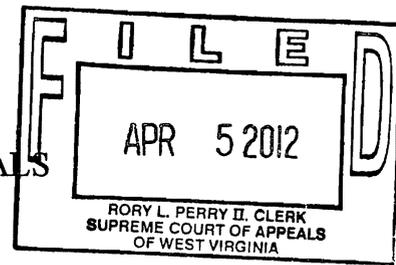


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



BRANDY PINGLEY, et al.

Plaintiffs Below, Petitioners,

vs.

Case No. 11-1605

PERFECTION PLUS TURBO-DRY, LLC,

Defendant Below, Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF CASE

A. Factual History

The Pingleys experienced a sewer back-up in their home on April 14, 2007. App. pg. 142. On April 16, 2007, Brandy Pingley executed a contract with Perfection Plus Turbo-Dry, LLC (“Perfection Plus”) to provide cleaning and restoration services at the Pingley’s home. App. pg. 141. Perfection Plus’ owner, Norman Wagner, met with Brandy Pingley at which time he viewed the Pingley’s home and explained the services that his company could provide. App. pgs. 140-141. Brandy Pingley testified she could have taken the contract to an attorney to review, but she trusted Mr. Wagner and he went over everything with her. App. pg. 381. The contract was a one-page document. Centered on the page in bold-print, and underlined was a caption stating **“MOLD/MILDEW/BACTERIA WAIVER”**. App. pg. 159. A portion of one sentence was underlined. That sentence stated that Perfection Plus offers **“no assurance that your structure is free of mold, mildew or bacteria and may not be held liable for hazards to health or structural damages caused by mold, mildew or bacteria.”** App. pg. 159.

Perfection Plus performed its water restoration services pursuant to the contract with state-of-the-art equipment and, even in the face of continued flooding, completed its task of scrubbing, sanitizing and drying the Pingley residence, specifically including the multiple crawl spaces. App. pg. 144. Perfection Plus completed its work on

June 11, 2007. App. pg. 141. Shortly thereafter, according to Brandy Pingley, she smelled a “stench” in her house. App. pg. 162. Upon investigation of the cause of the smell, the Pingleys found water under their home. App. pg. 162. The water was lying in what the Pingleys referred to as a trench which they alleged Perfection Plus had dug. App. pg. 163. Brandy Pingley has testified that immediately after Perfection Plus completed its work they realized that run off water was seeping under their house. App. pg. 153.

Over the next three years, the Pingleys never contacted Perfection Plus about any dissatisfaction with its work, or concerns about moisture, or concerns about the “trench”. App. pg. 141. Instead, Brandy Pingley testified in her deposition that Perfection Plus’ big heater dried out the floor joists and underneath the house. App. pg. 147. Her husband, Jonathan Pingley, testified that Perfection Plus did a good job cleaning his house, that Perfection Plus did not violate the contract and that Perfection Plus did not do anything to cause the water problems that he subsequently had at his residence. App. pgs. 148-149.

B. Procedural History

The original Complaint was filed by the Pingleys on June 9, 2008, asserting that Huttonsville Public Service District (“HPSD”) negligently failed to properly maintain its sewer lines, causing a back-up on April 14, 2007, and resultant damages. App. pg. 142. The Pingleys also alleged that HPSD was negligent in failing to adequately clean up the results of the claimed back-up. *Id.* The Trial Court granted summary judgment for HPSD

and the Pingleys appealed that decision. The West Virginia Supreme Court of Appeals reversed and remanded the case, allowing an opportunity for the Pingleys to pursue discovery. *Pingley, et al. v. Huttonsville Public Service District*, 225 W.Va. 205, 691 S.E.2d 531 (2010).

Although the Pingleys assert in their brief that the Trial Court held that Perfection Plus was a party necessary to fully litigate the case, that is not an accurate representation of the Trial Court's Order. Petitioners' brief pg. 5. The Pingleys and HPSD submitted an Order to the Trial Court entitled, "Agreed Order Granting Plaintiff's Leave to File An Amended Complaint" which Order was subsequently entered by the Trial Court on July 30, 2010. App. pgs. 7-8. The Order, as drafted by the Pingleys' counsel, indicates that the Pingleys' claim against Perfection Plus was "necessary to fully litigate this matter on the merits." App. pg. 7. HPSD represented in that Order that it had "no objection to leave being granted." *Id.* The Order which the Trial Court entered simply granted leave to file the Amended Complaint. *Id.* On July 28, 2010, the Pingleys filed the Amended Complaint naming Perfection Plus as a Defendant - the first time that a claim had ever been asserted against Perfection Plus. App. pgs. 3-5. Perfection Plus had no knowledge or notice of the original Complaint or of the Pingleys dissatisfaction with its work until the Amended Complaint was filed. App. pg. 141.

On August 3, 2011, following months of discovery, Perfection Plus filed a Motion for Summary Judgment. App. pgs. 139-212. The Pingleys responded on August 10, 2011. App. pgs. 303-842. On August 15, 2011, the Trial Court held a hearing on this motion, as well as others, and granted Summary Judgment to Perfection Plus. App. pgs. 864-873. The Order memorializing that hearing was entered on September 15, 2011. *Id.*

Later, on September 29, 2011, the Trial Court held a hearing on the Pingleys' Motion to Enforce Settlement with HPSD as well as a motion submitted by HPSD. (See Exhibit B to Respondent's Motion to Dismiss submitted to this Court on January 24, 2012, as this Order has been omitted from the Appendix.) In this Order, the Trial Court acknowledged that the claims between the Pingleys and HPSD had been resolved, and the claims between the Pingleys and Perfection Plus had previously been dismissed on summary judgment, and that the Defendants no longer wished to pursue its counterclaims. *Id.* Therefore, the Trial Court confirmed by Order that all claims were dismissed and the case was to be removed from the active docket. *Id.* This Order was entered on October 17, 2011. *Id.*

Although the Pingleys assert in the Petitioners' Brief that the Plaintiffs are appealing from a judgment entered on October 6, 2011, that is not an accurate assertion. Petitioners' brief pg. 7. Actually, the Petitioners are appealing the Order that was entered on September 15, 2011, which granted summary judgment to Perfection Plus, and was later

referenced in the Order entered on October 17, 2011. All remaining actions were finally removed from the active docket on October 17, 2011. In the Notice of Appeal, the Pingleys incorrectly responded to question 6, i.e., Date of Entry of Judgment, with the date of October 17, 2011. Notice of Appeal, pg. 2 of 4.

SUMMARY OF ARGUMENT

The Trial Court correctly ruled that the Pingleys' claim was barred by the applicable statute of limitations. If the facts of a case are not complex, then the Trial Court is not required to do an in-depth analysis of each step identified in *Dunn v. Rockwell*. 225 W.Va. 43, 689 S.E.2d 255 (2009). The Pingleys knew of their claims that they had been injured by an alleged negligent clean-up at least by June 9, 2008, when they filed the original Complaint. The Amended Complaint, which for the first time stated a claim against Perfection Plus, was filed on July 28, 2010, 49 days past the two year statute of limitations. Therefore, the Trial Court was correct and the Pingleys' claim is barred by the statute of limitations.

The Trial Court correctly ruled that the contract between the parties was neither unconscionable nor against public policy. To be unenforceable a contract must be procedurally and substantively unconscionable. *Brown v. Genesis Healthcare Corp., et al.*, 2011 W.Va. Lexis 61 (W.Va., June 29, 2011). *vacated on other grounds, Marmet Healthcare, Inc., v. Brown, et al.* 132 S.Ct. 1201 (Feb. 21, 2012). The

MOLD/MILDEW/BACTERIA WAIVER was in bold print, capitalized and underlined.

The contract had no hidden terms, nor was it written in complex terms. The purpose of the waiver was commercially reasonable in that it ensured that the Pingleys were aware that no assurance was given that their home would be free of mold, mildew or bacteria. Since the contract was not unconscionable, it must be enforced. Therefore, the Trial Court did not err by granting summary judgment to Perfection Plus.

No genuine issues of fact were in dispute in relation to when the cause of action occurred. The Pingleys knew of their claim that they had been injured by the alleged negligent clean-up of their home when they filed the original Complaint on June 9, 2008. Therefore, the Trial Court correctly granted summary judgment for Perfection Plus.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to *West Virginia Rules of Appellate Procedure* Rule 18(a), oral argument would not be necessary because the facts and legal arguments are adequately presented in the briefs and record on appeal unless the Court decides the decisional process would be significantly aided by oral argument. If the Court decides oral argument shall be held, it would be suitable for oral argument according to Rev. R.A.P. 19 and disposition by memorandum decision.

ARGUMENT

A. ASSIGNMENT OF ERROR ONE

The Trial Court correctly determined that the Plaintiffs' negligence claim was barred by the applicable statute of limitation because the statute of limitations began to run in July 2007 or at the latest on June 9, 2008.

In *Dunn v. Rockwell*, the West Virginia Supreme Court of Appeals outlined a five step analysis to be used in determining whether cases are barred by the applicable statute of limitations. (Syl. Pt 5, 225 W.Va. 43, 689 S.E.2d 255 (2009)). "First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the Plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the Plaintiff is not entitled to the benefit of the discovery rule, then determine whether the Defendant fraudulently concealed facts that prevented the Plaintiff from discovering or pursuing the cause of action And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine." *Dunn*, 225 W. Va. at 265. Under the discovery rule as set forth in

Syllabus Point 4 of *Gaither*, whether a Plaintiff “knows of” or “discovered” a cause of action is an objective test. *Id.* “The Plaintiff is charged with knowledge of the factual, not legal, basis for the action.” *Id.*

The first step is a question of law solely, but the remaining steps require the court to analyze mixed questions of law and fact to determine whether or not a genuine issue of fact exists. *Id.* When the resolution of a step does not require resolution of a genuine issue of fact, the court should decide the issue. *Id.*

The first step of the analysis was stipulated by the parties and required no action by the Court. Both Perfection Plus and the Pingleys noted in the motions reviewed by the Court that the applicable statute of limitations is 2 years as set forth in *West Virginia Code* §55-2-12. App. pg. 143 and App. pg. 306.

The second step in the analysis is to identify when the requisite elements of the cause of action occurred. In negligence, the requisite elements would be that a duty existed, the duty was breached, the Plaintiff was injured and the breach caused the injury. *Atkinson v. Harman*, 151 W.Va. 1025, 1031, 158 S.E.2d 169, 173 (1967). Perfection Plus established in its Motion for Summary Judgment that the requisite elements of the cause of action occurred and the Pingleys were fully aware of who caused their injuries on an unknown date following completion of its work in June or July of 2007. App. pgs. 139-252.

The duty was established on April 16, 2007, when Perfection Plus and Brandy Pingley entered into a contract for restoration services at the Pingley home. App. pgs. 140-141. If a breach of that duty occurred, it must have occurred prior to the completion of the job on or about June 11, 2007. App. pg. 141. The Pingleys have never disputed that Perfection Plus completed its work on or about June 11, 2007. Brandy Pingley stated in her deposition on July 27, 2010, that she knew she had moisture problems in her home right after Perfection Plus completed its work. App. pg. 143 and App. pgs. 162-163. If Brandy Pingley knew she had been injured right after Perfection Plus completed its work, i.e. June 11, 2007, the latest she knew would have been an unknown date in June or July of 2007. App. pg. 143. Therefore, the Court clearly had before it the date upon which the required elements of the cause of action occurred and there is no genuine issue of fact to be resolved. The events leading to the cause of action occurred on or about July, 2007.

The third step in the analysis is to determine when the statute of limitations began to run. Pursuant to the discovery rule, the statute of limitations begins to run when the Plaintiff knows or should know the following: “(1) the Plaintiff has been injured, (2) the identity of the entity who owed the Plaintiff a duty to act with due care, and who may have engaged in conduct that breached the duty, and (3) that the conduct of that entity has a causal relation to the injury.” *Dunn*, 225 W.Va. at Syl. Pt. 2.

The facts submitted to the Trial Court clearly show that the statute of limitations began to run in July of 2007. According to Brandy Pingley's deposition on July 27, 2010, the Pingleys were injured in July of 2007 when they smelled a "stench" in their home and discovered water lying in a trench in their crawlspace. App. pg. 162-163 The Pingleys alleged that Perfection Plus dug out the crawlspace leaving the trench. App. pgs. 162-163. Therefore, the Pingleys knew the identity of the entity that allegedly harmed them and knew of the conduct ("digging out the crawlspace") that allegedly had a causal relation to the injury (the "moisture" and "stench"). App. pgs. 162-163.

Furthermore, the record indicated to the Trial Court that the Pingleys were definitely aware of their supposed injury by June 9, 2008. On that day the Pingleys filed their original Complaint alleging that they had been injured by the negligent clean-up of the sewer back-up in their home. App. pg. 142. The Pingleys are, therefore, estopped from claiming that they were unaware of their injuries until 2009 because they verified the original Complaint in June 2008.

The Pingleys argue that the statute of limitations did not begin to run until 2009 when Brandy Pingley suffered health related symptoms and suspected mold growth. Petitioners' brief pgs. 13-14. Although the health claim is one injury, other injuries to their home and person were allegedly suffered by the Pingleys (and known to them) according to their Complaint which was filed on June 9, 2008. Brandy Pingley's alleged health related

claim arises from one alleged wrongful act. Therefore, it could not be a continuing tort. The statute of limitations begins to run from “. . . when the tortious overt acts or omissions cease.” *Graham v. Beverage*, Syllabus Pt. 11. 211 W.Va. 466, 566 S.E.2d 603 (2002). But see, *Ricottilli v. Summersville Mem’l Hosp.*, 188 W.Va. 674, 425 S.E.2d 629, 632 (1992) (“a continuing tort requires a showing of repetitious, wrongful conduct [a] wrongful act with consequential damages is not a continuing tort.”) Accordingly, there was no tolling of the statute of limitations.

Viewing all facts in the light most favorable to the Pingleys, there is no genuine issue concerning the fact that the statute of limitations began to run in July 2007. Therefore, any action for damages against Perfection Plus based upon allegations of negligence must be barred if not brought prior to some uncertain date in either June or July of 2009. App. pgs. 143-144. Even if the court extends the most caution and leniency possible to the Pingleys, the statute of limitations clearly began to run on June 9, 2008 when they filed their original claim. Two years from that date would have been June 10, 2010. The amended Complaint naming Perfection Plus as a Defendant was filed on July 28, 2010, or 49 days after the two year statute of limitations had expired. Therefore, the Court did not err by holding that the Pingleys’ negligence claim was barred by the applicable statute of limitations.

The fourth step of the analysis requires the Court to determine whether the Defendant fraudulently concealed facts that prevented the Plaintiff from pursuing the action. *Dunn*, 225 W. Va. at 265. The Pingleys admit that Perfection Plus did not fraudulently conceal facts from them to prevent them from knowing about any alleged negligence or injuries. Petitioners' brief pg. 15.

The fifth step of the analysis requires the Court to determine if the statute of limitation period was arrested by some other tolling doctrine. *Dunn*, 225 W.Va. at 265. The Pingleys assert in their brief that the statute of limitations was tolled pursuant to *W.Va. Code* §55-2-21. Petitioners' brief pg. 16. *W. Va. Code* §55-2-21 tolls the statute of limitation after a civil action is commenced for any claim that has or may be asserted by Counterclaim, cross-claim or third-party Complaint. The claim against Perfection Plus was asserted in an Amended Complaint, thus *W.Va. Code* §55-2-21 is not applicable.

Furthermore, the Amended Complaint changed the party against whom the negligence claim was asserted after the statute of limitations had expired. *West Virginia Rules of Civil Procedure*, specifically Rule 15(c)

“expressly provides that an amendment that changes the parties *relates back* to the date of the original pleading, thereby avoiding the effect of the statute of limitations if - *but only if* - certain conditions are satisfied.” *Brooks*, 213 W.Va. at 684, 584 S.E.2d at 540 (quoting *Peneschi v. Nat'l Steel Corp.*, 511, 523, 295 S.E.2d 1, 13 (1982) (emphasis provided).). This court set forth those conditions in syllabus points 4, 8 and 9 of *Brooks, supra*:

4. Under Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure*[1998], an amendment to a Complaint changing a Defendant or the naming of a Defendant will relate back to the date the Plaintiff filed the original Complaint if: (1) the claim asserted in the amended Complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original Complaint (2) the Defendant named in the amended Complaint received notice of the filing of the original Complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the Defendant either knew or should have known that he or she would have been named in the original Complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the Defendant within the period prescribed for commencing an action and service of process of the original Complaint.

8. Where a Plaintiff seeks to change a party Defendant by a motion to amend a Complaint under Rule 15(c) of the West Virginia Rules of Civil Procedure [1998], the amendment will relate back to the filing of the original Complaint only if the proposed new party Defendant, prior to the running of the statute of limitations, received such notice of the institution of the original action that he will not be prejudiced in maintaining his defense on the merits and that he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.” Syllabus, *Maxwell v. Eastern Associated Coal Corp., Inc.* 183 W.Va . 70, 394 S.E.2d 54 (1990).

9. Under the 1998 amendments to Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure*, before a Plaintiff may amend a Complaint to add a new Defendant, it must be established that the newly-added Defendant (1) received notice of the original action, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the newly-added Defendant, prior to the running of the statute of limitation or within the

period prescribed for service of the summons and Complaint, whichever is greater. To the extent that the Syllabus of Maxwell v. Eastern Associated Coal Corp., 183 W.Va. 70, 394 S.E.2d 54 (1990) conflicts with this holding, it is hereby modified.”

King v. Heffernan, 214 W.Va. 835, 838, 591 S.E.2d 761, 762 (2003).

It is clear that in this case the conditions required to toll the statute of limitations where an amendment relates back to the date of original pleading are not met. Perfection Plus did not have any notice of the filing of the original action or of any dissatisfaction with its work until the Amended Complaint was filed. App. pg. 141. In fact, Jonathan Pingley’s mother’s place of business is directly across the street in Elkins from Perfection Plus’ office and Brandy Pingley spoke with Norman Wagner, owner of Perfection Plus, during a Forest Festival parade after the work was completed but prior to filing the Amended Complaint. App. pg. 174. During that conversation, she never expressed any concerns about the work performed at her house. *Id.* The Pingleys clearly knew the name of the entity that provided the clean-up work to their home and how to contact Perfection Plus. The Pingleys chose to file their original Complaint against HPSD for all damages resulting from the sewer backup, only and no mistake was made regarding the identification of the entity. Since Perfection Plus had no notice of the original action and no mistake of identity was made, the statute of limitations was not tolled. Therefore, the Trial Court did not err when it granted summary judgment to Perfection Plus because the applicable statute of limitations barred the claim.

In *Dunn*, this Court clearly stated “the depth to which these five steps are analyzed is naturally dependent upon the procedural posture and facts of the case under review.” *Dunn*, 225 W.Va. at 265. The facts of this case are very simple and the Trial Court did not need to do an in-depth analysis. The statute of limitations began running in July 2007, when the Pingleys knew they had a moisture problem in their home and alleged that the problem was caused by Perfection Plus’ negligent work. But even viewing the facts in the light most favorable to the Pingleys, they knew that they had been injured by the alleged negligent clean-up when they filed the original Complaint on June 9, 2008. App. pg. 142.

The statute of limitations is two years. Two years from June 9, 2008, the date that the Pingleys actually claim that they had been injured, would be June 10, 2010. The claim against Perfection Plus was filed on July 28, 2010, well after the Pingleys knew of a problem and two years and 49 days after the Pingleys had filed claims against another party alleging negligent clean-up. Therefore, the Trial Court was correct in its holding that the claim is barred by the applicable statute of limitations.

B. ASSIGNMENT OF ERROR TWO

The Trial Court correctly enforced the contract between the parties because the contract was neither unconscionable nor against public policy.

Unconscionability of a contract is analyzed in terms of two component parts: procedural unconscionability and substantive unconscionability. *Brown*, 2011 W.Va. Lexis 61. Procedural unconscionability is concerned with inequities, unfairness in the bargaining

process, and formation of the contract. *Brown*, 2011 W.Va. Lexis 61 at 70. Procedural unconscionability would include inequities such as hidden or unduly complex terms, literacy of a party, adhesive nature of the contract, the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract. *Id.*

The contract in this case does not involve procedural unconscionability. The **MOLD/MILDEW/BACTERIA WAIVER** was the only item that appeared in bold print, capitalized and underlined as a caption in the center of the single-page contract. App. pg. 159. The paragraph below the bold-print caption, had only one sentence or a portion of that sentence underlined. It states that Perfection Plus offers “no assurance that your structure is free of mold, mildew or bacteria and may not be held liable for hazards to health or structural damages caused by mold, mildew or bacteria.” App. pg. 159. The waiver and its terms were not hidden or stated in complex terms. Ms. Pingley is literate and admits that the owner of Perfection Plus explained everything to her. App. pg. 145. Nothing in these facts even hints at procedural unconscionability.

Substantive unconscionability involves unfairness in the contract and whether its terms are one-sided with an overly harsh affect on the disadvantaged party. *Brown*, 2011 W.Va. Lexis 61 at 73. When considering substantive unconscionability, the courts should consider commercial reasonableness, the purpose and effect of the terms, allocation of the risks between the parties and public policy concerns. *Id.*

The contract in this case does not involve substantive unconscionability. The contract was commercially reasonable because it informed all customers of the potential dangers from water intrusion and that Perfection Plus was not an expert on mold, mildew or bacteria. More specifically, it affirmatively informed the Pingleys that moisture in their home may cause mold, mildew or bacteria and that Perfection Plus could make no assurances that their home would be free of mold, mildew or bacteria. Furthermore, the Pingleys were informed that Perfection Plus could only offer opinions and that a Certified Hygienist should be contacted to verify any matters related to mold, mildew or bacteria.

The purpose of this contract was to ensure that the customer knew that water intrusion could cause mold, mildew and bacteria and that Perfection Plus was not an expert on mold, mildew or bacteria. The effect was not oppressive but enlightening. The Pingleys were informed that the service they were contracting for offered “no assurance that your structure is free of mold, mildew or bacteria.”

Before a contract is unenforceable, it must be deemed to be procedurally and substantially unconscionable, although not in the same degree. *Brown*, 2011 W.Va. Lexis 61at 75. The courts should use a “sliding scale” in making this determination: the less procedurally unconscionable the contract term the more evidence of substantively unconscionability is required. *Id.* It is quite clear the contract in this case was not procedurally unconscionable and the evidence does not support a finding that it was

commercially unreasonable or substantively unconscionable. Therefore, the Trial Court did not err by enforcing the contract and granting summary judgment to Perfection Plus.

The Pingleys now claim that the reason they hired Perfection Plus was to “eliminate their risk of exposure to diseases and bacteria.” Petitioners’ brief p. 18. However, in the Amended Complaint, the Pingleys claimed they hired Perfection Plus “to remove the sewage from Plaintiffs’ residence and provide[d] cleaning and restorative services relative to the same.” App. pg. 3. But that is the exact reason for the Mold/Mildew/Bacteria Waiver. It ensures that all customers know that Perfection Plus cannot assure that their structure will be free of mold, mildew or bacteria. What the Pingleys are attempting to do is hold Perfection Plus responsible for something that Perfection Plus informed them that it could not do, i.e., to assure their home was free from mold, mildew or bacteria.

The Trial Court finding that the contract was neither unconscionable nor against public policy was accurate and correct. If a contract is not unconscionable, its terms must be enforced. Therefore, the Trial Court did not err when it granted summary judgment for Perfection Plus.

C. ASSIGNMENT OF ERROR THREE

The Trial Court correctly granted summary judgment to Perfection Plus because there were no genuine issues of fact in dispute.

As stated in the argument section of Assignment of Error One, no genuine

issues of material fact existed as to when the cause of action occurred and it was appropriate for the Trial Court to decide the issue on a summary judgment motion. At the latest, the Pingleys knew that they were injured on June 9, 2008, when they filed a lawsuit against another entity alleging injuries from the negligent clean-up of the sewer back-up. App. pg. 142.

The Pingleys are estopped from claiming that they were unaware of their injuries until 2009 since they verified the Complaint in June 2008. Because no genuine issue of fact exists as to when the action occurred, Trial Court did not err in granting summary judgment for Perfection Plus.

CONCLUSION

Based on the foregoing, the Trial Court did not err when it granted summary judgment to Perfection Plus because the statute of limitations barred the claim, the contract was not unconscionable, and there were no genuine issues of fact in dispute. Therefore, Perfection Plus respectfully moves this Court to affirm the October 17, 2011, Order of the Circuit Court of Randolph County that granted summary judgment to Perfection Plus and dismissed all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true copy of *Respondent's Brief* the foregoing upon all other parties to this action by:

_____ Hand delivering a copy hereof to the parties listed below:

or by

 X By depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 5th day of April, 2012.



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