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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON
COUNTY

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2022-001202

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.

PETITIONERS' BRIEF

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QUESTION PRESENTED

1. Did the court of appeals err in holding the statute of limitations began to run in June of 2011, at the latest, and, therefore, this action is barred by the statute of limitations?

STATEMENT OF THE CASE

This matter is before the Court on Writ of Certiorari granted on July 11, 2023. From the appeal of the Honorable Edward W. Miller's December 7, 2018, Order granting Respondent's R. 56 SCRCP Motion for Summary Judgment based upon the statute of limitations barring Appellants' claims.

Judge Miller found that a 2008 letter from adverse counsel addressed to attorneys for the non-profit corporate entity and not directly to Respondent placed Appellants on notice of the claims against Respondent. Respondent failed to demonstrate the absence of any genuine issue of material fact that this letter placed Appellants on notice. Judge Miller issued no findings as to when or how any members of the Appellant 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 for failing to timely file against the developers.

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 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 Appellants in the instant action, was timely appealed and remained on appeal until March 26, 2014, thereby preventing Appellants from filing this action until that appeal was decided.

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 based upon, among other things, there being no justiciable controversy at the time of Appellants' filing due to Appellants' damages being unascertainable at the time of filing. Appellants 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. On October 16, 2018, Appellants filed their Return to Defendant's Motion for Summary Judgment. 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's Order granting Respondent's motion for summary judgment was filed. In his Order, Judge Miller found that Appellants were placed on notice of a negligence claim against Respondent based upon either, 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 when Judge Young's June 9, 2011 Order dismissed Respondent's Water Intrusion Lawsuit

placed Appellants on notice of a negligence claim against Respondent despite Judge Young's Order being timely appealed by Respondent (Order, p. 9). Judge Miller ruled that the appeal of the 2011 Order of Judge Young did not trigger Rule 241(a) SCACR and therefore prevent petitioners from filing the negligence action v. respondent until the Court of Appeals affirmed Judge Young's Order in March of 2014.

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, the Respondent would levy a special assessment upon Appellants to pay for the repairs that are the Respondent's responsibility and therefore the Appellants suffered at least nominal damages either in 2008 or in 2011 (Order, p. 10).

On December 17, 2018, Appellant filed Plaintiffs' SCRCR 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"). In the Motion to Reconsider, Appellants argued that the appeal of Judge Young's June 9, 2011, Order putting Appellants on notice that Respondent had missed the applicable statute of limitations in that R. 241(a) SCACR tolled the statute of limitations until the Court of Appeals affirmed the Order on March 26, 2014. The only issue on the appeal of Judge Young's Order was whether respondent missed the statute of limitations in the water intrusion lawsuit against the developers. The claimed negligence by respondent in this action, is that Respondent breached its duty to the appellants by missing that statute of limitations. A letter purported to have been sent to Respondent could not have put Appellants on notice of any claim they might have against Respondent.

On June 21, 2019, Judge Miller filed his Order Denying Plaintiffs Motion to Alter or Amend Order.

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) assessment Respondent levied upon Appellant for all foundation repairs together with the applicable pre-judgment interest presently in excess of Seven Hundred Thousand dollars (\$700,000.00).

In Unpublished Opinion No. 2022-UP-269 filed June 22, 2022, the South Carolina Court of Appeals Affirmed the Trial Court. By Order filed July 29, 2022, the South Carolina Court of Appeals, Denied Appellant's petition for rehearing.

The opinion of the Court of Appeals affirmed Judge Miller's finding that the statute of limitations began to run from the 2008 letter, written to attorneys for Respondent or the Order of Judge Young issued in June of 2011.

On July 11, 2023, The South Carolina Supreme Court granted the petition for writ of certiorari on the following question:

1. Did the court of appeals err in holding the statute of limitations began to run in June of 2011, at the latest, and, therefore, this action is barred by the statute of limitations?

ARGUMENTS

1. Respondent Failed to Meet Their Burden of Proof in Asserting the Affirmative Defense of the Statute of Limitations

Respondent, as the moving party, has the initial burden to 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. "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court" Chastain v. Hiltabidle, 673 S.E.2d 826,

829 (Ct.App.2009). "The burden of establishing the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide" Walbeck v. The I'On Company, LLC, et.al., 426 S.C. 494,520 (Ct.App 2018) *citing to* Bayle v. S.C. Dep't of Transp., 344 S.C. 115 126 (Ct.App.2001).

In contravention of this principle, the Court of Appeals shifts the burden of proof to the Appellants, as the non-moving party, to show the tolling of the statute of limitations to avoid summary judgment. Reversal is proper since the record is barren of evidence to support the trial court's finding that the Respondent showed beyond a question of material fact that Appellants knew or should have known at some undefined moment greater than three (3) years prior to the January 2, 2015, filing of this action that Appellants had a negligence claim against Respondent.

2. The January 30, 2008, Letter does not satisfy Respondent's burden of proof of notice of the appropriate statute of limitations

The Court of Appeals held that, "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 period of the statute of limitations." This was error.

Respondent first relies upon the January 30, 2008, letter addressed to Respondent during previous litigation from Respondent's opposing counsel (hereinafter "2008 letter") to commence the running of the statute of limitations. This holding is flawed in numerous respects. Primarily, there is nothing in the record to show that the letter placed Appellants on notice of a claim. Respondent did not produce any affidavits or testimony by the drafters of the letter authenticating the genuineness of the letter. There was no evidence presented that the letter was indeed mailed or personally delivered to anybody. Respondent did not produce

any affidavits, testimony, or other evidence as to whether any Appellant knew of the existence of the 2008 letter much less that any belief had been formed by anyone regarding the 2008 letter.

In their 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 Plaintiffs' 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 admits that this letter is not to the Appellants but to the Respondent. Respondent, however, without any evidence in the record, leaps to the conclusion that this letter from a third party to it, somehow places petitioners on notice of a claim. Such a conclusion is without evidentiary support and should have been disregarded by the Trial Court and the Court of Appeals.

In its brief, Respondent cites a plethora of case law supporting the notion that "The statute runs from the date the injured party knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct" **(Respondent's Brief, p. 10-11)**. However, Respondent does not explain how the January 30, 2008, letter caused Appellants to either know or be in a position where they should have known through reasonable diligence that Appellants had a claim against Respondent.

In defense to summary judgment, Appellants produced the affidavit of Steven Bernard **(Affidavit of Steven Bernard)**. Steven Bernard is the only member of the Appellant class whose knowledge as to what was known or should have been known by the Appellant class was before the trial court. Mr. Bernard was the only member of the Appellant class who testified. His testimony was submitted by his affidavit and by his deposition. In neither his affidavit nor

his deposition does Mr. Bernard speak of the January 30, 2008, letter. In his sworn affidavit, Mr. Bernard testified that he did not purchase a condominium at 3 Chisolm Street until December 21, 2012, less than three years prior to the January 2, 2015, filing date for this action (**Affidavit of Steven Bernard**). Mr. Bernard further testified in his affidavit that it was not until November of 2014, a mere two months prior to the filing date of this action, that he knew anything about the Glick Report having placed the Respondent on notice of a claim against the developers and that the Respondent failed to take legal action within their applicable statute of limitations (**Affidavit of Steven Bernard**). Respondent failed to introduce any evidence that showed beyond a question of material fact that Mr. Bernard or any other Appellant class member knew or should have known of the January 30, 2008, letter placing them on notice of a claim against Respondent.

"[T]he determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence" Moriarty v. Garden Sanctuary Church of God, 341 S.C. 324,338 (S.C. 2000).

"When testimony conflicts regarding time of discovery of a cause of action, it becomes an issue for the jury to decide" *id. citing to* Arant v. Kressler, 327 S.C. 225, 229 (S.C. 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, 64 (S.C. 1993); "Application of discovery rule to a claim is a question of fact for jury" *id. citing to* Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 274 (S.C. 1989); "When testimony is conflicting upon the statute of limitations, it becomes an issue for jury to decide" *id. citing to* Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556 (S.C.1995); "In determining whether statute of limitations begins to run under discovery rule, jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action" *id. citing to* Maier v. Tietex Corp., 331 S.C. 371,377 (Ct.App.1998)

In the present case there is no conflicting evidence of when the statute began to run as

Respondent introduced no evidence showing that the Appellant class knew or should have known of the January 30, 2008, letter. However, assuming arguendo, that the court finds there was some evidence introduced by the Respondent, summary judgment is improper as there is conflicting evidence requiring this issue be sent to the jury.

The Court of Appeals erred by adopting the findings and conclusions of the trial court in this regard.

3. Notice to Respondent Does Not Impute Notice to Petitioners/Appellants

In the instant case the Court of Appeals erred in determining that when “unit owners” were allegedly told by counsel for Respondent that the statute of limitations for construction defects expired in April of 2006; no evidence was before the trial court and no findings were made by the trial court in regards to such disclosure. Even assuming arguendo that individual unit owners received the information that the statute of limitations for the HOA to file suit for construction defects expired April of 2006, Respondent HOA was at all times the corporate entity charged to conduct the business of the HOA including necessary litigation. Respondent HOA was at all times represented by corporate counsel and Appellant had a right to rely and reasonably relied upon the corporate respondent and its counsel to take such actions as were necessary to protect the interests of the HOA and therefore the Petitioner class members.

Appellants could not have been reasonably expected to make further inquiry beyond the information that Resp. HOA was represented by counsel and were actively pursuing litigation. The filing of the action by the HOA against the developers in 2009 was rightfully relied upon by appellant class members as being timely and pursuant to advice of counsel.

In their initial brief, Respondent argues " ... 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" (**Respondent's Brief, p. 12**). As previously explained herein, there is no evidence in the record authenticating the 2008 letter or proving that it had been mailed or personally delivered to the Respondent or had been received by the Respondent. Further, Respondent failed to prove beyond a question of material fact that the 2008 letter was ever disseminated to the Appellant class members and that it did or should have put them on notice of a claim against Respondent. Respondent, without any evidence, is trying to create an inference that the letter triggered the statute of limitations. However, "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)." The Court of Appeals erred in holding that the January 30, 2008, letter could have under any circumstances constituted notice to Appellant class members.

Furthermore, it is undisputed that the Respondent HOA is a corporate entity. "Courts are generally reluctant to disregard the corporate entity: If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears."

Mid-South Management Co., Inc. v. Sherwood Development Corp., 649 S.E.2d 135, 140 (Ct.App.2007).

The Court of Appeals erred in concluding that the June 2008 letter in conjunction with Judge Young's 2011 Order, which dismissed Respondent HOA's 2009 action as barred by the statute of limitations, put appellants on sufficient notice to make further inquiry. Appellants reasonably relied on the actions of Respondent HOA acting in accordance with

the advice of counsel.

The Court of Appeals further erred by not appreciating the effect of Rules 205 and 241(a) SCACR in staying any action based on the facts of that litigation pending the outcome of the appeal, and that the 2014 date was the first actual notice of the negligence on the part of respondent HOA , and the January 2015 assessment was the first actual notice of any damages to the Appellant class members.

4. *Respondent Is Not Relieved of Meeting Its Burden of Proof Based Upon This Being a Class Action*

Respondent failed to show how any Appellant class member was put on notice of a claim against Respondent at some undefined date greater than three (3) years prior to the January 2, 2015 filing of this action, but argues that since this is a class action, if any class member had notice of such a claim, then all class members had notice of such a claim.

Respondent failed to show beyond a question of material fact when any member of the Appellant class was placed on notice of a claim against Respondent, and Respondent has failed to show why the court should disregard when every Appellant class member knew or should have known of a claim against Respondent. ¹

¹ Respondent argues that despite class representative Steven Bernard not owning a condominium unit until December 2012 and not moving in until March 7, 2013, Mr. Bernard was placed on notice by the January 30, 2008 letter merely because the class of plaintiffs was certified in 2017.

Respondent essentially argues that by seeking class certification Appellants have waived Respondent's burden of proof to show beyond a question of material fact that each and every class member knew or should have known of a claim against Respondent three (3) years prior to the January 2, 2015, filing of this action.

When each member learned of a potential claim against Respondent is a genuine issue of material fact in order to have each Appellant class member's claim dismissed as a matter of law:

("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)).

By consenting to the definition of the class, Respondent has agreed that the facts that are the "crux of a predominant legal issue" are whether or not a class member was "... subject to the 2015 lump sum payment to make necessary repairs and... subject to the increased regime fees to make necessary repairs" (**Order Certifying Class**).

When each and every appellant class member knew or should have known of a claim against respondent should not have been disregarded by the court of appeals, and the trial court should be reversed for Respondent's failure to show when each and every Appellant class member knew of should have known beyond a question of material fact of a claim against Respondent.

5. *The January 16, 2009, Filing of the Water Intrusion Lawsuit by the Respondent did not put Petitioners/Appellants on Notice of a Claim Against Respondent for negligently failing to file within the statute of limitations.*

Respondent argues that "Thus, by January 16, 2009, the Appellants and class members should have been aware of the Glick Report², 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, Appellants knew or should have known that the action was doomed, meritless, and frivolous. Nowhere in the record 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).

² 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 Appellant.

³ This is especially true since Mr. Bernard testified as to not even having purchased his unit until three years later in 2012.

Furthermore, Respondent does not address why Appellants were required to perform their due diligence by investigating on January 16, 2009, the merits of Respondent's claims against the third-party developers of the condominiums. 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 January 16, 2009, Appellants were on notice that Respondent's actions were suspect and that Appellant should be double checking every action taken by Respondent. Also, Appellants had 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 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.

6. Petitioners'/Appellants' Reliance for Tolling the Statute of Limitations is Based Upon the South Carolina Appellate Court Rules 205 and 241 (a)

The Court of Appeals misinterpreted Appellants' argument as to why the statute of limitations was tolled from Judge Young's June 2011 dismissal of Respondent's Water Intrusion

Lawsuit until the March 26, 2014, affirmation by the Court of Appeals. Appellants' argument that the statute of limitations was tolled from June 2011 until March 26, 2014, is based upon Rules 205 and 241(a) SCACR. Appellant utilized the case of Stokes- Craven Holding Corp. v. Robinson, 416 S.C. 517 (S.C. 2016), in conjunction with numerous other cases, to support tolling the statute of limitations while Respondent's 2009 Water Intrusion Lawsuit was on appeal.

Appellants raised to the trial court the issue of tolling by Respondent's appeal of Judge Young's June 2011 Order in their Return to Respondent's Motion for Summary Judgment:

"The issue of whether Defendant's breached their duty to file an action within the statute of limitations was a legal and factual issue involved in pending litigation until the Court of Appeal's March 26, 2014 Opinion... Whether Plaintiffs had a viable claim for negligence against the Defendant was contingent upon the outcome of the Defendant's action against the renovators of the condominiums" **Plaintiff's Return to Defendant's Motion for Summary Judgment, p. 5.**

The Court of Appeals erred in failing to recognize that whether Petitioners had a viable claim for negligence against the Respondent was contingent upon the outcome of the Respondent's 2009 action against the renovators of the condominiums which the Court of Appeals found to have been barred by the statute of limitations in its March 26, 2014, affirmation of Judge Young's June 2011 Orders.

7. *Petitioners/Appellants have not Changed Their Position on Appeal*

In pages 19-21 of their brief, Respondent attempts to muddy the waters by arguing that Appellants are interchanging the Water Intrusion Lawsuit and Foundation Defect Lawsuit in an attempt to change their theory on appeal (**Respondent's Brief, p. 19-21**). However, Appellants' theory has remained throughout this case: 1) The Glick Report placed Respondent on notice of multiple construction defects and the need to conduct further forensic investigations; 2) had the Respondent followed the recommendations of the Glick

Report the foundation issues would have been discovered prior to 2014 and the developers of the condominiums would have been liable for the necessary foundation repairs; 3) Respondent failed to follow the Glick Report recommendations within a timely manner resulting in Judge Young's 2011 dismissal of Respondent's action against the developers of the condominium buildings, the Court of Appeals affirming that order on March 26, 2014; and 4) Appellants being levied with the January 22, 2015 special assessment to pay for the foundation repairs.

The terms "Water Intrusion Lawsuit" and "Foundation Defects Lawsuit" were coined by the Respondent. Respondent used those terms in their Motion for Summary Judgment and in the Order granting Summary Judgment that Judge Miller asked Respondent to draft. Appellants' only concern with these lawsuits is that in the Water Intrusion Lawsuit the Court of Appeals established Respondent's breach of their duty owed to Appellants as an adjudicated fact ("... the circuit court properly determined the statute of limitations began to run in 2003 because of 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..." 3 Chisolm Street Homeowner's Ass'n., Inc. v. Chisolm Street Partners, LLC, et.al., Unpublished Opinion No.: 2014-UP-128).

Prior to March 26, 2014, the issue of whether or not Respondent breached their duty owed to Appellants was a pending issue in controversy which Respondent and their attorneys were arguing had not been breached. Prior to March 26, 2014, Respondent believed that they had not missed the statute of limitations in suing the developers and thereby breached their duty to Appellants. Respondent now argues that the Appellants should have known that whole time that Respondent was wrong. Appellants' theory of Respondent's negligence has not changed on this appeal.

8. *The Court of Appeals Erred in affirming the trial court's ruling That the Petitioners/Appellants Knew or Reasonably Should Have Known That an Assessment Would Likely Be Levied Against the Homeowners to Pay for Respondent's Negligence*

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, the burden of proof respondent bore at the motion for summary judgment

hearing was to show no existence of a question of material fact 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 were Appellants' damages as a result of Respondent's negligence.

"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 (I 997).

Further, assuming arguendo that 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).

The Court of Appeals erred in affirming the finding of the trial court that the 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 Appellants would be levied to pay for foundation repairs. The Court of Appeals failed to appreciate the holding in Gray, wherein the Supreme Court stated:

"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, Defendant's 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 \$2,500,000 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).

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 Appellant's knowledge of Respondent's inability, 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 an HOA to exhaust all other avenues for funds 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 Court of Appeals erred in affirming the trial court's finding that the Appellants knew or reasonably should have known not later than June 2011, that an assessment would likely be levied against the homeowners to pay for Respondent's negligence.

9. Petitioners/Appellants Have Not Taken Inconsistent Positions

The Court of Appeals properly refused to consider Respondent's argument that Appellants have taken inconsistent positions by filing this action on January 2, 2015, while arguing that there was no justiciable controversy until the special levy on the Appellants approximately twenty (20) days later and "...should be estopped from taking inconsistent positions" (**Respondent's Initial Brief, p. 24**).

Since, estoppel is not properly before the court as it was never raised at the trial level, and Respondent is making this argument with unclean hands as they took inconsistent positions by arguing in their March 5, 2015, filed motion to dismiss that Appellants filed this action too early as there existed no justiciable controversy but now argue that Appellants filed this action too late. Second, Appellants have maintained throughout this litigation that whether or not Respondent indeed breached their duties owed to Appellants was an issue in controversy before the court until the March 26, 2014, opinion of the Court of Appeals, and that Appellants

suffered no damages as a result of Respondent's negligence until the January 2015 special levy upon Appellants to pay for the necessary foundation repairs.

CONCLUSION

The Court of Appeals erred in holding the statute of limitations began to run in June 2011, at the latest, and, therefore, this action is barred by the statute of limitations.

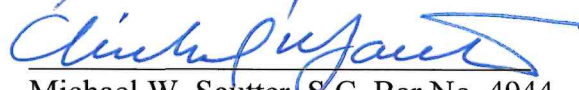
Reversal is proper since the record is barren of evidence to support the trial court's finding that the Respondent showed beyond a question of material fact that Appellants knew or should have known at the latest by the 2011 Order of Judge Young, that Appellants had a negligence claim against Respondent. Further the Court of Appeals erred in failing to appreciate that pursuant to Rules 205 and 241 SCACR, any proceedings on issues directly affected by the 2011 Order of Judge Young were stayed until affirmed by the Court of Appeals in 2014, and Appellants' cause of action based on the negligence of Respondent was not judiciable until the appeal of the HOA claim against the developer was finally determined on March 26, 2014. It was therefore error for the Court of Appeals to conclude that the statute of limitations began to run in June 2011, at the latest. The Opinion of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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