STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COURT OF COMMON PLEAS
RICHLAND COUNTY

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SC Court of Appeals

Case No: 2012-CP-40-06895R

Tymika Jones Alston and Harold Alston individually
And as Parents and Guardians on behalf of their minor child, J.A.,.................. Appellants,

v.

Donald Richard Torres d/b/a DMT Construction Co., Inc.,
L&L Electric, Inc. and Eduardo Moreno d/b/a
E.S. Moreno Construction, Defendants,

Of which Donald Richard Torres d/b/a/ DMT
Construction Co., Inc., is the ....Respondent.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY DISMISS PLAINTIFFS' DIRECT CLAIMS AGAINST DMT BASED ON THE RUNNING OF THE APPLICABLE STATUTE OF LIMITATIONS?

II. DID THE CIRCUIT COURT PROPERLY DISMISS PLAINTIFFS' EQUITABLE TOLLING ARGUMENT?

III. DID THE CIRCUIT COURT PROPERLY DISMISS PLAINTIFFS' WAIVER ARGUMENT?

IV. DID THE CIRCUIT COURT PROPERLY DISMISS PLAINTIFFS' LACHES ARGUMENT?

STATEMENT OF THE CASE

This appeal arises out of an order granting summary judgment to Respondent Donald Richard Torres d/b/a DMT Construction, Co. Inc. ("DMT") in a case that has a somewhat complicated procedural history. On June 29, 2010, Plaintiffs Tymika Jones Alston and Harold Alston initially filed suit against Willow Creek Construction, Inc. and Oscar Torres,[1] alleging that the home they engaged Willow Creek to construct was defectively built which, due to water intrusion and mold issues, caused them to have to move out of it as of September 1, 2009. The Complaint alleged five causes of action against Willow Creek, including breach of contract, negligence and negligent supervision, and breach of the implied warranties of workmanlike service, of merchantability and of fitness for a particular purpose. Plaintiffs alleged personal bodily injury, past and future medical expenses and lost wages, as well as alternative living expenses they allege they incurred due to the house being uninhabitable. (Complaint, Docket No. 10-CP-40-04307, filed June 29, 2010).

On March 31, 2011, Willow Creek filed a third party complaint naming DMT, among other subcontractors, as Third-Party Defendants. (Defendant Willow Creek Construction, Inc.'s Third-Party Complaint, Docket No. 10-CP-40-04307, filed March 31, 2011) ("Third Party Complaint"). DMT filed a timely answer, (Answer to Third Party Complaint, Docket No. 10-CP-40-04307, filed June 27, 2011), after which Willow Creek filed an Amended Third-Party Complaint on June 29, 2011. (Defendant Willow Creek Construction, Inc.'s Amended Third-Party Complaint, filed June 30, 2011)

[1] Neither Oscar Torres nor Willow Creek Construction, Inc. are affiliated in any way with Richard Torres d/b/a DMT Construction Co., Inc. Oscar Torres and Willow Creek Construction, Inc. will be referred to jointly as Willow Creek herein.

("Amended Third Party Complaint"). Willow Creek alleged that DMT performed framing work on the Plaintiffs' home, including installation of windows and doors, among other things, as well as flashing and sealing "the window jambs and heads." (Third-Party Complaint, ¶ 4) (Amended Third-Party Complaint, ¶ 4). Willow Creek alleged that, if it were held liable to or settled with the Plaintiffs based on any defective the work performed by the subcontractors named as Third-Party Defendants, including DMT, then those Third-Party Defendants would be required to indemnify Willow Creek for any amounts it was required to pay. (Amended Third-Party Complaint, ¶¶ 11-12, 16-17, 22-23, 29-30). DMT duly answered the Amended Third-Party Complaint. (Answer to Amended Third-Party Complaint, Docket No. 10-CP-40-04307, filed July 11, 2011).

The case proceeded to discovery, including taking the Plaintiffs' depositions on July 27, 2011. The parties – Plaintiffs, Defendant Willow Creek and Third-Party Defendant DMT – filed a Consent Order to strike the case from the active docket on November 1, 2011. (Consent Order to Strike Case from the Docket Pursuant to Rule 40(J) SCRCP, Docket No. 10-CP-40-04307, filed Nov. 1, 2011).

In October 2012, Plaintiffs moved to restore the case to the active docket, (Plaintiff's [sic] Motion to Restore Case to Active Trial Roster, Docket No. 10-CP-40-04307, filed Oct. 11, 2012), which was granted that same date. (Order to Restore Case to Active Trial Roster, Docket No. 10-CP-40-04307, filed Oct. 11, 2012). Given that the case had been restored, the parties re-engaged in discovery, with DMT serving discovery requests on Plaintiffs and seeking pertinent medical records.

On May 22, 2014, Plaintiffs filed a motion to amend their Complaint. (Plaintiffs Motion for Leave to File Amended Complaint Adding Parties, Docket No. 10-CP-40-

04307, filed May 22, 2014) ("Motion to Amend").[2] The Motion to Amend stated that Plaintiffs were seeking leave to amend their Complaint to add "their minor child [J.A.] as a party Plaintiff to this action pursuant to South Carolina Rules of Civil Procedure 15(a), 19, 20 and 21." Plaintiffs alleged that it was only "[t]hrough the course of discovery" that they "learned of the serious long term injuries sustained" by Plaintiffs "as Parents and Guardians of their minor child, [J.A.]." They stated that their child's absence as a Plaintiff from the case would preclude complete relief and that "Defendants would not be prejudiced in any way by adding said parties to this action." (Motion to Amend, ¶¶ 3, 5, 6).

In June 2014, Plaintiffs reached an agreement to settle their claims against Willow Creek during a mediation. Under that agreement, Willow Creek was to enter into a confession of judgment as to the amount of alleged repairs necessary to restore the home.[3]

On July 15, 2014, Plaintiffs' counsel sent an email to DMT's counsel advising that Willow Creek's counsel had agreed to the amended pleading and had "no intentions on appearing as the case is settled with respect to his client." The email explained that "the law clearly allows for the amendment and with the statute of limitations being tolled

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[2] Although Plaintiffs filed their Motion to Amend in Docket No. 10-CP-40-04307, the restored action was assigned Docket No. 2012-CP-40-6895R.

[3] DMT did not learn of the content of the mediated settlement agreement until March 17, 2015, the day before the March 18, 2015 hearing on its Motion for Summary Judgment. DMT sought a copy of the Agreement from the mediator, but Plaintiffs objected. (Email from A. Macaulay to T. Dougall, D. Gist, A. Wallace, et al., "Re: MEDIATION: Alston v. Willow Creek," sent March 17, 2015 at 9:00 p.m.). However, before the mediator notified the parties of Plaintiffs' objection, Willow Creek's counsel had provided a copy to DMT's counsel. (Email from T. Dougall to T. Chase, "Re: Tymika Jones Alston and Harold Alston v. Willow Creek Settlement Documents," sent March 17, 2015 at 4:23 p.m.).

due to [minor child's] minority it would be in all parties best interest to resolve this matter during this case rather than with subsequent litigation." (Email from A. Wallace to T. Chase, "Motion Hearing in Alston vs Willow Creek Construction (7/22/14)," sent July 15, 2014). In response, DMT's counsel advised that "[w]e will consent to the amendment provided we are in agreement that the parents depositions may be reopened as to the minor's claim." (Email from T. Chase to A. Wallace, "Motion Hearing in Alston vs Willow Creek Construction (7/22/14)," sent July 18, 2014). DMT's counsel subsequently agreed, upon request from Plaintiffs' counsel, to accept service on the Amended Complaint. (Emails between A. Wallace to T. Chase, "Motion Hearing in Alston vs Willow Creek Construction (7/22/14)," sent Aug. 11, 2014).

On August 11, 2014, before the Court had ruled on their Motion to Amend, Plaintiffs filed an Amended Complaint that, for the first time, named DMT as a direct Defendant. In light of their prior settlement, the Amended Complaint did not name Willow Creek as a defendant. The Amended Complaint included Plaintiffs' minor child, J.A., as a Plaintiff and alleged the same five causes of action raised in their initial Complaint against Willow Creek: breach of contract, negligence and negligent supervision, and breach of the implied warranties of workmanlike service, of merchantability and of fitness for a particular purpose. Unlike their initial Complaint, however, Plaintiffs now were seeking to recover their same alleged damages, along with those of their minor child, J.A., directly from DMT. (Amended Complaint, filed in Docket No. 10-CP-40-04307 but moved to Docket No. 2012-CP-40-6895R, filed Aug. 11, 2014) ("2014 Amended Complaint").

DMT's counsel amended the Acceptance of Service certificate attached to the Amended Complaint. The resulting certificate corrected DMT's name and provided that DMT was waiving "any requirement for other service of the Amended Complaint in this action *while preserving all other defenses*." (Acceptance of Service, filed in Docket No. 10-CP-40-04307 but moved to Docket No. 2012-CP-40-6895R,[4] dated Aug. 18, 2014).

On September 4, 2014, DMT filed an Answer to the Amended Complaint, generally denying the allegations and, among other defenses, asserting that Plaintiffs' claims are barred by laches and/or the applicable statute of limitations. (Answer to Amended Complaint, filed Sept. 4, 2014). On September 29, 2014, Willow Creek filed a Stipulation of Dismissal, dismissing all its third party claims against DMT. (Stipulation of Dismissal with Prejudice by Willow Creek Construction, Inc., filed Sept. 29, 2014).

On January 2, 2015, DMT filed a Motion for Summary Judgment, arguing that Plaintiffs' direct claims against it in the Amended Complaint are barred by the statute of limitations. (Defendant Donald Richard Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment, filed Jan. 2, 2015). Plaintiffs filed an opposition. (Plaintiffs' Memorandum in Opposition to defendant Donald Richard Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment, filed March 11, 2015). DMT filed a Memorandum in Support of its Motion, (Memorandum in Support of Donald R. Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment, filed March 18, 2015), and the parties were heard by the Honorable W. Jeffrey Young, Circuit Judge, on March 18, 2015. Per the request of Judge Young, the parties submitted supplemental memoranda of law. (Plaintiffs' Supplemental Memorandum in Opposition to defendant

[4] Unless noted otherwise, all other remaining filings discussed in this Section were filed in Docket No. 2012-CP-40-6895R.

Donald Richard Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment, dated March 26, 2015) (Supplemental Memorandum in Support of Donald R. Torres d/b/a DMT Construction Co., Inc.'s Motion for Summary Judgment, dated March 30, 2015) ("DMT's Supplemental Memorandum").

At the hearing, Judge Young ruled from the bench in favor of DMT. Prior to Judge Young's formal order being filed, however, Plaintiffs moved for reconsideration. (Plaintiffs' Motion for Reconsideration of the Court's Decision to Grant Defendant's Motion for Summary Judgment, filed Oct. 22, 2015).

On November 2, 2015, Judge Young filed a written Order granting summary judgment to DMT as to Tymika and Harold's individual claims, and clarifying that their minor child's personal bodily injury claim can continue. Specifically, the Circuit Court dismissed Tymika and Harold's individual claims for personal bodily injury, past and future medical expenses and lost wages, and for alternative living expenses, costs to repair and/or remediate the home and/or diminution in the value of the home. (Order for Summary Judgment Related to Individual Claims of Tymika Jones Alston and Harold Alston, filed Nov. 2, 2015).[5] DMT responded to Plaintiffs' Motion for Reconsideration, (Defendant's Response to Plaintiffs' Motion for Reconsideration, filed Nov. 10, 2015), which the Circuit Court denied on January 15, 2019. (Form 4 Order denying Plaintiffs' Motion for Reconsideration, filed Jan. 15, 2019).

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[5] In the Order for Summary Judgment, the Circuit Court explained that the parties agreed that Plaintiffs' child J.A.'s, claims are not time barred and remain viable. (Order on Summary Judgment, p. 4). On November 5, 2015, the parties filed a Consent Motion to Stay the Case, in which they requested, for purposes of judicial economy, that the pending claims of the Plaintiffs' minor child J.A. be stayed until "there has been a final judicial determination as to whether Harold Alston and Tymika Alston are allowed to proceed with their claims as Individual Plaintiffs." (Consent Motion to Stay the Case, filed Nov. 4, 2015).

Plaintiffs timely appealed to this Court.

FACTUAL BACKGROUND

Plaintiffs Tymika and Harold Alston contracted with Willow Creek to construct a home at 451 Apple Branch Court, Blythewood, in Richland County, South Carolina. (Complaint ¶¶ 1, 7). DMT served as one of Willow Creek's subcontractors in the construction of Plaintiffs' residence. (Answer to Amended Third-Party Complaint ¶5).

Plaintiffs moved into the home on April 3, 2007. Two days later, on April 5, 2007, Plaintiffs noticed their bedroom wall was wet, both inside and out, from a neighbor's sprinkler. They contacted Oscar Torres who came out and sanded and painted the wall. (Complaint ¶¶ 8, 9).

Following a heavy rain in July 2007, Plaintiffs again noticed that the bedroom wall was wet and contacted the builder, Oscar Torres, who came out and sanded and repainted the wall, and resealed the window. (Complaint ¶ 10). However, that summer, Plaintiffs allege they began to experience medical issues involving their sinuses, as well as allergy problems. (Complaint ¶ 11).

In November 2008, Plaintiffs hired a mold specialist to inspect their home. The inspection revealed mold throughout their home. (Complaint ¶ 12). On December 5, 2008, Plaintiffs received a quote to repair the bedroom window and perform mold treatment. (Complaint ¶ 13) (Proposal by CBS Builders, dated Dec. 5, 2008). The Parties are in agreement that, as of December 5, 2008, Plaintiffs were on notice that some of their damages were caused by installation of the bedroom window. (Tr. p. 9, line 3 – p. 10, lines 21) (T. Jones Alston Dep. p. 64, lines 12-24;. p. 83, lines 5-18;). Tymika Jones Alston testified that Oscar Torres with Willow Creek told her that "the problem

here is that [his] subcontractor didn't do a good job," and specifically mentioned DMT. (T. Jones Alston Dep. p. 153, lines 11-23).

On February 27, 2009, Plaintiffs had the home inspected by Pinpoint Home and Commercial Inspections. That inspection concluded that the bedroom window that had been installed was "not the correct window" and was a vinyl replacement window dissimilar to the other windows in the home. (Complaint ¶ 14). (Pinpoint Home & Commercial Inspections, LLC Summary for Harold & Tymika Alston, dated Feb. 27 2009).

Subsequently, on March 8, 2009, Plaintiffs notified Willow Creek of the mold issues and the nonconforming window. According to their Complaint, "[t]he builder responded on March 20, 2009 and replaced the window on April 16, 2009." (Complaint ¶ 15).

Plaintiffs allege that they continued to experience medical problems and, as a result, ordered an inspection by Southeastern Inspection Services in August 2009. That inspection identified "[n]umerous deficiencies, code violations and unsatisfactory work," as well as moisture readings of over 30% in some areas of the home. The inspector "strongly suggested that Plaintiffs move out" of their home, which they did on September 1, 2009. (Complaint ¶¶ 16, 17) (Letter from Southeastern Inspection Services, Inc. to Plaintiffs, dated Aug. 11, 2009).

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009). That is,

summary judgment should be granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In making this determination, the Court must view the evidence and all inferences which can be reasonably drawn therefrom ... in the light most favorable to the nonmoving party." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 120, 542 S.E.2d 735, 738 (Ct. App. 2001). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010). Furthermore, a "party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); *see also* Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452 (Ct. App. 1988) (same).

ARGUMENTS

I. The Circuit Court properly dismissed Plaintiffs' direct claims against DMT based on the running of the applicable statute of limitations.

South Carolina Code § 15-3-530 establishes a three year statute of limitations for contract and negligence actions. For negligence actions, the statute of limitations begins to run from the date when the injury resulting from the wrongful conduct either is discovered or should have been discovered by the exercise of reasonable diligence. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 370-371, 597 S.E.2d 27, 29 (Ct. App. 2004). The date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of statute of limitations. Gillman v. City of Beaufort, 368 S.C. 24, 27-28, 627 S.E.2d 746, 748 (Ct. App. 2006).

The Circuit Court correctly ruled that Plaintiffs' claims against DMT are barred by the statute of limitations.[6] Plaintiffs filed their Complaint against DMT on August 11, 2014, well over three years after they admittedly learned of their claim on December 5, 2008 and, consequently, their Complaint was dismissed properly. As the Circuit Court pointed out, "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Furthermore, while "[t]he statute of limitations may sometimes work a great hardship in special cases ... under the principle that litigation and contention must have an ending, and that the repose and quiet of the many compensates for the loss of the few, such statutes have been adopted and strictly enforced in most countries as wise, and as contributing to the best interests of society." Arial v. Arial, 29 S.C. 84, 93, 7 S.E. 35, 40 (1888).

The fact that Willow Creek filed a Third Party Complaint against DMT has no bearing on the operation of the statute of limitations on Plaintiffs' direct claims against DMT. The Third Party Complaint and the Amended Third Party Complaint clearly state that, in the event Willow Creek is held liable to Plaintiffs for construction defects, then DMT and the other named Third Party Defendants would be liable to Willow Creek. (Third Party Complaint) (Amended Third Party Complaint). As a Third Party Defendant,

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[6] The parties are in agreement that the personal bodily injury claim of Plaintiffs' child, J.A., is not barred by the statute of limitations, which the Circuit Court noted.

DMT would be liable only to Willow Creek and only if Willow Creek were determined to be liable to Plaintiffs. Logically, pursuant to the Amended Third Party Complaint, if Willow Creek was not liable to Plaintiffs, DMT and the other Third Party Defendants faced no liability whatsoever.

Plaintiffs suggest that the distinction between direct liability and third party liability is meaningless because DMT "was subject to potential liability as it relates to the allegations in Appellant's [sic] Complaint," and that DMT "should not now be able to escape liability on the sole basis of Appellants having partially settled with Willow Creek." (App. Br. p. 9).

In Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 2000), this Court held that a counterclaim for abuse of process, which was filed more than three years after the lawsuit began, was time-barred by the statute of limitations. The fact that there was a pending, ongoing suit between the parties did not affect the running of the statute of limitations. Here, the facts are more compelling than those in Whitfield because there was never a direct claim between Plaintiffs and DMT until Plaintiffs filed their Amended Complaint in August of 2014, even though the lawsuit was originally filed in 2010.

In Gillman, this Court held that a claim against an indispensable party under Rule 19, SCRCP, was time barred under the applicable statute of limitation. This Court explained that, "it is well established that the statute of limitations operates as a defense to limit the remedy available from an existing cause of action, and unless the action is commenced before the expiration of the limitations period, the plaintiff's claim is

barred."[7] 368 S.C. at 28, 627 S.E.2d at 748. It is apparent from these cases that, when suits have already been initiated and even when a party is indispensable, claims cannot be brought after the statute of limitations has expired.

Here, Plaintiffs slept on their rights and failed to bring any direct claims against DMT before the statute of limitations expired. As a result, this Court should affirm the Circuit Court's grant of summary judgment to DMT and dismissal of Plaintiffs' claims.

II. The Circuit Court did not err by failing to find that the statute of limitations was tolled.

Plaintiffs erroneously argue that the statute of limitations should be equitably tolled. Essentially, they argue that, by participating in discovery as a Third Party Defendant, and defending itself against the Third Party Complaint and Amended Third Party Complaint, DMT somehow caused Plaintiffs' delay and/or prevented them from timely filing direct claims against it.

First, the case law on which Plaintiffs rely is factually and meaningfully distinguishable from the facts of this case. For instance, Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), on which Plaintiffs rely, illustrates precisely why equitable tolling is not appropriate in this case. In Magnolia North, the property owners association ("POA") filed suit against the condominium developer more than three years from the date the statute of limitations began to run, but approximately eight months after the plaintiffs assumed control of the POA. Prior to the plaintiffs assuming control, the developer controlled the property owners' association. This Court found "unpersuasive [the defendants'] claim that an

[7] *See also*, Sandridge v. Folsom, 200 F. Supp. 25, 27 (M.D.Tenn. 1959) (holding that "an amendment bringing in an indispensable new party is, in effect, the commencement of a new action and it cannot be allowed after a statute of limitations has run").

organization they controlled would have initiated an action against itself during this period." 397 S.C. at 371-372, 725 S.E.2d at 125. Here, Plaintiffs were aware that they had a claim against DMT as early as December 5, 2008 and, unlike the POA in Magnolia North, were under no impediment to bringing any direct claims they had against DMT.

Hooper is equally distinguishable. There, the nursing home defendant, Ebenezer, had been taken over by another entity, Agape Rehabilitation of Rock Hill, during the time the statute of limitations was running on a wrongful death and survival action. As a result of the corporate change and due to the defendant's failure to list a viable registered agent,[8] the plaintiff's complaint was served on Ebenezer/Agape after the statute of limitations had run. Noting that equitable tolling "should be used sparingly and only when the interests of justice compel its use," Hooper, 386 S.C. at 117, 687 S.E.2d at 33, the Supreme Court held that Ebenezer's failure to list a proper registered agent for service of process hindered timely service of the complaint. Under those circumstances, where the defendants' actions caused the failure to timely serve and the plaintiff diligently pursued service, the Court held that it was "not equitable that Ebenezer be the beneficiary of the drastic consequence of a dismissal." 386 S.C. at 118, 687 S.E.2d at 34. Here, in contrast, Plaintiffs can point to no action or inaction on the part of DMT that caused or contributed to them failing to file their direct claim against it before the statute of limitations ran. Nor can they point to any diligent effort on their part to preserve their claim. In short, while asserting "justice and equity" demand that their 2014 Amended

[8] When the plaintiff attempted to serve the registered agent, she was first told the registered agent had moved, then that he lived in another county, and later than he had left his wife and moved to an unknown address. Hooper, 386 S.C. at 112, 687 S.E.2d at 30-31.

Complaint not be dismissed, they have presented no facts to support that allegation and no basis on which the Circuit Court or this Court should exercise its equitable powers.

In Janasik v. Fairway Oaks Villas Hor. Prop. Regime, 307 S.C. 339, 415 S.E.2d 384 (1992), the plaintiffs invoked the doctrine of equitable estoppel as a shield against the property management company's lawsuit asking that certain landscaping features be removed. Noting that the management company had been fully aware of the landscaping installations over the years as the respondents expended over $10,000 in landscaping fees, the Supreme Court held that both waiver and estoppel, which "can only be determined in light of the circumstances of each case," were applicable. 307 S.C. at 344-345, 415 S.E.2d at 388. Here, in contrast, DMT did nothing to cause Plaintiffs to expend efforts or money unnecessarily in this case.

Lee v. Southern R. Co., 228 S.C. 240, 243, 89 S.E.2d 431, 432 (1955), simply defines equitable estoppel as "where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact." Plaintiffs have pointed to no action taken by DMT or failure to act on DMT's part that denied them the right to plead or prove their case. Plaintiffs were free to add DMT any time up until the statute of limitations ran and nothing DMT did caused them to miss that deadline. There is no evidence whatsoever that DMT's status as a Third Party Defendant caused Plaitniffs to delay filing a direct claim within the proper time.

Ironically, in Ocana v. American Furn. Co., 135 N.M. 539, 91 P.3d 58 (N.M. 2004), on which Plaintiffs also rely, the New Mexico Supreme Court explained that "[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." 135 N.M. at 547, 91

P.3d at 66. However, where, as was the case in Ocana[9] and is the case here, the plaintiff's failure to receive notice and/or bring a timely claim is due to the plaintiff's own fault, "equitable tolling does not apply." Id.

All of the actions recited on pages 5, 9 and 10 of their Brief that Plaintiffs characterize as demonstrating DMT's "undisputed and pervasive" involvement that justifies equitable tolling, with the sole exception of "answering Appellants' Amended Complaint," occurred as the result of DMT being named a Third Party Defendant and occurred prior to Plaintiffs filing their 2014 Amended Complaint. Third party defendants are permitted to participate fully in discovery and procedural orders in order to protect their interests against the third party plaintiff. Doing so does not prevent a plaintiff from bringing direct claims against a third party defendant, nor does it lull the plaintiff into a false sense that they do not need to file the same.

Plaintiffs suggest that DMT should be equitably estopped because it did not raise the statute of limitations defense earlier. (App. Br. p. 9). First, DMT raised the statute of limitations as an affirmative defense in its Answer to the 2014 Amended Complaint. (Answer to 2014 Amended Complaint, ¶45). Second, DMT did not raise a statute of limitations defense earlier because, with respect to Willow Creek's third party claims, there was no such affirmative defense available to it. Plaintiffs mistakenly and repeatedly

[9] In Ocana, the plaintiff failed to receive her "right to sue" letter from the EEOC, which triggered her time for filing her employment discrimination suit under Title VII, because she moved after filing her complaint with the EEOC and did not advise that Division of her new address. The court held that this failure prevented the plaintiff from equitably tolling the statute of limitations. 135 N.M. at 547, 91 P.3d at 66. Here, Plaintiffs knew of their rights and failed to act on them in a timely manner. Equity should not be exercised to save Plaintiffs from their own knowing failure to act in a timely manner.

assume that there is no functional or legal difference between Willow Creek's third party claim against DMT and their attempt to bring direct claims against DMT.

Plaintiffs also assert that DMT wrongfully participated in discovery "for the course of a five-month period after the Complaint had been amended," as evidence supporting their equitable tolling claim. However, Plaintiffs' failure to timely serve DMT with direct claims cannot possibly have been influenced by actions or inactions taken *after* Plaintiffs filed their 2014 Amended Complaint. Furthermore, until the 2014 Amended Complaint against it was dismissed, DMT was entitled to take steps to defend itself against Plaintiffs' claims.

Plaintiffs' argument that filing a timely Answer to the 2014 Amended Complaint that raised affirmative defenses including the running of the statute of limitations, (App. Br. pp. 9-10), constitutes justification for tolling the statute of limitations is both specious and absurd. DMT's counsel properly and timely accepted service of the 2014 Amended Complaint, specifically and unambiguously "preserving all other defenses." (Acceptance of Service). DMT properly and timely raised, among other affirmative defenses, the running of the statute of limitations. (Answer to 2014 Amended Complaint, ¶45).

DMT timely and properly raised the statute of limitations as a defense. As a result, this Court should reject Plaintiffs' equitable tolling argument and affirm the Circuit Court's grant of Summary Judgment.

III. DMT did not waive its right to raise the statute of limitations defense.

Plaintiffs correctly cite Janasik for the rule that "waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at

the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." 307 S.C. at 344, 415 S.E.2d at 387-388. Here, Plaintiffs can show no facts that even suggest a voluntary and/or intentional abandonment of a known right. As a result, the Circuit Court's grant of summary judgment was proper.

First, Plaintiffs state as though it were a given fact, which it is not, that, since their Amended Complaint relates back to the original Complaint under Rule 15(c), SCRCP, DMT was under an obligation to raise its statute of limitations defense earlier and, by not doing so, it has voluntarily and intentionally waived its right to rely on that defense. However, the Circuit Court specifically and correctly rejected Plaintiffs' argument that Rule 15(c) applied to their attempt to add DMT as a direct Defendant after the statute of limitations expired. (Order pp. 6-7).

As the Circuit Court correctly pointed out, Plaintiffs' 2014 Amended Complaint does not relate back to their earlier Complaint because they were not amending it to substitute a party, correct a name or corporate defendant's identity. Gause v. Smithers, 384 S.C. 130, 681 S.E.2d 607 (Ct. App. 2009) is instructive. There, the plaintiff sued the Father, believing he was the driver of the vehicle that had been stopped on a highway. After the statute of limitations had run, the plaintiff filed an amended complaint adding the Son, who was the actual driver, as a defendant. This Court affirmed the lower court's grant of summary judgment in favor of the Son because "the addition of a party is not contemplated by Rule 15(c)." 384 S.C. 133, 681 S.E.2d at 609.

The same result was reached in Cline, where the plaintiff attempted to add a defendant after the statute of limitations had run. Rejecting the plaintiff's argument that its amended complaint should relate back to its original complaint under Rule 15(c), this

Court explained that "relation back applies only when an existing party is changed, not when a new party is added to a complaint." 359 S.C. at 371 n.2, 597 S.E.2d at 29 n.2, *citing* Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) ("Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant"). As was the case in Jackson, had there been a mere substitution or correction of a defendant's name, instead of an attempt to add an entirely new direct Defendant, then the amendment could have been analyzed under the test set forth in Hughes v. Water World Water Slide, 314 S.C. 211, 442 S.E.2d 584 (1994), a case on which Plaintiffs relied heavily below but curiously have abandoned on appeal.

Here, Plaintiffs clearly cannot fulfill the requirements of Rule 15(c). While the allegations in their 2014 Amended Complaint do arise out of the same "conduct, transaction or occurrence" set forth in their Complaint, they cannot show DMT "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." There was no mistake in identity. Plaintiffs indisputably were aware that Willow Creek was the general contractor and, as of December 5, 2008, that DMT was the subcontractor that installed the bedroom window. They failed to bring any direct claims against DMT before the statute of limitations ran and, harsh result or not, this Court should affirm that their 2014 Amended Complaint does not relate back pursuant to Rule 15(c). *See* Gause, 384 S.C. at 133, 681 S.E.2d at 609.

While it is true that the 2014 Amended Complaint named DMT as a Defendant and no longer named Willow Creek as a Defendant, that is precisely because Plaintiffs had settled with Willow Creek for their alleged damages. There was no attempt to

substitute DMT for Willow Creek. Instead, Plaintiffs simply and opportunistically sought to drag DMT in as a direct Defendant after having settled their claims against Willow Creek.

Because their 2014 Amended Complaint does not relate back to their original Complaint, Plaintiffs' waiver argument is somewhat disjointed and, in any event, lacks merit. As noted above, Plaintiffs argue that DMT could have and should have raised the statute of limitations argument earlier, in fact, "before the discovery process began." (App. Br. pp. 10-11). However, in the face of timely third party claims against it by Willow Creek, DMT had no reason or basis on which to raise a statute of limitations defense. Furthermore, because Plaintiffs did not bring any direct claims against DMT until the 2014 Amended Complaint, there was no reason for DMT to allege a statute of limitations defense – or any defense for that matter – against Plaintiffs' then non-existent direct claims. At the times identified by Plaintiffs – the start of discovery, the motion to strike the case from the active docket pursuant to Rule 40(j) and the Motion to Restore it to the active docket – Plaintiffs' direct claims against DMT simply did not exist. In short, Plaintiffs' assertions that DMT should have raised their statute of limitations defense prior to Plaintiffs naming them as a direct Defendant are nonsensical and facially unsound.

As they did below, Plaintiffs suggest that DMT waived its right to raise the statute of limitations because it did not oppose their Motion to Amend. However, as is clearly set out above, in the Motion to Amend itself and in correspondence attached to DMT's Supplemental Memorandum, Plaintiffs were moving to amend solely to add their minor child, J.A., to the Complaint. (Motion to Amend) (DMT's Supplemental Memorandum

Exhs. D ("I think the law clearly allows for the amendment and with the statute of limitations being tolled due to [J.A.'s] minority it would be in all parties best interest to resolve this matter during this case rather than with subsequent litigation"), Exh. E (DMT's counsel agreeing to the proposed amendment)).[10]

DMT timely and properly raised the statute of limitations as a defense. As a result, this Court should reject Plaintiffs' waiver argument and affirm the Circuit Court's grant of Summary Judgment.

IV. Laches does not bar DMT's right to raise the statute of limitations defense.

Laches is the neglect for an unreasonable and unexplained amount of time, under circumstances permitting diligence, to do what in law should have been done." *E.g.*, Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996). The party asserting laches must demonstrate not only delay, but unreasonable delay, RWE NuKEM Corp. V. ENSR Corp., 373 S.C. 190, 199, 644 S.E.2d 730, 735 (2007), and, in addition, material prejudice. Mid-State Trust, 323 S.C. at 307, 474 S.E.2d at 423. Plaintiffs do not present any evidence or identify any question of material fact regarding any part of the test for laches. As a result, summary judgment properly was granted to DMT.

For many of the same reasons that Plaintiffs' waiver argument fails, their laches argument also fails. Plaintiffs repeat their argument that DMT should have asserted its statute of limitations defense before they filed their 2014 Amended Complaint naming

[10] Plaintiffs argued below that the fact that Mr. Wallace's July 15, 2014 email noted that Plaintiffs had settled with Willow Creek somehow constituted "notice" that the 2014 Amended Complaint would add DMT as a direct Defendant. Given that Willow Creek had not been dismissed and remained the only named Defendant at that point in time, there is no basis for nor reasonable expectation that DMT should "intuit" Plaintiffs' intentions to name DMT as a direct Defendant in an attempt to pursue their direct claims against DMT alone.

DMT for the first time as a direct Defendant. Of the list of nine "actions" that occurred prior to DMT filing its Motion for Summary Judgment, the first seven occurred prior to DMT ever being named as a direct Defendant. Number eight is their 2014 Amended Complaint and number nine is DMT's Answer to the 2014 Amended Complaint, which specifically and timely raised the affirmative defense of the running of the statute of limitations. As explained above, their arguments that DMT should have raised the statute of limitations even before it was named a direct Defendant and/or that DMT somehow prejudiced Plaintiffs by filing a timely Answer raising appropriate affirmative defenses, are both nonsensical and unpersuasive. Furthermore, Plaintiffs' arguments do not provide any grounds for this Court to reverse the Circuit Court's grant of summary judgment.

The fact that DMT participated in discovery and in the proceedings below as a Third Party Defendant, after being named in Willow Creek's timely Amended Third Party Complaint does not alter the outcome. Clearly, DMT's position in this case as a Third Party Defendant, who potentially would be liable to Willow Creek only in the event that Willow Creek was found liable to Plaintiffs, is substantially and substantively different from Plaintiffs naming DMT as the sole direct Defendant. Until Plaintiffs did so, which did not occur until over four years after they filed their initial Complaint naming Willow Creek as the only Defendant, DMT had no reason to raise the statute of limitations defense. To assert that DMT should have done so is both groundless and absurd.

Finally, Plaintiffs have failed to demonstrate any prejudice resulting to them, even assuming they could show unreasonable delay, which they cannot. Their unsupported

assertions that the delay has been "harmful to the Appellants' to a degree," and that they incurred costs engaging with DMT in discovery and litigation costs in pursuing their claim against DMT do not constitute prejudice. As is explained above, DMT participated in the proceedings, including discovery, as a named Third Party Defendant. It had every right to do so to defend itself against Willow Creek's third party claims. The fact that DMT timely filed an Answer to Plaintiffs' 2014 Amended Complaint that specifically raised the statute of limitations as an affirmative defense cannot be construed as an action that supports Plaintiffs' laches argument.

DMT timely and properly raised the statute of limitations as a defense. As a result, this Court should reject Plaintiffs' laches argument and affirm the Circuit Court's grant of Summary Judgment.

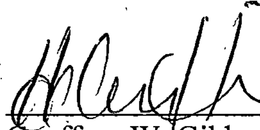
CONCLUSION

For all the reasons stated here, this Court should affirm the grant of Summary Judgment in DMT's favor and dismiss this appeal with prejudice.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

July 18, 2019



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Attorneys for Respondent Donald Richard Torres d/b/a DMT Construction Co., Inc.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COURT OF COMMON PLEAS
RICHLAND COUNTY

RECEIVED
JUL 22 2019
SC Court of Appeals

Case No: 2012-CP-40-06895R

Tymika Jones Alston and Harold Alston individually
And as Parents and Guardians on behalf of their minor child, J.A.,.................. Appellants,

v.

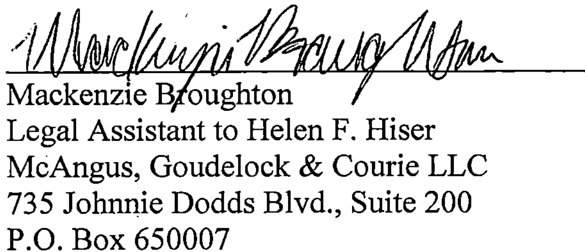
Donald Richard Torres d/b/a DMT Construction Co., Inc.,
L&L Electric, Inc. and Eduardo Moreno d/b/a
E.S. Moreno Construction, Defendants,

Of which Donald Richard Torres d/b/a/ DMT
Construction Co., Inc., is the ....Respondent.

PROOF OF SERVICE

I certify that on the 18th day of July 2019, I served the **Initial Brief of Respondent** Donald Richard Torres d/b/a DMT Construction Co., Inc., and Respondent's **Designation of Matter to be Included in the Record on Appeal** on Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record:

Donald Gist
Aaron Wallace
Gist Law Firm, PA
P.O. Box 30007
Columbia, South Carolina 29230



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RECEIVED
JUL 22 2019
SC Court of Appeals

July 18, 2019

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Tymika Jones Alston and Harold Alston individually and as Parents and Guardians on behalf of their minor child Jayden Alston vs. Donald Richard Torres d/b/a DMT Construction, Co., Inc., L&L Electric Inc. and Eduardo Moreno d/b/a E.S. Moreno Construction
Civil Action No.: 2012-CP-40-06895R (Richland)
Carrier Claim No.: MPI80262
MGC File No.: 20362.11008
Appeal No.: 2019-000148

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Brief of Respondents;
2. original and one copy of the Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

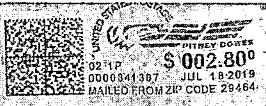
Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

Very truly yours,

Helen F. Hiser

Enclosure

cc: Donald Gist, Esq.
Arron Wallace, Esq.



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