THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No: 2019-001100
Case No. 2015-CP-10-0020

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly Situated, ...Appellants,

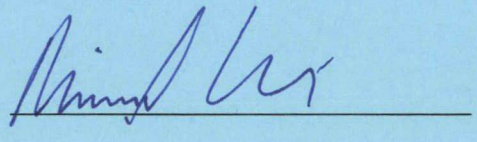
v.

3 Chisolm Street Homeowners Association, Inc.,.....Respondent.

APPELLANTS' FINAL BRIEF

Michael H. Ellis, Esquire
O. Grady Query, Esquire
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412

Counsel for Appellant



Other Counsel of Record:

M. Dawes Cook, Esquire
Jeffrey Michael Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402

Andrew F. Lindemann
P.O. Box 6923
Columbia, SC 29260
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF ISSUES ON APPEAL

I. The trial court committed reversible error by finding that the January 30, 2008 Foltz Martin letter, triggered the applicable statute of limitations since Respondent failed to show the absence of a genuine issue of material fact as to whether the letter put Appellant on notice of an actionable claim against Respondent.

II. The trial court committed reversible error by finding that Judge Young's June 9, 2011, Order dismissing Respondent's Water Intrusion Lawsuit based upon the statute of limitations triggered the applicable statute of limitations in this case since the time was tolled until the March 26, 2014, Court of Appeals Order affirming Judge Young's dismissal.

III. The trial court committed reversible error by finding Appellant reasonably should have known that they would have to pay the expense to repair or remediate the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit when the Respondent was repeatedly representing to Appellant that Respondent was actively engaged in seeking to compel others to pay that expense.

IV. The trial court committed reversible error by finding Appellant had a justiciable controversy prior to January 21, 2015.

V. The trial court committed reversible error by analyzing Defendant's statute of limitations defense under SC Code § 15-3-530(5)[1] since that statute was not properly before the Court pursuant to R. 7(b)(1) SCRCP.

VI. The trial court committed reversible error by dismissing Appellant's case based upon the statute of limitations provided in SC Code § 33-31-830(f)

a. (a) The trial court committed reversible error by interpreting SC Code § 33-31-830(f) to apply to a non-profit corporate entity despite its clear and unambiguous meaning.

b. The trial court compounded the error by relying upon an unpublished opinion with no precedential value that does not address subpart (f) to expand the scope of SC Code § 33-31-830(f) beyond its clear and unambiguous meaning.

FACTS

Appellant is Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and All Others Similarly Situated (hereinafter "Appellant"). Respondent is 3 Chisolm Street Homeowner's Association, Inc. (hereinafter "Respondent"). Appellant is a class of condominium owners that have been exposed to damages resulting from the breach of duty/negligence/gross negligence by the Respondent, the Homeowner's Association for the condominium complex when Respondent failed to file suit against the negligent renovators of the condominium buildings within the applicable statute of limitations (3 Chisolm Street Homeowners Association v. Chisolm Street Partners, LLC, Unpublished Opinion No.: 2014-UP-128 (Ct.App.2014)(**R. p. 303**)). Respondent is a non-profit corporate entity. 3 Chisolm Street is a collection of condominium units subject to the South Carolina Horizontal Property Act. The buildings used are the same buildings in place

[1] In the trial court's December 7, 2018 Order, there is an apparent typographical error identifying the three-year statute of limitations as SC Code § "15-3-505". There is no SC Code § 15-3-505 and Appellant believes that the trial court intended SC Code § 15-3-530(5) as he referenced that statute in his denial of Appellant's Motion to reconsider.

when the property was used as the Andrew B. Murray Vocational School. The school buildings were renovated into the condominiums in 2002.

In 2003, in response to water intrusion issues, Respondent hired architect Myles Glick to investigate the condominium buildings. On April 8, 2003, Myles Glick issued his report (hereinafter "the Glick Report") (Exhibit A to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. p. 165**) to the non-profit corporation Respondent. In his report, Glick stated, among other things, that there are numerous construction issues and that Respondent should perform "a program of destructive testing" and "seek legal counsel relative to the impacts of the above issues as well" (id.) (**R. p. 168**). At a May 6, 2003 Board of Directors Meeting, Respondent resolved to follow the recommendations made in the Glick report (Exhibit B to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. p. 170**).

On January 16, 2009, Respondent filed an action alleging construction defects against the contractors and sub-contractors that performed the 2002 renovation of the condominiums. The appealed from Order in this action identifies the 2009 action as the "Water Intrusion Lawsuit" and Appellant adopts that identification for the purpose of this Appellant Brief. In 2011, the Honorable Roger M. Young dismissed Defendant's 2009 Water Intrusion Lawsuit as time barred due to the 2003 Glick report having triggered the statute of limitations (Exhibit F to Defendant's Motion for Summary Judgment) (**R. p. 126**). Respondent appealed the dismissal of the Water Intrusion Lawsuit and the Court of Appeals affirmed the trial court's dismissal on March 26, 2014.

At a November 6, 2014 meeting of the owners of the condominium units, Respondent for the first time informed Appellant that there was a need to repair the crawlspace of the main condominium building at an estimated cost of $2.5 million (Exhibit E to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. p. 201**). On January 21, 2015, Respondent held

a special meeting to address the needed repair to the crawlspace of the main building (id.). At this January 21, 2015 meeting, Respondent, for the first time, notified Appellant that Appellant would be required to fund the needed repair to the crawlspace of the main building through a special assessment of $82,000.00 levied by the Respondent upon each of the individual condominium units (id.). Section 12(a) of Respondent's Master Deed (Exhibit F, p.2 to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. p. 207**) provides that such an assessment creates a lien on each unit owner's property and is personal obligation of each unit owner. The special assessment was required to be paid by June of 2015 and all Appellant class members paid their individual share of the special assessment (Affidavit of Steven Bernard) (**R. p. 214**).

Appellant filed their initial Summons and Complaint in January of 2015 asserting Breach of Duty/Negligence/ and Gross Negligence due to Respondent failing to file the Water Intrusion Lawsuit within the applicable statute of limitations and the resulting damages to Appellant from having to bear the costs of making the necessary repairs to the condominium foundations.

STATEMENT OF THE CASE

This is an appeal from the Order of the Honorable Edward W. Miller issued on December 7, 2018 , granting Respondent's R. 56 SCRCP Motion for Summary Judgment based upon the statute of limitations barring Appellant's claims under both SC Code §§ 15-3-530(5) and 33-31-830(f).

The trial court found that the January 30, 2008, Foltz Martin letter (Exhibit C to Defendant's Motion for Summary Judgment) (**R. pp. 112-115**) sent by adverse counsel addressed to attorneys for the non-profit corporate entity Respondent placed Appellant on notice of the claims against Respondent despite Respondent failing to demonstrate the absence of any genuine issue of material fact as to whether this letter placed Appellant on notice. This

letter was from prior litigation that did not include Appellant as a party. Respondent never authenticated this letter nor introduced any evidence to demonstrate that this letter was ever sent by its drafters received by Respondent's legal counsel or respondent, or disseminated to any members of the Appellant class. The trial court issued no findings as to when or how any members of the Appellant class were given notice of the existence of the January 30, 2008, Foltz, Martin letter and made no analysis as to why this letter placed any members of the class on notice of a potential claim against Respondent.

The trial court also found that Judge Young's June 9, 2011 Order dismissing Respondent's Water Intrusion Lawsuit (Exhibit F to Defendant's Motion for Summary Judgment) (**R. p. 126**) placed Appellant on notice of a negligence claim against Respondent, despite the fact that the Order, and the issue of whether Respondent was barred by the statute of limitations, which is the only negligent act claimed by Appellant in this action, was timely appealed and remained on appeal until March 26, 2014.

Appellant filed their original Summons and Complaint on January 2, 2015 alleging negligence on behalf of the Respondent for failing to bring the Water Intrusion Lawsuit within the applicable statute of limitations. On March 5, 2015, Respondent filed Defendant's Motion to Dismiss (Defendant's Motion to Dismiss) (**R. p. 37**) based upon, among other things, there being no justiciable controversy at the time of Appellant's filing due to Appellant's damages being unascertainable at the time of filing. Appellant filed an Amended Summons and Complaint on April 13, 2015 still alleging negligence on behalf of the Respondent for failing to bring the Water Intrusion Lawsuit within the applicable statute of limitations. An Order by Consent to Certify the Class of Plaintiffs was filed on August 7, 2017, defining the class of Plaintiffs as:

> "All persons who were owners of condominium units at 3 Chisolm Street between the time of January 1, 2015 and the present including those that were subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fees to make necessary repairs".

On May 30, 2018, Respondent filed Defendant's Motion for Summary Judgment asserting a statute of limitations defense solely under SC Code § 33-31-830(f). On October 16, 2018, Appellant filed Plaintiff's Return to Defendant's Motion for Summary Judgment arguing that § 33-31-830(f) is inapplicable to this action as the only named Defendant is the nonprofit corporate entity and the clear and unambiguous reading of the statute only applies to the individual directors of the non-profit corporation. Respondent filed a Reply to Plaintiff's Return to Defendant's Motion for Summary Judgment on October 19, 2018 and the motion was heard before The Honorable Edward W. Miller on October 22, 2018.

On December 7, 2018, the trial court's Order granting Respondent's motion for summary judgment was filed. In his Order, The Honorable Edward W. Miller found that Appellant was placed on notice of a negligence claim against Respondent based upon either, the January 30, 2008, Foltz Martin letter (Exhibit C to Defendant's Motion for Summary Judgment) (**R. pp. 112-115**) addressed from a third party not to any member of the Appellant class but to legal counsel for the Respondent (Order, p. 9) (**R. p. 13**), or when Judge Young's June 9, 2011 Order dismissed Respondent's Water Intrusion Lawsuit (Exhibit F to Defendant's Motion for Summary Judgment) (**R. p. 126**) placed Appellant on notice of a negligence claim against Respondent despite that Order being timely appealed by Respondent (Order, p. 9) (**R. p. 13**). The trial court further found that it was reasonable for the Appellant to speculate that seven years after the 2008 letter that Appellant's had no knowledge of and four years after Judge Young's 2011 Order that was appealed, the Respondent would levy a special assessment upon Appellant to pay for the repairs that are the

Respondent's responsibility; therefore, the Appellant suffered at least nominal damages either in 2008 or in 2011 (Order, p. 10) (**R. p. 14**). At the hearing, the trial court acknowledged that in accordance with R. 220 SCACR, unpublished opinions have no precedential value (Tr. p. 24, 4-10) (**R. p. 276, line 4-10**), but he found that the unpublished opinion of Smith v. Dockside Ass'n, Inc., No. 2005-UP-139 (Ct.App.2005) (**R. p. 148**) expanded SC Code § 33-31-830(f) beyond its clear and unambiguous meaning of only applying to the individual directors of the non-profit corporation (Order, p 10) (**R. p. 14**). The trial court found, despite the Summons and Complaint only naming the individual non-profit corporation as the sole Defendant, there being no attempts by Appellant to amend the Summons and Complaint to add any individual directors as named Defendants—and the Respondent the being the only Defendant served in the action—that Steven Bernard's deposition testimony expanded the named Defendants to this action to include the individual directors. The court made this expansion even though no rule in the South Carolina Rules of Civil Procedure exists to provide for such an amendment by depositional testimony (Order, p. 10) (**R. p. 14**). Despite Respondent not seeking relief under SC Code § 15-3-530(5), the trial court further found that the statute of limitations barred Appellant's claim (Order, p. 10) (**R. p. 14**).

On December 17, 2018, Appellant filed Plaintiffs' SCRCP R.59(e) Notice of Motion and Motion to Alter or Amend the December 7, 2018 Order Granting Defendant's Motion for Summary Judgment (hereinafter "Motion to Reconsider") (**R. p. 225**). In the Motion to Reconsider, Appellant argued that Respondent's sole prayer for relief in their motion was for dismissal based upon the statute of limitations as provided by SC Code § 33-31-830(f) and therefore the Court should not have dismissed Appellant's claims based upon § 15-3-530(5); Despite Judge Young's June 9, 2011 Order putting Appellant on notice that Respondent missed

the applicable statute of limitations, R. 241(a) SCACR tolled the statute of limitations until the Court of Appeals affirmed the Order on March 26, 2014 as the only issue on appeal in that action was whether Respondent missed the statute of limitations and the claimed negligent act in this action is whether Respondent missed the statute of limitations; a letter purported to have been sent to Respondent did not put Appellant on notice of any claim they might have against Respondent; and that SC Code § 33-31-830(f) is inapplicable to this case as that statute only applies to the individual directors of a non-profit corporate entity and the only named Defendant is the non-profit corporate entity itself.

On June 21, 2019, the trial court filed his Order Denying Plaintiff's Motion to Alter or Amend Order. The trial court found that Appellant's October 16, 2018 filing of their opposition memorandum amended Respondent's motion and added SC Code § 15-3-530(5) as further grounds for which Respondent was seeking relief and therefore there was no prejudice to the Appellant when the Court granted Respondent's motion to dismiss based upon grounds not presented by Respondent, despite Appellant having no notice that the court would consider that statute as a ground for granting Respondent's motion. Further, the trial court reiterated that SC Code § 33-31-830(f) applies to the non-profit corporate entity and therefore bars Appellant's claims.

The notice of appeal was served on July 2, 2019. The amount involved on appeal is the two-million-five-hundred-five-thousand-three-hundred-thirty-two dollars ($2,505,332.00) Respondent levied upon Appellant for all foundation repairs together with the applicable pre-judgment interest in excess of six-hundred-fifty-thousand dollars ($650,000.00).

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56 SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law" Sloan v. Friends of the Hunley, Inc., 630 S.E.2d 474, 477 (S.C.2006). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo" Town of Summerville v. City of North Charleston, 662 S.E.2d 40, 41 (S.C. 2008).

An Order granting summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" R. 56(c) SCRCP. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact" Richardson v. The State-Record Company, Inc., 499 S.E.2d (Ct.App.1998), *citing to* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Summer v. Carpenter, 492 S.E.2d 55, 58 (1997). "Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party" Watters v. Terminix Service, Inc., 658 S.E.2d 110, 111 (Ct.App. 2008). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment" Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 760 S.E.2d 121, 128 (Ct.App. 2014). "Summary judgment should not be granted even when there

is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts" Lyons v. Fid. Nat. Title Ins. Co., 781 S.E.2d 126, 130-31 (Ct.App.2015).

I. The trial court committed reversible error by finding that the January 30, 3008, Foltz Martin letter triggered the applicable statute of limitations since Respondent failed to show the absence of a genuine issue of material fact as to whether the letter put Appellant on notice of an actionable claim against Respondent.

The trial court erroneously found that "...the statute of limitations on Plaintiffs' case against the HOA for failing to timely file the Foundation Defects Lawsuit began to run with the Plaintiffs' class members' receipt of the January 2008 letter informing them that the HOA missed the statute of limitations..." (Order, p. 9) (**R. p. 13**) "The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State-Record Company, Inc., 499 S.E.2d, *citing to* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Respondent failed to meet their burden of proof by offering no evidence: 1) that the letter was sufficient to place Appellate on notice of a claim against respondent, 2) that the letter was actually delivered to or seen by any member of the Appellate class in any capacity in order to provide notice, or that 3) the letter was actually delivered to or seen by every member of the class in order to dismiss the action *in toto.* [2]

The trial court erroneously found that the January 2008 Foltz Martin triggered the statute of limitations under both SC Code §§ 33-31-830(f) and 15-3-530(5). The scriveners of that letter, Hudson & Spivey, were representing the soon to be Defendant contractors and/or developers and were in an adversarial relationship with the Appellant HOA. The letter was addressed to Nexsen Pruett who was serving as Respondent's legal counsel for negotiating a pre-suit settlement with

[2] R.23(a) SCRCP provides the prerequisites of a class and provides that a class is a collection of individuals rather than a single entity ("One or more members of a class...").

the renovators of the condominium buildings. In any event, Respondent could hardly have been expected to rely upon representations made by adverse counsel in this correspondence, the sole purpose of which was posturing in pre-suit negotiations. However, Respondent argues that this letter placed Appellant on notice of a claim against Respondent.

In their motion, Respondent states:

> "In January 2008, Members of the Plaintiffs' class were put on actual notice that the HOA failed to file the Water Intrusion lawsuit within the statute of limitations and were advised that they may have a negligence suit against the HOA" (Defendant's Motion for Summary Judgment, p. 8) (**R. p. 99**).

"Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him" Strother v. Lexington C'nty Rec. Commission, 504 S.E.2d 117, n.6 (S.C. 1998) *citing to* 58 Am.Jur.2d Notice § 5. Respondent attached this letter to their motion; however, they introduced no evidence as to if or when it 1) was sent by its drafters, 2) was delivered to its addressee, 3) was delivered to the Respondent, 4) was known to exist by any members of the Appellant class, or 5) provided any notice to any member of the Appellant class that they had a potential cause of action against the Respondent. Respondent has produced no evidence whatsoever to demonstrate that **any class member** knew of the existence of this letter in any capacity. Further, Respondent never identifies anybody who "...advised that [the class members] may have a negligence suit against the HOA" (Defendant's Motion for Summary Judgment, p.8) (**R. p. 99**).

Having failed to demonstrate that any class member even knew of the existence of the January 2008 letter, the Court was unable to analyze whether or not any class member exercised reasonable diligence in response to the letter.

> "The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury 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 might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed" Dorman v. Campbell, 500 S.E.2d 179, 184 (Ct.App.1998).

Respondent introduced no evidence to show that any class member received actual notice as a result of this January 2008 letter and introduced no evidence of what any class member did or should have done in response to this January 2008 letter. Respondent failed to demonstrate what reasonable diligence Appellant should have taken, what that reasonable diligence would have revealed to Appellant, and when that due diligence would put Appellant on notice of some right having been invaded by Respondent.

Further, Respondent failed to demonstrate that **every member** of the Appellant class ever had knowledge of this January 2008 letter. Despite Respondent never showing any member being placed on notice of a claim by the January 2008 letter, the trial court has imputed the actual notice of some unidentified class member to every member of the class and dismissed their claims *in toto*. R.23(a) SCRCP provides the prerequisites of a class and provides that a class is a collection of individuals rather than a single entity ("One or more members of a class…").

In defense to the motion for summary judgment, Appellant introduced the Affidavit of Steven Bernard, one of the named representatives of the class. Mr. Bernard affirmed that:

> "My wife and I purchased condominium unit number 405 at 3 Chisolm Street…on December 21, 2012"; "At the time my wife and I purchased unit 405, we had no knowledge regarding the condition of the condominium building's foundation"; "In November of 2014, a special general meeting of all the homeowners was called by the Board of Directors to inform the homeowners of the foundation problems and that repairs were needed immediately"; "It was at this November 2014 special general meeting that I first learned of the March 26, 2014 decision of the Court of Appeals in 3 Chisolm Street

> Homeowners Association, Inc. v. Chisolm Street Partners, et. al., Appellate Case No.: 2012-207850 affirming the trial court's decision that the April 2003 Glick Report had: (1) put the Board of Directors on notice of the construction defects of the need for further investigation of the construction defects or the need for further investigation of the construction defects in 2003, and (2) that the statute of limitation had run by the time the Board of Directors had filed the original lawsuit."; "Prior to this meeting, I had never been informed of either the existence of the Glick Report or the decision of the Court of Appeals." (Affidavit of Steven Bernard Opposing Defendant's Motion for Summary Judgment) (**R. pp. 211-214**).

Before the trial court was the sworn testimony of a member of the Appellant class stating that he had no notice of any claim he may have had against the Respondent until November of 2014. The only evidence before the trial court as to when any member of the Appellant class had notice of potential claims against the Respondent was this affidavit. Steven Bernard's affidavit states he first received notice of a potential claims against Respondent a mere two months prior to this suit being filed. "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment" Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 760 S.E.2d 121, 128 (Ct.App. 2014). Respondent had no testimony—or evidence whatsoever— demonstrating when any other Appellant class member had notice of an action against Respondent. "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide" Brown v. Finger, 124 S.E.2d 781, 786 (S.C.1962).

At the very best, Respondent has coupled the January 2008 letter together with a list of the Board of Directors for various years (Defendant's Motion for Summary Judgment, Exhibit D) (**R. p. 116**) to create the inference that this letter was either disseminated to any member of the Appellant class, or that it put any member of the Appellant class on notice of potential claims

against Respondent. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Summer v. Carpenter, 492 S.E.2d 55, 58 (1997). This assertion also ignores Respondent's failure to offer any evidence that the letter was ever mailed or received.

Respondent failed to show that any member of the Appellant class ever had knowledge of the January 2008 letter, or that it was sufficient to place any member on notice of a claim against Respondent. "Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party" Watters v. Terminix Service, Inc., 658 S.E.2d 110, 111 (Ct.App. 2008).

Assuming arguendo that every member of the Appellant class had knowledge of the January 2008 letter sometime prior to the filing of the present action, Respondent still failed to demonstrate that Appellant should have taken the legal advice of the attorney that had an adverse position to Appellant as well as disregard the legal advice of the attorney retained by Respondent to represent Appellant's interest. "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts" Lyons v. Fid. Nat. Title Ins. Co., 781 S.E.2d 126, 130-31 (Ct.App.2015).

Appellant requests that the Order granting Defendant's Motion for Summary Judgment be reversed as the trial court committed reversible error by finding that the January 2008 letter placed Appellant on notice of any claim against Respondent whether that be under the statute of limitations provided by SC Code §§ 33-31-830(f) or 15-3-530(5).

II. The trial court committed reversible error by finding that Judge Young's June 9, 2011 Order dismissing Respondent's Water Intrusion Lawsuit based upon the statute of limitations triggered the applicable statute of limitations in this case since the time was tolled until the March 26, 2014 Court of Appeals Order affirming Judge Young's dismissal.

The trial court erroneously found that "...the statute of limitations on Appellant's case against the HOA for failing to timely file the Foundation Defects Lawsuit began to run with...at the latest with Judge Young's June 2011 orders finding that the HOA missed the statute of limitations." (Order, p. 9) (**R. p. 13**). Judge Young dismissed Respondent's action based upon the statute of limitations having been triggered by the 2003 Glick Report and Respondent having failed to file suit within the applicable statute of limitations. Respondent appealed the issue of whether or not they failed to file the action within the applicable statute of limitations. Appellant's claim in the instant case is in fact based upon the Respondent having failed to file suit within the applicable statute of limitations.

According to the ruling by the trial court, Appellant had every ability, and indeed an obligation: to file this action in June of 2011, proceed through discovery, have a trial, and receive a verdict on the issue, all the while ignoring the Court of Appeal's subsequent decision as to the very same—potentially opening the verdict to collateral attack. Fortunately, court rules prevent this type of uncertainty and promote judicial economy. ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is "a matter affected by the appeal" under Rules 205 and 241(a)" Tillman v. Oakes, 728 S.E.2d 45, 51 (Ct.App. 2012) *citing to* Arnal v. Fraser, 641 S.E.2d 419, 422 (S.C. 2007)).

SCACR R. 241(a) provides an automatic stay of any matters decided in an appealed Order:

> "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. **This**

> **automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.** The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." (emphasis added)

Appellant's action against Respondent is for failing to file an action against the developers and/or contractors within the time permitted by the applicable statute of limitations. Until March 26, 2014, Respondent was appealing the issue of whether the HOA failed to file an action within the applicable statute of limitations. "Rule 205, SCACR, provides the appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal" Arnal v. Fraser, 641 S.E.2d 419, 422 (S.C. 2007). Appellant was barred by R. 205 SCACR from filing in the lower court a negligence claim based upon Respondent having missed their statute of limitations since Respondent's appeal granted the appellate court exclusive jurisdiction over that issue.

In Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517 (S.C. 2016), the Supreme Court reversed the dismissal of the Appellant's case based upon the statute of limitations holding that a Plaintiff has no claim for legal malpractice while the appeal of the action in which the alleged malpractice occurred is pending ("Thus, if a client appeals the matter in which the alleged malpractice occurred, any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending"). While this action is not one of legal malpractice, Stokes-Craven is analogous. Both cases involve negligent acts which are issues in controversy pending their appeal; therefore, they are not actionable at the trial level, pending the disposition of the appellant court. The outcome of the appeal ultimately determines whether or not a cause of action truly exists.

The Supreme Court stated in Stokes-Craven Holding Corp. v. Robinson:

> "Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues, triggering the statute of limitations." Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517 (S.C. 2016) (emphasis added).

In Personal Care, Inc. v. Theos, 825 S.E.2d 281, 286 (Ct.App.2019) the Court of Appeals interpreted Stokes-Craven, stating that "[i]f the client appeals the adverse judgment...there can be no legally cognizable action until the appeal is resolved. The court reasoned that under Rule 241(a), SCACR, the filing of a notice of appeal automatically stays matters decided in the judgment; thus, any basis for the legal malpractice claim is also stayed" Personal Care, at 286. The Honorable Edward W. Miller found that Appellant's time to file a claim against Respondent was triggered by Judge Young's June 9, 2011, judgment dismissing Respondent's action against the renovators. However, "... [Stokes-Craven] dealt with the "particular scenario" in which a client's injuries are predicated on an adverse judgment that is then appealed. In those cases, the appellate rules mandate that the matter be stayed until the appeal is resolved" Personal Care, at 786. Because Respondent appealed the adverse judgment dismissing their case for failing to file within the applicable statute of limitations, Appellant's statute of limitations for claims against Respondent could not have expired prior to March 26, 2014, as "the appellate rules mandate the matter be stayed until the appeal is resolved" id.

The automatic stay of Judge Young's June 9, 2011, Order, pursuant to SCACR R. 241(a) provides an automatic stay of any matters decided in the appealed Order, including the very issue upon which Appellant bases the negligence claim. Until the March 26, 2014, Court of Appeals decision, Appellant could not know whether the Defendant was negligent for missing the statute of limitations against the developers of the condominiums. Until the March 26, 2014, Court of Appeals decision, the lower court was deprived of jurisdiction to hear the issue of Respondent's

negligence involved in this action ("Under Rule 205, the lower court is deprived of the power to proceed with the matters that are affected by the appeal..." Tillman v. Oakes, 728 S.E.2d 45, 51 (Ct.App. 2012). Therefore, Appellant requests a reversal of the trial court's Order granting Defendant's Motion for Summary Judgment as Appellant's January 2, 2015, filing of this action was well within the statute of limitations.

III. The trial court committed reversible error by finding Appellant reasonably should have known that they would have to pay the expense to repair or remediate the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit when the Respondent was repeatedly representing to Appellant that Respondent was actively engaged in seeking others to pay that expense.

In his Order granting Respondent's motion for summary judgment, the trial court found that "[Appellant] reasonably should have known that the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit would have to be repaired or remediated at some point and that the HOA would necessarily have to acquire those funds through its assessment process from the Plaintiffs" (Order, p. 10) (**R. p. 14**). Respondent introduced no evidence regarding any Appellant class members' actual or constructive knowledge concerning who would ultimately pay for the damages in those two lawsuits. Further, respondent introduced no evidence that any Appellant Class member believed that, in the event the respondent HOA was ultimately required to pay for those damages, that Respondent "...would necessarily have to acquire those funds through its assessment process from the Plaintiffs" (id.). "The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact" Richardson, 499 S.E.2d (Ct.App.1998).

The only evidence before the trial court regarding knowledge or belief of any Appellant class member concerning the transactions and occurrences giving rise to this action was contained in the excerpts from the deposition of Steven Bernard (Exhibit E to Defendant's Motion for

Summary Judgment) (**R. p. 118**) and the Affidavit of Steven Bernard. In neither his Affidavit nor his deposition did Steven Bernard state that the Appellant class members knew or believed, prior to January 2015, that Respondent would be required to acquire the funds for the necessary repairs through a special assessment upon the Appellant. In his deposition excerpts that were before the trial court, Steven Bernard states that in 2014 he had no idea how the foundation repairs were going to be paid for. (Exhibit E to Defendant's Motion for Summary Judgment, p. 34, 14) (**R. p. 123**)[3]. In his affidavit, Steven Bernard states that it is not until "... January 2015, at a specially called general homeowners' meeting, the members of the Regime voted to assess each unit in the Regime..." (Affidavit of Steven Bernard, p. 4) (**R. p. 214**).

In fact, there was ample evidence before the trial court that Respondent actively sought relief from third parties in an attempt to avoid Appellant having to pay for the necessary repairs:

> Respondent decided to address the issues raised in the Glick Report ("With respect to building issues discussed in the Glick report, small progress has been made, mostly on window leaks. [Property Manager] is pushing to get the rest of the issues resolved without legal action" (July 16, 2003 Respondent Meeting Minutes, Exhibit B to Defendant's Motion for Summary Judgment) (**R. p. 107**); Respondent retained the Nexsen Pruet law firm to negotiate pre-suit resolution with the renovators to have them pay the costs of the repairs (Exhibit C to Defendant's Motion for Summary Judgment) (**R. p. 112**); Respondent brought a 2009 Charleston County Common Pleas action against the renovators to avoid having Appellant pay the costs of the necessary repairs (Exhibits F and G to Defendant's Motion for Summary Judgment & Exhibits C & D to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. pp. 126; 134; 173; 194**); Respondent brought a 2014 Charleston County Common Pleas action against the renovators to avoid having Appellant pay the costs of the necessary repairs (Exhibit I to Defendant's Motion for Summary Judgment) (**R. p. 145**).

[3] "At that point I didn't know anything"

The only evidence before the trial court to suggest that Appellant had any belief that they would be responsible for paying for the repairs through an assessment was the Minutes of the January 21, 2015 Special Meeting of the 3 Chisolm Street Homeowners Association, Inc. (Exhibit E to Plaintiff's Return to Defendant's Motion for Summary Judgment) (**R. p. 201**). Even at this time, Respondent attempted to avoid Appellant paying the costs of these necessary expenses. (Id.)[4]

In response to Appellant bringing the current action, Respondent maintained that Appellant would not be responsible for the expenses to make the necessary repairs because Respondent was trying to shield Appellant from that burden. In fact, Respondent moved to dismiss this action based upon their belief that they were still actively engaged in shielding Appellant from any damages. (Defendant's Motion to Dismiss, p. 6) (**R. p. 42**).[5]

Respondent introduced no evidence to support the finding that "[Appellant] reasonably should have known that the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit would have to be repaired or remediated at some point and that the HOA would necessarily have to acquire those funds through its assessment process from the Plaintiffs" (Order, p. 10) (**R. p. 14**). The court does not specify any such evidence—and the record does not reflect any evidence—that supports this finding beyond a question of material fact. However, there is ample evidence, including the affidavit and deposition testimony of Steven Bernard, as well as the above mentioned exhibits, to show a question of material fact as to whether the Appellant should reasonably have known that Respondent would fail to secure payment from

[4] "G. Hamlin O'Kelley, III...provided an update of the three (3) legal cases pending involving 3 Chisolm Street. The first is the window lawsuit involving the gym. That matter is pending before the South Carolina Supreme Court to see if that Court is willing to hear the matter and reverse the South Carolina Court of Appeals or the trial court. The second case involves the crawlspace and is in the early stages of service of process upon the Defendants. The Defendant contractor in that case will be represented by Rogers Townsend & Thomas in Columbia. The other defendants have not answered the complaint filed."

[5] "Here, [Appellant's] claim against [Respondent] is not ripe because [Appellant] can recover the damages sought here, the estimated $2,500,000 cost to repair the foundation defects, by way of the [Respondent's] Foundation Defects Action

a third party, or that Appellant would be responsible for the costs of the repairs. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Summer, 492 S.E.2d 55, 58 (1997). "Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party" Watters, 658 S.E.2d 110, 111 (Ct.App. 2008). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment" Fisher, 760 S.E.2d 121, 128 (Ct.App. 2014).

The trial court committed reversible error by finding that there existed no question of material fact as to whether Appellant should have known that they would be responsible for the costs of the necessary repairs prior to January 2015.[6]

Appellant respectfully requests that summary judgment be reversed.

IV. The trial court committed reversible error by finding Appellant had a justiciable controversy prior to January 21, 2015.

The trial court erroneously found that Appellant's "...action against the [Respondent] accrued when Plaintiffs knew or should have known that [Respondent] failed to timely file suit... [Appellant] could have sued as soon as they suffered any damage, which was as soon as they knew or should have known that the [Respondent] might have failed to timely file suit" (Order, p.8-9) **(R. pp. 12-13)**.

> "While it is well settled that a statute of limitations commences to run only from the time that the cause of action accrues, it is often difficult to determine when that time arrives. The fundamental test, however, in determining whether a cause of action has accrued, is whether the party asserting the claim can maintain an action to enforce it. A cause of action

[6] (Minutes of the January 21, 2015, special meeting of the 3 Chisolm Street Home Owners Association, Inc. Exhibit E to Plaintiffs Return to Defendant's motion for Summary Judgment.) **(R. pp. 201-204)**

accrues at the moment when the plaintiff has a legal right to sue on it" Brown v. Finger, 124 S.E.2d 781, 785 (S.C.1962).

It is undisputed that the foundation of the condominium buildings is what needed to be repaired, and that the foundation is a common element within the Respondent's purview and control. (Exhibit E to Plaintiff's Return to Defendant's Motion for Summary Judgment, p. 2) (**R. p. 202**)[7] As discussed in greater detail in **Issue III**, it was not reasonable for Appellant to assume that they would be the ones paying for the necessary repairs to the foundation. Respondent was actively engaged in seeking payment from third parties for the necessary repairs as was their obligation. Respondent was appealing the dismissal of their 2009 action; Respondent filed a new action against some of the original Defendants and added new Defendants as well. Respondent was in fact moving to have the instant case dismissed as prematurely filed because respondent was still pursuing third-parties for damages related to the foundation repairs. Clearly, nothing indicated to Appellant or Respondent that any right of the Appellant had been invaded. "[C]ourts must decide whether the circumstances of the case 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 might exist" Young v. SC Dep't. of Corrections, 333 S.C. 714, 719 (Ct.App. 1999).

The only evidence before the trial Court as to when an invasion of some right of Appellant's would be the Affidavit of Steven Bernard and the Minutes of the January 21, 2015, Special Meeting of the 3 Chisolm Street Homeowners Association, Inc. In his affidavit, Steven Bernard states that "In October of 2014, the lead registered structural engineer, Edward Porcher, advised the Board of Directors that the foundation of the main building was in such an unsafe condition that unless the Regime began steps to repair the foundation, he was obligated to notify the City of Charleston

[7] "Mr. O'Kelley informed the group that the Board is charged with maintaining the common elements for the Owners"

and request that it be condemned" (Affidavit of Steven Bernard, p. 2) (**R. p. 212**). This information was provided to Respondent, and not to Appellant. However, assuming arguendo, that this knowledge was imputed to the Appellant, it would be the first time that Appellant was put on notice that Respondent's failure to file action against the renovators invaded some right of Appellant. Prior to this October of 2014 notice, Respondent had failed to file against the renovators of the condominiums, but it caused no harm to Appellant as Respondent was responsible for the maintenance of common elements, and no private rights of the Appellant had been invaded by their failure to do so.

It was not until the January 21, 2015, special assessment that Appellant was put on notice beyond a question of material fact that a right of Appellant was invaded by Respondent. Until this January 21, 2015 meeting when Respondent expressly informed Appellant that Appellant would have to pay for the costs of the repairs, it was reasonable for Appellant to believe that Respondent would remediate the issues affecting this common element with no injury to Appellant.

"Three elements are essential to a cause of action based on negligence: (1) the existence of a duty on the part of the defendant to protect the plaintiff; (2) the failure of the defendant to discharge the duty; and (3) an injury to the plaintiff resulting from the defendant's failure to perform" Winburn v. Insurance Company of North America, 339 S.E.2d 142, 147 (Ct.App. 1985) *citing to* Crowley v. Spivey, 339 S.E.2d 774 (Ct.App. 1985). "The absence of any one of these elements renders the evidence insufficient" Winburn, at 147 *citing to* 65 C.J.S. Negligence § 2(1) at 464 (1966). "Before any action can be maintained, a justiciable controversy must be present" Byrd v. Irmo High School, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character" Sloan v. Greenville County, 590 S.E.2d 338

(Ct.App. 2003). Appellant could not maintain an action for negligence prior to the January 21, 2015 levy of the special assessment to pay for the necessary repairs to the foundation. "It is fundamental and elemental that, in order to reap the benefit of negligence, the person pleading negligence must show that he has been injured by the negligence, and that the negligence was the proximate cause of the injury" National Loan & Exchange Bank v. Lachovitz, 128 S.E. 10 (S.C. 1925). It was with the January 21, 2015 decision of the Defendant to utilize a special assessment levied upon the Appellant as the means to pay for the necessary repairs that the Plaintiffs were first put on notice of an invasion of their right as a result of Defendant's negligence and gave the Plaintiff's an actionable claim for negligence. "It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another" Gray v. Southern Facilities, Inc., 256 S.C. 558, 567 (S.C. 1971).

Respondent failed to show beyond a question of material fact the date upon which any right of Appellant was invaded as a result of Respondent's failure to file within their applicable statute of limitations against the renovators of the condominium buildings. Appellant has introduced evidence demonstrating that it was at the most a mere four (4) months prior to the filing of this action. "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide" Brown, supra. at 786. As there exists a question of material fact as to when Appellant had a legal right to sue Respondent, Appellant requests that the trial court's Order be reversed.

V. The trial court committed reversible error by analyzing Defendant's statute of limitations defense under SC Code § 15-3-530(5) as that statute was not properly before the Court pursuant to R. 7(b)(1) SCRCP.

The trial court committed reversible error by finding "[t]his Court need not decide which statute applies" (Order, p.10) (**R. p. 14**). It is Appellant's position that when presented with a motion for summary judgment based upon the Respondent's specifically pled relief under SC Code § 33-31-830(f) only, the trial court was absolutely obligated to decide only whether that statute applies. It was reversible error to dismiss Appellant's action based upon the statute of limitations codified in SC Code § 15-3-530(5) as the only prayer for relief Respondent placed before the Court was dismissal under the statute of limitations codified in SC Code § 33-31-830(f). R. 7(b)(1) dictates that:

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief of order sought".

Respondents May 30, 2018 motion for summary judgment sought relief solely upon the statute of limitations in § 33-31-830(f):

> ("The Defendant HOA is a South Carolina Nonprofit Corporation and, thus, any suit against it must be filed within the statute of limitations prescribed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq*. The statute of limitations for claims against a Nonprofit Corporation [is]... S.C. Code. Ann. § 33-31-830(f)" (Defendant's Motion for Summary Judgment, p. 1-2) (**R. pp. 92-93**)).

Respondent, in their motion, clearly says that because this action involves a nonprofit corporation, the Court should not analyze this motion for dismissal based upon the statute of limitations provided for in § 15-3-530(5):

> "This differs from the general tort statute of limitations in that the discovery rule does not apply" (Respondent's Motion for Summary Judgment, p. 2) (**R. p. 93**).

In their motion, Respondent set forth that the relief or order sought was dismissal of Appellant's claims based solely upon § 33-31-830(f). Appellants prepared for the Court's analysis of Respondent's motion for summary judgment based solely upon Respondent's particularly stated grounds for relief. Appellant argued that the clear and unambiguous interpretation of that statute only applies to individual directors rather than the nonprofit corporate entity. Further, that an unpublished opinion has no precedential value to expand that statute.

> "§ 33-31-830(f) is inapplicable to this action as only the non-profit corporation itself is a party" (Appellant's Return to Motion for Summary Judgment, p. 7) (**R. p. 160**); "Reading the statute as written by the legislature clearly and unambiguously shows that this statute of limitations only applies to director liability, not liability on behalf of the named defendant" (id.) (**R. p. 160**) "This case is an unpublished opinion and thus has no precedential value" (id. at 8) (**R. p. 161**); "Even if Smith did have precedential value, it does not contradict the plain and clear meaning of § 33-31-830(f) and allow for the application of this statute of limitations to the non-profit corporate entity" (id. at 8) (**R. p. 161**); "...the statute [Respondent] cite[s] to today as establishing the statute of limitations is 33-31-830(f)" (Motion Hearing tr., 23:21-22)(**R. p. 275, lines 21-22**); "[Respondent] rel[ies] upon an unpublished opinion to stretch that to try to bring in the defendant nonprofit corporation since there have been no individual directors to name in this action" (id., at 24:4-7) (**R. p. 276, lines 4-7**); "South Carolina Appellate Court Rule 220 says that unpublished opinions, memorandum opinions--Have no precedential value" (id., at 24:8-10) (**R. p. 276, lines 8-10**);

"As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP" Chastain v. Hiltabidle, 673 S.E. 2d 826, 831 (Ct.App. 2009) *citing to* M&M Group, Inc. v. Holmes, 666 S.E.2d 262, 265 (Ct.App.2008). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case" Chastain, at 831 *citing to* Gardner v. S.C. Dept. of Revenue, 577 S.E.2d 190 (S.C. 2003).

Appellant prepared to oppose Respondent's motion for summary judgment based upon Respondent's seeking an Order solely upon the theory that § 33-31-830(f) time barred Appellant's claims. The trial court erroneously found that SC Code § 15-3-530(5) was properly before the Court because Appellants placed it before the Court (Order Denying Plaintiffs' Motion to Alter or Amend, p. 2). **(R. p. 2)**[8] Again, R. 7(b)(1) dictates that issues can only be brought before the Court by way of a motion. Appellant's Memorandum in Opposition was not a written motion requesting the Court to dismiss their own case under § 15-3-530(5). The only reference Appellant made of § 15-3-530(5) is that since § 33-31-830(f) is inapplicable to the present action, Respondent should have raised the other statute. (Plaintiff's Return to Defendants Motion for Summary Judgment, p. 9) **(R. p. 162)**.[9] It was merely a defense to the only issue properly before the Court: whether the statute of limitations imposed by § 33-31-830(f) time barred Appellant's claims.

It was not until Respondent's October 19, 2018, filing of their reply to Plaintiff's Return to Defendant's Motion for Summary Judgment that Respondent referenced § 15-30-530(5), a mere three (3) days prior to the October 22, 2018, hearing. "A written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served **not later than ten days before the time specified for the hearing**..." R. 6(b) SCRCP (emphasis added). As a result of the trial court's error in failing to apply R. 7(b)(1) SCRCP to Respondent's motion, an Order was issued dismissing Appellant's claims largely based upon the general tort three (3) year statute of limitations utilizing the discovery rule, despite Respondent expressly stating that they did not move the Court to use that analysis. (Defendant's Motion for Summary Judgment p.2) **(R. p. 93)**.[10]

---

[8] "The record reflects that the Plaintiffs raised and fully discussed S.C. Code Ann. § 15-3-530(5) and the application of the discovery rule in its opposition memorandum filed October 16, 2018"

[9] "The statute of limitations that applies to the instant case is SC Code § 15-3-530(5)"

[10] [§ 33-31-830(f)] differs from the general tort statute of limitations in that the discovery rule does not apply"

If Appellants had the mandated notice that the Court would be asked to analyze Respondent's claimed relief under any theory other than § 33-31-830(f), Appellants would have properly prepared a defense against those theories. Appellants are now prejudiced by having an Order dismissing their claims based upon an analysis that was not solely limited to § 33-31-830(f) Respondent pled. Because it was not properly before the court, it was reversible error to analyze Respondent's motion for summary judgment under the statute of limitations provided by SC Code § 15-3-530(5).

VI. The trial court committed reversible error by dismissing Appellant's case based upon the statute of limitations provided in SC Code § 33-31-830(f).

a. The trial court committed reversible error by interpreting SC Code § 33-31-830(f) to apply to a non-profit corporate entity despite its clear and unambiguous meaning.

The trial court committed reversible error by finding that SC Code § 33-31-830(f) applied to this action since the only named Defendant is a non-profit corporate entity, not the individual directors of a non-profit corporation. SC Code § 33-3-830 is titled "General Standards for Directors" and deals only with individual directors of a non-profit corporation, not the non-profit corporation entity. In their motion for summary judgment, Respondent cited to § 33-3-830(f) as the applicable statute of limitations for this case but misrepresents the first third of this statute to fit the needs of their motion for summary judgment. (Defendant's Motion for Summary Judgment, p.1) (**R. p. 92**).[11] Reading § 33-31-830(f) in its entirety confirms that the statute does not apply to the non-profit corporation entity:

> "**An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced** before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or

[11] "The statute of limitations for claims against a Nonprofit Corporation expires "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm is complained of is, or reasonably should have been, discovered"'

reasonably should have been, discovered." (Emphasis added to the portion misrepresented by Respondent).

§ 33-31-830(f) is inapplicable to this action as only the non-profit corporation itself is a party. Despite the trial court's finding that Steven Bernard's deposition amended the Summons and Complaint to add individual directors, no individual director is a Defendant. The trial court erroneously found that individual directors of the Respondent's HOA board are parties to this action. No individual director has ever been named as a defendant in this action or served with a summons. The only Defendant ever named and served is the non-profit corporate entity, 3 Chisolm Street Homeowners Association, Inc. R. 4(a) SCRCP deals with proper process upon Defendants to an action ("Copies of the original summons shall be served upon **each** defendant" (emphasis added)). An Answer to the Complaint was filed only on behalf of 3 Chisolm Street Homeowners Association, Inc, not any individual directors. (3 Chisolm Street Homeowners Association Inc.'s Answer to Amended Complaint, p. 1) (**R. p. 78**).[12] However, the trial court found that Steven Bernard's April 27, 2018, deposition testimony expanded the Defendants in this action to include the individual directors of the Respondent HOA board. The trial court never specifically identifies the individual directors that have been joined as Defendants because of the deposition testimony, just that there are some unidentified directors that are now named Defendants. (Order, p.10) (**R. p. 14**).[13] The trial court's finding that deposition testimony expands the named Defendants beyond those named and served with a summons is not supported by any rules of civil procedure, common or statutory law, and it completely ignores due process.

[12] "The Defendant 3 Chisolm Street Homeowners Association, Inc.,... by and through its undersigned counsel, hereby submits this Answer to the Plaintiffs' Amended Class Action Complaint"

[13] "Indeed, Steven Bernard, one of the individually-named Plaintiffs and the appointed class representative, testified that this case is against both the HOA and its directors."

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature" Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5 (S.C. 1993) *citing to* Banker Trust of South Carolina v. Bruce, 275 S.C. 35 (1980). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute" Hodges v. Rainey, 341 S.C. 79, 85 (S.C. 2000) *citing to* In re Vincent J., 333 S.C. 233 (S.C. 1998). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning" id. Reading the statute as written by the legislature clearly and unambiguously shows that this statute of limitations only applies to director liability, not liability on behalf of the named non-profit corporate entity Respondent.

There is nothing unclear or ambiguous with SC Code § 33-31-830(f). It only applies to "[a]n action against **directors** asserting **the director's** failure to act in compliance with this section..." (emphasis added). If the legislature intended for the statute to apply to the non-profit corporate entity along with the individual directors, the legislature would have included non-profit corporate entities such as the Respondent. "The canon of construction "expression unius est exclusion alterius" or "inclusio unius est exclusion alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative'" Hodges, *supra* at 86.

It is the individual directors of a non-profit corporate entity that are expressed in § 33-31-830(f) and therefore SC Code § 33-31-830(f) is inapplicable to this action where only the non-profit corporate entity is a named Defendant. Appellant respectfully requests that the trial court's Order be reversed as § 33-31-830(f) is inapplicable to this action.

b. The trial court compounded the error by relying upon an unpublished opinion which has no precedential value and does not address subpart (f) to expand the scope of SC Code § 33-31-830(f) beyond its clear and unambiguous meaning.

The trial court erroneously found that the unpublished opinion of Smith v. Dockside Association, Inc., unpublished opinion No. 2005-UP-139 (Ct.App. 2005) expanded § 33-31-830(f) to encompass Respondent into this statute of limitations by citing to Smith v. Dockside Association, Inc., unpublished opinion No. 2005-UP-139 (Ct.App. 2005). Because this case is an unpublished opinion, it has no precedential value, pursuant to R. 220(a) SCACR,

> "The appellate court shall make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached. Published opinions shall appear in the Official Reports of the Supreme Court and the Court of Appeals; memorandum opinions shall not be published in the official reports and shall be of no precedential value".

At the time of the hearing, the trial court agreed that in accordance with R. 220(a) Smith v. Dockside had no precedential value. (Hearing Tr., p. 24, 8-10) (**R. p. 276, lines 8-10**).[14] However, in the Order, the trial court committed reversible error by expanding §33-31-830(f) based upon an unpublished opinion (Order, p. 10) **(R. p. 14)**.[15]

Assuming arguendo, Smith does have precedential value, it does not contradict the plain and clear meaning of § 33-31-830(f) and allow for the application of this statute of limitations to the non-profit corporate entity. Smith was an action brought against both a homeowners' association corporate entity as well as the individual directors. The Defendants in that action filed a motion for summary judgment under § 33-31-830 and the trial court "...found, the individual directors were protected from liability by South Carolina Code section 33-31-830". The court denied summary judgment to the Association, finding the statute only applied to individual

[14] "South Carolina Appellate Rule 220 says that unpublished opinions, memorandum opinions --- have no precedential value"

[15] "The South Carolina Court of Appeals has held, in an unpublished opinion, that the Nonprofit Corporations Act applies not only to claims against individual directors or a nonprofit corporation, but also to claims against the corporation"

directors, not the corporation itself. Upon motions for reconsideration filed by both sides, the circuit court granted summary judgment to the Association, "...**finding the business judgment rule insulated the directors as well as the corporate entity** from any liability" Smith, at 2. (emphasis added)

Upon appeal in Smith, the Court of Appeals only analyzed § 33-31-830 as it applies to the business judgment rule, not the statute of limitations ("Section 33-31-830 provides the applicable standard of care for directors of non-profit corporations in the discharge of their duties" Smith at 3). The Court of Appeals unpublished opinion never even once mentioned subpart (f), but rather only analyzed subparts (a), (b), (c), and (d). In Smith the Court of Appeals affirmed the dismissal of the action against the homeowner's association because they found "... the business judgment rule precluded judicial review of the action taken by the Board..." not because of the statute of limitations.

In the present case, Respondent has moved for the homeowner's association to be dismissed because of the statute of limitations, not the business judgment rule. Therefore, the Order grating summary judgment should be reversed as it relies upon Smith, which is both inapplicable and has no precedential value, to expand the § 33-31-830(f) beyond its clear and unambiguous meaning.

Conclusion

Summary judgment is improper because there exist genuine issues of material fact as to when Appellant's cause of action accrued and when Appellant was on notice of that accrual. Furthermore, the Order granting summary judgment contains reversible errors of law: not tolling the statute of limitations while this very issue was on appeal, granting Respondent relief under SC Code § 15-3-530(5) despite that statute not properly being before the Court, interpreting SC Code

§ 33-31-3830(f) beyond its clear and unambiguous meaning, and expanding SC Code § 33-31-830(f) beyond its clear and unambiguous meaning based upon an unpublished opinion that both has no precedential value and is inapplicable. Appellant respectfully requests the reversal of the trial court's Order granting summary judgment.

O. Grady Query, Esquire
Michael H. Ellis, Esquire
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412
Telephone: 843-795-9500
Counsel for Appellants

Dated: March _____, 2020
Charleston, South Carolina