RECEIVED

Oct 20 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2022-001202
Case No. 2015-CP-10-0020

Steven M. Bernard and Deborah J. Bernard, On Behalf of Themselves and all others Similarly Situated,..... Petitioners,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ANDREW F. LINDEMANN
LINDEMANN & DAVIS, P.A.
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

M. DAWES COOKE, JR.
BARNWELL WHALEY PATTERSON & HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
(843) 577-7700

Counsel for Respondent

TABLE OF CONTENTS

STATEMENT OF THE CASE

This is a negligence action brought by the Petitioners Steven M. Bernard and Deborah J. Bernard, as representatives of a class, against the Respondent 3 Chisholm Street Homeowners Association, Inc. ("HOA"). The class was certified as follows: "All persons who were owners of condominium units at 3 Chisholm 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 fee to make necessary repairs." (R. 4). The HOA is a nonprofit corporation that is organized and existing under South Carolina law. The HOA includes as members all of the owners of the condominium units at 3 Chisholm Street in Charleston, South Carolina.

The residential condominium complex is on the site of the old Andrew B. Murray Vocational School which was built in the early 1900s. From 2000 through 2002, the three buildings of the old school -- consisting of the main building, the gymnasium and the cottage -- were renovated and turned into condominiums. (R. 65). There are 26 individual units, with nineteen in the main building, six in the gymnasium, and one in the cottage. (R. 65). The Certificate of Occupancy was issued on June 28, 2002. (R. 65). In March 2003, the developer turned over control of the HOA to the unit owners.

Beginning in late 2002 and 2003, the condominium unit owners began to complain of condensation on the windows and moisture issues. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. On April 8, 2003, Glick issued a report (referred to hereafter as the "Glick Report") which consisted of a letter to the HOA with the results of his visual inspection of the main building. Glick identified a number of deficiencies which he concluded were "significant" and "pervasive throughout the entire building." (R. 105). He

recommended "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections." (R. 105). Glick further recommended that "the board seek legal counsel relative to the impacts of the above issues as well as pursuing a forensic report documenting and recording the above issues." (R. 105).

According to the allegations contained in the Petitioners' Amended Complaint, the HOA Board acknowledged in May and June 2003 the need to investigate the three buildings to determine the extent of the damage and to identify other potential problems. *See,* Amended Complaint, ¶ 21. (R. 66). The Petitioners allege that "[a] person of common knowledge and experience, much less a Board of Directors entrusted with preserving the value of three condominium buildings, would have been on notice at that time that some legal claim might exist." *See,* Amended Complaint, ¶ 23. (R. 66). The Petitioners also allege that the HOA Board ignored Glick's recommendations and failed to obtain the forensic inspection of the three buildings. *See,* Amended Complaint, ¶ 23. (R. 67).

In late 2007, prior to pursuing litigation, the HOA sent correspondence to the developer (Chisholm Street Partners, LLC) and demanded remediation of the construction deficiencies. In response, the counsel for the developer sent a letter dated January 30, 2008 to counsel for the HOA disputing the claims made. In addition, the developer's counsel wrote as follows: "In conclusion, we concur with Mr. Morrison's prior assertions that the individual Board Members and Officers of the Association should instead notify their own D&O insurer. The real issue relates to the negligence in management…." (R. 115). Each of the Board members at that time are part of the current class. (R. 116).

On January 16, 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and several subcontractors in an action captioned *3 Chisholm Street*

Homeowners Association, Inc. v. Chisholm Street Partners, LLC, et al., Civil Action Number 2009-CP-10-267 (hereafter referred to as the "Water Intrusion Lawsuit"). The defendants in that action moved for summary judgment based on a statute of limitations defense. The motions were granted in part by Circuit Court Judge Roger Young in orders entered June 9, 2011. (R. 126-138). Judge Young determined that the statute of limitations on the original construction work (in contrast to some remediation work done since 2003) began to run in 2003 upon receipt of the Glick Report. (R. 138). Judge Young's orders were appealed, and on March 26, 2014, the South Carolina Court of Appeals affirmed by a *per curiam* opinion. (R. 303-306). The Court of Appeals found "the circuit court properly determined the statute of limitations began to run in 2003 because the Glick report, issued in April 2003, put the HOA on inquiry notice of defects that would have been discoverable through additional inspections and destructive testing, which both the report and the HOA president recommended." *See, 3 Chisholm Street Homeowners Association, Inc. v. Chisholm Street Partners, LLC,* Op. No. 2014-UP-128 (S.C. Ct. App. March 26, 2014). (R. 304).

In February 2014, a home inspection related to the sale of one of the units discovered issues with the foundation in the main building. (R. 68). On November 4, 2014, the HOA filed another construction defects lawsuit against the developer, the general contractor, and several subcontractors and engineering firms in an action captioned *3 Chisholm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc. et al.*, Civil Action Number 2014-CP-10-6803 (hereafter referred to as the "Foundation Defects Lawsuit"). The defendants in that action moved for summary judgment based on a statute of limitations defense, but those motions were never adjudicated. The HOA agreed to a settlement to resolve that litigation. Accordingly, there

was no judicial adjudication of any statute of limitations defense asserted in the Foundation Defects Lawsuit. (R. 125, 263-265).

On January 2, 2015, the Petitioners filed the current litigation which is a negligence claim brought against the HOA as the sole party-defendant. (R. 20-36). The original Complaint was subsequently amended with the filing of the Amended Class Action Complaint on April 13, 2015. (R. 63-77). The Petitioners allege that the HOA Board failed to follow the recommendations in the Glick Report in 2003, and had the recommended forensic investigation and testing been conducted in 2003, "the deficiency of the foundation would have been discovered." *See,* Amended Complaint, ¶ 41. (R. 69). The Petitioners contend that the HOA Board was negligent in failing to carry out the recommended inspection and investigation which resulted in the untimely filing of the Foundation Defects Lawsuit. (R. 9, 158). The Petitioners seek damages consisting of the amounts paid by the class members for the foundation repairs. (R. 70).

In the case at bar, the HOA filed a motion for summary judgment on May 30, 2018, based on a statute of limitations defense. (R. 92-100). The parties fully briefed the motion, which was heard on October 22, 2018, by Circuit Court Judge Edward W. Miller. (R. 253-279). On December 7, 2018, Judge Miller issued an order granting the HOA's motion for summary judgment. (R. 5-15). He concluded 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, or at the latest with Judge Young's June 2011 orders finding that the HOA missed the statute of limitations." (R. 13).

The Petitioners filed a Rule 59(e) motion to alter or amend on December 17, 2018. (R. 225-234). Judge Miller denied that motion by order entered June 21, 2019. (R. 16-19).

The Petitioners thereupon filed an appeal to the South Carolina Court of Appeals. On June 22, 2022, the Court of Appeals issued an unpublished *per curiam* opinion affirming the Circuit Court's order granting summary judgment to the Respondent. *See, Bernard v. 3 Chisolm Street Homeowners Association, Inc.*, Op. No. 2022-UP-269 (S.C. Ct. App. filed June 22, 2022). The Petitioners filed a petition for rehearing which was denied by order filed July 29, 2022.

The Petitioners have now filed a Petition for Writ of Certiorari with this Court.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues warrant review on a writ of certiorari. Notably, in their petition, the Petitioners make no reference to nor mention of Rule 242(b), nor of any of the factors. The Petitioners offer no analysis as to why this case is an appropriate candidate for a writ of certiorari under the test outlined in Rule 242(b). In contrast, the Respondent submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is actually unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion by the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. The *per curiam* opinion cites to and is fully supported by well-established precedent from this Court and from the Court of Appeals.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to or bearing on other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.

II. In their Petition for Writ of Certiorari, the Petitioners never specifically address any rulings by the Court of Appeals and why those rulings are in error.

As written and presented to this Court, the Petitioners do not even address any specific rulings by the Court of Appeals in its *per curiam* opinion. The Petitioners make no specific mention of those rulings nor analyze why any such rulings are in error. There is, in fact, no specific reference to the Court of Appeals' opinion in the petition. Instead, the Petitioners present their petition as if it is a reply brief where they discuss and reference only the Respondent's brief filed in the Court of Appeals. In order to seek the issuance of a writ of certiorari, however, it is incumbent on a petitioner to raise and address errors made by the Court of Appeals. That has not occurred here, and for that additional reason, a writ of certiorari is not warranted.

III. Many of the arguments made in the Petition for Writ of Certiorari are not properly preserved for review.

Rule 242(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 242(d)(2) provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000). A comparison of the Petition for Writ of Certiorari to the Petition for Rehearing filed in the Court of Appeals reflects that the Petitioners have raised issues to this Court not asserted on rehearing. There are substantial differences between the two filings and how the issues are presented and argued. That should be an additional consideration in assessing whether a writ of certiorari is warranted.

IV. The Court of Appeals' rulings in its *per curiam* opinion are correct and present no basis for the issuance of a writ of certiorari.

As stated above, the Petitioners make no mention nor even reference the actual rulings by the Court of Appeals in their petition. In its *per curiam* opinion, the Court of Appeals made the following rulings: First, the Court found that "the statute of limitations for the 2014 foundation defects lawsuit was not tolled by the appeal in the 2009 water intrusion lawsuit because Petitioners did not need to wait for an adverse judgment on an issue that was not on appeal in this case to know they had an injury." (Slip. Op. at 2). Second, the Court found that there was a three-year statute of limitations, and as a result, "the trial court did not err in finding it need not decide whether S.C. Code Ann. § 15-3-530(5) or S.C. Code Ann. § 33-31-830(f) applies to this case because both statutes provided at most a three-year statute of limitations." (Slip Op. at 3). Third, the Court concluded that the Petitioners' claim is "barred by the statute of limitations under either S.C. Code Ann. § 15-3-530(5) or S.C. Code Ann. § 33-31-830(f)." (Slip Op. at 3).

Moreover, as for the additional grounds raised on appeal, the Court of Appeals declined to address the Petitioners' remaining issues under the authority of *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), which allows an appellate court to decline to address an issue when the resolution of a prior issue is dispositive. *See also, Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not address remaining issues when resolution of prior issue is dispositive). In their petition, the Petitioners raise no exception to or issue with the Court of Appeals' decision to invoke the "*Futch* rule" and decline to consider other issues. For that reason, there is no need to consider any other issues on certiorari.

As to the three rulings actually made, the Court of Appeals' analysis and opinion are correct and do not warrant the issuance of a writ of certiorari for further review. Those issues are addressed below.

A. The trial court, as affirmed by the Court of Appeals, was correct in ruling that the dismissal date of the Water Intrusion Lawsuit triggered the statute of limitations which was not tolled by the appeal in that case.

As its first ruling, the Court of Appeals determined that "the statute of limitations for the 2014 foundation defects lawsuit was not tolled by the appeal in the 2009 water intrusion lawsuit because Petitioners did not need to wait for an adverse judgment on an issue that was not on appeal in this case to know they had an injury." (Slip. Op. at 2).

Like the Court of Appeals, the trial court looked at several alternative events as an accrual date when the Petitioners knew or should have known – using an objective standard – that they had a cause of action for the alleged foundation defects. The trial court referenced June 9, 2011, which is the date of the dismissal of the Water Intrusion Lawsuit by Judge Roger Young, as a definite accrual date that would trigger the statute of limitations. The trial court recognized that by that date, the Petitioners and class members were or should have been on notice that the HOA failed to follow the recommendations of the Glick Report to conduct additional forensic testing and failed to timely sue the renovators. (R. 13). The Petitioners argue that the trial court committed reversible error in relying on the date of dismissal of the Water Intrusion Lawsuit because the accrual date was tolled until the Court of Appeals affirmed Judge Young's orders on March 26, 2014.

In effect, the Petitioners contend that the trial court failed to properly apply the holding in *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). In that case,

this Court overturned prior precedent and adopted a new accrual rule *specifically for legal malpractice claims* where there is an appeal of the underlying litigation that gives rise to the alleged malpractice. This Court held: "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." 787 S.E.2d at 495. The Petitioners' reliance on *Stokes-Craven* to toll the accrual date in this case fails on both procedural and substantive bases.

As affirmed by the Court of Appeals, the trial court rejected the *Stokes-Craven* accrual test for three separate and distinct reasons. First, the *Stokes-Craven* accrual rule was raised to the trial court for the first time in the Petitioners' Rule 59(e) motion and thus was not timely or properly raised. Second, the *Stokes-Craven* accrual rule applies only in the context of legal malpractice actions and has not been extended to other types of negligence cases. And third, even if the *Stokes-Craven* accrual rule could be extended beyond the realm of legal malpractice cases, it would still have no applicability to the case at bar.

The Petitioners actually appealed only two of those three rulings. The Petitioners did not appeal the trial court's ruling that the *Stokes-Craven* accrual rule was not timely raised. As the trial court determined, "the accrual rule in the *Stokes-Craven* case was never cited to nor argued to this Court by the Plaintiffs prior to the filing of their Rule 59(e) motion." (R. 17). *See, Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014) ("a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not"). The Petitioners never disputed that ruling on appeal to the Court of Appeals, and thus it constitutes the law of the case. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an

unappealed ruling, right or wrong, is the law of the case"). Similarly, the two-issue rule is implicated as an additional basis for affirmance.[1]

Nonetheless, on the merits as well, the trial court was correct in rejecting the *Stokes-Craven* accrual rule in the context of this litigation. As indicated, *Stokes-Craven* is a legal malpractice case, and the accrual rule as announced in that case has never been extended to other types of causes of action. In fact, this Court specifically recognized that "the case that we address today is a legal malpractice cause of action that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice." *Stokes-Craven,* 787 S.E.2d at 494. This Court referred to "that particular scenario" and pointed out that "there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling." *Id*. The present case as brought against the HOA is not a legal malpractice action. The Petitioners are suing the HOA, not any attorneys. The alleged negligence was committed by the directors of the HOA Board, not by any attorneys. Thus, as the trial court correctly ruled, the accrual rule in *Stokes-Craven* has no applicability to the present case. That decision was properly affirmed by the Court of Appeals which explained that Petitioners "did not need to wait for an adverse judgment on an issue that was not on appeal in this case to know they had an injury." (Slip Op. at 2).

The decision in *Personal Care, Inc. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019), also supports the Court of Appeals' ruling herein. In that case, the Court of Appeals ruled

[1] In applying the "two-issue" rule, this Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), the Court of Appeals held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

-- in a legal malpractice action -- that the *Stokes-Craven* accrual rule does not apply where the cause of action is not predicated on an adverse judgment. The Court of Appeals explained: "We do not believe that the *Stokes-Craven* decision eliminated the discovery rule in favor of a separate bright-line rule that all legal malpractice claims accrue on the date an adverse judgment is entered against the client." 825 S.E.2d at 286. Instead, the Court of Appeals determined that the client's cause of action was predicated on an allegedly defamatory letter written by the lawyer being sued. Thus, as the trial court correctly ruled, even if the *Stokes-Craven* accrual rule could be extended beyond the realm of legal malpractice cases, it would still have no applicability to the case at bar. In this case, as in *Personal Care*, the Petitioners' claim against the HOA is not predicated on an adverse judgment – just as the Court of Appeals explained. In fact, the Petitioners do not allege as a basis for their Amended Complaint that the HOA was negligent in failing to timely file the Water Intrusion Lawsuit, which is the lawsuit that proceeded through an appeal to the Court of Appeals. Instead, as the trial court described in its Order, the Petitioners allege in their Amended Complaint that the HOA "was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). As the trial court correctly ruled, that alleged negligent act was discovered or reasonably should have been discovered more than three years prior to the filing of this lawsuit on January 22, 2015.

To reiterate, in an attempt to claim the benefit of the *Stokes-Craven* accrual rule, the Petitioners confuse and conflate the two lawsuits. In essence, they treat the Water Intrusion Lawsuit and the Foundation Defects Lawsuit interchangeably or as the same. It was the Water Intrusion Lawsuit that was dismissed by Judge Young on statute of limitations grounds and was

appealed to the Court of Appeals, thereby resulting in an affirmance on March 26, 2014. In contrast, the Foundation Defects Lawsuit was never subject to an appeal. That lawsuit was voluntarily settled, and there was never an adjudication of a statute of limitations defense. (R. 125, 263-265). There was no "adverse judgment" in that litigation that tolled any statute of limitations.

The Petitioners have erroneously suggested that the present lawsuit against the HOA is based on the HOA failing to timely file the Water Intrusion Lawsuit. That is not correct. To reiterate, in its Order, the trial court described the Petitioners' claims as follows: "the Plaintiffs here allege one claim against the HOA: that it was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). That description comports with the Petitioners' return to the motion for summary judgment, where the Petitioners write: "Plaintiff filed the present action in January 2015 asserting Breach of Duty/Negligence and Gross Negligence for failing to file suit against the renovators within the applicable statute of limitations and the resulting [d]amages to Plaintiffs in having to bear the costs of making necessary repairs to the condominium foundations." (R. 156). Similarly, in the same filing, the Petitioners agreed that "the crux of the Plaintiffs' theory of liability is that the HOA failed to file the Foundation Defects Litigation within the statute of limitations." (R. 158). This is also in accord with the class definition which includes only the owners of the condominium units from January 1, 2015 to present who were "subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fees to make necessary repairs." (R. 4). Finally, in their opening brief in the Court of Appeals, the Petitioners write: "It is undisputed

that the foundation of the condominium buildings is what needed to be repaired." *See*, Appellants' Opening Brief, p. 24. Thus, there is no attempt in this litigation to recover for damages claimed in the Water Intrusion Lawsuit. This litigation is designed solely to collect damages that were sought in the Foundation Defects Lawsuit. Yet, the Foundation Defects Lawsuit was never adjudicated, never dismissed as untimely, and never appealed. Contrary to the Petitioners' contention raised for the first time in the Court of Appeals, this action was not about the HOA failing to timely bring the Water Intrusion Lawsuit. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). Accordingly, even if the *Stokes-Craven* accrual rule is expanded to apply in the non-legal malpractice context, it has no applicability to this case. Just as the Court of Appeals ruled in its *per curiam* opinion, the Petitioners did not have to wait and were not waiting on the final adjudication of an adverse judgment to commence this action against the HOA over the timeliness of the Foundation Defects Lawsuit.[2] In short, this issue presents no compelling basis for the issuance of a writ of certiorari.

[2] Moreover, it is illogical to conclude, as the Petitioners seem to suggest, that any negligence action predicated on the expiration of the statute of limitations does not accrue until the plaintiff files that underlying action and obtains a dismissal of that action as being untimely. If that were the case, then there would effectively be no statute of limitations for such a negligence action. A plaintiff could arguably bring the underlying action ten or even twenty years after the statute of limitations expired and still claim that the ensuing negligence action did not "accrue" until an adverse ruling was entered in the underlying action as time-barred.

B. The trial court, as affirmed by the Court of Appeals, was correct in applying a three-year statute of limitations, and it makes no substantive difference whether the statute of limitations is furnished by S.C. Code Ann. § 15-3-530(5) or S.C. Code Ann. § 33-31-830(f).

Additionally, the Court of Appeals ruled that a three-year statute of limitations applied, and as a result, "the trial court did not err in finding it need not decide whether S.C. Code Ann. § 15-3-530(5) or S.C. Code Ann. § 33-31-830(f) applies to this case because both statutes provided at most a three-year statute of limitations." (Slip Op. at 3). The Petitioners continued to argue that the statute of limitations contained in S.C. Code Ann. § 33-31-830(f) has no application to this case. However, the Petitioners do not dispute that the applicable statute of limitations was three years. Thus, as both the trial court and the Court of Appeals ruled, the Petitioners' negligence action against the HOA is time-barred regardless of whether the applicable statute of limitations is Section 33-31-820(f) or Section 15-3-530(5). The same principles of law with respect to accrual date and the application of the discovery rule generally apply regardless of which statute is the correct one. This issue presents no basis whatsoever for the issuance of a writ of certiorari.

C. The trial court, as affirmed by the Court of Appeals, was correct in ruling that the Petitioners and class members had at least constructive or inquiry notice of the Glick Report and the HOA's alleged failure to follow the recommendations in that report thereby triggering the statute of limitations.

Ultimately, the Court of Appeals affirmed the summary judgment entered by the trial court by concluding that the Petitioners' claim is "barred by the statute of limitations under either S.C. Code Ann. § 15-3-530(5) or S.C. Code Ann. § 33-31-830(f)." (Slip Op. at 3). The Petitioners argue that the trial court erred in its application of the discovery rule. The Petitioners insist that there is no evidence that the Petitioners and the class members knew or should have

known by the exercise of reasonable diligence that they had a claim against the HOA more than three years prior to the filing of this lawsuit on January 2, 2015. That is not supported by the undisputed evidence in the record, including the Petitioners' own allegations in their Amended Class Action Complaint.

The Petitioners focus on the January 30, 2008 letter sent by the law firm representing the developer to the HOA Board which raised a statute of limitations defense as to the developer's liability but also stated that the HOA was at fault to its members for failing to pursue the action before the statute of limitations expired. (R. 112-115). The Petitioners contend that there is no evidence that any class members had *actual notice* of that letter, and thus they reason that the trial court erred in granting summary judgment.[3]

The Petitioners' position in this regard is flawed in several significant ways.

First, the trial court did not rely solely on the January 30, 2008 letter as establishing an accrual date more than three years prior to the filing of this lawsuit on January 2, 2015. The trial court also cited alternatively to the dismissal of the Water Intrusion Lawsuit by Judge Roger Young with the filing of his orders dismissing that litigation on June 9, 2011. Moreover, and perhaps most significantly, the Petitioners admitted *in their pleadings* that the HOA members

[3] The Petitioners are critical that the HOA failed to meet its burden of proof to show that the January 30, 2008 letter had been delivered to the HOA or was provided to members of the HOA. In doing so, however, the Petitioners are improperly shifting the burden of proof. The statute of limitations is an affirmative defense for which the HOA has the burden of proof. However, it is well settled that an exception to the statute of limitations, such as tolling by way of the discovery rule or equitable tolling or equitable estoppel, is the burden of the party asserting it to prove. Here, it is the Petitioners who are relying on the discovery rule to toll the statute of limitations, and that is their burden of proof. *See*, *Moriarty v. Garden Sanctuary Church of God***,** 341 S.C. 320, 534 S.E.2d 672, 682 (2000) (plaintiff has the burden of proving a person of common knowledge and experience would not be on notice that some right of hers has been invaded or that some claim against another party might exist).

knew by April 2006 of the deadline for the HOA to file suit for any construction defects.[4] The Court of Appeals writes:

> As Appellants stated in their own complaint, unit owners were told the statute of limitations for the HOA to file suit for construction defects expired in April 2006. Thus, Appellants knew of the HOA's negligence as early as April 2006, when it failed to timely file a lawsuit.

(Slip Op. at 3). The Court of Appeals was referring to the Amended Class Action Complaint, in which the Petitioners pled as follows:

> 24. During 2003, the HOA property manager was Mike Parades.
>
> 25. Upon information and belief, Mike Parades informed the Board that as a result of the findings of and the recommendations of the Glick Report, the HOA should inspect all three buildings of the Structures and perform further testing to identify any and all construction deficiencies of the Structures.
>
> 26. Almost three years later, on February 6, 2006, unit owner(s) inquired of the HOA counsel as to its deadline for filing litigation related to concerns with deficiencies in the Structures and was/were told the deadline was April, 2006.
>
> 27. The HOA failed to file an action prior to April of 2006.

See, Amended Complaint, ¶¶ 24-27. (R. 67). In their petition, the Petitioners make no mention of nor challenge to the Court of Appeals' conclusion that the statute of limitations began to run by April 2006, which is the date by which the HOA members were advised by the HOA counsel

[4] In *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992), the Court of Appeals held that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." 418 S.E.2d at 323. "The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." *Id. See also, Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015); *Kitchen Planner, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

in February 2006 that "litigation related to concerns with deficiencies in the Structures" had to be filed. Thus, that ruling is the law of the case and cannot now be challenged for the first time before this Court.

Additionally, the Court of Appeals ruled as follows:

> At the latest, the January 30, 2008 letter, in conjunction with the June 2011 orders dismissing the lawsuit based on the statute of limitations, put Appellants on sufficient notice that the HOA failed to file suit for the foundation defects within the applicable statute of limitations. Acting with reasonable diligence, Appellants could or should have known that a cause of action against the HOA might exist as of January 30, 2008 or June 2011. Therefore, we find the statute of limitations began to run on one of those dates, at most seven years or at least four years before Appellants commenced this action on January 2, 2015. Accordingly, the trial court did not err in holding the statute of limitations barred Appellants' 2015 lawsuit against the HOA for negligence.

(Slip Op. at 3). That demonstrates that the Court of Appeals likewise did not focus on the January 30, 2008 letter as the only possible accrual date. There were several alternative accrual dates, but based on each one, it is clear that the statute of limitations had expired long before January 2, 2015, when this lawsuit was filed.

Consistent throughout the Petitioners' argument is their misapplication of the discovery rule to the negligence action against the HOA. "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645, 647 (1996). "The statute 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." *Id*. "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." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333, 334 (1981). Contrary to the Petitioners' application, "[t]he date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 90 (1995). "Therefore, the statutory period of limitations begins to run when a person *could or should have known,* through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798, 800 (Ct. App. 1989). (Emphasis in original). The court addresses this as "inquiry notice." In effect, "the discovery rule focuses upon whether the complaining party acquired knowledge of any existing facts sufficient to put said party on inquiry, which, if developed, will disclose the alleged [cause of action]" *Id. See also*, *Republic Contracting Corp. v. South Carolina Department of Highways & Public Transportation*, 332 S.C. 197, 503 S.E.2d 761, 767 (Ct. App. 1998) (holding the plaintiff "had sufficient information ... to put it on inquiry notice, which, if developed, would have revealed the defects").

As the Respondent explained in the courts below, the appeal filed in the Water Intrusion Lawsuit presents an excellent example of a case where this concept of "inquiry notice" was applied to determine the trigger date for the statute of limitations. In the Water Intrusion Lawsuit, the Court of Appeals had found that "the circuit court properly determined the statute of limitations began to run in 2003 because the Glick report, issued in April 2003, put the HOA on inquiry notice of defects that would have been discoverable through additional inspections and destructive testing, which both the report and the HOA president recommended." (R. 304). The Court of Appeals further ruled in that earlier case that "[t]he Glick report also triggered the

statute of limitations for claims against all three respondents because the report listed specific defects that put the HOA on inquiry notice to discover whether those defects were attributable to design, construction, or manufacturing errors." (R. 304).

The same is true in the present case. Importantly, the class members are all members of the HOA, and therefore, had constructive or inquiry notice of the January 30, 2008 letter to the HOA from counsel for the developer. The class members also knew or should have known by proper inquiry that HOA counsel had advised them in February 2006 that "litigation related to concerns with deficiencies in the Structures" had to be filed by April 2006. *See,* Amended Complaint, ¶¶ 24-27. (R. 67).

Moreover, the class members, as members of the HOA, had at least constructive or inquiry notice, if not actual notice, of the Water Intrusion Lawsuit and the Glick Report that formed the basis for that litigation by January 16, 2009, when that lawsuit was filed. That cannot be disputed, particularly given the filing of the Water Intrusion Lawsuit which thereby made it part of the public record. (R. 281). The Water Intrusion Lawsuit and the Glick Report, in turn, provided, as the Court of Appeals had previously determined, for "inquiry notice of defects that would have been discoverable through additional inspections and destructive testing." (R. 304). As the trial court described in its Order, the Petitioners alleged in their Amended Complaint in the case at bar that the HOA "was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). Thus, by January 16, 2009, the Petitioners and class members should have been aware of the Glick Report, which formed the basis for the Water Intrusion Lawsuit, and with due diligence, should have recognized the fact that the HOA had failed to

follow the Glick Report's advice to pursue additional forensic testing, which ultimately became the basis for this action against the HOA.

In short, the Petitioners are focusing on what they perceive to be the absence of evidence of *actual notice* by each and every class member. Actual notice is synonymous with knowledge, which arguably requires an individualized inquiry that is not appropriate for a class action.[5] However, as the foregoing case law ably demonstrates, the discovery rule is an objective test, not a subjective one. Actual notice is not the standard. Instead, the standard is inquiry notice -- whether the class member *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist "rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Burgess*, 386 S.E.2d at 800. Therefore, the absence of proof that every class member had *actual knowledge* of the January 30, 2008 letter is not fatal to the trial court's grant of summary judgment. Instead, the discovery rule is an objective standard, and as the trial court correctly ruled, the Petitioners and the class members had inquiry notice of the January 30, 2008 letter. Alternatively, there can be no reasonable dispute that the Petitioners and the class members had inquiry notice of the Water Intrusion Lawsuit and the Glick Report by January 2009, when that lawsuit was filed and placed in the public record. Likewise, there can be no reasonable dispute that the Petitioners and the class members had inquiry notice that April 2006 was the date that "litigation related to concerns

[5] In *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), the Supreme Court rejected a request for class certification on the issue of commonality. The Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." 577 S.E.2d at 201. *See also*, *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978) ("[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action"). In essence, the Petitioners are arguing that the application of the discovery rule requires an individualized inquiry as to when each class members had actual notice of the claim; however, that position is inconsistent with the Petitioners' request for and the trial court's grant of class certification.

with deficiencies in the Structures" had to be filed. That was explicitly pled in their Amended Complaint. *See,* Amended Complaint, ¶¶ 24-27. (R. 67).

In sum, the Court of Appeals was correct in ruling that the Petitioners' action is barred by the three-year statute of limitation. This issue simply does not warrant the issuance of a writ of certiorari.

CONCLUSION

Based on the foregoing discussion, the Respondent 3 Chisolm Street Homeowners, Association, Inc. respectfully requests that this Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

LINDEMANN & DAVIS P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

-and-

M. DAWES COOKE, JR. #1376
BARNWELL WHALEY
PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200
Post Office Drawer H
Charleston, South Carolina 29402-0197
(843) 577-7700

Counsel for Respondent 3 Chisolm Street Homeowners Association, Inc.

October 20, 2022