

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen

Case No.: 2011-CP-07-2700

Tad Segars,

Plaintiff/Appellant,

v.

Ocean Estate Builders, Inc., Ed Flynn, Individually,
David Garcia d/b/a Ynette Plastering, Inc., Advanced
Roofing, Inc., teofilo Lezcano, Individually and d/b/a
Advanced Roofing, Inc., a/k/a Yuko Constructio, Inc.,
And Jaguar Masonry, Inc.,

Of whom CMC Construction Company, Inc.,
Is the

Respondent

Respondents

APPELLANT'S FINAL BRIEF

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June 26, 2014

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

STATEMENT OF THE ISSUES ON APPEAL.....4

STATEMENT OF THE CASE.....5

SUMMARY OF ARGUMENTS.....9

ARGUMENTS.....11

 Standard of Review.....11

 I. The lower Court erred by granting Summary Judgment to
 Defendant CMC Construction Company, Inc., (“CMC”) on
 the basis that the Statute of Limitations had expired.....12

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

South Carolina State Cases

United Educational Distributors, LLC v. Educational Testing Services,
35 S.C. 7,10, 564 S.E.2d 324, 326 (Ct. App.2002),.....11

Longshore v. Saber Sec. Services, Inc., 365 S.C. 554, 560,
619 S.E.2d 5, 9 (Ct.App. 2005).....11

Temple v. Tec-Fab, Inc., 370 S.C. 383, 387, 635 S.E. 2d 541, 543
(Ct. App. 2006)11

Okatie River, LLC v. Southeastern Site Prep, L.L.C., 353 S.C.....11
327, 334, 577 S.E. 2d 468, 472 (Ct. App2003);.....11

Chambers v. Pingree, 351 S.C. 442, 454 , 570 S.E. 2d 528, 534 (Ct. App. 2002)....11

Dean v Ruscon Corp., 321 S.C. 360, 363 468 S.E.2d 645, 647 (1996).9

Snell v. Columbia Gun Exchange. 276 S.C. 301, 278 S.E.2d 333 (1981).....12

Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169. 170 (1994).....12

Valentine v. Davis, 319 S.C. 169, 460 S.E.2d 218 (S.C. App. 1995).....14

RULES

Rule 15, SCRCP.....9

STATUTES

S.C. Code Ann § 15-3-530.....9

STATEMENT OF ISSUES ON APPEAL

- I. Did the lower Court err by granting Summary Judgment to Defendant CMC Construction Company, Inc., (“CMC”) on the basis that the Statute of Limitations had expired when CMC was already a party to the lawsuit?

STATEMENT OF THE CASE

Plaintiff is a citizen and resident of Beaufort County South Carolina and owns a home at 87 Singleton Beach on Hilton Head Island. Plaintiff filed a Summons and Complaint on September 23, 2009 alleging various construction deficiencies. (R pp.22-4.) Prior to filing the Summons and Complaint, Plaintiff's attorney's office requested all construction documents from the Town of Hilton Head Island Building Department. The only information provided was that the general contractor responsible for the construction of the residence was Ocean Estates Builders, Inc. (R pp.13-14.)

As the home was nearly ten years old at the time suit was filed, neither Plaintiff, nor his wife, were able to accurately remember the subcontractors that performed work on their home. Therefore, the only information available to Plaintiff's counsel based upon the official records provided by the Town of Hilton Head was that Ocean Estates Builders, Inc., was the general contractor. Ed Flynn was known to be a licensed residential builder and the owner of Ocean Estates Builders.

Initially, Ocean Estates did not file an Answer to the Complaint because it's insurance carrier denied coverage because the Certificate of Occupancy was issued prior to their policies. The carrier eventually agreed to defend the lawsuit by the time Plaintiff's Amended Complaint had been filed. Ocean Estates filed an Answer to Plaintiff's Amended Complaint on September 18, 2010. Attached hereto as Exhibit (3) is a copy of Ocean Estates' Answer to Plaintiff's Amended Complaint. (R pp. 9-12.)

Despite the fact that the case was only one year old, it appeared high on the trial roster in the fall of 2010. Given that Ocean Estates had only recently filed a

responsive pleading, the parties agreed to voluntarily dismiss the case pursuant to Rule 40(j), SCRCF. On or about October 19, 2010, pursuant to an agreement between the parties, the case was dismissed pursuant to Rule 40(j), SCRCF. (R. pp15-16.) The only defendants in the case at the time of voluntary dismissal were Ocean Estates Builders and Ed Flynn, individually. Prior to the dismissal pursuant to Rule 40(j) of the SCRCF, it was determined through discovery, that neither Ocean Estates Builders or Ed Flynn were in possession of any documents pertaining to the Segars residence.

Pursuant to a records subpoena dated September 28, 2010, counsel for Ocean Estates Builders apparently obtained records from the Town of Hilton Head Island which included a subcontractor roster for the Segars residence. These documents had not been produced to Plaintiff's counsel by the Town of Hilton Head Island despite a request prior to the original Complaint having been filed. Presumably, Ocean Estates Builder's counsel received these documents in early October 2010 as evidenced by their Supplemental Responses to Plaintiff's Request for Production dated October 25, 2010. (R. pp. 23-28.) This case was subsequently restored to the roster in March 2012 based upon a timely motion filed in October 2011. (R p. 26.)

The subcontractor roster used by the Town of Hilton Head in 1999, when the application for a building permit was submitted, was somewhat limited. The subcontractor roster required the identities of various subcontractors including, but not limited to the roofer, the framer, and the stucco applicator. (R p. 28.) The roofer was listed as YUKO Construction which was accurate. The subcontractor roster did not require that a waterproofing subcontractor be listed, thus, no waterproofing subcontractor was listed. Discovery in this case suggests that in addition to the roofing, YUKO

Construction d/b/a Advanced Roofing performed at least some of the waterproofing. The Stucco subcontractor was listed as Alberto Garcia which was incorrect. The actual stucco applicator was David Garcia d/b/a Yinet Plastering. The masonry subcontractor was listed as Jaguar Masonry. Jaguar was sued in this case a subsequently settled out. The framer was listed as Ocean Estates Builders. (R p. 28.) This proved to be incorrect and the actual framer was CMC Construction. Therefore, the subcontractor roster did not indicate the correct stucco applicator, the correct framer or any waterproofing contractor. Despite the fact that the subcontractor roster might have been available in October 2010 the information as to the identity of potential defendants was wrong.

On October 13, 2011 Plaintiff filed a Second Amended Complaint which added Jeld Wend Windows and doors and Espy Lumber Company. (R pp. 29-39.) An investigation of the residence by Plaintiff's expert revealed the identity of the window manufacturer and Espy Lumber was known to have supplied Jeld Wen Windows on Hilton Head. Both parties have subsequently been voluntarily dismissed from the lawsuit.

On June 11, 2012, based upon the information contained in the erroneous subcontractor roster, Ocean Estates filed a Third Party Complaint. (R pp. 60-66.) Ocean Estates alleged causes of action against Jaguar Masonry, Advanced Roofing, Alberto Garcia Stucco, and CMC Construction. Advanced Roofing was on the subcontractor roster as the roofer. Jaguar Masonry was on the subcontractor roster as the masonry subcontractor. Alberto Garcia was not the stucco applicator but was listed on the subcontractor roster. CMC Construction was not listed as the framer on the subcontractor roster. It is not known how counsel for Ocean Estates became aware of CMC as a

possible Defendant. (R pp. 40-47.) At the time of the filing of the Amended Third Party Complaint, the identity of the stucco applicator and waterproofing subcontractor were not known. Defendant CMC was served on July 24, 2012.

On February 8, 2013 Plaintiff filed a Motion to Amend his Complaint. and sought to file a Third Amended Complaint. The Third Amended Complaint was erroneously captioned as Second Amended Complaint. (R pp. 83-94.) That amended complaint sought to bring direct actions against Advanced Roofing, Jaguar Masonry, CMC Construction and David Garcia d/b/a Yinet Plastering. Only David Garcia d/b/a Yinet Plastering was a new party as the other three defendants were brought in by virtue of Ocean Estates Third party Complaint. A Consent Order allowing Plaintiff to file his Third Amended Complaint was signed by the Honorable Carmen Mullen at some time after the motion was submitted. The date on the Consent Order is January 1, 2013 which is clearly wrong as it predates the filing of the Motion to Amend. (R pp.77-80.) Plaintiff filed their Third Amended Complaint February 12, 2013. (R pp. 83-94.)

Defendants Advanced Roofing and CMC Construction, Inc., filed Motions for Summary Judgment against Plaintiff on the basis that Statute of Limitations had expired. The matter came before the Honorable Carmen T. Mullen for oral argument. (R pp. 138-182.) By Order dated September 11, 2013 Judge Mullen granted both Advanced Roofing and CMC's motion for summary judgment. (r pp. 183-186.) Appellant originally appealed the judge's order granting summary judgment as to Advanced Roofing but hereby withdraws same and elects only to appeal the portion of the order that grants summary judgment to CMC Construction.

SUMMARY OF ARGUMENTS

CMC argues that Appellant's claims against them were brought after the three (3) year Statute of Limitations had expired. However, CMC's argument is misplaced. Pursuant to Rule 15 SCRPC Plaintiff is free to assert claims against a party. Rule 15(a)(b)(c) SCRPC allow a party to amend its Pleadings against a *party* during discovery, during trial and even after a verdict has been rendered. Rule 15 (a)(b) and (c) do not take into consideration the Statute of Limitations argument because it is irrelevant. The Statute of Limitations arguments on which CMC relies, applies only to *new* parties and not to *existing* parties. The lower Court should not have granted summary judgment because CMC was already a party to the case well before the statute of limitations expired.

Appellant acknowledges that South Carolina applies a three (3) year statute of limitations for civil claims S.C. Code 15-3-53. Additionally, South Carolina follows the discovery rule which states that "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).

Plaintiff filed its original Complaint September 23, 2009. (Rpp. 1-8.) Defendant Ocean Estates Builders Inc., filed a Third Party Complaint against CMC and Advanced on June 11, 2012. (R pp. 42-47.) The Third Party Complaint was served on CMC on July 24, 2012. CMC argued that the statute of limitations expired on September 23, 2012 three years after the original Complaint was filed. They further assert that Plaintiff's Third

Amended Complaint filed in February 12, 2013 which alleged claims against CMC and Advanced was beyond the statute of limitations. However, CMC was served the Third Party Complaint prior to the expiration of the statute of limitations. Therefore, when Plaintiff filed his Third Amended Complaint, CMC was a party to the lawsuit well before the statute of limitations expired.

ARGUMENTS

STANDARD OF REVIEW

Appellant, the Plaintiff appeals several matters related to the lower court's granting of Summary Judgment in favor of Advanced Roofing and CMC Construction. Plaintiff's causes of action against Advanced and CMC were for negligence. Negligence is a tort and is therefore an action at law. United Educational Distributors, LLC v. Educational Testing Services, 35 S.C. 7, 10, 564 S.E.2d 324, 326 (Ct. App.2002), Longshore v. Saber Sec. Services, Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct.App. 2005) ("An action in tort for damages is an action at law.").

The standard of review for actions at law is de novo with regard to legal conclusions, but factual findings will be overturned only if wholly unsupported by the evidence or controlled by a legal error. "In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." Temple v. Tec-Fab, Inc., 370 S.C. 383, 387, 635 S.E. 2d 541, 543 (Ct. App. 2006) (citing Okatie River, LLC v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E. 2d 468, 472 (Ct. App2003);

Further, the mere inclusion of a statement in the "Findings of Fact" section of an order does not make the statement a factual finding. The appellate court reviewing an order must determine whether a statement in the order is a finding of fact or a conclusion of law. Chambers v. Pingree, 351 S.C. 442, 454 , 570 S.E. 2d 528, 534 (Ct. App. 2002)

Where a statement included in the “Findings of Fact” section is in actuality a conclusion of law, the usual de novo standard applicable to legal conclusions applies. Id.

I. THE LOWER COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANT CMC CONSTRUCTION COMPANY INC., ON THE BASIS THE STATUTE OF LIMITATIONS HAD EXPIRED WHEN CMC WAS ALREADY A PARTY TO THE CASE WELL BEFORE PLAINTIFF AMENDED HIS COMPLAINT TO ASSERT CLAIMS AGAINST CMC DIRECTLY

CMC argued that the Plaintiff’s claims against them were not asserted in a timely manner. South Carolina applies a three year statute of limitations for civil claims SC Code § 15-3-530. Additionally, South Carolina follows the discovery rule, which states that “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). Under the discovery rule, “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. The exercise of reasonable diligence means 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.Id. at 364, 468 S.E.2d at 647 (citing Snell v. Columbia Gun Exchange. 276 S.C. 301, 278 S.E.2d 333 (1981).

Our courts have consistently held that “the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer.” Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169. 170 (1994). In this claim, CMC was aware of the claims against them by virtue of Ocean Estates’ Third Party Complaint and Amended Third

Party Complaint. Therefore CMC reliance on the Statute of Limitations defense is unfounded and misplaced.

Respondent CMC has asserted that Appellant's injury was known to Appellant at least at the time Plaintiff filed his original Summons and Complaint on September 23, 2009. (R pp. 1-8.) Therefore, according to CMC and Advanced Roofing the statute of limitations expired for Plaintiff on September 23, 2012. CMC argued that "Plaintiff filed his action against CMC and Advanced on February 12, 2013 –over three years after filing his original Complaint for construction defects." In fact Appellant filed his Third Amended Complaint on February 12, 2013. Respondent CMC takes the position that Appellant would have to file and serve the Third Amended Complaint on them as if they were not *already parties* to the lawsuit. (Emphasis added).

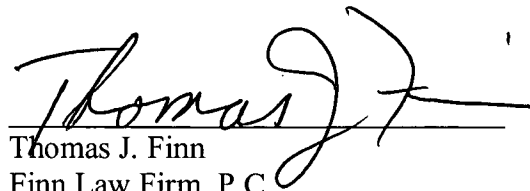
Respondent CMC conveniently ignore the fact that defendant Third Party Plaintiff Ocean Estates filed its Amended Third Party Complaint on June 11, 2012 and served Respondent CMC on July 24, 2012 within the applicable statute of limitations for Ocean estates to file a Third Party Complaint. (R pp. 58-66.) In fact Ocean Estates filed its Third Party Complaint and served CMC months before CMC alleges the statute of limitations was to expire (September 23, 2012). Once in the lawsuit CMC was a party and under Rule 15 SCRPC Appellant should have been permitted to assert claims against CMC. Both CMC and Advanced Roofing urged the lower Court to simply find that the statute of limitations began to run on Plaintiff's claims when the original complaint was filed on September 23, 2009. They further argued that Plaintiff's Third Amended Complaint which was filed on February 12, 2013 was filed more than three years after the original complaint and thus barred by the applicable statute of limitations. (R pp. 117-

128.) What CMC, Advanced and the Court failed to consider was that CMC was already a party having been served the Third Party Complaint in July 2012.

Rule 15, SCRCP, does not allow an existing plaintiff to add a new party to the case to assert a claim against the defendant. Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant. Valentine v. Davis, 319 S.C. 169, 460 S.E.2d 218 (S.C. App. 1995). In the present case when Plaintiff moved to file his Third Amended Complaint he was merely asserting claims against an existing Defendant CMC Construction who was already in the lawsuit by virtue of Ocean Estates Third Party Complaint. (R pp. 40-47.) Accordingly, Appellant should have been permitted to assert direct claims against defendant CMC Construction.

CONCLUSION

For the reasons explained herein, the lower court erred in granting summary judgment to CMC on the basis that the applicable Statute of Limitations expired. CMC was already a party to the lawsuit by virtue of Ocean Estates Third Party Complaint. Plaintiff's Third Amended Complaint merely asserted claims against party which is permissible under Rule 15, SCRPC. The Appellant accordingly respectfully requests that this Court reverse the order of the lower court which granted summary judgment to CMC.



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June 26, 2014

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INDIVIDUALLY and D/B/A ADVANCED ROOFING
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JAGUAR MASONRY, INC.,

OF WHOM CMC CONSTRUCTION COMPANY, INC.
IS THE Respondent

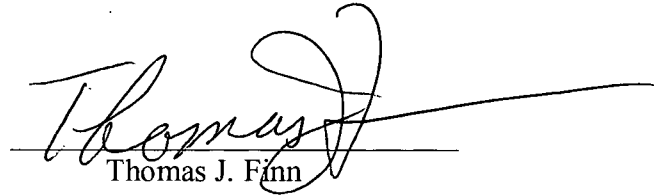
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant Tad Segars, Final Brief complies
with Rule 211 (b), of the South Carolina Appellate Court Rules.

July 3, 2014.

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A handwritten signature in cursive script, appearing to read "Thomas J. Finn", written over a horizontal line.

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JAGUAR MASONRY, INC.,

OF WHOM CMC CONSTRUCTION COMPANY, INC.
IS THE Respondent

PROOF OF SERVICE

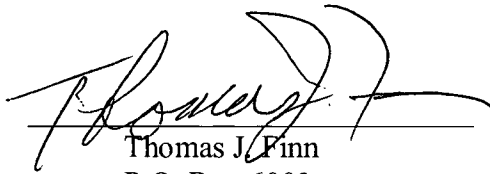
I CERTIFY THAT I HAVE SERVED three (3) copies of Appellants' Initial Brief and Designation of Matter on Respondent CMC Construction Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on June 30, 2014 addressed to their attorney of record, J. Patrick Norris at their offices at the addresses listed below.

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A handwritten signature in black ink, appearing to read "Thomas J. Finn", written over a horizontal line.

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