THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 24 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2019-000851

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 ....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.

RESPONDENT RUSS COOPER ASSOCIATES, INC.'S RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE ISSUE ON APPEAL

1. Did the Circuit Court err in granting summary judgment to Respondent Russ Cooper Associates, Inc. based on the statute of limitations?

COUNTER-STATEMENT OF THE CASE

Petitioner is the absentee owner of the residence at issue, an approximately 11,000-square-foot, oceanfront home on Kiawah Island. (R. p. 38, ¶ 1; Pet. Br. at 1). Respondent Russ Cooper Associates, Inc. ("RCA") served as the general contractor for the original construction. (See R. p. 38, ¶ 5; p. 139; p. 177, ¶ 3). RCA completed construction of the house in May 1994. (R. p. 295, lines 8-11). Between 1999 and 2010, Petitioner steadily accumulated knowledge of defects in RCA's work from numerous sources.

Rather than recount the extensive chronology of problems with the residence and Petitioner's longstanding knowledge of same, RCA relies upon and incorporates by reference the statements of fact presented in its Memorandum in Support of Summary Judgment (R. pp. 62-88) and its Final Brief to the Court of Appeals, as well as the Court of Appeals' factual findings.

In summary, Petitioner failed to prosecute timely her claims against RCA, ignoring the advice of experts and consultants who encouraged her to pursue these claims. The Circuit Court appropriately granted RCA's motion for summary judgment based on the statute of limitations, and the Court of Appeals appropriately affirmed the Circuit Court's ruling.

ARGUMENT

I. NO GROUNDS EXIST FOR ISSUANCE OF A WRIT OF CERTIORARI

This Court has stated it will not generally issue a writ of certiorari on matters that can be addressed in the lower courts. Further, this Court has ruled it will issue a writ of

certiorari only in exceptional cases of great public interest. *In re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998).

Applying the guidelines of South Carolina Appellate Court Rule 242(b), the present appeal does not warrant the issuance of a writ of certiorari. There are no novel questions of law; this is a simple, fact-dependent case that can be, and has been, decided through the application of well-settled caselaw concerning the statute of limitations. There was no dissent in the decision of the Court of Appeals. As the Court of Appeals made clear in its opinion, there is no conflict with prior decisions of this Court. This appeal does not involve constitutional issues. Finally, no federal question is at issue. For these reasons alone, this Court should deny the Petition for Writ of Certiorari.

II. PETITIONER'S ARGUMENT THAT SHE IS ATTEMPTING TO RECOVER ONLY MONEY SPENT AFTER 2011 IS IRRELEVANT

Petitioner argues erroneously that the statute of limitations is inapplicable because she seeks recovery only for damages incurred since 2011. (Pet. Br. at 5). Petitioner argues mistakenly that her claims can be barred by the statute of limitations only if she knew, or should have known, of all the defects in the house prior to her expert's forensic investigation in 2011. (*Id.* (emphasis added)).

The critical question with respect to time is when Petitioner knew she had a claim against RCA. Petitioner's claim that she is pursuing recovery only for damages incurred within 3 years of filing her lawsuit is irrelevant. Also, when Petitioner became aware of all the defects in the house is irrelevant. Under the established law of South Carolina, the only relevant issue is when Petitioner discovered her potential claims against RCA, thus triggering the statute of limitations.

The applicable statute of limitations for Petitioner's claims is three years. S.C. Code Ann. §§ 15-3-530, -535 (2005). Although Petitioner had knowledge of defects as early as February 1999, (See R. pp. 1085-87), she did not file suit against RCA until August 5, 2013. (R. pp. 38-41).

To determine when a cause of action arose, South Carolina courts employ the "discovery rule." See *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989). Under 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, 468 S.E.2d 645 (1996). The applicable limitations period for a claim begins to run when a plaintiff "knew or by the exercise of reasonable diligence[1] should have known that [s]he had a cause of action." S.C. Code Ann. § 15-3-535 (2005). See *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C.254, 692 S.E.2d 510, 513 (2010).

A key element in the reasonable diligence test is "notice." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). A cause of action accrues for purposes of the statute of limitations when a plaintiff has notice that she might have a remedy for a harm. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183 (Ct.App. 2004) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996)).

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[1] "The exercise of reasonable diligence means simply that an injured party must act with some promptness when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of . . . has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). See also *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996); *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994).

It is immaterial that an injured party may not comprehend or appreciate fully the potential extent of the damage as the statute is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. *Snell*, 276 S.C. at 303, 278 S.E.2d at 334. This is an objective test governed by when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist, not an examination of whether a plaintiff knew with certainty that she had a claim or when she sought the advice of counsel, developed a full-blown theory, or identified the wrongdoer. See *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); *Snell*, 276 S.C. at 303, 278 S.E.2d at 334); *Rumpf*, 357 S.C. at 395.

South Carolina courts have consistently held that once a reasonable person has reason to believe that a right has been invaded or that she may have a claim against another, the requirement to investigate takes precedence over the person's inability to ascertain the extent of her damages or even the possibility that damages may be recoverable. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 680 S.E2d 778 (Ct.App. 2009) (holding reasonable person would direct an inquiry into cause of account shortfall); *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838 (Ct.App. 2002) (holding plaintiffs had responsibility to investigate their claim once they had information that would place a reasonable person on notice that they had a possible cause of action); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989) (noting that statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). Finally, once a person knows or should know that she has some claim against another, the

statute of limitations begins to run for all claims against all parties based on that injury. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).

Petitioner had actual notice of problems with the house in February 1999, when Robert Cowan, a house guest, informed her of roof and basement leaks. (See R. p. 1086). Indeed, as the undisputed facts reveal, and in recognition of the known problems with the house, Petitioner engaged numerous experts and professionals to both investigate and remedy the defects in the structure. Petitioner admitted that Buffington Homes' repairs in 2004-05 were intended to remedy defects in RCA's original construction. (R. p. 438, line 21 – p. 439, line 10; p. 439, line 22 – p. 440, line 8). In October 2008, consultant Victoria Stein notified Petitioner of both defects in RCA's construction and the expiration of Petitioner's claims against RCA due to the statute of limitations. (R. pp. 1440-49). The Record contains many more examples between 1999 and 2010 of Petitioner's knowledge of her claims against RCA. Yet, despite having knowledge of the defects which she had been unable to remedy over a 14-year period, Petitioner waited until August 2013 to bring an action against RCA.

Petitioner's attempted distinction between damages that occurred before or after 2011 is of no matter. The undisputed facts establish Petitioner knew of her claims against RCA long before August 2010. Therefore, Petitioner's claims, including those that relate to damages incurred since 2011, are time-barred as a matter of law.

III. <u>**THE LOWER COURTS' DECISIONS ARE CONSISTENT WITH ESTABLISHED JURISPRUDENCE**</u>

A. <u>*Dean* and *Barr* Are Controlling</u>

Petitioner contends erroneously that the statute of limitations cannot bar a claim for a defect of which she had no knowledge, and argues the lower courts improperly relied upon *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996), and *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998). (Pet. Br. at 6). Both *Dean* and *Barr* are applicable to the facts of the present case and support the grant of summary judgment.

In *Dean*, Dean purchased a building in September 1984 after a contractor inspected and deemed it structurally sound. 321 S.C. at 362, 468 S.E.2d at 645. Two months later, Dean noticed a fine crack in the building's façade, which she thought might be related to nearby pile driving performed by Ruscon. *Id.* Dean immediately hired consultants to examine the crack. *Id.* Several months later, Dean noticed that the original crack had expanded and the façade was beginning to bulge and buckle at that location. Further, a second crack appeared at another location. *Id.*, 468 S.E.2d at 646-47. Dean brought suit against Ruscon in 1991, after being informed the building was no longer structurally sound. *Id.*, 468 S.E.2d at 647. At trial, the court directed a verdict against Dean, finding as a matter of law that the statute of limitations had expired prior to the filing of her action. *Id.* at 363. On appeal, this Court affirmed, holding that the statute of limitations began to run in November 1984 when Dean discovered the first crack. *Id.* at 364-65, 468 S.E.2d at 648. 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." *Id.* at 366, 468 S.E.2d at 647.

In *Barr*, the Barrs purchased a house in February 1985. 330 S.C. at 642. From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the house. *Id.* The termite inspectors also suggested repairs to alleviate the moisture problem. *Id.* In August 1992, the Barrs received a structural engineering report that disclosed numerous defects in the house, several of which were unrelated to the moisture problem. *Id.* at 643. The Barrs filed suit in March 1994. *Id.* The Court of Appeals upheld summary judgment for the defendant based on the statute of limitations. *Id.* at 645-46. The court held a termite inspection report noting moisture in the crawl space of the Plaintiffs' house was sufficient notice of water damage to trigger the running of the statute of limitations. *Id.* at 645.

Petitioner contends the holdings in *Dean* and *Barr* are inapplicable to the present action because *Dean* and *Barr* did not involve latent defects. Specifically, Petitioner claims Clements' 2011 investigation "revealed conditions that were unknown or could not have been known absent a complete declad[ding] of the home." (Pet. Br. at 7). However, as the Record makes clear, the present case does not involve latent defects. The overwhelming evidence, including Petitioner's own admissions, provides no doubt that prior to August 2010 she was aware of defects in RCA's original construction. Therefore, Petitioner's attempt to distinguish *Dean* and *Barr* through the purported existence of latent defects must fail.

The obvious and relevant similarity between Petitioner and the *Barr* and *Dean* plaintiffs is that they all had knowledge an injury sufficient to put them on notice of possible causes of action, and all of them failed to prosecute their claims with "reasonable [and timely] diligence." Petitioner investigated defects in RCA's work (that she now claims were latent

and unknowable) and attempted to repair them as early as 2004-05. However, she took no action to preserve or prosecute her claims until filing this lawsuit in 2013 – years after the statute of limitations had expired.

B. *Holly Woods* and *McAlhany* Are Distinguishable

While acknowledging in her petition that friends, consultants, and contractors repeatedly notified her of original construction defects and the expiration of the statute of limitations from 1999-2010, Petitioner attempts to avoid the time bar by arguing these warnings relate to defects that are different from the defects for which she is now seeking recovery. (Pet. Br. at 12). However, Petitioner fails to present evidence establishing any difference between the 1999-2010 defects and those she claims were identified in 2011.

Petitioner contends the lower courts should have denied summary judgment based on the holdings in *Holly Woods Association of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011), and *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct.App. 2015). However, these cases are distinguishable because, unlike Petitioner, the plaintiffs in these cases presented conflicting evidence as to when they learned of their claims.

In *Holly Woods*, the Court of Appeals affirmed the trial court's denial of the defendants' motion for directed verdict based on the statute of limitations. 392 S.C. at 185, 708 S.E.2d at 794. Notably, the plaintiff HOA presented evidence that the drainage problems identified in 2002, which formed the basis of its suit, were different from drainage problems that occurred in 1991, 1998, and 2000 at other areas within the neighborhood.

Petitioner points to the affidavits submitted by herself and her expert, Russ Clements, to refute the Court of Appeals' holding that she failed to present evidence that the defects she claims to have discovered in 2011 are unrelated to those she had notice of as early as

1999. However, neither Petitioner nor Clements' affidavit creates a question of material fact on this issue. A careful reading of the affidavits reveals that Clements' 2011-12 investigation was intended to determine the "root cause" of the defects Petitioner had known about for years. (R. p. 178; ¶ 8; p. 192, ¶ 16). While the "root cause" of the damage to the house might not have been discoverable until destructive testing was performed, the affidavits fail to establish that the defects identified by Clements in 2011 are different than those observed by Petitioner and her consultants, experts, and contractors between 1999 and 2010. To the contrary, Petitioner admits that at least "some of [the defects identified in 2011] were similar to those previously identified and repaired." (R. p. 178, ¶ 8).

Petitioner contends the Court of Appeals improperly relied upon *McAlhany* and held Petitioner failed to present conflicting evidence with respect to the timing of her discovery of defects. In *McAlhany*, the trial court granted the defendants' motions for summary judgment based on the statute of limitations. 415 S.C. at 54, 781 S.E.2d at 107. The defense motion was based on plaintiff's deposition testimony that he discovered mold within his residence in 2007. *Id.* at 59, 781 S.E.2d at 108. However, the plaintiff later testified in his deposition that he discovered the mold in 2008, and then also testified he did not discover the mold until 2009. *Id.* at 61, 781 S.E.2d at 109. The Court of Appeals reversed the grant of summary judgment because plaintiff's testimony was conflicting with regard to when he discovered mold in his house; thus, a jury could find the plaintiff was confused about the dates he discovered the mold, rather than intentionally contradicting his earlier testimony. *Id.* at 64, 781 S.E.2d at 111.

Petitioner's affidavit differs greatly from her deposition testimony (in which she admitted knowledge of numerous defects in RCA's construction work in 2004-05) and

from the facts in the Record. Petitioner has failed to explain her contradictory statements that she believed the pre-2011 defects and damage were simple maintenance issues or otherwise differed from the defects identified by Clements in 2011.

Again, the affidavits of Petitioner and Clements establish nothing more than Clements' 2011-12 investigation was intended to determine the "root cause" of defects that Petitioner had been notified of between 1999 and 2010. In her affidavit, Petitioner admits that she retained Clements as her causation expert in 2011, "to investigate the root cause of problems at the home . . ." (R. p. 178, ¶ 8 (emphasis added)). Similarly, Clements testified in his affidavit that, "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." (R. p. 192, ¶ 16 (emphasis added)). However, as he must, Clements acknowledged that only the root causes of the alleged defects were latent prior to his 2011 forensic investigation. Correctly, Clements expressly recognizes the existence of "observed visual deficiencies" prior to his 2011 forensic investigation. (*Id.*).

Although the "root cause" of the damage might not have been discoverable until destructive testing was performed in 2011, the affidavits fail to contradict the undisputed evidence establishing Petitioner was notified repeatedly of defects and of potential claims against RCA between 1999 and 2010. As neither affidavit creates a question of fact as to when Petitioner was put on notice of claims against RCA or as to when the statute of limitations began to run, Petitioner's argument must fail.

Even if RCA were to concede that the "root causes" of the alleged defects were latent or unknowable without deconstruction of the house, Petitioner cannot refute that the damage stemming from these root causes was patently obvious and known to her since

1999. As the lower courts found, the Record is replete with evidence of Petitioner's admitted knowledge of both defects and of her claims against RCA from 1999 to 2010.

IV. PETITIONER FAILS TO PRESENT A QUESTION OF FACT AS TO WHEN SHE KNEW OF HER CLAIMS

Petitioner contends a question of fact exists as to when she knew or should have known of the claims she is asserting – claims for damages sustained after 2011. (Pet. Br. at 12). Again, Petitioner attempts to circumvent the statute of limitations by distinguishing between the claims for damages she contends she learned of in 2011, "as opposed to those she may have asserted much earlier." (Pet. Br. at 12).

As pointed out above, Petitioner cannot avoid the time-bar simply by choosing to pursue recovery only for damages incurred within three years of prosecuting her claim. The statute of limitations began to run on all claims the moment she knew or should have known she had any claim against RCA.

In support of her argument, Petitioner argues she did not previously "know of all the conditions" identified by Clements in 2011. (Pet. Br. at 12-13 (emphasis added)). However, this Court has held it is immaterial that an injured party may not comprehend or appreciate fully the potential extent of the damage as the statute is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334. Petitioner's contention that she was unaware of all the defects, or the "root cause" of same, does not toll the statute of limitations and her claims are time-barred. The facts reveal that the alleged defects and

resulting damage were open, obvious, and known to Petitioner. Furthermore, Petitioner's arguments are contrary to established South Carolina precedent on these issues.

Petitioner also argues that "many if not most of [the] conditions could not have been discovered without the extensive deconstruction . . . in 2011," and that "'reasonable diligence' did not require her to deconstruct the building before 2011." (Pet. Br. at 13). The fact that Petitioner waited until 2011 to perform a forensic investigation does not toll the statute of limitations.

South Carolina courts have consistently held that once a reasonable person has reason to believe that a right has been invaded or that she may have a claim against another, the requirement to investigate takes precedence over the person's inability to ascertain the extent of her damages or even the possibility that damages may be recoverable. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 680 S.E2d 778 (Ct.App. 2009) (holding reasonable person would direct an inquiry into cause of account shortfall); *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838 (Ct.App. 2002) (holding plaintiffs had responsibility to investigate their claim once they had information that would place a reasonable person on notice that they had a possible cause of action); *Burgess v. American Cancer Soc'y*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989) (noting that statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). Petitioner's dilatory investigation does not toll the statute of limitations. Petitioner's argument appears to suggest that this State's statute of limitations jurisprudence does not apply if complying with South Carolina law proves burdensome. Further, the Record establishes there is no question of fact as to when Petitioner discovered a claim existed;

she was aware of her claim against RCA and warned of both its pending and ultimate expiration on numerous occasions from 1999-2010.

The issue is not what Petitioner believed or knew or thought to be reasonable. South Carolina courts have held repeatedly that the statute of limitations can be triggered even if a plaintiff does not know the exact cause of her injury or has not developed a full-blown theory as to the cause of her injury. See, *e.g.*, *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). All that is required to trigger the statute of limitations are "facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right of [hers] has been invaded or that some claim against another party might exist." *Id.* The law imposes an objective standard upon her actions and the evidence proves that, in the light of repeated warnings and her admitted knowledge of construction defects, Petitioner failed to act with reasonable diligence with respect to pursuing claims against RCA. She elected to wait until 2011 to identify the "root cause" of the defects in the house and, in the meantime, the statute of limitations on Petitioner's claims expired.

V. IN ADDITION TO RETAINING COUNSEL IN 2009, AMPLE EVIDENCE ESTABLISHES THAT PETITIONER'S CLAIMS ARE TIME-BARRED

Petitioner contends the Court of Appeals erred in finding, "At the very latest, the statute of limitations applicable to [Petitioner]'s claims against RCA ran in March 2012," and in relying upon *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993) (finding plaintiff knew or should have known she had a claim against her physician after seeking legal advice about a claim against him). Petitioner argues there is no conclusive evidence on the nature

of the legal advice sought other than Petitioner's affidavit testimony which states she sought legal counsel to "discuss the ongoing maintenance and repair costs" at the house.

The facts regarding Petitioner's retention of counsel are clear. In March 2009, Victoria Stein again recommended Petitioner consult with an attorney about the continued problems, damage, and water intrusion at the house despite previous repairs. (R. p. 746, lines 13-14; p. 748, line 4 – p. 749, line 20; p. 750, line 20 – p. 751, line 2; p. 1381. See also R. p. 1507, line 14 – p. 1508, line 15). Petitioner retained counsel, who made arrangements for engineer Skip Lewis to survey the house for structural issues, including evaluating the leaking roof and windows. (R. p. 745, lines 16-18; p. 1523, line 20 – p. 1524, line 2; p. 1524, line 14 – p. 1525, line 4; p. 1526, lines 16-20. See also R. pp. 1381-84). The purpose of Lewis' inspection was to investigate the source of continued water intrusion despite the repairs performed by Buffington Homes in 2004-05. (R. p. 768, line 16 – p. 769, line 15). In May 2009, Lewis presented, at the direction of Petitioner's counsel, a $45,000 proposal to conduct a building condition survey, including a visual inspection of the building envelope, windows, and cladding. (R. pp. 1385-87). Despite her counsel's recommendation that Lewis inspect the house, Petitioner rejected Lewis proposal and otherwise failed to conduct a forensic analysis of the house until Clements' 2011-12 investigation. (R. p. 787, line 1 – p. 788, line 1).

Although one might find it odd to consult an attorney about "maintenance and repair costs," rather than a contractor or property manager, the Record is replete with additional evidence (other than Petitioner's retention of counsel) that establishes the statute of limitations began to run long before March 2009. As noted by the Court of Appeals in the paragraph preceding the finding in question: between 1999 and 2002, Cowan notified

Petitioner of defects in the roof, chimneys, exterior walls, windows, doors, patio, and basement, and further notified her pervasive water damage to home's interior; between 1999 and 2011, Petitioner engaged numerous experts and professionals to investigate and remedy various construction defects; Petitioner admitted in her deposition that she Buffington's 2004-05 repairs were intended to remedy defects in RCA's original construction. In stating that the statute of limitations expired "at the latest" in March 2012, the Court of Appeals was doing no more than viewing the evidence in the light most favorable to Petitioner. Even if one ignores the fact Petitioner retained legal counsel in March 2009, the Record makes clear that Petitioner's claims against RCA expired long before she filed suit in August 2013.

VI. THE CIRCUIT COURT'S EXCLUSION OF PORTIONS OF CSA'S 2003 REPORT AND STEIN'S 2008 REPORT FROM ITS ORDER IS OF NO CONSEQUENCE

Petitioner contends the lower courts ignored evidence that supports her arguments as to what she knew and when she knew it. (Pet. Br. at 14). Specifically, Petitioner argues that the Circuit Court included portions of CSA's 2003 report that are unfavorable to her in its order, but excluded portions of the report that she believes are favorable to her. (*Id.* at 15-16). Similarly, Petitioner contends the Circuit Court excluded portions of Stein's 2008 report that are favorable to her.

In order to defeat a motion for summary judgment based on the statute of limitations, a plaintiff must establish the existence of a question of fact through the introduction of conflicting evidence. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997). When there is no conflicting evidence, or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that she

had a claim is a matter of law to be decided by the trial court. *Cf. Johnston v. Bowen*, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993); *Knox v. Greenville Hosp. System*, 362 S.C. 566, 571-72, 608 S.E.2d 459 (Ct.App. 2005) (holding trial court viewed evidence objectively and properly determined when plaintiff's claim should have been discovered).

Specifically, Petitioner contends the Circuit Court failed to consider excerpts from the 2003 CSA report (R. pp. 1155-71) and the 2008 Consultant report (R. p. 1440-49) that suggest certain problems with the house were the responsibility of someone or something other than RCA and its construction. (Pet. Br. at 15-16). Petitioner complains that the Circuit Court's Order (1) did not state the purpose of CSA's survey was to determine the sources of isolated areas of damage and fungal growth, (2) did not include CSA's suspicion that the HVAC system and environmental forces may be contributing to the air/water intrusion, and (3) did not include CSA's summary stating, "[O]utside 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." *Id.* at 15.

Petitioner fails to recognize, however, that the purported "conflicts" in this evidence do not relate to the key issue in this case, which is, "When did Petitioner have notice of the existence of a claim against RCA?" While RCA acknowledges that the CSA report does refer to concerns with the HVAC system (which Petitioner admits is not RCA's responsibility), the fact remains that the CSA report also put Owner on notice of defects that a reasonable person would objectively attribute to RCA. For example, the CSA reported references "ongoing water intrusion around windows, at roof valleys, and at several sub-grade locations" and recommends the removal of certain windows and roof

sections to investigate the source of water leaks. (R. pp. 1157-61, 1164). These problems clearly are attributable to RCA. This evidence was sufficient to put Petitioner on notice of a potential claim in 2003.

Petitioner also complains that the Circuit Court failed to consider excerpts from Stein's October 2008 report in which the consultant opined that the major contributor to mold was the HVAC system (which, again, is not RCA's responsibility) and recommended that Petitioner pursue legal action related to problems with the HVAC system, but not claims for defects in RCA's work. (Pet. Br. at 15-16). This is irrelevant. Petitioner cannot refute the portions of Stein's 2008 report that list defects for which Stein deemed RCA responsible. Stein stated those defects, "<u>are numerous but bottom line is that the Statute of Limitations ran out in May 2007</u>." (R. p. 1449 (emphasis added)).

The "favorable" portions of these documents do not contradict the "unfavorable" portions; rather, they do no more than discuss problems that are not RCA's responsibility. Certainly, the "favorable" statements do not create a question of fact as to when Petitioner was on notice of defects in RCA's work or of her claims against RCA. While Petitioner may have succeeded in pointing to perceived conflicts as to irrelevant matters, she has failed to present any conflicting evidence as to when she discovered her claims or when the statute of limitations began to run.

CONCLUSION

For the foregoing reasons, RCA respectfully submits that the Circuit Court's grant of summary judgment was proper and the Petition for Writ of Certiorari be denied.

BEST HONEYCUTT, P.A.

By: ____________________

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June 19, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2019-000851

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 ....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.

PROOF OF SERVICE

I certify that I have served Respondent Russ Cooper Associates, Inc.'s *Return to Appellant's Petition for Writ of Certiorari* by depositing a copy in the U.S. Mail, postage paid, on June 19, 2019, and via electronic mail to counsel of record as follows:

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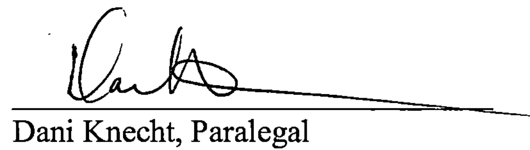

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June 19, 2019
Charleston, South Carolina