the samples, he sent the samples to Pro-Lab in Westin, Florida for analyses. (See Deposition of Cyrus Higgs p. 14). Mr. Higgs then received a report from Pro-Lab. In this case, the mold analysis report generated for Ms. Brown came back as "not elevated." (See Certificate of Mold Analysis Report dated September 4, 2008 p.5). Mr. Higgs explained that "not elevated" means that there are more mold spores outside than there are inside Ms. Brown's apartment. (Deposition of Cyrus Higgs pp. 15, 16). Specifically, Mr. Higgs testified that the report shows the spore county outside the home was 8,640 and inside the home was 1,560. (Deposition of Cyrus Higgs pp. 16, 17). Mr. Higgs testified that if the level of mold in your house is not elevated, then that

is an acceptable level of mold and in fact normal. (Deposition of Cyrus Higgs p. 29).

Mr. Higgs testified that mold is everywhere, you cannot get away from it. (Deposition of Cyrus Higgs p. 8). Mr. Higgs further testified that mold comes into your house when you walk in. It comes in on your clothing. It comes in on your shoes and also when you open a door or window you get like a breeze that comes through, or if people open their windows for an extended time you'll get some mold coming from outside. (Deposition of Cyrus Higgs pp. 8, 9).

b. Dr. Gerber Testimony

Dr. Gerber testified that mold is everywhere and one could expect to find it in most buildings, including her own medical building in which she treats patients. (Deposition of Patricia S. Gerber p. 10). Dr. Gerber went on to say that, "mold is ubiquitous, it's everywhere in the Lowcountry, because we live in a humid environment." (Deposition of Patricia S. Gerber p. 46). Dr. Gerber elaborated even further stating, "it's next to impossible in the Lowcountry to have a mold-free home. You know, if you had a meticulous house cleaner in a brand-new place – but even a brand-new home, within weeks to months in the Lowcountry, gets mold in it." (Deposition of Patricia S. Gerber p. 51). Dr. Gerber concluded stating that mold is "something you would expect. It's standard." Id. Thus, it is not negligent for mold to be present in the Ms. Brown's home. Mold is everywhere.

Ms. Brown and her children have failed to submit any evidence from any expert that the presence of mold in a house is negligent. In fact, it is the

consensus of both experts identified that mold in a house is normal. Thus, even taking the evidence in the light most favorable to Ms. Brown and her children, a jury could not find that it is negligent to have such levels of mold in your house, because mold is everywhere.

III. EVEN IF THE CLAIMS ARE NOT TIME BARRED, RESPONDENT IS NONETHELESS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE PLAINTIFFS DID NOT GIVE NOTICE TO DEFENDANT AS REQUIRED BY THE RESIDENTIAL LANDLORD TENANT ACT.

Ms. Brown and her children allege a breach of the rental agreement under S.C. Code Ann. Section 27-40-10 et. seq. Under section 27-40-610(a) of the South Carolina Code, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with section 27-40-440 materially affecting health and safety or the physical condition of the property, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen days after receipt of the notice if the breach is not remedied within fourteen days. The Plaintiffs have not submitted any evidence of written notice of any material noncompliance in accordance with section 27-40-610(a).[1] In *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009), the Court of Appeals reaffirmed that "the Landlord–Tenant Act **require[s] written notice** to the landlord specifying the acts and omissions constituting the breach and failure

[1] While the record does contain the aforementioned letter from Anne L. Peterson-Hutto notifying the Housing Authority of Ms. Peterson-Hutto's clients' alleged injuries, the letter does not satisfy the requirements of the RLTA because it both fails to specify that the rental agreement will terminate and it fails to give Housing Authority the requisite fourteen days to cure the alleged breach. (Letter to the City of Charleston Housing Authority dated October 4, 2007). The letter is merely a notice of an impending lawsuit.

of the landlord to make the necessary repairs after notice." *Thompson v. CDL Partners LLC*, 378 F. App'x 288, 292 (4th Cir. 2010)(emphasis added). Both in *Code* and *Thompson*, the court concluded that the plaintiff could not state a claim under the SCRLTA without having provided written notice to the landlord. Thus, this Court must grant Defendant summary judgment as there is no issue of material fact that Plaintiff did not provide the Defendant written notice of the material noncompliance.

If for the sake of argument, the Court finds that such notice was provided, pursuant to S.C. Code Ann. Section 27-40-610(b), the Plaintiffs' recovery would be limited to actual damages. To date, the Plaintiffs have not submitted any evidence of damages with regards to the alleged breach of the rental agreement caused by the Defendant. As such, the Plaintiffs have failed to prove an element essential to this cause of action and summary judgment in favor of the Defendant must be granted.

CONCLUSION

Any action based in tort against a governmental entity must be brought under the Tort Claims Act – it is the exclusive remedy. Because Appellants' claims sound in tort and are brought against a governmental entity, the Appellants are subject to the limitations imposed by the Tort Claims Act, including its two-year statute of limitations. Because the lower court correctly applied the two-year statute of limitations found in the Tort Claims Act to this case and correctly concluded that Appellants' claims were filed more than two

years after they had reason to know about their claim, we ask that this Court affirm the trial court's order.

HOWELL, GIBSON & HUGHES, P.A.

By: _____

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February 12, 2019

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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Gwendolyn Brown, individually, and as natural guardian of Quintez Lee Sapp, Deville Kiez Simmons, Haroldett Uneke Simmons, and Glenn Simmons, Plaintiffs,

Of whom Gwendolyn Brown, Deville Kiez Simmons, and Haroldett Uneke Simmons are.....Appellants,

vs.

Housing Authority of the City of Charleston, South Carolina.....Respondent.

PROOF OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Initial Brief of Respondent and Designation of Matter upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 12th day of February, 2019 addressed to the following:

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SC Court of Appeals

February 12, 2019

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Re: Gwendolyn Brown, individually, and as natural guardian of Quintez Lee Sapp, Deville Kiez Simmons, Haroldett Uneke Simmons, and Glenn Simmons vs. Housing Authority of the City of Charleston, South Carolina
2014-CP-10-043
Civil Action No.: 2018-001089
Our File No: 11845 MBL

Dear Ms. Kitchings:

Please find enclosed herewith for filing *Initial Brief of Respondent* and *Designation of Matter* with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

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cc: J. Seth Whipper

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