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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

Appellate Case No. 2016-000471

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant hereby files this Petition for Rehearing.

Maria Allwin respectfully requests a rehearing of Opinion 5617 (filed January 16, 2019) and/or the issuance of a new opinion on the issues outlined herein.

Argument

I. The Court does not acknowledge that Allwin is not seeking the recovery of money she spent prior to 2011, and only seeks the recovery of money she spent as part of the Ross Clements/Phillip Smith work which began in 2011.

A critically important fact about this case is that Allwin is not seeking to recover sums she spent before 2011, which total some $2,000,000 (R. pp. 000177-000181). Even though that fact was a central focus of Allwin's Affidavit and argument before the Court, is not referenced anywhere in the Court's opinion and it is dispositive of the statute of limitations issue.

The Court's application of the statute of limitations is persuasive if Allwin was seeking to recover the costs of work that she did in 2001, 2002, or any time before 2011, but she is not. Her claim is strictly limited to the recovery of repair costs she incurred as part of the Ross Clements/Phillip Smith work, which did not begin until 2011. The only way the claim for those funds can be barred by the statute of limitations is if she knew or should have known, as a matter of law, of all of the defects discovered by Clements and repaired by Smith before 2011. Given that Allwin has said she did not know of all of the defects Clements found and Smith repaired prior to 2011, and given that Clements has testified that she could not have known of all of those problems absent a complete declad of the home, and given that Clements and Cooper have both said a complete declad of the home is an extraordinary scope of work, outside of the exercise of reasonable diligence, there is a question of fact as to whether the statute of limitations bars Allwin's

claim. *Holly Woods Assc. of Residence Owners v. Hiller,* 385 S.C. 344, 682 S.E.2d 818 (Ct. App. 2009) and *McAlhany v. Carter,* 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

II. The Court relies on *Dean* and *Barr*, which are inapposite with significant legal and factual differences to this case. *Holly Woods* and *McAlhany* are controlling and compel a reversal of the trial judge's ruling.

In its order the Court relies upon *Dean v. Ruscon,* 321 S.C. 360, 468 S.E.2d 105 (1996) and *Barr v. City of Rock Hill,* 330 S.C. 640, S.E.2d 157 (1998) to establish the law of the statute of limitations. As noted in Allwin's brief and at the lower court, those cases are factually distinguishable and are inapposite. The issue presented here is whether a claim for damages to correct conditions the owner claims she never knew of is barred by the statute of limitations. When the factual scenario involves other conditions that the owner admits she knew of, the question of whether the owner knew or could have known of the new conditions, through the exercise of reasonable diligence, is a question of fact for the jury. This Court has decided two cases that are both factually similar and both apply the correct law and analysis relative to the application of the statute of limitations. In both *Holly Woods* and *McAlhany* the Court correctly concluded that whether the claims being asserted were or should have been known was a question of fact for the jury. In *Holly Woods* the HOA was aware of and spent money to correct prior problems that related to, or may have been related to those they were suing over and this Court held that that was a question for the jury to decide. In *McAlhany*, the Court was faced with issues that the Plaintiff admitted to knowing in 2007. However, since the Plaintiff later recanted that and testified by affidavit, they were not known until 2009, this Court reversed the trial court, holding that is was up to the jury, not the curt, to decide which testimony of the Plaintiffs was more believable.

In this case, both Allwin and Clements testified that after 2011, Clements' investigation revealed conditions that were unknown and could not have been known absent a complete de-clad

of the home. As admitted by Cooper himself, a complete declad was not customary or ordinary and was "extreme", meaning that Allwin's failure the declad before 2011 was not unreasonable. As noted in the brief, even when faced with Clements' concerns in 2011 the architect of record, Shope Reno, even then recommended that Allwin not declad the home as recommended by Clements. (R. p. 001063, line 1-24; R. pp. 000177-000188)

Holly Woods and *McAlhany* are controlling and both cases compel a decision reversing the lower court here and remanding this action for a trial and a jury decision about what, if any, of Allwin's current claim were or should have been known to her through the exercise of reasonable diligence.

III. In applying the law of *Holly Woods* and *McAlhany*, the Court has ignored the evidence presented by Allwin and Clements which establishes that Clements' work revealed deficiencies the could not have been discovered without a complete de-clad of the home, which Clements and Cooper both said was not required of Allwin in the exercise of reasonable diligence.

The Court has ignored two aspects of the evidence in this case which, under *Holly Woods* and *McAnally*, compel reversal of the lower court and a remand for trial. First, with respect to *Holly Woods*, the Court incorrectly held that, "By contrast, the record here establishes that Allwin failed to present any evidence that the defects she claims to have discovered in 2011 were unrelated to those she had notice of as early as February, 1999." The affidavits of Clements and Allwin both constitue the evidence the Curt says is lacking. Allwin's affidavit states:

> 9. In 2011, Fuller issued a preliminary report (attached) in which it identified pervasive and systemic original construction deficiencies, meaning defects in the work done by Cooper.
>
> 10. The nature and pervasiveness of the defects identified by Fuller had never been identified by any of the numerous repair contractors who had worked on our home previously; had they been, we would have repaired them.

13. Notwithstanding SRW's advise and recommendation, I elected to follow the Fuller repair recommendation. In doing so I hired Phillip Smith to act as general contractor for the repair of the home. That work commenced after April 23, 2013, and during that time, the roof and siding were removed as were extensive portions of interior drywall. The removal of those components revealed evidence of extensive and pervasive defects in the original construction of the home, which were unknown to me or, to my knowledge, Jim. Over the years of our ownership of the home, despite paying more that $2,000,000 for repairs and maintenance, no contractor had ever suggested to us that our home had the defects uncovered by the work of Phillip Smith.

14. The defects uncovered by Smith, which were unobservable to any one prior to the removal of the roof, siding and interior drywall, included evidence of improperly installed flashing, improperly installed building wrap, improperly installed windows and the omission of components such as insulation around windows. Again, there was no way I or anyone else could have observed those deficiencies hidden in the walls and under the roof absent removal of the roof, siding and interior drywall.

(R. pp. 000177-000181)

Clements' Affidavit states:

15. While the construction defects FCE observed would have been open and obvious to SRW, as construction was ongoing, it is my professional opinion that as original construction continued and ultimately concluded, the defects could not have been known to the Plaintiff, absent extensive deconstruction efforts.

16. Furthermore, it is my opinion that the level of destructive testing and deconstruction required at the subject residence to uncover latent 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 fully 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.

17. Complete removal of interior and exterior building envelope components was required in order to uncover latent construction defects and damages, including but not limited to the following:

1. Reverse-lapped roof underlayment;
2. Improper roof terminations;
3. Water damaged roof sheathing and framing;
4. Unsealed roof-to-wall intersections allowing air intrusion/condensation;
5. Incomplete spray foam insulation in attic and sloped roof areas;
6. Incomplete/missing Tyvek weather-resistive barrier (hereinafter WRB);
7. Reverse-lapped WRB;
8. Improper integration of WRB with window and door flashing;
9. Improper integration of WRB with roof-to-wall flashings;
10. Improper integration of window and door opening head flashings with flexible flashing and/or WRB;
11. Improperly installed wall/cornice flashing;
12. Water damaged wall sheathing, framing, termites;
13. Incomplete asphalt-saturated building felt (WRB) behind stucco;
14. Incomplete perimeter air seal at windows resulting in air intrusion/condensation;
15. Incomplete perimeter seal at windows resulting in bulk water intrusion;
16. Improper integration of window rough opening flashing with pan flashings and WRB;
17. Improper installation of sill pan flashing at windows;
18. Improper installation of WRB at window openings;
19. Improper structural attachment of windows – fasteners missing;
20. Fungal growth/mildew behind window trim;
21. Incomplete perimeter air seal at doors resulting in air intrusion/condensation;
22. Incomplete perimeter seal at doors resulting in bulk water intrusion;
23. Improper integration of door rough opening flashing with pan flashings and WRB;
24. Improper installation of sill pan flashing at doors;
25. Wood sub-flooring improperly installed over flattened back leg of sill pan flashings;
26. Improper installation of WRB at door openings;
27. Fungal grown/mildew behind door trim;

28. Inadequate patio deck-to-wall waterproofing and flashing;

29. Inadequate repairs attempted at patio deck-to-wall waterproofing and flashing;

30. Water damaged wood framing at deck-to-wall intersections;

31. Improper slope of patio at elevated concrete slab (below tile surface); and

32. Insulation missing between Study turret floor and elevated concrete slab.

(R. pp. 000189-000194)

A comparison of the Court's factual analysis in *Holly Wood's* is striking. In *Holly Wood's* this Court reasoned as follows:

> Specifically, the minutes from an annual meeting of the Association's board meeting from 1991 reveal the Association knew of certain problems in 1991, including a pool leak, drainage around building five, and termite bonding. However, witnesses testified the damages that formed the basis of the Association's 2005 lawsuit stem from different problems than those that existed in 1991.
>
> Mary Louise Reeves, secretary of the Association's Board, testified the Association was only seeking damages that occurred from 2002 to 2005. Reeves testified problems have always existed within the development and some are the same problems, but some are different problems. Richard H. Roubard, a member of the Association's Board since 1998, testified the damage around building five that existed in 1991 was corrected. Roubard testified Gray Engineering came up with a design for a culvert that went over the existing road and a head wall and drainage to pick up the run off. According to Roubard, the culvert repair resolved the 1991 drainage issues. Additionally, Roubard explained new problems with drainage arose between 1998 and 2000; however, he claimed the Association also addressed and corrected those problems. Roubard testified the Association learned of the most current drainage problems in September 2002 after a rainstorm.
>
> Steven John Geiger, the Association's expert, also testified as to the damages the Association claimed could have been discovered in 2002 or later. Geiger categorized the condition ***185** of **Holly Woods** into three distinct occurrences contributing to the problems: (1) the general random nature that storm water flows across the site, (2) the presence of poor loose compressible soil, and in some cases

> soil that contains organic matter underlying the construction; and (3) the open excavation around the eastern and southern perimeters of building five. Geiger testified he knew about the 1991 report, but he testified the 1991 report did not affect the content of his damage report and had nothing to do with his research. Further, he testified that the majority of the damages on **Holly Woods** could be attributable to conditions since 2002.
>
> We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellants' directed verdict motion based on the statute of limitations.

Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172 (2011) 708 S.E.2d 787

The *Holly Woods'* case, read with the Allwin and Clements Affidavits, simply cannot be reconciled with the Court's ruling in this case. For the same reasons there was a question of fact in *Holly Woods* regarding application of the statute of limitations, there is a question of fact in this case.

Second, with regard to *McAlhany*, the Court held, "Allwin failed to present conflicting evidence with respect to the timing of her discovery of the various defects in the home. Indeed, the chronology of Allwin's defect discoveries is fully established in this record." Again, the Affidavits of Allwin and Clements are evidence that the defects she now seeks recovery for *were not discovered* and *could not have been discovered* prior to 2011. The record which the Court refers to is a history of Allwin's knowledge about defects that existed prior to 2011 for which she seeks no recovery. The Court's error in this analysis is exemplified by its finding that, "Cowan, Buffington, CSA and Stein independently and repeatedly notified Allwin of original design and construction defects. Buffington and Stein went so far as to inform Allwin of the possible expiration of her claims against RCA." The evidence referred to by the Court relates to defects

Cowan, Buffington and Stein knew of, which are not the defects Allwin is seeking recovery for now. Cowan, Stein and Buffington could not warn Allwin of claims that were unknown at the time of their involvement and they could express concerns to Allwin about the expiration of claims for money that she would not spend until years later.

IV. Whether Allwin knew or Should have Known of the Claims she now asserts prior to 2011 is a Question of Fact for the Jury.

The issue before the court is whether the claims Allwin is bringing now, for damages she sustained after 2011, is time-barred by the statute of limitations as a matter of law. Allwin cited *McAnally* for the discovery rule, which provides that, "Under the discovery rule, the three (3) year clock starts ticking on the date the inured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct." This the question before the Court was, when did Allwin know, or when, through the exercise of reasonable diligence, should she have known, of the conditions which give rise to the claim she asserts now (as opposed to those she may have asserted much earlier)? The evidence establishes that 1) she did not know of all of the conditions discovered in 2011 (Allwin Affidavit); 2) many if not most of those conditions could not have been discovered without the extensive deconstruction of the building that began to occur in 2011 (Clements Affidavit); and 3) "reasonable diligence" did not require her to deconstruct the building before 2011 (Clements Affidavit, Cooper testimony, Allwin Affidavit regarding what SRW told her in 2011).

V. The Court's ruling that the statute of limitations ran, at the latest, in 2012, establishes that the Court improperly applied the law of the statute of limitations.

The Court's ruling "At the very latest, the statute of limitations applicable to Allwin's claims against RCA ran in March of 2012." is erroneous. That ruling is based on the bare fact that Allwin retained counsel in 2009. There is literally no evidence at all about counsel's involvement

for Allwin in 2009, other than Allwin's affidavit which is conclusive on that point. That affidavit, at paragraph 7, states:

> In 2009, two years after Jim's death, I contacted attorney Robert Lyles to discuss the ongoing maintenance and repair costs and how to try and manage them. From that meeting, we met with Skip Lewis, an engineer recommended by Mr. Lyles, to do a property condition assessment and to develop a life cycle repair for maintenance of our home. The plan was to budget for the ongoing costs to maintain the home. That was never done.

There is no evidence that there was ever any discussion between Allwin and counsel about pursuit of claims against RCA or SRW at that time or about the recovery of the sums Allwin had already paid to maintain and repair the home. She was trying to manage maintenance costs and received a recommendation concerning an expert on a maintenance and repair plan for the home, which she never got. Those facts alone cannot establish that the statute of limitations began to run as a matter of law. If they do, building owners must be reluctant to hire counsel for issues involving maintenance and repair of their home for fear that hiring counsel starts the statute of limitations running on any claim the owner may have, whether known or not.

VI. Like the Lower Court, this Court Failed to Consider the Evidence in the Light Most Favorable to Allwin.

Like the lower court, this court has taken selective evidence that was presented and held that, "...the chronology of Allwin's defect discoveries is fully established in this record." In doing so, the Court has either ignored or disregarded the Allwin and Clements Affidavits but also ignored other evidence that supports Allwin with respect to what she knew and when she knew it.

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. pp. 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. pp. 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. pp. 001155-001171, Allwin 00945). 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. pp. 001164, Allwin 00948).

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. pp. 000028, R. pp. 001440-001449; R. pp. 001366). Thus, the reference is related to the HVAC issues, which did not involve Russ Cooper.

CONCLUSION

For the reasons set forth above, Appellant respectfully request that this Court reconsider its opinion and reverse the trial court's grant of summary judgment and remand this matter for a trial on the merits.

Respectfully Submitted:

for Robert T. Lyles, Jr.

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March 4, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellate Case No. 2016-000471

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PROOF OF SERVICE

I certify that I have served **Appellant's Petition for Rehearing** on counsel for the Respondent by depositing a copy in the United States Mail, First Class postage prepaid, this 4th day of March, 2019, addressed to the following:

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March 4, 2019

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March 4, 2019

VIA HAND-DELIVERY

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Maria Allwin vs. Russ Cooper Associates, Inc., et al.
Appellate Case No. 2016-000471

Dear Ms. Allen:

Enclosed please find the original and seven (7) copies each of Appellant's Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of $50.00 to cover the required filing fee. I would appreciate your filing the Petition and returning one (1) file-stamped copy to me in the envelope which is also enclosed for your convenience.

Should you have any questions concerning the enclosed, please do not hesitate to give me a call.

Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert Lyles /cw

Robert T. Lyles, Jr.

RTL/cw
Enclosures
cc: Dean Best, Esquire
Paul E. Sperry, Esquire
Tyler P. Winton, Esquire