THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBIN B. STILWELL
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2019-001375
CIVIL ACTION NO. 2018-CP-23-3382

John H. Hine and Maria W. Hine,

APPELLANTS,

versus

Timothy M. McCrory, individually and as agent, Michael P. McCrory, Seabrook L. Marchant, and The Marchant Company,

RESPONDENTS.

INITIAL BRIEF OF RESPONDENTS

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II. The doctrine of equitable tolling does not apply because the Plaintiffs presented no evidence that they acted diligently in pursuing their claims or were prevented in some extraordinary way from filing suit.

COUNTERSTATEMENT OF THE CASE

This action arises out of the purchasers' claims that the sellers, listing agent, and broker of a residential home purportedly failed to disclose the existence of unrepaired termite damage. After purchasing the home, the plaintiffs discovered termite damage in 2012. Despite the purchasers' knowledge in 2012 that the home had termite damage which was allegedly not disclosed at the time of the sale, the purchasers waited until 2018 to file suit – a suit which the trial court correctly concluded was time barred under the applicable three-year statute of limitations. This case presents a straightforward application of the statute of limitations which requires parties to pursue their claims in a timely manner.

On June 18, 2018, the Plaintiffs, John M. and Maria W. Hine (collectively, the "Hines") filed a Complaint in the Court of Common Pleas for Greenville County against the Defendants, Timothy M. McCrory, individually and as agent; Michael P. McCrory; Seabrook L. Marchant; and The Marchant Company (collectively, the "Defendants"). The Hines alleged that the Defendants, as sellers and/or listing agent/broker of the residential home purchased by the Hines, failed to allegedly disclose the existence of unrepaired termite damage. The Hines asserted claims for fraud and misrepresentation, conversion, violation of South Carolina's Residential Property Condition Disclosure Act, S.C. CODE ANN. § 27-50-10 *et seq.*, violation of certain statutory duties imposed upon real estate brokers, and negligence. [R.pp. ___; Compl.]

The Defendants each filed answers, denying the material allegations of the Complaint and asserting among affirmative defenses the expiration of the statute of limitations. [R.pp. ____; Answers.]

The Hines thereafter filed a First Amended Complaint on August 15, 2018 which added claims of negligent hiring, training, supervision, and retention; unjust enrichment; violation of the Unfair Trade Practices Act; and breach of the covenant of good faith and fair dealing. [R.pp. ___; Am. Compl.] The Defendants again responded and continued to assert the expiration of the statute of limitations as a defense. [R.pp. ___; Answers.]

On April 17, 2019, the Defendants filed a Motion for Summary Judgment on the ground that the Hines failed to commence the lawsuit within the applicable three-year statute of limitations. [R.pp ___; ___; Mtn. for Summary Judgment with Exs.; M. McCrory Mtn. to Join.]

A hearing was held before the Honorable Robin B. Stilwell on June 18, 2019. [R.pp ___; Hearing Tr.] Following the hearing, the Trial Court issued an Order on July 23, 2019 granting the Defendants' Motion for Summary Judgment based upon the expiration of the applicable statute of limitations. [R.pp. ___; Order.] The Hines filed a Motion to Alter or Amend on August 2, 2019 which the Trial Court denied August 8, 2019. [R.pp. ___; ____; Mtn.; Order.]

The Hines filed and served their Notice of Appeal to this Court on or about August 13, 2019.

COUNTERSTATEMENT OF FACTS

Timothy McCrory and his brother, Michael McCrory, owned a single family home located at 416 Leyswood Drive, Greenville, South Carolina 29615 (the "Property"). [R.p. ___; Am. Compl., ¶ 8.] On or about May 14, 2008, the brothers listed the Property for sale with realtor/broker, Seabrook Marchant and The Marchant Company. Timothy was also a real estate agent for Seabrook Marchant and The Marchant Company and

served as the listing agent for the Property. [R.pp. ___; ___; ___; Id. at ¶¶ 9-11; Answers, ¶ 7.]

The Hines became interested in the Property. The McCrorys provided the Hines with a Residential Property Condition Disclosure Statement (the "Disclosure Statement"). [R.pp. ___; Disclosure Statement.] The Disclosure Statement indicated there was no present infestation or damage which had not been repaired from past infestation of wood destroying insects or organisms. [R.p. ___; Id. at p. 2.] The Disclosure Statement also noted that two rooms in the basement had been framed out and sheetrocked in 2005. The McCrorys also disclosed in Paragraph 13 that there used to be paneling for the walls that was ripped out to add wood studs (2x4) and sheetrock. [R.p. ___; Id. at p. 3.] The Hines acknowledged receipt of the Disclosure Statement on May 25, 2018. [R.p. ___; Id. at p. 4.]

On May 27, 2018, the Hines entered into a contract with the McCrorys for the purchase and sale of the Property for $175,000. [R.pp. ___; ___; ___; Am. Compl., ¶¶ 15-16; Answers, ¶ 11.] Prior to closing, a CL-100 Wood Infestation Report was issued. This Report, which was signed by the Hines, noted that there were signs of past termite infestations and treatment. While the Report noted some areas of the Property were obstructed from view or inaccessible, the Report indicated "previous infestation/scorn marks from termite shelter tubes with damage to sills, joist and sub-floor was noted right side of garage and to sill right rear of garage." The Report further mentioned "prior treatment/drill holes to exterior foundation wall [indicating] previous termite treatment," "fungi/wood destroying fungi present throughout the basement area," and "discolored

wood [noted] around HVAC duct boot rear of utility room." [R.pp. ___; CL-100 Report.]

The Report noted that repairs had been made in the garage area but that "some damage remains and should be evaluated by a licensed builder." Finally, the termite inspector preparing the Report checked the box under "Damaged Observed (If Any): Item C: "Will not be corrected by this company; recommend that structure be thoroughly and completely evaluated by a qualified building expert licensed or registered with the S.C. Department of Labor, Licensing, and Regulations, Residential Builder's Commission and that needed repairs be made." [R.pp. ___; Id.]

Prior to closing, the Hines also had a property inspection completed by Pillar to Post. [R.pp. ___; ___; Pillar and Post Report; Invoice to Hines.] This inspection report noted and recommended, among other things, to "consult a qualified foundation contractor to evaluate and correct pest damage at joists located near center to rear area of garage/basement area to promote intended use." [R.pp. ___; Id. at pp. 8, 23.]

Before the Hines closed on the Property, they were well aware that the Property had multiple issues with prior termite infestations and damage. They were also aware that the Property was not under a termite bond during the time of the McCrorys' ownership. [R.p. ___; Disclosure Statement, p. 2 (not checked "Yes" for transferable termite bond).] The Hines closed on the purchase of the Property on July 1, 2008. [R.p. ___; Am. Compl., ¶ 17.]

On April 27, 2012, almost four years after the purchase of the Property, Mr. Hine was removing shoe molding around the baseboard in the front bedroom of the Property when he discovered "extensive" termite damage to the wood studs behind the drywall.

A contractor hired by Mr. Hine to further inspect the damage discovered that the rim joists were also damaged. Mr. Hine stated that as a result of the damage discovered in the upstairs bedroom, the finished ceiling in the room of the basement located below the bedroom had to be removed, along with the soffit and ductwork located in that portion of the basement. Mr. Hine further claimed that as the repairs were being completed, additional damage was uncovered along a double joist that ran above a cinder block wall as well as damage to the headers of both windows in the upper bedroom. [R.pp. ___; May 14, 2012 Ltr.]

Mr. Hine, who is a licensed attorney, wrote a letter on his law firm letterhead to Seabrook Marchant of The Marchant Company on May 14, 2012 alleging that when the McCrorys performed work in the basement as noted in Paragraph 13 of the Disclosure Statement, the termite damage should have been discovered and disclosed. Mr. Hine attached to the letter invoices from the contractor who made the repairs and sought these costs as damages from the Defendants. [R.pp. ___; May 14, 2012 Ltr. with attachments.]

On July 9, 2012, Mr. Hine sent an additional letter on his law firm letterhead to Seabrook Marchant demanding damages in the amount of $4,000 for the repairs made to the Property to correct the termite damage. [R.p. ___; July 9, 2012 Ltr.] There was some discussion back and forth between Mr. Hine and the Defendants about the alleged claim, and the Hines ultimately decided not to pursue their claim for the alleged undisclosed termite damage. [R.pp. ___; J. Hine Dep., pp. 26, l. 23 – 28, l. 14.] Mr. Hine would later admit that he did not include this damage in the current lawsuit filed in 2018 because "[he didn't] know that [he had] the evidence to prove that, and [he didn't]

know that [he was] still entitled to it under the statute of limitations." [R.p. ___; Id. at p. 24, ll. 10-18.] He also conceded that he did not ask the contractor who made the repairs to conduct any exploratory testing to determine whether the Property contained additional termite damage. [R.p. ___; Id. at 25, ll. 19-24.]

In 2013, Mr. Hine contacted Sargent Pest Solutions to inspect the Property and place the Property under an active termite bond contract. The Residential Treatment Contract shows the Property was inspected March 28, 2013 and further indicates that the Property was being treated for **existing live termites**. The Contract also noted "Possible Hidden Damage" existing in the rear portion and basement of the Property. [R.pp. ___; Residential Treatment Contract.]

The Hines continued with renovations to the Property. [R.p. ___; J. Hine Dep., p. 29, ll. 10-22.] On February 3, 2018, almost ten years after the purchase of the Property, the Hines were remodeling the master bathroom when they discovered additional termite damage. Notably, this damage was discovered after the Hines had experienced **live termites** in 2013. [R.p. ___; Am. Compl., ¶ 18.]

The Hines alleged that upon removal of more drywall, paneling, and insulation, more termite damage was discovered in the stairwell of the Property. The Hines further contended that the McCrorys had previously removed a portion of drywall and framing in the ceiling of the stairwell and then concealed purported termite damage by attaching sections of new 2x4 wood studs and drywall to the framing in the stairwell. One of the 2x4 studs had a bar code stamp with a date of September 7, 2005 which, coincidentally, was the date the McCrorys had purchased the Property. [R.p. ___; Id. at ¶¶ 18-26.]

The Hines then brought this action against the Defendants for the nondisclosure of unrepaired termite damage in June 2018, almost ten years after they purchased the Property and over six years after they first discovered termite damage to the Property. The Defendants denied noticing any unrepaired termite damage or concealing any such damage. [R.pp. ___; Answers.]

The Trial Court granted the Defendants' Motion for Summary Judgment because the Hines did not file their suit within the applicable three-year statute of limitations after becoming aware of the alleged undisclosed termite damage on April 27, 2012. [R.pp. ___; Order.] The Hines now challenge on appeal the clear-cut application of the statute of limitations.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) provides a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." Id. at 42, 747 S.E.2d at 181-82; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). The party seeking summary judgment under Rule 56(c) has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis, 358 S.C. at 518, 595 S.E.2d at 822. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 518-19, 595 S.E.2d at 822. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Id. at 518, 595 S.E.2d at 822.

Furthermore, summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." McMaster v. Dewitt, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014); see Kreutner v. David, 320 S.C. 283, 286–87, 465 S.E.2d 88, 90 (1995) (affirming the circuit court's order granting summary judgment because the statute of limitations had run).

ARGUMENT

I. The Trial Court properly granted summary judgment as a matter of law to the Defendants on the Plaintiffs' claims for the alleged nondisclosure of unrepaired termite damage because the three-year statute of limitations barred the claims where the undisputed evidence established the Plaintiffs were on notice of termite damage in 2012 but did not file suit until 2018.

The Trial Court ruled the Defendants were entitled to summary judgment on the Hines' lawsuit for undisclosed termite damage because the applicable three-year statute of limitations provided under S.C. CODE ANN. § 15-3-530 had expired. The record is

undisputed that the Hines were aware of the alleged undisclosed termite damage by April 27, 2012 but did not file suit until over six years later on June 18, 2018. The facts of this case demonstrate a clear situation where a plaintiff sat on his or her rights and failed to timely file suit. Only when the Hines comprehended the full extent of the alleged unrepaired termite damage on the Property did the Hines file suit. A plaintiff's failure to fully appreciate the damage is not a justification for allowing a stale lawsuit to proceed. Therefore, this Court should affirm the Trial Court's grant of summary judgment to the Defendants.

Statutes of limitation "'are designed to promote justice by forcing parties to pursue a case in a timely manner.'" Gibson v. Bank of Am., N.A., 383 S.C. 399, 410, 680 S.E.2d 778, 784 (Ct. App. 2009) (quoting State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000)). As this Court has observed;

> Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

Statutes of limitations aim to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in

litigation. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

The parties do not dispute that the three year statute of limitations set forth under S.C. CODE ANN. § 15-3-530 controls in this case. "[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person **knew or by the exercise of reasonable diligence should have known that he had a cause of action**." S.C. CODE ANN. § 15-3-535 (emphasis added). In other terms, "the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." Gibson, 383 S.C. at 406, 680 S.E.2d at 782.

Under South Carolina law, in determining when a cause of action arises under § 15-3-530, courts apply the "discovery rule." Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run "when a cause of action reasonably ought to have been discovered," or, in other words, "when a plaintiff has notice that he might have a remedy for a harm." Id.

The standard as to when the statute of limitations begins to run is objective rather than subjective. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); Gibson, 383 S.C. at 406, 680 S.E.2d at 782. Therefore, the test is not whether the particular plaintiff actually knew a claim is existed. Rumpf, 357 S.C. at 395, 593 S.E.2d at 187. The test is when a person **could or should have known** through reasonable diligence that some cause of action exists against another person rather than when a

person obtains actual knowledge of a potential claim or of the facts giving rise thereto. Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998).

The key element of reasonable diligence is notice. Reasonable diligence requires that a party act with some promptness where facts and circumstances would put a person on notice that some right has been invaded or that some claim against another party might exist. Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The statute begins to run at this point and not when:

- the advice of counsel is sought;
- a full-blown theory of recovery is developed; or
- the injured party comprehends the full extent of the damage.

Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean, 321 S.C. at 363-64, 468 S.E.2d at 647; Wiggins, 314 S.C. at 128, 442 S.E.2d at 170; Dorman, 331 S.C. at 184-85, 500 S.E.2d at 789; Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998).

Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson, 383 S.C. at 406-07, 680 S.E.2d at 782.

The undisputed evidence before the Trial Court established the Hines were aware of their claims for alleged undisclosed termite damage by April 27, 2012. Mr. Hine wrote a letter to Seabrook Marchant on May 14, 2012 advising Mr. Marchant of his April 27, 2012 discovery of "extensive" termite damage on the Property. [R.pp. ___; May 14, 2012 Ltr.] In this letter, Mr. Hine accused the McCrorys of failing to disclose the termite

damage on the Disclosure Statement and contended the listing agent should be liable for the misrepresentation. [R.pp. ___; Id.] Both Mr. and Mrs. Hine both acknowledged in their depositions that the termite damage was discovered on April 27, 2012. [R.pp. ___; ___; J. Hine Dep., p. 25, ll. 13-18; M. Hine Dep., p. 15, ll. 15-19 (conceding that the Hines first determined they had termite damage on the Property on April 27, 2012.).]

On April 27, 2012, the Hines not only could or should have known through reasonable diligence that they had a potential cause of action against the Defendants; the Hines in fact **did know** they had a potential cause of action as evidenced by their very letters on May 14, 2012 and July 9, 2012 demanding damages from the Defendants. [R.pp. ___; Ltrs.] Despite being fully aware that they had a potential claim for nondisclosure of termite damage, the Hines did not file suit within three years after they knew they had a cause of action.

The statute of limitations on any claim by the Hines against the Defendants for undisclosed termite damage expired on April 27, 2015. The Hines did not file an action against the Defendants by this date.

Over three years after the statute of limitations expired, on February 3, 2018, the Hines discovered additional damage from termites on the Property, which they discovered after experiencing live termites on the Property in 2013. Four months after this discovery, on June 18, 2018, did the Hines file a lawsuit for the first time against the Defendants for the nondisclosure of alleged unrepaired termite damage. The lawsuit, being untimely, was correctly dismissed by the Trial Court.

The Hines challenge the Trial Court's dismissal of their claims based on the expiration of the statute of limitations, contending that because they discovered additional

damage from termites in 2018, the clock restarts on their claims for undisclosed termite damage. The courts have time and again rejected the same argument by other plaintiffs desperate to extend long expired limitations periods.

In Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996), the appellant purchased real property in downtown Charleston in September 1984 after a contractor inspected it and determined it to be structurally sound. 321 S.C. at 362, 468 S.E.2d at 646. Two months later, the appellant observed a fine crack approximately three feet in length at the front right corner of the building and concluded it was attributable to a construction company's pile driving at a nearby construction site for Charleston Place. Id. The appellant immediately hired expert consultants to examine and repair the crack. Id. In August 1985, the appellant noticed the original crack had expanded and the facade of the building was beginning to bulge and buckle. Id. at 362, 468 S.E.2d at 646–47. The appellant additionally observed that a second crack had appeared at another location. Id. at 362, 468 S.E.2d at 647. After being informed the building was no longer structurally sound, the appellant brought suit against the construction company in 1991. Id. At trial, the circuit court directed a verdict against the appellant, finding as a matter of law that the applicable six-year statute of limitations had expired prior to the filing of her lawsuit. Id. at 363, 468 S.E.2d at 647.

The Court of Appeals reversed the circuit court, finding a question of fact existed as to whether the appellant was reasonably diligent in determining whether the construction company caused the damage to her building, thereby triggering the statute of limitations in 1984. Id. On appeal to this State's Supreme Court, the appellant argued the 1984 crack and the 1985 bulging of the bricks presented two distinct harms and, thus, two

different dates of accrual existed for statute of limitations purposes. Id. at 364, 468 S.E.2d at 647. The Supreme Court disagreed and rejected the argument that two distinct harms existed, holding the circuit court correctly directed a verdict for the construction company. Id. at 366, 468 S.E.2d at 648. Finding the statute of limitations began to run in November 1984—when the appellant initially discovered the first crack—the Supreme Court explained:

> Because [the appellant] **had notice** in November 1984 that she may have a cause of action against [the construction company], **there is no need to toll the statute of limitations beyond that date**. [The appellant's] subsequent failure to act with reasonable diligence in pursuing such claim is no reason to toll the statute of limitations until such time as further damage evolved. Moreover, the fact that [the appellant] **may not have comprehended** in 1984 that the original crack would expand causing the building to ultimately buckle is **immaterial**.

Id. at 365–66, 468 S.E.2d at 648 (emphasis added).

In Barr v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998), the appellants purchased a home from the Rock Hill Economic Development Corporation (RHEDC), which had purchased the house from the City of Rock Hill (the "City") in February 1985. Id. at 642, 500 S.E.2d at 158. From May 1987 through May 1990, four annual termite inspections revealed excessive moisture under the appellants' home. Id. Termite inspectors suggested several repairs. Id. In March 1992, the appellants contacted the City and requested an inspection and report, which found several problems in the home's crawl space. Id. at 640, 500 S.E.2d at 159. In August 1992, the appellants received a structural engineering report disclosing numerous defects in the house, several of which were unrelated to the moisture problem. Id. at 643, 500 S.E.2d at 159. The appellants filed suit in March 1994. Id. On appeal, this court affirmed the circuit court's grant of summary judgment in favor of the City and RHEDC based on the

statute of limitations. Id. at 646, 500 S.E.2d at 160. Despite the fact that the appellants did not realize "**the magnitude of the problem**" until August 1992, this Court held the circuit court correctly ruled the termite inspection reports were sufficient notice to trigger the running of the statute of limitations. Id. at 645–46, 500 S.E.2d at 160 (emphasis added).

Relying upon Dean and Barr, this Court in Allwin v. Russ Cooper Assocs., Inc., 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019), cert. denied, (Sept. 18, 2019), also held that a property owner's claims against an architectural firm and general contractor began when she first became aware of numerous defects in the house and not when she realized the full extent of the damage from the construction defects. The home had been completed in 1994, and in the late 1990s and early 2000s, a tenant notified the homeowner of numerous problems with the roof, chimneys, exterior walls, windows, doors, patio, and basement, as well as interior water damage to hardwood floors, drywall, wallpaper, and subfloor framing. The tenant also reported mold, mildew, peeling paint, and water stains. Id. at 4-5, 825 S.E.2d at 709. Over the next ten years, the homeowner engaged various contractors and inspectors to investigate and repair some of the construction issues. Id. at 5-10, 825 S.E.2d at 709-11.

The homeowner had a full forensic analysis of the home performed by an engineer in 2011, and due to his concern about unknown conditions, the engineer suggested a comprehensive scope of repair for the house, including the removal of the roof, a large concrete deck, and all exterior siding and interior drywall so that any potential latent defects could be located and repaired. Id. at 9-10, 825 S.E.2d at 711. A letter was sent by counsel for the homeowner to the architectural firm in 2011 advising of

the potential claim against it for design deficiencies and the resulting damages. Id. at 14, 825 S.E.2d at 714.

The homeowner filed a construction and design defect action for negligence, gross negligence, and breach of warranty against the general contractor in 2013 and added the architectural firm as a defendant in 2014. Id. at 10, 825 S.E.2d at 711. Both defendants moved for summary judgment based upon the expiration of the three-year statute of limitations, which the trial court granted. Id. at 11, 825 S.E.2d at 712.

On appeal, the homeowner argued that conflicting evidence existed as to whether the statute of limitations barred her construction defect claims. Id. at 11-12, 825 S.E.2d at 712. This Court rejected the homeowner's arguments, observing that like the appellant in Dean, the homeowner discovered issues with her home which led her to investigate the problems and perform multiple repairs between 1999 and 2011. However, despite actual knowledge of her potential claims for this damage, the homeowner failed to pursue her claims in a timely manner. This Court also noted that because the homeowner was put on notice of the home's design and construction defects, her failure to comprehend the magnitude of the water intrusion and other defective conditions was immaterial and did not extend the statute of limitations period. Id. at 17, 825 S.E.2d at 715.

The Hines' position that their claim for undisclosed termite damage is resurrected because they discovered additional termite damage in 2018 is unfounded. Their argument runs counter to the well-established case law in Dean, Barr, and Allwin that a cause of action accrues when the plaintiff is put on notice of a potential claim and not when the plaintiff realizes the full extent of the damage. See also Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 215, 332 S.E.2d 555, 559

(Ct. App. 1985), overruled on other grounds by, Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) ("The fact, however, the [plaintiff] did not appreciate the full extent of the damage until later is immaterial.").

The case law upon which the Hines rely do not support a different result. In McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015), a homeowner brought an action in 2011 against the prior owner for negligent misrepresentation and against a pest control company for negligence, alleging that company did not perform the wood infestation inspection in accordance with the South Carolina Pesticide Control Act and that the homeowner was injured when mold spores were released into the air while painting. The defendants moved for summary judgment based upon the expiration of the statute of limitations, which the trial court granted finding that the homeowner "knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007" when the home was inspected for termites. The trial court also found that based upon deposition testimony, the homeowner discovered in 2007 that the prior owner had not installed a proper moisture barrier and observed mold when he pulled back the existing hardwood floor. The homeowner contended he, however, did not discover mold in the home until 2009. Id. at 61-62, 781 S.E.2d at 109-110.

On appeal, this Court reversed the trial court's conclusion that the statute of limitations had expired on the homeowner's claims, finding that there was conflicting evidence in the record as to when the homeowner actually discovered the presence of mold in the house. The trial court granted summary judgment based on the homeowner's

deposition testimony that he discovered the mold within his residence in 2007. Id. at 59, 781 S.E.2d at 108. Later during the same deposition, however, the homeowner expressed confusion about when he discovered the mold and whether his discovery occurred as late as 2009. Id. at 61, 781 S.E.2d at 109. In the present case, it is undisputed that the Hines discovered termite damage on April 27, 2012. Therefore, McAlhany is unpersuasive because there is no conflicting evidence as to when the Hines first discovered termite damage on the Property.

In McAlhany, this Court further noted that the homeowner had sued the pest control company for negligence arising out of its inspection of the home and issuance of a CL–100 in October 2007. The October 2007 CL–100, which the homeowner reviewed at the time it was issued, found no "visible evidence of active ... subterranean termites" or "other wood destroying insects" within the home. Nonetheless, the homeowner's uncontradicted testimony was that he saw active termites in the home on the day he moved in, which would have been late October 2007, and he knew in October 2007 that the pest control company had not done its job properly. Because the homeowner was aware of termites in the home in late October 2007, and he knew the October 2007 CL–100 erroneously stated there were not active termites in the home, this Court found a reasonable person would have been on notice of a potential negligence claim against the pest control company for termite damage. However, because the homeowner was suing the pest control company not for termite damage but rather for mold, this Court determined a reasonable person would **not** have been on notice of a potential negligence claim for mold damage. Id. at 65-66, 781 S.E.2d at 111-12.

The discovery of termite damage therefore did not put the homeowner in McAlhany on notice of mold damage to trigger the accrual of the statute of limitations because the two types of damage were separate and distinct. In the present case, the Hines brought an untimely suit for the exact type of damage – that caused by termites - for which they were aware of in 2012. That the Hines did not realize how far the damage extended is irrelevant as to when the statute of limitations began to run.

The Hines also rely upon Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011), in which this Court affirmed the circuit court's denial of the developers' directed verdict motion based on the statute of limitations. Id. at 185, 708 S.E.2d at 794. In Holly Woods, the minutes from HOA board meetings indicated the HOA was aware of certain problems with the development including a pool leak, drainage problems, and termite issues in 1991; additional problems appeared between 1998 and 2000. But the damages the HOA claimed in the 2005 lawsuit involved a different location within the neighborhood, unrelated to the previous defects. Id. at 184-85, 708 S.E.2d at 794. By contrast, the record here establishes that the Hines sought in 2018 to sue for the same exact type of issue – termite damage - that they were aware of in 2012. Once more, that the Hines discovered additional termite damage in another area of the Property relates to the extent of termite damage sustained on the Property and does not constitute a separate event to trigger a new limitations period.

Similarly, the Hines' reliance upon Stoneledge at Lake Keowee Owner's Ass'n, Inc. v. IMK Dev. Co., 425 S.C. 268, 821 S.E.2d 504 (Ct. App. 2018), cert. granted (Aug. 6, 2019), does not compel reversal of the Trial Court's grant of summary judgment. In Stoneledge, this Court held that the issue of when homeowners in a townhome

community discovered construction defects was a jury question in the homeowners' association's action filed in 2010 against the developer alleging negligence and breach of implied warranties. The record in Stoneledge reflected that while some homeowners in the townhome community experienced issues with water intrusion as early as 2003, other homeowners did not have such knowledge and only discovered issues with their construction after rains in 2008 and 2009. The Court found there was evidence in the record that latent defects in the latter group of homeowners' properties due to water intrusion could not have been discovered until 2009 until there was sufficient precipitation to put the homeowners on notice. Therefore, the conflicting evidence in the record created a jury question as to whether it was reasonable for the homeowners to know, or by reasonable diligence discover, there were issues with their construction. Id. at 275-76, 821 S.E.2d at 508.

Unlike Stoneledge, there is no conflicting evidence in the record as to when the Hines became aware of the termite damage on the Property. Both Mr. and Mrs. Hine conceded they became aware of termite damage on April 27, 2012. Once the Hines became aware of this damage, they were on notice of a potential claim against the Defendants. While the Hines claim that they could not have known of the damage they discovered in 2018 because it was latent, once the Hines became aware of hidden termite damage in 2012, they were on notice of a claim for undisclosed termite damage at that

time.[1] It was their duty to use reasonable diligence to determine the full extent of the termite damage in 2012 and not delay. The Hines' failure to do so does not extend the statute of limitations.

While the Hines contend they acted reasonably in not conducting testing to determine whether they had additional termite damage once they discovered damage on April 27, 2012[2], such does not negate the fact that the Hines were on notice of their potential claim for undisclosed termite damage on April 27, 2012 but failed to bring suit against the Defendants until 2018. The issue here is when the Hines discovered their potential claims, thus triggering the statute of limitations, not whether they acted reasonably in repairing the damage discovered in 2012 or discovering additional damage. See Allwin, 426 S.C. at 20-21 825 S.E.2d at 717 (rejecting homeowner's claims that because she "reasonably elected between conflicting professional recommendations as to

[1] While the Hines contend that there was absolutely no way they could have known about the termite damage discovered in 2018, it is interesting that the reports prepared prior to closing and the 2013 Sargent Pest Solutions report each noted potential damage in the basement area of the home. [R.pp. ___; ___; ___; CL-100 Report; Pillar to Post Report, pp. 8, 23; Residential Treatment Contract.] The damage discovered in 2012 also required repairs to the basement area. [R.pp. ___; May 14, 2012 Ltr.] The damage the Hines discovered in 2018 was, in part, damage to the framing of the staircase leading to the basement. [Appellant's Brief, p. 3.] The basement area was a central location of the termite damage and, certainly, the Hines possessed sufficient information in 2012 that the areas surrounding the basement needed to be inspected for termite damage.

[2] In footnote one of the Appellants' Brief, the Hines state that each Defendant agreed that the Hines' conduct was reasonable in not learning of further termite damage until 2018. This assertion misstates the Record. Rather, the Defendants testified as to the Hines' reliance upon certain statements and reports prior to closing on the purchase of the Property. [R.pp. ___; ___; ___; M. McCrory Dep., p. 34, ll. 1-4 (reliance upon the Disclosure Statement); 46, ll. 11-13 (reliance upon the CL-100 report); T. McCrory Dep., p. 82, ll. 14-23 (reliance upon the Disclosure Statement); 83, ll. 4-15; 85, ll. 16-25 (reliance upon termite and home inspection prior to closing); Marchant Dep., pp. 91, ll. 1-11 (reliance upon the Disclosure Statement); 97, l. 12 – 99, l. 13 (reliance upon termite and home inspection prior to closing).] The Defendants did not concede in any way that the Hines were reasonable in not discovering the additional termite damage until 2018.

the scope of necessary repairs," the statute of limitations for her construction defect action should have been extended).

The remaining cases cited by the Hines are also factually distinct and do not mandate reversal of the Trial Court's conclusion that the statute of limitations precluded their lawsuit. See Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (holding earlier cracks in two separate pocket bins of a cement storage silo complex did not necessarily provide notice that a third and different pocket bin would later collapse and result in the death of two people; thus the issue of when the statute of limitations began to run was for the jury); Box v. Sparrow Group, LLC, Op. No. 2018-UP-353, 2018 WL 3913504 (S.C. Ct. App. Aug. 15, 2018) (holding buyer's cause of action against seller for nondisclosure of foundation issues did not begin to run upon the buyer's receipt of disclosure statement which indicated there had been past foundation issues which were repaired but rather from the date that buyer became aware that seller had in fact not repaired the previous foundation issues).

This Court should affirm the Trial Court's grant of summary judgment to the Defendants based upon the expiration of the three-year statute of limitations because the Hines were aware of a potential claim for undisclosed termite damage in 2012 but delayed filing suit until 2018. To find for the Hines would mean that plaintiffs would be allowed to litigate their claim in piecemeal fashion, contrary to the policy of repose behind the statute of limitations. Under the Hines' approach, a buyer discovering termites in part of the building can simply elect not to sue the seller at that time and allow the statute of limitations to expire. Years later, according to the Hines, the buyer can discover termites in another part of the building and have the statute of limitations restart.

Or, using the argument of the Hines, the buyer can maintain multiple lawsuits over a span of years for each separate instance of termite damage discovered.

Such an approach strains logic and the policy behind the limitations period. The sounder conclusion is that the initial discovery of infestation puts the buyer on inquiry notice such that he or she should have discovered other existing infestations and determined material facts sufficient for his or her claim to accrue. This more reasoned approach prevents the prejudice suffered by defendants in defending stale claims – lost physical evidence, witnesses who cannot be located, and witnesses with faded memories. The cause of action accrues, in its entirety, at the initial discovery of termite infestation and for that reason, the Trial Court properly ruled that the three-year statute of limitations barred the Hines' action against the Defendants.

II. The doctrine of equitable tolling does not apply because the Plaintiffs presented no evidence that they acted diligently in pursuing their claims or were prevented in some extraordinary way from filing suit.

The Hines further argue that if their claims against the Defendants are time barred by the three-year statute of limitations, this Court should nevertheless equitably toll the statute of limitations to allow their action to proceed. The Hines, however, have not established that they are entitled to the remedy of equitable tolling to allow their lawsuit, filed over six years too late, to proceed.

"Tolling refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting. . . . Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (internal citations omitted).

The doctrine of equitable tolling is judicially created and may be applied in certain situations to suspend or extend a limitations period to serve principles of justice and fairness. Id. Nevertheless, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Id. at 117, 687 S.E.2d at 33. "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Id. at 115, 687 S.E.2d at 32.

Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his control, where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim, or where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his claim. The plaintiff may be entitled to equitable tolling if the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit. Id. at 116, 687 S.E.2d at 32-33.

The Hines have not shown the existence of any extraordinary circumstance preventing their filing of a lawsuit within three years after discovering undisclosed termite damage in 2012. Mr. Hine, himself a licensed attorney, knew he had a potential claim in 2012 when he sent two demand letters to Mr. Marchant. [R.pp. ___; ___; May 14, 2012 Ltr; July 9, 2012 Ltr.] The Hines, however, failed to follow through with filing a legal action against the Defendants. The Hines have not pointed to any conduct by the Defendants preventing their filing of a lawsuit after their 2012 discovery of the termite damage.

Instead, the Hines rely upon an unproven allegation that the McCrorys concealed termite damage to the framing of the staircase to the basement and that this alleged concealment triggers the doctrine of equitable tolling. This is an allegation central to the merits of the lawsuit which the Defendants strongly deny. The record contains evidence that the termite damage observed by the Hines may not have even occurred until after they purchased the Property. The Hines had owned the Property for almost four years when they first discovered termite damage in 2012. Live termites were present on the Property in 2013, as discovered by Sargent Pest Solutions. [R.pp. ___; Residential Treatment Contract.] These very termites discovered in 2013 could have caused the damage the Hines uncovered in 2018 which would of course mean the Defendants have no liability for such damage. To allow the Hines to benefit from unsubstantiated allegations that the McCrorys concealed termite damage to extend the limitations period would deny the Defendants the opportunity to contest these dubious allegations and force the Defendants to defend against these claims more than ten years after they were involved with the Property and over six years after the Hines discovered termite damage.

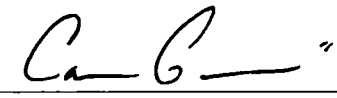
The Hines have devised a story that the McCrorys defrauded the Hines when they sold the Property but the record establishes otherwise. The Hines were well aware that the Property had multiple issues with termites before they even purchased the Property as indicated by the CL-100 wood infestation report and the Pillar to Post property inspection report which were both completed prior to closing and which indicated the presence of past termite damage as well as the potential for present termite issues. [R.pp. ___; ___; CL-100; Pillar to Post Report.]

After owning the Property for almost four years, the Hines discovered termite damage in 2012 and also became aware of existing live termites in 2013. The Hines owned and had complete control of the Property during this time period and nothing prevented the Hines from inspecting their own home for further termite damage which they decided not to do. [R.p. ___; J. Hine Dep., p. 25, ll. 19-24 (conceding they did not ask for any exploratory testing to determine whether the Property contained additional termite damage in 2012).] The decisions made by the Hines were of their own accord. The Defendants took no actions preventing the Hines from inspecting their own property or from proceeding with a timely lawsuit against the Defendants. Instead, the Hines sat on their claim and allowed it to expire. Resurrecting an expired claim against the Defendants more than ten years after the Property was sold and over six years after the Hines discovered termite damage would only severely prejudice the Defendants where evidence has been lost and memories have been dimmed by the passage of time. This Court should accordingly reject the Hines' attempt to invoke the doctrine of equitable tolling.

CONCLUSION

For the reasons set forth herein, the Defendants respectfully request this Court to affirm the Trial Court's grant of summary judgment based upon the expiration of the three-year statute of limitations under S.C. CODE ANN. § 15-3-530.

Respectfully submitted,



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February 3, 2020.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents, do hereby certify that I have this date served the foregoing Initial Respondents' Brief, dated February 3, 2020, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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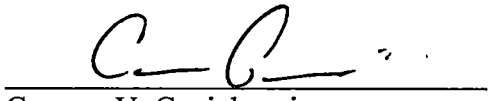

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February 3, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
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Re: ***John Hine v. Timothy McCrory et al.***
Appellate Case No.: 2019-001375
RPR File No.: 101-2875

Dear Ms. Kitchings:

Enclosed for filing are the original Initial Respondents' Brief of Timothy M. McCrory, as agent and individually, Seabrook L. Marchant, The Marchant Company, and Michael P. McCrory and the Respondents' Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

By copy of this letter, we are this day serving a copy of our Initial Brief and Designations on opposing counsel.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Carmen V. Ganjehsani

Encs.
cc: M. Todd Carroll
John M. Hine
H. Chase Harbin
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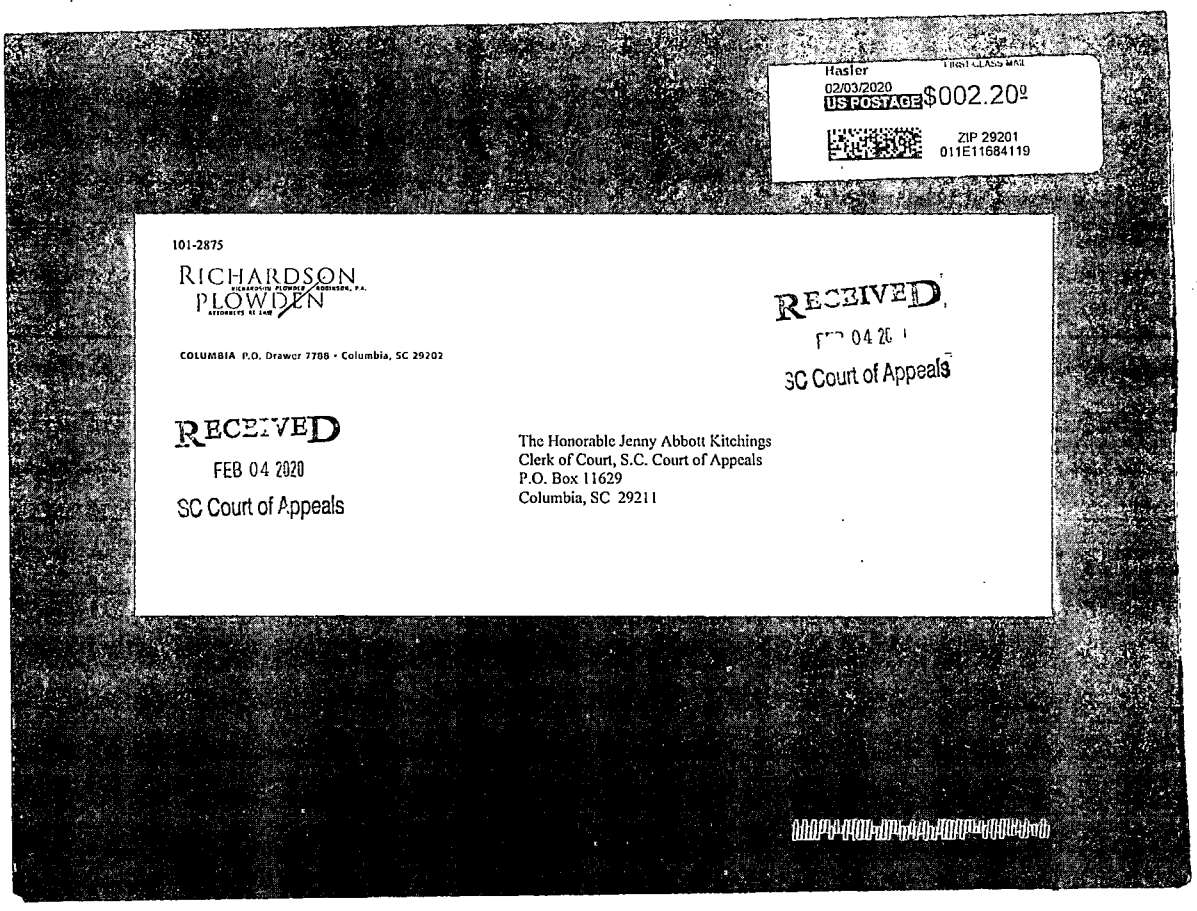

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