IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2009 Session

# KAYE LOCKWOOD v. RONALD G. HUGHES, ET AL.

**Appeal from the Chancery Court for Williamson County**
**No. 29056 Jeff Bivens, Chancellor**

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**No. M2008-00836-COA-R3-CV - Filed April 28, 2009**

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Buyer of home filed complaint against Sellers for, among other things, violation of the Tennessee Consumer Protection Act ("TCPA"). The trial court granted summary judgment to Sellers on the TCPA claim on the ground that it was barred by the statute of repose. Buyer filed a Motion to Alter or Amend the Judgment, raising a new argument, which the trial court denied. On appeal, Buyer challenges: (1) the trial court's grant of summary judgment, asserting that material facts were in dispute regarding Buyer's allegation that Sellers fraudulently concealed defects in the home and that the fraudulent concealment tolled the statute of repose and (2) the trial court's failure to consider the new argument raised in Buyer's Motion to Alter or Amend. Finding the trial court's actions to be proper in all respects, we affirm the decision.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and FRANK G. CLEMENT, JR., J. joined.

Jean Dyer Harrison, Nashville, Tennessee, for the appellant, Kaye Lockwood.

Joseph M. Huffaker and Mary Beth Haltom, Nashville, Tennessee, for the appellees, Ronald G. Hughes and Patricia T. Hughes and d/b/a Ronny Hughes Builders.

## OPINION

### I. Factual and Procedural History

During 1996 and 1997, Ronny Hughes Builders constructed a home to serve as a residence for Ronald and Patricia Hughes. Prior to the completion of construction, the Hughes found another residence in which to live and, on August 15, 1998, entered into a contract with Kaye Lockwood for sale of the home they had been constructing. Ms. Lockwood did not have the home professionally inspected prior to signing or closing on the contract. The closing occurred on August 24, 1998, and Ms. Lockwood moved into the home in mid-December 1998. Upon occupying the home, she began

experiencing problems with the phone jacks and plugs; wet circles on the wall in her bedroom, the upstairs ceilings, and the sunroom; a crack in the chimney; deterioration of the exterior walls; and a water intrusion in the basement. The Hughes worked with Ms. Lockwood to fix the problems after she discovered them.

Ms. Lockwood had the home inspected in 2002 and, after being advised that it had numerous defects,[1] filed a complaint on August 23, 2002, against Ronald and Patricia Hughes and Ronny Hughes Builders[2] for damages allegedly arising out of the construction of the home.[3] The complaint alleged breach of contract, negligence, code violations, substandard workmanship and materials, construction and design deficiencies, and violations of the Tennessee Consumer Protection Act ("TCPA").[4] The Hughes filed an answer on November 5, 2002.

On December 15, 2003, the Hughes filed a motion for summary judgment, asserting that the statute of limitations[5] and statute of repose[6] applicable to actions to recover damages to real property had run. In ruling on that motion, the trial court summarized Ms. Lockwood's complaint as raising two causes of action - (1) negligent construction and substandard workmanship and (2) violations of the TCPA - and found that the Hughes' summary judgment motion only addressed the negligent construction and substandard workmanship claim. The trial court found that the home was substantially completed on August 1, 1997,[7] and, consequently, the negligent construction and substandard workmanship claim was barred by the statute of limitations since it was brought more than 5 years after the date of substantial completion. The trial court granted partial summary judgment to the Hughes on that issue, leaving only the claim for violation of the TCPA.[8]

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[1] The defects found by Ms. Lockwood's 2002 inspection of the home, as alleged in her complaint, include "[c]ode violations and substandard workmanship and materials" and "numerous construction and design deficiencies."

[2] Ronald Hughes is the owner of Ronny Hughes Builders.

[3] Williamson County was originally named as a defendant, however, Ms. Lockwood voluntarily dismissed the County as a party because it was immune from suit under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq*.

[4] Tenn. Code. Ann. § 47-18-101 *et seq*.

[5] Tenn. Code Ann. § 28-3-105.

[6] Tenn. Code Ann. § 28-3-202.

[7] The court based this finding on an affidavit filed by Mr. Hughes, which stated that the home was substantially completed before August 1, 1997. Ms. Lockwood admitted this date in a response to the Hughes' Statement of Undisputed Facts in support of their fourth summary judgment motion. Despite this admission, Ms. Lockwood's attorney raised an issue with the date of substantial completion at the August 27, 2007, hearing on the Hughes' fourth summary judgment motion. Ms. Lockwood, however, does not contest the date of substantial completion on appeal.

[8] Ms. Lockwood's brief states that "the only claim before the trial Court [sic] concerned whether the Hughes had violated the [TCPA] by engaging in deceptive conduct."

The parties continued with discovery and depositions until April 4, 2006, when the Hughes filed a second motion for summary judgment, asserting that the TCPA claim should be dismissed because the complaint cited provisions of the TCPA that were not applicable and because the claim was barred by the statute of repose. In addition to responding in opposition to this motion, Ms. Lockwood filed a motion to amend her complaint to cite the catch-all provision of the TCPA.[9] The trial court entered an order on June 23, 2006, denying the summary judgment motion, stating that genuine issues of material fact existed, and granting Ms. Lockwood's motion to amend.

On April 18, 2007, the Hughes filed a third motion for summary judgment, asserting that the TCPA claim was barred by the four year statute of repose in light of an opinion from the Court of Appeals of the Eastern Section of Tennessee in *Cunha v. Cecil and Weber*, 2007 WL 273753 (Tenn. Ct. App. Jan. 31, 2007), which addressed a TCPA claim in the residential home building context. In response, Ms. Lockwood argued that the case did not apply, but that, if it did, she requested the opportunity to amend her complaint to allege fraudulent concealment in order to toll the statute of repose. At a hearing on June 18, 2007, the court denied the summary judgment motion "subject upon Plaintiff coming forward with proof of fraudulent concealment by the Defendants." Ms. Lockwood filed her second amended complaint on July 6, 2007, alleging that the Hughes deliberately concealed defects to electrical wiring in the home and failed to timely turn over inspection reports on the home.

On July 13, 2007, the Hughes filed a fourth motion for summary judgment, addressing Ms. Lockwood's new contention that they fraudulently concealed defects in the home. The trial court granted this motion, finding there to be no evidence of fraudulent concealment to toll the statute of repose and, consequently, that Ms. Lockwood's TPCA claim was barred.

Ms. Lockwood filed a motion to alter or amend the judgment, asserting the new argument that the Hughes were in actual possession of the home at the time it was defectively constructed and, therefore, could not raise the statute of repose defense in accordance with Tenn. Code Ann § 28-3-205(a). The trial court denied the motion and Ms. Lockwood appeals.

We summarize the issues raised by Ms. Lockwood as follows[10]:

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[9] The catch-all provision of the TCPA is found at Tenn. Code Ann. § 47-18-104(27).

[10] The Hughes raise as an alterative issue on appeal that they are entitled to summary judgment based on an exculpatory clause contained in the contract for sale of the home. In light of our holding, it is not necessary to reach this issue.

1. Whether the trial court erred in granting summary judgment when material facts relating to Ms. Lockwood's allegation of fraudulent concealment for the purpose of tolling the statute of repose at Tenn. Code Ann. § 28-3-205(b) were in dispute.

2. Whether the trial court erred in failing to consider Ms. Lockwood's contention that Tenn. Code Ann. § 28-3-205(a) prevented the Hughes from asserting the statute of repose defense, which contention was raised for the first time in the Motion to Alter or Amend Judgment.

3. Whether the statute of limitations at Tenn. Code Ann. § 28-3-105 applies to bar Ms. Lockwood's cause of action.

**II. Standard of Review**

The issues on appeal were resolved in the trial court upon summary judgment. "Our review of a trial court's award of summary judgment is de novo with no presumption of correctness, the trial court's decisions being purely a question of law." *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). "Summary judgment is appropriate where there is no genuine issue of material fact relevant to the claim or defense and where the movant is entitled to judgment as a matter of law on the undisputed facts." *BellSouth Adver. & Publ'g Co.*, 100 S.W.3d at 205.

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. *See Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008); *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). The summary judgment analysis to be used is as follows:

> The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 8-9. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. *See Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

*McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

*Martin*, 271 S.W.3d at 83-84.

**III. Analysis**

### A. Allegations of Fraudulent Concealment to Toll the Statute of Repose

Ms. Lockwood asserts that the trial court erred in dismissing her TCPA claim on summary judgment when material facts regarding allegations of fraudulent concealment were in dispute. In her second amended complaint, Ms. Lockwood alleged fraudulent concealment on the part of the Hughes in two respects: (1) "[t]he Defendants, by and through their authorized agents, placed GFI (ground fault interrupter) stickers on electrical receptacles that were not GFI receptacles which are a safety feature to prevent electrocution" and (2) the Hughes and their insurance carrier did not timely respond to her requests for inspection reports on the home, with the intention of delaying the filing of her cause of action.

Ms. Lockwood does not discuss the allegations relating to the GFI receptacles in either of her briefs on appeal; consequently, we consider her complaint regarding the trial court's grant of summary judgment based on that allegation to have been waived.[11] For the same reason we consider her complaint relating to the allegation that the Hughes and their insurance company acted to delay her from filing suit, briefly mentioned in her reply brief, to have been waived.[12] *See Frye v. St. Thomas Health Serv.*, 227 S.W.3d 595 (Tenn. Ct. App. 2007).

On appeal, Ms. Lockwood also asserts that the Hughes fraudulently concealed a water intrusion problem in the home's basement, which was known prior to closing, but never disclosed. She contends that Tenn. Code Ann. § 28-3-205(b) applies to prevent the Hughes from raising the statute of repose as a defense and that material facts were in dispute as to whether the Hughes fraudulently concealed the water intrusion in the home's basement; consequently, summary judgment was inappropriate. The Hughes contend that the allegation that they fraudulently concealed the water intrusion should not be considered on appeal because it was not properly raised before the trial court but that, if this Court considers the issue, they are still entitled to summary judgment.

"[I]ssues not raised in the trial court cannot be raised for the first time on appeal." *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). "This Court can only consider such matters as were brought to the attention of the trial court and acted upon or permitted by the trial court." *Irvin v. Binkley*, 577 S.W.2d 677, 679 (Tenn. Ct. App. 1978) (citing *Clement v. Nichols*, 209 S.W.2d 23 (Tenn. 1948)). Even though in her second amended complaint Ms. Lockwood did not specifically allege that the water intrusion was fraudulently concealed, the allegation was

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[11] Rule 13(b), Tenn. R. App. P., states that "[r]eview generally will extend only to those issues presented for review." The advisory commission comments further clarify that "[g]enerally speaking, control over the issues should reside in the parties, not in the court. Accordingly, this subdivision provides that review will typically extend only to those issues set forth in the briefs." *Frye v. St. Thomas Health Serv.*, 227 S.W.3d 595, 614 (Tenn. Ct. App. 2007).

[12] In *Frye*, this Court considered an appeal of a trial court's grant of summary judgment on all of the plaintiffs' causes of action. *Id*. at 601. On appeal, the plaintiffs' brief addressed some, but not all, of the causes of action. *Id*. at 614. The plaintiffs' reply brief, however, did ask this Court to review the dismissal of those causes of action not addressed in their original brief. *Id*. This Court held that "[b]ecause Plaintiffs failed to address these claims in their brief, we consider these issues waived on appeal." *Id*; *see also Smith v. Harriman Utility Bd.*, 26 S.W.3d 879, 885 (Tenn. Ct. App. 2000).

mentioned in the affidavit she filed in opposition to the fourth summary judgment motion and was briefly discussed by her attorney at the August 27, 2007, hearing on the motion.[13] Inasmuch as the water intrusion allegation was raised in the materials filed in response to the summary judgment motion and was "brought to the attention of the trial court" at the August 27 hearing, we will address the issue on appeal.

The statute of repose for actions to recover damages to improvements to real property, found at Tenn. Code Ann. § 28-3-202, is four years after substantial completion of the improvement. The ability of a party to claim the protection of the statute of repose is limited by Tenn. Code Ann. § 28-3-205(b), which states:

> (b) The limitation hereby provided [statute of repose] shall not be available as a defense to any person who shall have been guilty of fraud in performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying, in connection with such an improvement, or to any person who shall wrongfully conceal any such cause of action.

*Id*.

To toll the application of the statute of repose based on an allegation of fraudulent concealment, a plaintiff is required to prove the following: (1) that the defendant took affirmative action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so; (2) the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence; (3) knowledge on the part of the defendant of the facts giving rise to the cause of action; and (4) concealment of material information from the plaintiff. *Shadrick v. Coker*, 963 S.W.2d 726, 735 (Tenn. 1998). "The tolling doctrine of fraudulent concealment does not apply to cases where the court finds a plaintiff was aware or should have been aware of facts sufficient to put the plaintiff on notice that a specific injury has been sustained as a result of another's negligent or wrongful conduct." *Sommer v. Womick*, 2005 WL 1669843, at *4 (Tenn. Ct. App. July 18, 2005) (citing *Shadrick*, 963 S.W.2d at 736)).

The Hughes assert that they successfully negated an essential element of Ms. Lockwood's claim that they fraudulently concealed the water intrusion by showing that the problem was discoverable in the exercise of reasonable care and diligence and that, in fact, Ms. Lockwood was aware of it as early as 1999. In support of the motion, the Hughes relied on Ms. Lockwood's response to the Statement of Undisputed Facts filed in support of their second summary judgment

[13] At the hearing, the Hughes' attorney addressed the issue by stating "[t]he plaintiff appears to raise another issue in their response, a water issue, which isn't alleged in the complaint, as a part of the fraud argument. So, Your Honor, if the Court's not going to allow them to get into that, then I'm not going to address it." Ms. Lockwood's attorney then discussed an unrelated issue and never addressed the water intrusion problem before the trial court granted summary judgment.

motion,[14] her response to the Statement of Undisputed Facts filed in support of their fourth summary judgment motion,[15] and her deposition.[16] These revealed that Ms. Lockwood did not have the home inspected prior to closing; that she was aware of a water leak in the home's basement in 1999; and that she contacted the Hughes when the water leak first appeared but did not inform them during the next three years of the continuing problem. These materials were sufficient to negate an essential element of Ms. Lockwood's fraudulent concealment claim, *viz.,* that she could not have discovered the cause of action despite exercising reasonable care and diligence. The burden was then shifted to her to either come forward with evidence establishing material factual disputes that were overlooked or ignored by the Hughes, producing additional evidence establishing the existence of a genuine issue of fact for trial or explaining the need for further discovery. *See McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215; *Hannan*, 270 S.W.3d at 8-9.

In response to the motion and supporting materials, Ms. Lockwood filed the Hughes' responses to her Statement of Undisputed Facts. She relies upon the Hughes' acknowledgment that

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[14] The Hughes' Statement of Undisputed Facts in support of their second summary judgment motion contained the following assertion and response from Ms. Lockwood:

> 7. Ms. Lockwood had a massive water leak in the basement in 1999. (Lockwood Dep., p. 22, ll. 11-18).
> RESPONSE: ADMITTED

[15] The Hughes' Statement of Undisputed Facts in support of their fourth summary judgment motion contained the following assertion and response from Ms. Lockwood:

> 15. Prior to purchasing the home, Plaintiff did not have the home professionally inspected. (Deposition of Kaye Lockwood, p. 20, lines 6-8).
> RESPONSE: ADMITTED

[16] Ms. Lockwood discussed the water intrusion in the home's basement during a deposition, which included the following questioning, in part pertinent:

> Q. (BY [Hughes' Attorney]) What other problems?
> A. I had water in my basement.
> Q. When did that start occurring?
> A. It was sometime during the first year.
> Q. During 1999?
> A. Yes.
> Q. And what was done to correct the problem?
> A. Mr. and Mrs. Hughes came over immediately, brought fans to dry out the carpet. They kilned the walls and repainted them. It was fairly extensive. It was in a couple of closets and a couple of rooms on the back side of the basement.
> Q. Did the problems return?
> A. Not on that exact side or area, but yes, they have come back.
> Q. When did they come back?
> A. They continued to come back. It's been throughout the time I've lived there.
> Q. And did you tell Mr. Hughes about that, the problems?
> A. Not in the last two or three years.

they knew of the leak prior to the closing in support and contends that "the determination of whether the non-disclosure constitutes fraudulent concealment is an issue of fact which must be determined by the trier of fact."[17] Ms. Lockwood's reliance on the Hughes' knowledge of the leak, however, does not meet her burden of producing "specific facts establishing that genuine issues of material fact exist" relative to the determination of whether she could not have discovered the cause of action using reasonable care and diligence. *McCarley*, 960 S.W.2d at 588.

The record before us shows Ms. Lockwood's admissions that she did not have the home inspected prior to closing; that she discovered the leak in the basement in 1999, shortly after moving into the home; and that she reported the leak to Mr. Hughes. On this evidence we find that Ms. Lockwood failed to create an issue of fact as to whether, in the exercise of reasonable care and diligence, she could not have discovered the water intrusion in the basement and affirm the trial court's grant of summary judgment to the Hughes. *See Sommer*, 2005 WL 1669843, at *4.

**B. Applicability of the Statute of Repose**

Ms. Lockwood contends that Tenn. Code Ann. § 28-3-205(a) prevents the Hughes from raising the defense that her action is barred by the statute of repose because they "owned the home at the time the construction deficiencies which led to [her] claims were created."[18] The Hughes contend that this argument was raised for the first time in the Rule 59 Motion to Alter or Amend Judgment and, therefore, was properly not considered by the trial court. They also contend that, if the Court considers the issue to have been properly raised, the statute does not apply to them.

Ms. Lockwood acknowledges that "[i]t is undisputed that [her] previous counsel did not argue that the statute of repose defense was barred pursuant to T.C.A. § 28-3-205(a) before the trial Court [sic] in the initial response to the summary judgment motion filed by Hughes and [she] is mindful of this fact." She asserts, however, that the trial court failed to consider the factors set forth in *Harris v. Chern*, 33 S.W.3d 741 (Tenn. 2000), which are to be considered by a trial court when

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[17] This admission by Mr. Hughes derives from Ms. Lockwood's Statement of Undisputed Facts, filed in response to the fourth summary judgment motion, which alleges, among other things, that the Hughes "knew of water problems in certain basement areas prior to the signing of the contract to purchase the home," to which the Hughes had responded by saying "[i]t is admitted that there had been a water leak in the basement prior to the signing of the contract, but that Defendant believed the problem had been corrected."

[18] Tenn. Code Ann. § 28-3-205, states:

> (a) The limitation provided by this part [statute of repose] shall not be asserted as a defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

ruling on a Rule 59.04 motion to alter or amend that includes information not before the court prior to judgment.[19]

This court reviews a trial court's action on a motion to alter or amend a judgment using an abuse of discretion standard. *Whalum v. Marshall*, 224 S.W.3d 169, 175-76 (Tenn. Ct. App. 2006). "The purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) (citing *Bradley v. McLeod*, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998)). "The motion should be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *Id*. (citing *Bradley*, *supra*).

This Court in *Bradley v. McLeod*, 984 S.W.2d 929 (Tenn. Ct. App. 1998) addressed the situation where new arguments were raised in a Rule 59 motion to alter or amend:

> [A] Tenn. R. Civ. P. 59.04 motion should not be used to alter or amend a summary judgment if it seeks to raise new, previously untried legal theories, to present new, previously unasserted legal arguments, or to introduce new evidence that could have been adduced and presented while the summary judgment motion was pending.

*Bradley*, 984 S.W.2d at 933; *In re M.L.D.*, 182 S.W.3d at 895.

The allegations made in support of Ms. Lockwood's Motion to Alter or Amend Judgment included the fact that the "Defendants built the home in question themselves" and that the "defendants owned the home at the time the construction deficiencies which led to Ms. Lockwood's claims were created." On appeal, Ms. Lockwood does not cite any evidence in support of this allegation, but instead asserts that "the ability to present additional evidence to address the factual issues surrounding the ownership of the home prior to the sale is not unduly burdensome to the Hughes." Neither fact was undiscovered prior to the trial court's consideration of the summary

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[19] The Court in *Harris*, *supra*, stated that:

> When additional evidence is submitted in support of a Rule 54.02 motion to revise a grant of summary judgment, a trial court should consider, when applicable: 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment; 2) the importance of the newly submitted evidence to the movant's case; 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; 4) the likelihood that the nonmoving party will suffer unfair prejudice; and 5) any other relevant factor.

*Harris*, 33 S.W.3d at 745. "Although *Harris* by its very language applies to Rule 54.02 motions, this Court has twice used the factors set forth in *Harris* when considering a Rule 59.04 motion to alter or amend." *Grace v. Mountain States Health Alliance*, 2001 WL 1131725, at *3 (Tenn. Ct. App. Sept. 25, 2001).

judgment motion.[20] The *Harris* factors apply to a Rule 59 motion to alter or amend only when newly discovered evidence is submitted. *Grace*, 2007 WL 1131725 at *3. Since Ms. Lockwood has presented no newly discovered evidence in support of the Motion to Alter or Amend Judgment, the *Harris* factors are inapplicable. Neither did the motion assert a change in the controlling law or evidence of a clear error of law or injustice needed to be corrected. *In re M.L.D.*, 182 S.W.3d at 895. Rather, the motion attempted to raise a "new, previously unasserted legal argument," the factual basis for which was known to her long before she filed her response to the motion.

Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Myint v. Allstate Ins., Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Under these circumstances, we find that the trial court did not abuse its discretion in denying Ms. Lockwood's Motion to Alter or Amend.

### C. Statute of Limitations

Ms. Lockwood contends that the statute of limitations, found at Tenn. Code Ann. § 28-3-105, does not bar her cause of action. The Hughes raised this defense in the trial court; however, the trial court granted summary judgment solely on the ground that the action was barred by the statute of repose.[21] The trial court never ruled on this defense and, since we have affirmed the trial court's dismissal of Ms. Lockwood's complaint on statute of repose grounds, it is unnecessary for us to address this issue.

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[20] For example, in her affidavit filed in response to the fourth summary judgment motion as well as in her response to the Hughes' statement of material facts, Ms. Lockwood acknowledged that the home was built by the Hughes.

[21] At the hearing on the fourth summary judgment motion, the Hughes' attorney and the trial court had the following colloquy on the statute of limitations issue:

> [Hughes Attorney]: ...I've heard the plaintiff say, "This isn't right." Well, Your Honor, every plaintiff in every case that's had a statute of limitations argument made probably says the same thing. I'm sorry, but that's the law. There is a reason we have these limitation periods.
>
> THE COURT: Well, this is not even the statute of limitations. I don't have as much problem with the statute of limitations as I do the statute repose [sic].

## IV. Conclusion

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED.

Costs are assessed against Ms. Lockwood, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE