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
Circuit Court Case No. 2018-CP-23-3382

John W. Hine and Maria W. Hine..... Appellants,

v.

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

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

John and Maria Hine purchased their house in 2008. In 2012, they discovered an isolated amount of termite damage that had not been disclosed in the statutorily-required Residential Property Condition Disclosure Statement, which they repaired for less than $4,000. In 2018, however, the family discovered a massive amount of additional undisclosed termite damage in a different, load-bearing section of the house that the defendants had actively masked with bits of 2x4 studs and then hid behind sheetrock. This additional termite damage required repairs in excess of $100,000. The Hine Family brought suit to recover for this extensive newly-discovered, previously-concealed damage.

The trial court granted summary judgment against the Hine Family based on a three-year statute of limitations and held that the family's discovery of an isolated, minor amount of undisclosed termite damage on one corner of the house in 2012 should have put them on notice of extensive damage on the opposite side of the house that the defendants had actively concealed.

Should a jury have been allowed to determine whether the Hine Family should have known about damage in other parts of their house that the defendants deliberately concealed when the family discovered an isolated, minor amount of termite damage elsewhere in the house in 2012?

STATEMENT OF THE CASE

This case arises out of the defendants' fraudulent conduct when flipping a residential property in Greenville, South Carolina. The facts regarding the defendants' liability are generally undisputed.

I. The McCrory brothers flipped a house, which the Hine Family purchased in 2008.

The defendants include a pair of brothers, Timothy and Michael McCrory, who purchased the house at 416 Leyswood Drive in Greenville on September 7, 2005. (R. p. 69; First Am. Compl. ¶ 8.) It is a single-story ranch house with a partially-finished basement, with the stairwell to the basement located in the middle of the home.

After renovating a portion of the house, the McCrory brothers put it up for sale in 2008. In their disclosure, they noted that they framed out and sheetrocked two rooms in the basement, but they—falsely—disclaimed knowledge of any unrepaired termite damage. (R. pp. 96–99; Residential Property Condition Disclosure Statement.)

Timothy McCrory is also a realtor, and he was the listing agent for this home. (R. p. 69; First Am. Compl. ¶ 11.) At the time, he worked as an agent for The Marchant Company, of whom Seabrook Marchant is the broker-in-charge. Both Mr. Marchant and The Marchant Company are defendants to this case as well, given the liability that attaches to brokerages with respect to residential-disclosure obligations imposed by the South Carolina Code.

John and Maria Hine, a husband and wife, are the plaintiffs in this case. Mr. Hine is an attorney, and he finished his legal education with an LLM in taxation from the University of Florida in July 2008. (R. p. 167; Mr. Hine Dep. 5:5–8.) Almost concurrent with his graduation, the Hine Family purchased this home from the McCrory brothers on July 1, 2008. (R. p. 70; First Am. Compl. ¶ 17.) The sales price was $175,000. (R. p. 69; *id.* ¶ 16.)

II. The Hine Family discovered a discrete amount of undisclosed termite damage in a corner of the main level of the house in 2012, which it repaired for $4,000.

In 2012, anticipating the arrival of their second child, the Hine Family began preparing a corner bedroom on the main level of the house to be a nursery. As part of those preparations, Mr. Hine removed the room's shoe moldings in order to paint them. Upon removing the shoe molding, however, he discovered some isolated termite damage behind the baseboards, which required approximately $4,000 to repair. (R. p. 155; Letter from Mr. Hine (May 14, 2012); R. p. 165; Letter from Mr. Hine (July 9, 2012).)

Mr. Hine reached out to the McCrory brothers, Mr. Marchant, and The Marchant Company regarding reimbursement for repairing that termite damage. They refused to compensate the Hine Family, who ultimately dropped the issue given the isolated nature of the damage and low dollar amount at stake. (R. p. 169; Mr. Hine Dep. 27:1–16.)

III. The Hine Family later discovered over $100,000 of undisclosed, unrepaired termite damage in a different part of their house, which had been proactively concealed by the McCrory brothers.

In February 2018, the Hine Family began renovating their master bathroom, which is located on main level, but on the opposite side of the house as the room that had been converted to a nursery in 2012. (R. p. 70; First Am. Compl. ¶ 18.) During that renovation, the Hine Family removed subflooring in the master bathroom, which revealed termite damage that extended beyond the bathroom. (*Id.* ¶ 19.) Like a magician endlessly pulling scarves out of a coat pocket, the Hine Family continued demolishing more and more of their house to determine where the newly-revealed damage would finally end.

After removing additional drywall, paneling, and insulation chasing the trail of damage, the Hine Family discovered that the entire framing of the staircase to the basement—the center of the home, which supported all of the main level flooring—had been eaten away with termites. (*Id.*

¶ 20.) Incredibly, some of this termite-destroyed framing had been patched together with short sections of 2x4 wood studs and then covered up with drywall so that the extensive damage would be invisible absent a full demolition of all framing in the core of the house. (*Id.* ¶¶ 21–24.) And there is no doubt that the McCrory brothers were responsible for this, as one of the wood pieces used to mask the damage has a "date of manufacturing" stamp on it of September 7, 2005—the very same day that the McCrory brothers bought the house before flipping it. (*Id.* ¶¶ 25–26.)

IV. The Hine Family filed suit seeking damages associated with this fraudulent conduct, but the circuit court granted summary judgment against the Hine Family based on the statute of limitations.

The Hine Family commenced this case on June 18, 2018, and asserted claims for fraud, conversion, negligence, and a variety of statutory violations against the McCrory brothers, Mr. Marchant, and The Marchant Company for their respective roles in the fraud detailed above. (R. p. 12; Compl. *passim.*) On August 15, 2018, the Hine Family amended the complaint to add claims of negligent hiring, training, supervision, and retention; unjust enrichment; breach of the covenant of good faith and fair dealing; and a violation of the South Carolina Unfair Trade Practices Act. (R. p. 68; First Am. Compl. *passim.*)

After discovery, the defendants moved for summary judgment. They did not argue that they were entitled to win the case on its merits—indeed, they will not when a jury hears the evidence—but instead argued that all of the claims asserted were time-barred because the Hine Family uncovered an isolated amount of termite damage in a different part of the house in 2012. (R. p. 152; Defs.' Mot. for Summ. J. at 7 ("The undisputed evidence shows that Plaintiffs either knew or should have known about the alleged unrepaired termite damage [in the staircase framing that supported the entire main level of the house] on or about April 27, 2012.").

In response, the Hine Family argued that it would be objectively unreasonable to believe that they should have known about over $100,000 of termite damage in the framing of the staircase that the McCrory brothers hid behind sheetrock simply because the family previously discovered a relatively minor amount of termite damage on the complete opposite side of the house. (R. p. 213; Hine Family Mem. in Opp'n to Summ. J. at 5.)

Despite this factual dispute, the circuit court granted summary judgment in the defendants' favor and held, apparently as a matter of law, that discovering one undisclosed issue with a house triggers the limitations period for all other fraudulent activity associated with that same house. In the circuit court's view, because the Hine Family discovered a minor amount of termite damage in one portion of the house in 2012, "Plaintiffs knew or should have known that there was unrepaired termite damage that was not disclosed to them during the process of purchasing the property," and were thus time-barred from pursuing any other claim, even though the family's claims in this case are unrelated to the previously-discovered damage. (R. p. 6; Order at 4.)

The Hine Family timely filed and served a motion to alter or amend the summary judgment ruling, which the circuit court denied by order dated August 8, 2019. (R. p. 240; Mot. to Alter or Amend; R. p. 10; Order Denying Plaintiffs' Motion to Alter or Amend.) This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper when there is no disputed material fact, and the moving party is entitled to judgment as a matter of law based on those undisputed facts. Rule 56(c), SCRCP. It is not proper, though, when even a scintilla of evidence suggests a disputed material fact is present. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Additionally, when evaluating summary judgment, all disputed facts and inferences drawn therefrom must be resolved in favor of the non-movant. *Id.* at 229–30, 673 S.E.2d at 802.

ARGUMENT

The circuit court has wrongly deprived the Hine Family of its day in court. As a matter of law, the Hine Family is entitled to present this case to a jury and let a jury of Greenville residents decide whether Mr. and Mrs. Hine acted reasonably in not destroying the entirety of their home in 2012 to figure out if it contained any termite damage that the McCrory brothers had actively hidden. Likewise, any statute of limitations should be equitably tolled here because of the McCrory brothers' fraudulent conduct. This Court should reverse the circuit court's summary judgment order and remand this matter for a trial accordingly.

I. It is hornbook law in South Carolina that it is for the jury to decide when a plaintiff knows or should have known that he or she had a cause of action.

In South Carolina, a statute of limitations begins running when "the underlying cause of action reasonably ought to have been discovered." *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.*, 425 S.C. 268, 271, 821 S.E.2d 504, 506 (Ct. App. 2018) (quoting *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011)). This analysis is objective, rather than subjective, and asks whether the circumstances presented "would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party may exist." *Id.* (quoting *Holly Wood Ass'n*, 392 S.C. at 183–84, 708 S.E.2d at 793.)

Critically, where evidence conflicts as to whether a plaintiff knew or should have known that a claim had accrued, it is a question for the jury, not the court, to resolve. *See, e.g., id.* at 275–76, 821 S.E.2d at 508 ("The facts in this case 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.").

Here, the defendants argued, and the circuit court held as a matter of law, that the Hine Family was on notice of over $100,000 of structural damage that the McCrory brothers patched with bits of 2x4 and then concealed with sheetrock in the center of the house based on the fact that the family identified an isolated, minimal amount of termite damage along the perimeter of the house in 2012.

This holding assumes that finding an isolated issue with a property necessarily puts a plaintiff on notice of every single other conceivable issue related to that same property. South Carolina courts, however, have repeatedly rejected such an assumption as a matter of law.

For instance, in *McAlhany v. Carter*, 415 S.C. 54, 58, 781 S.E.2d 105, 107–08 (Ct. App. 2015), *aff'd* Op. No. 2017-MO-007, 2017 S.C. Unpub. LEXIS 16 (May 3, 2017), a homebuyer sued a seller and an inspection company for undisclosed mold in the house. Relying on the statute of limitations, the circuit court granted summary judgment in favor of the seller and the inspection company. *Id.* at 61, 781 S.E.2d at 109. The circuit court explained that the homebuyer was generally on notice that the inspection company had "not done its job properly" because it had issued a report in mid-October 2007 stating that there were no termites in the house, but the homebuyer had visually seen termites in the house later that same month. *Id.* at 65–66, 781 S.E.2d at 112. In the circuit court's view, because the homebuyer was aware of one incorrect issue by the inspection company and seller, the statute of limitations began to run for all issues that arose out of that same general situation.

However, this Court reversed and held that the issue of when a reasonable person would have been aware of mold in the house was one for the jury. *Id.* at 66, 781 S.E.2d at 112. It specifically noted that awareness of one issue arising from the inspection did not equate to notice of any other problems with the house or the inspection. *See id.* ("Nevertheless, a reasonable person

would not have been on notice of a potential negligence claim for ***mold damage***.") (emphasis supplied by the *McAlhany* court).

This is precisely the situation presented by the instant case. The defendants argued, and the circuit court held, that when the Hine Family discovered a ***minimal amount*** of termite damage on a ***perimeter*** wall of the ***main-level nursery*** in 2012, the family was necessarily on notice of ***over $100,000*** of damage on the ***interior, load-bearing framing of the basement staircase*** the McCrory brothers had ***hidden behind sheetrock***. The *McAlhany* court specifically rejected just such an argument and held that the reasonableness of a homebuyer's diligence in discovering his or her claim should be resolved by the jury. The Court should reverse and remand accordingly.

Nor is *McAlhany* an isolated case. Numerous other decisions follow exactly that same reasoning.

For instance, in *Holly Woods Association*, a homeowners' association sued a developer for a variety of "general irrigation and design problems throughout the development." 392 S.C. at 183, 708 S.E.2d 793. The developer argued that the association had been on notice of these water-based claims as early at 1991, when the association's annual meeting minutes revealed problems with "a pool leak, drainage around building five, and termite bonding." *Id.* at 184, 708 S.E.2d at 794. Because the association did not bring suit until 2005, the developer argued that the moisture-based claims were time-barred. *Id.*

This Court rejected that argument. It held that even though some of the issues on which the association based its claims were similar in nature to those uncovered in 1991, the association's claims were not barred by the statute of limitations because the damages associated with the claims were different from and unrelated to the issues discovered in 1991. *Id.* As the Court concluded:

> We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There

> is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellants' directed verdict motion based on the statute of limitations.

Id. at 185, 708 S.E.2d at 794.

The Court recently reinforced that analysis in *Stoneledge at Lake Keowee Owners' Association*. There, various homeowners and a homeowners' association were generally aware of roof leaks and water intrusion in some properties as early as 2003, but did not file suit until 2010 regarding defective construction of columns, framing, and porch railings that allowed water intrusion. 425 S.C. at 275–76, 821 S.E.2d at 508.

The Court held that because these were ***latent*** defects that were not revealed until heavy rain in 2009, the claims were not time-barred despite a general awareness of water intrusion issues back in 2003. *Id.* Just as with the extensive damage hidden around the Hine Family's staircase, the Court specifically noted that the only way to have discovered the specific issues on which the claims were based would have been through "destructive testing." *Id.* at 275, 821 S.E.2d at 508. In the Court's view, it was 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.

Other examples of this issue being one for the jury's resolution abound. *See, e.g.*, *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 273–74, 384 S.E.2d 693, 695–96 (1989) (reversing holding that a construction defect claim was time-barred, holding that an awareness of construction defects in one area of a project did not put the plaintiff on notice of all claims that could relate to those defects, and concluding that the "reasonableness" of the plaintiff's investigation into the defects "was an issue to be decided by the jury"), *vacated in unrelated part by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C.

556, 559, 462 S.E.2d 858, 860 (1995); *Box v. Sparrow Group, LLC*, Op. No. 2018-UP-353, 2018 S.C. App. Unpub. LEXIS 355, at *4–6 (Ct. App. Aug. 15, 2018) (reversing a circuit court's grant of summary judgment based on the statute of limitations where a residential buyer sued a seller for fraudulent statements in a property disclosure, as the determination of whether the buyer acted reasonably in discovering her claims was one for the jury).

The reasoning of this line of case law holds particularly true here because the Hine Family's discovery of termite damage in 2012 would have, at most, put the family on notice that the defendants failed to disclose something about the house on the Residential Property Condition Disclosure Statement. It did not put the Hine Family on notice that it had been the victim of fraudulent behavior, nor did it put the family on notice that the McCrory brothers had intentionally concealed an extreme amount of termite damage in the heart of the house. But the first three causes of action in the Amended Complaint are for fraud, and the rest draw on that same conduct. These are claims that the Hine Family simply could not have asserted based on the information known or reasonably available in 2012, and it is reversible error to hold that the family is time-barred from presenting this issue to a jury for resolution.

II. The Court should set aside any limitations issues as a matter of equity.

Even if the Court finds that the Hine Family somehow should have known about the McCrory brothers' fraudulent conduct earlier than 2018, and that the family's failure to learn of that misconduct was objectively unreasonable,[1] it should still reverse the circuit court's summary judgment ruling by equitably tolling the statutes of limitations.

[1] Notably, every single defendant agreed that the Hine Family's conduct in this case was reasonable. (R. pp. 223–24; Dep. M. McCrory 34:1–4, 46:11–13; R. pp. 229–31; Dep. T. McCrory 82:14–23, 83:4–15, 85:16–25; R. pp. 236–39; Dep. Marchant 91:1–11, 97:12–99:13.)

Courts have the inherent power to equitably toll a statute of limitations "where justice demands it." *Hooper v. Ebenezer Senior Servs. & Rehabilitation Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Though it is to be used infrequently, a court should equitably toll a statute of limitations in order "to ensure fundamental practicality and fairness." *Id.* (quoting *Rodriguez v. Superior Court*, 98 Cal. Rptr. 3d 728, 736 (Cal. Ct. App. 2009)).

The Supreme Court has insisted that this power is not subject to rigid guidelines, but instead must remain flexible in order to apply whenever the circumstances render the passing of the limitations period unfair. Examples of such instances include those where a party has actively attempted to timely commence litigation but was precluded from doing so due to circumstances beyond its control, or where a plaintiff "by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim." *Id.* at 116, 687 S.E.2d at 33 (quoting *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999)).

This power is also triggered when, as here, a defendant has deliberately concealed the facts and circumstances that would give rise to a claim. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014) ("Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations.").

This case provides a prime instance where equitable tolling should be employed.[2] The extreme damage at the heart of this case was covered up and hidden by the McCrory brothers when flipping this house. They even conceded in depositions that the only way to discover their

[2] The Hine Family presented its equitable tolling argument both in opposition to the defendants' motion for summary judgment and again in a Rule 59 motion. (R. p. 213; Hine Family Mem. in Opp'n to Summ. J. at 5; R. pp. 242–43; Mot. to Alter or Amend at 3–4.) The circuit court failed to rule on it in either instance, but its presentation at every stage below preserves the issue for this Court's consideration.

fraudulent conduct would have been to destroy a part of the house that was not connected to or in any way related to the damage uncovered in 2012:

> Q: And you would agree, then, that the only way for him [*i.e.* Mr. Hine] or his wife to have discovered termite damage that was in the basement stairwell was to have the drywall there—either a hole bored into it or have it removed. Correct?
>
> A: Yes.

(R. p. 231; Dep. T. McCrory 85:19–25.)

In effect, the circuit court's reliance on the statutes of limitations to resolve this case without letting a jury hear it rewards the McCrory brothers for being excellent with their fraud, and allows the Marchant defendants to reap the benefits of that fraud right along with them. To be sure, the Hine Family did not discover the hidden damage in the core of their house until they began pulling up flooring, tearing down sheetrock, and ripping out insulation in parts of the house that they never had any reason to explore. Enforcing a statute of limitations in these circumstances incentivizes fraudsters to excel in the fraud so that it is not discovered until the time to bring a claim expires—exactly the opposite outcome that courts and the public should desire.

Nor does equitably tolling the statute of limitations work to prejudice the defendants here. There is nothing in the record to suggest that they altered their conduct in 2015 or at any point thereafter with the expectation that the statutes of limitations on their fraudulent behavior had expired. The only consequence of equitably tolling those limitations periods would be to allow the Hine Family's claims to be resolved on the merits, and for a jury to consider whether the defendants' misconduct is to be tolerated or excused. Because the defendants' misconduct is the only reason that the statutes of limitations are even at issue in this case, the Court should equitably toll those statutes and allow this case to proceed to trial.

CONCLUSION

The circuit court's decision to resolve this case through summary judgment was contrary to hornbook South Carolina law that holds that whether a plaintiff is on notice of a potential claim is a question for a jury to resolve when there is conflicting evidence on the issue. This is particularly true here, as the defendants' own fraudulent behavior is what delayed the Hine Family in discovering their misconduct and bringing this case.

Accordingly, the Hine Family respectfully requests that the Court reverse the circuit court's summary judgment ruling and remand this matter back for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Appellants, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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Re: John M. Hine and Maria W. Hine v. Timothy M. McCrory, individually and as agent, Michael P. McCrory, Seabrook L. Marchant and The Marchant Company
Appellate Case No. 2019-001375

Dear Ms. Kitchings:

Please find enclosed for filing the Brief of Appellants and Reply Brief of Appellants and 7 copies of each for the case cited above. Please return a clocked copy to our courier.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

cc: David A. Anderson
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