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
Civil 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' PETITION FOR REHEARING

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

July 21, 2022
Charleston, SC

Other Counsel of Record:

M. Dawes Cook, Esquire
Jeffrey Michael Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
Telephone: 843-577-7700

Andrew F. Lindemann
P.O. Box 6923
Columbia, SC 29260
Telephone: 803-881-8920

Counsel for Respondent

Pursuant to Rule 221 of the South Carolina Appellate Court Rules ("SCACR"), Appellants respectfully request a rehearing of the June 22, 2022, Appeal from the Honorable Edward W. Miller Order dated December 7, 2018, granting Respondent's Rule 56 SCRCP Motion for Summary Judgment based on the statute of limitations barring Appellants' claims under both S.C. Code §15-3-530(3) and 33-31-830(f). This petition is based on the following facts, points, and arguments which Appellants believe were overlooked or misapprehended:

1. Was it error to confirm the trial courts' finding that a letter from adverse counsel to attorneys for the Respondent homeowners association triggered the running of the statute of limitations on the claim of the Appellant property owners against the Respondent homeowners association for negligently failing to file when no proof was offered by Respondent that the letter was ever received by anyone, disseminated to the homeowners association or for that matter even mailed?

2. This case could not have been filed until the Appeal of the earlier case which was dismissed for failure to file within the statute of limitations was decided because a finding that the statute of limitations had not run would have eliminated the cause of action for failure to timely file that is the basis of this case.

3. Whether the Court of Appeals erred by finding the Appellants should have known or anticipated they would have to pay to repair the damages claimed in lawsuits filed by Respondent that were subsequently dismissed prior to the Appellants even being property owners within the homeowner's association.

4. Whether the Court of Appeals erred by finding the Appellants had a justiciable controversy prior to the assessments announced January 21, 2015, based solely on speculative damages.

5. Whether the Court of Appeals erred by relying on S.C. Code § 15-3-530(5) when it was never raised by Respondent at any time.

For the reasons set forth below, the Court should rehear its Decision and find that summary judgment was improper.

FACTS

Appellant class includes Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and All Others Similarly Situated (hereinafter "Appellants"). Respondent is 3 Chisolm Street Homeowner's Association, Inc.'s (hereinafter "Respondent"). Appellants are 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. Respondent is a non-profit corporate entity. 3 Chisolm Street is a collection of condominium units subject to the South Carolina Horizontal Property Act.

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") to 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". At a May 6, 2003, Board of Directors Meeting, Respondent resolved to follow the recommendations made in the Glick Report.

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". 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. Respondent appealed the dismissal of the Water Intrusion Lawsuit and the Court of Appeals affirmed the Trial Court's dismissal on March 26, 2014.

Appellants were first informed by Respondent that there was a need to repair the crawlspace of the main condominium building at an estimated cost of $2.5 million at a November 6, 2014 meeting of the owners of the condominium units. On January 22, 2015, Respondent held a special meeting to address the needed repair to the crawlspace of the main building. At this January 22, 2015 meeting, Respondent, for the first time, notified Appellants that Appellants would be required to fund the needed repair to the crawlspace of the main building through a special assessment levied by the Respondent upon the individual condominium owners.

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

STATEMENT OF THE CASE

On July 2, 2019, Appellant appealed the Honorable Edward W. Miller's December 7, 2018 Order granting Respondent's Rule 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 33-31-820(f). On June 22, 2022, the South Carolina Court of Appeals affirmed Judge Miller's Order.

The Appellants respectfully assert that the Court of Appeals' Order affirming Judge Miller's decision was done in error. Judge Miller found that a 2008 letter from adverse counsel addressed to attorneys for Respondent placed Appellants on notice of the claims against Respondent despite Respondent failing to demonstrate the absence of any genuine issue of material fact that the letter was even provided to Appellants, or that it was even mailed or received by the counsel for Respondent. Judge Miller issued no findings as to when or how any members of the Appellants' class obtained notice of the existence of the January 2008 letter and made no analysis

as to why this letter placed any members of the class on notice of a potential claim against Respondent. Judge Miller also found that Judge Young's June 9, 2011, Order dismissing Respondent's Water Intrusion Lawsuit placed Appellants on notice of a negligence claim against Respondent. That Order, and the issue of whether Respondent was barred by the statute of limitations, which is the only negligent act claimed by Appellants in this action, was timely appealed and remained on appeal until March 26, 2014. During the pendency of that appeal, Appellants could not have brought an action for Respondent's negligence in failing to timely file when the issue —*i.e.*, the timeliness of the filing— was pending before this Honorable Court.

Appellants 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, which was subsequently withdrawn. Appellants filed an Amended Summons and Complaint on April 13, 2015. 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, Appellants filed Plaintiffs' 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 Plaintiffs' Return to Defendant's Motion for Summary Judgment on October 19, 2018 and the Motion was heard before Judge Miller on October 22, 2018.

On December 7, 2018, Judge Miller filed the Order granting Respondent's Motion for Summary Judgment. In his Order, Judge Miller found that Appellants were placed on notice of a negligence claim against Respondent based upon either: (1) a January 2008 letter addressed from a third party not to any member of the Appellants' class but to legal counsel for the Respondent (Exhibit C to Defendant's Motion for Summary Judgment) (Order, p. 9); or (2) Judge Young's June 9, 2011, Order which dismissed Respondent's Water Intrusion Lawsuit, placed Appellants on notice of a negligence claim against Respondent despite that Order being timely appealed by Respondent (Order, p. 9). Judge Miller further found that it was reasonable for the Appellants to speculate that seven years after the 2008 letter of which Appellants had no knowledge and four years after Judge Young's 2011 Order that was appealed, that the Respondent would levy a special assessment upon Appellants to pay for the repairs that are the Respondent's responsibility and therefore the Appellant suffered at least nominal damages either in 2008 or in 2011 (Order, p. 10).

At the hearing, Judge Miller acknowledged that in accordance with Rule 220 SCACR, unpublished opinions have no precedential value (Tr. p. 24, 4-10), but he found that the unpublished opinion of Smith v. Dockside Ass'n, Inc., No. 2005-UP-139 (Ct. App.2005) 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). Judge Miller found, despite the Summons and Complaint only naming the individual non-profit corporation as the sole Defendant; there being no attempts by Appellants to amend the Summons and Complaint to add any individual

directors as named Defendants; the Respondent was the only Defendant served in the action; and there being no rule of South Carolina Civil Procedure allowing for it, Steven Bernard's deposition testimony expanded the named Defendants to this action to contain the individual directors (Order, p. 10). Despite Respondent not seeking relief under S.C. Code § 15-3-530(5), Judge Miller further found that the statute of limitations under that statute barred Appellants' claim (Order, p. 10).

On December 17, 2018, Appellant filed Plaintiffs SCRCP Rule 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"). In the Motion to Reconsider, Appellants argued (1) 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 case based upon § 15-3-530(5); (2) despite Judge Young's June 9, 2011 Order putting Appellant on notice that Respondent missed the applicable statute of limitations, Rule 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; (3) a letter purported to have been sent to Respondent did not put Appellants on notice of any claim they might have against Respondent; and (4) 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, Judge Miller entered his Order denying Plaintiffs' Motion to Alter or Amend the Order. Judge Miller found that Appellants' 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 Appellants when the Court granted Respondent's Motion to Dismiss based upon grounds not requested by Respondent. Further, Judge Miller reiterated that SC Code § 33-31-830(f) applies to the non-profit corporate entity and therefore bars Appellants' 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) representing the damages Respondent levied upon Appellants for all foundation repairs together with the applicable pre-judgment interest in excess of six-hundred-fifty-thousand dollars ($650,000.00).

On June 22, 2022, the Appellate Court filed its Order affirming Judge Miller's decision. The Appellants believe this was done in error. For the following reasons, Appellants respectfully request a rehearing of their Appeal.

ARGUMENTS

a. The Appellate Court Erred by Finding That the January 2008 Letter Triggered the Statute of Limitations

The first question for the Court of Appeal to review is whether a letter addressed to a third party unrelated to the present case constitutes notice to the parties in the instant action that the statute of limitations has begun to run without any evidence of the letter having been received by anyone or disseminated to anyone particularly not to any party to the instant case?

It is respectfully submitted that this Honorable Court misapprehended the import of the January 2008 Letter from attorneys for the developers and/or contractors who were Defendants in a separate action (which Appellants were not parties to), that was directed to the attorneys for the present Respondent, the 3 Chisolm Street HOA. This Court's December 7, 2018, Order states 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. The only January 2008 letter submitted for the Court's review was exhibit C of Defendant's Motion for Summary Judgment which is a January 30, 2008 letter from the attorneys for the developer of the condominium units addressed not to the Appellants' class members, but to the attorneys for Respondent 3 Chisolm Street Homeowners Association, Inc. The scriveners of that letter, Hudson & Spivey were representing the soon to be Respondent contractors and/or developers and were in an adversarial relationship with the very HOA to whose attorney the letter was directed. The Appellants, not being parties to that action, could hardly have been expected to rely upon representations made in correspondence from adverse counsel.

In its motion for summary judgment, Respondent states of the January 30, 2008 letter: "The developer **further advised the HOA** to notify its own insurance carrier of a potential suit by the HOA members (the Appellants' class here) against the HOA for negligence in management, which would have included failure to timely file suit" (emphasis added) (Respondent's Motion for Summary Judgment, p. 3). Respondent HOA admits that this letter is not to the Appellant but to the Respondent HOA. Respondent HOA, however without any evidence in the record, leaps to the conclusion this letter from a third party to the Respondent HOA, somehow places third party individuals, the Appellant homeowners who are not addressed in the letter, on notice of a claim. Such a conclusion is without evidentiary support and should be disregarded.

For Respondent to prevail on its argument that this letter triggered the three-year statute of limitations it would have to demonstrate the absence of any genuine issue of material fact that this letter put the Appellants on notice of their cause of action against Respondent. *See* Richardson v. The State Record Co., Inc., 330 S.C. 562 (Ct. App. 1998)(("The party seeking summary judgment

has the initial responsibility of demonstrating the absence of a genuine issue of material fact"). Respondent submitted this January 2008 letter to the Court without demonstrating that the letter was ever disseminated to the Appellants, nor did Respondents provide any other way to demonstrate that it placed the Appellants on notice of any cause of action against the Respondent, thereby evidencing a genuine issue of material fact. "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law" McAlhany v. Carter, 415 S.C. 54 (Ct. App. 2016) *citing to* Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320 (2000). "The Court must construe all ambiguities, conclusions and inferences arising from the evidence against the moving party" City of Columbia v. Town of Irmo, 316 S.C. 193, 195 (1994).

Submitted in opposition to Respondent's Motion for Summary Judgment was the Affidavit of Steven Bernard, a representative of Appellants in this action. Mr. Bernard attests to not having purchased his condominium unit until December 21, 2012 and not knowing of the Glick Report or the previous litigation involving the Respondent and the developers until a November 2014 special general meeting of the homeowners. "If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury." McAlhany, 415 S.C. at 64 *citing to* Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 618 (Ct. App. 2010). "When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide" id. *citing to* Arant v. Kressler, 327 S.C. 225 (1997). "Whether a claimant knew or should have known that they had a cause of action is question for the jury" id. *citing to* Johnston v. Bowen, 313 S.C. 61 (1993).

Only two months after his discovery of the Respondent's failure to file against the renovators of the condominiums within the applicable statute of limitations, Mr. Bernard initiated

this action on behalf of himself and his fellow class members. The January 2015 filing of this action was less than one year from the March 26, 2014 Court of Appeal's Opinion giving rise to a discoverable legally cognizable cause of action. "The statute [of limitations] runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct" Dean v. Ruscon Corporation, 321 S.C. 360, 363 (S.C. 1996) *citing to* Johnston v. Bowen, 313 S.C. 61 (1993). "We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist" id. at 363-364 *citing to* Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301 (1981).

Moreover, at the time of the alleged January 2008 letter and the decision of Judge Young in 2009, Appellant Steven Bernard and other class members were not yet homeowners and could not possibly have had notice of either evaluation. The eligibility of individual class members to receive damages is only decided after an award of damages and not during before there is a determination of liability. Class members who were homeowners at the time of the letter or Judge Young's Order could possibly be disqualified from receiving damages if they are determined to have been placed on notice at the time of either event.

Whether or not a letter sent to the Respondent HOA's attorney, by an attorney for the adverse party, in an action in which Appellant class members were not parties, places the Appellant class members on notice that they have a cause of action against the Respondent, is clearly a question of fact for the jury that makes summary judgment improper.

This Court overlooked and/or misapprehended the issue. Therefore, Appellants respectfully request that their Petition for a Rehearing be granted.

b. The Appellate Court Erred in Finding that Judge Young's 2011 Order Did Not Toll the Statute of Limitations

The next question for the Court of Appeals to address is whether the statute of limitations for Appellants' claim of negligence against Respondent for failing to timely file an action against the contractors/developers, is tolled during the pendency of the separate Appeal where the issue in that separate Appeal is whether or not the statute of limitations in the Respondent/contractor/developer action has expired? Appellants submit that this question must be answered in the affirmative because whether or not a claim of negligence exists in this action is dependent upon the outcome of the Appeal in the separate action.

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. Therefore, Appellants' January 2, 2015, filing of this action was well within the statute of limitations. In Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517 (S.C. 2016), the Supreme Court reversed the dismissal of the Plaintiff'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").

Stokes-Craven, is analogous to this claim. That case involves the dismissal of a legal malpractice claim due to the statute of limitations while the present case involves the dismissal of a claim against the Respondent Homeowner Association for the negligent representation of the Plaintiffs' interests due to the failure to file within the applicable statute of limitations.

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)

Appellants' action against the Respondent was for failing to file an action against the developers and/or contractors within the time permitted by the applicable statute of limitations. It is respectfully submitted that the Court overlooked and/or misapprehended the fact that until March 26, 2014, the Respondent HOA was appealing the issue of whether the HOA failed to file an action within the applicable statute of limitations. 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).

In the instant case, there was no legally cognizable cause of action against the HOA for negligence until the Appeal between Respondent and the contractor/directors was decided upon by the Court of Appeals. That Appeal, affirming the Order of Judge Young, was not issued until March 26, 2014.

c. The Appellate Court Erred by Finding the Appellant Should Have Reasonably Known They Would Have to Pay the Expense to Repair the Damages Claimed in the 2009 Lawsuit.

The next question the Appellants present to the Court of Appeals is whether home owners are required to perform their own due diligence on the merits of an HOA's claims against third-party developers of the condominiums that were filed prior to the individual home owners owning property within the HOA?

Respondent argues that "[b]y January 16, 2009, the Appellant class members should have been aware of the Glick Report[1], which formed the basis for the Water Intrusion Lawsuit, and with due diligence, should have recognized the fact that the HOA failed to follow the Glick Report's advice to pursue additional forensic testing, which ultimately became the basis for this action against the HOA" (Respondent's Brief, p. 13). Respondent's argument is that at the time of filing the action that was ultimately dismissed by Judge Young based upon the statute of limitations, Appellant knew or should have known that the action was doomed, meritless, and frivolous. Nowhere in the record, however, did Respondent argue prior to appeal, nor did the trial court find, that the January 16, 2009, filing of the Water Intrusion Lawsuit by Respondent against the third-party developers of the condominiums was a statute of limitations triggering event. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review" Elam v. SCDOT, 361 S.C. 9, 23 (S.C.2004) *citing to* Long v. Dunlap, 87 S.C. 8 (S.C.1910). "It is an error of law for a court to decide a case on a ground not before it." Griffin v. Capital Cash, 423 S.E.2d 143, 147 (Ct.App.1992).

Furthermore, Respondent does not address why Appellants were required to perform their own due diligence by investigating the merits of Respondent's claims against the third-party developers of the condominiums.[2] The Respondent was incorporated and charged with managing the affairs of the condominium buildings including the bringing of legal actions against third-parties that affect the condominium buildings. Respondent has produced no evidence that on

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[1] Nowhere in the Record does Respondent show that Appellants ever became aware of the Glick Report or that the Glick Report was ever disseminated to the Appellants.

[2] This is especially true since Mr. Bernard testified that he had not purchased his unit until three years later in 2012.

January 16, 2009 Appellants were on notice that Respondent's actions were suspect, and that Appellants should be double checking every action taken by Respondent. Also, Appellants have a right to rely on the signature of Respondent's attorney that the January 16, 2009 filing of that action was not meritless *see* SC Code § 15-36-10(A)(3)(b):

> "The signature of an attorney or a pro se litigant constitutes a certificate to the court that:...a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law".

Respondent has introduced no evidence suggesting that Appellants knew or should have known that at the time of the January 16, 2009 filing, Respondent was negligent by filing that lawsuit outside the statute of limitations.

As it is raised for the first time on appeal, and Respondent has failed to show beyond a question of material fact that Appellants knew or should have known that the January 16, 2009 filing of Respondent's action placed Appellants on notice of their claims against Respondent, summary judgment should be reversed.

This Court overlooked and/or misapprehended this issue. Therefore, Appellants respectfully request that their Petition for a Rehearing be granted.

d. The Appellate Court Erred by Finding the Appellants had a Justiciable Controversy Prior to January 21, 2015.

The only evidence offered by Respondent to the trial court that speaks towards what Appellants knew or should have known regarding any levy to pay for repairs to the foundations of the condominium buildings is the Minutes of the January 21, 2015 Special Meeting (Defendant's Motion for Summary Judgment, Exhibit B) which was approximately twenty (20) days after the January 2, 2015 filing of this action. The excerpts from the deposition transcript of Steven Bernard

(Defendant's Motion for Summary Judgment, Exhibit E) state that Respondent maybe learned of the foundation defects at the time that Stantec completed their investigation and issued a report to Respondent. (Depo. of Steven Bernard Tr. p. 41: 5-25). According to the Minutes of the January 21, 2015, Special Meeting (Defendant's Motion for Summary Judgment, Exhibit B), Stantec's report was first presented to Appellants on November 6, 2014, a mere fifty-seven (57) days prior to the January 2, 2015 filing of this action. Respondent does not even establish a point in time that they themselves knew that the condominium buildings' foundations would need to be repaired and that they would have to levy Appellants for the funds to effectuate those repairs. Despite no other evidence, Respondent's position is that the trial court was correct in finding that at some undefined moment greater than three years prior to the January 2, 2015 filing of this action, Appellant should have known that:

> "...(1) repairs would need to be made, (2) the repairs would need to be paid for, and (3) if a recovery cannot be made from third parties because the construction defect litigation was not timely filed, then there would likely be an assessment levied to pay for the repairs"

(Respondent's Initial Brief, p. 22).

However, Respondent had the burden of proof at the motion for summary judgment hearing and was required to show that there existed no issues of material fact. In other words, Respondent was required to show that Appellants knew or should have known at a definite moment in time greater than three (3) years prior to the January 2, 2015 filing of this action that they would be subject to the January 21, 2015 special levy that was Appellant's damages as a result of Respondent's negligence. Respondent failed to meet its burden.

> "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. 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).

Further, assuming *arguendo*, which Appellants vehemently deny, Respondent is correct that at some point greater than three (3) years prior to the January 2, 2015 filing of this action, the Appellants knew or should have known that "there would **likely** be an assessment levied to pay for the repairs" (Respondent's Initial Brief, p. 22) (emphasis added), summary judgment is still improper. "Likely" is just another word for "speculative". "Neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation" Gray v. Southern Facilities, Inc. et. al., 256 S.C. 558, 567 (S.C.1971) *citing to* Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705 (S.C.1968).

Respondent argues that Appellants should have known at some undefined moment three (3) years prior to the January 2, 2015 filing of this action that maybe or maybe not Respondent would be levied to pay for foundation repairs. However, "'[i]t 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" Gray, 256 S.C. 558, 567 (S.C.1971) *citing to* National Loan & Exchange Bank v. Lachovitz, 131 S.C. 432 (S.C.1925).

> "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. et. al., 256 S.C. 558 (S.C.1971) *citing to* 38 Am. Jur., Negligence, § 28, page 73.

It is this same line of reasoning that resulted in Respondent's filing of their March 5, 2015 Motion to Dismiss (Defendant's March 5, 2015 Motion to Dismiss) based upon there being sources other than a levy on Appellants to pay for the necessary foundation repairs. In their motion,

Respondent argued that it was unreasonable for Appellants to seek their damages in this action as there were other avenues for recovery:

> "Here, Plaintiffs claim against Defendant is not ripe because Plaintiffs can recover the damages sought here, the estimated $2,500,00 cost to repair the foundation defects by way of the Defendant's Foundation Defects Action. In fact, the Defendant will only be exposed to any liability in this action if the Foundation Defects Action is dismissed because of some failure on behalf of the Defendant with regards to the timeliness of its additional forensic inspections or prosecution of the Foundation Defects Action. Notably, the Complaint does not contain any allegations that the Plaintiffs or the Defendant are precluded from pursuing an action against any construction defendants to recover the costs to repair the foundation defects because of some act of negligence on part of the Defendant...**Plaintiffs have not yet been exposed to any liability in this case, making it not ripe**"

(Defendant's March 5, 2015 Motion to Dismiss) (emphasis added).

Yet, Respondent introduced no evidence concerning Respondent's financial condition at the time that the foundation repairs were needed. Absent a showing of why the Respondent was incapable of paying for the necessary repairs and Appellants' knowledge of Respondent's inability to pay, Respondent cannot even create an inference that it was reasonable for Appellants to assume that Appellants would be required to pay for the foundation repairs through a special levy. It is reasonable for homeowner's associations to take out bank loans to pay for necessary repairs to the common elements such as the foundation. It is reasonable for homeowner's associations to create reserves to pay for exigent and unexpected repairs to common elements such as the foundation repairs in the present case. It is reasonable for homeowners to exhaust all other avenues for funding prior to placing a special levy upon the condominium owners. Respondent failed to show when or why Appellants knew or should have known that it was reasonable that that there was no other source to pay for the necessary foundation repairs.

There was no evidence before the Court to show beyond a question of material fact that Appellants knew or should have known at some undefined point greater than three (3) years prior to the January 2, 2015, filing of this action that they would have to pay for the foundation repairs through a levy and even if they did, the damages would have been speculative. Respondent argued two (2) months after Appellants filed this action that it was filed too early because there were sources other than a levy on Appellants to pay for the necessary foundation repairs. The trial court erred in ruling that the Appellants knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for Respondent's negligence.

This Court overlooked and/or misapprehended these facts and this issue. Therefore, Appellants respectfully request that their Petition for a Rehearing be granted.

e. The Appellate Court Erred by Analyzing Respondent's Statute of Limitations Defense Under SC Code § 15-3-530(5) as that Statute was Not Properly Before the Court Pursuant to Rule 7(b)(1) SCRCP.

Finally, the Court of Appeals must determine if the Court's previous reliance on an unpublished opinion regarding a statute of limitations, was done in error. That unpublished opinion not only does not address the statute of limitations but it addresses a statute that does not apply to this proceeding.

S.C. Code Ann. § 33-31-830(f) clearly and unambiguously applies only to "an action against a director asserting the director's failure to act in compliance with this section..." and is thus entitled to the plain meaning rule ("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" Hodges v. Rainey, 341 S.C. 79, 85 (S.C. 2000) *citing to* In re Vincent J., 333 S.C. 233 (S.C. 1998).

This Court is urged to reconsider reliance upon Smith v. Dockside Ass'n, Inc., No. 2005-UP-139 (Ct. App. 2005) to expand S.C. Code Ann. § 33-31-830(f) beyond its clear and unambiguous application to only the directors of the non-profit corporation to include also the non-profit corporate entity, as that case was an unpublished opinion and therefore has no precedential value pursuant to Rule 220(a) SCACR.

Putting precedential value issues aside, Dockside also does not address subpart (f) of the statute, which speaks to the statute of limitations, but rather addresses only subparts (a), (b), (c), and (d). Even assuming *arguendo* that the holding in Dockside is applicable, this action was brought within less than one year of the legally cognizable cause of action.

This Court misapprehended this issue. Therefore, Appellants respectfully request that their Petition for a Rehearing be granted.

Conclusion

Accordingly, Appellants respectfully petition this Court to rehear the appeal and reconsider the panel's June 22, 2022, Order affirming the trial court's Order granting Respondent's Motion for Summary Judgment.

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

July 21, 2022
Charleston, SC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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.

PROOF OF SERVICE

I certify that I served a copy of APPELLANT'S PETITION FOR REHEARING upon M. Dawes Cook, Jeffrey Michael Bogdan, and Andrew Lindemann, attorneys for Respondent by email and by depositing a copy of it in the United States Mail, with sufficient postage attached thereto and addressed as follow:

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

Andrew F. Lindemann, Esquire
P.O. Box 6923
Columbia, SC 29260

Dated: July 21, 2022

Tracy O'Barker