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.

REPLY BRIEF OF APPELLANTS

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellants John and Maria Hine

Columbia, South Carolina
March 20, 2020

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INTRODUCTION

The crux of the Hine Family's argument is that the family's discovery in 2012 of $4,000 of termite damage along a perimeter wall in the nursery on the main-level of their house did not, as a matter of both law and fact, put them on notice of over $100,000 of structural damage in the basement, which is in the center of their house, and which the Respondents deceptively and shoddily patched and hid behind sheetrock. Once this extreme damage to the core of their house was discovered, the Hine Family promptly filed suit within four months, and any dispute about this case being brought within a limitations period should be resolved by a jury, not by the circuit court through a summary judgment motion.

In opposing the Hine Family's appeal, the Respondents have only reinforced exactly why the circuit court's summary judgment ruling should be reversed. The cases on which the Respondents rely make clear that when a party has notice of damage in one location, that awareness does ***not*** constitute notice of ***any other*** damage in a ***different location*** sufficient to trigger a statute of limitations regarding the later-discovered damage. Accordingly, the Court should follow the long-settled precedent cited by all parties to this appeal, reverse the summary judgment decision, and remand this matter with instructions to let a jury decide whether the Hine Family's case should proceed and succeed on its merits.

ARGUMENT

I. As a matter of law, discovery of damage in one location on property does not trigger the statute of limitations for all other unknown damage everywhere else on the same property.

In attempting to rehabilitate the circuit court's improper disposition of this case, the Respondents attempt the same sleight-of-hand that countless litigants have previously tried, and that South Carolina's appellate courts have previously rejected. Namely, they argue that an

awareness of a problem ***somewhere*** on the property renders a plaintiff aware of other problems ***everywhere*** on the same property. (*See, e.g.*, Respondents' Br. at 13, 21 (arguing that because the Hine Family discovered "termite damage" in April 2012, their 2018 lawsuit should be time-barred even though the 2012 damage is not the basis for their claims).) But this is not the law.

South Carolina cases are uniform that an awareness of an issue in one portion of property ***does not*** trigger a limitations period for claims that may arise for damages in another area of property, and that any dispute as to the scope of the plaintiff's supposed "notice" should be resolved by the jury. The Supreme Court has so held. *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 the trial court's conclusion that a construction defect claim was time-barred, and holding that an awareness of 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).

And this Court has so held, time after time. *See, e.g.*, *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co.*, 425 S.C. 268, 275–76, 821 S.E.2d 504, 508 (Ct. App. 2018) (rejecting an argument that a homeowners' association's awareness of water intrusion in some portions of the property in 2003 barred subsequent claims for defective construction of columns, framing, and porch railings that allowed water intrusion, and concluding that 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"); *McAlhany v. Carter*, 415 S.C. 54, 66, 781 S.E.2d 105, 112 (Ct. App. 2015) (reversing summary judgment based on a statute of limitations and rejecting an

argument that a homeowner's awareness of one problem with an inspection report regarding termites in the house put the homeowner on notice of all potential claims against the inspector), *aff'd* Op. No. 2017-MO-007, 2017 S.C. Unpub. LEXIS 16 (May 3, 2017); *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011) ("We find it is a jury question as to whether the [moisture-based] damages the Association claimed in 2005 were different from those it experienced in the past [which would have been time-barred].").

Moreover, the cases on which the Respondents ground their appellate argument stand for this exact same proposition. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 364–65, 468 S.E.2d 645, 647 (1996) (holding that suing for cracks and bulging bricks that rendered a building not structurally sound was time-barred because the owner had been aware of the crack from which the damage emanated for several years, and the damage was in "***the same location*** and of the same nature as the original harm") (emphasis added); *Allwin v. Russ Cooper Assocs.*, 426 S.C. 1, 19–20, 825 S.E.2d 707, 717 (Ct. App. 2019) ("But the damages the HOA claimed in the 2005 lawsuit [in *Holly Woods Association*] involved a ***different location*** within the neighborhood, unrelated to the previous defects. By contrast, the record here establishes Allwin failed to present any evidence that the defects she claims to have discovered in 2011 were unrelated to those she had notice of as early as February 1999.") (emphasis added); *Barr v. City of Rock Hill*, 330 S.C. 640, 644–45, 500 S.E.2d 157, 159–60 (Ct. App. 1998) (holding that a suit involving moisture damage under a house was time-barred because the plaintiffs were repeatedly alerted to the specific source of their claims in several annual inspections that long predated their complaint, and one of the plaintiffs even conceded to having an awareness of the issues but did not act on them until it was too late).[1]

[1] The Respondents discuss *Dean* on Pages 14 through 15 of their brief; *Barr* on Pages 15 through 16; and *Allwin* on Pages 16 through 17. These are the Respondents' primary authorities, but they support reversal here.

Here, the record contains uncontroverted evidence as to the isolated nature of the 2012 damage the family discovered in a part of their home that is separate and distinct from the crippling, hidden damage they uncovered in 2018 that forms the basis of this suit. Mr. Hine specifically testified to this point:

> Q: Are you recovering or attempting to recover damages for this work [done in 2012]?
>
> A: ***No.***
>
> Q: And why not?
>
> A: Because I don't—this came and went, and ***this isn't part of the current litigation***.
>
> *****
>
> Q: You're making a separate determination or a separate claim as it relates to this termite damage than the termite damage that's referenced in your suit filed in 2018?
>
> [objection of counsel]
>
> A: I am saying that I have found ***two separate instances of termite damage that were not contiguous***. So just because I discovered one didn't mean that I knew about the other one.

(R. p. 168; Mr. Hine Dep. 23:25–24:5, 24:25–25:8 (Feb. 12, 2019) (emphasis added).)

Mr. Hine further testified that the 2012 repairs only went as far as the damage that was present in the nursery: "[A]s they took down the wall in the bedroom upstairs [*i.e.* on the main level of the house], whatever we discovered, they repaired, and then when they stopped, you know, uncovering termite damage, they stopped tearing down the walls." (R. p. 169; *id.* 26:1–:5.)

Under circumstances such as this, it is the jury's job to determine whether the Hine Family acted reasonably in demolishing their home in 2012 only until they "stopped . . . uncovering termite damage" in the nursery, or whether the family should have continued stripping the whole house down to the studs to determine whether the Respondents had masked much more extensive damage in other, non-adjacent, parts of the house.

If the contrary were true and the Respondents' argument was correct, then the Respondents would have total immunity for their misdeeds and deceptive conduct with respect to this house. For instance, if the Hine Family had filed suit in 2012 (or in 2015 at the latest), as the Respondents argue should have happened, the family's only claim would have been for $4,000 worth of damage. That was the extent of all known damages based on the Hine Family's investigation and repairs at that time. There is simply no way that the Hine Family could have sued then for the severe structural damage that they have now uncovered without demolishing their house.

Of course, the law does not give homeowners only two choices: (1) to sue for known damages and waive all potential, even-unrelated claims that have not yet been discovered; or (2) to destroy their house, at their own expense, on an exploratory mission to uncover any other not-yet-known issues hiding within the structure. But this is the outcome urged by the Respondents and adopted by the circuit court, and it is incorrect as a matter of law.

Whether the Hine Family exercised "reasonable diligence," or should have undertaken additional destructive testing in 2012, is a question for the jury to resolve after hearing all of the evidence, not for the court to resolve on summary judgment. *Stoneledge at Lake Keowee Owners' Ass'n*, 425 S.C. at 275–76, 821 S.E.2d at 508. Nor does this case present any of the concerns addressed by statutes of limitations, as the evidence of the Respondents' misconduct has not gone stale—it was uncovered in 2018 after being hidden behind sheetrock, and the "date of manufacturing" stamp on the 2x4s that the Respondents used to mask the house's structural damage makes it inescapable that they are responsible for the deception (R. p. 70; First Am. Compl. ¶¶ 18–26)—and the witnesses are the parties themselves. Accordingly, the Court should reverse the circuit court's summary judgment ruling and allow a jury to decide whether the Hine Family's actions in uncovering the Respondents' misconduct were reasonable.

II. Equity does not reward deception and concealing facts that would have resulted in litigation commencing within a limitations period.

In its opening brief, the Hine Family argued that even if the Court finds that the three-year limitations period expired, that period should be tolled as a matter of equity because the Respondents actively hid the evidence of their misconduct behind a wall of sheetrock. In response, the Respondents concede, as they must, that a "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." (Respondents' Br. at 25.) But the Respondents then engage in a lengthy fact-based argument about whether or not they actively concealed the severe structural damage in the Hine Family's basement when flipping this house. (*Id.* at 25–27.)

The Respondents' posturing on this issue underscores why a trial is necessary. They pepper their return brief with rhetoric like "unproven allegation," "strongly deny," "may not have even," "could have," "unsubstantiated allegations," and "devised a story." (*Id.* at 26.) Meanwhile, the evidence is undisputed that the 2x4s holding the severely-damaged structure together bear a "date of manufacturing" stamp of September 7, 2005—the very same day that the Respondents bought the house in order to flip it. (R. p. 70; First Am. Compl. ¶¶ 25–26.) Despite their protestations, there is simply no way that someone other than the Respondents installed those 2x4s, and there is simply no way that someone other than the Respondents concealed this damage behind sheetrock.

Because the facts on this issue are disputed, the Hine Family is entitled to a trial to "prove" and "substantiate" its allegations that the Respondents concealed their bad acts within the walls of the house in such a manner as to prevent this lawsuit from being filed sooner. *See Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997) (reiterating that that "equitable estoppel interposed in a law case should be tried by the court as an equitable issue").

Accordingly, in the event the Court believes that the Hine Family's claims could potentially be time-barred, it should reverse the circuit court's reliance on a limitations period with instructions to conduct a trial at which the Hine Family will be entitled to put forth evidence regarding equitable tolling of the relevant limitations period.[2]

CONCLUSION

The Hine Family should be given an opportunity to fully present the evidence of this case at trial and let a jury decide whether the Respondents deceptively caused and concealed over $100,000 of structural damage to the family's home and whether the Hine Family acted reasonably with respect to discovering this damage. The Hine Family should also be given a chance to present evidence as to why any statute of limitations here should be equitably tolled due to the Respondents' misconduct. Because the circuit court incorrectly deprived the Hine Family of its day in court, the Court should reverse the lower court's summary judgment ruling and remand this matter for trial.

Signature Page Attached

[2] The parties do not dispute that the Hine Family's claims would be subject to a three-year limitations period. The Respondents' brief states that all claims are governed by South Carolina Code § 15-3-530. (Respondents' Br. at 11.) However, for the sake of clarity in the record, because the Hine Family is also prosecuting a claim under the Unfair Trade Practices Act, that claim would be governed by South Carolina Code § 39-5-150, which is also a three-year period.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By:_____

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellants John and Maria Hine

Columbia, South Carolina
March 20, 2020

CERTIFICATE OF COMPLIANCE

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

WOMBLE BOND DICKINSON (US) LLP

By: _____

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Bryant S. Caldwell
S.C. Bar No. 102206
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellants John and Maria Hine

Columbia, South Carolina
March 20, 2020

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):

Pleading: Reply Brief of Appellants

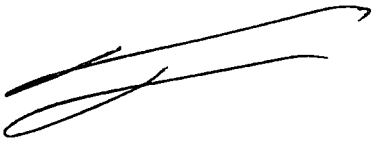
Parties Served:

David A. Anderson
Carmen Ganjehsani
Richardson, Plowden & Robinson, P.A.
Post Office Drawer 7788
Columbia, SC 29202

Attorneys for Respondents Timothy M. McCrory, Seabrook L. Marchant, and The Marchant Company

H. Chase Harbin
Law Office of H. Chase Harbin, P.A.
419 Vardy Street
Greenville, SC 29601

Attorneys for Respondent Michael P. McCrory



M. Todd Carroll

March 20, 2020

womblebonddickinson.com

WOMBLE BOND DICKINSON

Womble Bond Dickinson (US) LLP

M. Todd Carroll
Direct Dial: 803.454.7730
Direct Fax: 803.381.9130
E-mail: todd.carroll@wbd-us.com

1221 Main Street
Suite 1600
Columbia, SC 29201

t: 803.454.6504

March 20, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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
Carmen Ganjehsani
H. Chase Harbin