

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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
Situating, ...Appellants,

v.

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

APPENDIX

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APPENDIX FOR WRIT OF CERTIORI

BERNARD v 3 CHISOLM

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case Number: 2019-001100

Case No. 2015-CP-10-0020

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MAR 20 2020

SC Court of Appeals

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc., ...Respondent.

RECORD ON APPEAL

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Dated: _____
Charleston, SC

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves
And All Others Similarly Situated,

Plaintiffs,

vs.

3 Chisolm Street Homeowners
Association, Inc.,

Defendant.

ORDER BY CONSENT TO CERTIFY
THE CLASS OF PLAINTIFFS

FILED
2015 AUG -7 PM 2:32
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before me pursuant to Plaintiff's Motion to Certify Class.

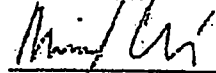
Based upon review of the Motion and supporting affidavit and the pleadings on file I
make the following Findings of Fact and Conclusions of Law:

1. Steven M. Bernard and Deborah J. Bernard reside at 3 Chisolm Street, Unit 405 Charleston, South Carolina.
2. The remaining members of the class of Plaintiffs are present and previous condominium unit owners at 3 Chisolm Street, Charleston, South Carolina for the time frame of January 1, 2015 through the present.
3. Defendant is a statutory entity incorporated under the laws of South Carolina and with a primary place of business in Charleston County, South Carolina.
4. The allegations giving rise to this action are alleged to have taken place in Charleston County, South Carolina.
5. This court has jurisdiction over the parties and subject matter, and venue is proper.

1023
JAY

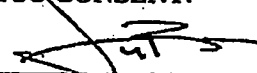
6. The class of present and previous owners is so numerous that joinder of all members is impracticable.
7. There are questions of law and fact common to the class.
8. The claims of Steven M. Bernard and Deborah J. Bernard are typical of the claims of the class.
9. Steven M. Bernard and Deborah J. Bernard will fairly and adequately protect the interests of the class.
10. The amount in controversy exceeds one-hundred dollars (\$100) for each member of the class.
11. Plaintiffs have satisfied the requirements of SCRCP R. 23(a).
12. While Defendant has consented to the definition of the class set forth below, it does not thereby agree that the class possesses viable claims. The Defendant expressly reserves the right to raise defenses asserting that any or all of Plaintiffs' claims are not properly brought as class claims.

I SO MOVE:



Michael H. Ellis, Esquire
O. Grady Query, Esquire
Attorneys for Plaintiffs

I SO CONSENT:



Jeff M. Bogdan, Esquire
M. Dawes Cooke, Esquire
Attorneys for Defendant

IT IS THEREFORE

ORDERED, ADJUDGED AND DECREED that the following class is certified:

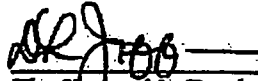
All persons who were owners of condominium units at 3 Chisolm Street between the time of January 1, 2015 and the present including those that were subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fees to make necessary repairs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any members of the class who do not desire to proceed with this lawsuit shall have the option to "opt out" of the class;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Steven M. Bernard and Deborah J. Bernard shall be appointed as the representative parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's consent to this class definition and nothing else contained in this Order will operate as a waiver of Defendant's argument that the class does not possess viable claims, or Defendant's right to raise defenses asserting that any or all of the Plaintiffs' claims are not properly brought as class claims.

IT IS SO ORDERED at Charleston County, South Carolina this 2nd day of August, 2017.


The Honorable Deadra L. Jefferson
Chief Administrative Judge
Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Steven M. Bernard and Deborah J.
Bernard, on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

3 Chisolm Street Homeowners
Association, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-10-0020

ORDER

2018 DEC -7 PM 12:00
CLERK OF COURT
BY

This matter came before the Court on Defendant 3 Chisolm Street Homeowners Association, Inc.'s (hereinafter the "HOA") Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. A hearing was held on October 22, 2018. Dawes Cooke and Jeff Bogdan were present and argued on behalf of the HOA. Mike Ellis was present and argued on behalf of the Plaintiffs. The Court also considered the briefs submitted by both parties, including the HOA's Motion for Summary Judgment, Plaintiffs' Return, and the HOA's Reply. For the reasons set forth below, the Court GRANTS the HOA's motion and dismisses Plaintiffs' case in its entirety.

BACKGROUND

The HOA is a South Carolina Nonprofit Corporation that is made up of the owners of the condominium units located at 3 Chisolm Street in Charleston, South Carolina (hereinafter the "Condos"). The Condos are located on the site of the old Andrew B. Murray Vocational School, which was built sometime in the beginning of the 20th century. From about 2000 through 2002, the three buildings of the Vocational School (the Main Building, the Gymnasium, and the

Cottage) were renovated and converted to the Condos. The Certificate of Occupancy was issued on June 28, 2002. In March 2003, the developer turned over control of the HOA to the unit owners.

Plaintiffs Steven and Deborah Bernard are members of the HOA, who purchased their unit in 2012. The Plaintiffs' class has been certified as "all persons who were owners of condominium units at 3 Chisolm Street between 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."

Beginning in late 2002 and/or 2003, homeowners, including members of the Plaintiffs' class, began experiencing and complaining of condensation and moisture intrusion at the windows of their units. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. In April 2003, Glick issued a report to the HOA (hereinafter the "Glick Report") which summarized his visual inspection (without any destructive testing) of the Main Building only. The Glick Report summarized Glick's observations regarding the complained-of water intrusion and concluded by noting that the problems he found were "significant and were persuasive [sic] throughout the entire" Main Building and included his recommendation "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. . . ." Glick also recommended that the HOA pursue "a forensic report documenting and recording the above issues." The HOA sent a copy of the Glick Report to the developer, who responded by sending the general contractor to the Condos to repair certain elements that were causing the water intrusion. Years later, the water intrusion issues reappeared and the HOA again demanded that the developer remediate the problems. The developer responded via letter dated January 30, 2008, stating that any negligence claim that the

HOA would have against the developer was without merit and barred by the statute of limitations. 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, including failure to timely file suit. At that time, the HOA's board was made up of Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, and Bill Maneri. Each of these individuals is a member of the Plaintiffs' class.¹

In January 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and certain subcontractors styled 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a R Masonry Brickwork, Carolina Roofing Systems, Inc., and Lacy Painting 2009-CP-10-267, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Water Intrusion Lawsuit"). The defendants therein moved for summary judgment, arguing that the Water Intrusion Lawsuit was time-barred by the three-year statute of limitations. On June 9, 2011, the Honorable Roger Young issued several orders granting in whole or in part some of the defendants' motions. Judge Young found that the three-year statute of limitations on the HOA's claims regarding defective original construction work, as opposed to defective repair work done in response to the Glick Report, had expired. In another order, Judge Young explained that the three-year statute of limitations on construction work done as part of the conversion project began to run in 2003, when the HOA received a copy of the Glick Report. The Court of Appeals agreed via unpublished opinion issued March 26, 2014, finding that the statute of limitations on defects in the original renovation construction began to run in April 2003 when the HOA received a copy

¹ All but one of these class members had rotated off the HOA's board by 2011.

of the Glick Report and, thus, the statute expired in April 2006, making the Water Intrusion Lawsuit time-barred.

In February 2014, almost three years after Judge Young's initial summary judgment orders in the Water Intrusion Lawsuit, a home inspection conducted in relation to the sale of one of the units revealed structural deficiencies in the crawlspace under the Main Building, and these defects were later confirmed by a structural engineer. In response, the HOA filed a lawsuit on November 4, 2014, styled 3 Chisolm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc., Chisolm Street Partners, LLC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue, John W. Wilcox, III, Austin Dillon Cook Engineering, Inc., and John Doe #1, 2014-CP-10-6805, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Foundation Defects Lawsuit"). The defendants moved for summary judgment, arguing that the Foundation Defects Lawsuit was barred by the statute of limitations because, in accordance with Judge Young's and the Court of Appeals' holdings in the Water Intrusion Lawsuit, the HOA's receipt of the Glick Report in 2003 started the running of the statute of limitations on all defects related to the original conversion construction, which would include the defects being claimed in the Foundation Defects Lawsuit. In response, the HOA argued that it did not have notice (constructive or actual) of the foundation defects until February 2014, making its November 2014 filing of the Foundation Defects Lawsuit timely. The HOA submitted the affidavit of Myles Glick, which stated that his 2003 inspection and report were related to above-grade water intrusion issues only, not to any structural issues or potential problems in the crawlspace. Glick swore that he did not advise the HOA to undertake a structural analysis of any of the buildings and that neither he nor the HOA were on notice of any structural defects in the foundations or crawlspaces in 2003. Glick said that, even if the HOA

had commissioned the forensic examination that his 2003 report recommended, that forensic examination would not have included an examination of the crawlspaces and would not have uncovered any defects therein. While the summary judgment motions were pending in the Foundation Defects Lawsuit, the HOA (including members of the Plaintiffs' class) voluntarily agreed to a settlement. There was never an adjudication of whether the statute of limitations had expired on the Foundations Defect Lawsuit.

Now, in a third lawsuit filed January 2, 2015, 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.

STANDARD

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). SCRCP 56(e). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

While the HOA asserts that it timely filed the Foundation Defects Lawsuit (and thus was not negligent), it does not ask the Court to decide that issue here. Instead, the HOA argues that if Plaintiffs are correct that the Glick Report triggered the statute of limitations to begin to run on both the Water Intrusion Lawsuit and the Foundation Defects Lawsuit, then Plaintiffs must have failed to file *this case* within the statute of limitations because everyone knew, more than three years before this suit was filed, that the HOA might have filed the Water Intrusion Lawsuit too late. The HOA argues that Plaintiffs' class members were placed on actual and/or constructive notice that the HOA may have been negligent in failing to timely file suit: (1) in or around January 2008, when one of the Water Intrusion Lawsuit defendants notified the then-HOA board (which was made up entirely of individuals who are now members of the Plaintiffs' class) that the claims against it were barred by the statute of limitations and advised the class members that they may have a negligence case against the HOA for failing to timely file suit; and/or (2) on June 9, 2011, when Judge Young issued his orders finding that the HOA failed to timely file suit. Therefore, the HOA argues that the Plaintiffs' January 2, 2015 filing of this case was untimely. The crux of Plaintiffs' claim of negligence against the HOA is that, even though nobody knew of any problem with the foundations until February 2014, the foundation defects were, should have been, or could have been part of the Water Intrusion claim, so the HOA was too late in filing the Foundation Defects Lawsuit because it was too late in filing the Water Intrusion Lawsuit. The HOA argues that if this is so, then the same principle applies to this suit: The Plaintiffs knew by 2008, or at least by June 9, 2011, that the HOA might have missed the statute of limitations, so this suit had to be filed no later than June 9, 2014.

The Plaintiffs on the other hand argue that the statute of limitations did not begin to run on this case until March 26, 2014 (when the Court of Appeals affirmed Judge Young's ruling) or until January 22, 2015 (when the HOA levied a special assessment on its members to pay for the cost of repairs to the foundations). Therefore, Plaintiffs argue that their January 2, 2015 filing of this case was timely.

The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); Dean v. Ruscon Corp., 321 S.C. 360, 363, 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."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."). The statute of limitations can be triggered despite the fact that the injured party may not comprehend the full extent of the damage or may not have developed a full-blown theory of recovery. Dean, 321 S.C. at 364, 468 S.E.2d at 647. "The date on which discovery should have been made is an objective, not subjective, question." Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). As Plaintiffs correctly cite, a statute of limitations begins to run at the time the cause of action accrues. King v. James, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). "A cause of action accrues at the

moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose.” Bergstrom v. Palmetto Health All., 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004), quoting Stephens v. Draffin, 327 S.C. 1, 4–5, 488 S.E.2d 307, 309 (1997); McAlhany v. Carter, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), aff’d, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). A cause of action accrues when the defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989). “The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule).” Doe v. Bishop of Charleston, 407 S.C. 128, 140, 754 S.E.2d 494, 500 (2014), quoting Kreutner, 320 S.C. at 285, 465 S.E.2d at 90.

Here, Plaintiffs’ sole claim against the HOA is one of negligence. Therefore, it accrued at the moment the alleged negligent conduct caused some injury, or when a reasonable person would have been put on notice that they had a claim against the HOA. Doe, 407 S.C. at 140, 754 S.E.2d at 500. Plaintiffs acknowledge in their Return that the HOA’s alleged negligent act for which Plaintiffs are seeking damages was “failing to file suit against renovators² within the applicable statute of limitations.” Therefore, Plaintiffs’ action against the HOA accrued when Plaintiffs knew or should have known that the HOA failed to timely file suit. Plaintiffs were damaged then, even though the amount of damage would not be quantified until later. Plaintiffs could have sued as soon as they suffered any damage, which was as soon as they knew or should have known that the HOA

² Plaintiffs defined “renovators” as “the general contractor and various sub-contractors that performed the 2002 renovation of the condominiums.”

might have failed to timely file suit. Under Plaintiffs' theory that the 2003 Glick Report triggered the statute of limitations for both the Water Intrusion Lawsuit and the Foundation Defects Lawsuit, 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.

Plaintiffs are incorrect that their claim did not accrue until the Court of Appeals issued its March 26, 2014 opinion affirming Judge Young's rulings. Plaintiffs incorrectly contend that it could not have filed suit against the HOA until then, because it was not until then that the HOA's liability was conclusively established. Plaintiffs suffered damage as soon as the HOA missed the statute of limitations, even though the extent of the damage continued to evolve with subsequent events, including the affirmance by the Court of Appeals.

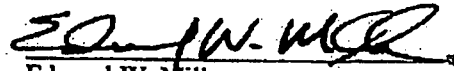
For the same reason, Plaintiffs are also incorrect that their negligence claim against the HOA did not accrue until January 22, 2015, when Plaintiffs claim they were "first damaged" by the HOA's levying of the special assessment. As an initial matter, Plaintiffs filed this case on January 2, 2015, which is before it even accrued, according to them. Plaintiffs are also incorrect because they did not have to wait until all of their damages were established before filing suit. See Bergstrom, 358 S.C. at 397, 596 S.E.2d at 46 ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose."). Plaintiffs could have filed suit before all of its damages occurred or were discovered. Grooms, 298 S.C. at 402, 380 S.E.2d at 857. Plaintiffs certainly did not have to wait until all of their damages were established and billed to them before filing suit, as they now claim in

this argument. Plaintiffs reasonably should have known that the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit would have to be repaired or remediated at some point and that the HOA would necessarily have to acquire those funds through its assessment process from the Plaintiffs. In any event, Plaintiffs knew that they had suffered some damage to their claims against the renovators as soon as they were aware that the HOA might have missed the statute of limitations. This undeniably occurred more than three years before Plaintiffs filed this suit.

The HOA argues, in the alternative, that Plaintiffs' claim is governed by the statute of limitations found in the South Carolina Nonprofit Corporations Act of 1994, which provides that Plaintiffs' case must have been commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code, Ann. § 33-31-830(f). The South Carolina Court of Appeals has held, in an unpublished opinion, that the Nonprofit Corporations Act applies not only to claims against individual directors of a nonprofit corporation, but also to claims against the corporation. Smith v. Dockside Ass'n, Inc., No. 2005-UP-139, 2005 WL 7083482, at *4-5 (S.C. Ct. App. Feb. 28, 2005). This is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself. Indeed, Steven Bernard, one of the individually-named Plaintiffs and the appointed class representative, testified that this case is against both the HOA and its directors. This Court need not decide which statute applies. Based on the Court's rulings above, the statute of limitations expired before Plaintiffs filed this suit, regardless of whether the Court applies §33-31-820(f)'s statute of limitations of §15-3-505's, with the discovery rule. Even a three-year statute of limitations with the discovery rule would have expired in either January 2011 or June 2014, prior to Plaintiffs filing this case in January 2015.

IT IS HEREBY ORDERED THAT:

Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' case is dismissed in its entirety.



Edward W. Miller
Presiding Judge, Ninth Judicial
Circuit

November 22 2018

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2015-CP-10-0020

Plaintiffs,)

v.)

3 Chisolm Street Homeowners)
Association, Inc.,)

Defendant.)

**ORDER DENYING PLAINTIFFS'
MOTION TO ALTER OR AMEND ORDER**

FILED
JULIE J. ARSHIST
CLERK OF COURT
JUN 21 AM 11:55

This matter is before this Court on the Plaintiffs' Motion to Alter or Amend Order filed December 17, 2018. After careful consideration of the Plaintiffs' motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded. Accordingly, this Court hereby denies Plaintiffs' motion. In addition, pursuant to Rule 59(f), SCRPC, the Court is of the opinion that oral argument is not necessary and thereby decides this motion on the written record and submissions filed by the parties.

On December 7, 2018, this Court issued an Order granting the Defendant's Motion for Summary Judgment based upon the expiration of the statute of limitations. The Court ruled that the Plaintiff's negligence action against the Defendant 3 Chisolm Street Homeowners Association, Inc. ("HOA") is time barred regardless of whether the applicable statute of limitations is S.C. Code Ann. § 33-31-820(f) or S.C. Code Ann. § 15-3-530(5). In their Rule 59(e) motion, the Plaintiffs are critical that the Court even considered the timeliness of the filing of their Complaint under S.C. Code Ann. § 15-3-530(5). The Plaintiffs insist that the HOA did not raise S.C. Code Ann. § 15-3-530(5) as a basis for dismissal until the filing of its reply memorandum, and as a result, they

claim to be prejudiced in opposing a statute of limitations defense pursuant to S.C. Code Ann. § 15-3-530(5). This Court disagrees. The record reflects that the Plaintiffs raised and fully discussed S.C. Code Ann. § 15-3-530(5) and the application of the discovery rule in its opposition memorandum filed October 16, 2018. In fact, in that memorandum, the Plaintiffs write: "The statute of limitations that applies to the instant case is S.C. Code § 15-3-530(5)." Therefore, the Plaintiffs cannot reasonably object to the HOA's discussion of S.C. Code Ann. § 15-3-530(5) on reply or that this Court examined and addressed the application of S.C. Code Ann. § 15-3-530(5) in ruling on the summary judgment motion. The Plaintiffs have not been legally prejudiced.

In their Rule 59(e) motion, the Plaintiffs also argue that this Court failed to properly apply the holding in *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). This Court disagrees for several reasons.

First, 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. 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").

Second, *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, the Supreme 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. The Supreme 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 Plaintiffs are suing the HOA, not any attorneys. Thus, the

accrual rule in *Stokes-Craven* has no applicability to the present case.

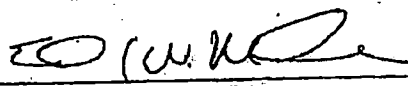
Third, in its recent decision in *Personal Care, Inc. v. Theos*, Op. No. 5628 (S.C. Ct. App. filed February 20, 2019), the Court of Appeals ruled – in a legal malpractice action – that the *Stokes-Craven* accrual rule does not apply where the cause of action is not predicated on an adverse judgment. 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.” 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, 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 Plaintiffs’ claim against the HOA is not predicated on an adverse judgment. In fact, the Plaintiffs do not allege as a basis for their 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 this Court described in its Order, the Plaintiffs allege in their 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.” (Order filed December 7, 2018, p. 5). As this Court has already 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.

Moreover, even if the *Stokes-Craven* accrual rule does apply to this case, it would have no bearing on the application of the statute of limitations set forth in S.C. Code Ann. § 33-31-820(f). As addressed in the Order filed December 7, 2018, this Court reiterates that S.C. Code Ann. § 33-31-820(f) is applicable to claims brought against a nonprofit corporation and thus bars the

Plaintiffs' negligence claim against the HOA.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion to Alter or Amend Order is hereby denied.

AND IT IS SO ORDERED.


EDWARD W. MILLER
Presiding Circuit Court Judge,
Ninth Judicial Circuit

June 19, 2019

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STEVEN M. BERNARD AND
DEBORAH J. BERNARD, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,,

Plaintiff(s)

vs.

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Defendant(s)

Submitted By: W. Andrew Gowder, Jr. & Thomas P.
Gressette, Jr.
Address: 16 Charlotte Street
Charleston, SC 29403

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 10-0020

SC Bar #: 7895 & 14065

Telephone #: 843-727-2229

Fax #: 843-727-2231

Other:

E-mail: wag@p-tw.com & tpg@p-tw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20--CF-- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Stander/Label (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☒ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predation (610)		

Submitting Party Signature:

W. Andrew Gowder, Jr.

Date:

1.2.15

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STEVEN M. BERNARD AND
DEBORAH J. BERNARD, ON BEHALF OF
THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

vs.

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,
Defendant.

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

SUMMONS
(Jury Trial Demanded)

FILED
2015 JAN -2 PM 3:32
JULIE J. ARMSTRONG
CLERK OF COURT

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the complaint upon the subscribers at their offices at 16 Charlotte Street, Charleston, South Carolina 29403, within (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint and judgment by default will be rendered against you.

Respectfully submitted,

By: W. Andrew Gowder

W. Andrew Gowder (SC Bar # 7895)

Email: wag@p-tw.com

Direct: 843-727-2229

Thomas P. Gressette, Jr. (SC Bar #14065)

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PRATT-THOMAS WALKER, P.A.
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Charleston, SC 29412-2247
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Attorneys for the Plaintiffs

Charleston, South Carolina
January 2, 2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STEVEN M. BERNARD AND
DEBORAH J. BERNARD, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,
Plaintiffs,

vs.

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,
Defendant.

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10- 6020

COMPLAINT
(Jury Trial Demanded)

FILED
2015 JAN -2 PM 3:32
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiffs, individually and as class representatives for all other others similarly situated, complaining of the Defendant herein, would respectfully show unto this Court as follows:

PARTIES AND JURISDICTION

1. Plaintiffs Steven M. Bernard and Deborah J. Bernard are a married couple residing at 3 Chisolm Street, Unit 405, Charleston, South Carolina 29401.
2. Plaintiffs Steven M. Bernard and Deborah J. Bernard are citizens of the State of South Carolina, and residents of Charleston County, South Carolina.
3. Plaintiffs Steven M. Bernard and Deborah J. Bernard own a residential condominium unit, Unit Number 405 in 3 Chisolm Street Horizontal Property Regime, as is documented by the Title to Real Estate recorded at the office of the Register of Mesne Conveyance, Charleston County, State of South Carolina, at Book 229 at Page 495.
4. Plaintiffs Steven M. Bernard and Deborah J. Bernard bring this action in their individual capacity and on behalf of all others similarly situated (the "Plaintiff

- Class") (collectively "Plaintiffs"), and all allegations contained herein are made in both capacities.
5. The Plaintiff Class consists of all the owners of residential condominium units at 3 Chisolm Street in Charleston, South Carolina.
 6. The Defendant, 3 Chisolm Street Homeowners Association, Inc., is a South Carolina non-profit corporation established pursuant to the Master Deed Establishing 3 Chisolm Street Horizontal Property Regime ("Master Deed").
 7. The Master Deed is recorded at the Office of the Register of Mesne Conveyance, Charleston County, State of South Carolina, at Book V390 at Page 659.
 8. By virtue of its governing documents, the Defendant 3 Chisolm Street Homeowners Association, Inc. ("HOA") is charged with certain duties, powers, rights and obligations in connection with the condominium units of and the common areas of 3 Chisolm Street Horizontal Property Regime.
 9. Specifically, the HOA is charged with, *inter alia*, the management and administration of 3 Chisolm Street Horizontal Property Regime, including the maintenance and repair of all common elements and limited common elements of 3 Chisolm Street Horizontal Property Regime.
 10. The management and administration duties of the HOA include the inspection of, maintenance of, and investigation of potential problems with the three buildings located at 3 Chisolm Street.

11. The registered agent for service upon Defendant 3 Chisolm Street Homeowners Association, Inc. is Sentry Management, Inc. located at 4925 Lacross Road, North Charleston, South Carolina 29406.

FACTUAL ALLEGATIONS

12. This is a matter within the subject matter jurisdiction of the Court, the Court has jurisdiction over the parties, and venue is appropriate in this Court.
13. The former site of a school and gymnasium, 3 Chisolm Street is a residential condominium complex located in downtown Charleston and consisting of three separate buildings.
14. On or about 2000 through 2002, the three buildings located at 3 Chisolm Street (main, gymnasium, and cottage) (collectively "the Structures") were renovated and converted to residential condominiums.
15. At the conclusion of the renovation, a Certificate of Occupancy was issued for the Structures on June 28, 2002.
16. The Master Deed established a total of twenty-six (26) units in the Structures: nineteen (19) in the Main Building, six (6) in the Gymnasium Building, and one (1) in the Cottage.
17. Beginning in late 2002 and/or 2003, condominium unit owners began to complain about condensation on the windows and moisture intrusion.
18. To investigate the complaints regarding the windows and water intrusion issues, the HOA hired Myles Glick, a forensic architect, Thomas Carlson of Calibogue Construction, a general contractor, and Joe Dapore, an attorney.

19. An inspection was performed on January 30, 2003, and in April 2003, Myles Glick issued a report ("the Glick Report") on the results of his investigation. The Glick Report noted, among other things, significant and pervasive deficiencies at the Structures, including condensation on the windows, moisture intrusion at the windows, and stucco cracks in the courtyard.
20. The Glick Report recommended documenting the construction deficiencies through destructive testing and recommended the HOA obtain a more complete forensic report analyzing and addressing any other potential problems with the Structures. The Glick Report also suggested that the HOA seek legal counsel regarding the known issues and the need to further investigate potential problems with the Structures.
21. The Board of the HOA in May and June of 2003 acknowledged the need to investigate all three buildings constituting the Structures to determine the full extent of damage.
22. At that time, the HOA was on notice that its forensic architect and general contractor believed there were significant and pervasive construction defects associated with the Structures, and the HOA was urged to have all three buildings associated with the Structures inspected to determine the scope of the alleged problems.
23. 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 claim might exist. However, instead of acting in a reasonably diligent manner, the HOA ignored for almost

four years the HOA's own experts' recommendations that all three buildings be inspected.

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 of 2006.

27. The HOA failed to file an action prior to April of 2006.

28. After almost another three full years, on January 16, 2009, the HOA filed an action to recover for alleged construction defects in the Structures (the "Construction Litigation").

29. Contrary to the recommendations of its own forensic architect, which was informed by input from a general contractor and its property manager, the HOA waited over four years to have any of the buildings inspected. The HOA waited six and one-half years to have the Main Building fully inspected (almost a year after it initiated the Construction Litigation), and it waited over seven years to have the stucco issues visually reexamined (almost two years after filing its complaint in the Construction Litigation).

30. In October of 2010, George Davidson, president of the HOA, testified in the Construction Litigation that the building problems at issue in the Construction Litigation were consistent with those noted in the 2003 Glick Report.
31. After a series of hearings and oral arguments in the Construction Litigation regarding a motion for summary judgment and the HOA's Motion to Reconsider, Alter or Amend Judgment, on January 10, 2012, the Honorable Roger M. Young, presiding Circuit Court Judge, issued an Order Granting Defendant Genoa Construction Services, Inc.'s Motion for Summary Judgment (the "January 10, 2012, Order").
32. The January 10, 2012, Order contains numerous findings of fact, including that the Defendant herein failed to act "in a reasonably diligent manner" by making a "decision to avoid any attempt to discover defects and claims" in the Structures thereby unconscionably and incompetently failing to protect the Plaintiffs herein.
33. Because the HOA failed to follow the instructions of Myles Glick, the Glick Report, Mike Parades, and George Carlson, the recommended forensic examination of all three Structures was never conducted.
34. Because the recommended forensic examination was not conducted, the HOA did not inspect the foundations of the Structures.
35. In approximately October 2014, the Plaintiffs learned of problems with the foundation of the Structures.
36. When the Structures were originally constructed, the foundations were built using rebar encased in concrete. However, the concrete is now spalling, which

means it is flaking and disintegrating thereby exposing the steel supports within the concrete.

37. Spalling of concrete in foundations like those in the Structures creates a hazard that must be remedied so as to avoid problems with structural integrity of the entire building.

38. The spalling issues are pervasive throughout the main building and could extend to all Structures.

39. Had the previously recommended inspections been conducted in or about 2003 when recommended, the deficiency of the foundation would have been discovered.

40. Because the recommendation for further action, including further inspections, was not followed, the defects in the foundation were not discovered and the foundation continued to deteriorate.

41. Without the knowledge that would have been gained from the recommended inspection, the foundation deficiencies went undetected.

42. The current owners of each unit now face an assessment for repairs of the foundation. The total estimated work to repair the foundation may be in excess of \$2,500,000, resulting in an assessment to be applied to each and every unit owner of more than \$100,000.

CLASS ALLEGATIONS

43. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure, the Plaintiffs Steven M. Bernard and Deborah J. Bernard bring this action both individually and as a proposed class

action against the Defendant on behalf of themselves and on behalf of all other similarly situated persons and entities that own condominium units at 3 Chisolm Street.

44. The Class of Plaintiffs in this action, then, includes all persons and/or entities that own a condominium unit at 3 Chisolm Street ("the Class").

45. As representatives of the Class and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, the Plaintiffs seek to recover monetary damages from the Defendant on behalf of themselves and on behalf of the Class.

46. The Class is so numerous that joinder of all members is impractical. There are 26 units in the 3 Chisolm Street Horizontal Property Regime, per the Master Deed, and many of these units have co-owners which increases the number of individuals and entities included within the Class.

47. There are questions of law or fact common to the Class, including, but not limited to:

- a. the duties of the defendant HOA to the members of the Class;
- b. the breach of duties owed by the HOA to the members of the Class;
- c. the Defendant HOA's liability for failing to act on the advice of experts, including Myles Glick, to obtain a more complete forensic report addressing any potential issues with the Structures;
- d. the Defendant HOA's liability for failing to act on the advice of experts, including Myles Glick, to seek legal counsel regarding any potential issues with the Structures;

- e. the Defendant HOA's liability for failing to engage in other inspections or investigations related to the Structures;
- f. the Defendant HOA's liability for failing to properly select employees capable of completing the tasks required to protect the common property and interests of the HOA;
- g. the Defendant HOA's liability for failing to properly supervise its employees charged with completing the tasks required to protect the common property and interests of the HOA;
- h. the Defendant HOA's liability for failing to properly advise the HOA members of the events, occurrences, advice from experts, and decisions of the Defendant HOA;
- i. the Defendant HOA's liability for failing to use that degree of care an ordinary and prudent HOA and HOA Board of Directors would have used under the same or similar circumstances; and
- j. the damage caused by the HOA's actions and inactions to each member of the Class.

48. These common questions of law and fact exist as to all members of the Class and predominate over questions, if any, affecting only individual members of the Class.

49. Claims of the representative parties are typical of the claims of the Class in that pursuant of the Master Deed, all units and their owners have an equal interest and responsibility for assessments.

50. The representative Plaintiffs will fairly and adequately protect the interests of the Class as required by law.

51. The Plaintiffs have engaged qualified counsel to vigorously prosecute this action, and counsel has committed the financial resources to do so.

52. Neither Plaintiffs nor the undersigned counsel have any interest adverse to those of the Class.

53. This action is appropriate for class certification because questions of law and fact common to the members of the Class predominate over questions, if any, affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy, because, among other things, individual joinder of all members of the Class is impracticable.

54. Should individual Class Members be required to bring separate actions for the claims alleged herein, as opposed to proceeding as a class action, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments.

55. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this Class Action presents far fewer management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single court of the Class.

56. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice vis-a-vis each class member.
57. Class certification is appropriate under applicable law in that the Defendant acted and/or refused to act in manners that apply generally to the Class, thus warranting the requested relief.
58. All members of the Class have the same legal right to and interest in redress for damages associated with the Structures at 3 Chisolm Street, the HOA's actions and inactions, as well as all other claims addressed in this action.
59. The likely costs of litigation, including the costs for engineers and other experts, make it too difficult for each member of the Class to proceed with individual litigation.
60. The Plaintiffs Steven M. Bernard and Deborah J. Bernard envision no unusual difficulty in the management of this action as a class action.
61. The amount in controversy for each member of the Class exceeds One Hundred Dollars (\$100.00).
62. A definable Class exists, the named representatives are members of that Class, and the claims of the Class are not moot.

CAUSES OF ACTION
(Breach of Duty / Negligence / Gross Negligence)

63. The Plaintiffs reallege each and every preceding allegation as if fully set forth herein.
64. Defendant owed a duty to Plaintiffs to manage and administer the business affairs of the HOA in a prudent, diligent, and capable manner and to protect

the HOA's interests, thereby protecting the interest of each member of the HOA.

65. Defendant breached its duty and was negligent, grossly negligent, and reckless in the following ways:

- a. failing to act on the advice of experts, including Myles Glick, to obtain a more complete forensic report addressing any potential issues with the Structures and to seek legal counsel regarding the issues;
- b. failing to engage in other inspections or investigations related to the Structures;
- c. failing to properly select and supervise employees capable of completing the tasks required to protect the common property and interests of the HOA;
- d. failing to properly advise the HOA members of the events, occurrences, advice from experts, and decisions of the Defendant; and
- e. failing to use that degree of care an ordinary and prudent HOA and HOA Board of Directors would have used under the same or similar circumstances.

66. These actions and failures to act are unconscionable, are evidence of a lack of good faith, and demonstrate incompetence.

67. The Defendant did not act in good faith in making these decisions to act and/or not to act.

68. The Defendant's actions and failures to act were both incompetent and unconscionable.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Steven M. Bernard and Deborah J.
Bernard, on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

3 Chisolm Street Homeowners
Association, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

FILED
2015 MAR -5 PM 4:42
JAMES J. ARMSTRONG
CLERK OF COURT

DEFENDANT'S MOTION TO DISMISS

TO: W. ANDREW GOWDER AND THOMAS P. GRESSETTE, JR., ATTORNEYS FOR
THE PLAINTIFFS

PLEASE TAKE NOTICE that the Defendant 3 Chisolm Street Homeowners Association, Inc. (hereinafter "Defendant"), by and through its undersigned counsel, will move before the Presiding Judge of the Ninth Judicial Circuit, at such time and place as counsel may be heard, for an Order dismissing Plaintiffs' Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

INTRODUCTION

The Plaintiffs Steven M. Bernard and Deborah J. Bernard are members of the Defendant Homeowners Association. The members of the Plaintiffs' putative class are also all members of the Defendant Homeowners Association. The Plaintiffs have brought this action against the Defendant Homeowners Association alleging that Defendant breached its duty of care to the Plaintiffs by failing to act on the advice of certain experts who were previously retained by the Defendant to investigate certain alleged construction defects at the 3 Chisolm Street condominium complex (hereinafter "3 Chisolm Street"). More specifically, the Plaintiffs allege that Defendant failed to

follow its expert's 2003 recommendation to obtain a more complete forensic investigation of 3 Chisolm Street. Plaintiffs allege that, because of this failure, Plaintiffs did not discover certain foundation defects at 3 Chisolm Street until October 2014. However, as will be shown below, Plaintiffs' Complaint admits that Defendant actually did obtain the more complete forensic investigation that Plaintiffs also claim that it didn't. Further, this case is not ripe because of a lawsuit currently pending in the Charleston County Court of Common Pleas wherein the Defendant, to include the Bernard Plaintiffs and their putative class members, sued certain construction defendants alleging negligence resulting in the very foundation defects that the Plaintiffs here claim the Defendant is somehow responsible for. Finally, Defendant asserts that this matter is barred by the applicable statute of limitations. For these reasons, as will be more fully discussed below, Defendant requests that this Honorable Court dismiss the Plaintiffs' Complaint in its entirety.

FACTS IN COMPLAINT¹

3 Chisolm Street is a condominium complex that consists of three separate buildings (the Main Building, the Gymnasium Building, and the Cottage) which hold a total of twenty-six individual living units. Compl. ¶ 16. Plaintiffs allege that in late 2002 and/or 2003, the members of the Defendant began to complain about moisture intrusion and condensation on their windows. Compl. ¶ 17. Plaintiffs allege that, in response to these complaints, Defendant hired Myles Glick, a forensic architect, Thomas Carlson, a general contractor, and Joe Dapore, an attorney, to investigate potential construction defects leading to the condensation and water intrusion on the windows at 3 Chisolm Street. Compl. ¶ 18. Plaintiffs allege that, after inspections in January and April 2003, Myles Glick issued a report (hereinafter the "2003 Glick Report") noting certain construction defects at 3 Chisolm Street resulting in condensation and water intrusion at the windows. Compl. ¶

¹ For the purposes of this Motion to Dismiss, the facts as alleged in the Complaint must be viewed in a light most favorable to the Plaintiffs. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

19. According to the Plaintiffs, the 2003 Glick Report recommended destructive testing and a more complete forensic investigation and report analyzing and addressing any other potential problems with 3 Chisolm Street. Compl. ¶ 20. Plaintiffs allege that, instead of taking the advice of its expert, Defendant ignored such advice for almost four years before having the recommended additional inspection performed. Compl. ¶ 23. Importantly, Plaintiffs admit that, following the 2003 Glick Report, the Defendant did in fact cause three additional forensic inspections to be performed on 3 Chisolm Street, but not until 2007, 2009, and 2010. Compl. ¶ 29.

On January 16, 2009, almost six years after the 2003 Glick Report, Defendant filed a lawsuit to recover the costs to repair the window defects noted in the 2003 Glick Report (hereinafter the "Windows Defects Action"). Compl. ¶ 28. As a result, Plaintiffs allege that the Circuit Court granted summary judgment to the defendants in the Windows Defects Action, finding that the applicable statute of limitations barred the Windows Defects Action because the Defendant knew or should have known of the window defects in 2003, but failed to file suit until 2009. Compl. ¶¶ 31-32.

Plaintiffs' Complaint next alleges that in October 2014, Plaintiffs learned of defects with the foundation at 3 Chisolm Street. Compl. ¶ 35. Plaintiffs allege that, "[b]ecause the recommended forensic examination was not conducted, the HOA did not inspect the foundation of [3 Chisolm Street]." Compl. ¶ 34. Specifically, Plaintiffs allege that the foundations of the three buildings at 3 Chisolm Street were constructed using rebar encased with concrete, but that the concrete is now disintegrating, or spalling, thereby exposing the steel supports and creating a hazard that must be remedied. Compl. ¶¶ 36-37. Plaintiffs allege that, "[h]ad the previously recommended inspections been conducted in or about 2003 when recommended, the deficiency of the foundation would have been discovered." Compl. ¶ 39. Plaintiffs allege that because no further inspections were made, the

foundation defects were not discovered and continued to deteriorate. Compl. ¶ 40. The Plaintiffs allege the owner of each unit at 3 Chisolm Street now faces an assessment of more than \$100,000, to offset the total estimated cost of \$2,500,000 to repair the foundation defects. Compl. ¶ 42.

THE FOUNDATION DEFECTS ACTION

On November 4, 2014, Defendant filed a construction defects action styled 3 Chisolm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc., Chisolm Street Partners, LLC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue, John W. Wilcox, III, Austin Dillon Cook Engineering, Inc., and John Doe #1, 2014-CP-10-6805, in the South Carolina Court of Common Pleas, Charleston County (hereinafter the "Foundation Defects Action"). A copy of the Complaint in the Foundation Defects Action is attached hereto as Exhibit A. In the Foundation Defects Action, Defendant sued the developer, general contractor, and engineer of 3 Chisolm Street, alleging that the foundation "is deteriorated and damaged to include exposed and failing steel beams, corroded steel, spalled concrete, cracked concrete, deteriorated steel hangers, and similar conditions." See Exhibit A ¶ 20. As of the filing of this Motion, only defendant Austin Dillon Cook Engineering has responded to the Foundation Defects Action by filing an Answer. Notably, no defendants have moved to dismiss the Foundation Defects Action based on the statute of limitations or the ruling in the Windows Defects Action.

ARGUMENT

I. **THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE, WHEN READ ON ITS FACE, IT FAILS TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE DEFENDANT**

The crux of the Plaintiffs' claim in this action is that the Defendant failed to commission the additional forensic inspections that were recommended by its own expert in the 2003 Glick Report.

Plaintiffs claim that, had these inspections been performed, the Plaintiffs would have discovered the foundation defects before they did.

However, Plaintiffs' Complaint admits that the Defendant did the exact thing that the Plaintiffs now claim it was negligent for failing to do: perform additional forensic examination. These allegations are contained in two separate places in the Plaintiffs' Complaint. In Paragraph 23, Plaintiffs allege that Defendant "ignored for almost four years the [Defendant's] own experts' recommendations that all three buildings be inspected." (emphasis added). Next, in Paragraph 29, Plaintiffs allege that Defendant "waited over four years to have any of the buildings inspected. [Defendant] waited six and one-half years to have the Main Building fully inspected (almost a year after it initiated the [Windows Defects Action]), and it waited over seven years to have the stucco issues visually reexamined (almost two years after filing its complaint in the [Windows Defects Action])."

To be clear, the Defendant's negligent act, according to the Complaint, is that it never conducted the additional recommended forensic inspections, as opposed to inspecting too late. See Compl. ¶¶ 33, 34, 40, 41. The plain language of the Complaint admits that Defendant did actually follow the advice of its expert and caused additional forensic inspections to be performed. Accordingly, Plaintiffs' Complaint fails to assert facts sufficient to constitute a cause of action against Defendant and, therefore, must be dismissed.

II. THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS NOT RIPE

"Before any action can be maintained, there must exist a justiciable controversy. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Justiciability encompasses several doctrines, including ripeness, mootness, and standing." James

v. Annie's, Inc., 390 S.C. 188, 192, 701 S.E.2d 730, 732 (2010) (internal citations and quotations omitted).

In determining a ripeness issue, courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. Waters v. S. Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996); Tracy v. Tracy, 384 S.C. 91, 99, 682 S.E.2d 14, 18 (Ct. App. 2009).

In Tracy v. Tracy, husband filed a rule to show cause against wife, arguing that wife violated the divorce order which required her to be responsible for 100% of the couples' joint tax liability for the years 2004 and 2005. 284 S.C. at 94, 682 S.E.2d at 15-16. Husband argued that, because wife negotiated an Offer in Compromise with the IRS, by which she did not pay the full tax liability, husband may be liable to pay the difference to the IRS. Id. The Court found husband's claim in this regard was not ripe because husband "has not been exposed to any liability at this time as a result of [wife's] entering into the OIC. Furthermore, any claim [husband] may have is contingent upon [wife's] nonpayment." Id. at 100, 682 S.E.2d at 18.

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 the part of Defendant. In fact, the Foundation Defects Action has been pending

for some time and no defendant therein has moved for dismissal. Just as in Tracy, Plaintiffs have not yet been exposed to any liability in this case, making it not ripe.

Further, using the two-factor test espoused in Waters v. S. Carolina Land Res. Conservation Comm'n, Plaintiffs' case is not ripe because (1) it is not fit for judicial decision and (2) there would be no hardship on the Plaintiffs if the court dismisses this case. 321 S.C. at 227-28, 467 S.E.2d at 917-18. Specifically, this case is not fit for judicial determination because its damages will not be ascertainable until the Foundation Defects Action is disposed of. If the Defendant recovers in the Foundation Defects Action, it will recover the cost to repair the foundation defects and there will be no assessment levied on the Plaintiffs, and thus, no damages in this case. Further, there would be no hardship on Plaintiffs for dismissing this action now because, should the Foundation Defects Action be dismissed because of the Defendant's failure to act in a reasonably diligent manner, Plaintiffs may then choose to pursue a claim against Defendant.

Accordingly, Plaintiffs' claim is not ripe and, therefore, this action must be dismissed.

III. THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

Defendant is a South Carolina Nonprofit Corporation (Compl. ¶ 6) and thus is governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq.* The statute of limitations provided for in the South Carolina Nonprofit Corporation Act of 1994 for claims against a Nonprofit Corporation, or its directors, states that such action must be commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f).

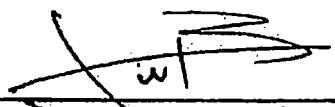
As an initial matter, Defendant recognizes that the plain language of § 33-31-830 applies to actions against directors of a Nonprofit Corporation. This matter has been brought against the Defendant corporation itself, and not against any of its individual directors. However, the South Carolina Court of Appeals found that § 33-31-830 applies not only to claims against individual directors of a nonprofit corporation, but also to claims against the corporation itself. Smith v. Dockside Ass'n, Inc., No. 2005-UP-139, 2005 WL 7083482, at *4-5 (S.C. Ct. App. Feb. 28, 2005). The Smith Court specifically noted that a corporation can only act through its directors, so application of the standards governing a corporation's directors also apply to the corporation itself. Id. Accordingly, the statute of limitations found in § 33-31-830(f) applies here.

The alleged negligent act that Plaintiffs complain of is Defendant's failure to appropriately react to the 2003 Glick Report by commissioning further inspections of 3 Chisolm Street. This failure began in 2003 and, according to § 33-31-830(f), an action based on this failure must have been filed within three years after this failure -- sometime in 2006. Since this action was not filed until 2015, it is barred by § 33-31-830(f).

CONCLUSION

Plaintiffs' only act of alleged negligence plead against Defendant is that Defendant never had 3 Chisolm Street forensically inspected as was advised in the 2003 Glick Report. However, Plaintiffs' Complaint admits that Defendant did in fact commission three separate forensic inspections. Further, since the Foundation Defects Action is currently pending, Plaintiffs' action here is not ripe. Finally, even if viable, this action is time-barred by § 33-31-830(f) of the South Carolina Code. For these reasons, Defendant respectfully requests this Honorable Court dismiss the Plaintiffs' Complaint in its entirety.

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*Attorneys for 3 Chisolm Street Homeowners
Association, Inc.*

MAY 4, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

15-CP-10-20

I hereby certify that a copy of Defendant's Motion to Dismiss has been forwarded to counsel of record via USPS this 4th day of March, 2015 as follows:

W. Andrew Gowder, Jr., Esquire
Thomas P. Gressette, Jr., Esquire
Pratt-Thomas Walker, PA
P.O. Drawer 22247
Charleston, SC 29412-2247

Karen L. Jessee
Karen L. Jessee, Legal Secretary
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FILED
2015 MAR -5 PM 4:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

3 Chisolm Street Homeowners Association, Inc.,

Plaintiff,

v.

Genoa Construction Services, Inc., Chisolm
Street Partners, LLC, Murray School Partners,
LLC, David L. Perdue, A. Rhodes Perdue, John
W. Wilcox, III, Austin Dillon Cook Engineering,
Inc., and John Doe #1,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) Case No.: 2014-CP-10- 6805

AMENDED COMPLAINT

(Jury Trial Demanded)

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FACTUAL ALLEGATIONS

Plaintiff 3 Chisolm Street Homeowners Association, Inc. hereby amends its Complaint filed on November 4, 2014 pursuant to Rule 15(a), SCRPC. This rule allows Plaintiff to amend its Complaint once as a matter of course any time before or within 30 days after a responsive pleading is served. No responsive pleading has been served by any Defendant to date; therefore this Amended Complaint is both timely and proper. Additionally, this Amended Complaint relates back to date of the original pleading (November 4, 2014) pursuant to Rule 15(c), SCRPC.

Plaintiff, complaining of the above-named Defendants, hereby alleges and would show as follows:

PARTIES

1. Plaintiff 3 Chisolm Street Homeowners Association, Inc. is a South Carolina eleemosynary corporation.
2. Plaintiff owns and governs the common elements contained in the condominium horizontal property regime known as the Chisolm Street Condominiums, located at 3 Chisolm



Street in the City of Charleston (Charleston County), South Carolina, as reflected in the Master Deed establishing the 3 Chisolm Horizontal Property Regime recorded in Book V309 beginning at Page 659 in the Charleston County RMC Office (hereinafter referred to as the "condominiums").

3. The condominiums are located on the site of the old Andrew B. Murray Vocational School, and the condominiums were developed by converting the school buildings into condominiums.

4. The condominiums consist of three buildings generally described as a three-story main building, a gymnasium building, and a caretaker building, together with the other common elements contained in the regime as described in the Master Deed.

5. Upon information and belief, Defendant Chisolm Street Partners, LCC is a limited liability company organized and existing under the laws of the State of Georgia.

6. Upon information and belief, Chisolm Street Partners, LCC was a developer of the condominiums.

7. Upon information and belief, Defendant Murray School Partners, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

8. Upon information and belief, Murray School Partners, LLC was a developer of the Chisolm Street Condominiums and acted as the general manager for Chisolm Street Partners, LCC during development of the condominiums.

9. David L. Perdue is, upon information and belief, a resident of the state of Georgia and operated as a manager and member of Murray School Partners, LLC. Further, upon information and belief, David L. Perdue served as one of the original members of the Board of Directors during the time period the board was controlled by the Developer.

10. A. Rhodes Perdue is, upon information and belief, a resident of the state of Georgia and operated as a manager and member of Murray School Partners, LLC. Further, upon information and belief, A. Rhodes Perdue served as one of the original members of the Board of Directors during the time period the board was controlled by the Developer.

11. John W. Wilcox, III is, upon information and belief, a resident of the state of Georgia and operated as a manager and member of Murray School Partners, LLC. Further, upon information and belief, John W. Wilcox, III served as one of the original members of the Board of Directors during the time period the board was controlled by the Developer.

12. Chisolm Street Partners, LCC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue and John W. Wilcox III are sometimes hereinafter individually and collectively referred to as the "Developer Defendants".

13. Upon information and belief, the Developer Defendants purchased the Andrew B. Murray Vocational property, converted and developed the property into condominium units, and then marketed and sold the condominiums to the condominium unit owners who comprise the 3 Chisolm Street Homeowners Association, Inc., or their predecessors.

14. The Developer Defendants formed the 3 Chisolm Street Homeowners Association, Inc. and controlled the Association until turnover.

15. Upon information and belief, Defendant Genoa Construction Services, Inc. ("Genoa") is a limited liability company organized and existing under the law of the State of Georgia.

16. Upon information and belief, Genoa acted as the general contractor for the construction of the condominiums.

17. Upon information and belief, Austin, Dillon, Cook Engineering, Inc. ("ADC")

acted as the structural and civil engineer for the construction of the condominiums. ADC performed an inspection of the infrastructure of the buildings and served as the engineer of record on the construction project. ADC is a for-profit corporation organized and existing under the laws of the State of South Carolina.

18. Defendant John Doe #1 is a fictitious name representing the as-yet unidentified person or entity that acted as a contractor, engineer, or subcontractor during construction of the condominiums.

JURISDICTION AND VENUE

19. This Court has jurisdiction over the parties and subject matter of this action and venue is proper before this Court.

FACTUAL ALLEGATIONS

20. The Chisolm Street condominiums contain significant construction defects and deficiencies related to the infrastructure existing under the ground floor in the crawlspace. Specifically, the infrastructure is deteriorated and damaged to include exposed and failing steel beams, corroded steel, spalled concrete, cracked concrete, deteriorated steel hangers, and similar conditions.

21. The conditions existing in the crawlspace were discovered during a home inspection for an individual unit. This inspection took place on February 3, 2014. This was the first notice to the Plaintiff of any problem with the infrastructure.

22. The Developer Defendants were under a duty to develop, sell, and disclose the condition of the condominiums and to make full, fair, and accurate disclosures to prospective purchasers regarding the condition of the property and the useful life of its common elements and the cost to remedy any code violations.

23. The condominium infrastructure contained construction defects that resulted in ongoing deterioration and failures of the infrastructure and surrounding areas. The Defendants failed to conduct adequate forensic investigation and repairs and failed to issue the appropriately required disclosure documents. The Defendants have committed breaches of fiduciary duties, negligence, gross negligence, recklessness, wantonness, willfulness, breach of warranties, negligent misrepresentation, bad faith, mismanagement, unconscionable conduct, and waste with respect to constructing, engineering, developing, and selling of the buildings and units at issue. These wrongful acts and admissions have caused, and will cause, the Plaintiff to incur and continue to incur substantial money damages.

24. The construction defects have resulted in a systemic failure of the infrastructure, the failure of the surrounding components to the infrastructure, have caused failures to the overall structural integrity of the building, have caused related damage to the common elements to include ongoing cracking, concrete spalling, flooring issues, wall issues, cracked foundation issues, failure of the structural system, and other consequential damage to the common elements and to the interior of the units. Upon information and belief, these adverse events have occurred each and every year since construction and constitute "occurrences" and "property damages" and compensable damage under the standard and/or typical general liability and/or completed operations insurance policies maintained by the Defendants herein; further, the negligence of each Defendant herein has resulted in damage to the work of the others.

25. The contractor, as the entity responsible for constructing, repairing, and converting this building into condominiums, owed the Plaintiff a duty to use as its best judgment, apply the applicable building codes, and complete the project to industry standards. Contractor failed to uphold its responsibilities by failing to adequately investigate, repair, and construct the

infrastructure, thereby allowing its failure.

26. ADC, the structural engineer for this project with responsibility to investigate and oversee the engineering of the construction and repair of the building infrastructure during the conversion to condominiums, owed the Plaintiff a duty to use its best judgment and perform its work according to good engineering practices. ADC failed in its duty. See Affidavit attached hereto as Exhibit A.

27. Developer Defendants created the association and owed the association fiduciary and fiduciary-like duties.

28. Developer Defendants owed a duty to the association to ensure that the common elements were in a good condition at the time they were transferred to the association.

29. The deficiencies and defects should have been aware upon a reasonable investigation at the time the condominiums were constructed by the Defendants.

30. As the result of the defects and deficiencies described above, the condominiums require significant repairs and remediation to avoid potential catastrophic structural failures.

31. Plaintiff has been, and will continue to be, directly and proximately damaged by the construction defects in the condominiums.

32. As a result of the construction defects and the resulting property damage, Plaintiff has incurred, and in the future will incur, significant damages to include professional fees to investigate, identify, and determine the extent of the problems and a determine a plan for repairing the deficiencies, to pay for the repairs, loss of use for those who will be unable to remain in their condominium during repair work, and diminution in value.

FOR A FIRST CAUSE OF ACTION

(Negligence, Negligence *Per Se*, Gross Negligence, Carelessness, Recklessness, Willfulness, and Wantonness as to the Developer Defendants)

33. Plaintiff repeats and incorporates the above paragraphs by reference.

34. Developer Defendants owed a duty of due care to Plaintiff and to purchasers of the condominiums units in overseeing the construction, development, and management of the condominiums.

35. The Developer Defendants breached the duty of due care they owed the Plaintiff and to purchasers of condominium units in failing to investigate, discover, and oversee the construction of the condominium units in that the deficiencies in the infrastructure were never discovered or repaired.

36. The Developer Defendants, by and through their agents, servants, and employees, and individually, undertook and were under a duty to develop, design, repair, construct, and sell the buildings and units in accordance with the building code, construction industry standards and practices, and in accordance with all requirements imposed by laws and statutes of the State of South Carolina.

37. The Developer Defendants were negligent, grossly negligent, reckless, careless, willful, and wanton in developing, building, repairing, constructing, and selling the buildings and units at issue. Such negligence, gross negligence, recklessness, carelessness, willfulness, and wantonness includes, and is not limited to, the following particulars:

- (a) In failing to use due care in development, repair, construction, and sale of the buildings and units at issue;
- (b) In designing, developing, and constructing the condominiums in which the structural integrity of the infrastructure was ignored and allowed the infrastructure to subsequently fail, causing damage throughout the buildings;
- (c) In failing to take required actions to maintain and effect permanent repairs to the property during the construction process;
- (d) In designing, developing, constructing, marketing, and selling units and

buildings constructed and/or repaired in violation of applicable building codes, standard building practices, relevant specifications and accepted construction industry standards and practices;

- (e) In failure to disclose conditions, then existing, of significant infrastructure failures and limitations; and
- (f) Other deficiencies and failures as will be proven at trial.

38. As a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, and wantonness of the Developer Defendants, the Plaintiff has suffered actual, incidental, consequential, and special damages, including but not limited to, the expense of having to hire experts to investigate the extent of the failures, having to spend substantial money in order to renovate, correct, repair, and restore the buildings at issue to make them safe and habitable. Additionally, Plaintiff has been injured, as the failures have been continuous and continue to deteriorate and weaken the building substructure and related areas, including the finishes and structure elements of the building, all of which will be required to be corrected and repaired as a result.

39. Plaintiff will suffer loss of use and enjoyment of the common elements during the repairs.

FOR A SECOND CAUSE OF ACTION

(Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness, and Wantonness as to Genoa, ADC, and John Doe #1)

40. Plaintiff repeats and incorporates the above paragraphs by reference.

41. Genoa, ADC and John Doe #1 by and through their agents, servants, and employees, and individually, undertook, and were under a duty, to investigate, engineer, repair, design, oversee, and construct the buildings and units in accordance with the building code, construction industry standards and practices, and in accordance with all requirements imposed by the laws of the State of South Carolina.

42. Genoa, ADC, and John Doe #1 were negligent, grossly negligent, reckless, careless, willful, and wanton, in building, repairing, designing, overseeing, constructing, and engineering the buildings and units at issue. Such negligence, gross negligence, recklessness, carelessness, willfulness, and wantonness, includes, and is not limited to, the following particulars:

- (a) In failing to use due care in the design, repair, construction, oversight, and engineering of the buildings and units at issue;
- (b) In designing, repairing, overseeing, engineering, and constructing the condominiums such that the structural integrity of the infrastructure was ignored and allowed the infrastructure to subsequently fail, causing damage throughout the buildings;
- (c) In failing to take required actions to maintain and effect permanent repairs to the property during the construction process;
- (d) In designing, repairing, overseeing, engineering, and constructing the buildings in violation of applicable building codes, standard building practices, relevant specifications, and accepted construction industry standards and practices;
- (e) In failure to discover conditions then-existing of significant infrastructure failures and limitations; and
- (f) Other deficiencies and failures as will be proven at trial.

43. As a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, and wantonness of the these Defendants, the Plaintiff has suffered actual, incidental, consequential, and special damages, including but not limited to, the expense of having to hire experts to investigate the extent of the failures, having to spend substantial money in order to renovate, correct, repair, and restore the buildings at issue to make them safe and habitable. Additionally, Plaintiff has been injured, as the failures have been continuous and continue to deteriorate and weaken the building substructure and related areas, including the finishes and structure elements of the building, all of which will be required to be corrected and repaired as a

result.

44. Plaintiff will suffer loss of use and enjoyment of the common elements during the repairs.

FOR A THIRD CAUSE OF ACTION
(Negligence *Per Se* as to Genoa, ADC, and John Doe #1)

45. Plaintiff repeats and incorporates the above paragraphs by reference.

46. By undertaking construction work on this project, Defendants Genoa, ADC, and John Doe #1 owed a duty Plaintiff to use reasonable care during the performance of their work, to perform their scope of work in accordance with all applicable building codes and industry standards, and to ensure the construction conforms to the design documents.

47. These Defendants breached their duty of care owed to Plaintiff.

48. These Defendants violated the applicable building codes and industry standards by the following:

- (a) Failing to properly inspect and investigate the infrastructure at the time of construction;
- (b) Failure to perform the proper and necessary investigation prior to converting the building for use as condominiums;
- (c) Failing to take the necessary care as required out of the circumstances;
- (d) Failing to design, repair, engineer, oversee, and construct a code-compliant infrastructure; and
- (e) Such additional building code violations as may be discovered during ongoing investigation.

49. The violations described above amount to negligence *per se*.

50. Plaintiff has been directly and proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damages that have already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for

design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

51. Plaintiff will suffer loss of use of the common elements during the repairs.

52. As the result of the negligence *per se* of these Defendants, Plaintiff is entitled to a judgment against Defendants for damages, in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects,
Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a
Particular Purpose and Breach of Warranty of Merchantability and
Serviceability as to all Defendants)**

53. Plaintiff repeats and incorporates the above paragraphs by reference.

54. The Defendants implicitly and/or expressly warranted that the subject units, buildings, and common areas would be habitable and fit for their intended uses as condominiums and that said buildings and common areas would be designed, developed, constructed, repaired, engineered, and remodeled in a fit, serviceable, good, and workmanlike fashion in accordance with the applicable building codes and accepted construction industry standards applicable thereto and that the subject buildings and units would be merchantable, free from latent defects and fit for the particular purpose for which they were developed, built, and sold.

55. Defendants breached said warranties by designing, selling, supervising, and/or failing to supervise, remodeling or repairing, engineering, and constructing the subject condominiums in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards, and not in conformity with the laws and statutes of this State.

56. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiff has suffered actual, direct, incidental, consequential, and special damages, including but

not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair, and restore the buildings and units to make them safe and habitable, all of which has required, or will require, the Plaintiffs to expend great amounts of money to correct and repair, as well as to suffer the loss, use, and enjoyment of its properties, as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR AN FIFTH CAUSE OF ACTION
(Negligent Misrepresentation as to Developer Defendants)

57. Plaintiff repeats and incorporates the above paragraphs by reference.

58. The Developer Defendants, through their agents and/or employers, advertisements, literature, and other written materials, made representations and non-disclosures to the Plaintiff and Plaintiff's members about the quality of the construction of the subject buildings and units' suitability for habitation and low maintenance.

59. The Developer Defendants made the above-described representations and non-disclosures in a business or commercial capacity.

60. As set forth above, the above-described representations and non-disclosures the Developer Defendants and their agents made to Plaintiff and its members were untrue and were misrepresentations or non-disclosures of material facts and were made in such a manner that, by the exercise of reasonable and ordinary care, the Developer Defendants knew, or should have known, that they were false and that the Plaintiff could, and would, reasonably and justifiably rely on such representations and/or non-disclosures in purchasing, making, and/or authorizing payment and accepting the subject residences.

61. The Plaintiff and its members relied on this false information supplied by the Developer Defendants when they purchased their condominium units.

62. Such reliance by the Plaintiff and its members was reasonable and justifiable based on the knowledge available to them and the circumstances at the time.

63. Developer Defendants breached their duties by failing to exercise due care when making these representations.

64. The Plaintiff reasonably and justifiably relied on these Developer Defendants representations, to their detriment.

65. The Developer Defendants, by their action(s) described hereinabove, including representations to the Plaintiff and its members that induced them to purchase units at issue in this case, constitute a violation of South Carolina Codes §§27-31-43 and 33-31-830.

66. As a direct, foreseeable, and proximate result of Developer Defendants' negligent misrepresentations and non-disclosures, failing to disclose that the residences were not constructed in accordance with applicable building codes, not in conformance with accepted construction and industry standards, and that the buildings were not structurally sound, the Plaintiff has relied on such representations and nondisclosures and has suffered actual, direct, incidental, consequential, and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair, and restore the buildings and units to make them safe and habitable, all of which has or will require the Plaintiff to expend great amounts of money to correct and repair, as well as to suffer the loss, use, and enjoyment of its properties as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to Developer Defendants)

67. Plaintiff repeats and incorporates the above paragraphs herein.

68. In their capacity as developers and governing body of the condominium project the Developer Defendants as a matter of law, undertook a fiduciary duty towards the Plaintiff and undertook the duty under the Master Deed to maintain the common elements in "first class condition".

69. The Developer Defendants, in their capacity set forth above, breached their duty as fiduciaries towards the Plaintiff in failing to act in a reasonable prudent manner and in placing their interests ahead of the interests of those to whom they owed a clear fiduciary duty. Rather than acting in the highest possible degree of good faith and fair dealing concerning the Plaintiff, these Defendants acted exactly to the contrary, in acting in their own interests at all times, in all aspects of the development and sales of the condominium units.

70. As a direct and proximate result of these breaches of fiduciary duty, the Plaintiff has suffered damages in the amount equal to the repair, maintenance, and reconstruction costs required, and to be required, over the expected life of the structure, diminution in value of the condominium units, and loss of use.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to Developer Defendants)

71. Plaintiff repeats and incorporates the above paragraphs herein.

72. The Developer Defendants are "persons" within the meaning of South Carolina Code §39-5-10(a).

73. The Developer Defendants, by their actions in developing, designing, selling, repairing, supervising, and overseeing construction and/or repair activities, are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

74. The Developer Defendants, by their action(s) described hereinabove, including representations to the Plaintiff and its members that induced them to purchase units at issue in

this case, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-10(a).

75. The Developer Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

76. The Developer Defendants' conduct affects the public interest of the people of South Carolina.

77. The Developer Defendants knew, or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

78. As a direct, foreseeable, and proximate result of the Developer Defendants' unfair and deceptive practices, the Plaintiff has suffered actual, direct, incidental, consequential, and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair, and restore the buildings and units to make them safe and habitable, all of which has required, or will require, the Plaintiff to expend great amounts of money to correct and repair, as well as to suffer the loss, use, and enjoyment of its properties, as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

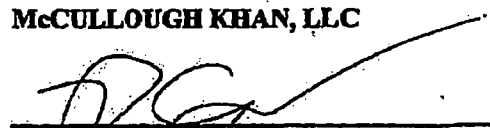
WHEREFORE, the Plaintiff prays that this Court issue an Order granting judgment for the Plaintiff against the Defendants, jointly and severally, for the following relief:

- (a) for actual damages in an amount to be proven at trial;
- (b) for treble damages under S.C. Code §39-5-110;
- (c) for punitive damages;
- (d) for prejudgment and post judgment interest on Plaintiff's damages;
- (e) for attorney's fees and costs; and

(f) for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

McCULLOUGH KHAN, LLC


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1-23, 2015
Charleston, South Carolina

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STEVEN M. BERNARD AND
DEBORAH J. BERNARD, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs.

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,
Defendant.

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

AMENDED
CLASS ACTION
COMPLAINT
(Jury Trial Demand)

2015 APR 13 PM 1:09
CLERK OF COURT
J. ARSTRONG

FILED

The Plaintiffs, individually and as class representatives for all other others similarly situated, complaining of the Defendant herein, would respectfully show unto this Court as follows:

PARTIES AND JURISDICTION

1. Plaintiffs Steven M. Bernard and Deborah J. Bernard are a married couple residing at 3 Chisolm Street, Unit 405, Charleston, South Carolina 29401.
2. Plaintiffs Steven M. Bernard and Deborah J. Bernard are citizens of the State of South Carolina, and residents of Charleston County, South Carolina.
3. In late December 2012, Plaintiffs Steven M. Bernard and Deborah J. Bernard purchased and still own a residential condominium unit, Unit Number 405, in 3 Chisolm Street Horizontal Property Regime, as is documented by the Title to Real Estate recorded at the office of the Register of Mesne Conveyance, Charleston County, State of South Carolina, in Book 0229 at Page 495.

4. Plaintiffs Steven M. Bernard and Deborah J. Bernard bring this action in their individual capacity and on behalf of all others similarly situated (the "Plaintiff Class") (collectively "Plaintiffs"), and all allegations contained herein are made in both capacities.
5. The Plaintiff Class consists of all the owners of residential condominium units at 3 Chisolm Street in Charleston, South Carolina.
6. The Defendant, 3 Chisolm Street Homeowners Association, Inc., is a South Carolina non-profit corporation established pursuant to the Master Deed Establishing 3 Chisolm Street Horizontal Property Regime ("Master Deed").
7. The Master Deed is recorded at the Office of the Register of Mesne Conveyance, Charleston County, State of South Carolina, in Book V390 at Page 659.
8. By virtue of its governing documents, the Defendant 3 Chisolm Street Homeowners Association, Inc. ("HOA") is charged with certain duties, powers, rights and obligations in connection with the condominium units of and the common areas of 3 Chisolm Street Horizontal Property Regime.
9. Specifically, the HOA is charged with, *inter alia*, the management and administration of 3 Chisolm Street Horizontal Property Regime, including the maintenance and repair of all common elements and limited common elements of 3 Chisolm Street Horizontal Property Regime.
10. The management and administration duties of the HOA include the inspection of, maintenance of, and investigation of potential problems with the three buildings located at 3 Chisolm Street.

11. The registered agent for service upon Defendant 3 Chisolm Street Homeowners Association, Inc. is Sentry Management, Inc., located at 4925 Lacross Road, North Charleston, South Carolina 29406.
12. This is a matter within the subject matter jurisdiction of the Court, the Court has jurisdiction over the parties, and venue is appropriate in this Court.

FACTUAL ALLEGATIONS

13. The former site of a school and gymnasium, 3 Chisolm Street is a residential condominium complex located in downtown Charleston and consisting of three separate buildings.
14. On or about 2000 through 2002, the three buildings located at 3 Chisolm Street (main, gymnasium, and cottage) (collectively "the Structures") were renovated and converted to residential condominiums.
15. At the conclusion of the renovation, a Certificate of Occupancy was issued for the Structures on June 28, 2002.
16. The Master Deed established a total of twenty-six (26) units in the Structures: nineteen (19) in the Main Building, six (6) in the Gymnasium Building, and one (1) in the Cottage.
17. Beginning in late 2002 and/or 2003, condominium unit owners began to complain about condensation on the windows and moisture intrusion.
18. To investigate the complaints regarding the windows and water intrusion issues, the HOA hired Myles Glick, a forensic architect, Thomas Carlson of Calibogue Construction, a general contractor, and Joe Dapore, an attorney.

19. In or about April 2003, Myles Glick issued a report ("the Glick Report") to the Defendant. The Glick Report noted, among other things, significant and pervasive deficiencies at the Structures, including condensation on the windows, moisture intrusion at the windows, and stucco cracks in the courtyard.
20. The Glick Report recommended documenting the known construction deficiencies through destructive testing and recommended the HOA obtain a more complete forensic report analyzing and addressing any other potential problems with the Structures. The Glick Report also suggested that the HOA seek legal counsel regarding the known issues and the need to further investigate potential problems with the Structures.
21. The Board of the HOA in May and June of 2003 acknowledged the need to investigate all three buildings constituting the Structures to determine the full extent of damage from the known issues and to identify any other potential problems with the Structures.
22. At that time, the HOA was on notice that its forensic architect and general contractor believed there were significant and pervasive construction defects associated with the Structures, and the HOA was urged to have all three buildings associated with the Structures inspected to determine the scope of all potential problems with the Structures.
23. 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.

However, instead of acting in a reasonably diligent manner, the HOA ignored the HOA's own experts' recommendations that all three buildings be inspected. Further, even when the HOA ultimately did engage in some limited action almost four years later, it failed to conduct the recommended complete forensic inspection of the three buildings.

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.
28. After almost another three full years, on January 16, 2009, the HOA filed an action to recover for alleged construction defects in the Structures ("the Construction Litigation").
29. In October of 2010, George Davidson, president of the HOA, testified in the Construction Litigation that the building problems at issue in the Construction Litigation were consistent with the known issues noted in the 2003 Glick Report.
30. After a series of hearings and oral arguments in the Construction Litigation regarding a motion for summary judgment and the HOA's Motion to

Reconsider, Alter or Amend Judgment, on January 10, 2012, the Honorable Roger M. Young, presiding Circuit Court Judge, issued an Order Granting Defendant Genoa Construction Services, Inc.'s Motion for Summary Judgment (the "January 10, 2012, Order").

31. The January 10, 2012, Order contains numerous findings of fact, including that the Defendant herein failed to act "in a reasonably diligent manner" by making a "decision to avoid any attempt to discover defects and claims" in the Structures thereby unconscionably and incompetently failing to protect the Plaintiffs herein.
32. Because the HOA failed to follow the instructions of Myles Glick, the Glick Report, Mike Parades, and George Carlson, the recommended complete forensic examination of all three Structures was never conducted.
33. Because the recommended complete forensic examination was not conducted, the HOA did not inspect the foundations of the Structures.
34. In or about February 2014, a home inspection related to the sale of Unit 101 at 3 Chisolm Street discovered problems with the foundations of the Structures.
35. The HOA engaged Edward C. Porcher, PE of Stantec, Inc. to investigate the foundation problems discovered during the aforementioned home inspection.
36. Mr. Porcher prepared a report of findings and gathered information regarding the cost to remedy all problems identified with the foundations of the Structures.

37. Mr. Porcher's findings and the information regarding cost of required repairs were presented at a meeting of the 3 Chisolm Street Owners held on November 6, 2014.

38. When the Structures were originally constructed, the foundations were built using rebar encased in concrete. However, the concrete is now spalling, which means it is flaking and disintegrating, thereby exposing the steel supports within the concrete.

39. Spalling of concrete in foundations like those in the Structures creates a hazard that must be remedied so as to avoid problems with structural integrity of the entire building.

40. The spalling issues are pervasive throughout the Main Building and could extend to all Structures.

41. Had the Defendant conducted the previously recommended inspections in or about 2003 when recommended, the deficiency of the foundation would have been discovered.

42. Because the recommendation to the Defendant HOA for further action, including further inspections, was not followed by the Defendant HOA, the defects in the foundation were not discovered and the foundation continued to deteriorate.

43. Without the knowledge that would have been gained from the recommended inspection, the foundation deficiencies went undetected.

44. As a result of the time that has elapsed since 2003, and Judge Young's findings in the Construction Litigation, it is unlikely that the HOA will be able to

recover the costs of the foundation repair from those contractors and other trades professionals responsible for that work.

45. On January 22, 2015, during a Special Meeting of the 3 Chisolm Street Homeowners Association, Inc., the Owners approved a special assessment ("the Main Building Foundation Assessment") to repair the crawlspace and foundations in the Main Building.

46. The cost to repair the foundation has been estimated to exceed \$2,500,000.

The cost of the repair will be borne by and assessed to each Owner, pro rata.

47. The Main Building Foundation Repair Assessment now requires and legally obligates all owners of a unit at 3 Chisolm Street to pay an equal share of the cost of the repairs to the foundations of the Main Building. Based upon current estimates, each owner is legally required to pay approximately \$100,000.

48. If an owner does not pay his or her required share of the Main Building Foundation Repair Assessment, the HOA is empowered to pursue a legal claim against the owner seeking to force payment and/or to assert a lien against the owner's real property.

49. The harms alleged herein, including the Main Building Foundation Repair Assessment, are certain.

50. The harms alleged herein, including the Main Building Foundation Repair Assessment, are not contingent, hypothetical, or abstract in character.

51. A real, substantial, and justiciable controversy exists between these parties and that controversy is appropriate for judicial determination.

52. The Plaintiffs have suffered damages, as herein alleged.

53. The Plaintiffs will suffer additional damages, hardship, and injustice if the court does not adjudicate this matter.

CLASS ALLEGATIONS

54. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure, the Plaintiffs Steven M. Bernard and Deborah J. Bernard bring this action both individually and as a proposed class action against the Defendant on behalf of themselves and on behalf of all other similarly situated persons and entities that own condominium units at 3 Chisolm Street.

55. The Class of Plaintiffs in this action, then, includes all persons and/or entities that own a condominium unit at 3 Chisolm Street ("the Class").

56. As representatives of the Class and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, the Plaintiffs seek to recover monetary damages from the Defendant on behalf of themselves and on behalf of the Class.

57. The Class is so numerous that joinder of all members is impractical. There are 26 units in the 3 Chisolm Street Horizontal Property Regime, per the Master Deed, and many of these units have co-owners which increases the number of individuals and entities included within the Class.

58. There are questions of law or fact common to the Class, including, but not limited to:

- a. the duties of the defendant HOA to the members of the Class;
- b. the breach of duties owed by the HOA to the members of the Class;

c. the Defendant HOA's liability for failing to act on the advice of experts, including Myles Glick, to obtain a more complete forensic report addressing any potential issues with the Structures;

d. the Defendant HOA's liability for failing to act on the advice of experts, including Myles Glick, to seek legal counsel regarding any potential issues with the Structures;

e. the Defendant HOA's liability for failing to engage in other inspections or investigations related to the Structures;

f. the Defendant HOA's liability for failing to properly select employees and/or agents capable of completing the tasks required to protect the common property and interests of the HOA;

g. the Defendant HOA's liability for failing to properly supervise its employees and/or agents charged with completing the tasks required to protect the common property and interests of the HOA;

h. the Defendant HOA's liability for failing to properly advise the HOA members of the events, occurrences, advice from experts, and decisions of the Defendant HOA;

i. the Defendant HOA's liability for failing to use that degree of care an ordinary and prudent HOA and HOA Board of Directors would have used under the same or similar circumstances; and

j. the damage caused by the HOA's actions and inactions to each member of the Class.

59. These common questions of law and fact exist as to all members of the Class and predominate over questions, if any, affecting only individual members of the Class.
60. Claims of the representative parties are typical of the claims of the Class in that pursuant of the Master Deed, all units and their owners have an equal interest and responsibility for assessments.
61. The representative Plaintiffs will fairly and adequately protect the interests of the Class as required by law.
62. The Plaintiffs have engaged qualified counsel to vigorously prosecute this action, and counsel has committed the financial resources to do so.
63. Neither Plaintiffs nor the undersigned counsel have any interest adverse to those of the Class.
64. This action is appropriate for class certification because questions of law and fact common to the members of the Class predominate over questions, if any, affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy, because, among other things, individual joinder of all members of the Class is impracticable.
65. Should individual Class Members be required to bring separate actions for the claims alleged herein, as opposed to proceeding as a class action, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments.

66. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this Class Action presents far fewer management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single court of the Class.

67. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice vis-a-vis each class member.

68. Class certification is appropriate under applicable law in that the Defendant acted and/or refused to act in manners that apply generally to the Class, thus warranting the requested relief.

69. All members of the Class have the same legal right to and interest in redress for damages associated with the Structures at 3 Chisolm Street, the HOA's actions and inactions, as well as all other claims addressed in this action.

70. The likely costs of litigation, including the costs for engineers and other experts, make it too difficult for each member of the Class to proceed with individual litigation.

71. The Plaintiffs Steven M. Bernard and Deborah J. Bernard envision no unusual difficulty in the management of this action as a class action.

72. The amount in controversy for each member of the Class exceeds One Hundred Dollars (\$100.00).

73. A definable Class exists, the named representatives are members of that Class, and the claims of the Class are not moot.

CAUSES OF ACTION
(Breach of Duty / Negligence / Gross Negligence)

74. The Plaintiffs reallege each and every preceding allegation as if fully set forth herein.

75. Defendant owed a duty to Plaintiffs to manage and administer the business affairs of the HOA in a prudent, diligent, and capable manner and to protect the HOA's interests, thereby protecting the interest of each member of the HOA.

76. Defendant breached its duty and was negligent, grossly negligent, and reckless in the following ways:

- a. failing to act on the advice of experts, including Myles Glick, to obtain a more complete forensic report addressing any potential issues with the Structures and to seek legal counsel regarding the issues;
- b. failing to engage in other inspections or investigations related to the Structures;
- c. failing to properly select and supervise employees and/or agents capable of completing the tasks required to protect the common property and interests of the HOA;
- d. failing to properly advise the HOA members of the events, occurrences, advice from experts, and decisions of the Defendant; and
- e. failing to use that degree of care an ordinary and prudent HOA and HOA Board of Directors would have used under the same or similar circumstances.

77. These actions and failures to act are unconscionable, are evidence of a lack of good faith, and demonstrate incompetence.

78. The Defendant did not act in good faith in making these decisions to act and/or not to act.

79. The Defendant's actions and failures to act were both incompetent and unconscionable.

80. Plaintiffs have suffered damages proximately caused by the Defendant's negligent, grossly negligent, reckless, unconscionable, and incompetent conduct and Defendant's lack of good faith.

81. Plaintiffs are entitled to judgment against the Defendant in an appropriate amount of actual damages to be determined by the jury.

PRAYER FOR RELIEF

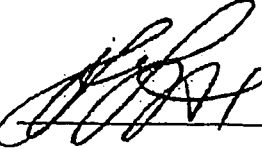
WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court enter judgment against Defendant and in favor of Plaintiffs and the Class and award the following relief:

- a. Certify the Class under South Carolina Rule of Civil Procedure 23;
- b. Appoint Steven M. Bernard and Deborah J. Bernard as Class Representatives;
- c. Appoint the undersigned attorneys as Class Counsel;
- d. Find that the Defendant's acts and omissions complained of herein constitute negligence, gross negligence, recklessness, incompetence, were unconscionable, and were not in good faith;

- e. Award compensatory damages and attorneys' fees and costs associated with this action; and
- f. Order such other relief and make judiciary determinations as may be appropriate in this proceeding.

PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted,

By: 

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Attorneys for the Plaintiffs

Charleston, South Carolina
April 13, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Steven M. Bernard and Deborah J.
Bernard, on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

3 Chisolm Street Homeowners
Association, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.'S
ANSWER TO AMENDED COMPLAINT

FILED
2015 APR 29 PM 3:24
JULIE J. ARHSTRONG
CLERK OF COURT

TO: W. ANDREW GOWDER, JR., ESQUIRE, COUNSEL FOR THE PLAINTIFF:

The Defendant 3 Chisolm Street Homeowners Association, Inc. (hereinafter "Defendant"), by and through its undersigned counsel, hereby submits this Answer to the Plaintiffs' Amended Class Action Complaint (hereinafter "Plaintiffs' Complaint"). Each and every allegation of Plaintiffs' Complaint is denied unless expressly admitted hereinafter.

AS TO PARTIES AND JURISDICTION

1. Defendant admits, upon information and belief, the allegations contained in Paragraph 1 of the Plaintiffs' Complaint.
2. Defendant admits, upon information and belief, the allegations contained in Paragraph 2 of the Plaintiffs' Complaint.
3. In response to Paragraph 3 of the Plaintiffs' Complaint, Defendant craves reference to the Title to Real Estate and other property records and denies any allegations inconsistent therewith.
4. In response to Paragraph 4 of the Plaintiffs' Complaint, Defendant admits that Plaintiffs Steven M. Bernard and Deborah J. Bernard have purported to bring this action in their

individual capacity and on behalf of all others similarly situated, but deny that this alleged posture is appropriate.

5. In response to Paragraph 5 of the Plaintiffs' Complaint, Defendants deny that there is a Plaintiff Class under South Carolina law.

6. Defendant admits the allegations contained in Paragraph 6 of the Plaintiffs' Complaint.

7. In response to Paragraph 7 of the Plaintiffs' Complaint, Defendant craves reference to the recorded Master Deed and denies all allegations inconsistent therewith.

8. Paragraph 8 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant craves reference to the "governing documents" and denies all allegations inconsistent therewith.

9. Paragraph 9 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant craves reference to the "governing documents" and denies all allegations inconsistent therewith.

10. Paragraph 10 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant craves reference to the "governing documents" and denies all allegations inconsistent therewith.

11. Defendant admits the allegations contained in Paragraph 11 of the Plaintiffs' Complaint.

12. Paragraph 12 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 12 of the Plaintiffs' Complaint.

AS TO FACTUAL ALLEGATIONS

13. Defendant admits the allegations contained in Paragraph 13 of the Plaintiffs' Complaint.

14. Defendant admits the allegations contained in Paragraph 14 of the Plaintiffs' Complaint.

15. Defendant admits the allegations contained in Paragraph 15 of the Plaintiffs' Complaint.

16. In response to Paragraph 16 of the Plaintiffs' Complaint, Defendant craves reference to the recorded Master Deed and denies all allegations inconsistent therewith.

17. Defendant admits, upon information and belief, the allegations contained in Paragraph 17 of the Plaintiffs' Complaint.

18. Defendant admits, upon information and belief, the allegations contained in Paragraph 18 of the Plaintiffs' Complaint.

19. In response to Paragraph 19 of the Plaintiffs' Complaint, Defendant craves reference to the Glick Report and denies all allegations inconsistent therewith.

20. In response to Paragraph 20 of the Plaintiffs' Complaint, Defendant craves reference to the Glick Report and denies all allegations inconsistent therewith. Defendant specifically denies that the Glick Report "recommended the HOA obtain a more complete forensic report analyzing and addressing any other potential problems with the Structures" or that the Glick Report suggested that the HOA seek legal counsel regarding "the need to further investigate potential problems with the Structures."

21. Defendant denies the allegations contained in Paragraph 21 of the Plaintiffs' Complaint.

22. Defendant denies the allegations contained in Paragraph 22 of the Plaintiffs' Complaint.

23. Defendant denies the allegations contained in Paragraph 23 of the Plaintiffs' Complaint.

24. Defendant admits, upon information and belief, the allegations contained in Paragraph 24 of the Plaintiffs' Complaint.

25. Defendant denies the allegations contained in Paragraph 25 of the Plaintiffs' Complaint.

26. Defendant denies the allegations contained in Paragraph 26 of the Plaintiffs' Complaint.

27. Defendant admits the allegations contained in Paragraph 27 of the Plaintiffs' Complaint.

28. Defendant admits the allegations contained in Paragraph 28 of the Plaintiffs' Complaint.

29. In response to Paragraph 29 of the Plaintiffs' Complaint, Defendant craves reference to George Davidson's deposition transcript and denies all allegations inconsistent therewith.

30. In response to Paragraph 30 of the Plaintiffs' Complaint, Defendant craves reference to the January 10, 2012, Order and denies all allegations inconsistent therewith.

31. In response to Paragraph 31 of the Plaintiffs' Complaint, Defendant craves reference to the January 10, 2012, Order and denies all allegations inconsistent therewith.

32. Defendant denies the allegations contained in Paragraph 32 of the Plaintiffs' Complaint.

33. Defendant denies the allegations contained in Paragraph 33 of the Plaintiffs' Complaint.

34. Defendant admits, upon information and belief, the allegations contained in Paragraph 34 of the Plaintiffs' Complaint.

35. Defendant admits the allegations contained in Paragraph 35 of the Plaintiffs' Complaint.

36. In response to Paragraph 36 of the Plaintiffs' Complaint, Defendant craves reference to Mr. Porcher's report and denies any allegations inconsistent therewith.

37. Defendant admits, upon information and belief, the allegations contained in Paragraph 37 of the Plaintiff's Complaint.

38. Defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 38 of the Plaintiffs' Complaint and, therefore, denies the same.

39. Paragraph 39 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 39 of the Plaintiffs' Complaint.

40. Defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 40 of the Plaintiffs' Complaint and, therefore, denies the same.

41. Defendant denies the allegations contained in Paragraph 41 of the Plaintiffs' Complaint.

42. Defendant denies the allegations contained in Paragraph 42 of the Plaintiffs' Complaint.

43. Defendant denies the allegations contained in Paragraph 43 of the Plaintiffs' Complaint.

44. Defendant denies the allegations contained in Paragraph 44 of the Plaintiffs' Complaint.

45. Defendant denies, as written, the allegations contained in Paragraph 45 of the Plaintiffs' Complaint.

46. Defendant denies the allegations contained in Paragraph 46 of the Plaintiffs' Complaint.

47. Paragraph 47 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 47 of the Plaintiffs' Complaint.

48. Paragraph 48 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 48 of the Plaintiffs' Complaint.

49. Defendant denies the allegations contained in Paragraph 49 of the Plaintiffs' Complaint.

50. Defendant denies the allegations contained in Paragraph 50 of the Plaintiffs' Complaint.

51. Defendant denies the allegations contained in Paragraph 51 of the Plaintiffs' Complaint.

52. Defendant denies the allegations contained in Paragraph 52 of the Plaintiffs' Complaint.

53. Defendant denies the allegations contained in Paragraph 53 of the Plaintiffs' Complaint.

AS TO CLASS ALLEGATIONS

54. In response to Paragraph 54 of the Plaintiffs' Complaint, Defendant admits that Plaintiffs Steven M. Bernard and Deborah J. Bernard have purported to bring this action in their individual capacity and as a proposed class action, but deny that this alleged posture is appropriate.

55. In response to Paragraph 55 of the Plaintiffs' Complaint, Defendant admits that Plaintiff has defined a class of plaintiffs, but denies that class certification is necessary or appropriate.

56. In response to Paragraph 56 of the Plaintiffs' Complaint, Defendant admits that Plaintiffs allegedly seek to recover damages on behalf of themselves and the purported class, but denies that class certification is necessary or appropriate.

57. Defendant denies the allegations contained in the first sentence of Paragraph 57 of the Plaintiffs' Complaint. In response to the second sentence of Paragraph 57 of the Plaintiffs' Complaint, Defendant craves reference to the recorded Master Deed and denies all allegations inconsistent therewith. Defendant further denies that any co-owners of units would increase Plaintiffs' purported class.

58. Defendant denies the allegations contained in Paragraph 58 of the Plaintiffs' Complaint, including subparagraphs a - j.

59. Defendant denies the allegations contained in Paragraph 59 of the Plaintiffs' Complaint.

60. Defendant denies the allegations contained in Paragraph 60 of the Plaintiffs' Complaint.

61. Defendant denies the allegations contained in Paragraph 61 of the Plaintiffs' Complaint.

62. Defendant admits the allegations contained in Paragraph 62 of the Plaintiffs' Complaint, but denies that class certification is necessary or appropriate.

63. Defendant denies the allegations contained in Paragraph 63 of the Plaintiffs' Complaint.

64. Defendant denies the allegations contained in Paragraph 64 of the Plaintiffs' Complaint.

65. Defendant denies the allegations contained in Paragraph 65 of the Plaintiffs' Complaint.

66. Defendant denies the allegations contained in Paragraph 66 of the Plaintiffs' Complaint.

67. Defendant denies the allegations contained in Paragraph 67 of the Plaintiffs' Complaint.

68. Defendant denies the allegations contained in Paragraph 68 of the Plaintiffs' Complaint.

69. Defendant denies the allegations contained in Paragraph 69 of the Plaintiffs' Complaint.

70. Defendant denies the allegations contained in Paragraph 70 of the Plaintiffs' Complaint.

71. Defendant is without sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 71 of the Plaintiffs' Complaint and, therefore, denies the same.

72. Defendant denies the allegations contained in Paragraph 72 of the Plaintiffs' Complaint.

73. Defendant denies the allegations contained in Paragraph 73 of the Plaintiffs' Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Duty / Negligence / Gross Negligence)

74. In response to Paragraph 74 of the Plaintiffs' Complaint, Defendant re-asserts and re-alleges its responses to Paragraph 1 - 73 of the Plaintiffs' Complaint, as if those responses were fully incorporate herein.

75. Paragraph 75 of the Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent a response is required, Defendant admits the allegations contained in Paragraph 75 of the Plaintiffs' Complaint.

76. Defendant denies the allegations contained in Paragraph 76 of the Plaintiffs' Complaint, including subparagraphs a - e.

77. Defendant denies the allegations contained in Paragraph 77 of the Plaintiffs' Complaint.

78. Defendant denies the allegations contained in Paragraph 78 of the Plaintiffs' Complaint.

79. Defendant denies the allegations contained in Paragraph 79 of the Plaintiffs' Complaint.

80. Defendant denies the allegations contained in Paragraph 80 of the Plaintiffs' Complaint.

81. Defendant denies the allegations contained in Paragraph 81 of the Plaintiffs' Complaint.

IN RESPONSE TO THE PRAYER FOR RELIEF

82. In response to the "WHEREFORE" paragraph of the Plaintiffs' Complaint, Defendant denies that Plaintiffs are entitled to any relief, and are specifically not entitled to any of the relief requested in subparagraphs a – f.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:
(S.C. Code § 33-31-830)

83. Defendant asserts that at all times relevant hereto, Defendant acted in compliance with S.C. Code § 33-31-830 and, thus, they are not liable to Plaintiffs.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:
(SCRCP Rule 12(b)(6))

84. Defendant alleges and says, that Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action pursuant to SCRCP Rule 12(b)(6).

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
DEFENDANT ALLEGES:
(Comparative/Contributory Negligence)

85. Defendant alleges and says, that alleged damages, if any, suffered by the Plaintiffs are the direct and proximate result of their own comparative and contributory negligence, and therefore, Plaintiffs' recovery should be barred, or alternatively reduced, proportionately to their own comparative and contributory negligence.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Waiver, Estoppel, Laches)

86. Defendant alleges and says, that Plaintiffs' claims are barred by the equitable doctrines of waiver, estoppel, and/or laches.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Ratification and Acquiescence)

87. Defendant alleges and says, that Plaintiffs' claims are barred by the doctrine of ratification and/or acquiescence.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Unclean Hands)

88. Defendant alleges and says, that Plaintiffs have unclean hands and may not recover against Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Justification)

89. Defendant alleges and says, that Plaintiffs' claims are barred by the defense of justification.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Statue of Limitations/Repose)

90. The claims asserted by Plaintiffs in this action are barred by the applicable statute of limitations and/or statute of repose.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Business Judgment Rule)

91. Defendant alleges and says, that Plaintiffs are barred from recovery pursuant to the Business Judgment Rule.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Reasonable Business Purpose)

92. The claims asserted by Plaintiffs are barred on ground that all actions taken by Defendant was for a legitimate and reasonable business purpose.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Bylaws)

93. Defendant alleges and says, that Plaintiffs' claims are premature in that Plaintiffs failed to follow the prescribed rules of the applicable bylaws in bringing this action.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Lack of Standing)

94. Plaintiffs lack standing to maintain this action and, thus, it must be dismissed.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Setoff and Recoupment)

95. Plaintiffs' damages, if any, are subject to setoff and/or recoupment by the amounts Plaintiffs and Defendant may collect in the pending litigation to recover for the construction defects in the foundation.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.

DEFENDANT ALLEGES:

(Ripeness)

96. Plaintiffs' claims must be dismissed because they are not ripe.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Immunity)

97. Defendant alleges and says, that they are immune from liability pursuant to the South Carolina Nonprofit Corporation Act, S.C. Code Ann. § 33-31-101, *et seq.*

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Abuse of Process)

98. Defendant alleges and says, that Plaintiffs have abused the legal process by filing this groundless lawsuit solely for the malicious intent to harass and inflict harm to Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Judicial Economy)

99. Defendant alleges and says, that Plaintiffs' claims should be barred on the grounds that judicial economy is best served not having multiple lawsuits litigating the same issues.

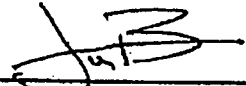
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

100. Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the applicable Rules of Civil Procedure.

WHEREFORE, having fully answered the Amended Complaint, Defendant prays that the Amended Complaint be dismissed with costs, and for such other and further relief as the Court deems appropriate.

[Signature block on following page]

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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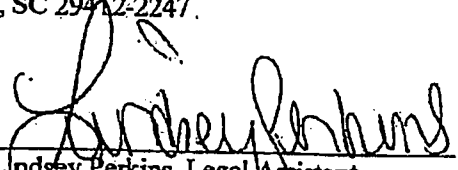
Attorneys for 3 Chisolm Street HOA

April 28, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff's foregoing Answer has been forwarded to counsel of record via USPS this 28 day of April, 2015 as follows:

W. Andrew Gowder, Jr., Esquire
Thomas P. Gressette, Jr., Esquire
Pratt-Thomas Walker, PA
P.O. Drawer 22247
Charleston, SC 29412-2247


Lindsey Perkins, Legal Assistant
Barnwell Whaley Patterson & Helms, LLC

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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reasonably should have been, discovered.” S.C. Code. Ann. § 33-31-830(f). This differs from the general tort statute of limitations in that the discovery rule does not apply. Plaintiffs filed this case on January 2, 2015, well after both of these deadlines expired. First, Steven Bernard, an individually named Plaintiff and the representative of the Plaintiffs’ class, admitted in his deposition that all of the failures complained of occurred in or around 2003, well over three years before Plaintiffs filed this case. Second, other members of the Plaintiffs’ class were actually advised to file this suit in January 2008, seven years before they did so. For these reasons and those additional reasons as will be discussed below, the Court should grant the HOA summary judgment as to Plaintiffs’ entire case.

FACTS

The HOA is a South Carolina Nonprofit Corporation that is made up of the owners of the condominium units located at 3 Chisolm Street in Charleston, South Carolina (hereinafter the “Condos”). Complaint ¶¶5-9. The Condos are located on the site of the old Andrew B. Murray Vocational School, which was built sometime in the beginning of the 20th century. From about 2000 through 2002, the three buildings of the Vocational School (the Main Building, the Gymnasium, and the Cottage) were renovated and converted to the Condos. The Certificate of Occupancy was issued on June 28, 2002. The Condos are made up of 26 individual units, including nineteen in the Main Building, six in the Gymnasium Building, and one in the Cottage. Complaint ¶¶13-16. In March 2003, the developer turned over control of the HOA to the unit owners.

Beginning in late 2002 and/or 2003, members of the Plaintiffs’ class began experiencing and complaining of condensation and moisture intrusion at the windows of their units. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. In April 2003, Glick

issued a report to the HOA (hereinafter the "Glick Report") which summarized his visual inspection (without any destructive testing) of the Main Building only. Complaint ¶¶17-19; Glick Report p.1, attached as Exhibit A. The Glick Report summarized Glick's observations regarding the complained-of water intrusion and concluded by noting that the problems he found were "significant and were persuasive (sic) throughout the entire" Main Building and included his recommendation "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. . . ." Exhibit A, p.4. Glick also recommended that the HOA pursue "a forensic report documenting and recording the above issues." *Id.* The HOA sent a copy of the Glick Report to the developer, who responded by sending the general contractor to the Condos to repair certain elements that were causing the water intrusion. HOA Board July 16, 2003 Meeting Minutes at p.2, attached hereto as Exhibit B. Years later, the water intrusion issues reappeared and the HOA again demanded that the developer remediate the problems. The developer responded via letter dated January 30, 2008, stating that any negligence claim that the HOA would have against the developer was without merit and barred by the statute of limitations. January 30, 2008 letter from Kevin Hudson to Christopher Ogiba at p.4, attached as Exhibit C. 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. *Id.* At that time, the HOA's board was made up of Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, and Bill Maneri. See list of HOA Board Members, attached hereto as Exhibit D. Each of these individuals is a member of the Plaintiffs' class. Steven Bernard Dep. April 27, 2018, 37:3-20, attached hereto as Exhibit E.

In January 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and certain subcontractors styled 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a R Masonry Brickwork, Carolina Roofing Systems, Inc., and Lacy Painting 2009-CP-10-267, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Water Intrusion Lawsuit"). Complaint ¶28. The defendants moved for summary judgment, arguing that the Water Intrusion Lawsuit was time-barred by the three-year statute of limitations. On June 9, 2011, the Honorable Roger Young issued several orders granting in whole or in part some of the defendants' motions. See e.g. Order Granting in Part and Denying in Part Defendant Genoa Services, Inc.'s¹ Motion for Summary Judgment, attached hereto as Exhibit F. Judge Young found that the three-year statute of limitations on the HOA's claims regarding defective original construction work, as opposed to defective repair work done in response to the Glick Report, had expired. *Id.* at p.6. In another order, Judge Young explained that the three-year statute of limitations on construction work done as part of the conversion project began to run in 2003, when the HOA received a copy of the Glick Report. Order Granting Defendant Williams Mechanical Corporation's Motion for Summary Judgment, attached hereto as Exhibit G, at p. 5. The Court of Appeals agreed, finding that the statute of limitations on defects in the original renovation construction began to run in April 2003 when the HOA received a copy of the Glick Report and, thus, expired in April 2006. 3 Chisolm Street Homeowners Ass'n, Inc. v. Chisolm Street Partners, LLC, 2014-UP-128, 2014 WL 2581458, at *2-3 (S.C. Ct. App. March 26, 2014), attached hereto as Exhibit H.

In February 2014, almost three years after Judge Young's initial summary judgment orders in the Water Intrusion Lawsuit, a home inspection conducted in relation to the sale of one

¹ Genoa Services, Inc. was the general contractor.

of the units revealed structural deficiencies in the crawlspace under the Main Building, and these defects were later confirmed by a structural engineer. Complaint ¶¶34 – 40. In response, the HOA promptly filed a lawsuit on November 4, 2014, styled 3 Chisolm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc., Chisolm Street Partners, LLC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue, John W. Wilcox, III, Austin Dillon Cook Engineering, Inc., and John Doe #1, 2014-CP-10-6805, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the “Foundation Defects Lawsuit”). The defendants moved for summary judgment, arguing that the Foundation Defects Lawsuit was barred by the statute of limitations because, in accordance with Judge Young’s and the Court of Appeals’ holdings in the Water Intrusion Lawsuit, the HOA’s receipt of the Glick Report in 2003 started the running of the statute of limitations on all defects related to the original conversion construction, which would include the defects being claimed in the Foundation Defects Lawsuit. In response, the HOA argued that it did not have notice (constructive or actual) of the foundation defects until February 2014, making its November 2014 filing of the Foundation Defects Lawsuit timely. The HOA submitted the affidavit of Myles Glick, which stated that his 2003 inspection and report were related to above-grade water intrusion issues only, not any structural issues or potential problems in the crawlspace. Affidavit of Myles Glick, October 4, 2016 at ¶¶4-8, attached hereto as Exhibit I. Glick swore that he did not advise the HOA to undertake a structural analysis of any of the buildings and that neither he nor the HOA were on notice of any structural defects in the foundations or crawlspaces in 2003. *Id.* at ¶¶5, 7, 8. Glick said that, even if the HOA would have commissioned the forensic examination that his 2003 report recommended, that forensic examination would not have included an examination of the crawlspaces and would not have uncovered any defects therein. *Id.* at ¶¶7-8. While the

summary judgment motions were pending in the Foundation Defects Lawsuit, the HOA (including members of the Plaintiffs' class) voluntarily agreed to a settlement. Bernard Dep. Exhibit E 46:5-47:1.

Now, in a third lawsuit filed January 2, 2015, the Plaintiffs allege 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. Complaint ¶¶ 23, 27, 32, 33, 41-44, 76.

ARGUMENT

As Plaintiffs allege in their own Complaint, Defendant is a South Carolina Nonprofit Corporation (Complaint ¶ 6) and thus is governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq.* The statute of limitations for claims against a Nonprofit Corporation, or its directors, states that such action must be commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f).²

Section 33-31-830(f) provides two alternatives for measuring when a suit against the HOA becomes barred by the statute of limitations. The first method bars a suit unless it is filed within three years "after the failure complained of." In other words, the first method does not

² Section 33-31-830 specifically applies to actions against *directors* of a Nonprofit Corporation; this action has been brought against the Defendant corporation itself and not against its individual directors. However, the South Carolina Court of Appeals has held that the Nonprofit Corporations Act (§ 33-31-830 was at issue in that case) applies not only to claims against individual directors of a nonprofit corporation, but also to claims against the corporation itself. Smith v. Dockside Ass'n, Inc., No. 2005-UP-139, 2005 WL 7083482, at *4-5 (S.C. Ct. App. Feb. 28, 2005), attached hereto as Exhibit J. This is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself. *Id.* In any event, Steven Bernard, one of the individually-named Plaintiffs and the appointed class representative, testified that this case is against both the HOA and its directors. Exhibit E, 37:21-38:1. Accordingly, the statute of limitations found in § 33-31-830(f) applies here.

employ the discovery rule.³ The second method, which uses the discovery rule, says that a case is time-barred unless it is filed within two years "after the harm complained of is, or reasonable should have been discovered." Most importantly, however, is that §33-31-380(f) provides that suit against the HOA must be filed before the *sooner* of the two potentially different deadlines.

This action is time-barred under either of §33-31-380(f)'s statute of limitations measurements. Using the three-year statute of limitations, without the discovery rule, this case should have been filed by April 2009, at the latest. The Plaintiffs complain of numerous failures, all of which allegedly occurred more than three years before they filed this complaint on January 2, 2015. The crux of the Plaintiffs' theory of liability is that the HOA failed to file the Foundation Defects Litigation within the statute of limitations. The HOA alleges that the Foundation Defects Litigation should have been filed on or before April 2006 (Complaint ¶27) and this failure to timely file precluded the Plaintiffs from recovering the costs of the foundation repairs from the contractors and other professionals responsible (Complaint ¶44). The HOA does not concede that the statute of limitations for the Foundation Defects Litigation expired in April 2006 but, for the purpose of this Motion only, will accept the Plaintiffs' position that it did. Mr. Bernard's deposition testimony supports an even earlier expiration. He testified that the HOA committed five negligent acts or omissions, and provided the dates for each act or omission:

1. The HOA failed to commission a complete forensic examination, as recommended by the Glick Report, and this failure occurred in or around April 2003. Exhibit E, 9:2-11; 13:1-22.

³ "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered," and "[t]he 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." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

2. The HOA did not authorize Mr. Glick or someone else to take the next steps as recommended in the Glick Report, and this failure occurred in or around April 2003. Id. 10:5-8; 13:23-14:6.
3. The HOA failed to repair the foundation defects, and this failure began to occur in 2003. Id. 10:18-21; 14:7-15.
4. The HOA failed to timely file the Foundation Defects Litigation and this failure occurred in April 2006, at the latest. Id. 10:25-11:16; 15:18-17:9.⁴
5. The HOA failed to examine and maintain the foundations, which are common elements and this failure occurred in 2003. Id. 14:16-15:6.

According to §33-31-830(f)'s three-year statute of limitations (without the discovery rule) and based on the Plaintiffs' own allegations, this case had to be filed in April 2009, at the latest. Based on Mr. Bernard's own testimony, it should have been filed by April 2006. Since this action was not filed until January 2, 2015, this case is barred by the statute of limitations.

Next, using §33-31-830(f)'s two-year statute of limitations, with the discovery rule, this case is still time-barred. In January 2008, Members of the Plaintiffs' class were put on actual notice that the HOA failed to file the Water Intrusion Lawsuit within the statute of limitations and were advised that they may have a negligence suit against the HOA. See Exhibit C. The potential lawsuit that members of the Plaintiffs' class were put on notice of would have involved the very same claim that they are asserting in this lawsuit. Therefore, even given the benefit of the discovery rule, this case should have been filed by January 2010. It was filed five years too late. Alternatively, the Plaintiffs' class was placed on either actual or constructive notice of these claims against the HOA when Judge Young issued his publicly-filed orders in June 2011 where he found that the HOA failed to file suit within the statute of limitations. At that time, the Plaintiffs' class knew, or at least should have known, that it had a potential claim against the

⁴ Mr. Bernard actually testified that he does not know when the statute of limitations expired on the Foundations Defects Litigation, but rather referred to the Court of Appeals opinion in the Windows Defect Litigation, which held that the statute of limitations expired for that case in April 2006. Exhibit H.

HOA for its failure to timely file. Using that date, this case is time-barred since it was filed after June 2013.

CONCLUSION

It is ironic that a case which alleges that a defendant was negligent for allowing a statute of limitations to expire without filing suit was itself filed many years after its applicable statute of limitations expired. Even taking the facts most favorable to the Plaintiffs and their class, the statute of limitations for this action expired in June 2013. This case was not filed until January 2015. This case is time-barred and the HOA is entitled to summary judgment.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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Association, Inc.*

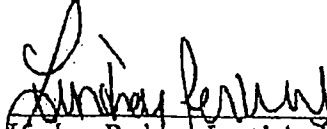
May 30, 2018
Charleston, South Carolina

2015-CP-10-20

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion for Summary Judgment has been forwarded to Plaintiffs' counsel of record via USPS this 30 day of May 2018 as follows:

Grady Query, Esquire
Michael H. Ellis, Esquire
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, #202
Charleston, SC 29412


Lindsey Perkins, Legal Assistant
Barnwell Whaley Patterson & Helms, LLC

FILED
2018 MAY 30 PM 4:32
JULIE J. ARYSTROM
CLERK OF COURT

Glick/Boehm & Associates, Inc.

April 8, 2003

Jack Bernette
President
Chisholm Street Homeowners Association
3 Chisholm Street
Charleston, SC 29401

Re: Initial Site Visit
Chisholm Street Condominiums
Charleston, SC

Dear Mr. Bernette,

In accordance with the request of the Chisholm Street Homeowners Association Board of Directors, I have prepared comments regarding my visual observations that took place on January 30, 2003. Present during that site visit were Myles Glick, Thomas Carlson, Brett Carlson, and Joe Dapora. The following comments are based on visual observations only, therefore, no destructive testing has taken place. The goal of the visit was to get an understanding of the project and to see what appeared to be some very obvious building failures.

A. Introduction

The Chisholm Street Condominiums are located in three buildings at 3 Chisholm Street. The first of three distinct buildings is known as the old Murray Vocational School, which is a three-story masonry building with a flat roof. The second building is known as the old headquarters for the Charleston Symphony Orchestra, which is a two-story residential scaled building. The third building was the gymnasium associated with the Murray Vocational School that has been divided into units on the top floor and an indoor parking garage on the first floor. The following comments represent an overview of my observations are specific to the main three-story Murray Vocational School building. The other two buildings that are listed above were not reviewed.

B. Water Intrusion

The indications of water intrusion into the main building were in the following areas: windows, roof parapet, and a strong possibility that the roof parapet is leaking. Of the four areas identified, the roof parapet will need more research so that this area can be eliminated or to determine that it is contributing to the water intrusion into the exterior wall cavity.

In almost every case, the window system is a steel window with fixed panes of glass and an opening panel that does not close. Therefore, the windows do not stop water from intruding into the building. Water has accumulated on window sills as a result of water intrusion through the gaps created in the operable window areas. It also appears that water is coming through the frames (mullions) of the fixed panes as well.

Condensation issues were apparent on the inside of the glass within the units and these areas may have associated problems (in terms of cause and effect) with the size and distribution of the mechanical systems.

C. Interior Floors

The floor problems noticed throughout the building had to do with undulating wood floors as a result of water intrusion. In some cases, there were construction quality issues that resulted in finishing problems on the wood floors. Most of the moisture intrusion problems associated with the wood floors, had to do with the first floor units. The damage in Unit 101 is an example of extensive movement within the floor system itself. In this case, the floor moved so much that the closet door in one of the bedrooms would not even open.

D. Mechanical Systems

Problems associated with the mechanical systems will fall into two categories. The first category would be capacity of the unit relative to specific unit sizes and unit orientation. The other concern is air distribution within the actual spaces. The air distribution system is not adjacent to the glass areas and therefore, this begins to contribute to the extremes in temperature differentials causing condensation. An additional item with the mechanical system was noticed on the roof. The units (compressors) were sitting on 4x4 wood members and therefore, the units are not tied down to the roof, which is required by code and within the standard care for construction. This would be a separate construction deficiency in addition to the possibility of design issues with capacity and distribution.

E. Exterior Stucco

It was noticed that there were new walls built at the rear courtyard of the main building and these walls appear to be metal studs with a three-coat masonry stucco finish. Intersections of the metal stud walls with the original masonry building are beginning to show cracks because of the construction defects associated with the installation of the three-coat masonry system. There are other areas of this exterior system that are also not installed in accordance with the standard of care for stucco as called for in the ASTM Standards

which are in turn, called for in the building code. Stucco cracks will allow water to enter the building envelope.

F. Predicable Results From Water Intrusion

1. It can be seen in some of the units that are occupied, but mostly in the first floor units that are not occupied, that there is an extensive amount of mold and mildew. Mold and mildew presents a clear and present danger in terms of health for the individuals that occupy the spaces. The removal of mold and mildew within the wall cavities is extremely important, because without the removal of mold and mildew and without stopping the water intrusion causing the mold and mildew, the problem will persist and grow.
2. Because of the extensive amount of water intrusion into various areas of the building, there is rotted drywall associated with the windows.
3. Because of the sealant failure at the windows and the fact that the opening portion of the windows do not close properly to stop water intrusion, there is an extreme amount of rust showing up on the steel windows. Steel windows that are subject to rust will eventually be a maintenance problem if these problems are not stopped. Even under the best circumstances, a strong maintenance program will be needed to stop the rust on these steel windows.
4. Sealant Failures- In a lot of cases there was evidence that water was coming through fixed mullions of the steel windows. There were indications of added sealant to stop the water intrusion from coming through the window panes/mullion intersections. A full investigation of these areas needs to be made.
5. Grout at existing exterior window ledges- Sill areas on the exterior of the building, where existing windows were replaced with new steel windows are problematic. In many cases there was grout missing which allows water to intrude in and around the frames of the steel windows. This is a particular concern to me, because the walls of the existing building are extremely thick and therefore, it will take some time for the water to show up on the inside of the units. In the interim, the walls will be subject to mildew and mold growth if water intrudes.

G. Miscellaneous Issues

1. The roof, which is a flat roof, looks as if there are numerous patches that could very well be from the original construction. A full investigation is recommended to see if there are any hidden failures.
2. Slope of exterior verandas- It was noticed that in at least two units, that the scuppers associated with water removal from the exterior verandas did not have slope to them. In one case, water was sloping away from the scupper. Without proper slope on these verandas, water will have a tendency to puddle, break down mortar joints and ultimately penetrate into the slab

and down to the unit below. In some cases, water is already coming in under the threshold of some of the doors resulting in a wood floor problem.

H. Conclusions

All of the above issues are significant and were pervasive throughout the entire building. I would recommend that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. Without correction, the issue of sales of unsold units and resales will come into play. I recommend 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. This report only represents observations during a limited site visit and other construction deficiencies may exist.

IFT can be of any further assistance, please do not hesitate to call.

Sincerely,


Steven F. Glick, AIA
Principal

Copy: Joe DePore
Tom Carlson

**3 Chisolm Street HOA
Board Meeting
July 16, 2003**

Members Present

Jack Burnett, Pete Wyrick, Frances Hegenberger, Jackie Noller and Angela Halfacre

Others Present

Mike Parades

The meeting was called to order at 5:35 p.m.

Minutes of Prior Meeting

Mike reported the minutes of the June 10, 2003 Board meeting had been previously distributed. As there were no changes or corrections, motion was made, seconded and passed to approve the minutes as issued.

Meeting Schedule

Discussion followed on schedule for meetings the rest of the year. It was agreed meetings would be held as follows:

Tuesday, August 12, 2003 at 5:30 p.m. at Jackie's unit.
Tuesday, October 14, 2003 at 5:30 p.m. at Angela's unit
Tuesday, December 9, 2003 at 5:30 p.m. at Frances' unit

Other Business

1. Recycling

Some owners have stated a desire to be able to recycle. CCM was asked to investigate options and report to the Board.

2. Doors to buildings

It was noted that some doors need to be adjusted. CCM will arrange to get this done. In addition, door access system needs to be looked at and possibly codes changed. Mike noted he intends to set up maintenance service contract with the Williams Company.

3. Pest Control

Service was discussed and it was agreed that the pest service should be scheduled for the same day and time each month.



Defendant - 006917
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**3 Chisolm Street Board Meeting
July 16, 2003**

4. Fire Alarm System

Mike reviewed the service proposal from Simplexgrinnell. The contractor has taken steps to resolve the frequent alarm problems by cleaning all sensors. System now appears to be operating properly and contract has been executed.

5. Insurance Coverage

Mike noted he has reviewed insurance coverages. A summary will be prepared and distributed to the Board for information. It was noted that there is no coverage for Directors & Officers. As such, Mike recommended coverage be placed. Motion was made, seconded and passed to place coverage as recommended.

6. Developer Issues

Mike reported additional funds have been received from the developer. Of the original approximate \$56,000 referenced in his letter to David Perdue, approximately \$52,000 has been received. All past due bills have been paid. The remaining differences are being reconciled.

With respect to building issues discussed in the Glick report, small progress has been made, mostly on window leaks. Mike is pushing to get rest of issues resolved without legal action. Of particular concern are the roof issues and the need to have the AC units on the roof tied down.

There being no further business, the meeting adjourned at 6:30 p.m.

Respectfully submitted by
CCM Management, Inc.

Action Items

1. Building Issues Resolution
2. Complete account reconciliation with Developer
3. Building access system update
4. Recycling
5. Insurance Summary and place D&O coverage
6. Pest Control Schedule

**MINUTES OF THE JANUARY 21, 2015, SPECIAL MEETING OF THE 3 CHISOLM
STREET HOMEOWNERS ASSOCIATION, INC.**

At 5:30 p.m., on January 22, 2015, a Special Meeting of the 3 Chisolm Street Homeowners Association, Inc., was held at 3 Chisolm Street on the 3rd Floor of the Murray Vocational School Building. The meeting was held after the appropriate written notice. There was a quorum of owners in attendance at the meeting.

The meeting was called by the Board to vote upon the following two items: 1) the approval of a Special Assessment to repair the crawlspace in the main building and 2) to reschedule the annual meeting from the first Monday in February to a later date in February to be approved.

The meeting was called to order by the President of the Board, Ms. Mims Roberts. The agenda was approved and followed.

Ms. Roberts provided a brief introduction as to the history of the crawlspace issues and the status of discovery, investigation, and recommendations regarding the crawlspace. Ms. Roberts provided the history from February 2014, when the sale of Unit 101 was inspected by Lowcountry Home Inspections whose workers discovered problems with the crawlspace. This was followed up by Omni Services as well as ADC Engineering, the original engineering firm hired by the developer of 3 Chisolm Street. The Board contacted Mr. Eddie Porcher with Stantec Engineering who also completed a review and evaluation of the crawlspace. The Board obtained bids for the repair work which came in at an amount not to exceed \$2,500,000.00 plus engineering costs based upon Mr. Porcher's report. The report from Mr. Porcher and the bid amount were presented at a November 6, 2014, meeting of the Owners.

Mr. Steven Bernard provided an update as to the repairs and construction issues involving the crawlspace. Mr. Bernard and Mr. Wally Seinsheimer have met with other contractors and hope to have another bid for the work as of February 5, 2015. There is no contract in place for any work with any contractor. NBM, Trident, and Palmetto Gunitite have all been contacted about potential bids. Palmetto Gunitite has provided a bid of not to exceed \$2,500,000.00 plus engineering costs. NBM will provide its bid by February 5, 2015. Trident has not given a date for its bid. Mr. Bernard advised that Joel Krueger, a contact obtained through Ms. Kimberly Rosbe, was going to provide a potential bid. Mr. Krueger advised Mr. Bernard that he could not provide a bid after being in contact with Mr. Porcher. Mr. Bernard informed those present that he was hopeful the costs could come down to between \$1,500,000.00 to \$1,750,000.00. The

work will probably take nine to twelve months to complete according to Mr. Bernard. First floor owners should not have to move out of their Units according to Mr. Bernard.

G. Hamlin O'Kelley, III, of Buist, Byars & Taylor, LLC, provided an update of three (3) legal cases pending involving 3 Chisolm Street. The first is the window lawsuit involving the gym. That matter is pending before the South Carolina Supreme Court to see if that Court is willing to hear the matter and reverse the South Carolina Court of Appeals or the trial court. The second case involves the crawlspace and is in the early stages of service of process upon the Defendants. The defendant general contractor in that case will be represented by Rogers Townsend & Thomas in Columbia. The other defendants have not answered the complaint filed. The third lawsuit was filed on January 5, 2015, by Steven Bernard seeking to hold the Board and past-Boards liable for negligence, breach of duty, and gross negligence regarding the prosecution or mis-prosecution of the construction issues involving the windows, and, possibly, the crawlspace. There is an extension to answer that case until March 7, 2015.

Mr. O'Kelley also provided an explanation of the legal duties to repair the crawlspace, both under the terms of the Master Deed for 3 Chisolm Street and under cases decided by the South Carolina Supreme Court. Mr. O'Kelley explained the liability of the Board and of the Owners should a special assessment not be approved. Mr. O'Kelley informed the group that the Board is charged with maintaining the common elements for the Owners. Mr. O'Kelley advised the repairs would have to be made regardless of the special assessment being approved or not.

Ms. Roberts opened the floor for comments and questions. Ms. Charles Wunsch and Ms. Linda Hojnacki both made comments about their past experience with construction issues and the status of the crawlspace damages. Mr. Seinsheimer spoke regarding the issues of costs, the reports by Mr. Porcher and the scope of work to be completed. Ms. Rosbe inquired as to the methodologies used by the engineers and contractors. Mr. Bill Maneri brought up the issue of "peer review" of the reports by a personal friend who works for a national engineering firm. Ms. Catherine Jones asked questions about the schedule of work. Ms. Bernard advised that she did not wish to vote "yea" on the ballot without a spending cap. Ms. Caroline McMillan provided a written commentary about the Murray Vocational School building's prominence being on the National Register of Historic Places and being subject to easements held by the Historic Charleston Foundation. Mr. Bernard, Ms. Roberts, Mr. Jack Burnett, and Dr. Martin Morad, and Mr. O'Kelley answered questions concerning the special assessment, the work to be performed and the status of same.

After discussion, Dr. Layton McCurdy moved that there be a vote on the ballot presented. Mr. Seinsheimer seconded the motion. The ballot read as follows:

Should the special assessment, in the amount not to exceed \$2,500,000.00 plus engineering costs, to repair the crawlspace in the main building, be approved?

 YES

 NO

Should rescheduling the annual meeting from the first Monday in February to a later date in February be approved?

 YES

 NO

Discussion followed by the Owners in favor of voting on the motion as presented, on amending the motion, and on changing the motion. Mr. O'Kelley advised as to the procedure to withdraw, amend, or vote on the motion. At the end of the discussion, Dr. McCurdy withdrew the motion to vote on the ballot as it read. Following the withdrawal of that motion, Mr. Alonso Galvan moved that the ballot be amended as follows:

Should the special assessment, in the amount not to exceed \$2,500,000.00 plus engineering costs, to repair the crawlspace in the main building, be approved?

 YES

 NO

Should rescheduling the annual meeting from the first Monday in February to a later date in February be approved?

 YES

 NO

Ms. Rosbe seconded the motion to have the ballot approved as amended. Discussion followed by the Owners regarding the pros and cons of the ballot as written. Ms. Shawn Wallace inquired if there was sufficient notice of an amended ballot. Mr. O'Kelley advised that since there was notice of the special assessment and this was still being voted upon, the ballot could be voted upon as written. Ms. Roberts called the question at that time and Mr. Yohanna LaRoche with Sentry Management conducted a roll call vote for those in attendance. The votes for those

owners who provided proxies were given to Ms. Roberts. Mr. O'Kelley agreed to tally the votes as they were called.

At the end of the voting, the first question passed with fifteen yea's and eleven nay's. The second question passed unanimously. Mr. O'Kelley announced that the Owners approved the following:

- ~~1. The special assessment to repair the crawlspace in the main building is approved~~
2. The annual meeting would be rescheduled from the first Monday in February to a later date in February

Mr. Bernard moved to adjourn the meeting. There was no second. Mr. Seinsheimer asked to address the Owners regarding a potential amendment to the Master Deed for this Special Assessment. Mr. Seinsheimer advised, and Mr. O'Kelley confirmed, that 66.67% of the Owners would have to approve such an amendment. Mr. Seinsheimer proposed changing the method of assessment for this Special Assessment only. This new method would be based upon the square footage of each Unit and each Unit's value as determined by the "3 Chisolm Street Assessment Schedule" provided by Mr. Seinsheimer. Mr. Seinsheimer then moved that the Board schedule a meeting to change amend the Master Deed for this issue only. Mr. Galvan seconded the motion.

There being no further business, Mr. Bernard moved that the meeting be adjourned. Mr. Charles Wyrick seconded the motion. The meeting was adjourned at 7:22 p.m.

Respectfully submitted:

3 Chisolm Street Homeowners Association, Inc.

By: Mims Roberts
Its: President

By: Jack Burnett
Its: Secretary/Treasurer

FOLTZ MARTIN LLC
ATTORNEYS AT LAW5 PIEDMONT CENTER SUITE 750 ATLANTA GA 30305-1541
TELEPHONE 404-231-9397 / FACSIMILE 404-237-1659

January 30, 2008

VIA FACSIMILE 843-720-1777VIA CERTIFIED MAIL

Christopher Ogiba, Esq.

Paul Dominick, Esq.

NEXSEN PRUET

205 King Street, Suite 400

P.O. Box 486

Charleston, SC 29402

Re: 3 Chisholm Street Condominiums

Gentlemen:

This firm has been retained by Chisholm Street Partners, LLC ("CSP") in regard to the Chisholm Street Condominiums. We have reviewed your firm's letters, dated June 20, 2007 and November 14, 2007. While you make a number of assertions in these letters, the main focus seems to be on two issues. First, you claim that the windows in the former gymnasium were replaced in a defective manner and/or not replaced at all, apparently basing these conclusions on (a) a layman's observation (June 20, 2007 letter) and (b) the October 16, 2007 preliminary observations report of Applied Building Sciences, Inc. ("ABS"). Second, you threaten that if CSP doesn't "step up" in regard to the window issue, you will bring a claim for violation of the South Carolina Unfair Trade Practices Act. Each of these positions is without merit. We will attempt to deal with your erroneous factual statements and conclusions, but reserve the right to amend our positions as we continue to investigate this matter.

We trust that after reviewing this letter, you will revisit your positions with the Chisholm Street Homeowners Association (the "Association") during the February 4, 2008 meeting and determine that any remedy the Association hopes to seek or may eventually seek, will not be, and should not be, forthcoming from CSP. To the extent you institute legal actions based on your erroneous factual and legal conclusions, CSP will investigate abusive litigation claims and seek its fees and costs in defending any actions that arise. Further, from a practical standpoint and as already pointed out by Mr. Morrison in his response letter dated July 19, 2007, CSP is essentially a defunct entity.

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Christopher Ogiba, Esq.
Paul Dominick, Esq.
January 30, 2008
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Windows

Originally, your entire argument related to the windows hinged on a visual observation of windows at the former gymnasium with outwardly visible paint peeling and wood deterioration. In a climate such as Charleston's, a lack of proper maintenance by the Association over the six-year period after our clients' involvement, would obviously result in this type of deterioration. In fact, the length of time involved before these issues were brought to CSP's attention, is indicative of the improper maintenance and management that likely led to the problems with the windows in the first place. To date, there has been no effort to evaluate the lack of maintenance or responsibility of the management company. We suggest that you once again revisit this issue with the Association and with Mr. Michael Parades.

CSP pointed these facts out and rightfully refused to expend money hiring an independent third party for evaluation. In response, the Association chose to engage ABS to perform a preliminary visual investigation in the summer of 2007. Contrary to the assertions in your November 14, 2007 letter, nothing in the ABS report supports your contentions that CSP bears any responsibility or liability to the Association. In fact, the entire basis of the ABS report is tainted due to ABS's review of incorrect contract documents. As clearly stated in the ABS report, its assumptions and conclusions were based on discussions with Mr. Colin Bruner (apparently the property manager) and architectural drawings/contract documents prepared by Brock Green Architects and Planners, dated June 16, 2000.

However, the documents reviewed by ABS which form the basis of its conclusions are misleading at best, as there were supplemental conditions which changed these documents. As you can see at Tab 1 attached to this letter, the wood shop drawings were submitted by Masterpiece Millwork per the plans, specifications and supplemental drawings for review and approval by Brock Green Architects & Planners on November 22, 2000. Genoa Construction has assured us that the wood windows were manufactured per the approved shop drawings and that installation, caulking and painting of the wood windows in the gymnasium building occurred in November and December 2001. Genoa has also stated that the windows were recaulked and repainted by Genoa in May 2002 and that it received the Certificate of Occupancy for the entire project, including the gymnasium building on June 28, 2002. ABS obviously did not review the revised and updated documents, as it based its conclusions on only the June 16, 2000 documents without the benefit of reviewing the revised shop drawings and supplemental conditions.

Moreover, even a "layman's observation" of the pictures at Tab 2 demonstrates that the windows in the gymnasium building were replaced, on both the lower and upper levels. See Tab 2 (pictures of the buildings from August of 1999 and then again, during construction). Clearly the windows on the bottom levels were replaced, as they are all removed from the gymnasium building in the "after" pictures. In addition, note that the windows on the upper level contained five (5) rows of panes in the pictures from August 1999, but in the "after" pictures they contain six (6) rows of panes. All of this evidence actually points in favor of the

Christopher Ogiba, Esq.
Paul Dominick, Esq.
January 30, 2008
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windows being replaced, as the ABS report states in the conclusions section that "all of the windows appeared to be of the same age based on the visual survey conducted." Further, the stamps noted by ABS (ANSI Z97.1-1984 16 CFR 1201 CII 1/8 UTP) on all of the windows related to the ANSI standard are actually consistent with the contract documents and instead support the proposition that all windows were replaced in accordance with the documents. This is further supported by Brock Green Architects and Planners acceptance of the project and the issuance of the certificate of occupancy by the city in 2002.

The most cursory review of the documentation we have provided should demonstrate that Genoa Construction did replace the windows and that CSP bears no further responsibility to the Association. Even without the benefit of the correct contract documents, the ABS report acknowledges the stamp on the glazing of the windows does not help to identify the age of the window. The ABS report clearly states that the 1984 stamp only refers to the code which was not revised until 2004. Therefore, unless the windows were replaced after 2004, they would obviously bear the 1984 stamp. The ABS report specifically states that it "is likely that additional information regarding the windows will be required in order to determine if replacement units were ever installed during the 2000 renovations." The Association now has both visual (photographic) and contractual (supplemental conditions and drawings) support that the windows were replaced.

Given that the correct plans and photos show proper installation of new windows per the plans and specifications, the lack of maintenance as the cause of any alleged problems is confirmed. The Association should look to the management companies it has placed in charge of the property for an explanation, inclusive of CCM Management and Sentry Management (who we noted as the current management company from your last letter). It is our understanding that Mr. Parades has worked at both of these companies and been in charge of managing the property since May of 2002. It is also our understanding that Mr. Parades received all of the warranties related to various products in September of 2003 via federal express and also received Operation & Maintenance Manuals at the conclusion of the Project from Genoa Construction.

SC UTPA

In regard to your threats based upon the South Carolina Unfair Trade Practices Act, your interpretation of the Horizontal Property Regime Act is strained at best and bordering on abusive, especially when the facts at hand are reviewed. To suggest that CSP was somehow required to give notice based on S.C. Code § 27-31-410 because the vocational school allegedly had at one point had a building referred to as a caretaker's house, deserves the "incredulity" that Mr. Morrison gave it in his prior response. As you can see from the pictures behind Tab 2, the "custodian's house" was anything but a residential property that would lead to the application of the notice provisions of the statute in S.C. Code § 27-31-410.

Christopher Ogiba, Esq.
Paul Dominick, Esq.
January 30, 2008
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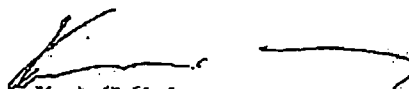
To read the Horizontal Property Regime Act in the light that you suggest, places form over substance and, in that regard, CSP's alleged failure to give notice under S.C. Code § 27-31-430 is without merit. Further, even assuming arguendo that such disclosures should have been made, any alleged violation of the South Carolina Unfair Trade Practices Act has long since been time-barred by the three (3) year statute of limitations on such claims. S.C. Code § 39-5-150.

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 coverage insurer. The real issue relates to the negligence in management and to the extent that the Association does not address it correctly, this may place your firm in a conflict of interest position, pitting the members of the Association against its derelict board members/officers. See e.g. Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367 (1986) (members of unincorporated condo association can sue association for contract or tort).

We look forward to your review of this letter and enclosed documents with the Association at the February 4, 2008 meeting and subsequent response.

Sincerely,

FOLTZ MARTIN, LLC



Kevin H. Hudson
Matthew A. Spivey

MAS/act

cc: Mr. Jack Wilcox
Mr. David Perdue

3 Chisolm Street Board Members

2003-2017

2003

Jack Burnett, Pete Wyrick, Frances Hegenberger and Jackie Noller

2004

Jack Burnett, Pete Wyrick, George Cogar, Frances Hegenberger and Laura Radley

2005

Jack Burnett, Laura Radley, Connie Wyrick and Linda Austin

2006

Jack Burnett, Linda Austin, Connie Wyrick and Gwen McCurdy

2007

Jack Burnett, Connie Wyrick, Gwen McCurdy, Bill Maneri

2008

Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, Bill Maneri

2009

Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, Bill Maneri

2010

Wally Seinsheimer, Mims Roberts, Bill Maneri, George Davidson, Georgia Bell

2011

Wally Seinsheimer, Helen Warren, Mims Roberts, Georgia Bell, George Davidson

2012

Helen Warren, Mims Roberts, George Davidson, George Cogar, Wally Sensheimer

2013

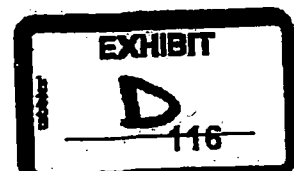
Jack Burnett, Layton McCurdy, Martin Morad, Mims Roberts, Doug Hamilton

2014

Jack Burnett, Douglas Hamilton, Martin Morad, Mims Roberts, and Charles (Pete) Wyrick,
Steven Bernard

2015

Jack Burnett, Martin Morad, Mims Roberts, Charles (Pete) Wyrick, Steve Bernard



3 Chisolm Street Board Members

2003-2017

2003

Jack Burnett, Pete Wyrick, Frances Hegenberger and Jackie Noller

2004

Jack Burnett, Pete Wyrick, George Cogar, Frances Hegenberger and Laura Radley

2005

Jack Burnett, Laura Radley, Connie Wyrick and Linda Austin

2006

Jack Burnett, Linda Austin, Connie Wyrick and Gwen McCurdy

2007

Jack Burnett, Connie Wyrick, Gwen McCurdy, Bill Maneri

2008

Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, Bill Maneri

2009

Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, Bill Maneri

2010

Wally Seinsheimer, Mims Roberts, Bill Maneri, George Davidson, Georgia Bell

2011

Wally Seinsheimer, Helen Warren, Mims Roberts, Georgia Bell, George Davidson

2012

Helen Warren, Mims Roberts, George Davidson, George Cogar, Wally Sensheimer

2013

Jack Burnett, Layton McCurdy, Martin Morad, Mims Roberts, Doug Hamilton

2014

Jack Burnett, Douglas Hamilton, Martin Morad, Mims Roberts, and Charles (Pete) Wyrick, Steven Bernard

2015

Jack Burnett, Martin Morad, Mims Roberts, Charles (Pete) Wyrick, Steve Bernard



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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

STEVEN M. BERNARD AND DEBORAH J. BERNARD ON
BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

vs. CASE NO. 2015-CP-10-0020

3 CHISOLM STREET HOMEOWNERS ASSOCIATION, INC.

Defendant.

DEPOSITION OF: STEVEN M. BERNARD

DATE: April 27, 2018

TIME: 1:00 p.m.

LOCATION: 288 Meeting Street
Charleston, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

EXHIBIT

E



A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 2

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR PLAINTIFFS
3 STEVEN M. BERNARD AND DEBORAH J.
4 BERNARD ON BEHALF OF THEMSELVES AND
5 ALL OTHERS SIMILARLY SITUATED:
6
7 QUERY, SAUTTER & ASSOCIATES
8 BY: MICHAEL H. ELLIS
9 O GRADY QUERY
10 147 Wappoo Creek Drive, Suite 202
11 Charleston, SC 29412
12 (843) 795-9500
13 Mellis@qlawsc.com
14
15 ATTORNEYS FOR DEFENDANT
16 3 CHISOLM STREET HOMEOWNERS
17 ASSOCIATION, INC.:
18
19 BARNWELL, WHALEY, PATTERSON & HELMS
20 BY: JEFFREY M. BOGDAN
21 288 Meeting Street, Suite 200
22 Charleston, SC 29401
23 (843) 577-7700
24 Jbogdan@barnwell-whaley.com
25
(INDEX AT REAR OF TRANSCRIPT)

Page 4

1 Q. So you've sat in my seat probably
2 hundreds of times then?
3 A. If not thousands.
4 Q. Have you ever done one in South
5 Carolina?
6 A. No.
7 Q. I'm required to tell you a couple of
8 rules. I'm sure you know these, but I'm supposed
9 to do it. So I'm going to do it.
10 If you don't understand one of my
11 questions, don't answer it. Ask me to clarify it.
12 If you answer it, I'm going to assume that you
13 understood it; is that fair?
14 A. I'm smiling because I have a law
15 professor that told me you should never let an
16 attorney in a deposition make that statement that
17 you would assume something. The answer is I will
18 tell you if I don't understand your question.
19 Q. I can live with that. If you need a
20 break at any time let me know. As you know, this
21 is not an endurance contest. It's informal. If
22 you need to use the restroom, make a phone call,
23 whatever you need to do, I'm happy to accommodate
24 you. The only caveat there is if there is a
25 question on the table I would ask that you answer

Page 3

1 PROCEEDINGS
2 * * * * *
3 STEVEN M. BERNARD
4 being first duly sworn, testified as follows:
5 EXAMINATION
6 BY MR. BOGDAN:
7 Q. Mr. Bernard. We've met off the record
8 at mediation and just again before the deposition.
9 My name is Jeff Bogdan. I represent 3 Chisolm
10 Street Homeowners' Association in a lawsuit that
11 has been filed by yourself and your wife, both
12 individually and on behalf of a class of
13 individuals. We're here today to take your
14 deposition. Do you understand that?
15 A. Yes.
16 Q. Have you ever sat for a deposition
17 before?
18 A. I have not sat as a deponent before.
19 Q. Are you a retired attorney?
20 A. I am.
21 Q. What kind of law did you practice?
22 A. I was a trial lawyer. I practiced -
23 had a suburban practice. We did everything but
24 labor law and taxes, and I did a lot of
25 construction defect litigation.

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1 the question before we take the break.
2 During the breaks you're not supposed
3 to have any discussions with your attorneys or
4 anybody else about the substance of the case. You
5 can talk about the weather. You can talk about
6 what you're going to do over the weekend. You're
7 not supposed to talk about the substance of the
8 case or your deposition. If you do talk about the
9 substance, I'm allowed to ask you about it.
10 A. I understand.
11 Q. The court reporter is taking
12 everything down. Verbal responses as opposed to
13 head nods.
14 A. I understand.
15 Q. That's probably it for the rules.
16 Where did you practice when you were practicing?
17 A. In the San Francisco Bay area, a town,
18 city called Fremont, and then we moved to Newark,
19 California.
20 Q. Always in California then?
21 A. Yes.
22 Q. How long were you a practicing
23 attorney?
24 A. Almost 40 years.
25 Q. Where did you go to law school?

Page 6 1 A. Brooklyn Law School in New York City. 2 Q. Are you from New York? 3 A. I am. 4 Q. How did you get out to California? 5 A. I met — a group of us went to 6 California one summer, and I met the woman who was 7 to be my wife — my first wife there. She was 8 from — she was a native in the city of Fremont. 9 So we got married, and she wanted to go home. 10 Q. The lawsuit that's been filed, you are 11 a plaintiff both individually and as a class 12 member. Are you also one of the class 13 representatives? 14 A. Yes. 15 Q. Is the other class representative your 16 wife? 17 A. Yes. 18 Q. Her name is Deborah? 19 A. Deborah. 20 Q. Bernard? 21 A. Yes. 22 Q. The lawsuit alleges one cause of 23 action for negligence/gross negligence. I think 24 it might be. Does that sound right to you? 25 A. I don't know how many causes of	Page 7 1 action. I haven't read it in a while. But the 2 answer is yes for negligence, yeah. 3 Q. So the cause of action in the amended 4 complaint is breach of duty/negligence/gross 5 negligence, and that's the only cause of action. 6 A. Okay. 7 Q. What I'd like you to do just to jump 8 right into it is tell me all of the ways that you 9 and your fellow class members think that the HOA 10 was negligent as it relates to this lawsuit that 11 you have filed? 12 A. Let me start this way. The 13 condominiums consist of three buildings. There's 14 a main building that has approximately 20 units. 15 I think it actually has 21 because one has been 16 subdivided. There is a cottage in the middle, 17 which was a caretaker's cottage, and the building 18 that I live in, which had been a gymnasium. 19 That's six units. 20 The conversion took place I believe 21 2002 or thereabouts. Shortly after that there was 22 a series of window leaks and other issues that 23 arose from the conversion. The board hired a 24 gentleman named Myles Glick, who is a forensic 25 architect, to do a study of the problems that were
Page 8 1 visible to the board at that time. 2 So Mr. Glick did a report. At the end 3 of the report he indicated that there were 4 probably significant other construction 5 deficiencies and that — he suggested that a 6 destructive — that a total forensic analysis of 7 the buildings be undertaken, which would include 8 destructive testing. 9 The board failed to act. The board 10 failed to do anything really. They did not follow 11 Mr. Glick's recommendations. They did not hire 12 anyone to do an analysis. They didn't hire 13 anybody to examine the buildings, and then they 14 filed a lawsuit several years later and the 15 statute of limitations had passed. So the case 16 got bounced out. 17 Q. Anything else? 18 A. Well, if they had done what Mr. Glick 19 had indicated, they would have examined the 20 buildings from top to bottom. And the foundation, 21 which needed significant repairs even at that 22 time, would have been discovered and the repairs 23 would have — they could have done something, the 24 board could have done something to force the 25 general contractor and the developer to do the	Page 9 1 repairs. 2 Q. So my question was for you to list 3 each and every negligent act. I might not have 4 said it exactly this way, but list all of the 5 negligent acts that the HOA did or committed. And 6 I want to — I think that you might have given me 7 a lot of them there, but I want to get a definite 8 list. One that I wrote down is that the HOA 9 failed to follow Glick's recommendation for a 10 complete forensic examination; is that a fair one? 11 A. Right. Yes. 12 Q. Is there a second failure or second 13 negligent act? 14 A. The second negligent act is to have 15 anyone other than — even other than Glick do a 16 forensic analysis and conduct destructive testing. 17 Q. So they should have gone behind Glick 18 and have somebody do the exact same thing that he 19 did? 20 A. Right. In my view Glick put the board 21 on notice that there was a problem, and the board 22 didn't hire anybody, any expert. And it required, 23 in my view, expert — an expert analysis to 24 determine what the full extent of the problems 25 with the buildings were. They did nothing.

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1 Q. Could that expert have been Glick?
2 A. Yes.
3 Q. So that's part of failing to follow
4 his recommendation, which is negligent at number
5 one. Number two is that they didn't authorize
6 Glick to take the next step or hire somebody else
7 to take the next step.
8 A. Yes.
9 Q. Anything else? You have two now.
10 A. Well, there are things that would have
11 flowed from taking those two steps, which would
12 have been doing the repairs or authorizing the
13 repairs to be done by the developer and/or the
14 contractor, the general contractor generally.
15 Q. Which repairs are you speaking of in
16 this lawsuit?
17 A. The repairs to the foundation.
18 Q. So number three would be failing to
19 have the foundation repaired, assuming that, of
20 course, it had been discovered?
21 A. Yes.
22 Q. Any more?
23 A. That's all I can think of at the
24 moment.
25 Q. Let me ask if this is one, because

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1 recommendation?
2 A. Yes.
3 Q. First they have to follow Glick's
4 recommendations in order to discover the
5 foundation defect?
6 A. They also had another obligation,
7 which was to maintain the common elements, which
8 requires, irrespective of Glick, to examine the
9 common elements and conduct maintenance. If they
10 had examined the common elements and conducted the
11 maintenance they would have discovered the
12 problems.
13 Q. And the foundations are common
14 elements?
15 A. Yes, they are.
16 Q. Were you a plaintiff or defense lawyer
17 when you were in your practice?
18 A. We were a suburban law firm. So we
19 were both. For the most part we were defense
20 lawyers.
21 Q. How about in your construction
22 practice? Defense?
23 A. Almost all. On a few occasions we
24 were plaintiff lawyers. For the most part we were
25 defense lawyers.

Page 11

1 this -- at least as I read this case and have gone
2 through the discovery, this might seem to be the
3 biggest one to me, is that the HOA failed to
4 timely file lawsuits. Is that one of your alleged
5 negligent acts?
6 A. Well, as I understand it, if they had
7 done -- if they had followed Glick's
8 recommendations or hired somebody to look at the
9 foundation they could have then sued the
10 contractor or the general -- the general
11 contractor and/or the developer. They failed to
12 discover the problem and, therefore, they failed
13 to file a lawsuit in time.
14 Q. So that is one?
15 A. Yeah, but one follows -- it just flows
16 one from the other.
17 Q. Sure. All of these are in a chain of
18 events?
19 A. Yes.
20 Q. It starts with failing to follow
21 Glick's recommendations?
22 A. Well, it starts with failing to
23 discover that the foundations needed repair.
24 Q. Which you believe would have been
25 discovered had they followed Glick's

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1 Q. So I've got a list of five negligent
2 acts. What I want to know next is when they
3 occurred. So I'm going to go back through the
4 list and I'll ask questions for each one, is when
5 did this happen. Number one, failed to follow
6 Glick's recommendation for a complete forensic
7 examination. When did that happen?
8 A. It happened after the board received
9 Glick's report.
10 Q. That was in, from what I've received,
11 around April 2003, maybe May or June?
12 A. I don't know the exact date. The
13 report is -- I don't know what date the report is
14 dated, but they received it shortly after it's
15 dated is my understanding.
16 Q. We have the report, and I'll mark it
17 as an exhibit. I'll go ahead and give you a
18 preview of it just so you can tell me that date.
19 A. The report is dated April 8, 2003.
20 Q. So this failure number one would have
21 been some time around April 2003; is that fair?
22 A. Yes.
23 Q. Number two failure is have anyone or
24 commission anyone to take the next step or,
25 including Glick, that he recommended in his

Page 14

1 report?
2 A. Yes.
3 Q. Was that the same timeframe, April
4 2003, when that happened?
5 A. It would have been after they received
6 the report and reviewed the report.
7 Q. Number three, you said that they were
8 negligent in not repairing the foundation?
9 A. Right.
10 Q. When did that negligent act occur?
11 A. It occurred from the time that the
12 developer turned over the board of directors to
13 the homeowners. From that moment on they had an
14 obligation to inspect the foundation and maintain
15 it. They failed to do that.
16 Q. That's actually number five, examine
17 and maintain the common elements. Number three
18 was having the foundation repaired. Are those
19 distinctions in your mind?
20 A. Well, I guess. Having the foundation
21 repaired would have been a subsequent action after
22 review of the Glick report and after hiring
23 somebody to look at the foundation, then they
24 would have determined the foundation was in need
25 of repair and they would have repaired it.

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1 limitations and the statute expired.
2 Q. You don't know when that statute
3 expired?
4 A. I do not.
5 Q. As the plaintiff in this lawsuit that
6 alleges that the HOA didn't file a lawsuit within
7 the statute of limitations, you don't know when
8 they should have filed it?
9 A. As I said, I have attorneys who
10 determined what the statute of limitations are.
11 I'm not admitted to practice in the state of South
12 Carolina. So I don't know all of the nuances of
13 the state of the statute of limitations.
14 Q. Besides your attorneys, has anybody
15 told you when the statute of limitations expired?
16 A. The Court of Appeals.
17 Q. What did it say?
18 A. It said the statute expired before the
19 HOA took any action, any affirmative action by
20 filing a lawsuit.
21 Q. Did the Court of Appeals say when the
22 statute expired?
23 A. I don't remember what the Court of
24 Appeals said in specific.
25 Q. If, in fact, the Court of Appeals

Page 15

1 Q. Is your answer for both of them
2 beginning in -- I think you said it was 2002 when
3 they turned over?
4 A. No. No. It was constructed in 2002.
5 I do not know when the developer actually turned
6 the board of directors to individual homeowners.
7 Q. So whenever that happen. Do you have
8 an idea of when it was?
9 A. Really, I don't.
10 Q. I thought I saw, I think it happened
11 in 2003.
12 A. It could well have. I just don't
13 know.
14 Q. We can dig up the document that says
15 that. That would have started whenever the
16 turnover happened?
17 A. Yes.
18 Q. Number four in your list of negligent
19 acts is failure to file suit?
20 A. Yes.
21 Q. When did that occur?
22 A. Well, I'm not sure of the statute of
23 limitations in the state of South Carolina or
24 whether this was a latent or a patent defect. But
25 they didn't file a lawsuit within the statute of

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1 decision gives a date as to when the statute of
2 limitations expired, would that then be your date
3 for the failure to file suit?
4 A. I really can't answer that question.
5 Q. Why not? What do I need to do --
6 A. I would need to review the Court of
7 Appeals decision and see and go through all of the
8 discovery to date before I could give you an
9 answer to that.
10 Q. You haven't done any of that?
11 A. I have not.
12 Q. The Court of Appeals decision stemmed
13 from a lawsuit that the HOA filed against the
14 developers and the general contractor and
15 subcontractors regarding above grade water
16 intrusion. Is that your understanding? It was
17 leaky windows, leaking roofs?
18 A. Yes, in part. I think there was also
19 more general language. That complaint I have
20 never read. So I don't know exactly what was
21 alleged.
22 Q. So do you believe that the defects in
23 the foundations underneath the buildings were
24 included in that lawsuit that was filed in 2009?
25 A. I don't know.



Page 34 1 February 2014. 2 A. Then I was on the board in October 3 2014. 4 Q. Does that make sense from a timing 5 standpoint? 6 A. Uh-huh. 7 Q. Because you said shortly thereafter. 8 So shortly could be four months? 9 A. Yes. 10 Q. So you learned that there was a 11 foundation issue in or around February 2014. How 12 did you then come to the conclusion that the HOA 13 was negligent? 14 A. At that point I didn't know anything. 15 All I know is that there was a big problem. When 16 Stantec came up with their findings I knew there 17 was a big problem and a large financial problem. 18 As the facts were uncovered, I knew I read -- I 19 was in a meeting where they discussed a Court of 20 Appeals decision and they asked -- the property 21 manager at the time was Sentry Management -- if 22 they had a copy of the Court of Appeals decision, 23 and I read it. I was not happy when I read it. I 24 asked for a copy of the Glick report and read 25 that, and I came to the conclusion that the board	Page 35 1 was negligent. 2 Q. You learned about this fairly quickly 3 after you moved in to your unit? 4 A. Welcome to Charleston. 5 Q. Do you think that the other residents 6 and the other owners of units knew about this 7 before you did? 8 A. I don't know. 9 Q. You don't know? 10 A. Who knew what when. 11 Q. That Court of Appeals opinion, that 12 came out in March 2014. I don't expect you to 13 know that, but it was March 26, 2014. So actually 14 that was after y'all found out about the 15 foundation defects, right? 16 A. Well, are you asking me when I found 17 out? I don't know what other people knew. So I 18 don't want to speculate as to what other people 19 knew. I found out once Stantec completed its 20 report. I understood that there was an issue. I 21 didn't know the extent of the issue or what was 22 involved. Stantec literally crawled the entire 23 crawl space and documented it. 24 Q. What you found out from revealing the 25 Court of Appeals opinion and Myles Glick's report
Page 36 1 Is that the HOA blew the statute of limitations? 2 A. That's what the Court of Appeals said. 3 Q. Did you ever read any of the orders 4 that were being reviewed by the Court of Appeals? 5 A. I believe I did read the orders. It 6 was an order granting the motion for summary 7 judgment and then an order denying reconsideration 8 or on reconsideration. 9 Q. The first summary judgment orders came 10 out in June 2011. Again, I don't expect you to 11 know that. That was before you lived here. 12 A. Yes. 13 Q. Even purchased or moved into your 14 unit. Have you ever spoken to anybody else who 15 said, yeah, I remember those orders coming out and 16 we just didn't do anything about it? 17 A. I have not -- nobody. I have not 18 spoken with anybody about those orders, and they 19 didn't talk to me about those orders. 20 Q. The class that has been actually 21 certified in this case, are you familiar with the 22 definition of it? 23 A. I believe so. I believe it is those 24 people that paid the \$82,000 special assessment 25 and were owners in June 2015 and those persons who	Page 37 1 have paid additional sums as a result of the 2 requirement to fix the foundations. 3 Q. I'm going to ask you if a number of 4 people are class members, and if you don't know 5 that's fine. But if you do know, then please tell 6 me if they're class members. Jack Burnett? 7 A. If he is a class member I will say 8 yes, no, or I don't know. The Burnetts are, yes. 9 Q. McCurdy, Gwen McCurdy? 10 A. Yes. 11 Q. Her husband is -- 12 A. Yes. 13 Q. Connie Wyrick? 14 A. Yes, Connie and Pete Wyrick. 15 Q. They are class members? 16 A. Yes. 17 Q. George Davidson? 18 A. Yes. 19 Q. Bill Manary? 20 A. Yes. 21 Q. So is it that the HOA itself or the 22 HOA's board that you believe acted negligently? 23 A. Well, I believe the HOA is governed by 24 the board of directors. So whatever relationship 25 you want to call that relationship. So probably

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1 both.
2 Q. So for the purpose of these next few
3 questions I'm just going to refer to them globally
4 as the HOA, okay?
5 A. Okay.
6 Q. Do you believe that the HOA acted in
7 bad faith?
8 A. Tell me what you mean by bad faith.
9 Q. What do you think bad faith means as a
10 construction attorney?
11 A. I don't get to define your questions.
12 Q. You don't get to ask me questions, as
13 you know.
14 A. Right. I don't understand what you
15 mean by bad faith.
16 Q. So you can't answer yes and you can't
17 answer no?
18 A. Right.
19 Q. Do you believe that the HOA was
20 dishonest?
21 A. What do you mean by dishonest?
22 Q. Not honest.
23 A. I can't answer that question.
24 Q. Do you believe that the HOA acted
25 incompetently?

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1 (Defendant's EXH. 3, Civil Action
2 2014-CP-10-6805 and Summons, marked for
3 identification.)
4 BY MR. BOGDAN:
5 Q. Exhibit 3, Mr. Bernard, this is a copy
6 of the lawsuit that the HOA filed against Genoa
7 Construction and some other entities in 2014, and
8 this is the one filed by Clay McCullough. I know
9 you said you didn't have much involvement in this;
10 is that right?
11 A. Yes.
12 Q. I won't ask you too many questions,
13 but I do want to ask a few. The plaintiff in this
14 case is 3 Chisolm Street Homeowners' Association,
15 Incorporated. Do you have an opinion one way or
16 another whether that was the appropriate
17 plaintiff?
18 A. No.
19 Q. You don't have an opinion?
20 A. No.
21 Q. Is it your opinion that this lawsuit
22 was not filed on time?
23 A. I don't know.
24 Q. You don't know? You're not going to
25 testify that this lawsuit was filed after the

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1 A. Yes.
2 Q. Do you have evidence of that?
3 A. Well, my definition of incompetence is
4 the same as negligence. We have discussed the
5 negligence.
6 Q. Do you believe that the HOA acted
7 outside of its authority?
8 A. No.
9 Q. Do you believe that the HOA acted with
10 corrupt motives?
11 A. What do you mean by corrupt motives?
12 Q. If you can't answer yes or no just
13 tell me.
14 A. I can't answer.
15 Q. Do you believe that the HOA acted
16 fraudulently?
17 A. I don't know.
18 Q. Do you believe that the HOA acted in
19 self dealing?
20 A. I don't know.
21 Q. Do you think the HOA's actions were
22 unconscionable?
23 A. Again, I don't know what you mean by
24 these terms. So the answer is I don't know.
25 Q. That's fine.

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1 statute of limitations?
2 A. I don't know what the statute of
3 limitations in South Carolina is. So I can't
4 answer that question.
5 Q. When do you believe that any of the
6 board members or any other members of the HOA
7 first received actual notice, actual notice of the
8 defects in the foundations?
9 A. I don't mean to be argumentative, but
10 what do you mean by actual notice? Somebody
11 saying there's a problem with the foundation?
12 Q. Or seeing it. Actual notice as
13 opposed to a fun word that I screwed up earlier,
14 inquiry notice or constructive notice. Do you
15 understand the distinction between those things?
16 A. (Witness Nods in the Affirmative.)
17 Q. Is that a yes?
18 A. Sorry. That is a yes. I'm thinking.
19 That is a yes. That is hard to answer. The
20 reason that is hard to answer is that I don't know
21 what the home inspector told the HOA when the
22 issue first -- about new foundations first arose.
23 Clearly after Stantec completed its investigation
24 and issued a report we then knew. So I don't know
25 beforehand.



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1 A. I believe so. Hope so.
2 Q. Do you know if the cost of steel or
3 gunite went up from 2003 to 2014?
4 A. I don't know.
5 Q. Exhibit 3, this lawsuit filed by Clay
6 McCullough I have been calling the foundation
7 defects lawsuit. Is that a fair title for it?
8 A. You can call it anything you like.
9 Q. Have you ever referred to it as a
10 name?
11 A. I call it the McCullough lawsuit.
12 Q. Let's use that. I want to use your
13 terms, not mine. I'm not testifying. The
14 McCullough lawsuit was settled, right?
15 A. Yes.
16 Q. Did you have any role in the decision
17 to settle that lawsuit?
18 A. No.
19 Q. Do you know how that decision was
20 made?
21 A. There was a mediation that occurred,
22 and a number was reached at the mediation and then
23 that number -- I was not present at the mediation.
24 Mr. McCullough then came back to the board. I did
25 not participate in that position. The board voted

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1 It's very small. There were only -- the only
2 thing that that needed was some shims needed to be
3 replaced, which I'm not even sure they have been
4 replaced. It's very minor. There is a crawl
5 space in the other two buildings.
6 Q. Are the crawl spaces easily
7 accessible?
8 A. They are now.
9 Q. When did they become easily
10 accessible?
11 A. Let me back up. What do you mean by
12 easily accessible? They were always easily
13 accessible. There were entries to the crawl
14 spaces in both the gym building and the main
15 building, but in order to do the repairs what had
16 to be done in both buildings is removal of soil.
17 When you say accessible, if you went
18 down you could almost not be covered in dirt
19 anymore.
20 Q. So they dug the crawl spaces deeper?
21 A. Yes. They took out soils. They must
22 have dug it deeper.
23 Q. So perhaps people can stand underneath
24 there now?
25 A. They needed to be able to work down

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1 to accept the settlement.
2 Q. Do you understand that when the
3 McCullough lawsuit was settled the issue of
4 whether it was -- the lawsuit, the McCullough
5 lawsuit, was filed on time was actually in front
6 of the court? There was a pending motion to
7 determine that. Do you understand that?
8 A. I don't know that. I'm not saying it
9 wasn't. I just don't know that.
10 Q. Because you tried to stay away from
11 that?
12 A. Yes.
13 Q. That's fair. Have you ever been down
14 to the crawl space under any of the buildings?
15 A. I was invited to go in the crawl space
16 at the conclusion of the construction. I
17 declined. So I have never been down there.
18 Q. Is there a crawl space beneath all
19 three of the buildings?
20 A. No. Well, the answer is yes. The
21 answer is yes.
22 Q. Why did you hesitate? Is there
23 something different about the three?
24 A. Yes. The caretaker's cottage in the
25 middle has a very -- it's a standalone building.

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1 there. So they needed a certain height.
2 Q. How about just getting in and out of
3 them?
4 A. Yes, it was always access to it.
5 Q. Did that access get better?
6 A. I believe so. I believe that Palmetto
7 Gunite, who was the contractor involved, added at
8 least one access point and made the other ones --
9 wherever they needed to enter, they made it
10 better. I don't know what they did.
11 Q. Can you describe to me what the access
12 points to the crawl spaces -- let's just use the
13 main building for this at this time. Can you
14 describe to me how you would access the crawl
15 space under the main building when you purchased
16 your unit?
17 A. Back in 2013?
18 Q. Yes, before any of this work was done
19 by Stantec or Palmetto Gunite and whoever else.
20 Let me give you some context here.
21 A. You want to come visit?
22 Q. Underneath my house there is a crawl
23 space. In order for me to get in it I have to
24 pull off this wooden louvered board that's really
25 heavy. If I didn't know that that board came off

THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LLC,
MURRAY SCHOOL PARTNERS, LLC,
GENOA CONSTRUCTION SERVICES, INC.,
MASTERPIECE MILLWORK, INC., ALLEN
ROPER, JR. d/b/a MASONRY-BRICKWORK
AND STUCCO, JOHN DOE #1, JOHN DOE
#2, AND BROCK GREEN ARCHITECTS
AND PLANNERS, LLC,

Defendants.

GENOA CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

vs.

THE FOX STEEL COMPANY, CAROLINA
SERVICES, INC., LESCO RESTORATION,
INC., FERST PLASTERING, INC.,
CHARLESTON GLASS & MIRROR
COMPANY, 3D RENOVATIONS,
WILLIAMS MECHANICAL,
MASTERCRAFT INTERIOR & EXTERIOR,
COASTAL GLASS AND BLOCK, ADAMS
DAVIS & PARTNERS, TROY PARDEE
HEATING AND AIR CONDITIONING (d/b/a
PARDEE HEATING AND AIR), METRO
WATER-PROOFING, INC., CT WINDOWS
LIMITED, AND ARCHITECTURAL
MATERIALS & SYSTEMS,

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-10-267

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
GENOA CONSTRUCTION SERVICES
INC.'S MOTION FOR SUMMARY
JUDGMENT

FILED
2011 JUN -9 AM 11:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

R



CHISOLM STREET PARTNERS, LLC,

Third-Party Plaintiff,

vs.

THE FOX STEEL COMPANY, CAROLINA
SERVICES, INC., LESCO RESTORATION,
INC., FERST PLASTERING, INC.,
CHARLESTON GLASS & MIRROR
COMPANY, 3D RENOVATIONS,
WILLIAMS MECHANICAL,
MASTERCRAFT INTERIOR & EXTERIOR,
BONIFAY MASONRY, COASTAL GLASS
AND BLOCK, ADAMS DAVIS &
PARTNERS, and TROY PARDEE HEATING
AND AIR CONDITIONING (d/b/a PARDEE
HEATING AND AIR),

Third-Party Defendants.

LESCO RESTORATION, INC.,

Fourth-Party Plaintiff,

vs.

COASTAL WATERPROOFING, INC., n/d/b/a
WARDS WATERPROOFING, INC.,

Fourth-Party Defendants.

This matter came before the Court for a hearing on March 28, 2011, on the motions filed by various Defendants and Third-Party Defendants (hereinafter collectively referred to as "Defendants" for ease of reference) for summary judgment pursuant to Rule 56, SCRCP, based on the three-year statute of limitations under S.C. Code Ann. § 15-3-530. Specifically, the Defendants contend that the Plaintiff (the "HOA") filed this lawsuit more than three years from the date of

architect Miles Glick's report dated April 8, 2003 (the "Glick report"), which identified some construction defects in one of the HOA's three buildings.

Background

In the present matter, the affidavits and deposition testimony submitted by the HOA in opposition to the motions, which must be viewed in the light most favorable to the HOA, indicate as follows:

At the time of the Glick report, the Developer (i.e., Defendants Chisolm Street Partners, LLC and Murray School Partners, LLC) had recently transferred control of condominiums to the HOA. A number of units had not been sold, and the Developer still owned and was marketing the unsold units. The HOA hired Glick to perform a preliminary assessment because of concerns about potential leaks at roof parapets.

The HOA condominiums consist of three buildings, the "main building," which has metal frame windows, and the "gym building" and "caretaker cottage," which have wood windows. Mr. Glick only examined the main building, and his report states that the comments in the report "are specific to the main . . . building" and "[t]he other two buildings were not reviewed.

The HOA delivered the Glick's report to the Developer's representative, and the Developer had the general contractor, Defendant Genoa Construction Services, Inc. ("Genoa"), repair the problems identified by Mr. Glick on the main building, including installing caulk and seals to address water leaks at the metal windows, repairing roof leaks, and repairing cracks in the stucco. After the Glick report was issued, Genoa's workers were off and on the site for over a year performing repair work to address the issues raised in the report.

In addition to the repair performed by Genoa, the Developer paid another contractor to perform repair work, including repairing windows and cleaning, bleaching, and painting mold

accumulations in unoccupied units. The Developer also paid the contractor to install temporary dehumidifiers and run fans to stop water accumulation from condensation on the metal windows in the main building that was occurring because of lack of air conditioning circulation in the unoccupied units. The moisture accumulation problems in those units stopped once the empty units were sold and the occupants began operating the air conditioning systems.

When Genoa and the Developer completed the repair work, the HOA was informed and believed that the water intrusion issues and other issues referenced in the Glick report had been repaired.

Several years later, in 2007 or 2008, the wood windows in gym building began rotting, which prompted the HOA to hire Applied Buildings Sciences, Inc. ("ABS") to investigate the cause of the rotting wood windows. The HOA filed this lawsuit after the Developer and Genoa refused to repair the problems with the wood windows on the gym building.

Thereafter, in or around 2009, while ABS was on the site looking at the firewalls and wood windows in the gym building, ABS looked at the metal windows in the main building. During those observations ABS noted staining and deterioration around some of the metal windows. Based on those observations ABS recommended that portions of the walls under the metal windows in the main building be cut open so that ABS could survey the wall cavities for evidence of water intrusion. The HOA authorized ABS to conduct destructive cuts, at which point ABS cut open walls and observed water in the walls under one of the metal windows in the main building. At this point the HOA learned that the repair work performed by the Developer and Genoa on the main building in response to the Glick report had not been properly and completely performed to eliminate water intrusion issues in the main building.

Contrary to the Defendants' assertion that the HOA took no action to address the issues raised in the Glick report, the HOA took affirmative action by forwarding the report to the Developer and Genoa to repair the problems. The Developer and Genoa responded by repairing the problems and indicated that the problems had been fixed.

When viewed in the light most favorable to the HOA, as the Court must for purposes of a summary judgment motion, these facts indicate that the HOA did not learn that repairs performed by the Developer and Genoa to address the items in the Glick report were not properly and completely performed until ABS examined the main building in 2009 while it was onsite examining problems with the wood windows on the other two buildings.

Standard of review

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (internal citations omitted). "Summary judgment should not be granted even when there is no dispute as to

evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts."

Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

South Carolina law imposes a three-year statute of limitations on actions concerning damage to real property, general negligence claims, and claims arising out of "a contract, obligation, or liability, express or implied." S.C. Code § 15-3-530 (2010). The discovery rule determines when the applicable statute of limitations begins to run. S.C. Code Ann. § 15-3-535. "[U]nder the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E. 2d 615, 616 (1997).

Having considered the evidence in the light most favorable to the non-moving parties, this Court finds that South Carolina's three-year statute of limitations on any claims Plaintiff could have brought relating to Genoa Construction Services' original stucco work on the conversion project has tolled. However, this Court finds there is a genuine issue of material fact regarding the repair work Genoa Construction Services' was contracted to complete in response to the Glick report. When viewed in the light most favorable to the HOA, as the Court must for purposes of a summary judgment motion, the facts indicate that the HOA did not learn that repairs performed by the Developer and Genoa to address the items in the Glick report were not properly and completely performed until ABS examined the main building in 2009 while it was onsite examining problems with the wood windows on the other two buildings.

Additionally, Defendant Genoa Construction Services has moved for summary judgment regarding any and all claims relating to Unit 305 and 306 (a double unit), owned by Jack and Sandra Burnett. In July of 2002, the developer of the project, Chisholm Street Partners, LLC brought an action against Sandra Burnett in the Charleston County Court of Common Pleas. Mrs.

Burnett filed her Answer and Counterclaim on or about September 17, 2002. Burnett's Counterclaim contained causes of action for breach of warranty, negligence, gross negligence, and negligent misrepresentation arising out of the construction and her subsequent purchase of unit 305 and 306 at the 3 Chisholm Street property. Her answer and counterclaim specifically sought damages arising out of, among other things, "leaking windows." Burnett subsequently settled the lawsuit resulting in a resolution of any and all claims between Burnett and the developer, including all claims related to the design, construction, application, manufacture, installation, inspection, disclosure, and marketing, and/or sale of the condominium and any of its components and claims, known and unknown, relating in any way to alleged construction problems and defects in the interior of the condominium.

The Burnetts were on notice of potential claims arising out of the design and construction of their unit (305 and 306) when they asserted counterclaims in their lawsuit. Consequently, the three year statute of limitations bars any claims against Genoa arising out of these defects in Units 305 and 306.

The Court notes that Plaintiff was required pursuant to Rule 56(e), SCRCP, to present factual evidence refuting Genoa's motion for summary judgment in regards to Units 305 and 306, but that Plaintiff failed to present any such evidence. If any defective repairs to windows in units 305 and 306 were made, Plaintiff had the burden of presenting factual evidence showing that was the case.

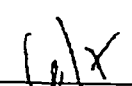
Based on the foregoing, this Court finds that there is no genuine issue of material fact supporting Plaintiff's claims relating to units 305 and 306, and that Genoa is entitled to summary judgment as a matter of law.

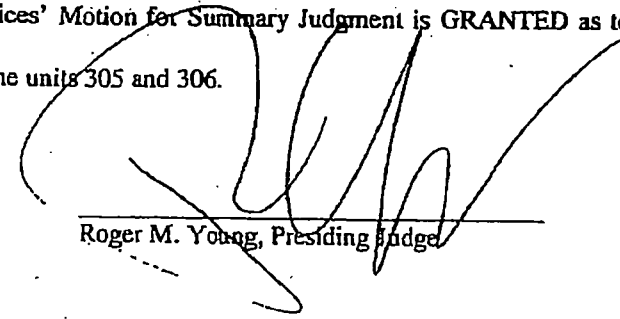
For the reasons set forth above, the Defendant Genoa Construction Services' Motion for Summary Judgment under Rule 56(c) of the South Carolina Rules of Civil Procedure is GRANTED IN PART and DENIED IN PART.

ORDERED, ADJUDGED AND DECREED that:

1. Genoa Construction Services' Motion for Summary Judgment is GRANTED as claims relating to the original construction work on the conversion project;
2. Genoa Construction Services' Motion for Summary Judgment is DENIED as claims relating to the repair work conducted in 2003;
3. Genoa Construction Services' Motion for Summary Judgment is GRANTED as to all claims as they pertain to the units 305 and 306.

SO ORDERED.


_____, 2011
Charleston, SC



Roger M. Young, Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LLC,
MURRAY SCHOOL PARTNERS, LLC,
GENOA CONSTRUCTION SERVICES,
INC., MASTERPIECE MILL WORK,
INC., ALLEN ROPER, JR. d/b/a R
MASONRY BRICKWORK, CAROLINA
ROOFING SYSTEMS, INC., LACY
PAINTING and BROCK GREEN
ARCHITECTS AND PLANNERS,

Defendants.

GENOA CONSTRUCTION SERVICES,
INC.,

Third-Party Plaintiff,

vs.

THE FOX STEEL COMPANY,
CAROLINA SERVICES, INC., LESCO
RESTORATION, INC., FERST
PLASTERING, INC., CHARLESTON
GLASS & MIRROR COMPANY, 3D
RENOVATIONS, WILLIAMS
MECHANICAL, MASTERCRAFT
INTERIOR & EXTERIOR, COASTAL
GLASS AND BLOCK, ADAMS DAVIS &
PARTNERS, TROY PARDEE HEATING
AND AIR CONDITIONING (d/b/a
PARDEE HEATING AND AIR), METRO
WATER-PROOFING, INC., CT
WINDOWS LIMITED, AND
ARCHITECTURAL MATERIALS &
SYSTEMS,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-10-267

**ORDER GRANTING DEFENDANT,
WILLIAMS MECHANICAL
CORPORATION'S MOTION FOR
SUMMARY JUDGMENT**

FILED
2011 JUN -9 PM 12:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

19



CHISOLM STREET PARTNERS, LLC,	)
Third-Party Plaintiff,	)
vs.	)
THE FOX STEEL COMPANY,	)
CAROLINA SERVICES, INC., LESCO	)
RESTORATION, INC., FERST	)
PLASTERING, INC., CHARLESTON	)
GLASS & MIRROR COMPANY, 3D	)
RENOVATIONS, WILLIAMS	)
MECHANICAL, MASTERCRAFT	)
INTERIOR & EXTERIOR, BONIFAY	)
MASONRY, COASTAL GLASS AND	)
BLOCK, ADAMS DAVIS & PARTNERS,	)
TROY PARDEE HEATING AND AIR	)
CONDITIONING (d/b/a PARDEE	)
HEATING AND AIR) and	)
MASTERPIECE MILLWORK, INC.	)
Third-Party Defendants,	)
LESCO RESTORATION, INC.	)
Fourth-Party Plaintiff,	)
vs.	)
COASTAL WATERPROOFING, INC.	)
n/d/b/a WARDS WATERPROOFING,	)
INC.	)
Fourth-Party Defendant	)

On March 28, 2011, this Court heard numerous motions for summary judgment from several first party and third party defendants based on South Carolina's three year statute of limitations. Based on the reasons set forth below, this Court hereby grants Williams Mechanical Corporation's Motion for Summary Judgment.

Factual Findings

This lawsuit arises out of alleged construction defects at 3 Chisolm Street Condominiums in Charleston, South Carolina. In approximately 2000, Genoa Construction Services, Inc. (Genoa) contracted to serve as the general contractor to convert the Murray Vocational School into condominiums. On or around February 15, 2001, Genoa contracted with Williams

Mechanical, Inc. (Williams) for Williams to serve as a subcontractor and perform the HVAC and plumbing scope of work in this project. Original construction was completed and the Certificate of Occupancy was issued in approximately July 2002.

After construction was completed, Plaintiff 3 Chisolm Street Homeowners Association began experiencing problems with the buildings and hired Myles Glick, a forensic architect, to investigate these problems. The Court finds that Glick specifically identified problems with the HVAC individual size units and unit orientation, which Glick believed could contribute to condensation issues with the windows on the project. Also, Glick opined that the units were not tied down properly to the roof. Glick also found several other issues unrelated to Williams' scope of work.

The Court was also presented evidence that Glick issued a report on April 8, 2003, to inform Plaintiff of deficiencies on the project. Specifically, Glick informed Plaintiff that the HVAC issues were significant and pervasive throughout the entire building. Glick also recommended destructive testing be performed to investigate the issues, and suggested that Plaintiff retain an attorney.

Plaintiff filed this lawsuit against Genoa, Chisolm Street Partners (developer), and several other Defendants on January 16, 2009. Genoa filed an Answer to Plaintiff's Complaint and also filed a Third-Party Complaint against several subcontractors, including Williams, for contractual indemnity, common law indemnification (equitable indemnification), breach of express warranties, breach of implied warranties, negligence, negligent misrepresentation, breach of contract and contribution. Also, Chisolm Street Partners (CSP), answered and filed a Third-Party Complaint against several parties, including Williams, asserting causes of action of breach of warranty, negligence, contractual indemnification, and equitable indemnification.

As it concerns HVAC issues on the project, Plaintiff's counsel admitted at the hearing that the pending lawsuit does not concern HVAC issues and that the 2003 Glick report placed Plaintiff on notice of HVAC issues that existed at that time. Plaintiff's expert Scott Harvey of Applied Building Sciences has also testified that he did not investigate any HVAC issues and did not have an opinion concerning the HVAC system on the project. Also, Plaintiff's counsel stated at the hearing that issues with the main building solely concerned repairs made after the 2003 Glick report was issued, and Plaintiff was not claiming any damages for work performed by Genoa's original subcontractors during the original conversion project. Williams was only involved in the original project and did not perform any repair work on the project after the Glick report was issued in 2003.

Conclusions of Law

South Carolina law imposes a three-year statute of limitations on actions concerning damage to real property, general negligence claims, and claims arising out of "a contract, obligation, or liability, express or implied." S.C. Code § 15-3-530 (2010). In each of those instances, plaintiffs benefit from the "discovery rule" of S.C. Code § 15-3-535 that tolls the limitations period until such time that a plaintiff reasonably ought to have known that it had a cause of action against another party. *Barr v. City of Rock Hill*, 330 S.C. 640, 644 (Ct. App. 1998). Under the discovery rule, the Statute of Limitations runs from the date the injured party either knew or should have known by the exercise of reasonable diligence that a cause of action had arisen from the wrongful conduct of the tortfeasor. *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). The fact that the injured party may not comprehend the full extent of damage or appreciate the exact nature of the wrong is immaterial to the discovery rule analysis. *Christensen v. Mikell*, 324 S.C.

70, 73, 476 S.E.2d 692, 694 (1996). *See also Dean v. Ruscon Corp.*, 321 S.C. 360, 365 (1996).

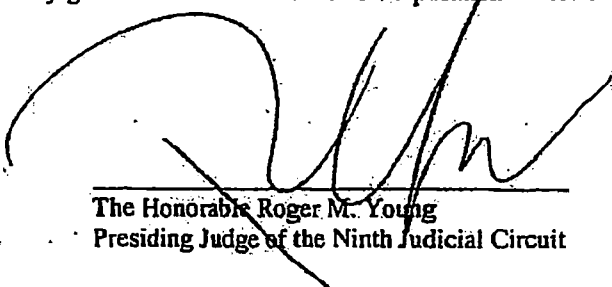
The Court hereby finds that South Carolina's three year statute of limitations on any claims Plaintiff could have brought against Williams Mechanical began to run in 2003 when Myles Glick placed Plaintiff on notice of potential issues with Williams' scope of work on the project as well as other problems with the project's original renovation work. Because Plaintiff did not file a lawsuit until January 16, 2009, the statute of limitations bars Plaintiff's action as it concerns Williams' scope of work.

As a practical matter, Plaintiff has admitted that Williams' scope of work is not at issue in this case. Also, Plaintiff's expert has not investigated HVAC issues and does not have an opinion as to the HVAC systems on the project.

Plaintiff has not filed a first party action against Williams. Instead, Genoa and CSP have filed third party actions for indemnification against Williams. The Court hereby finds under separate Order that Genoa and CSP are entitled to Summary Judgment as it concerns Williams' scope of work on the project because Plaintiff is barred by the three year statute of limitations under SC Code § 15-3-530. As a result, Genoa and CSP do not have indemnification actions against Williams, and Williams is likewise entitled to Summary Judgment in full.

WHEREFORE, this Court hereby grants Williams Mechanical Corporation's Motion for Summary Judgment.

IT IS SO ORDERED.



The Honorable Roger M. Young
Presiding Judge of the Ninth Judicial Circuit

Dated: 6/7/11

Charleston, South Carolina

2014 WL 2581458

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

3 CHISOLM STREET HOMEOWNERS ASSOCIATION, INC., Appellant,

v.

CHISOLM STREET PARTNERS, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a Masonry Brickwork and Stucco, John Doe # 1, John Doe # 2, and Brock Green Architects and Planners, LLC, Defendants,

Of whom Genoa Construction Services, Inc., Masterpiece Millwork, Inc., and Brock Green Architects and Planners, LLC are the Respondents.

Genoa Construction Services, Inc., Third-Party Plaintiff,

v.

The Fox Steel Company, Carolina Services, Inc., Lesco Restoration, Inc., Ferst Plastering, Inc., Charleston Glass & Mirror Company, 3d Renovations, Williams Mechanical, Mastercraft Interior & Exterior, Coastal Glass and Block, Adams Davis & Partners, Troy Pardee Heating and Air Conditioning (d/b/a Pardee Heating and Air), Metro Water-Proofing, Inc., CT Windows Limited, and Architectural Materials & Systems, Third-Party Defendants.

Lesco Restoration, Inc., Fourth-Party Defendant,

v.

Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party Defendant.

Appellate Case No.2012-207850.

No. 2014-UP-128.

Heard Feb. 4, 2014.

Decided March 26, 2014.

Appeal From Charleston County; Roger M. Young, Sr., Circuit Court Judge.

Attorneys and Law Firms

David Jay Parrish, Nexsen Pruet, LLC, of Charleston, for Appellant.

Kent Taylor Stair, Paul Eliot Sperry, and John Patrick Turner Norris, Carlock Copeland & Stair, LLP, all of Charleston, for Respondent Brock Green Architects and Planners; Wendy Raina Johnson Keefer, Keefer & Keefer, LLC, of Charleston, Jenny Costa Honeycutt, Best Honeycutt, P.A., of James Island, and L. Dean Best, Best Honeycutt, P.A., of Charleston, for Respondent Masterpiece Millwork; Franklin H. Turner, III, Joshua Allan Bennett, and Laurence S. McWhorter, Rogers Townsend & Thomas, PC, all of Columbia, for Respondent Genoa Construction.

Opinion

PER CURIAM.



*1 In this construction defect case, the 3 Chisolm Street Homeowners Association, Inc. (the "HOA") brought suit in 2009 against several defendants that completed construction work on three condominium buildings in 2002, including the respondents—Genoa Construction Services, Inc., the general contractor, Masterpiece Millwork, Inc., the manufacturer of the windows used in the buildings, and Brock Green Architects and Planners, LLC, the architect. The circuit court granted summary judgment to the respondents on claims related to original construction work based on the statute of limitations. We affirm.

Section 15-3-530 of the South Carolina Code (2005) sets forth a three-year statute of limitations for actions based in negligence and contract. See § 15-3-530(1) and (5) (providing for a three-year statute of limitations for "an action upon a contract" and "an action for ... any injury ... not arising on contract and not enumerated by law"). In determining when the statute of limitations began to run, the circuit court applied the "discovery rule," which provides that the time to file a claim "begins to run when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). The HOA argues there are material issues of fact as to when the HOA discovered, or should have discovered, that a cause of action existed for original construction defects in all three condominium buildings—the main building, the gym building, and the cottage building.

As to the main building, we find 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 *Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 207, 503 S.E.2d 761, 766 (Cl.App.1998) (stating the statute of limitations begins to run "from the date the injury is discoverable by the exercise of reasonable diligence"); 332 S.C. at 208, 503 S.E.2d at 767 (holding the plaintiff "had sufficient information ... to put it on inquiry notice, which, if developed, would have revealed the defects"). The 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. See *Barr v. City of Rock Hill*, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Cl.App.1998) (stating a party has notice of claims when the facts and circumstances "would put a person of common knowledge and experience on notice that ... some claim against another party *might exist*" (internal quotation marks and citation omitted) (emphasis in original)); *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) ("The focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer."); *id.* ("If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." (citation omitted)).

*2 As to the gym and cottage buildings, we find the circuit court correctly found Glick's report provided the HOA sufficient information to put it on inquiry notice of construction defects existing in these buildings. See *Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (stating "the fact that the injured party may not comprehend the full extent of the damage is immaterial"); *Republic*, 332 S.C. at 208, 503 S.E.2d at 767. Specifically, Glick's report put the HOA on inquiry notice of defects in the gym and cottage buildings because:

- (1) all three buildings were built at the same time, by the same general contractor, and in accordance with the same plans developed by the same architect;
- (2) the minutes from the board of directors meeting in May 2003 provide that after receiving Glick's report, the board discussed "steps that should be followed," including "[i]nspection of the cottage and gym building[s]";
- (3) the minutes from the board of directors meeting in June 2003 demonstrate the HOA solicited proposals from companies for "additional investigation" into the defects highlighted in Glick's report, although it ultimately decided not to pursue this course of action due to the cost;
- (4) the HOA was urged to conduct further investigations by Glick, who warned of "significant and pervasive construction defect problems"; and

(5) an inspection report shows the HOA undertook remedial measures on the gym building some time before 2007 "in an effort to inhibit water intrusion at windows."

There is also evidence that if the HOA had exercised reasonable diligence and investigated the other buildings in 2003, it would have discovered the defects before the statute of limitations ran. *Barr*, 330 S.C. at 645-46, 500 S.E.2d at 160 (holding had the plaintiffs "exercised reasonable diligence and investigated the problems noted in the ... inspection reports, they could have realized the magnitude of the problem and brought suit before the statute of limitations ran"). An inspection report issued in 2007 that concerned the gym and cottage buildings alerted the HOA to defects that existed in 2003 and would have been discoverable. Moreover, according to an architect who inspected the buildings, the deterioration of the wooden windows in the gym building resulted, in part, from condensation buildup on the windows, which would "have been occurring prior to [his] observations" in 2007 because it was caused by installation of single-pane windows. Thus, the defect causing the condensation—the single-pane windows—existed at the time construction was completed in 2002.

The HOA also argues it "thought the problems [in the main building] had been repaired" by Genoa in 2004, which tolled the statute of limitations as to original work performed by Genoa. We find the issue is not properly before this court, as the HOA raised this issue for the first time in its reply brief. See Rule 208(b)(1)(B), SCACR ("[N]o point will be considered which is not set forth in the statement of the issues on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct.App.2001) (stating "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief").¹

*3 Because we affirm on the merits of the circuit court's conclusion that the statute of limitations bars the HOA's claims, we decline to address other grounds on which summary judgment was granted. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address appellant's remaining issues when disposition of a prior issue was dispositive).²

AFFIRMED.

FEW, C.J., SHORT and GEATHERS, JJ., concur.

All Citations

Not Reported in S.E.2d, 2014 WL 2581458

Footnotes

1 Additionally, we find no merit to this argument. The HOA bases this assertion on language in the circuit court's order that stated the statute of limitations for original construction work "has tolled." We do not interpret the court's use of the word "tolled" as invoking the doctrine of equitable estoppel, but instead as a finding that the statute of limitations expired as to all claims related to original work. This conclusion is supported by (1) the context in which the court made this statement; (2) the fact that the HOA did not assert equitable estoppel before the court made this ruling; and (3) the ultimate holding that the statute of limitations barred the HOA's claims regarding original work.

2 Genoa also raises an issue in its brief regarding the circuit court's application of the "continuous treatment exception." We decline to address this argument, as it was never raised to the circuit court. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 482, 609 S.E.2d 286, 299 (2005) (finding issue not preserved because it was not raised to and ruled upon by the trial court).

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

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) Case No.: 2014-CP-10-6805

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Vocational School building. I never ventured into the main building's crawl space, as I have never been asked to perform any services regarding the crawl space at the Property and none of the above water intrusion issues had anything to do with the crawl space.

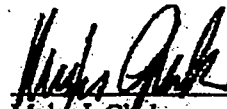
5. During the time I was involved, there were no indications of any structural problems at the Property. Nothing during my site visit caused me to be concerned about the structural integrity of the building. Based on our observations, neither I nor the Board were on notice of structural issues in the building.
6. On April 8, 2003 I prepared a written summary of my preliminary observations for the Board's consideration based on the above initial site visit investigation (the "Report"). A true and accurate copy of this report with supporting photographs is attached hereto as Exhibit A. In the Report I recommend the Board pursue a forensic report to document and record the issues related primarily to water infiltration and its impact on the building.
7. The scope of my initial site visit was limited to a visual observation of the Property from grade level to the roof regarding the above water intrusion issues. Since there were no signs of structural issues in the building, I did not advise the Board to undertake a structural analysis of the building. As such, it was not my expectation that the forensic investigation I was recommending in my Report would have included an examination of the condition of the sub-substructure.
8. The Report does not contain any findings, recommendations, or other observations concerning any of the crawl spaces located at the Property. Therefore, the Report does not put the Board or anyone else on inquiry notice of defects or problematic conditions vis-à-vis the crawl space and that was not my intent. It also didn't suggest or recommend any testing or examination of these areas. As such, the investigation I was recommending

would not have included inspection of the structural elements in the crawl space. Had the Board even followed the suggestions in my Report, the conditions in the sub-structure would not have been discovered.

9. Finally, the property owners had a right to rely on the work performed by the professionals that undertook the construction work to convert this property into condominiums. It was reasonable for them to assume the building, having recently been redesigned, studied, engineered, and constructed, would be safe, habitable, and structurally sound. I didn't put them on notice of the need to investigate otherwise.

10. This Affidavit is made on my personal knowledge. Where opinions are stated, the opinions are to a reasonable degree of architectural certainty, most probably.

AFFIANT FURTHER SAYETH NOT.


Myles L. Glyck

SWORN to before me this 7th day
of October, 2016


Notary Public for South Carolina

My Commission Expires: 8/7/21



) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

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Case No.: 2014-CP-10-6805

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Defendants.

**AFFIDAVIT OF
MYLES L. GLICK**

2016 OCT 13 PM 1:19
JULIE J. ARMSTRONG
CLERK OF COURT

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1. I am a licensed architect in the State of South Carolina and hold a national board – NCARB – certificate in architecture. Aside from being a practicing architect, I also perform forensic investigations for clients and have done so for many years.
2. At the request of the Chisholm Street Homeowners Association Board of Directors (the “Board”), on January 30, 2003 I performed a visual observation of real property commonly known as the “Chisolm Street Condominiums” located in downtown Charleston, SC (the “Property”).
3. The purpose of my initial site visit was to investigate the origin and cause of water intrusion reported by the Board and unit owners specifically in the following areas: windows, window ledges; condensation buildup on the inside of the glass, and the roof.
4. Although the Property consists of three separate structures, my initial site visit investigation regarding the above water intrusion issues was limited to the main three-story old Murray



Vocational School building. I never ventured into the main building's crawl space, as I have never been asked to perform any services regarding the crawl space at the Property and none of the above water intrusion issues had anything to do with the crawl space.

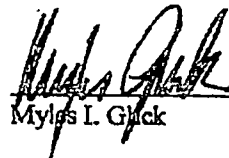
5. During the time I was involved, there were no indications of any structural problems at the Property. Nothing during my site visit caused me to be concerned about the structural integrity of the building. Based on our observations, neither I nor the Board were on notice of structural issues in the building.
6. On April 8, 2003 I prepared a written summary of my preliminary observations for the Board's consideration based on the above initial site visit investigation (the "Report"). A true and accurate copy of this report with supporting photographs is attached hereto as Exhibit A. In the Report I recommend the Board pursue a forensic report to document and record the issues related primarily to water infiltration and its impact on the building.
7. The scope of my initial site visit was limited to a visual observation of the Property from grade level to the roof regarding the above water intrusion issues. Since there were no signs of structural issues in the building, I did not advise the Board to undertake a structural analysis of the building. As such, it was not my expectation that the forensic investigation I was recommending in my Report would have included an examination of the condition of the sub-substructure.
8. The Report does not contain any findings, recommendations, or other observations concerning any of the crawl spaces located at the Property. Therefore, the Report does not put the Board or anyone else on inquiry notice of defects or problematic conditions vis-à-vis the crawl space and that was not my intent. It also didn't suggest or recommend any testing or examination of these areas. As such, the investigation I was recommending

would not have included inspection of the structural elements in the crawl space. Had the Board even followed the suggestions in my Report, the conditions in the sub-structure would not have been discovered.

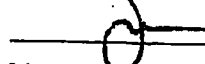
9. Finally, the property owners had a right to rely on the work performed by the professionals that undertook the construction work to convert this property into condominiums. It was reasonable for them to assume the building, having recently been redesigned, studied, engineered, and constructed, would be safe, habitable, and structurally sound. I didn't put them on notice of the need to investigate otherwise.

10. This Affidavit is made on my personal knowledge. Where opinions are stated, the opinions are to a reasonable degree of architectural certainty, most probably.

AFFIANT FURTHER SAYETH NOT.


Myles L. Gluck

SWORN to before me this 7th day
of October, 2016


Notary Public for South Carolina

My Commission Expires: 8/7/21



2005 WL 7083482

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

Katharine SMITH and Margaret Rittenbury, Individually and on behalf of all similarly situated coowners of the Dockside Horizontal Property Regime, Appellants,

v.

DOCKSIDE ASSOCIATION, INC., a non-profit corporation; and Douglas Berlinsky, Wilbur Burbage, II, Francis G. Cain, Jr., Lydia P. Davidson, William B. Ellison, Grant D. Small, James F. Spann and Jonathan L. Yates, Respondents.

No. 2005-UP-139.

Heard Feb. 9, 2005.

Decided Feb. 28, 2005.

Appeal from Charleston County; R. Markley Dennis, Jr., Circuit Court Judge.

Attorneys and Law Firms

Paul A. Dominick and Christopher A. Ogiba, both of Charleston, for Appellants.

John S. Wilkerson, III, of Charleston; R. Hawthorne Barrett, of Columbia; for Respondents.

Opinion

PER CURIAM.

*1 In this civil matter, Katharine Smith and Margaret Rittenbury, individually and on behalf of all similarly situated co-owners of the Dockside Horizontal Property Regime ("Appellants"), instituted this action against Dockside Association, Inc. (the "Association"), and various individual directors and members of the Board of Directors, alleging the Board and the directors were negligent for improperly discharging their duties to maintain the Dockside facilities and for fiscal mismanagement. They now appeal the circuit court's grant of summary judgment to both the Association and the individual directors. We affirm.

FACTS

Dockside is a residential, waterfront condominium community situated on the Charleston Harbor consisting of an eighteen-story building and twenty-one townhouses. The developers eventually transferred control of Dockside to the non-profit corporation, the Association, which was controlled by an elected Board of Directors. Since that time, the Association, through its Board, assumed the duty to maintain Dockside, including maintaining the common areas and managing the fiscal affairs of the Association. The individually named defendants¹ in the underlying lawsuit all served on the Board at various times during the 1990s.



Throughout that time period, the Board controlled the daily administration of Dockside, including normal maintenance and repairs, and any special situations warranting Board attention. For example, the Board oversaw the settlement of a construction defect lawsuit, the damage caused by Hurricane Hugo, construction of Dockside's piers and bulkheads, and major renovations to the east and west walls of the condominium tower. When addressing maintenance, repair, or financial decisions, the Board, through its individual directors, routinely sought advice and counsel from various outside professionals and consultants, including: the Association's attorney, Arthur Rosenbloom; the Association's accountant and CPA; the property manager; maintenance personnel; outside engineers; architects; plumbers; electricians; and general contractors.

In 1999, the Board attempted to address Dockside's aging structures. The Board consulted and hired a forensic architect, Myles Glick, to develop and implement a long-range maintenance plan for Dockside's structures. Glick conducted an extensive investigation, reviewed prior architectural reports, and, on September 15, 2000, issued a detailed report informing the Board that the condominium structures suffered from water intrusion problems as a result of structural defects. Dockside co-owners were informed about the structural problems and were presented with a proposed two-phase, \$21,000,000 renovation plan at an owner's meeting on March 6, 2001. Glick later stated in his affidavit submitted at trial that the damage to Dockside was not caused by lack of routine maintenance and that the Board could not have known about the extent of the structural problems during the 1990s because the structural damage was not visible until the outer stucco had been removed during Glick's investigation.

*2 On December 31, 2001, Appellants filed the underlying action against the Association and individual past and present directors from the Board, alleging negligence and gross negligence in the performance of their duties, including maintenance, making repairs, and managing Association funds. The Board presented all the co-owners a special assessment to cover the necessary repair costs on the association's damaged structures in March 2002. Although the pendency of Appellants' lawsuit initially led the co-owners to delay approval of the special assessment, the co-owners eventually passed the special assessment and the repair work began.

After the dismissal of a separate federal declaratory judgment action brought by the Association's liability insurance carrier, the Association and the individual directors moved for summary judgment in the underlying action on February 19, 2003. The circuit court granted summary judgment to the individual directors, finding they discharged their duties in good faith, with care, and in a manner reasonably believed to be in the best interest of the corporation. Thus, the court found, the individual directors were protected from liability by South Carolina Code section 33-31-830. The court denied summary judgment to the Association, finding the statute only applied to individual directors, not the corporation itself. Upon motions for reconsideration filed by both sides, the circuit court granted summary judgment to the Association, finding the business judgment rule insulated the directors as well as the corporate entity from any liability. The court denied Appellants' motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, an appellate court must apply the same standard applied by a circuit court pursuant to Rule 56(c), SCRCP. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439. Because summary judgment is a drastic remedy, it should not be granted "until the opposing party has had a full and fair opportunity to complete discovery." *Id.* However, the nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence and that the party is not attempting to engage in a "fishing expedition." *Id.*; *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544.

LAW/ANALYSIS

I. Individual Directors

Appellants argue the circuit court improperly granted summary judgment to the individual directors because the court misinterpreted and misapplied section 33-31-830. We disagree.

*3 Section 33-31-830 provides the applicable standard of care for directors of non-profit corporations in the discharge of their duties. The section provides:

A director shall discharge his duties as a director, including his duties as a member of a committee:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner the director reasonably believes to be in the best interests of the corporation.

S.C.Code Ann. § 33-31-830(a) (Supp.2004). The section clarifies the general standard by expressly allowing directors to rely on outside sources for guidance, providing, in pertinent part:

In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;
- (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence.

S.C.Code Ann. § 33-31-830(b) (Supp.2004). However, where a director has other knowledge that makes a director's reliance on outside experts unwarranted, the director is not acting in good faith. S.C.Code Ann. § 33-31-830(c) (Supp.2004). Subsection (d) states the following "safe harbor" provision: "A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section." S.C.Code Ann. § 33-31-830(d) (Supp.2004).

The official comments to section 33-31-830 demonstrate the legislature's intention to provide considerable deference to the informed decisions of directors of a nonprofit corporation: "The directors need not be right, but they must act with common sense and informed judgment. The duty of care recognizes that directors are not guarantors of the success of investments; activities, programs, or grants. It allows leeway and discretion in exercising judgment." S.C.Code Ann. § 33-31-830, cmt. 2. Comment two suggests a degree of deference be employed in a court's review of director decisions: "A court should not be harsh in second guessing directors who in good faith make a judgment that proves incorrect. Although some decisions turn out to be unwise or the result a mistake of judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight."

The statute clearly provides protection to a director who, acting in good faith, makes informed decisions in exercising his or her judgment. Once the requirements of section 33-31-830 are met, it precludes review or second-guessing of the director's decisions. In the present case, the undisputed evidence shows the individual directors consulted with various professionals when confronted with financial or construction issues relating to the Association. The types of experts consulted corresponded with the issues the Board sought to resolve. For example, the directors sought advice from

attorneys for legal questions, accountants and CPAs for financial questions, and architects for construction issues. Because there was undisputed evidence that the directors sought outside advice in order to make informed maintenance and financial decisions for the Association, the individual directors were protected from liability.

*4 Appellants, nevertheless, argue that the individual directors' reliance upon experts was "unreasonable" because they had outside knowledge of the maintenance problems at Dockside. Thus, Appellant's argue, the directors did not comply with the statute, were not immune from liability, and were not entitled to summary judgment. Knowledge of the maintenance problems alone is not sufficient to remove the immunity provided by section 33-31-830(d). The burden to prove the directors did not act in good faith, and their reliance upon experts was not in good faith, was on Appellants. See *Dockside Ass'n, Inc. v. Deryens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) (reviewing a board's protection under the business judgment rule, the court held that the burden was on the party challenging the board's actions to prove a lack of good faith in the exercise of judgment, not upon the board to prove good faith). Although Appellants offered their affidavits and the affidavit of one expert opining that there were maintenance problems at Dockside that could have been handled differently, no evidence was offered indicating the directors' reliance upon experts was misplaced.

Therefore, we hold the undisputed facts established compliance with section 33-31-830(b). By relying upon the advice of various individuals with particular professional competence and expertise, as a matter of law, the individual directors discharged their duties in good faith, with the care of an ordinarily prudent person and in the best interest of Dockside. Because compliance with this statute provides immunity from liability, we hold the grant of summary judgment to the individual directors was proper.² Moreover, the common law business judgment rule would protect the respondents notwithstanding their alleged noncompliance with section 33-31-830.

II. The Corporation

Appellants argue the circuit court improperly granted summary judgment to the corporate entity, the Association, because corporations do not have protection under the business judgment rule. We disagree.

The business judgment rule "precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct." *Dockside Ass'n, Inc. v. Deryens*, 294 S.C. at 87, 362 S.E.2d at 874. Although there are no cases directly on point, our state courts have implied the business judgment rule applies to corporate entities. In *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987), a landowner appealed the grant of summary judgment to the homeowners association in an action to collect unpaid assessments. In reversing the grant of summary judgment to the association, the court noted that although the business judgment rule would apply to corporate actions taken pursuant to the bylaws and covenants, it would not apply to protect the corporation from acts outside the corporation's authority. *Seabrook Island*, 292 S.C. at 347-48, 356 S.E.2d at 414 ("The 'business judgment rule' applies to *intra vires* action of the corporation, not to *ultra vires* acts."); see *Cedar Cove Efficiency Condo. Ass'n, Inc. v. Cedar Cove Prop., Inc.*, 558 So.2d 475, 479 (Fla.Ct.App.1990) (applying the business judgment rule to homeowners association's decisions on maintenance, repair, and assessment issues).

*5 Further, since a corporation may only act through its directors, the application of the business judgment rule to the corporate entity with regard to the business judgments of the directors is appropriate.³ See *Chapman-Storm Lumber Corp. v. Minnesota-South Carolina Lund & Timber Co.*, 183 S.C. 31, 34, 190 S.E. 117, 118 (1937) (noting that where a corporation and its agent are sued together for the act of the agent and the agent is found to be without blame, the corporation cannot be held liable for the agent's conduct).

In the instant case, the suit against the Association and the individual directors only complained about the actions of the individual directors. No evidence was produced at the summary judgment hearing to show the Association was

separately negligent. Accordingly, we find the business judgment rule precludes judicial review of the action taken by the Board, and, thus, the circuit court correctly granted summary judgment to the Association.

III. Discovery

Appellants argue the circuit court erred in granting summary judgment because they did not have a full and fair opportunity to conduct discovery. We disagree.

As previously discussed, summary judgment is a drastic remedy and should not be granted where the nonmoving party has not had the opportunity to conduct discovery. *Darwins*, 354 S.C. at 69, 580 S.E.2d at 439. The burden is upon the nonmoving party, however, to show that further discovery will likely uncover additional relevant evidence, the request for further discovery is not an attempt to engage in a fishing expedition, and the nonmoving party was not dilatory in pursuing discovery. *Id.*; *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544.

The litigation in this case began in December 2001 when Appellants filed the underlying action. In July 2002, the Association and the individual directors responded to Appellants' discovery requests by answering interrogatories and providing Appellants with access to over 50,000 documents, including Association minutes, every file maintained on all homeowners, all financial records, a list of all current and former directors, and a list of the Association's experts. The separate federal lawsuit between the Association and its liability carrier was filed in December 2002. Thereafter, the Association and individual directors filed motions to compel, for a more definite statement, and for summary judgment. Appellants then moved for a stay of the underlying litigation pending the outcome of the federal suit on February 27, 2003, but it does not appear from the record that the circuit court ever ruled upon this motion. The federal court issued a declaratory judgment that the Association's liability carrier had a duty to defend the underlying action on April 3, 2003.

The Association and the individual directors thereafter filed a memorandum in support of the motion for summary judgment on July 1, 2003, and Appellants served deposition notices on July 3, 2003. A hearing on the motion for summary judgment was held July 9, 2003, and the circuit court granted summary judgment to the individual directors.

*6 Initially, this issue is not preserved for review. Although Appellants mentioned in their memorandum in opposition to the motion for summary judgment that granting the motion was premature because discovery was pending, the circuit court order granting summary judgment to the individual directors did not address the issue of adequacy of discovery. Appellants did not point out the failure to address the question of adequacy of discovery in their motion for reconsideration. Further, Appellants did not attempt to protect their interests by requesting a continuance until discovery could be completed. Because this question was never ruled upon by the circuit court, it is not preserved for appellate review. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (noting that the question of whether summary judgment was premature pending a ruling on an outstanding motion to compel discovery was not preserved where the party opposing summary judgment did not move for a continuance pending the outcome of the motion to compel and the issue was never ruled upon by the court).

In any event, this argument fails on the merits. Appellants argue that they did not have enough time to review the thousands of pages of documents submitted by the Association and the individual directors, that the discovery process was halted pending the federal lawsuit, and that further discovery would reveal that the individual directors were grossly negligent. Appellants were aware of the names of the individual directors nearly a year before the summary judgment hearing, but they did not move to depose individual directors until after the motion for summary judgment was filed. Further, although Appellants filed a motion to stay the state court proceedings pending the outcome of the federal proceedings, nothing in the record indicates that motion was ever ruled upon. Appellants give no real justification for the delay in deposing witnesses, and they merely argue that they may find information to prove the individual directors grossly negligent. We find Appellants have failed to meet their burden to show that summary judgment was premature.

CONCLUSION

Therefore, the circuit court's grant of summary judgment is

AFFIRMED.

ANDERSON, BEATTY, and SHORT, JJ., concur.

All Citations

Not Reported in S.E.2d, 2005 WL 7083482

Footnotes

- 1 The Respondents Douglas Berlinsky, Wilbur Burbage, II, Francis G. Cain, Jr., Lydia P. Davidson, William B. Ellison, Grant D. Small, James F. Spann, and Jonathan L. Yates all served as directors at some time from 1990–1999.
- 2 The General Assembly has provided further protection to directors of nonprofit corporations by enacting South Carolina Code section 33–31–834. That section provides that directors of nonprofit organizations are immune from suits arising from the conduct of the affairs of the organization unless the directors' conduct amounts to "willful, wanton, or gross negligence." S.C.Code Ann. § 33–31–834 (Supp.2004). Although this section was presented to the circuit court to further support the individual directors' motion for summary judgment, the court did not rely upon this section in ruling.
- 3 In finding our courts recognize application of the business judgment rule to corporate entities, we focus only on the exercise of due care in making routine *business* judgments for the benefit of the corporation. Our finding does not extend the business judgment rule to protect corporations from tort liability or for actions taken outside the scope of the corporation's authority, with corrupt motive, or in bad faith.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

Steven M. Bernard and Deborah J.)
Bernard, on Behalf of Themselves)
And All Others Similarly Situated,)
Plaintiffs,)

PLAINTIFF'S RETURN TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

vs.)

3 Chisolm Street Homeowners)
Association, Inc.,)
Defendant.)

FILED
2018 OCT 16 PM 1:31
JULIE J. AUSTIN
CLERK OF COURT

TO: COUNSEL FOR THE ABOVE NAMED DEFENDANT:

Plaintiffs, by and through their undersigned counsel, hereby make this Return to
Defendant's Motion for Summary Judgment.

Facts

3 Chisolm Street is a collection of condominium units subject to the South
Carolina Horizontal Property Act. The buildings used are the same buildings in place
when the property was used for Andrew B. Murray Vocational School. The buildings
were renovated into condominiums in 2002.

The Plaintiffs in this action are a class of "all persons who were owners of
condominium units at 3 Chisolm Street between 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" (August
2, 2017 Order by Consent to Certify the Class of Plaintiffs, The Honorable Deadra L.

Jefferson). The Defendant in this action is 3 Chisolm Street Homeowners Association, Inc.

On April 8, 2003, Myles Glick issued a report (hereinafter "the Glick Report") to the Defendant Homeowners Association (Exhibit A). In the report, Glick stated, among other things, that there are numerous construction issues and that the Defendant should perform "a program of destructive testing" and "seek legal counsel relative to the impacts of the above issues as well" (Exhibit A, paragraph H). At a May 6, 2003 Board of Directors Meeting, the Defendant decided to follow the recommendations made in the Glick Report (Exhibit B). On January 16, 2009, Defendant filed an action alleging construction defects against the general contractor and various sub-contractors that performed the 2002 renovation of the condominiums (hereinafter "the renovators") (Exhibit C). In 2011, the Honorable Roger M. Young dismissed Defendant's 2009 action as time barred by the statute of limitations that was triggered by the Glick Report. Defendant appealed the dismissal of the 2009 action. On March 26, 2014, the Court of Appeals affirmed the trial court's dismissal based upon the statute of limitations (Exhibit D).

At a November 6, 2014 meeting of the owners of the condominium units, Defendant informed the Plaintiffs that there was a need to repair the crawlspace of the main condominium building at an estimated cost of \$2.5 million. On January 22, 2015, the Defendant held a special meeting to address the needed repairs to the crawlspace of the main building (Exhibit E). At this meeting, the Defendant made the decision to levy a special assessment upon the owners of the individual condominium units to pay for the necessary repairs to the foundation and established for the first time the amount of the

special assessment levied upon each condominium unit. Paragraph 12 of The Master Deed Establishing 3 Chisolm Street Horizontal Property Regime provides that such an assessment creates a lien on each unit owner's property and is a personal obligation of each unit owner (Exhibit F).

Plaintiffs 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 Damages to Plaintiffs in having to bear the costs of making the necessary repairs to the condominium foundations.

Standard of Review

An Order granting summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" R. 56(c) SCRCP. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 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" Sumner v. Carpenter, 492 S.E.2d 55, 58 (1997). "Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party" Watters v. Terminix Service, Inc., 658 S.E.2d 110, 111 (Ct.App. 2008). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment" Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 760 S.E.2d

121, 128 (Ct.App. 2014). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts" Lyons v. Fid. Nat. Title Ins. Co., 781 S.E.2d 126, 130-31.

Plaintiffs Filed Their Causes of Action Within the Applicable Statute of Limitations

The general rule as to the time of commencement of civil actions is set forth in SC Code § 15-3-20(A):

"Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." (emphasis added)

The first question this Court is faced with in analyzing the Defendant HOA's motion for summary judgment is: when did Plaintiffs' causes of action accrue?

The Plaintiffs' January 2015 filing of their claims of Breach of Duty/ Negligence/ and Gross Negligence was within the statute of limitations as Defendant's negligence could not have been established until the March 26, 2014 Court of Appeals decision (**Exhibit D**) and Plaintiffs' damages from Defendant's negligence were not ascertainable until the January 22, 2015 levying of the special assessment upon the class members to pay for the necessary repairs to the foundation. "Three elements are essential to a cause of action based on negligence: (1) the existence of a duty on the part of the defendant to protect the plaintiff, (2) the failure of the defendant to discharge the duty, and (3) an injury to the plaintiff resulting from the defendant's failure to perform" Winburn v. Insurance Company of North America, 339 S.E.2d 142, 147 (Ct.App. 1985) *citing to* Crowley v. Spivey, 339 S.E.2d 774 (Ct.App. 1985). "The absence of any one of these elements renders the evidence insufficient" Winburn, at 147 *citing to* 65 C.J.S. Negligence § 2(1) at 464 (1966).

As Defendant states in their Motion for Summary Judgment, "...the crux of the Plaintiffs' theory of liability is that the HOA failed to file the Foundation Defects Litigation within the statute of limitations" *Defendant's Motion for Summary Judgment*, p.7. 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 (Exhibit D). 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. "Before any action can be maintained, a justiciable controversy must be present" Byrd v. Irmo High School, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character" Sloan v. Greenville County, 590 S.E.2d 338 (Ct.App. 2003).

Just as Plaintiffs could not maintain their action for negligence during the pendency of Defendant's litigation with the renovators, Plaintiffs could not maintain an action for negligence prior to the January 22, 2015 levy of the special assessment to pay for the necessary repairs to the foundation (Exhibit E). "It is fundamental and elemental that, in order to reap the benefit of negligence, the person pleading negligence must show that he has been injured by the negligence, and that the negligence was the proximate cause of the injury" National Loan & Exchange Bank v. Lachovitz, 128 S.E. 10 (S.C. 1925). It was with the January 22, 2015 decision of the Defendant to utilize a special assessment levied upon the Plaintiffs as the means to pay for the necessary repairs that the Plaintiffs were first damaged as a result of Defendant's negligence and gave the

Plaintiff's an actionable claim for negligence. "It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another" Gray v. Southern Facilities, Inc., 256 S.C. 558, 567 (S.C. 1971).

The Defendant believes there is a material question regarding the date that the Plaintiffs were first damaged as a result of the Defendant's negligence. On March 5, 2015, three months after the filing of this action, Defendant filed a motion to dismiss based upon, among other things, this case "...is not ripe" (*Defendant's Motion to Dismiss* p. 5). Three months after Plaintiffs filed this action, Defendants contend "[s]pecifically, this case is not fit for judicial determination because its damages will not be ascertainable until the Foundation Defects Action is disposed of" *id.*, at p.7.

As there is a question of material fact regarding the dates that Plaintiffs had a justiciable controversy against the Defendant and that Plaintiffs were damaged as a result of Defendant's negligence, Plaintiff respectfully requests that Defendant's motion for summary judgment be denied.

SC Code § 33-3-830(f) Relied Upon by the Defendant is Inapplicable to this Cause of Action

SC Code § 33-3-830 is titled "General Standards for Directors" and deals only with individual directors of a non-profit corporation rather than the non-profit corporation entity. Defendant cites to § 33-3-830(f) as the applicable statute of limitations for this case but misstates the first third of this statute to fit the needs of their motion for summary judgment ("The statute of limitations for claims against a Nonprofit Corporation expires "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm is complained of is, or reasonably should have been,

discovered” *Defendant’s Motion for Summary Judgment*, p.1). Reading § 33-31-830(f) in its entirety confirms that the statute does not apply to the non-profit corporation entity:

“An action against a director asserting the director’s failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered.” (Emphasis added to the portion misstated by the Defendant).

§ 33-31-830(f) is inapplicable to this action as only the non-profit corporation itself is a party. No individual director is a Defendant. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature” Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5 (S.C. 1993) *citing to Banker Trust of South Carolina v. Bruce*, 275 S.C. 35 (1980). “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute” Hodges v. Rainey, 341 S.C. 79, 85 (S.C. 2000) *citing to In re Vincent J.*, 333 S.C. 233 (S.C. 1998). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning” *id.* Reading the statute as written by the legislature clearly and unambiguously shows that this statute of limitations only applies to director liability, not liability on behalf of the named defendant.

There is nothing unclear or ambiguous with SC Code § 33-31-830(f). It only applies to “[a]n action against directors asserting the director’s failure to act in compliance with this section...”. If the legislature intended for the statute to apply to the non-profit corporate entity along with the individual directors, the legislature would have included non-profit corporate entities such as the Defendant. “The canon of construction

"expression unius est exclusion alterius" or "inclusio unius est exclusion alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative" Hodges, supra at 86.

The Defendant attempts to stretch § 33-31-830(f) to encompass the Defendant into this statute of limitations by citing to Smith v. Dockside Association, Inc., unpublished opinion No. 2005-UP-139 (Ct.App. 2005). This case is an unpublished opinion and thus has no precedential value, *see* R. 220(a) SCACR.

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

Even if Smith did have precedential value, it does not contradict the plain and clear meaning of § 33-31-830(f) and allow for the application of this statute of limitations to the non-profit corporate entity. Smith was an action brought against both a homeowners' association corporate entity and the individual directors. The Defendants filed a motion for summary judgment under § 33-31-830 and the trial court

"...found, the individual directors were protected from liability by South Carolina Code section 33-31-830. The court denied summary judgment to the Association, finding the statute only applied to individual directors, not the corporation itself. Upon motions for reconsideration filed by both sides, the circuit court granted summary judgment to the Association, **finding the business judgment rule insulated the directors as well as the corporate entity from any liability**" Smith, at 2. (emphasis added)

Upon appeal, the Court of Appeals only analyzed § 33-31-830 as it applies to the business judgment rule, not the statute of limitations ("Section 33-31-830 provides the applicable standard of care for directors of non-profit corporations in the discharge of

their duties" Smith at 3). The Court of Appeals unpublished opinion never even once mentioned subpart (f), but rather only analyzed subparts (a), (b), (c), and (d).

In Smith the Court of Appeals affirmed the dismissal of the action against the homeowner's association because they found "... the business judgment rule precluded judicial review of the action taken by the Board..." not because of the statute of limitations. In the present case, Defendant has moved for the homeowner's association to be dismissed because of the statute of limitations, not the business judgment rule, thus Smith is inapplicable.

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

"Within three years: an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law..."

Enumerated "is often used in law as equivalent to "mentioned specifically," "designated," or "expressly named or granted" (Black's Law Dictionary, 5th ed). It is the individual directors, not the non-profit corporate entity that is enumerated in § 33-31-830(f) and therefore this action is subject to the statute of limitations in § 15-3-530(5). "Further, Plaintiffs are entitled to the benefit of the Discovery Rule contained in § 15-3-535:

"Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action".

Until the March 26, 2014 Court of Appeals decision, the Plaintiffs could not know whether the Defendant was negligent for missing the statute of limitations against the developers of the condominiums. Until the January 22, 2015 levy of the special

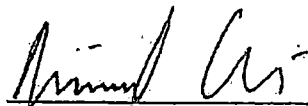
assessment against them, the Plaintiffs had no way of knowing that they were damaged as a result of the Defendant missing the statute of limitations against the developers of the condominiums.

Conclusion

Plaintiffs' January 2015 filing was within the applicable statute of limitations as they had no justiciable claim for negligence against the Defendant until the March 26, 2014 Court of Appeal's decision and they had no claim for damages until the January 22, 2015 levy of the special assessment by the Defendant upon the Plaintiffs. Furthermore, Defendant has cited a statute of limitations that is not applicable to this action.

Respectfully submitted by,

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Attorneys for Plaintiffs

October 12, 2017

EXHIBIT

A

Glick/Boehm & Associates, Inc.

April 8, 2003

Jack Bernette
President
Chisholm Street Homeowners Association
3 Chisholm Street
Charleston, SC 29401

Re: Initial Site Visit
Chisholm Street Condominiums
Charleston, SC

Dear Mr. Bernette,

In accordance with the request of the Chisholm Street Homeowners Association Board of Directors, I have prepared comments regarding my visual observations that took place on January 30, 2003. Present during that site visit were Myles Glick, Thomas Carlson, Brett Carlson, and Joe Depora. The following comments are based on visual observations only, therefore, no destructive testing has taken place. The goal of the visit was to get an understanding of the project and to see what appeared to be some very obvious building failures.

A. Introduction

The Chisholm Street Condominiums are located in three buildings at 3 Chisholm Street. The first of three distinct buildings is known as the old Murray Vocational School, which is a three-story masonry building with a flat roof. The second building is known as the old headquarters for the Charleston Symphony Orchestra, which is a two-story residential scaled building. The third building was the gymnasium associated with the Murray Vocational School that has been divided into units on the top floor and an indoor parking garage on the first floor. The following comments represent an overview of my observations are specific to the main three-story Murray Vocational School building. The other two buildings that are listed above were not reviewed.

B. Water Intrusion

~~The main source of water intrusion into the water tanking were in the following areas: window, window ledge, and window opening on the north side of the glass and a stone parapet. It is noted that the roof parapet is leaking. Of the four areas identified, the roof parapet will need more research so that this area can be eliminated or to determine that it is contributing to the water intrusion into the exterior wall cavity.~~

In almost every case, the window system is a steel window with fixed panes of glass and an opening panel that does not close. Therefore, the windows do not stop water from intruding into the building. Water has accumulated on window sills as a result of water intrusion through the gaps created in the operable window areas. It also appears that water is coming through the frames (mullions) of the fixed panes as well.

Condensation issues were apparent on the inside of the glass within the units and these areas may have associated problems (in terms of cause and effect) with the size and distribution of the mechanical systems.

C. Interior Floors

The floor problems noticed throughout the building had to do with undulating wood floors as a result of water intrusion. In some cases, there were construction quality issues that resulted in finishing problems on the wood floors. Most of the moisture intrusion problems associated with the wood floors, had to do with the first floor units. The damage in Unit 101 is an example of extensive movement within the floor system itself. In this case, the floor moved so much that the closet door in one of the bedrooms would not even open.

D. Mechanical Systems

Problems associated with the mechanical systems will fall into two categories. The first category would be capacity of the unit relative to specific unit sizes and unit orientation. The other concern is air distribution within the actual spaces. The air distribution system is not adjacent to the glass areas and therefore, this begins to contribute to the extremes in temperature differentials causing condensation. An additional item with the mechanical system was noticed on the roof. The units (compressors) were sitting on 4x4 wood members and therefore, the units are not tied down to the roof, which is required by code and within the standard care for construction. This would be a separate construction deficiency in addition to the possibility of design issues with capacity and distribution.

E. Exterior Stucco

It was noticed that there were new walls built at the rear courtyard of the main building and these walls appear to be metal studs with a three-coat masonry stucco finish. Intersections of the metal stud walls with the original masonry building are beginning to show cracks because of the construction defects associated with the installation of the three-coat masonry system. There are other areas of this exterior system that are also not installed in accordance with the standard of care for stucco as called for in the ASTM Standards

which are in turn, called for in the building code. Stucco cracks will allow water to enter the building envelope.

F. Predictable Results From Water Intrusion

1. It can be seen in some of the units that are occupied, but mostly in the first floor units that are not occupied, that there is an extensive amount of mold and mildew. Mold and mildew presents a clear and present danger in terms of health for the individuals that occupy the spaces. The removal of mold and mildew within the wall cavities is extremely important, because without the removal of mold and mildew and without stopping the water intrusion causing the mold and mildew, the problem will persist and grow.
2. Because of the extensive amount of water intrusion into various areas of the building, there is rotted drywall associated with the windows.
3. Because of the sealant failure at the windows and the fact that the opening portion of the windows do not close properly to stop water intrusion, there is an extreme amount of rust showing up on the steel windows. Steel windows that are subject to rust will eventually be a maintenance problem if these problems are not stopped. Even under the best circumstances, a strong maintenance program will be needed to stop the rust on these steel windows.
4. Sealant Failures- In a lot of cases there was evidence that water was coming through fixed mullions of the steel windows. There were indications of added sealant to stop the water intrusion from coming through the window panes/mullion intersections. A full investigation of these areas needs to be made.
5. Grout at existing exterior window ledges- Sill areas on the exterior of the building, where existing windows were replaced with new steel windows are problematic. In many cases there was grout missing which allows water to intrude in and around the frames of the steel windows. This is a particular concern to me, because the walls of the existing building are extremely thick and therefore, it will take some time for the water to show up on the inside of the units. In the interim, the walls will be subject to mildew and mold growth if water intrudes.

G. Miscellaneous Issues

1. The roof, which is a flat roof, looks as if there are numerous patches that could very well be from the original construction. A full investigation is recommended to see if there are any hidden failures.
2. Slope of exterior verandas- It was noticed that in at least two units, that the scuppers associated with water removal from the exterior verandas did not have slope to them. In one case, water was sloping away from the scupper. Without proper slope on these verandas, water will have a tendency to puddle, break down mortar joints and ultimately penetrate into the slab

and down to the unit below. In some cases, water is already coming in under the threshold of some of the doors resulting in a wood floor problem.

II. Conclusions

All of the above issues are significant and were pervasive throughout the entire building. I would recommend that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. Without correction, the issue of sales of unsold units and resales will come into play. I recommend 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. This report only represents observations during a limited site visit and other construction deficiencies may exist.

If I can be of any further assistance, please do not hesitate to call.

Sincerely,



David L. Glick, AIA
Principal

Copy: Joe DePore
Tom Carlson

EXHIBIT

B

Board of Directors Meeting
3 Chisolm Street HOA
May 6, 2003

Members Present

Pete Wyrick, Jackie Noller and Frances Hegenberger

Others Present

Mike Parades

The meeting was called to order at 5:15 p.m.

Minutes of Prior Meetings

Jackie commented she had not received a copy of the minutes. Mike will mail to her.

There being no changes or corrections, motion was made, seconded and passed to approve the minutes of the March 26, 2003 Board meeting minutes as issued.

Old Business

1. Building Report

It was noted the preliminary building inspection report has been received from Myles Glick. The report and accompanying photographs were reviewed. Discussion followed as to the next steps to be taken. It was noted that Mr. Glick only looked at the main building.

Mike discussed the typical sequence of steps that should be followed including:

1. Inspection of the cottage and gym building.
2. Some destructive testing will be needed to document cause of damage and what should be done to correct the problems.

It was agreed that proposals should be solicited from Glick/Boehm and Calibogue Construction for the next phases of investigation. Mike was asked to obtain these proposals for the next Board meeting.

2. Action Items

It was reported that all action items from the previous meeting have been completed or are in process. Mike noted he has received financial information from Great Beach and is in the process of reviewing all activity back to inception of the HOA.

3. Comparison to other regimes

Frances reported she had investigated typical regime fees for other comparable HOAs in downtown. Based on her findings, the monthly fee for 3 Chisolm is reasonable for the services being provided.

**3 Chisolm Street HOA
Board Meeting
May 6, 2003**

New Business

1. Noise from pets

It was noted that there is an on-going problem with barking pets, particularly in #104. It was agreed that a general letter should be sent to all owners and include a copy of the Rules & Regulations, with emphasis on the section related to pets.

2. Management Report

Mike reported he is in the process of going through the financial information provided by Great Beach. In addition, he has begun meeting with service providers to review their contracts and actual work being performed.

The fire alarm contractor has advised the warranty period has ended and is preparing a maintenance contract for approval. Mike noted that in his discussions with this contractor it has been emphasized that the HOA is not prepared to accept the warranty period is over until it can be shown the alarm system operates properly. This is based on the fact that the systems in both buildings have a history of spurious alarms.

3. Meeting Schedule

Following discussion, it was agreed that the regular monthly Board meeting will be held the second Tuesday of each month at 5:30 p.m. in one of the Board member's home.

There being no further business, the meeting adjourned at 6:15 p.m.

Respectfully submitted by
CCM Management, Inc.

EXHIBIT

C

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.

Plaintiff(s)

vs.

CHISOLM STREET PARTNERS, LLC, et al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009-CP-10-267

(Please Print)

Submitted By: David J. Parrish, Esquire

Nexsen Pruet, LLC

Address: 205 King Street

Suite 400

Charleston, SC 29401

SC Bar #: 5914

Telephone #: 843-577-9400

Fax #: 843-720-1777

Other:

E-mail: dparrish@nexsenpruet.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

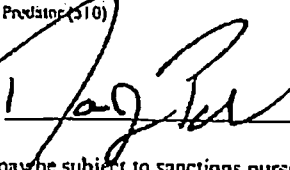
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☒ Construction (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/ File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Habeas Corpus (530)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
☐ Other (599)	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Other (799)	☐ Other (899)	☐ Worker's Comp (960)
-
Special/Complex /Other			
☐ Environmental (600)	☐ Pharmaceuticals (630)		
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out-of State Depositions (650)		
☐ Other (699)	☐ Sexual Predation (610)		
-
			☐ Zoning Board (970)
			☐ Administrative Law Judge (980)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)

Submitting Party Signature: 

Date: 11/16/09

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LCC;
MURRAY SCHOOL PARTNERS, LLC;
GENOA CONSTRUCTION SERVICES,
INC.; MASTERPIECE MILLWORK, INC.;
ALLEN ROPER, JR. D/B/A R MASONRY -
BRICKWORK AND STUCCO; and JOHN
DOE #1, and JOHN DOE #2,

Defendants.

IN THE CIRCUIT COURT

Case No. 2009-CP-10-267

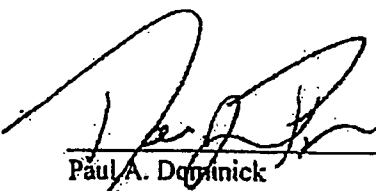
SUMMONS

2009 JAN 16 PM 4:19
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the
above entitled action, a copy of which is herewith served upon you, and to serve a copy of your
Answer upon the subscribers at Post Office Box 486, Charleston, South Carolina 29402 (205
King Street, Suite 400, Charleston, South Carolina 29401), within thirty (30) days after the date
of such service, exclusive of the day of service; and if you fail to answer the said Complaint
within the time aforesaid, judgment by default will be rendered against you for the relief
demanded in the Complaint.


Paul A. Dominick
David J. Parrish
NEXSEN PRUET, LLC
P.O. Box 486
Charleston, SC 29402
843.577.9440
Attorneys for Plaintiff

January 16, 2009

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LCC;
MURRAY SCHOOL PARTNERS, LLC;
GENOA CONSTRUCTION SERVICES,
INC.; MASTERPIECE MILLWORK, INC.;
ALLEN ROPER, JR. D/B/A R MASONRY -
BRICKWORK AND STUCCO; JOHN DOE
#1, and JOHN DOE #2,

Defendants.

IN THE CIRCUIT COURT
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2009-CP-10-267

COMPLAINT

(Construction Defects)

Jury Trial Demanded

FILED
2009 JAN 16 PM 4:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff would show as follows

1. Plaintiff 3 Chisolm Street Homeowners Association, Inc. is a South Carolina eleemosynary corporation.
2. Plaintiff owns and governs the common elements contained in the condominium horizontal property regime known as the Chisolm Street Condominiums located at 3 Chisolm Street in the City of Charleston (Charleston County), South Carolina, as reflected in the Master Deed Establishing the 3 Chisolm Horizontal Property Regime recorded in Book V309 beginning at Page 659 in the Charleston County RMC Office (hereinafter referred to as the "condominiums).

3. The condominiums are located on the site of the old Andrew B. Murray Vocational School, and the condominiums were developed by converting the school buildings into condominiums.

4. The condominiums consist of three buildings generally described as a three-story main building, a gymnasium building, and a care taker building, together with the other common elements contained in the regime as more fully described in the master deed.

5. Upon information and belief, Defendant Chisolm Street Partners, LCC is a limited liability company organized and existing under the laws of the State of Georgia. Upon information and belief, Chisolm Street Partners, LCC was a developer of the condominiums.

6. Upon information and belief, Defendant Murray School Partners, LLC is a limited liability company organized and existing under the laws of the State of Georgia. Upon information and belief, Murray Street Partners, LLC was a developer of the Chisolm Street Condominiums and acted as the general manager for Chisolm Street Partners, LCC during development of the condominiums.

7. Chisolm Street Partners, LCC and Murray School Partners, LLC are sometimes hereinafter individually and collectively referred to as the "Developer Defendants."

8. Upon information and belief, the Developer Defendants converted and developed, the Murray School property into condominium units, and then marketed and sold the condominiums to the condominium unit owners who comprise the 3 Chisolm Street Homeowners Association, Inc., or to their predecessors.

9. The Chisolm Street Condominiums are on the list of the National Register of Historic Places in South Carolina.

10. Upon information and belief, the Developer Defendants received substantial rehabilitation tax credits in connection with their conversion, rehabilitation, and development of the Chisolm Street Condominiums.

11. The Developer Defendants formed the 3 Chisolm Street Homeowners Association, Inc. and controlled the Association through appointment of its board of directors.

12. Upon information and belief Defendant Genoa Construction Services, Inc. ("Genoa") is a limited liability company organized and existing under the laws of the State of Georgia and acted as the general contractor for the construction of the condominiums.

13. Upon information and belief, Masterpiece Millwork, Inc. is corporation organized and existing under the laws of the State of Georgia and manufactured and supplied the window units installed during construction of the condominiums.

14. Upon information and belief, Allen Roper, Jr., d/b/a R Masonry – Brickwork and Stucco, is a citizen and resident of Charleston County, South Carolina, and acted as the masonry subcontractor during construction of the condominiums.

15. Defendant John Doe #1 is a fictitious name representing the as-yet unidentified person or entity that acted as the painting subcontractor during construction of the condominiums.

16. Defendant John Doe #2 is a fictitious name representing the as-yet unidentified person or entity that acted as the painting subcontractor during construction of the condominiums.

17. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper before this Court.

18. The Chisolm Street condominiums contain construction defects and deficiencies, including without limitation the following:

- (a) improper installation of windows;
- (b) installation of windows that lack adequate wood preservative treatment;
- (c) improper priming and painting of the windows;
- (d) improper flashing of the windows and window openings;
- (e) improper connection of the windows to side walls;
- (f) rusting and deterioration of the brick lintel over windows;
- (g) improper installation firewalls between condominium units;
- (h) improper installation of the roofs on the buildings;
- (i) improper installation of interior grade doors in exterior applications;
- (j) such additional items as may be discovered during investigation of construction deficiencies.

19. The condominiums have sustained, and continue to sustain, water damage and water intrusion to the common elements caused by and resulting from defects and deficiencies in the construction of the condominiums.

20. As a result of the above defects and deficiencies, the roofs, brick lintels, windows and in the condominiums are prematurely failing and resulting in water intrusion and damage to the buildings.

21. Plaintiff has been and will continue to be proximately damaged by the water intrusion, water damage, and construction defects in the condominiums.

22. As a result of the construction defects and resulting property damage, Plaintiff has incurred, and in the future will incur, damages in the form of having to pay for professional fees to investigate, identify, and determine the extent of the problems and determine a plan for

repairing the problems, and to pay for the preparation of the plans, specifications and other documents needed to perform the repairs, and to pay for the repairs.

23. Plaintiff will suffer damages arising from having to pay for the costs of the repairs.

24. Plaintiff will incur damages in the form of the loss of use and enjoyment of the common elements during the repairs.

FOR A #1 CAUSE OF ACTION

(Negligence as to the Chisolm Street Partners, LCC
and Murray School Partners, LLC)

25. Plaintiff repeats and incorporates the above paragraphs by reference.

26. As the developers of the Chisolm Street condominiums, the Developer Defendants owed a duty of due care to Plaintiff and to the purchasers of condominium units in overseeing the construction and management of the condominiums.

27. The Defendants breached the duty of due care they owed to Plaintiff and to the purchasers of condominium units in one or more of the following particulars:

- (a) by failing to properly select the contractors and materials used in the construction of the condominiums.
- (b) by failing to properly oversee the construction, including the selection of contractors, of the condominiums when it planned to sell the condominium units to members of the public for profit.

28. The negligent acts and omissions of the Defendants are the proximate cause of construction defects and deficiencies which have resulted in property damage and financial damages to Plaintiff.

29. The acts and omissions of the Defendants have proximately caused Plaintiff to be damaged in that Plaintiff has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify and determine the

extent of the problems, to pay for design remediation plans and specifications to correct the construction defects and deficiencies, and to pay for the repairs.

30. Plaintiff will suffer loss of use and enjoyment of the common elements during the repairs.

31. As a result of the negligence of the Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #2 CAUSE OF ACTION

(breach of implied warranty of habitability as to Chisolm Street Partners, LCC
and Murray School Partners, LLC)

32. Plaintiff repeats and incorporates the above paragraphs by reference.

33. As the developers of the condominiums, the Developer Defendants provided an implied warranty of habitability under South Carolina law to the purchasers and owners of the condominiums by controlling the design and ultimate cost of construction, by selecting contractors, by controlling the means and methods of construction, by offering the units for sale to the public, and by entering into contracts of sale. This warranty of habitability extends to subsequent purchasers who were the foreseeable beneficiaries of this warranty.

34. The construction defects and resulting property damage to the condominiums constitutes a breach of the warranty of habitability under the laws of South Carolina.

35. Due to the construction defects and resulting property damage, Plaintiff has, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

36. Plaintiff will suffer loss of use of the common areas during the repairs.

37. Plaintiff is entitled to a judgment against the Defendants in an amount to be proven at trial for all damages proximately caused by Defendants' breach of the warranty of habitability.

FOR A #3 CAUSE OF ACTION

(negligence as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1,
and John Doe #2)

38. Plaintiff repeats and incorporates the above paragraphs by reference.

39. By undertaking construction work on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor owed a duty to Plaintiff to use reasonable care during the performance of their respective work on the buildings and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, the applicable standard of care, and industry standards.

40. Defendants breached the duty of care they owed to Plaintiff.

41. Defendants were negligent, grossly negligent, willful, and reckless in numerous aspects of the construction of the building, including, but not limited to, the following:

- (a) failing to properly supervise subcontractors and laborers during the construction of the condominiums;
- (b) failing to follow plans and specifications of the architect and design professionals;
- (c) failing to follow installation instructions and recommendations;
- (d) failing to perform construction work in accordance with applicable building codes and proper workmanlike practices; and
- (e) failing to select proper materials and capable subcontractors.
- (f) improper installation of windows;

- (g) installation of windows that lack adequate wood preservative treatment;
- (h) improper priming and painting of the windows;
- (i) improper flashing of the windows and window openings;
- (j) improper connection of the windows to side walls;
- (k) rusting and deterioration of the brick lintel over windows;
- (l) improper installation firewalls between condominium units;
- (m) improper installation of the roofs on the buildings;
- (n) improper installation of interior grade doors in exterior applications;
- (o) such additional items as may be discovered during investigation of construction deficiencies.

42. As a direct and proximate result of the negligence and recklessness of Defendants as hereinabove set forth, the condominium units and the common elements of the condominiums have been damaged by the intrusion of water.

43. Plaintiff has been proximately damaged by Defendants in that it has, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

44. Plaintiff will suffer loss of use of the common areas during the repairs.

45. As a result of the negligence of Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #4 CAUSE OF ACTION

(negligence per se as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Doe #2)

46. Plaintiff repeats and incorporates the above paragraphs by reference.

47. By undertaking construction work on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor owed a duty to Plaintiff to use reasonable care during the performance of their work on the buildings and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, conformed to the applicable standard of care, and conformed to industry standards.

48. Defendants breached the duty of care owed to Plaintiff.

49. Defendants violated the applicable building codes in effect at the time of construction, specifically including, but not limited to the following:

- (a) improper installation of windows;
- (b) installation of windows that lack adequate wood preservative treatment;
- (c) improper priming and painting of the windows;
- (d) improper flashing of the windows and window openings;
- (e) improper connection of the windows to side walls;
- (f) rusting and deterioration of the brick lintel over windows;
- (g) improper installation firewalls between condominium units;
- (h) improper installation of the roofs on the buildings;
- (i) improper installation of interior grade doors in exterior applications;
- (j) such additional building code violations which may be discovered during ongoing investigations of construction deficiencies.

50. The violation of the building codes by Defendants amounts to negligence per se.

51. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for

professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

52. Plaintiff will suffer loss of use of the common elements during the repairs.

53. As a result of the negligence per se of Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damage in an amount to be determined at trial.

FOR A #5 CAUSE OF ACTION

(breach of implied warranty of workmanlike service as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Does #2)

54. Plaintiff repeats and incorporates the above paragraphs by reference.

55. By undertaking construction on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor impliedly warranted that their work would be of quality workmanship and in accordance with industry standards.

56. The above referenced construction defects and deficiencies show that Defendants breached their implied warranties by failing to provide quality workmanship and by failing to comply with industry standards

57. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

58. Plaintiff will suffer loss of use of the common elements during the repairs.

59. Plaintiff is entitled to a judgment against Defendants for damages, in an amount to be determined at trial, resulting from the breach of their implied warranties.

FOR A #6 CAUSE OF ACTION

(breach of express warranty as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Doe #2)

60. Plaintiff repeats and incorporates the above paragraphs by reference.

61. Plaintiff is informed and believes that, as part of their contracts for this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor expressly warranted that their work would be of good quality, free from defects, and in conformance with the contract documents, and in conformance with industry standards.

62. As the ultimate and foreseeable owner of the condominiums, Plaintiff and its members are beneficiaries of the express warranties provided by these Defendants.

63. Defendants breached their express warranties by failing to construct the condominiums in a manner free from defects and in compliance with the contract documents, applicable building codes, and industry standards.

64. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damages that has already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

65. Plaintiff will suffer loss of use of the common areas during the repairs.

66. Plaintiff is entitled to a judgment against Defendants for damages, in an amount to be determined at trial, resulting from the breach of their express warranties.

FOR A #7 CAUSE OF ACTION

(breach of implied warranty of merchantability as to Masterpiece Millwork)

67. Plaintiff repeats and incorporates the above paragraphs by reference.

68. By providing windows for use in the condominiums, Defendant Masterpiece Millwork impliedly warranted that the windows it supplied would be fit for the ordinary purposes for which they are used and would pass without objection in the trade.

69. The windows provided by Masterpiece Millwork are defective, have failed, and are allowing water to intrude into the buildings.

70. The failures of the windows provided by Masterpiece Millwork have resulted in damage to buildings and will require repair and restoration by Plaintiff, including, but not limited to, removal of the exterior windows and replacement with exterior windows that comply with the current building codes.

71. Plaintiff will suffer loss of use of the common elements during the repairs.

72. The failure of the windows constitutes a breach of the implied warranty of merchantability.

73. Plaintiff is entitled to a judgment against Masterpiece Millwork for damages, in an amount to be determined at trial, result from its breach of the implied warranty of merchantability.

FOR A #8 CAUSE OF ACTION

(breach of implied warranty of fitness for a particular purpose as to Masterpiece Millwork)

74. Plaintiff repeats and incorporates the above paragraphs by reference.

75. Defendant Masterpiece Millwork was aware that its windows were being used as building components for the condominiums.

76. Upon information and belief, Masterpiece Millwork recommended its windows for the particular purposes stated by the contractors, the developers, and the architect.

77. Masterpiece Millwork knew or reasonably should have known that the purchasers were relying on its skill and judgment to select suitable goods that are were in compliance with applicable building codes and industry standards.

78. By selling the windows for a particular use in the condominiums, Masterpiece Millwork impliedly warranted that its windows would be fit for their intended purposes in this condominium project.

79. The windows sold by Masterpiece Millwork and incorporated into the condominiums have failed prematurely and are allowing water to intrude into the buildings.

80. The failure of the windows has resulted in damage to the various components of the buildings and will require extensive repair and restoration by Plaintiff including, but not limited to, removal of the windows and replacement with windows that comply with current building codes.

81. Plaintiff will suffer loss of use of the common elements during the repairs.

82. The failure of the windows amounts to a breach of the implied warranty of fitness for a particular purpose.

83. Plaintiff is entitled to a judgment against Masterpiece Millwork from damages, in an amount to be determined at trial, resulting from its breach of the implied warranty of fitness for a particular purpose.

FOR A #9 CAUSE OF ACTION
(strict liability in tort as to Masterpiece Millwork)

84. Plaintiff repeats and incorporates the above paragraphs by reference.

85. Defendant Masterpiece Millwork is in the business of selling building products for use in construction projects in South Carolina, specifically windows.

86. Masterpiece Millwork manufactured and sold the windows that were incorporated into the condominiums during construction.

87. The windows were expected to and were incorporated into the without substantial change from the condition in which they were originally manufactured and sold.

88. The windows have failed prematurely and are allowing water to enter the buildings.

89. The failure of the windows is causing property damage.

90. The failure of the windows will result in danger to Plaintiff and its members and their guests and invitees if the window products are unable to withstand the design wind loads required by the applicable building codes.

91. The windows that were sold for use in the condominiums are defective and unreasonably dangerous to the condominium owners.

92. As a proximate result of the defective windows, Plaintiff and its members have suffered and will continue to suffer damages, including but not limited to the costs of removal of the windows and replacement with windows that comply with current building codes.

93. Plaintiff and its members will suffer loss of use of the common elements during the repairs

94. As a direct and proximate result of the damages caused by the defective windows, Plaintiff is entitled to a judgment against Defendant for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #10 CAUSE OF ACTION

(South Carolina Unfair Trade Practices Act as to all Defendants)

95. Plaintiff repeats and incorporates the above paragraphs by reference.

96. Plaintiff and Defendants are considered persons within the meaning of the South Carolina Unfair Trade Practices ("UTPA"), S.C. Code Ann. § 39-5-10 et seq.

97. By developing, marketing, constructing, and selling the condominium units, the Defendants were engaged in commerce within the meaning of the UTPA.

98. In connection with their developing, marketing, constructing, and selling the Chisolm Street condominiums, Defendants engaged in unfair or deceptive acts or practices in the conduct of trade in violation of the UTPA.

99. The unfair and deceptive practices engaged in by Defendants affect the public interests of South Carolina, have the potential for repetition, and will continue to have an impact on the public interest.

100. Due to the acts of Defendants and the construction defects and resulting property damage, Plaintiff has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies and to pay for the repairs. Plaintiff will also suffer loss of use of the common elements during the repairs.

101. Plaintiff is entitled under the UTPA to a judgment against Defendants, jointly and severally, for treble actual damages plus attorneys' fees based on Defendants' knowing, intentional, willful, and malicious violations of the UTPA.

FOR A #11 CAUSE OF ACTION
(Violation of S.C. Code § 27-31-430)

102. Plaintiff repeats and incorporates the above paragraphs by reference.

103. The South Carolina Horizontal Property Act contains requirements applicable to conversion of rental units to condominium ownership, as is set forth in S.C. Code §§ 27-31-410 to 27-31-440.

104. Section 27-31-410 states:

As used in this chapter, "conversion of rental units to condominium ownership" means the establishment of a horizontal property regime encompassing a preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis other than persons who, at the time of such recording, had contractual rights to acquire condominium ownership within the building.

105. Upon information and belief, when the condominium property was used as the Andrew B. Murray Vocational School, the school's caretaker lived in a building on the property known as the care taker building. The Developer Defendants subsequently acquired the property, converted the buildings and property into condominiums, and then offered, marketed, and sold the condominium units to third party buyers. The condominiums horizontal property regime created and developed by the Developer Defendants included the renovation, conversion, and sale of the care taker building into condominiums.

106. Occupancy of the care taker building by the school's caretaker renders it a "preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis" as set forth in § 27-31-410.

107. Section 27-31-430 states:

Whenever the lessee, sole owner, or co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, written disclosure shall be made within thirty days of the date of the recordation to all prospective purchasers, including tenants in possession, as to the physical condition of the building. The disclosure shall contain a written report prepared by an independent registered

architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements. The report shall contain a good faith estimate of the remaining useful life to be expected for each item reported on, together with a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations. The good faith estimate of useful life shall not constitute a warranty and, as to an independent registered architect or engineer licensed to practice his profession in this State, shall not be deemed a representation of material fact or an inducement to purchase and shall not give rise to any cause of action at law or in equity against such architect or engineer. A failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act.

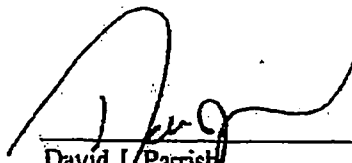
108. Upon information and belief, the Developer Defendants did not prepare or disclose the written report required under § 27-31-430.

109. The failure of the Developer Defendants to make the disclosures required under § 27-31-430 constitutes a *per se* violation of the South Carolina Unfair Trade Practices Act as stated in the last sentence of § 27-31-430.

110. Pursuant to § 27-31-430, Plaintiff is entitled under the UTPA to a judgment against the Developer Defendants, jointly and severally, for treble actual damages plus attorneys' fees based on their knowing, intentional, willful, and malicious violations of the UTPA

WHEREFORE, Plaintiff prays for:

- (a) a judgment for actual damages against Defendants jointly and severally with regard to causes of action #1 through #9;
- (b) a judgment for punitive damages against Defendants jointly and severally, with regard to causes of action #1, 3, 4, and 9;
- (c) a judgment for treble actual damages against Defendants jointly and severally with regard to cause of action #10 and #11.
- (d) an award of attorney's fees and costs; and
- (e) such other and further relief as the Court deems just and proper.



David J. Parrish
Paul A. Dominick
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
843.577.9440
Attorneys for Plaintiff

January 16, 2009

EXHIBIT

D

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 Chisolm Street Homeowners
Association, Inc.,

Plaintiff,

vs.

Chisolm Street Partners, LLC, Murray
School Partners, LLC, Genoa Construction
Services, Inc., Masterpiece Millwork, Inc.,
Allen Roper, Jr. d/b/a R. Masonry
Brickwork, Carolina Roofing Systems, Inc.
and Lacy Painting,

Defendants.

Genoa Construction Services, Inc.,

Third Party Plaintiff,

vs.

The Fox Steel Company, Carolina
Services, Inc., Lesco Restoration, Inc.,
Ferst Plastering, Inc., Charleston Glass &
Mirror Company, 3D Renovations,
Williams Mechanical, Mastercraft Interior &
Exterior, Coastal Glass and Block, Adams
Davis & Partners, Troy Pardee Heating
and Air Conditioning (d/b/a Pardee
Heating and Air), Metro Water-proofing,
Inc., CT Windows, Limited, and
Architectural Materials & Systems,

Third-Party Defendants.

Lesco Restoration, Inc.,

Fourth- Party Plaintiff,

vs.

Coastal Waterproofing, Inc. n/d/b/a Wards
Waterproofing, Inc.

Fourth-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-00267

2012 MAY 25 PM 2:43
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

ORDER GRANTING MASTERPIECE
MILLWORK, INC.'S MOTION FOR
SUMMARY JUDGMENT

19

This matter comes before the Court pursuant to Masterpiece Millwork, Inc.'s [hereinafter "Masterpiece"] Motion for Summary Judgment filed on September 1, 2011.¹

FINDINGS OF FACT

This case involves alleged construction deficiencies at 3 Chisolm Street arising out of the conversion of a vocational school to luxury condominiums which took place between 2000 and 2002. Three buildings were included in the conversion: the main building, the gym, and the cottage. The three buildings are in close proximity to each other and are all adjacent to a small common parking area. Genoa Construction Services, Inc. [hereinafter "Genoa"] acted as the general contractor for the project. Genoa purchased wood window units from Masterpiece in 2000-2001 for the gym and cottage buildings. Masterpiece has had no involvement with the project since construction was completed. The Certificate of Occupancy was issued in approximately July, 2002.

After construction was completed, the Plaintiff, 3 Chisolm Street Homeowners Association, Inc., began experiencing water intrusion and other problems with the buildings. They hired Myles Glick, a forensic architect, to investigate the problems. On January 30, 2003, Mr. Glick conducted a visual inspection of the property while accompanied by Joe Dapore, Esquire, the HOA's attorney, and Tom and Brett Carlson, who were representatives of a local contractor, Calibogue Construction.

Mr. Glick issued a report dated April 8, 2003, which cited numerous, significant

¹ In June 2011, this court previously granted various motions for summary judgment based upon the applicable statute of limitations. The Plaintiff filed a Motion to Reconsider which was denied by Order dated January 4, 2012. The Plaintiff has appealed. During the April 25, 2012 telephonic status conference, Judge Young requested from Counsel for Masterpiece a proposed order consistent with those previously granted granting Masterpiece Millwork, Inc.'s Motion for Summary Judgment absent a hearing so that this order could be added to the pending appeal. This Order is based upon the Order Granting Lacy Painting's Motion for Summary Judgment filed June 9, 2011.

and pervasive deficiencies at the property, including water intrusion and sealant failures at the windows, condensation on the inside of the glass window panes, problems with the roof, and cracks in the stucco in the courtyard area. It also cited that there was an extensive amount of mold and mildew in the units and that the mold and mildew presented a clear and present danger in terms of health for the individuals that occupy the units. He went on to say, "The removal of mold and mildew within the wall cavities is extremely important, because without the removal of mold and mildew, the problem will persist and grow." He recommended that a full investigation be made, which included destructive testing.

He concluded:

All of the above issues are significant and were persuasive throughout the entire building. I would recommend that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. Without correction, the issue of sales of unsold units and resales will come into play. I recommend 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. This report only represents observations during a limited site visit and other construction deficiencies may exist. [Emphasis added]

A copy of the Glick report was sent to Jack Burnett, the President of the HOA. The report was discussed on at least two different occasions by the Board of Directors for the HOA as reflected by the meeting minutes on May 6, 2003 and June 10, 2003. In those meetings, the Board discussed the steps that they needed to take for additional investigation and destructive testing in all three buildings. Nevertheless, no additional investigation was performed and no legal action was taken.

Water intrusion problems continued and the possibility of legal action was again addressed as reflected in the meeting minutes of February 6, 2006. At that time, Joe



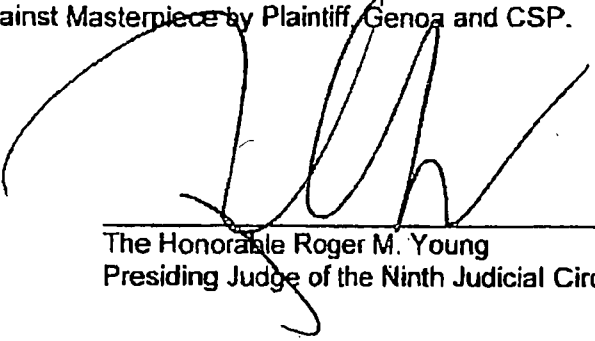
the full extent of the damage. Because Plaintiff did not file a lawsuit until January 16, 2009, the statute of limitations bars Plaintiff's action as it concerns Masterpiece scope of involvement in this project. This Court concludes that there is no genuine issue as to any material fact, and Masterpiece is entitled to judgment as a matter of law.

In addition, Genoa and CSP have filed cross claims against Masterpiece. The Court hereby finds that Genoa and CSP are entitled to Summary Judgment as it concerns Masterpiece because Plaintiff's claims are barred by the statute of limitations. As a result, Genoa and CSP do not have indemnification actions against Masterpiece, and Masterpiece is likewise entitled to Summary Judgment in full.

WHEREFORE, this Court hereby grants Masterpiece's Motion for Summary Judgment in full for all claims against Masterpiece by Plaintiff, Genoa and CSP.

IT IS SO ORDERED.


April 5, 2012
Charleston, South Carolina


The Honorable Roger M. Young
Presiding Judge of the Ninth Judicial Circuit

EXHIBIT

E

MINUTES OF THE JANUARY 21, 2015, SPECIAL MEETING OF THE 3 CHISOLM
STREET HOMEOWNERS ASSOCIATION, INC.

At 5:30 p.m., on January 22, 2015, a Special Meeting of the 3 Chisolm Street Homeowners Association, Inc., was held at 3 Chisolm Street on the 3rd Floor of the Murray Vocational School Building. The meeting was held after the appropriate written notice. There was a quorum of owners in attendance at the meeting.

The meeting was called by the Board to vote upon the following two items: 1) the approval of a Special Assessment to repair the crawlspace in the main building and 2) to reschedule the annual meeting from the first Monday in February to a later date in February to be approved.

The meeting was called to order by the President of the Board, Ms. Mims Roberts. The agenda was approved and followed.

Ms. Roberts provided a brief introduction as to the history of the crawlspace issues and the status of discovery, investigation, and recommendations regarding the crawlspace. Ms. Roberts provided the history from February 2014, when the sale of Unit 101 was inspected by Lowcountry Home Inspections whose workers discovered problems with the crawlspace. This was followed up by Omni Services as well as ADC Engineering, the original engineering firm hired by the developer of 3 Chisolm Street. The Board contacted Mr. Eddie Porcher with Stantec Engineering who also completed a review and evaluation of the crawlspace. The Board obtained bids for the repair work which came in at an amount not to exceed \$2,500,000.00 plus engineering costs based upon Mr. Porcher's report. The report from Mr. Porcher and the bid amount were presented at a November 6, 2014, meeting of the Owners.

Mr. Steven Bernard provided an update as to the repairs and construction issues involving the crawlspace. Mr. Bernard and Mr. Wally Seinsheimer have met with other contractors and hope to have another bid for the work as of February 5, 2015. There is no contract in place for any work with any contractor. NBM, Trident, and Palmetto Gunitite have all been contacted about potential bids. Palmetto Gunitite has provided a bid of not to exceed \$2,500,000.00 plus engineering costs. NBM will provide its bid by February 5, 2015. Trident has not given a date for its bid. Mr. Bernard advised that Joel Krueger, a contact obtained through Ms. Kimberly Rosbe, was going to provide a potential bid. Mr. Krueger advised Mr. Bernard that he could not provide a bid after being in contact with Mr. Porcher. Mr. Bernard informed those present that he was hopeful the costs could come down to between \$1,500,000.00 to \$1,750,000.00. The

work will probably take nine to twelve months to complete according to Mr. Bernard. First floor owners should not have to move out of their Units according to Mr. Bernard.

G. Hamlin O'Kelley, III, of Buist, Byars & Taylor, LLC, provided an update of three (3) legal cases pending involving 3 Chisolm Street. The first is the window lawsuit involving the gym. That matter is pending before the South Carolina Supreme Court to see if that Court is willing to hear the matter and reverse the South Carolina Court of Appeals or the trial court. The second case involves the crawlspace and is in the early stages of service of process upon the Defendants. The defendant general contractor in that case will be represented by Rogers Townsend & Thomas in Columbia. The other defendants have not answered the complaint filed. The third lawsuit was filed on January 5, 2015, by Steven Bernard seeking to hold the Board and past-Boards liable for negligence, breach of duty, and gross negligence regarding the prosecution or mis-prosecution of the construction issues involving the windows, and, possibly, the crawlspace. There is an extension to answer that case until March 7, 2015.

Mr. O'Kelley also provided an explanation of the legal duties to repair the crawlspace, both under the terms of the Master Deed for 3 Chisolm Street and under cases decided by the South Carolina Supreme Court. Mr. O'Kelley explained the liability of the Board and of the Owners should a special assessment not be approved. Mr. O'Kelley informed the group that the Board is charged with maintaining the common elements for the Owners. Mr. O'Kelley advised the repairs would have to be made regardless of the special assessment being approved or not.

Ms. Roberts opened the floor for comments and questions. Ms. Charles Wunsch and Ms. Linda Hojnacki both made comments about their past experience with construction issues and the status of the crawlspace damages. Mr. Seinsheimer spoke regarding the issues of costs, the reports by Mr. Porcher and the scope of work to be completed. Ms. Rosbe inquired as to the methodologies used by the engineers and contractors. Mr. Bill Maneri brought up the issue of "peer review" of the reports by a personal friend who works for a national engineering firm. Ms. Catherine Jones asked questions about the schedule of work. Ms. Bernard advised that she did not wish to vote "yea" on the ballot without a spending cap. Ms. Caroline McMillan provided a written commentary about the Murray Vocational School building's prominence being on the National Register of Historic Places and being subject to easements held by the Historic Charleston Foundation. Mr. Bernard, Ms. Roberts, Mr. Jack Burnett, and Dr. Martin Morad, and Mr. O'Kelley answered questions concerning the special assessment, the work to be performed and the status of same.

After discussion, Dr. Layton McCurdy moved that there be a vote on the ballot presented. Mr. Seinsheimer seconded the motion. The ballot read as follows:

Should the special assessment, in the amount not to exceed \$2,500,000.00 plus engineering costs, to repair the crawlspace in the main building, be approved?

 YES

 NO

Should rescheduling the annual meeting from the first Monday in February to a later date in February be approved?

 YES

 NO

Discussion followed by the Owners in favor of voting on the motion as presented, on amending the motion, and on changing the motion. Mr. O'Kelley advised as to the procedure to withdraw, amend, or vote on the motion. At the end of the discussion, Dr. McCurdy withdrew the motion to vote on the ballot as it read. Following the withdrawal of that motion, Mr. Alonso Galvan moved that the ballot be amended as follows:

Should the special assessment, in the amount not to exceed \$2,500,000.00 plus engineering costs, to repair the crawlspace in the main building, be approved?

 YES

 NO

Should rescheduling the annual meeting from the first Monday in February to a later date in February be approved?

 YES

 NO

Ms. Rosbe seconded the motion to have the ballot approved as amended. Discussion followed by the Owners regarding the pros and cons of the ballot as written. Ms. Shawn Wallace inquired if there was sufficient notice of an amended ballot. Mr. O'Kelley advised that since there was notice of the special assessment and this was still being voted upon, the ballot could be voted upon as written. Ms. Roberts called the question at that time and Mr. Yohanna LaRoche with Sentry Management conducted a roll call vote for those in attendance. The votes for those

owners who provided proxies were given to Ms. Roberts. Mr. O'Kelley agreed to tally the votes as they were called.

At the end of the voting, the first question passed with fifteen yea's and eleven nay's. The second question passed unanimously. Mr. O'Kelley announced that the Owners approved the following:

- ~~1. The special assessment to repair the crawlspace in the main building is approved~~
2. The annual meeting would be rescheduled from the first Monday in February to a later date in February

Mr. Bernard moved to adjourn the meeting. There was no second. Mr. Seinsheimer asked to address the Owners regarding a potential amendment to the Master Deed for this Special Assessment. Mr. Seinsheimer advised, and Mr. O'Kelley confirmed, that 66.67% of the Owners would have to approve such an amendment. Mr. Seinsheimer proposed changing the method of assessment for this Special Assessment only. This new method would be based upon the square footage of each Unit and each Unit's value as determined by the "3 Chisolm Street Assessment Schedule" provided by Mr. Seinsheimer. Mr. Seinsheimer then moved that the Board schedule a meeting to change amend the Master Deed for this issue only. Mr. Galvan seconded the motion.

There being no further business, Mr. Bernard moved that the meeting be adjourned. Mr. Charles Wyrick seconded the motion. The meeting was adjourned at 7:22 p.m.

Respectfully submitted:

3 Chisolm Street Homeowners Association, Inc.

By: Mims Roberts
Its: President

By: Jack Burnett
Its: Secretary/Treasurer

EXHIBIT

F

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

EX . V39096659

**MASTER DEED ESTABLISHING
3 CHISOLM STREET HORIZONTAL PROPERTY REGIME**

KNOW ALL MEN BY THESE PRESENTS, That this Master Deed is made on the date hereinafter set forth by CHISOLM STREET PARTNERS, LLC, hereinafter sometimes called "Developer," a limited liability company, organized under the laws of the State of Georgia and qualified to do business in South Carolina;

WHEREAS, Developer is the sole owner in fee simple of real property and buildings and improvements thereon (collectively the "Property"), which is located on the west side of Chisolm Street in the City of Charleston, Charleston County, South Carolina, and desires to submit the Property as hereinafter more fully described to a Horizontal Property Regime, according to the laws of the State of South Carolina (the "State") and subject to conditions and restrictions contained herein; and

WHEREAS, Developer desires to convey the Property pursuant and subject to certain protective covenants, conditions, restrictions, reservations, liens and charges under the South Carolina Horizontal Property Act and as hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the benefits expected to flow to Developer as a result of the submission of the herein described Property to a Horizontal Property Regime:

KNOW ALL MEN BY THESE PRESENTS that Chisolm Street Partners, LLC, for itself, its successors and assigns, subject to matters set forth herein, hereby submits the Property, to a Horizontal Property Regime according and subject to the terms and provisions of the Horizontal Property Act of the State of South Carolina as presently codified in the 1976 South Carolina Code of Laws at Section 27-31-10 et seq. (hereinafter sometimes referred to as the "Act") as it is now constituted and as it may from time to time be amended; PROVIDED, however, that such submission shall be and is made subject further to the conditions, provisions and restrictions contained herein, including exhibits attached hereto and incorporated herein by reference, that certain facade easement heretofore granted to Historic Charleston Foundation and that certain easement heretofore granted to BellSouth Telecommunications, Inc., all of which shall be covenants, conditions, restrictions and easements which shall run with the land and shall bind and inure to the benefit of Developer, its successors and assigns, and all subsequent owners of any interest in the Property, their grantees, successors, heirs, executors, administrators, personal representatives, devisees or assigns.

1. DEFINITIONS: Unless a contrary definition is provided by the Act or is clearly required by the context hereof in order to effectuate the purpose and intent of the within Master Deed, the following definitions of terms shall apply to the within Master Deed, but in case of any

CHARLESTON 0095_17

Defendant - 000095
BWPB 2026.044

3 Chisolm HOA 0746

206

207

repair and replacement by a Co-owner shall be done in a manner so as to maintain the harmonious exterior appearance of the Property.

12. **ASSESSMENTS:** The Co-owner of each Unit shall be responsible for his share of assessments established by the Regime as follows:

(a) Creation of lien and personal obligation for assessments. Each of the Co-owners of the Units are bound to contribute pro-rata in the percentage computed as set forth on Exhibit "D", and each Unit is and shall be subject to a lien and permanent charge in favor of the Regime for, the payment of annual and special assessments for the expenses of administration and of maintenance and repair of the general and limited common elements of the Property and toward any other expenses lawfully agreed upon or properly chargeable to the Unit Co-owner. If a lien for unpaid assessments is enforced by the Association, either by suit for damages or foreclosure, the Association shall be entitled to collect all costs of that action including attorneys fees. All sums assessed by the Association or other form of administration but unpaid for the share of common expenses, both general and limited, chargeable to any Unit shall constitute a lien on such Unit prior to all other liens except only (i) tax liens on the Unit in favor of any assessing unit, and (ii) mortgage and other liens, duly recorded, encumbering the Unit. Such lien may be foreclosed by suit by the Association or other form of administration, if any, acting on behalf of the Council of Co-owners, or by the Council of Co-owners itself, and in like manner as a mortgage of real property. In any such foreclosure the Unit Co-owner shall be required to pay a reasonable rental for the Unit after the commencement of the foreclosure action and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect such rents. The Association or other form of administration, acting on behalf of the Council of Co-owners, shall have power to bid in the Unit at foreclosure sale and to acquire and hold, lease, mortgage and convey the same. Suit for recovery of a money judgment for unpaid common expenses may be maintained without instituting foreclosure proceedings.

(b) Where the mortgagee of any mortgage of record or other purchaser of a Unit other than the defaulting Unit owner obtains title at the foreclosure sale of such a mortgage, such acquirer of title, his/its heirs, successors and assigns, shall not be liable for the share of common expenses or assessments by the Association chargeable to such Unit accruing after the date of recording such mortgage but prior to the acquisition of title to such Unit by such acquirer. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the Unit Co-owners, including such acquirer, his/its heirs, successors and assigns. The foregoing shall be without prejudice to the right of the Association or any Co-owner to seek recovery from the defaulting Unit owner.

The purchaser of a Unit (other than a purchaser at a foreclosure sale as described above) shall be jointly and severally liable with the Seller for the amounts owing by the latter to the Association for assessments up to the time of the conveyance, without prejudice to the purchaser's right to recover from the other party the amounts paid by him such joint debtor. The Association shall provide for the issuance and shall issue to any purchaser, upon his request, a statement of such amounts due by the seller and the purchaser's liability hereunder shall be limited to the amount as set forth in this statement.

(c) No later than December 20th of each calendar year, the Board of Directors of the Association shall set the annual assessments by estimating the common expenses to be incurred during the immediately succeeding calendar year and shall prorate such common expenses among the Co-owners of the Units in accordance with the percentage interest appurtenant to such Unit and shall give written notice to each Unit Co-owner of the annual assessment affixed against his Unit for such immediately succeeding calendar year. One-twelfth (1/12th) of such annual assessments shall be due and payable by the Co-owner to the Association or its designated agent in advance on or before the fifth day of each month.

(d) Developer anticipates that ad valorem taxes and other governmental assessments, if any, upon the Property will be assessed by the taxing authorities upon the Unit Co-owners and that each assessment will include the assessed value of the Unit and of the undivided interest of the Unit Co-owner in the common elements. Any such taxes and governmental assessments upon the property which are not so assessed shall be included in the budget of the Association as a recurring expense and shall be paid by the Association as a common expense. Each Unit Co-owner is responsible for making his own return of taxes and such returns shall include such owners undivided interest in the common elements, both general and limited.

(e) Special Assessments. In addition to the annual assessments, the Association may levy in any calendar year special assessments for the purpose of supplementing the annual assessments if the same are inadequate to pay the common expenses and for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of the general common elements or the limited common elements; provided that in the case of limited common elements, such special assessments shall be assessed only against those Units and the Co-owners thereof which shall be entitled to the use and benefit of such limited common elements, including the necessary fixtures and personal property related thereto; PROVIDED, HOWEVER, that any such special assessments shall have the assent of a majority of the votes of the Co-owners to be affected thereby represented, in person or by proxy, at a meeting at which a quorum is present, duly called for the expressed purpose of approving such expenditure, written notice of which shall be sent to all affected owners not less than fifteen (15) days nor more than thirty (30) days in advance of the meeting, which notice shall set forth with particularity the purpose of a meeting. Special assessments shall be fixed against the Units involved in proportion to the percentage interest attributable to each Unit. The period of assessment and manner of payment shall be determined by the Board of Directors of the Association.

(f) Date of Commencement of Annual Assessments. The responsibility of each Co-owner who purchases from Developer for assessments provided for herein shall as to each Unit commence upon the date of conveyance thereof (the "Commencement Date"). The first monthly payment of the annual assessment for each such Unit shall be an amount rounded to the nearest whole dollar equal to the monthly payment for the fiscal year in progress on such Commencement Date, divided by the number of days in the month of conveyance and multiplied by the number of days then remaining in such month; PROVIDED, HOWEVER, that at the Commencement Date any purchaser of a Unit from the Developer shall pay to the Developer the pro-rata portion of any prepaid expenses paid by the Developer, such as by way of example only

and not as a specification or limitation, prepaid insurance premiums for flood and hazard insurance.

13. **TRANSFER OF INTEREST IN UNITS:** (a) Upon the transfer or attempted transfer of an interest in any Unit, whether such transfer be by deed, lease, sublease, gift, devise, or by any means other than by first mortgage, sale pursuant to foreclosure of first mortgage or deed in lieu of foreclosure of said first mortgage, the Association shall have the right of first refusal in such interest as follows:

(i) **SALE OR LEASE:** Any Co-owner who wishes to sell or lease an interest in a Unit (or any lessee of any Unit wishing to assign or sublease such Unit) to any person not related by blood or marriage to the Co-owner shall give to the Association written notice of the terms of any such contemplated transfer, together with the name and address of the proposed purchaser, assignee, lessee or sublessee. The Association shall at all times have the first right and option to purchase or lease such Unit upon the same terms, which option shall be exercisable for a period of ten (10) days following the date of receipt of such notice. If said option is not exercised by the Association within said option period, the Co-owner (or lessee) may, at the expiration of said period and at any time within ninety (90) days after the expiration of said period, or for such longer period of time as the Association may agree to in writing, sell or lease (or sublease or assign) such Unit ownership upon the terms specified in such notice.

(ii) **GIFT:** Any Co-owner who wishes to make a gift of an interest in a Unit ownership or any interest therein to any person or persons or entity who would not be heirs at law of the owner under the laws of intestate succession of this state as of the date such gift is proposed, (or to any person or persons or entity who would not be an heir at law as aforesaid of any principal of Co-owner, if Co-owner is not a natural person), shall give to the Association written notice of intent to make such gift. The Association shall at all times have the first right and option to purchase such Unit ownership or interest therein for cash at fair market value to be determined by mutual agreement between such owner and the Association or if mutual agreement cannot be reached, then by arbitration as herein provided, which option shall be exercisable until the date of expiration as provided herein. If Co-owner and Association cannot agree within five (5) days of such notice to Association on fair market value, then within fifteen (15) days after receipt by the Association, of said written notice, the Association and the owner desiring to make such gift shall each appoint a qualified real estate appraiser to act as arbitrators. The two arbitrators so appointed shall, within fifteen (15) days after their appointment, appoint another qualified real estate appraiser to act as the third arbitrator. Within fifteen (15) days after the appointment of said arbitrator, the three arbitrators shall determine, by majority vote, the fair market value of the Unit ownership or interest therein which the Co-owner contemplates conveying by gift, and shall thereupon give written notice of such determination to the Co-owner and the Association. The Association's option to purchase the Unit ownership or interest therein shall expire thirty (30) days after the date of receipt by it of such notice or after agreement in writing between Co-owner and Association as to fair market value of the Unit, unless exercised in writing within said period and closed within thirty (30) days thereof. If the Association shall elect to

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

Steven M. Bernard and Deborah J.)
Bernard, on Behalf of Themselves)
And All Others Similarly Situated,)

Plaintiffs,)

vs.)

3 Chisolm Street Homeowners)
Association, Inc.,)

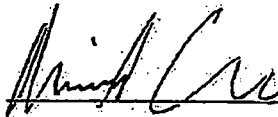
Defendant.)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of Plaintiff's Return to Defendant's Motion for Summary Judgment and Affidavit of Steven Bernard in Opposition of Summary Judgment and upon Jeffrey Michael Bogdan, attorneys for the Defendant, by placing a copy of same in the United States Mail with sufficient postage attached thereto and addressed as follows:

Jeffrey Michael Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, SC 29402

Dated: 10/12/2018



FILED
2018 OCT 16 PM 1:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY SS

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

Steven M. Bernard and Deborah J.)
Bernard, on Behalf of Themselves)
And All Others Similarly Situated,)
Plaintiffs,)

AFFIDAVIT OF STEVEN BERNARD
OPPOSING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

vs.)

3 Chisolm Street Homeowners)
Association, Inc.,)
Defendant.)

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JULIE J. ARMSTRONG
CLERK OF COURT
BY SB

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The affiant, after being duly sworn, states as follows:

1. My name is Steven Bernard, I am at least 18 years of age, of sound mind, and have personal knowledge of the following:
2. I am one of the two class representatives for the Plaintiff class in this action. My wife Deborah Bernard is the other class representative.
3. My wife and I purchased condominium unit number 405 at 3 Chisolm Street Charleston, SC (hereinafter "unit 405") on December 21, 2012 and presently own that same unit.
4. My wife and I did not move into unit 405 until on or about March 7, 2013.
5. At the time my wife and I purchased unit 405, we had no knowledge regarding the condition of the condominium building's foundation.
6. The 3 Chisolm Street Condominiums consist of three separate buildings. The largest building, which is referred to as the Main Building, was built in 1929 and served initially as a vocational school and later as County of Charleston offices.

The second building is the caretaker's cottage. The third building is known as the Gym Building and was built in the 1950's to serve as the gymnasium for the vocational school.

7. The Main Building and the Gym Building were renovated and turned into condominiums in 2002.
8. The Main Building previously consisted of 20 units, but within the last two years one of the largest units was partitioned into two units for a total of 21 units.
9. The Gym Building consists of 6 units and the caretaker's cottage is a single unit.
10. I was asked to be on the Board of Directors for the Defendant Homeowner's Association in October of 2014.
11. Upon becoming a member of the Board of Directors, I was informed for the first time by then President of the Board, Mary Roberts, that the Board of Directors had hired a structural engineering firm known as Stantec Consulting Services, Inc. to conduct a complete investigation of the condition of the foundation of all three buildings comprising the Regime known as 3 Chisolm Street (hereinafter "Regime").
12. In October of 2014, the lead registered structural engineer, Edward Porcher, advised the Board of Directors that the foundation of the main building was in such an unsafe condition that unless the Regime began steps to repair the foundation, he was obligated to notify the City of Charleston and request that it be condemned.
13. Mr. Porcher completed his investigation of the Gym Building's foundation in 2015 and informed the Board of Directors that while not as in bad of a condition

as the Main Building, it was still in need of extensive repairs. Mr. Porcher also advised that the foundation of the caretaker's cottage was in need of minor repairs.

14. In November of 2014, a special general meeting of all the homeowners was called by the Board of Directors to inform the homeowners of the foundation problems and that repairs were needed immediately.

15. At the special general meeting, Mr. Porcher and representatives of construction company, Palmetto Gunit Construction Company, Inc., informed the homeowners as to the condition of the foundation, the extent of the repairs needed, and estimated associated costs.

16. It was at this November of 2014 special general meeting that I first learned of the March 26, 2014 decision of the Court of Appeals in 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, et. al., Appellate Case No.: 2012-207850 affirming the trial court's decision that the April 2003 Glick Report had: (1) put the Board of Directors on notice of the construction defects or the need for further investigation of the construction defects in 2003, and (2) that the statute of limitation had run by the time the Board of Directors had filed the original lawsuit.

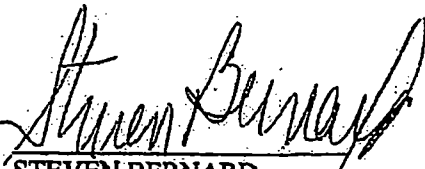
17. Prior to this meeting, I had never been informed of either the existence of the Glick Report or of the decision of the Court of Appeals. I immediately asked the property manager for both the Glick Report and the Court of Appeals decision.

18. Thereafter, in January of 2015, at a specially called general homeowners' meeting, the members of the Regime voted to assess each unit in the Regime \$82,000.00 payable by June of 2015.

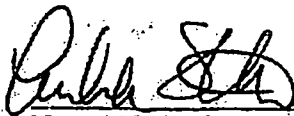
19. My wife and I paid the special assessment of \$82,000.00 in June of 2015.

20. All other class members have paid the special assessment.

FURTHER AFFIANT SAYETH NOT!


STEVEN BERNARD

Sworn to and Subscribed before
Me this 17th day of October, 2018


Notary Public for South Carolina
My Commission expires: 12/4/2022

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Steven M. Bernard and Deborah J.
Bernard, on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

3 Chisolm Street Homeowners
Association, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

2015 OCT 19 PM 2:45
JULIE J. MALONE
CLERK OF COURT

**REPLY TO PLAINTIFFS' RETURN TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

The Defendant 3 Chisolm Street Homeowners Association, Inc. (hereinafter the "HOA" or "Defendant"), by and through its undersigned counsel, submits this Reply to Plaintiff's Return to the HOA's Motion for Summary Judgment. Plaintiffs make two arguments in their Reply: (1) Plaintiffs timely filed this case within the statute of limitations and (2) the statute of limitations found in S.C. Code Ann. § 33-31-830(f) does not apply.

A. PLAINTIFFS DID NOT FILE THIS CASE BEFORE THE STATUTE OF LIMITATIONS EXPIRED

Plaintiffs' first argument is that their cause of action for negligence against the HOA did not accrue until January 22, 2015¹ (the date the HOA levied the special assessment on the Plaintiffs to pay for the foundation repairs), because it was not until that date that the Plaintiffs "were first damaged as a result of the Defendant's negligence." While in the heading of this argument Plaintiffs claim that this case was filed "within the applicable statute of limitations," Plaintiffs inexplicably failed to assert what that "applicable statute of limitations" was or when it expired.

¹ Plaintiffs filed this case on January 2, 2015, which, according to them, was twenty days before their claim existed.

Instead, Plaintiffs' first argument focuses solely on when they believe their cause of action "accrued," i.e. when the statute of limitations clock began to run.

The South Carolina Supreme Court has "repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded." City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010); Dean v. Ruscon Corp., 321 S.C. 360, 363, 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."); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."). The statute of limitations can be triggered despite the fact that the injured party may not comprehend the full extent of the damage or may not have developed a full-blown theory of recovery. Dean, 321 S.C. at 364, 468 S.E.2d at 647. "The date on which discovery should have been made is an objective, not subjective, question." Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016); Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). As Plaintiffs correctly cite, a statute of limitations begins to run at the time the cause of action accrues. King v. James, 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010). The question of when a cause of action accrues is a question of law for the court to decide. Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). "A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." Bergstrom v. Palmetto Health All., 358 S.C. 388,

397, 596 S.E.2d 42, 46 (2004), quoting Stephens v. Draffin, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309 (1997); McAlhany v. Carter, 415 S.C. 54, 67, 781 S.E.2d 105, 112 (Ct. App. 2015), aff'd, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017). A cause of action accrues when defendant breaches a duty owed to the plaintiff, even though substantial damages either were not discovered or did not even occur until sometime later. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989). "The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule)." Doe v. Bishop of Charleston, 407 S.C. 128, 140, 754 S.E.2d 494, 500 (2014), quoting Kreutner, 320 S.C. at 285, 465 S.E.2d at 90.

Here, Plaintiffs' sole claim against the HOA is one of negligence. Therefore, it accrued at the moment the alleged negligent conduct caused some injury, or when a reasonable person would have been put on notice that they had a claim against the HOA. Doe, 407 S.C. at 140, 754 S.E.2d at 500. Plaintiffs admit in their Return that the HOA's alleged negligent act for which Plaintiffs are seeking damages was "failing to file suit against renovators² within the applicable statute of limitations and the resulting damages to Plaintiffs in having to bear the costs of making the necessary repairs to the condominium foundations." See Plaintiffs' Return at p.3. Therefore, Plaintiffs' action against the HOA accrued when Plaintiffs knew or should have known that the HOA failed to timely file suit to recover the costs to repair the foundation defects. Plaintiffs were damaged then, even though the amount of damage would not be quantified until later. Plaintiffs

² Plaintiffs defined "renovators" as "the general contractor and various sub-contractors that performed the 2002 renovation of the condominiums." See Plaintiffs' Return at p.2.

could have sued as soon as they suffered any damage, which was as soon as they knew or should have known that the HOA failed to timely file suit.³

1. The Court of Appeals' March 26, 2014 Opinion in the Water Intrusion Lawsuit did not Mark the Accrual of the Negligence Cause of Action Plaintiffs Have Asserted Here

Plaintiffs' first argument is that their negligence claim against the HOA did not accrue until March 26, 2014, when the Court of Appeals issued its opinion in the Water Intrusion Lawsuit, affirming that the HOA failed to file that case within the applicable statute of limitations. Plaintiffs contend that it was not until then that it was conclusively established that the HOA breached its duty to timely file the Foundation Defects Lawsuit and, thus, this negligence action did not accrue, and the statute of limitations did not begin to run, until March 26, 2014. This argument is flawed for at least two reasons. First, the March 26, 2014 Court of Appeals opinion did not discuss whether the HOA timely filed the Foundation Defects Lawsuit. The Foundation Defects Lawsuit had not even been filed when the Court of Appeals issued its opinion. Instead, the Court of Appeals' opinion found that the HOA failed to timely file the *Water Intrusion Lawsuit*. Plaintiffs do not allege that the HOA was negligent in failing to timely file the Water Intrusion Lawsuit, so the March 26, 2014

³ The HOA believes that it timely filed suit to recover the costs to repair the foundation defects. A critical and undisputed fact that Plaintiffs ignore in their Return is that the HOA filed two separate construction defect lawsuits. In January 2009, the HOA filed the Water Intrusion Lawsuit, which alleged deficiencies with the windows, roofs, and other components of the buildings that allowed water to enter above-grade. Plaintiffs are not claiming here that the HOA failed to timely file that case and are not seeking recovery of damages that were being sought in that case. Then, in November 2014, the HOA filed the Foundation Defects Lawsuit, which alleged structural deficiencies with the foundations underneath the buildings. This is the case that Plaintiffs claim the HOA failed to timely file, and the damages that the Plaintiffs are seeking to recover from the HOA in this case are the same as the damages the HOA was seeking there. It is undisputed that the HOA did not have actual notice of the foundation defects before February 2014. Therefore, the November 2014 Foundation Defects Lawsuit would only be time-barred if a the HOA *should* have been on notice of the facts supporting the Foundation Defects Lawsuit before February 2011. The crux of Plaintiffs' argument in this case is that the 2003 Glick Report put the HOA on constructive notice of the foundation defects. It did not. According to Glick himself, his 2003 report was related only to the above-grade water intrusion issues that became the subject of the Water Intrusion Lawsuit and he never intended for his report to result in an inspection of, or discovery of defects in, the crawlspaces or foundations of any buildings. See Glick Affidavit ¶¶4-8, Exhibit I to the HOA's Motion for Summary Judgment. There is absolutely no evidence, not even a scintilla, that the statute of limitations on the Foundation Defects Lawsuit expired before it was filed in November 2014 and, therefore, the HOA cannot be negligent for failing to timely file it.

Court of Appeals decision is not relevant to the issue of when the statute of limitations began to run in the case. Plaintiffs' flaw is best captured in the following sentence from their Return: "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." See Plaintiff's Return at p.5. In fact, the viability of Plaintiffs' claim against the HOA was dependent on the court's decision in the *Foundation Defects* Lawsuit, not the Water Intrusion Lawsuit. The court in the *Foundation Defects* Lawsuit was never given the opportunity to decide its timeliness, since the parties to that case agreed to settle it.⁴ Plaintiffs are incorrect that the viability of their claim against the HOA was dependent on the court's decision in the entirely separate Water Intrusion Lawsuit.

Next, assuming that the Court of Appeals' March 26, 2014 decision in the Water Intrusion Lawsuit is relevant in determining when the statute of limitations began to run in this case, then so would be events that occurred in the Water Intrusion Lawsuit prior to the issuance of that opinion. As discussed in the HOA's Motion for Summary Judgment, before the Water Intrusion Lawsuit was even filed and in response to a pre-suit demand, one of the eventual defendants in that case informed the HOA that it had missed the statute of limitations for filing suit and recommended that the HOA members file suit against the HOA board for failing to timely file. See Exhibit C to the HOA's Motion for Summary Judgment. Next, on June 9, 2011, the circuit court issued orders finding that the Water Intrusion Lawsuit was barred because the HOA did not timely file it. See Exhibits F and G to the HOA's Motion for Summary Judgment. If the Plaintiffs' argument is correct that the March 26, 2014 Court of Appeals opinion marked the accrual of their cause of action, then so did the June 9, 2011 orders, which would make this case time-barred unless filed on

⁴ It is notable that the decision to settle the *Foundation Defects* Lawsuit was made by the current board of the HOA, who are also members of the Plaintiffs' class.

or before June 9, 2014. Since this case was not filed until January 2015, it is time-barred under Plaintiffs' own theory.

The HOA stands on the arguments it made in its Motion for Summary Judgment that Plaintiffs' negligence claim against the HOA for failing to timely file the Foundation Defects Lawsuit accrued in either January 2008 or June 2011. But to reiterate, the HOA believes that the Foundation Defects Lawsuit was timely filed in November 2014 and all of its arguments here assume Plaintiffs' allegation that it wasn't, because it was filed after April 2006.

2. The HOA's January 22, 2015 Assessment for the Costs to Repair the Foundation Defects did not Mark the Accrual of the Negligence Cause of Action Plaintiffs Have Asserted Here.

The Plaintiffs' next argument is that their negligence claim against the HOA did not accrue until the HOA levied a special assessment on the Plaintiffs on January 22, 2015, to pay for the costs to repair the foundation defects, because until that date the Plaintiffs did not suffer any damages. This argument is even more confusing than the first, but just as incorrect, and, if accepted, would actually prove that the claims that were asserted in the Foundation Defects Lawsuit were not barred by the statute of limitations.

As an initial matter, if Plaintiffs are correct that their negligence claim against the HOA did not accrue until January 22, 2015 (they are not), then their negligence claim could not have accrued on March 26, 2014, as Plaintiffs initially argued. Plaintiffs themselves cannot even decide which date to choose to adopt as the accrual date of their claims, even though both are incorrect. The fact that is perhaps best illustrates the absurdity of this argument is that Plaintiffs filed this case on January 2, 2015, twenty days before they now claim they had a case to file.

Next, Plaintiffs' argument that the HOA's levying of a special assessment to the Plaintiffs to pay for the foundation repairs (i.e. sending the Plaintiffs a bill for the claimed damages) was the

event whereby Plaintiffs were "first damaged as a result of the Defendant's negligence and gave the Plaintiffs [sic] an actionable claim for negligence" is unsupported, and in fact contradicted, by established South Carolina law. Plaintiffs did not have to wait until all of their damages were established before filing suit. See Bergstrom, 358 S.C. at 397, 596 S.E.2d at 46 ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." Plaintiffs could have filed suit before all of its damages occurred or were discovered. Grooms, 298 S.C. at 402, 380 S.E.2d at 857. Clearly if Plaintiffs had filed this suit immediately after the statute of limitations expired for the Foundation Defects Lawsuit, the HOA could not have defended this suit on the basis that the amount of damages were not yet ascertained. The HOA would have to concede that, if it did negligently miss the statute of limitations, Plaintiffs were injured by the loss of its claim for foundation defects. If Plaintiffs' argument were correct, a party that suffered personal injuries in an accident caused by a tortfeasor could not institute a negligence cause of action until not only all of the injured party's damages had been determined, but the injured party received a bill for them. This is not how South Carolina law operates.

The most striking aspect of this argument is that, if the Plaintiffs are correct, it would actually disprove their entire negligence claim. If the HOA timely filed the Foundation Defects Lawsuit, then the HOA was not negligent. If the Plaintiffs are correct that their claim against the HOA did not accrue until January 22, 2015, when Plaintiffs claim they were "first damaged" by the HOA's alleged negligence, then it would also be true that the HOA's negligence claim against the defendants in the Foundation Defects Lawsuit did not accrue until the HOA was responsible to pay for the costs to repair the foundation defects. Plaintiffs' class representative Steven Bernard admits

that the HOA was not presented with a cost estimate to repair the foundation defects until November 2014. See Bernard Affidavit at ¶¶14-15. According to Plaintiffs, the Foundation Defects Lawsuit could not have accrued before then. Therefore, the HOA's November 2014 filing of the Foundation Defects Lawsuit must have been timely, according to Plaintiffs. This fundamental dilemma is the clearest reason that the HOA is entitled to summary judgment in this case: The very same argument that the Plaintiffs rely upon to avoid the statute of limitations defense exonerates the HOA of negligence in failing to timely file the Foundation Defects Lawsuit.

B. THE ENTIRE SOUTH CAROLINA NONPROFIT CORPORATIONS ACT OF 1994, INCLUDING THE STATUTE OF LIMITATIONS PROVIDED FOR THEREIN, APPLIES TO THIS CASE

Plaintiffs' final argument is that the statute of limitations found in S.C. Code §33-31-830(f) is only applicable to individual directors of the HOA, and not to the HOA itself. Plaintiffs argue that since the HOA, and not its individual directors, is the defendant in this case, §33-31-830(f)'s statute of limitations does not apply and, instead, the three-year statute of limitations and discovery rule codified in S.C. Code §§ 15-3-530(5) and 15-3-535 apply.

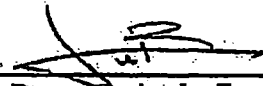
Plaintiff is incorrect. The statute of limitations found in §33-31-830(f) applies. First, the HOA concedes that Article 8 of the South Carolina Nonprofit Corporation Act of 1994 is entitled "Directors and Officers," that Section 33-31-830 is entitled "General standards for directors," and that the statute of limitations supplied by §33-31-830(f) applies to a "director." However, while the HOA is the only named defendant in this case, the Plaintiffs' class representative testified that this case is against both the HOA and its individual directors. Exhibit E to the HOA's Motion for Summary Judgment at 37:21-38:1. Further, since a corporation like the HOA can only act through its directors, the law applicable to its directors is also applicable to the association itself. Chapman-

Storm Lumber Corp. v. Minnesota-S.C. Land & Timber Co., 183 S.C. 31, 34, 190 S.E. 117, 118 (1937).

Nevertheless, even assuming Plaintiffs are correct and § 15-3-530(5)'s three-year statute of limitations and §15-3-535's discovery rule apply, Plaintiffs still failed to file this case on time. Here, Plaintiffs again argue that their negligence cause of action against the HOA did not accrue until March 26, 2014, and then again in the next breath argue that it did not accrue until January 22, 2015. As discussed above, under Plaintiff's theory in this case that the statute of limitations for the Foundation Defects Lawsuit expired in April 2006 (which the HOA vehemently denies), Plaintiffs' negligence claim against the HOA (if it even exists, which the HOA disputes) would have accrued long before either of the Plaintiffs' claimed dates. It would have accrued when the HOA's construction defendants told it in January 2008 that it failed to file within the statute of limitations and advised many of the Plaintiffs here to file this case. If not then, it would have accrued in June 2011 when the circuit court issued publicly-available orders finding that the HOA missed the statute of limitations. It was on either of those dates that members of the Plaintiffs' class had actual notice of a potential claim against the HOA, or reasonably should have been placed on such notice. Using the three-year statute of limitations and the discovery rule, Plaintiffs would have had to file this case in or before January 2011 or, at the latest, in or before June 2014. Plaintiffs did not file until January 2015, well after any possible statute of limitations expired.

The HOA requests that the Court grant it summary judgment and dismiss this case in its entirety.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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*Attorneys for 3 Chisolm Street Homeowners
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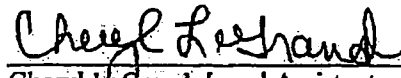
October 19, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Reply to Plaintiffs' Return to Defendant's Motion for Summary Judgment has been forwarded to Plaintiffs' counsel of record via USPS and electronic mail this 19th day of October 2018 as follows:

Grady Query, Esquire
Michael H. Ellis, Esquire
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, #202
Charleston, SC 29412

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Cheryl LeGrand, Legal Assistant
Barnwell Whaley Patterson & Helms, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-10-0020

Steven M. Bernard and Deborah J.)
Bernard, on Behalf of Themselves)
And All Others Similarly Situated,)
Plaintiffs,)

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

vs.)

3 Chisolm Street Homeowners)
Association, Inc.,)

Defendant.)

FILED
18 DEC 17 PM 4:47
CLERK OF COURT

TO: DAWES COOKE, ESQUIRE & JEFFREY BOGDAN, ESQUIRE,
ATTORNEYS FOR DEFENDANT

TAKE NOTICE that Plaintiffs, by and through their undersigned counsel, will move the Honorable Edward M. Miller to alter or amend his December 7, 2018 Order granting Defendant's motion for summary judgment dismissing Plaintiff's case filed in January 2015 on the basis that the statute of limitations ran by virtue of a January 2008 letter to the attorney for the HOA of the 3 Chisolm Street Condominiums as it existed in January 2008, and also finding that the statute of statute of limitations commenced as a result of the June 9, 2011 Order of the Honorable Roger Young.

This motion is made pursuant to SCRCR R. 59(e). "The purpose of rule 59(e), SCRCR, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172 (1992).

**The Only Issue Properly Before the Court Was Dismissal Pursuant to SC
Code § 33-31-830(f).**

Defendant filed their motion for summary judgment on May 30, 2018 seeking dismissal of Plaintiffs' claims based solely upon a statute of limitations issue pursuant to SC Code § 33-31-830(f).

("The Defendant HOA is a South Carolina Nonprofit Corporation and, thus, any suit against it must be filed within the statute of limitations prescribed by the South Carolina Nonprofit Corporation Act...[t]he statute of limitations for claims against a Nonprofit Corporation expires "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann § 33-31-830(f)". This differs from the general tort statute of limitations..." *May 30, 2018 Defendant's Motion for Summary Judgment*).

Plaintiffs respectfully request that the Court reconsider analyzing Defendant's motion under any theory of relief other than the solely prayed for dismissal pursuant to § 33-31-830(f). "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought" R. 7(b)(1) SCRCP.

In their motion, Defendant "...set forth the relief or order sought" as dismissal of Plaintiffs' claims based solely upon § 33-31-830(f). Plaintiffs prepared for the Court's analysis of Defendant's motion based solely upon Defendant's particularly stated grounds for relief. "As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP" Chastain v. Hiltabidle, 673 S.E. 2d 826, 831 (Ct.App. 2009) *citing to* M&M Group, Inc. v. Holmes, 666 S.E.2d 262, 265 (Ct.App.2008). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she

would have done something different, thereby affecting the decision of the trial court and advancing his or her case" Chastain, at 831 citing to Gardner v. S.C. Dept. of Revenue, 577 S.E.2d 190 (S.C. 2003).

Plaintiffs prepared to oppose Defendant's motion for summary judgment based upon Defendant's seeking an Order solely upon the theory that § 33-31-830(f) time barred Plaintiffs' claims. The substance of Plaintiffs' opposition was that §33-31-830(f) was inapplicable to this case as that statute clearly and unambiguously applies only to the directors of a non-profit corporation rather than to the non-profit corporate entity and that the unpublished Court of Appeals Opinion Smith v. Dockside Ass'n, Inc., No. 2005-UP-139 (Cl.App. 2005) has no precedential value pursuant to SCACR R. 220(a). It was not until October 19, 2018 that Defendant raised any other theory for relief with the filing of their Reply to Plaintiff's Return to Defendant's Motion for Summary Judgment, a mere three (3) days prior to the October 22, 2018 hearing. "A written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served **not later than ten days before the time specified for the hearing...**" R. 6(b) SCRCP (emphasis added). The Court has now issued an Order dismissing Plaintiffs' claims largely based upon an analysis involving the discovery rule and a three (3) year statute of limitations as would be applied to a general tort statute of limitations despite Defendant expressly stating that they did not move the Court to use that analysis ("[§ 33-31-830(f)] differs from the general tort statute of limitations in that the discovery rule does not apply" May 30, 2018 Defendant's Motion for Summary Judgment p.2).

Had Plaintiffs had the required notice that the Court would be asked to analyze Defendants claimed relief under any theory other than § 33-31-830(f), Plaintiffs would

have properly prepared a defense against those theories. Plaintiffs are now prejudiced by having an Order dismissing their claims based upon an analysis that was not solely limited to § 33-31-830(f) as was pled by the Defendant.

Plaintiffs respectfully request that the Court reconsider analyzing Defendant's Motion for Summary Judgment under any theory other than § 33-31-830(f).

**The Statute of Limitations Did Not Run Three Years After Judge Young's
June 9, 2011 Order**

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 Defendant 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)

Plaintiffs' action against the Defendant is 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 failed to consider that until March 26, 2014, the Defendant 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)

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, Plaintiffs' January 2, 2015 filing of this action was well within the statute of limitations.

In the instant case, there was no legally cognizable cause of action against the HOA until the issuance of an opinion by the Court of Appeals. The Appeal affirming the Order of Judge Young was not issued until March 26, 2014.

A Letter to the Defendant Does Not Provide Notice to the Plaintiffs

It is respectfully submitted that this Honorable Court misconstrued the import of the letter of January 2008 from counselors for the developers and/or contractors who

were Defendants in that action directed to the attorneys for the present Defendant, the 3 Chisolm Street HOA. The 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 Plaintiff class members, but to the attorneys for Defendant 3 Chisolm Street Homeowners Association, Inc. The scriveners of that letter, Hudson & Spivey were representing the soon to be Defendant contractors and/or developers and were in adversarial relationship with the very HOA to whose attorney the letter was directed. Those Plaintiffs could hardly have been expected to rely upon representations made in correspondence from adverse counsel.

For Defendant to prevail on their argument that this letter triggered the three year statute of limitations they have to demonstrate the absence of any genuine issue of material fact that this letter put the Plaintiffs on notice of their cause of action against Defendant ("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 Co., Inc., 330 S.C. 562 (Ct.App. 1998). Defendant submitted this January 2008 letter to the Court without demonstrating that the letter was ever disseminated to the Plaintiffs or in any other way demonstrating that it placed the Plaintiffs on notice of any cause of action against the Defendant, 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 Defendant's Motion for Summary Judgment was the Affidavit of Steven Bernard, a representative Plaintiff 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 Defendant 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, 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 Defendant'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).

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

SC Code § 33-31-830(f) is Inapplicable to This Case

SC Code § 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 SC Code § 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 R.220(a) SCACR. However, precedential value issues aside, Dockside does not even address subpart (f), 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.

Conclusion

Plaintiffs respectfully request that the Court reconsider the conclusions of the Order of December 7, 2018 and deny the Defendant's motion for summary judgment, since the Court's Order awards relief not properly before the Court; no legally cognizable cause of action existed until the decision of the Court of Appeals was issued on March 26, 2014, affirming Judge Young's Order of June 2011; and on the further ground that the unpublished opinion in Dockside is not a valid basis to expand § 33-31-830 (f) beyond the plain meaning of that statute; and finally that a genuine issue of material fact exists as to whether there was any dissemination of the 2008 letter of an opposing counsel and of the effect that such a letter from opposing counsel could possibly have on the determination of the existence of a cause of action against his adversary, the present Defendant, whose attorneys received the correspondence during the course of that adversarial relationship.

Respectfully submitted by,

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Attorneys for Plaintiffs

December 17, 2018

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

FILED
2019 JUL -5 PM 2:31
JULIE A. ARISTIDES
CLERK OF COURT
BY AG

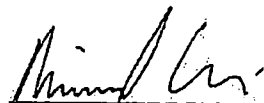
Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,

v.

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

NOTICE OF APPEAL

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others
Similarly Situated appeal the Order granting Defendant's Motion for Summary Judgment filed
on December 7, 2018 and the Order Denying Plaintiffs' Motion to Alter or Amend Order filed
on June 21, 2019, both Orders having been issued by the Honorable Edward W. Miller.
Appellant received notice of entry of judgment from the Charleston County Clerk of Court, via
electronic mail, on June 27, 2019.



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Telephone: 843-795-9500
Counsel for Appellants

July 2, 2019
Charleston, SC

Other Counsel of Record:

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Telephone: 843-577-7700**

Counsel for Respondent

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

FILED
2019 JUL -5 PM 2:31
JESSIE J. ADAMS, JR.
CLERK OF COURT

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc., ...Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent 3 Chisolm Street Homeowners
Association, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on July 2,
2019, addressed to their attorney of record at their office as follows:

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

Tracy Owen

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2015-CP-10-0020

Plaintiffs,)

**ORDER DENYING PLAINTIFFS'
MOTION TO ALTER OR AMEND ORDER**

v.)

3 Chisolm Street Homeowners)
Association, Inc.,)

Defendant.)

FILED
JUN 21 11:55
CLERK OF COURT

This matter is before this Court on the Plaintiffs' Motion to Alter or Amend Order filed December 17, 2018. After careful consideration of the Plaintiffs' motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded. Accordingly, this Court hereby denies Plaintiffs' motion. In addition, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary and thereby decides this motion on the written record and submissions filed by the parties.

On December 7, 2018, this Court issued an Order granting the Defendant's Motion for Summary Judgment based upon the expiration of the statute of limitations. The Court ruled that the Plaintiff's negligence action against the Defendant 3 Chisolm Street Homeowners Association, Inc. ("HOA") is time barred regardless of whether the applicable statute of limitations is S.C. Code Ann. § 33-31-820(f) or S.C. Code Ann. § 15-3-530(5). In their Rule 59(e) motion, the Plaintiffs are critical that the Court even considered the timeliness of the filing of their Complaint under S.C. Code Ann. § 15-3-530(5). The Plaintiffs insist that the HOA did not raise S.C. Code Ann. § 15-3-530(5) as a basis for dismissal until the filing of its reply memorandum, and as a result, they

claim to be prejudiced in opposing a statute of limitations defense pursuant to S.C. Code Ann. § 15-3-530(5). This Court disagrees. The record reflects that the Plaintiffs raised and fully discussed S.C. Code Ann. § 15-3-530(5) and the application of the discovery rule in its opposition memorandum filed October 16, 2018. In fact, in that memorandum, the Plaintiffs write: "The statute of limitations that applies to the instant case is S.C. Code § 15-3-530(5)." Therefore, the Plaintiffs cannot reasonably object to the HOA's discussion of S.C. Code Ann. § 15-3-530(5) on reply or that this Court examined and addressed the application of S.C. Code Ann. § 15-3-530(5) in ruling on the summary judgment motion. The Plaintiffs have not been legally prejudiced.

In their Rule 59(e) motion, the Plaintiffs also argue that this Court failed to properly apply the holding in *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). This Court disagrees for several reasons.

First, 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. 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").

Second, *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, the Supreme 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. The Supreme 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 Plaintiffs are suing the HOA, not any attorneys. Thus, the

accrual rule in *Stokes-Craven* has no applicability to the present case.

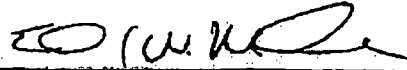
Third, in its recent decision in *Personal Care, Inc. v. Theos*, Op. No. 5628 (S.C. Ct. App. filed February 20, 2019), the Court of Appeals ruled – in a legal malpractice action – that the *Stokes-Craven* accrual rule does not apply where the cause of action is not predicated on an adverse judgment. 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.” 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, 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 Plaintiffs’ claim against the HOA is not predicated on an adverse judgment. In fact, the Plaintiffs do not allege as a basis for their 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 this Court described in its Order, the Plaintiffs allege in their 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.” (Order filed December 7, 2018, p. 5). As this Court has already 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.

Moreover, even if the *Stokes-Craven* accrual rule does apply to this case, it would have no bearing on the application of the statute of limitations set forth in S.C. Code Ann. § 33-31-820(f). As addressed in the Order filed December 7, 2018, this Court reiterates that S.C. Code Ann. § 33-31-820(f) is applicable to claims brought against a nonprofit corporation and thus bars the

Plaintiffs' negligence claim against the HOA.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion to Alter or Amend Order is hereby denied.

AND IT IS SO ORDERED.



EDWARD W. MILLER
Presiding Circuit Court Judge,
Ninth Judicial Circuit

June 19, 2019

Defendant.

ORDER

2018 DEC -7 PM 12:00
2018 DEC -7 PM 12:00
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243

Cottage) were renovated and converted to the Condos. The Certificate of Occupancy was issued on June 28, 2002. In March 2003, the developer turned over control of the HOA to the unit owners.

Plaintiffs Steven and Deborah Bernard are members of the HOA, who purchased their unit in 2012. The Plaintiffs' class has been certified as "all persons who were owners of condominium units at 3 Chisolm Street between 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."

Beginning in late 2002 and/or 2003, homeowners, including members of the Plaintiffs' class, began experiencing and complaining of condensation and moisture intrusion at the windows of their units. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. In April 2003, Glick issued a report to the HOA (hereinafter the "Glick Report") which summarized his visual inspection (without any destructive testing) of the Main Building only. The Glick Report summarized Glick's observations regarding the complained-of water intrusion and concluded by noting that the problems he found were "significant and were persuasive [sic] throughout the entire" Main Building and included his recommendation "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections. . . ." Glick also recommended that the HOA pursue "a forensic report documenting and recording the above issues." The HOA sent a copy of the Glick Report to the developer, who responded by sending the general contractor to the Condos to repair certain elements that were causing the water intrusion. Years later, the water intrusion issues reappeared and the HOA again demanded that the developer remediate the problems. The developer responded via letter dated January 30, 2008, stating that any negligence claim that the

HOA would have against the developer was without merit and barred by the statute of limitations. 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, including failure to timely file suit. At that time, the HOA's board was made up of Jack Burnett, Gwen McCurdy, Connie Wyrick, George Davidson, and Bill Mancini. Each of these individuals is a member of the Plaintiffs' class.¹

In January 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and certain subcontractors styled 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, Murray School Partners, LLC, Genoa Construction Services, Inc., Masterpiece Millwork, Inc., Allen Roper, Jr. d/b/a R Masonry Brickwork, Carolina Roofing Systems, Inc., and Lacy Painting 2009-CP-10-267, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Water Intrusion Lawsuit"). The defendants therein moved for summary judgment, arguing that the Water Intrusion Lawsuit was time-barred by the three-year statute of limitations. On June 9, 2011, the Honorable Roger Young issued several orders granting in whole or in part some of the defendants' motions. Judge Young found that the three-year statute of limitations on the HOA's claims regarding defective original construction work, as opposed to defective repair work done in response to the Glick Report, had expired. In another order, Judge Young explained that the three-year statute of limitations on construction work done as part of the conversion project began to run in 2003, when the HOA received a copy of the Glick Report. The Court of Appeals agreed via unpublished opinion issued March 26, 2014, finding that the statute of limitations on defects in the original renovation construction began to run in April 2003 when the HOA received a copy

¹ All but one of these class members had rotated off the HOA's board by 2011.

of the Glick Report and, thus, the statute expired in April 2006, making the Water Intrusion Lawsuit time-barred.

In February 2014, almost three years after Judge Young's initial summary judgment orders in the Water Intrusion Lawsuit, a home inspection conducted in relation to the sale of one of the units revealed structural deficiencies in the crawlspace under the Main Building, and these defects were later confirmed by a structural engineer. In response, the HOA filed a lawsuit on November 4, 2014, styled 3 Chisolm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc., Chisolm Street Partners, LLC, Murray School Partners, LLC, David L. Perdue, A. Rhodes Perdue, John W. Wilcox, III, Austin Dillon Cook Engineering, Inc., and John Doe #1, 2014-CP-10-6805, in the South Carolina Court of Common Pleas for Charleston County (hereinafter the "Foundation Defects Lawsuit"). The defendants moved for summary judgment, arguing that the Foundation Defects Lawsuit was barred by the statute of limitations because, in accordance with Judge Young's and the Court of Appeals' holdings in the Water Intrusion Lawsuit, the HOA's receipt of the Glick Report in 2003 started the running of the statute of limitations on all defects related to the original conversion construction, which would include the defects being claimed in the Foundation Defects Lawsuit. In response, the HOA argued that it did not have notice (constructive or actual) of the foundation defects until February 2014, making its November 2014 filing of the Foundation Defects Lawsuit timely. The HOA submitted the affidavit of Myles Glick, which stated that his 2003 inspection and report were related to above-grade water intrusion issues only, not to any structural issues or potential problems in the crawlspace. Glick swore that he did not advise the HOA to undertake a structural analysis of any of the buildings and that neither he nor the HOA were on notice of any structural defects in the foundations or crawlspaces in 2003. Glick said that, even if the HOA

had commissioned the forensic examination that his 2003 report recommended, that forensic examination would not have included an examination of the crawlspaces and would not have uncovered any defects therein. While the summary judgment motions were pending in the Foundation Defects Lawsuit, the HOA (including members of the Plaintiffs' class) voluntarily agreed to a settlement. There was never an adjudication of whether the statute of limitations had expired on the Foundations Defect Lawsuit.

Now, in a third lawsuit filed January 2, 2015, 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.

STANDARD

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). SCRCP 56(e). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

this argument. Plaintiffs reasonably should have known that the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit would have to be repaired or remediated at some point and that the HOA would necessarily have to acquire those funds through its assessment process from the Plaintiffs. In any event, Plaintiffs knew that they had suffered some damage to their claims against the renovators as soon as they were aware that the HOA might have missed the statute of limitations. This undeniably occurred more than three years before Plaintiffs filed this suit.

The HOA argues, in the alternative, that Plaintiffs' claim is governed by the statute of limitations found in the South Carolina Nonprofit Corporations Act of 1994, which provides that Plaintiffs' case must have been commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f). The South Carolina Court of Appeals has held, in an unpublished opinion, that the Nonprofit Corporations Act applies not only to claims against individual directors of a nonprofit corporation, but also to claims against the corporation. Smith v. Dockside Ass'n, Inc., No. 2005-UP-139, 2005 WL 7083482, at *4-5 (S.C. Ct. App. Feb. 28, 2005). This is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself. Indeed, Steven Bernard, one of the individually-named Plaintiffs and the appointed class representative, testified that this case is against both the HOA and its directors. This Court need not decide which statute applies. Based on the Court's rulings above, the statute of limitations expired before Plaintiffs filed this suit, regardless of whether the Court applies §33-31-820(f)'s statute of limitations of §15-3-505's, with the discovery rule. Even a three-year statute of limitations with the discovery rule would have expired in either January 2011 or June 2014, prior to Plaintiffs filing this case in January 2015.

IT IS HEREBY ORDERED THAT:

Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' case is dismissed in its entirety.



Edward W. Miller
Presiding Judge, Ninth Judicial
Circuit

November 27 2018

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Steven Bernard, et al.,	)	CASE NO. 2015-CP-10-00020
	)	
PLAINTIFFS,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
3 Chisolm Street Homeowners	)	
Association,	)	
	)	
DEFENDANT.	)	

October 22, 2018

Charleston, South Carolina

B E F O R E:

The Honorable Edward W. Miller

A P P E A R A N C E S:

Michael H. Ellis, Jr., Esquire
For the Plaintiff

Dawes Cooke, Esquire
For the Defense

Jeff Bogdon, Esquire
For the Defense

Certified Transcript Provided For: Michael H. Ellis

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

HEARING - -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 27

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: Bernard versus 3 Chisolm.

2 MR. ELLIS: Your Honor, prior to beginning we
3 submitted -- the plaintiffs submitted a memorandum in
4 opposition to this motion and affidavit. Has the Court
5 had a chance to review that; would you like another copy?

6 THE COURT: Filed October 16?

7 MR. ELLIS: Yes, Your Honor.

8 THE COURT: Yep. Nope. Got it.

9 MR. ELLIS: Thank you.

10 MR. COOKE: If it please the court, I am Dawes
11 Cooke. Good morning, Your Honor.

12 THE COURT: Yes, sir. I am fine, how are you?

13 MR. COOKE: Fine, thank you. And Jeff Bogdan. We
14 are with Barnwell Whaley Patterson Helms. We represent
15 the defendants in this case. And this is our motion for
16 summary judgment.

17 THE COURT: Okay.

18 MR. COOKE: We did email all of the briefs. But we
19 brought a hard copy. If you would like to have an extra
20 hard copy we can hand that up.

21 THE COURT: Let me make sure I have got it. But I
22 think I do. I have got it.

23 MR. COOKE: All right. Thank you.

24 (WHEREUPON, Court confers with law clerk.)

25 THE COURT: We are good.

1 MR. COOKE: You can always use more paper, right?

2 THE COURT: Yep. Right.

3 MR. COOKE: Thank you for hearing us this morning,

4 Your Honor. We represent the defendant, 3 Chisolm Street

5 Homeowners Association, Inc., which is the homeowners

6 association of 3 Chisolm Street, as its name suggests.

7 3 Chisolm Street is a condominium development

8 comprising some 29 units. It is a historic building. It

9 was the old Murray Vocational School which in 2000 to

10 2002 was renovated and turned into condominiums.

11 This case involves two lawsuits, two construction

12 defect lawsuits, that my client the HOA filed against the

13 developer who converted the buildings from the vocational

14 school to their current state of condominiums.

15 And these are -- it is a very nice development right

16 downtown in Charleston. You know, I think you would call

17 it a high-end residential area.

18 But there was -- the certificate of occupancy was

19 issued back in 2002. In about two thousand -- in April

20 of 2003 a forensic architect by the name of Miles Glick

21 did a study because they were experiencing some water

22 intrusion issues primarily through the windows. And he

23 wrote a report saying that there were construction

24 defects.

25 The HOA did not file suit on that matter until

1 January of 2009. And they did file suit. Ultimately on
2 June 9 of 2011 Judge Young granted summary judgment to
3 the defendant developers and other related parties on the
4 basis of the statute of limitations.

5 And they -- he said that essentially that the Miles
6 Glick report had placed them on notice of potential
7 defects and had they done their due diligence at that
8 time they would have discovered that they had a cause of
9 action against the developer and others and so the
10 statute of limitations barred. That case was appealed.
11 It was affirmed by the Court of Appeals.

12 This is the second -- this case arises out of the
13 second construction defect suit. In 2014 one of the
14 homeowners was getting ready to sell his unit and they
15 had a building inspection done and they discovered some
16 foundation defects, that the old steel supports that --
17 as you probably know, Charleston is a pretty wet area and
18 low. And so this -- the old Murray Vocational School had
19 been built on steel supports. And discovered that there
20 was some spalling in the concrete and rust in the steel,
21 and so that there was an additional defect.

22 The Homeowners Association promptly filed suit on
23 that. But meanwhile Mr. Bernard who by this time was a
24 member of the board himself and was a homeowner, filed
25 suit against the Homeowners Association saying you have

1 negligently waited too long to bring this lawsuit and you
2 have -- and therefore it is a derivative -- derivative
3 suit; it is a class action, saying that we -- all the
4 homeowners' now were going to be assessed the cost of
5 building -- of rebuilding this foundation because you
6 have waited too long to file this lawsuit.

7 So the defense to that on the merits is, no, this is
8 a separate lawsuit, this is the foundation, this had
9 nothing to do with the windows, nothing to do with what
10 Miles Glick found back in 2003; he was talking about
11 water intrusion through the windows, so this is a
12 separate lawsuit, it is not barred by the statute of
13 limitations.

14 So the summary judgment we have here today does not
15 require the court to decide that issue. What instead the
16 court should recognize is that if the plaintiff is right
17 and that the foundation lawsuit is really part of the
18 dismissed and late -- too-late-filed construction defect
19 water intrusion suit, then this lawsuit is also barred by
20 the statute of limitations; because the plaintiff class
21 was on notice for the very same reason that Judge Young
22 found that the board was on notice, you could go back to
23 2003 when Miles Glick issued his report and if that was
24 sufficient to put the board on notice of a foundation
25 defect then it was sufficient to put everyone on the

1 notice of a defect.

2 Second, when they finally did file their lawsuit in
3 the -- on the water intrusion suit the defendant moved
4 for summary judgment, thus placing everyone on notice
5 that they were time barred and had waited too long to
6 bring their construction defect lawsuit.

7 Additionally, even before that, back in 2008, there
8 is a letter dated June 30, 2008, which is Exhibit C to
9 our memorandum. The attorney for the developer, the
10 first -- when he was first contacted and accused of
11 construction defects they wrote back a very terse letter
12 and said for all of these reasons we are not liable but
13 in any event you are too late in bringing the lawsuit
14 and -- or in making this threat and you guys really ought
15 to put your directors and officers malpractice insurance
16 on notice because your -- you, the board of the HOA, are
17 the ones who are at fault.

18 So that was back in 2008 the board was placed on
19 notice at that time that -- and that everybody was placed
20 on notice that there was at least a claim that the
21 lawsuit was too late.

22 If there was any doubt about it it was then made
23 known to everybody, to all of the homeowners, on June 9,
24 2011, when Judge Young granted summary judgment.

25 So our position, Your Honor, is that the plaintiffs

1 are in as a matter of law in a dilemma, that if they are
2 wronged and that is that in fact as the HOA claims, the
3 foundation suit is completely separate from the water
4 intrusion suit that was time barred and therefore it is
5 not time-barred, then there is no liability.

6 But if they are right, if they are right that the
7 board or that the HOA was on constructive notice and
8 therefore their foundation suit is barred for the same
9 reason that the water intrusion suit was barred, then
10 this lawsuit is too late. Because everybody was on
11 notice back when Judge Young granted summary judgment, if
12 not before that, that the lawsuit was time barred.

13 So for that reason we ask for summary judgment.

14 THE COURT: Do you have a pending lawsuit with
15 respect to the foundation defect?

16 MR. COOKE: That was settled. And so there was
17 never an adjudication. And that was something that
18 troubled us, frankly. It is a little bit off point; but
19 it troubled us that while that suit was pending we had
20 one of our board members, Mr. Bernard and his wife,
21 filing suit claiming that our board has waited too long
22 to file this lawsuit.

23 Needless to say, that doesn't help your negotiating
24 position very well. But be that as it may, we didn't
25 represent the board in that lawsuit; but they did settle

1 rather than have the statute of limitations issue
2 adjudicated.

3 So there has been no judicial determination as to
4 whether that suit was barred. But whether it was or not,
5 if it was barred then this suit is also barred. If it
6 wasn't barred then there was no negligence on the part of
7 the board.

8 THE COURT: Okay.

9 MR. COOKE: Thank you.

10 THE COURT: Yes, sir.

11 MR. ELLIS: Thank you, Your Honor. Michael Ellis on
12 behalf of the plaintiffs in this case, Mr. Steven Bernard
13 and Deborah Bernard, the named representatives, and then
14 the other class members who are the condominium unit
15 owners at 3 Chisolm Street Condominiums.

16 This case is one of negligence. As Mr. Cooke just
17 did point out, there was a 2003 report by a forensic
18 architect that put the Homeowners Association
19 Incorporation on notice that there were serious
20 defects throughout this structure resulting from the
21 renovators -- renovation of this old school building into
22 condominium units.

23 This, as Mr. Cooke just stated, Judge Young did find
24 that the Homeowners Association brought this case too
25 late. It did go up on appeal.

1 This -- the issue of whether the Homeowners
2 Association filed their action too late was on appeal
3 until March 26, 2014. That is whenever the Court of
4 Appeals issued their opinion saying, yes, we affirm the
5 trial court, you did miss the statute of limitations.

6 This action was filed in January of 2015. So less
7 than a year after the Court of Appeals affirmed that in
8 deed the Homeowners Association board did miss their
9 statute of limitations.

10 If we had brought this action any sooner than that
11 March 26, 2014, I am sure no trial court would have had
12 any problem with dismissing our claim that the Homeowners
13 Association missed the statute of limitations while the
14 issue of whether they missed the statute of limitations
15 was currently on appeal before the Court of Appeals.

16 This is, as I said, a negligence action. As with
17 any negligence action you must have a duty, a breach, a
18 proximate cause, and damages.

19 We are asserting that the duty was that the h
20 association of a nonprofit corporation was responsible
21 for prosecuting that case against the renovators on
22 behalf of the homeowners. They breeched that duty by
23 failing to bring it within the applicable statute of
24 limitations and then the Homeowners Association, the
25 plaintiffs in this action, were not actually damaged

1 until January of 2015. Because it was in January of 2015
2 that the Homeowners Association board, the nonprofit
3 corporation, the defendant in this action, said you,
4 plaintiffs, are responsible for paying for the necessary
5 repairs to this building because we were too late in
6 bringing the action against the renovators ---

7 THE COURT: Which repairs are you talking about?

8 MR. ELLIS: The foundation repairs, Your Honor.

9 THE COURT: Not the window repairs?

10 MR. ELLIS: Correct. It is the foundation repairs
11 that were levied against the class members in 2015.

12 THE COURT: Well, you -- the case was settled with
13 respect to the foundational repairs; am I correct in
14 that?

15 MR. COOKE: Yes, Your Honor.

16 THE COURT: Okay. So how do you ---

17 MR. ELLIS: Your Honor, that case was settled for
18 much less than what the actual costs to the plaintiffs
19 were. And it was the defendant that settled that case.
20 It was not the actual plaintiffs in this class. The
21 plaintiffs still ---

22 THE COURT: Are they not members of the Homeowners
23 Association?

24 MR. ELLIS: They are members of the Homeowners
25 Association, Your Honor. But they are not -- they are

1 not the defendant nonprofit corporation which has been
2 named as the defendant in this action.

3 There are still -- that -- I believe that settlement
4 was a confidential amount, so I won't say it here today.
5 But it is grossly inadequate to establish -- to cover the
6 damages that were exposed to the plaintiffs in this
7 class.

8 THE COURT: Was a lawsuit filed in that -- in --
9 that was settled?

10 MR. ELLIS: And, Your Honor, again as Mr. Cooke
11 pointed out, this is -- this motion for summary judgment
12 before you today is not on the merits of our claim; it is
13 on the timeliness ---

14 THE COURT: No, ---

15 MR. ELLIS: --- of filing.

16 THE COURT: --- what I am asking is the settlement
17 that has been referred to that you say is grossly
18 inadequate - which I have no idea whether it is or not -
19 was the result of a lawsuit.

20 MR. ELLIS: Correct, Your Honor.

21 THE COURT: So there was a judicial determination
22 with respect to that settlement?

23 MR. ELLIS: No, Your Honor. It was a -- it was
24 a ---

25 THE COURT: The case was ---

1 MR. ELLIS: It was settled ---

2 THE COURT: The case was dismissed; is that right?

3 MR. ELLIS: Correct, Your Honor. But the merits of
4 the case were never adjudicated in that action. There
5 was a pending motion for summary judgment against the
6 defendant -- or the defendant in this action claimed in
7 that case, based upon the statute of limitations. And
8 with that motion for summary judgment hanging over the
9 defendant's head they did settle the case for a grossly
10 inadequate amount to cover the damages that the
11 plaintiffs are still trying to recoup in this action.

12 THE COURT: Wow. Okay.

13 MR. ELLIS: And, again, Your Honor, as I just
14 stated, this case is not -- or this motion is not on the
15 merits of our claim. It is the timeliness of filing our
16 claim.

17 And our claim is that the negligence of the
18 Homeowners Association nonprofit corporation waited too
19 late to sue the renovators and therefore the cost of
20 making the necessary repairs is passed on to the class
21 members. That special levy was not assessed on the class
22 members until January 2015. That is when their damages
23 resulted.

24 And in the 1972 Supreme Court case of Gray versus
25 Southern Facilities, Inc., the Supreme Court said it is

1 basic that a negligent act is not itself actionable and
2 only becomes such when it results in injury or damage to
3 another.

4 So it is whenever the Homeowners Association
5 corporation said you class members have to foot this bill
6 because we cannot make the truly liable party foot the
7 bill because we waited too late.

8 So that is when the classes ---

9 THE COURT: Well, you might be -- you might disagree
10 with the amount of the settlement, but they -- how did
11 they wait too late?

12 MR. ELLIS: Your Honor, if I may approach with a
13 copy of the Court of Appeals order from March 26th, 2014.

14 THE COURT: Well, that was -- if I am not mistaken
15 that is when the water intrusion claim, correct?

16 MR. ELLIS: That is as to all defects ---

17 MR. BERNARD: Right.

18 MR. ELLIS: --- that existed at the time of the
19 renovation. The Court of Appeals in their decision said
20 that the Miles Glick report -- and, Your Honor, the Miles
21 Glick report is attached to ---

22 THE COURT: Is there some question about when the
23 foundation defect was discovered?

24 MR. ELLIS: The Court of Appeals said that the Miles
25 Glick report of 2003 put the Homeowners Association on

1 notice, inquiry notice, as to all defects that existed at
2 that time.

3 THE COURT: Is that what was litigated in the court
4 below?

5 MR. BERNARD: Yes.

6 THE COURT: Tell your client that he is not ---

7 MR. BERNARD: I'm sorry. I'm sorry.

8 MR. ELLIS: Yes, Your Honor, there were many
9 outstanding issues in the case that was dismissed by
10 Judge Young. Miles Glick was hired because of the water
11 intrusion issue ---

12 THE COURT: Okay. And did his report address the
13 foundational issues?

14 MR. ELLIS: When he showed up he said: I see many
15 issues outside of what you hired for me. Again, this is
16 only my observation; I recommend that y'all perform
17 destructive testing immediately, get a forensic report,
18 have this entire thing done from top to bottom, because
19 with all the issues that I see there has got to be other
20 issues that you must look into.

21 That report was given to the defendant. And in
22 their meeting minutes the defendant said we are going to
23 follow that and we are going to do all of the steps that
24 he recommended. They did not do any of those steps. The
25 Miles Glick report ---

1 THE COURT: So that is what you say the negligence
2 is?

3 MR. ELLIS: Correct, Your Honor.

4 THE COURT: Okay. Mr. Cooke ---

5 MR. ELLIS: And -- well, the negligence was failing
6 to file the suit in time. And the Court of Appeals said
7 that the defendant was on inquiry notice as to all
8 defects that existed at the time of the Miles Glick
9 report.

10 THE COURT: Okay, he ---

11 MR. ELLIS: And our --- and our case is that the
12 foundation issue existed at that time. If they had
13 followed Miles Glick's recommendations, retained legal
14 counsel, done all of the forensic examinations, they
15 would have filed suit in time and the plaintiffs would
16 not have been exposed to footing the bill for the repairs
17 to the foundation. That is our case.

18 And the damages did not come to the plaintiffs until
19 2015, January 2015 ---

20 THE COURT: Okay. He says that your negligence
21 occurred back when the report came out and that your
22 board failed to pursue all of the forensic issues but
23 their cause of action did not arise until the Court of
24 Appeals finalized it.

25 MR. COOKE: Right. And that's -- that is what we

1 disagree with as a matter of law, Your Honor. If I
2 can -- if I can retrace ---

3 THE COURT: Yeah.

4 MR. COOKE: Retrace that. First of all, the first
5 lawsuit did not allege anything about foundation defects.
6 Nobody knew anything about foundation defects until
7 February of 2014 when one of the homeowners had a
8 homeowner's inspection done and discovered that.

9 THE COURT: Okay, but so he is saying that the --
10 Glick, is that his name?

11 MR. COOKE: Glick.

12 THE COURT: His report referenced all of these
13 pending issues. Is that correct? Do you agree with
14 that?

15 MR. COOKE: No, we don't agree with that. Miles
16 Glick gave an affidavit in the -- under -- in the
17 underlying suit that was settled saying his report had
18 nothing to do with foundation, he didn't know anything
19 about foundation, you could have done exactly what he
20 told them to do in that report and they wouldn't have
21 found any foundation defects.

22 He was talking about water intrusion. That is what
23 he was hired to do.

24 THE COURT: Okay. Well, they disagree with you on
25 that. Why -- why do -- how do you extrapolate that from

1 the report that his affidavit says it did not address it?

2 MR. ELLIS: We do not disagree that he was hired for
3 the purpose of the water intrusion. But ---

4 THE COURT: Have you seen the affidavit that Mr.
5 Cooke has referred to?

6 MR. ELLIS: I have seen the Glick -- the Glick
7 report that was given to the defendant, yes, Your Honor.
8 And ---

9 THE COURT: Well, the Glick affidavit filed in the
10 underlying foundation lawsuit or the second lawsuit.

11 MR. ELLIS: Well, and that contradicts his report.
12 It also contradicts the finding in fact that the Court of
13 Appeals made.

14 The Court of Appeals in their March 26, 2014, order
15 said that as to the main building we find the circuit
16 court properly determined the statute of limitations
17 began to run in 2003 because the Glick report issued in
18 April 2003 put the HOA on inquiry notice of defects that
19 would have been discoverable through additional
20 inspections and destructive testing which both the report
21 and the HOA president recommended.

22 So we are agreeing with the Court of Appeals that if
23 the HOA had done what was recommended in the Glick report
24 and done what they agreed they were going to do because
25 of the Glick report they would have hired somebody to do

1 the destructive testing, they would have discovered the
2 foundation defects, and plaintiffs would not have had to
3 be -- have a levy on them in January of 2015 at the time
4 we brought this action.

5 MR. COOKE: And, Your Honor, that is why I started
6 out by saying you don't have to decide that. Because --
7 and I think they have illustrated it very well that their
8 very argument is that the foundation suit is the same --
9 it is part of the water intrusion suit.

10 And if that is true -- you don't have to decide
11 whether it is true, but if that is true then this lawsuit
12 is barred because they -- the Homeowners Association
13 filed the foundation suit in November of 2014 just months
14 after they learned of the foundation defects.

15 So the only way that that can be untimely is if it
16 is true, as the plaintiff says, that there are just
17 one -- there is just one lawsuit; it is one claim, one
18 cause of action against the developer and they were both
19 barred by the statute of limitations and by Judge Young's
20 order.

21 If that is true then this lawsuit is barred.
22 Because they didn't file this until 2015. They knew in
23 2008 when the developer first wrote a letter saying you
24 are time barred and you guys are the ones that ought to
25 be letting your DNO carrier know. And then in 2011 when

1 Judge Young granted summary judgment that is when some
2 damage occurred.

3 And it is Hornbook statute of limitations law
4 that the statute doesn't begin to run when you have a
5 full-fledged lawsuit and you know what all of your
6 damages are. It is when you -- it is when you know or
7 should have known that you have some claim.

8 And the minute that the HOA had to start defending
9 against the statute of limitations defense that is when
10 they began to suffer damage.

11 And I will add one more thing if I may. I
12 appreciate your indulgence. In our brief we have argued
13 that the discovery rule doesn't even apply because this
14 is a lawsuit against a nonprofit corporation and the
15 Nonprofit Corporations Act applies.

16 And that statute is governed by Section 33-31-830(f)
17 which has -- it said the statute runs the earlier of two
18 days. One is two years after you know or should have
19 known you had a claim. And the other is within three
20 years after the wrongful acts occurred.

21 And by the plaintiff's own allegations the wrongful
22 acts occurred way back in 2003 when they failed to follow
23 up on the Miles Glick report.

24 Now we have acknowledged in our brief that the
25 literal language of the statute applies to lawsuits

1 against the directors themselves. It doesn't say against
2 the corporation.

3 But we cited an unpublished Court of Appeals case,
4 Smith versus Dockside - and it is attached as an
5 exhibit - where it says that the Nonprofit Corporations
6 Act applies to the suits against the corporation as well
7 as to the individual directors.

8 And Mr. Bernard testified at his deposition. And
9 we have cited that testimony as well that in effect this
10 is -- it is the same thing, his suit is intended to be a
11 suit against the directors and the corporation.

12 But we are not relying really on that argument ---

13 THE COURT: Let me ask you this. If I allow their
14 lawsuit to go forward, you represent the Homeowners
15 Association; right?

16 MR. COOKE: Correct.

17 THE COURT: And you will collect from your liability
18 carrier. Don't all of the members of the Homeowners
19 Association benefit?

20 MR. COOKE: Yes. Yes. And I think that is what Mr.
21 Bernard is -- I don't think he is evil. I think he is
22 trying to get his hands in some ---

23 THE COURT: Well, then why wouldn't you as a
24 Homeowners Association attorney ---

25 MR. COOKE: Welcome that?

1 THE COURT: Yeah.

2 MR. COOKE: Yeah, well, because they are suing the
3 Homeowners Association for negligence. And the
4 Homeowners Association is only liable if it was negligent
5 and the lawsuit is not barred by the statute of
6 limitations.

7 And so it would be -- you are sort of eating
8 yourself if you sue yourself to try to get your hands in
9 your own insurance policy to ---

10 THE COURT: I am trying to think of an analogous
11 situation where a car wreck where a parent is driving and
12 a child is injured.

13 MR. COOKE: Well, that's -- that is a different --
14 it would be more like you literally suing yourself, I
15 crashed so I am going to sue myself to get my own
16 insurance to pay. And that is kind of what it is. I
17 didn't want to get into the insurance.

18 THE COURT: I -- all right, well, I'm not -- but ---

19 MR. COOKE: That is what it is all about. But the
20 dilemma that we are talking about here is if they are
21 right that the foundation lawsuit is part and parcel of
22 the water intrusion claim and is thus barred for the same
23 reason that that was barred then this lawsuit is barred
24 because that injury accrued way back at least in 2011
25 when Judge Young dismissed that lawsuit.

1 And so to the extent that they were placed on notice
2 by that letter of 2008 they had that knowledge as class
3 members within -- and were no longer members of the board
4 within two years.

5 MR. ELLIS: And, Your Honor, we have not alleged
6 piercing the corporate veil in this case. It seems that
7 the defendants in this case would like to waive the
8 corporate veil. And I respect the distinction between
9 the corporate entity and the individual itself. If the
10 defendant doesn't want to go on the record and waive
11 their own corporate veil I cannot stop them from doing
12 so.

13 THE COURT: When is this case up for trial? 2015
14 case.

15 MR. ELLIS: It was stayed.

16 MR. COOKE: Stayed.

17 THE COURT: Yeah?

18 MR. ELLIS: Pending what has been coined the
19 foundation defects case. It was just brought back about
20 this time last year I believe.

21 MR. COOKE: It is not set for trial, but it is going
22 to start coming up on the trial docket.

23 THE COURT: Yeah, when? Have y'all mediated?

24 MR. COOKE: We have got another mediation scheduled
25 within a few weeks.

1 MR. ELLIS: This motion was actually filed two weeks
2 prior to within the last mediation, so we continued
3 mediation. Thank you for hearing it today. Hopefully we
4 will know whether or not we need to go to mediation next
5 Wednesday.

6 THE COURT: Oh, next Wednesday. Oh, God; it will
7 take me a while to scratch my head, I guess. All right.

8 MR. COOKE: Thank you.

9 THE COURT: Yeah. All right.

10 MR. COOKE: But we will go ahead -- we are going to
11 go ahead with the mediation either way.

12 THE COURT: Okay. Great.

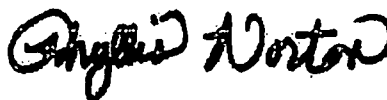
13 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on 10/22/2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: 5/1/2019

Certified Transcript Provided For: Michael H. Ellis
Certification Reference #2019-0501

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LCC;
MURRAY SCHOOL PARTNERS, LLC;
GENOA CONSTRUCTION SERVICES,
INC.; MASTERPIECE MILLWORK, INC.;
ALLEN ROPER, JR. D/B/A R MASONRY -
BRICKWORK AND STUCCO; and JOHN
DOE #1, and JOHN DOE #2,

Defendants.

IN THE CIRCUIT COURT

Case No. 2009-CP-10267

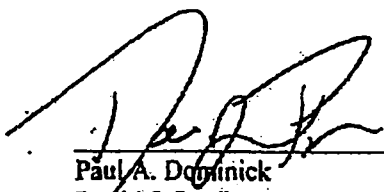
SUMMONS

2009 JAN 16 PM 4:19
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above entitled action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers at Post Office Box 486, Charleston, South Carolina 29402 (205 King Street, Suite 400, Charleston, South Carolina 29401), within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the said Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.


Paul A. Dominick
David J. Parrish
NEXSEN PRUET, LLC
P.O. Box 486
Charleston, SC 29402
843.577.9440
Attorneys for Plaintiff

January 16, 2009

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

3 CHISOLM STREET HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

CHISOLM STREET PARTNERS, LCC;
MURRAY SCHOOL PARTNERS, LLC;
GENOA CONSTRUCTION SERVICES,
INC.; MASTERPIECE MILLWORK, INC.;
ALLEN ROPER, JR. D/B/A R MASONRY -
BRICKWORK AND STUCCO; JOHN DOE
#1, and JOHN DOE #2,

Defendants.

IN THE CIRCUIT COURT
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2009-CP-10-267

COMPLAINT

(Construction Defects)

Jury Trial Demanded

FILED
2009 JAN 16 PM 4:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff would show as follows

1. Plaintiff 3 Chisolm Street Homeowners Association, Inc. is a South Carolina eleemosynary corporation.
2. Plaintiff owns and governs the common elements contained in the condominium horizontal property regime known as the Chisolm Street Condominiums located at 3 Chisolm Street in the City of Charleston (Charleston County), South Carolina, as reflected in the Master Deed Establishing the 3 Chisolm Horizontal Property Regime recorded in Book V309 beginning at Page 659 in the Charleston County RMC Office (hereinafter referred to as the "condominiums").

3. The condominiums are located on the site of the old Andrew B. Murray Vocational School, and the condominiums were developed by converting the school buildings into condominiums.

4. The condominiums consist of three buildings generally described as a three-story main building, a gymnasium building, and a care taker building, together with the other common elements contained in the regime as more fully described in the master deed.

5. Upon information and belief, Defendant Chisolm Street Partners, LCC is a limited liability company organized and existing under the laws of the State of Georgia. Upon information and belief, Chisolm Street Partners, LCC was a developer of the condominiums.

6. Upon information and belief, Defendant Murray School Partners, LLC is a limited liability company organized and existing under the laws of the State of Georgia. Upon information and belief, Murray Street Partners, LLC was a developer of the Chisolm Street Condominiums and acted as the general manager for Chisolm Street Partners, LCC during development of the condominiums.

7. Chisolm Street Partners, LCC and Murray School Partners, LLC are sometimes hereinafter individually and collectively referred to as the "Developer Defendants."

8. Upon information and belief, the Developer Defendants converted and developed, the Murray School property into condominium units, and then marketed and sold the condominiums to the condominium unit owners who comprise the 3 Chisolm Street Homeowners Association, Inc., or to their predecessors.

9. The Chisolm Street Condominiums are on the list of the National Register of Historic Places in South Carolina.

10. Upon information and belief, the Developer Defendants received substantial rehabilitation tax credits in connection with their conversion, rehabilitation, and development of the Chisolm Street Condominiums.

11. The Developer Defendants formed the 3 Chisolm Street Homeowners Association, Inc. and controlled the Association through appointment of its board of directors.

12. Upon information and belief Defendant Genoa Construction Services, Inc. ("Genoa") is a limited liability company organized and existing under the laws of the State of Georgia and acted as the general contractor for the construction of the condominiums.

13. Upon information and belief, Masterpiece Millwork, Inc. is corporation organized and existing under the laws of the State of Georgia and manufactured and supplied the window units installed during construction of the condominiums.

14. Upon information and belief, Allen Roper, Jr., d/b/a R Masonry – Brickwork and Stucco, is a citizen and resident of Charleston County, South Carolina, and acted as the masonry subcontractor during construction of the condominiums.

15. Defendant John Doe #1 is a fictitious name representing the as-yet unidentified person or entity that acted as the painting subcontractor during construction of the condominiums.

16. Defendant John Doe #2 is a fictitious name representing the as-yet unidentified person or entity that acted as the painting subcontractor during construction of the condominiums.

17. This Court has jurisdiction over the parties and subject matter of this action, and venue is proper before this Court.

18. The Chisolm Street condominiums contain construction defects and deficiencies, including without limitation the following:

- (a) improper installation of windows;
- (b) installation of windows that lack adequate wood preservative treatment;
- (c) improper priming and painting of the windows;
- (d) improper flashing of the windows and window openings;
- (e) improper connection of the windows to side walls;
- (f) rusting and deterioration of the brick lintel over windows;
- (g) improper installation firewalls between condominium units;
- (h) improper installation of the roofs on the buildings;
- (i) improper installation of interior grade doors in exterior applications;
- (j) such additional items as may be discovered during investigation of construction deficiencies.

19. The condominiums have sustained, and continue to sustain, water damage and water intrusion to the common elements caused by and resulting from defects and deficiencies in the construction of the condominiums.

20. As a result of the above defects and deficiencies, the roofs, brick lintels, windows and in the condominiums are prematurely failing and resulting in water intrusion and damage to the buildings.

21. Plaintiff has been and will continue to be proximately damaged by the water intrusion, water damage, and construction defects in the condominiums.

22. As a result of the construction defects and resulting property damage, Plaintiff has incurred, and in the future will incur, damages in the form of having to pay for professional fees to investigate, identify, and determine the extent of the problems and determine a plan for

repairing the problems, and to pay for the preparation of the plans, specifications and other documents needed to perform the repairs, and to pay for the repairs.

23. Plaintiff will suffer damages arising from having to pay for the costs of the repairs.

24. Plaintiff will incur damages in the form of the loss of use and enjoyment of the common elements during the repairs.

FOR A #1 CAUSE OF ACTION

(Negligence as to the Chisolm Street Partners, LCC
and Murray School Partners, LLC)

25. Plaintiff repeats and incorporates the above paragraphs by reference.

26. As the developers of the Chisolm Street condominiums, the Developer Defendants owed a duty of due care to Plaintiff and to the purchasers of condominium units in overseeing the construction and management of the condominiums.

27. The Defendants breached the duty of due care they owed to Plaintiff and to the purchasers of condominium units in one or more of the following particulars:

- (a) by failing to properly select the contractors and materials used in the construction of the condominiums.
- (b) by failing to properly oversee the construction, including the selection of contractors, of the condominiums when it planned to sell the condominium units to members of the public for profit.

28. The negligent acts and omissions of the Defendants are the proximate cause of construction defects and deficiencies which have resulted in property damage and financial damages to Plaintiff.

29. The acts and omissions of the Defendants have proximately caused Plaintiff to be damaged in that Plaintiff has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify and determine the

extent of the problems, to pay for design remediation plans and specifications to correct the construction defects and deficiencies, and to pay for the repairs.

30. Plaintiff will suffer loss of use and enjoyment of the common elements during the repairs.

31. As a result of the negligence of the Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #2 CAUSE OF ACTION

(breach of implied warranty of habitability as to Chisolm Street Partners, LCC
and Murray School Partners, LLC)

32. Plaintiff repeats and incorporates the above paragraphs by reference.

33. As the developers of the condominiums, the Developer Defendants provided an implied warranty of habitability under South Carolina law to the purchasers and owners of the condominiums by controlling the design and ultimate cost of construction, by selecting contractors, by controlling the means and methods of construction, by offering the units for sale to the public, and by entering into contracts of sale. This warranty of habitability extends to subsequent purchasers who were the foreseeable beneficiaries of this warranty.

34. The construction defects and resulting property damage to the condominiums constitutes a breach of the warranty of habitability under the laws of South Carolina.

35. Due to the construction defects and resulting property damage, Plaintiff has, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

36. Plaintiff will suffer loss of use of the common areas during the repairs.

37. Plaintiff is entitled to a judgment against the Defendants in an amount to be proven at trial for all damages proximately caused by Defendants' breach of the warranty of habitability.

FOR A #3 CAUSE OF ACTION

(negligence as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1,
and John Doe #2)

38. Plaintiff repeats and incorporates the above paragraphs by reference.

39. By undertaking construction work on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor owed a duty to Plaintiff to use reasonable care during the performance of their respective work on the buildings and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, the applicable standard of care, and industry standards.

40. Defendants breached the duty of care they owed to Plaintiff.

41. Defendants were negligent, grossly negligent, willful, and reckless in numerous aspects of the construction of the building, including, but not limited to, the following:

- (a) failing to properly supervise subcontractors and laborers during the construction of the condominiums;
- (b) failing to follow plans and specifications of the architect and design professionals;
- (c) failing to follow installation instructions and recommendations;
- (d) failing to perform construction work in accordance with applicable building codes and proper workmanlike practices; and
- (e) failing to select proper materials and capable subcontractors.
- (f) improper installation of windows;

- (g) installation of windows that lack adequate wood preservative treatment;
- (h) improper priming and painting of the windows;
- (i) improper flashing of the windows and window openings;
- (j) improper connection of the windows to side walls;
- (k) rusting and deterioration of the brick lintel over windows;
- (l) improper installation firewalls between condominium units;
- (m) improper installation of the roofs on the buildings;
- (n) improper installation of interior grade doors in exterior applications;
- (o) such additional items as may be discovered during investigation of construction deficiencies.

42. As a direct and proximate result of the negligence and recklessness of Defendants as hereinabove set forth, the condominium units and the common elements of the condominiums have been damaged by the intrusion of water.

43. Plaintiff has been proximately damaged by Defendants in that it has, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to identify the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

44. Plaintiff will suffer loss of use of the common areas during the repairs.

45. As a result of the negligence of Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #4 CAUSE OF ACTION

(negligence per se as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Doe #2)

46. Plaintiff repeats and incorporates the above paragraphs by reference.

47. By undertaking construction work on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor owed a duty to Plaintiff to use reasonable care during the performance of their work on the buildings and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, conformed to the applicable standard of care, and conformed to industry standards.

48. Defendants breached the duty of care owed to Plaintiff.

49. Defendants violated the applicable building codes in effect at the time of construction, specifically including, but not limited to the following:

- (a) improper installation of windows;
- (b) installation of windows that lack adequate wood preservative treatment;
- (c) improper priming and painting of the windows;
- (d) improper flashing of the windows and window openings;
- (e) improper connection of the windows to side walls;
- (f) rusting and deterioration of the brick lintel over windows;
- (g) improper installation firewalls between condominium units;
- (h) improper installation of the roofs on the buildings;
- (i) improper installation of interior grade doors in exterior applications;
- (j) such additional building code violations which may be discovered during ongoing investigations of construction deficiencies.

50. The violation of the building codes by Defendants amounts to negligence per se.

51. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for

professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

52. Plaintiff will suffer loss of use of the common elements during the repairs.

53. As a result of the negligence per se of Defendants, Plaintiff is entitled to a judgment against Defendants for actual and punitive damage in an amount to be determined at trial.

FOR A #5 CAUSE OF ACTION

(breach of implied warranty of workmanlike service as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Does #2)

54. Plaintiff repeats and incorporates the above paragraphs by reference.

55. By undertaking construction on this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor impliedly warranted that their work would be of quality workmanship and in accordance with industry standards.

56. The above referenced construction defects and deficiencies show that Defendants breached their implied warranties by failing to provide quality workmanship and by failing to comply with industry standards

57. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.

58. Plaintiff will suffer loss of use of the common elements during the repairs.

59. Plaintiff is entitled to a judgment against Defendants for damages, in an amount to be determined at trial, resulting from the breach of their implied warranties.

FOR A #6 CAUSE OF ACTION

(breach of express warranty as to Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1, and John Doe #2)

60. Plaintiff repeats and incorporates the above paragraphs by reference.
61. Plaintiff is informed and believes that, as part of their contracts for this project, Defendants Genoa, Masterpiece Millworks, Allen Roper, Jr., John Doe #1 painting contractor, and John Doe #2 roofing contractor expressly warranted that their work would be of good quality, free from defects, and in conformance with the contract documents, and in conformance with industry standards.
62. As the ultimate and foreseeable owner of the condominiums, Plaintiff and its members are beneficiaries of the express warranties provided by these Defendants.
63. Defendants breached their express warranties by failing to construct the condominiums in a manner free from defects and in compliance with the contract documents, applicable building codes, and industry standards.
64. Plaintiff has been proximately damaged by Defendants in that it has been, and in the future will be, forced to expend funds to repair damages that have already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies, and to pay for the repairs.
65. Plaintiff will suffer loss of use of the common areas during the repairs.
66. Plaintiff is entitled to a judgment against Defendants for damages, in an amount to be determined at trial, resulting from the breach of their express warranties.

FOR A #7 CAUSE OF ACTION

(breach of implied warranty of merchantability as to Masterpiece Millwork)

67. Plaintiff repeats and incorporates the above paragraphs by reference.

68. By providing windows for use in the condominiums, Defendant Masterpiece Millwork impliedly warranted that the windows it supplied would be fit for the ordinary purposes for which they are used and would pass without objection in the trade.

69. The windows provided by Masterpiece Millwork are defective, have failed, and are allowing water to intrude into the buildings.

70. The failures of the windows provided by Masterpiece Millwork have resulted in damage to buildings and will require repair and restoration by Plaintiff, including, but not limited to, removal of the exterior windows and replacement with exterior windows that comply with the current building codes.

71. Plaintiff will suffer loss of use of the common elements during the repairs.

72. The failure of the windows constitutes a breach of the implied warranty of merchantability.

73. Plaintiff is entitled to a judgment against Masterpiece Millwork for damages, in an amount to be determined at trial, result from its breach of the implied warranty of merchantability.

FOR A #8 CAUSE OF ACTION

(breach of implied warranty of fitness for a particular purpose as to Masterpiece Millwork)

74. Plaintiff repeats and incorporates the above paragraphs by reference.

75. Defendant Masterpiece Millwork was aware that its windows were being used as building components for the condominiums.

76. Upon information and belief, Masterpiece Millwork recommended its windows for the particular purposes stated by the contractors, the developers, and the architect.

77. Masterpiece Millwork knew or reasonably should have known that the purchasers were relying on its skill and judgment to select suitable goods that are were in compliance with applicable building codes and industry standards.

78. By selling the windows for a particular use in the condominiums, Masterpiece Millwork impliedly warranted that its windows would be fit for their intended purposes in this condominium project.

79. The windows sold by Masterpiece Millwork and incorporated into the condominiums have failed prematurely and are allowing water to intrude into the buildings.

80. The failure of the windows has resulted in damage to the various components of the buildings and will require extensive repair and restoration by Plaintiff including, but not limited to, removal of the windows and replacement with windows that comply with current building codes.

81. Plaintiff will suffer loss of use of the common elements during the repairs.

82. The failure of the windows amounts to a breach of the implied warranty of fitness for a particular purpose.

83. Plaintiff is entitled to a judgment against Masterpiece Millwork from damages, in an amount to be determined at trial, resulting from its breach of the implied warranty of fitness for a particular purpose.

FOR A #9 CAUSE OF ACTION
(strict liability in tort as to Masterpiece Millwork)

84. Plaintiff repeats and incorporates the above paragraphs by reference.

85. Defendant Masterpiece Millwork is in the business of selling building products for use in construction projects in South Carolina, specifically windows.

86. Masterpiece Millwork manufactured and sold the windows that were incorporated into the condominiums during construction.

87. The windows were expected to and were incorporated into the without substantial change from the condition in which they were originally manufactured and sold.

88. The windows have failed prematurely and are allowing water to enter the buildings.

89. The failure of the windows is causing property damage.

90. The failure of the windows will result in danger to Plaintiff and its members and their guests and invitees if the window products are unable to withstand the design wind loads required by the applicable building codes.

91. The windows that were sold for use in the condominiums are defective and unreasonably dangerous to the condominium owners.

92. As a proximate result of the defective windows, Plaintiff and its members have suffered and will continue to suffer damages, including but not limited to the costs of removal of the windows and replacement with windows that comply with current building codes.

93. Plaintiff and its members will suffer loss of use of the common elements during the repairs.

94. As a direct and proximate result of the damages caused by the defective windows, Plaintiff is entitled to a judgment against Defendant for actual and punitive damages in an amount to be determined at the trial of this case.

FOR A #10 CAUSE OF ACTION

(South Carolina Unfair Trade Practices Act as to all Defendants)

95. Plaintiff repeats and incorporates the above paragraphs by reference.

96. Plaintiff and Defendants are considered persons within the meaning of the South Carolina Unfair Trade Practices ("UTPA"), S.C. Code Ann. § 39-5-10 et seq.

97. By developing, marketing, constructing, and selling the condominium units, the Defendants were engaged in commerce within the meaning of the UTPA.

98. In connection with their developing, marketing, constructing, and selling the Chisolm Street condominiums, Defendants engaged in unfair or deceptive acts or practices in the conduct of trade in violation of the UTPA.

99. The unfair and deceptive practices engaged in by Defendants affect the public interests of South Carolina, have the potential for repetition, and will continue to have an impact on the public interest.

100. Due to the acts of Defendants and the construction defects and resulting property damage, Plaintiff has been, and in the future will be, forced to expend funds to repair damage that has already occurred, to pay for professional fees to investigate the full extent of the problems, to pay for design remediation plans and specifications to correct the construction deficiencies and to pay for the repairs. Plaintiff will also suffer loss of use of the common elements during the repairs.

101. Plaintiff is entitled under the UTPA to a judgment against Defendants, jointly and severally, for treble actual damages plus attorneys' fees based on Defendants' knowing, intentional, willful, and malicious violations of the UTPA.

FOR A #11 CAUSE OF ACTION
(Violation of S.C Code § 27-31-430)

102. Plaintiff repeats and incorporates the above paragraphs by reference.

103. The South Carolina Horizontal Property Act contains requirements applicable to conversion of rental units to condominium ownership, as is set forth in S.C. Code §§ 27-31-410 to 27-31-440.

104. Section 27-31-410 states:

As used in this chapter, "conversion of rental units to condominium ownership" means the establishment of a horizontal property regime encompassing a preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis other than persons who, at the time of such recording, had contractual rights to acquire condominium ownership within the building.

105. Upon information and belief, when the condominium property was used as the Andrew B. Murray Vocational School, the school's caretaker lived in a building on the property known as the care taker building. The Developer Defendants subsequently acquired the property, converted the buildings and property into condominiums, and then offered, marketed, and sold the condominium units to third party buyers. The condominiums horizontal property regime created and developed by the Developer Defendants included the renovation, conversion, and sale of the care taker building into condominiums.

106. Occupancy of the care taker building by the school's caretaker renders it a "preexisting building which, at anytime prior to the recording of the master deed or master lease, was wholly or partially occupied by persons as their residence on a permanent or at least a continuing basis" as set forth in § 27-31-410.

107. Section 27-31-430 states:

Whenever the lessee, sole owner, or co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, written disclosure shall be made within thirty days of the date of the recordation to all prospective purchasers, including tenants in possession, as to the physical condition of the building. The disclosure shall contain a written report prepared by an independent registered

architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements. The report shall contain a good faith estimate of the remaining useful life to be expected for each item reported on, together with a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations. The good faith estimate of useful life shall not constitute a warranty and, as to an independent registered architect or engineer licensed to practice his profession in this State, shall not be deemed a representation of material fact or an inducement to purchase and shall not give rise to any cause of action at law or in equity against such architect or engineer. A failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act.

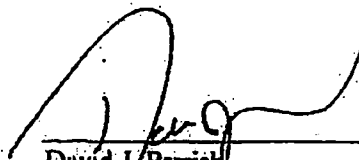
108. Upon information and belief, the Developer Defendants did not prepare or disclose the written report required under § 27-31-430.

109. The failure of the Developer Defendants to make the disclosures required under § 27-31-430 constitutes a *per se* violation of the South Carolina Unfair Trade Practices Act as stated in the last sentence of § 27-31-430.

110. Pursuant to § 27-31-430, Plaintiff is entitled under the UTPA to a judgment against the Developer Defendants, jointly and severally, for treble actual damages plus attorneys' fees based on their knowing, intentional, willful, and malicious violations of the UTPA

WHEREFORE, Plaintiff prays for:

- (a) a judgment for actual damages against Defendants jointly and severally with regard to causes of action #1 through #9;
- (b) a judgment for punitive damages against Defendants jointly and severally, with regard to causes of action #1, 3, 4, and 9;
- (c) a judgment for treble actual damages against Defendants jointly and severally with regard to cause of action #10 and #11.
- (d) an award of attorney's fees and costs; and
- (e) such other and further relief as the Court deems just and proper.



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January 16, 2009

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MASTER DEED ESTABLISHING
3 CHISOLM STREET HORIZONTAL PROPERTY REGIME

KNOW ALL MEN BY THESE PRESENTS, That this Master Deed is made on the date hereinafter set forth by CHISOLM STREET PARTNERS, LLC, hereinafter sometimes called "Developer," a limited liability company, organized under the laws of the State of Georgia and qualified to do business in South Carolina;

WHEREAS, Developer is the sole owner in fee simple of real property and buildings and improvements thereon (collectively the "Property"), which is located on the west side of Chisolm Street in the City of Charleston, Charleston County, South Carolina, and desires to submit the Property as hereinafter more fully described to a Horizontal Property Regime, according to the laws of the State of South Carolina (the "State") and subject to conditions and restrictions contained herein; and.

WHEREAS, Developer desires to convey the Property pursuant and subject to certain protective covenants, conditions, restrictions, reservations, liens and charges under the South Carolina Horizontal Property Act and as hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the benefits expected to flow to Developer as a result of the submission of the herein described Property to a Horizontal Property Regime:

KNOW ALL MEN BY THESE PRESENTS that Chisolm Street Partners, LLC, for itself, its successors and assigns, subject to matters set forth herein, hereby submits the Property, to a Horizontal Property Regime according and subject to the terms and provisions of the Horizontal Property Act of the State of South Carolina as presently codified in the 1976 South Carolina Code of Laws at Section 27-31-10 et seq. (hereinafter sometimes referred to as the "Act") as it is now constituted and as it may from time to time be amended; PROVIDED, however, that such submission shall be and is made subject further to the conditions, provisions and restrictions contained herein, including exhibits attached hereto and incorporated herein by reference, that certain facade easement heretofore granted to Historic Charleston Foundation and that certain easement heretofore granted to Bellsouth Telecommunications, Inc., all of which shall be covenants, conditions, restrictions and easements which shall run with the land and shall bind and inure to the benefit of Developer, its successors and assigns, and all subsequent owners of any interest in the Property, their grantees, successors, heirs, executors, administrators, personal representatives, devisees or assigns.

1. DEFINITIONS: Unless a contrary definition is provided by the Act or is clearly required by the context hereof in order to effectuate the purpose and intent of the within Master Deed, the following definitions of terms shall apply to the within Master Deed, but in case of any

CHARLESTON-10018_17

repair and replacement by a Co-owner shall be done in a manner so as to maintain the harmonious exterior appearance of the Property.

12. ASSESSMENTS: The Co-owner of each Unit shall be responsible for his share of assessments established by the Regime as follows:

(a) Creation of lien and personal obligation for assessments. Each of the Co-owners of the Units are bound to contribute pro-rata in the percentage computed as set forth on Exhibit "D", and each Unit is and shall be subject to a lien and permanent charge in favor of the Regime for, the payment of annual and special assessments for the expenses of administration and of maintenance and repair of the general and limited common elements of the Property and toward any other expenses lawfully agreed upon or properly chargeable to the Unit Co-owner. If a lien for unpaid assessments is enforced by the Association, either by suit for damages or foreclosure, the Association shall be entitled to collect all costs of that action including attorneys fees. All sums assessed by the Association or other form of administration but unpaid for the share of common expenses, both general and limited, chargeable to any Unit shall constitute a lien on such Unit prior to all other liens except only (i) tax liens on the Unit in favor of any assessing unit, and (ii) mortgage and other liens, duly recorded, encumbering the Unit. Such lien may be foreclosed by suit by the Association or other form of administration, if any, acting on behalf of the Council of Co-owners, or by the Council of Co-owners itself, and in like manner as a mortgage of real property. In any such foreclosure the Unit Co-owner shall be required to pay a reasonable rental for the Unit after the commencement of the foreclosure action and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect such rents. The Association or other form of administration, acting on behalf of the Council of Co-owners, shall have power to bid in the Unit at foreclosure sale and to acquire and hold, lease, mortgage and convey the same. Suit for recovery of a money judgment for unpaid common expenses may be maintained without instituting foreclosure proceedings.

(b) Where the mortgagee of any mortgage of record or other purchaser of a Unit other than the defaulting Unit owner obtains title at the foreclosure sale of such a mortgage, such acquirer of title, his/its heirs, successors and assigns, shall not be liable for the share of common expenses or assessments by the Association chargeable to such Unit accruing after the date of recording such mortgage but prior to the acquisition of title to such Unit by such acquirer. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the Unit Co-owners, including such acquirer, his/its heirs, successors and assigns. The foregoing shall be without prejudice to the right of the Association or any Co-owner to seek recovery from the defaulting Unit owner.

The purchaser of a Unit (other than a purchaser at a foreclosure sale as described above) shall be jointly and severally liable with the Seller for the amounts owing by the latter to the Association for assessments up to the time of the conveyance, without prejudice to the purchaser's right to recover from the other party the amounts paid by him such joint debtor. The Association shall provide for the issuance and shall issue to any purchaser, upon his request, a statement of such amounts due by the seller and the purchaser's liability hereunder shall be limited to the amount as set forth in this statement.

(c) No later than December 20th of each calendar year, the Board of Directors of the Association shall set the annual assessments by estimating the common expenses to be incurred during the immediately succeeding calendar year and shall prorate such common expenses among the Co-owners of the Units in accordance with the percentage interest appurtenant to such Unit and shall give written notice to each Unit Co-owner of the annual assessment affixed against his Unit for such immediately succeeding calendar year. One-twelfth (1/12th) of such annual assessments shall be due and payable by the Co-owner to the Association or its designated agent in advance on or before the fifth day of each month.

(d) Developer anticipates that ad valorem taxes and other governmental assessments, if any, upon the Property will be assessed by the taxing authorities upon the Unit Co-owners and that each assessment will include the assessed value of the Unit and of the undivided interest of the Unit Co-owner in the common elements. Any such taxes and governmental assessments upon the property which are not so assessed shall be included in the budget of the Association as a recurring expense and shall be paid by the Association as a common expense. Each Unit Co-owner is responsible for making his own return of taxes and such returns shall include such owners undivided interest in the common elements, both general and limited.

(e) Special Assessments. In addition to the annual assessments, the Association may levy in any calendar year special assessments for the purpose of supplementing the annual assessments if the same are inadequate to pay the common expenses and for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of the general common elements or the limited common elements, provided that in the case of limited common elements, such special assessments shall be assessed only against those Units and the Co-owners thereof which shall be entitled to the use and benefit of such limited common elements, including the necessary fixtures and personal property related thereto; PROVIDED, HOWEVER, that any such special assessments shall have the assent of a majority of the votes of the Co-owners to be affected thereby represented, in person or by proxy, at a meeting at which a quorum is present, duly called for the expressed purpose of approving such expenditure, written notice of which shall be sent to all affected owners not less than fifteen (15) days nor more than thirty (30) days in advance of the meeting, which notice shall set forth with particularity the purpose of a meeting. Special assessments shall be fixed against the Units involved in proportion to the percentage interest attributable to each Unit. The period of assessment and manner of payment shall be determined by the Board of Directors of the Association.

(f) Date of Commencement of Annual Assessments. The responsibility of each Co-owner who purchases from Developer for assessments provided for herein shall as to each Unit commence upon the date of conveyance thereof (the "Commencement Date"). The first monthly payment of the annual assessment for each such Unit shall be an amount rounded to the nearest whole dollar equal to the monthly payment for the fiscal year in progress on such Commencement Date, divided by the number of days in the month of conveyance and multiplied by the number of days then remaining in such month; PROVIDED, HOWEVER, that at the Commencement Date any purchaser of a Unit from the Developer shall pay to the Developer the pro-rata portion of any prepaid expenses paid by the Developer, such as by way of example only

and not as a specification or limitation, prepaid insurance premiums for flood and hazard insurance.

13. **TRANSFER OF INTEREST IN UNITS:** (a) Upon the transfer or attempted transfer of an interest in any Unit, whether such transfer be by deed, lease, sublease, gift, devise, or by any means other than by first mortgage, sale pursuant to foreclosure of first mortgage or deed in lieu of foreclosure of said first mortgage, the Association shall have the right of first refusal in such interest as follows:

(i) **SALE OR LEASE:** Any Co-owner who wishes to sell or lease an interest in a Unit (or any lessee of any Unit wishing to assign or sublease such Unit) to any person not related by blood or marriage to the Co-owner shall give to the Association written notice of the terms of any such contemplated transfer, together with the name and address of the proposed purchaser, assignee, lessee or sublessee. The Association shall at all times have the first right and option to purchase or lease such Unit upon the same terms, which option shall be exercisable for a period of ten (10) days following the date of receipt of such notice. If said option is not exercised by the Association within said option period, the Co-owner (or lessee) may, at the expiration of said period and at any time within ninety (90) days after the expiration of said period, or for such longer period of time as the Association may agree to in writing, sell or lease (or sublease or assign) such Unit ownership upon the terms specified in such notice.

(ii) **GIFT:** Any Co-owner who wishes to make a gift of an interest in a Unit ownership or any interest therein to any person or persons or entity who would not be heir at law of the owner under the laws of intestate succession of this state as of the date such gift is proposed, (or to any person or persons or entity who would not be an heir at law as aforesaid of any principal of Co-owner, if Co-owner is not a natural person), shall give to the Association written notice of intent to make such gift. The Association shall at all times have the first right and option to purchase such Unit ownership or interest therein for cash at fair market value to be determined by mutual agreement between such owner and the Association or if mutual agreement cannot be reached, then by arbitration as herein provided, which option shall be exercisable until the date of expiration as provided herein. If Co-owner and Association cannot agree within five (5) days of such notice to Association on fair market value, then within fifteen (15) days after receipt by the Association, of said written notice, the Association and the owner desiring to make such gift shall each appoint a qualified real estate appraiser to act as arbitrators. The two arbitrators so appointed shall, within fifteen (15) days after their appointment, appoint another qualified real estate appraiser to act as the third arbitrator. Within fifteen (15) days after the appointment of said arbitrator, the three arbitrators shall determine, by majority vote, the fair market value of the Unit ownership or interest therein, which the Co-owner contemplates conveying by gift, and shall thereupon give written notice of such determination to the Co-owner and the Association. The Association's option to purchase the Unit ownership or interest therein shall expire thirty (30) days after the date of receipt by it of such notice or after agreement in writing between Co-owner and Association as to fair market value of the Unit, unless exercised in writing within said period and closed within thirty (30) days thereof. If the Association shall elect to

HOA - Messed up and failed to file
the case v. developer within the statute of
limitations.

3 Chisolm Street Homeowners Association, Inc., Appellant,

v.

**Chisolm Street Partners, LLC, Murray School Partners, LLC,
Genoa Construction Services, Inc., Masterpiece Millwork, Inc.,
Allen Roper, Jr. d/b/a Masonry Brickwork and Stucco, John Doe #1,
John Doe #2, and Brock Green Architects and Planners, LLC, Defendants,
Of whom Genoa Construction Services, Inc.,
Masterpiece Millwork, Inc., and Brock Green Architects and Planners,
LLC are the Respondents.**

Genoa Construction Services, Inc., Third-Party Plaintiff,

v.

**The Fox Steel Company, Carolina Services, Inc.,
Lesco Restoration, Inc., Ferst Plastering, Inc.,
Charleston Glass & Mirror Company, 3d Renovations,
Williams Mechanical, Mastercraft Interior & Exterior,
Coastal Glass and Block, Adams Davis & Partners,
Troy Pardee Heating and Air Conditioning (d/b/a Pardee Heating
and Air), Metro Water-Proofing, Inc., CT Windows Limited,
and Architectural Materials & Systems, Third-Party Defendants.
Lesco Restoration, Inc., Fourth-Party Defendant,**

v.

**Coastal Waterproofing, Inc. n/d/b/a Wards Waterproofing, Inc., Fourth-Party
Defendant.**

**Appellate Case No. 2012-207850
Unpublished Opinion No. 2014-UP-128**

STATE OF SOUTH CAROLINA In The Court of Appeals

**Heard February 4, 2014
Filed March 26, 2014**

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

Page 2

**Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge**

AFFIRMED

David Jay Parrish, Nexsen Pruet, LLC, of Charleston, for Appellant.

**Kent Taylor Stair, Paul Eliot Sperry, and John Patrick Turner Norris, Carlock Copeland &
Stair, LLP, all of Charleston, for Respondent Brock Green Architects and Planners; Wendy
Raina Johnson Keefer, Keefer & Keefer, LLC, of Charleston, Jenny Costa Honeycutt, Best
Honeycutt, P.A., of James Island, and L. Dean Best, Best Honeycutt, P.A., of Charleston, for
Respondent Masterpiece Millwork; Franklin H. Turner, III, Joshua Allan Bennett, and
Laurence S. McWhorter, Rogers Townsend & Thomas, PC, all of Columbia, for Respondent
Genoa Construction.**

PER CURIAM: In this construction defect case, the 3 Chisolm Street Homeowners Association, Inc. (the "HOA") brought suit in 2009 against several defendants that completed construction work on three condominium buildings in 2002, including the respondents—Genoa Construction Services, Inc., the general contractor, Masterpiece Millwork, Inc., the manufacturer of the windows used in the buildings, and Brock Green Architects and Planners, LLC, the architect. The

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circuit court granted summary judgment to the respondents on claims related to original construction work based on the statute of limitations. We affirm.

Section 15-3-530 of the South Carolina Code (2005) sets forth a three-year statute of limitations for actions based in negligence and contract. See § 15-3-530(1) and (5) (providing for a three-year statute of limitations for "an action upon a contract" and "an action for . . . any injury . . . not arising on contract and not enumerated by law"). In determining when the statute of limitations began to run, the circuit court applied the "discovery rule," which provides that the time to file a claim "begins to run when a cause of action reasonably ought to have been discovered." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). The HOA argues there are material issues of fact as to when the HOA discovered, or should have discovered, that a cause of action existed for original construction defects in all three condominium buildings—the main building, the gym building, and the cottage building.

As to the main building, we find 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 Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp., 332 S.C. 197, 207, 503 S.E.2d 761, 766 (Ct. App. 1998) (stating the statute of limitations begins to run "from the date the injury is discoverable by the exercise of reasonable diligence"); 332 S.C. at 208, 503 S.E.2d at 767 (holding the plaintiff "had sufficient information . . . to put it on inquiry notice, which, if developed, would have revealed the defects"). The 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. See Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998) (stating a party has notice of claims when the facts and circumstances "would put a person of common knowledge and experience on notice that . . . some claim against another party might exist" (internal quotation marks and citation omitted) (emphasis in original)); Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) ("The focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer."); *id.* ("If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." (citation omitted)).

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As to the gym and cottage buildings, we find the circuit court correctly found Glick's report provided the HOA sufficient information to put it on inquiry notice of construction defects existing in these buildings. See Dean, 321 S.C. at 364, 468 S.E.2d at 647 (stating "the fact that the injured party may not comprehend the full extent of the damage is immaterial"); Republic, 332 S.C. at 208, 503 S.E.2d at 767. Specifically, Glick's report put the HOA on inquiry notice of defects in the gym and cottage buildings because:

- (1) all three buildings were built at the same time, by the same general contractor, and in accordance with the same plans developed by the same architect;
- (2) the minutes from the board of directors meeting in May 2003 provide that after receiving Glick's report, the board discussed "steps that should be followed," including "[i]nspection of the cottage and gym building[s]";
- (3) the minutes from the board of directors meeting in June 2003 demonstrate the HOA solicited proposals from companies for "additional investigation" into the defects highlighted in Glick's report, although it ultimately decided not to pursue this course of action due to the cost;
- (4) the HOA was urged to conduct further investigations by Glick, who warned of "significant and pervasive construction defect problems"; and
- (5) an inspection report shows the HOA undertook remedial measures on the gym building some time before 2007 "in an effort to inhibit water intrusion at windows."

There is also evidence that if the HOA had exercised reasonable diligence and investigated the other buildings in 2003, it would have discovered the defects before the statute of limitations ran. *Barr*, 330 S.C. at 645-46, 500 S.E.2d at 160 (holding had the plaintiffs "exercised reasonable diligence and investigated the problems noted in the . . . inspection reports, they could have realized the magnitude of the problem and brought suit before the statute of limitations ran"). An inspection report issued in 2007 that concerned the gym and cottage buildings alerted the HOA to defects that existed in 2003 and would have been discoverable. Moreover, according to an architect who inspected the buildings, the deterioration of the wooden windows in the gym building resulted, in part, from condensation buildup on the windows, which would "have been occurring prior to [his] observations" in 2007 because it was caused by installation of single-pane windows. Thus, the defect causing the condensation—the single-pane windows—existed at the time construction was completed in 2002.

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The HOA also argues it "thought the problems [in the main building] had been repaired" by Genoa in 2004, which tolled the statute of limitations as to original work performed by Genoa. We find the issue is not properly before this court, as the HOA raised this issue for the first time in its reply brief. See Rule 208(b)(1)(B), SCACR ("[N]o point will be considered which is not set forth in the statement of the issues on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (stating "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief").¹

Because we affirm on the merits of the circuit court's conclusion that the statute of limitations bars the HOA's claims, we decline to address other grounds on which summary judgment was granted. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address appellant's remaining issues when disposition of a prior issue was dispositive).²

AFFIRMED.

FEW, C.J., SHORT and GEATHERS, JJ., concur.

Notes:

1. Additionally, we find no merit to this argument. The HOA bases this assertion on language in the circuit court's order that stated the statute of limitations for original construction work "has tolled." We do not interpret the court's use of the word "tolled" as invoking the doctrine of equitable estoppel, but instead as a finding that the statute of limitations expired as to all claims related to original work. This conclusion is supported by (1) the context in which the court made this statement; (2) the fact that the HOA did not assert equitable estoppel before the court made this ruling; and (3) the ultimate holding that the statute of limitations barred the HOA's claims regarding original work.

2. Genoa also raises an issue in its brief regarding the circuit court's application of the "continuous treatment exception." We decline to address this argument, as it was never raised to the circuit court. Whaley v. CSX Transp., Inc., 362 S.C. 456, 482, 609 S.E.2d 286, 299 (2005) (finding issue not preserved because it was not raised to and ruled upon by the trial court).



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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 Number: 2019-001100

Civil Case No. 2015-CP-10-0020

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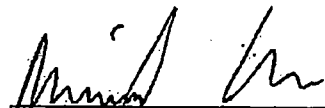
Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,

v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains no matter which is
irrelevant to the appeal.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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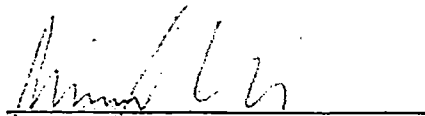
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STATEMENT OF ISSUES ON APPEAL

- I. The trial court committed reversible error by finding that the January 30, 2008 Foltz Martin letter, triggered the applicable statute of limitations since Respondent failed to show the absence of a genuine issue of material fact as to whether the letter put Appellant on notice of an actionable claim against Respondent.
- II. The trial court committed reversible error by finding that Judge Young's June 9, 2011, Order dismissing Respondent's Water Intrusion Lawsuit based upon the statute of limitations triggered the applicable statute of limitations in this case since the time was tolled until the March 26, 2014, Court of Appeals Order affirming Judge Young's dismissal.
- III. The trial court committed reversible error by finding Appellant reasonably should have known that they would have to pay the expense to repair or remediate the damages identified and claimed in both the Water Intrusion Lawsuit and the Foundation Defect Lawsuit when the Respondent was repeatedly representing to Appellant that Respondent was actively engaged in seeking to compel others to pay that expense.

- IV. The trial court committed reversible error by finding Appellant had a justiciable controversy prior to January 21, 2015.
- V. The trial court committed reversible error by analyzing Defendant's statute of limitations defense under SC Code § 15-3-530(5)¹ since that statute was not properly before the Court pursuant to R. 7(b)(1) SCRCP.
- VI. The trial court committed reversible error by dismissing Appellant's case based upon the statute of limitations provided in SC Code § 33-31-830(f)
 - a. (a) The trial court committed reversible error by interpreting SC Code § 33-31-830(f) to apply to a non-profit corporate entity despite its clear and unambiguous meaning.
 - b. The trial court compounded the error by relying upon an unpublished opinion with no precedential value that does not address subpart (f) to expand the scope of SC Code § 33-31-830(f) beyond its clear and unambiguous meaning.

FACTS

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

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

collection of condominium units subject to the South Carolina Horizontal Property Act. The buildings used are the same buildings in place when the property was used as the Andrew B. Murray Vocational School. The school buildings were renovated into the condominiums in 2002.

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

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

At a November 6, 2014 meeting of the owners of the condominium units, Respondent for the first time informed Appellant that there was a need to repair the crawlspace of the main

condominium building at an estimated cost of \$2.5 million (Exhibit E to Plaintiff's Return to Defendant's Motion for Summary Judgment). On January 21, 2015, Respondent held a special meeting to address the needed repair to the crawlspace of the main building (id.). At this January 21, 2015 meeting, Respondent, for the first time, notified Appellant that Appellant would be required to fund the needed repair to the crawlspace of the main building through a special assessment of \$82,000.00 levied by the Respondent upon each of the individual condominium units (id.). Section 12(a) of Respondent's Master Deed (Exhibit F, p.2 to Plaintiff's Return to Defendant's Motion for Summary Judgment) provides that such an assessment creates a lien on each unit owner's property and is personal obligation of each unit owner. The special assessment was required to be paid by June of 2015 and all Appellant class members paid their individual share of the special assessment (Affidavit of Steven Bernard).

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

STATEMENT OF THE CASE

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

The trial court found that the January 30, 2008, Foltz Martin letter (Exhibit C to Defendant's Motion for Summary Judgment) sent by adverse counsel addressed to attorneys for the non-profit corporate entity Respondent placed Appellant on notice of the claims

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

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

Appellant filed their original Summons and Complaint on January 2, 2015 alleging negligence on behalf of the Respondent for failing to bring the Water Intrusion Lawsuit within the applicable statute of limitations. On March 5, 2015, Respondent filed Defendant's Motion to Dismiss (Defendant's Motion to Dismiss) based upon, among other things, there being no justiciable controversy at the time of Appellant's filing due to Appellant's damages being unascertainable at the time of filing. Appellant filed an Amended Summons and Complaint on April 13, 2015 still alleging negligence on behalf of the Respondent for failing to bring the Water Intrusion Lawsuit within the applicable statute of limitations. An Order

by Consent to Certify the Class of Plaintiffs was filed on August 7, 2017, defining the class of Plaintiffs as:

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

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

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

of and four years after Judge Young's 2011 Order that was appealed, the Respondent would levy a special assessment upon Appellant to pay for the repairs that are the Respondent's responsibility; therefore, the Appellant suffered at least nominal damages either in 2008 or in 2011 (Order, p. 10). At the hearing, the trial court acknowledged that in accordance with R. 220 SCACR, unpublished opinions have no precedential value (Tr. p. 24, 4-10), 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). The trial court found, despite the Summons and Complaint only naming the individual non-profit corporation as the sole Defendant, there being no attempts by Appellant to amend the Summons and Complaint to add any individual directors as named Defendants—and the Respondent the being the only Defendant served in the action—that Steven Bernard's deposition testimony expanded the named Defendants to this action to include the individual directors. The court made this expansion even though no rule in the South Carolina Rules of Civil Procedure exists to provide for such an amendment by depositional testimony (Order, p. 10). Despite Respondent not seeking relief under SC Code § 15-3-530(5), the trial court further found that the statute of limitations barred Appellant's claim (Order, p. 10).

On December 17, 2018, Appellant filed Plaintiffs' SCRCRCP 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, Appellant argued that Respondent's sole prayer for relief in their motion was for dismissal based upon the statute of limitations as provided by SC Code § 33-31-830(f) and therefore the Court should not have dismissed Appellant's claims based upon § 15-3-530(5); Despite Judge Young's

June 9, 2011 Order putting Appellant on notice that Respondent missed the applicable statute of limitations, R. 241(a) SCACR tolled the statute of limitations until the Court of Appeals affirmed the Order on March 26, 2014 as the only issue on appeal in that action was whether Respondent missed the statute of limitations and the claimed negligent act in this action is whether Respondent missed the statute of limitations; a letter purported to have been sent to Respondent did not put Appellant on notice of any claim they might have against Respondent; and that SC Code § 33-31-830(f) is inapplicable to this case as that statute only applies to the individual directors of a non-profit corporate entity and the only named Defendant is the non-profit corporate entity itself.

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

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

STANDARD OF REVIEW

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

An Order granting summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" R. 56(c) SCRCP. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact" Richardson v. The State-Record Company, Inc., 499 S.E.2d (Ct.App.1998), *citing to* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Sumner v. Carpenter, 492 S.E.2d 55, 58 (1997). "Under the summary judgment standard, the Court gives every benefit of the doubt to the non-moving party" Watters v. Terminix Service, Inc., 658 S.E.2d 110, 111 (Ct.App. 2008). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment" Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 760 S.E.2d 121, 128 (Ct.App. 2014). "Summary

judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts” Lyons v. Fid. Nat. Title Ins. Co., 781 S.E.2d 126, 130-31 (Ct.App.2015).

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

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

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

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

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

In their motion, Respondent states:

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

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

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

"The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed" Dorman v. Campbell, 500 S.E.2d 179, 184 (Ct.App.1998).

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

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

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

"My wife and I purchased condominium unit number 405 at 3 Chisolm Street...on December 21, 2012"; "At the time my wife and I purchased unit 405, we had no knowledge regarding the condition of the condominium building's foundation"; "In November of 2014, a special general meeting of all the homeowners was called by the Board of Directors to inform the homeowners of the foundation problems and that repairs were

needed immediately”; “It was at this November 2014 special general meeting that I first learned of the March 26, 2014 decision of the Court of Appeals in 3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, et. al., Appellate Case No.: 2012-207850 affirming the trial court’s decision that the April 2003 Glick Report had: (1) put the Board of Directors on notice of the construction defects or the need for further investigation of the construction defects in 2003, and (2) that the statute of limitation had run by the time the Board of Directors had filed the original lawsuit.”; “Prior to this meeting, I had never been informed of either the existence of the Glick Report or the decision of the Court of Appeals.” (Affidavit of Steven Bernard Opposing Defendant’s Motion for Summary Judgment).

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

At the very best, Respondent has coupled the January 2008 letter together with a list of the Board of Directors for various years (Defendant’s Motion for Summary Judgment, Exhibit

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

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

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

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

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

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

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

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

"As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." (emphasis added)

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

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

of the appellant court. The outcome of the appeal ultimately determines whether or not a cause of action truly exists.

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

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

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

The automatic stay of Judge Young’s June 9, 2011, Order, pursuant to SCACR R. 241(a) provides an automatic stay of any matters decided in the appealed Order, including the very issue upon which Appellant bases the negligence claim. Until the March 26, 2014, Court of Appeals

decision, Appellant could not know whether the Defendant was negligent for missing the statute of limitations against the developers of the condominiums. Until the March 26, 2014, Court of Appeals decision, the lower court was deprived of jurisdiction to hear the issue of Respondent's negligence involved in this action ("Under Rule 205, the lower court is deprived of the power to proceed with the matters that are affected by the appeal..." Tillman v. Oakes, 728 S.E.2d 45, 51 (Ct.App. 2012)). Therefore, Appellant requests a reversal of the trial court's Order granting Defendant's Motion for Summary Judgment as Appellant's January 2, 2015, filing of this action was well within the statute of limitations.

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

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

The only evidence before the trial court regarding knowledge or belief of any Appellant class member concerning the transactions and occurrences giving rise to this action was contained in the excerpts from the deposition of Steven Bernard (Exhibit E to Defendant's Motion for Summary Judgment) and the Affidavit of Steven Bernard. In neither his Affidavit nor his deposition did Steven Bernard state that the Appellant class members knew or believed, prior to January 2015, that Respondent would be required to acquire the funds for the necessary repairs through a special assessment upon the Appellant. In his deposition excerpts that were before the trial court, Steven Bernard states that in 2014 he had no idea how the foundation repairs were going to be paid for. (Exhibit E to Plaintiff's Motion for Summary Judgment, p. 34, 14)³. In his affidavit, Steven Bernard states that it is not until "... January 2015, at a specially called general homeowners' meeting, the members of the Regime voted to assess each unit in the Regime..." (Affidavit of Steven Bernard, p. 4).

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

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

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

Appellant pay the costs of the necessary repairs (Exhibit I to Defendant's Motion for Summary Judgment);

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

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

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

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

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

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

The trial court committed reversible error by finding that there existed no question of material fact as to whether Appellant should have known that they would be responsible for the costs of the necessary repairs prior to January 2015.⁶

Appellant respectfully requests that summary judgment be reversed.

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

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

"While it is well settled that a statute of limitations commences to run only from the time that the cause of action accrues, it is often difficult to

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

determine when that time arrives. The fundamental test, however, in determining whether a cause of action has accrued, is whether the party asserting the claim can maintain an action to enforce it. A cause of action accrues at the moment when the plaintiff has a legal right to sue on it" Brown v. Finger, 124 S.E.2d 781, 785 (S.C.1962).

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

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

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

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

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

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

real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character” Sloan v. Greenville County, 590 S.E.2d 338 (Ct.App. 2003). Appellant could not maintain an action for negligence prior to the January 21, 2015 levy of the special assessment to pay for the necessary repairs to the foundation. “It is fundamental and elemental that, in order to reap the benefit of negligence, the person pleading negligence must show that he has been injured by the negligence, and that the negligence was the proximate cause of the injury” National Loan & Exchange Bank v. Lachovitz, 128 S.E. 10 (S.C. 1925). It was with the January 21, 2015 decision of the Defendant to utilize a special assessment levied upon the Appellant as the means to pay for the necessary repairs that the Plaintiffs were first put on notice of an invasion of their right as a result of Defendant’s negligence and gave the Plaintiff’s an actionable claim for negligence. “It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another” Gray v. Southern Facilities, Inc., 256 S.C. 558, 567 (S.C. 1971).

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

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

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

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

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

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

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

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

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

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

"As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRPC" Chastain v. Hiltabidle, 673 S.E. 2d 826, 831 (Ct.App. 2009) citing to M&M Group, Inc. v. Holmes, 666 S.E.2d 262, 265 (Ct.App.2008). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby

affecting the decision of the trial court and advancing his or her case” Chastain, at 831 *citing to* Gardner v. S.C. Dept. of Revenue, 577 S.E.2d 190 (S.C. 2003).

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

It was not until Respondent’s October 19, 2018, filing of their reply to Plaintiff’s Return to Defendant’s Motion for Summary Judgment that Respondent referenced § 15-3-530(5), a mere three (3) days prior to the October 22, 2018, hearing. “A written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served **not later than ten days before the time specified for the hearing...**” R. 6(b) SCRCP (emphasis added). As a result of the trial court’s error in failing to apply R. 7(b)(1) SCRCP to Respondent’s motion, an Order was issued dismissing Appellant’s claims largely based upon the general tort three (3) year

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

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

statute of limitations utilizing the discovery rule, despite Respondent expressly stating that they did not move the Court to use that analysis. (Defendant's Motion for Summary Judgment p.2).¹⁰

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

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

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

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

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

Judgment, p.1).¹¹ Reading § 33-31-830(f) in its entirety confirms that the statute does not apply to the non-profit corporation entity:

“An action against a director asserting the director’s failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered.” (Emphasis added to the portion misrepresented by Respondent).

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

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

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

p.10).¹³ The trial court's finding that deposition testimony expands the named Defendants beyond those named and served with a summons is not supported by any rules of civil procedure, common or statutory law, and it completely ignores due process.

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

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

It is the individual directors of a non-profit corporate entity that are expressed in § 33-31-830(f) and therefore SC Code § 33-31-830(f) is inapplicable to this action where only the non-

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

profit corporate entity is a named Defendant. Appellant respectfully requests that the trial court's Order be reversed as § 33-31-830(f) is inapplicable to this action.

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

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

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

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

Assuming arguendo, Smith does have precedential value, it does not contradict the plain and clear meaning of § 33-31-830(f) and allow for the application of this statute of limitations to the non-profit corporate entity. Smith was an action brought against both a homeowners' association corporate entity as well as the individual directors. The Defendants in that action

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

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

filed a motion for summary judgment under § 33-31-830 and the trial court "...found, the individual directors were protected from liability by South Carolina Code section 33-31-830". The court denied summary judgment to the Association, finding the statute only applied to individual directors, not the corporation itself. Upon motions for reconsideration filed by both sides, the circuit court granted summary judgment to the Association, **"...finding the business judgment rule insulated the directors as well as the corporate entity from any liability"** Smith, at 2. (emphasis added)

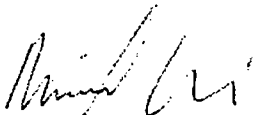
Upon appeal in Smith, the Court of Appeals only analyzed § 33-31-830 as it applies to the business judgment rule, not the statute of limitations ("Section 33-31-830 provides the applicable standard of care for directors of non-profit corporations in the discharge of their duties" Smith at 3). The Court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

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

Conclusion

Summary judgment is improper because there exist genuine issues of material fact as to when Appellant's cause of action accrued and when Appellant was on notice of that accrual.

Furthermore, the Order granting summary judgment contains reversible errors of law: not tolling the statute of limitations while this very issue was on appeal, granting Respondent relief under SC Code § 15-3-530(5) despite that statute not properly being before the Court, interpreting SC Code § 33-31-3830(f) beyond its clear and unambiguous meaning, and expanding SC Code § 33-31-830(f) beyond its clear and unambiguous meaning based upon an unpublished opinion that both has no precedential value and is inapplicable. Appellant respectfully requests the reversal of the trial court's Order granting summary judgment.



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Dated: September 16, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED

SEP 18 2019

SC Court of Appeals

Case No: 2015-CP-10-0020

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

v.

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

PROOF OF SERVICE

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THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER

DEPARTMENT OF FINANCE
BUREAU OF TAXATION

100 NASSAU ST. 10TH FL.
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TOWNSHIP OF BURGESS AND DISTRICT OF BURGESS, On Behalf of
Themselves and as Co-tenants of Burgess, et al.

Appellants

3 Chatham Street Homeowners Association, Inc.

Respondent

STATE OF NEW YORK

Andrew J. ...
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For the ...

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

Appellants,

v.

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

Respondent.

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STATEMENT OF THE CASE

This is a negligence action brought by the Appellants 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 Appellants' 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 Appellants 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 Appellants 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).

above
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). This Court 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 Appellants 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 Appellants 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 Appellants 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 Appellants 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

no evidence
HOA-MPT
much less
class
members
received
notice

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 Appellants 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). This appeal followed.

STANDARD OF REVIEW

“A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). “An appellate court reviews the grant of summary judgment under the same standard applied by the trial court.” *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). “The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.” *Id.*

“Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.” *Id.* “When the circuit court grants summary judgment on a question of law, we review the ruling de novo.” *Stoneledge at Lake Keowee Owners’ Association, Inc. v. Builders Firstsource - Southeast Group*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct. App. 2015).

The question of legal prejudice is subject to an abuse of discretion standard. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313 (1992). “An abuse of discretion occurs when the [circuit court’s] ruling is based upon an

error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

ARGUMENT

- I. **The trial court correctly determined that the Appellants 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.**

The trial court granted the HOA's motion for summary judgment based upon the expiration of the statute of limitations. Specifically, the court ruled that the Appellants' negligence action against the HOA is time barred regardless of whether the applicable statute of limitations is found in Section 33-31-820(f) or Section 15-3-530(5).

The Appellants argue that the applicable statute of limitations is three-years pursuant to Section 15-3-530(5) and that the trial court erred in its application of the discovery rule. The Appellants insist that there is no evidence that the Appellants 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. The Appellants 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 Appellants contend on appeal 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.¹

The Appellants' position in this regard is flawed in two specific 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.

Second, the Appellants have misapprehended and misapplied 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

¹ The Appellants 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 Appellants 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 Appellants 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 be on notice that some right of hers has been invaded or that some claim against another party might exist).

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.³

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, the Supreme 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. The Supreme 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 Appellants are suing the HOA, not any attorneys. The alleged negligence was committed by the directors

³ In applying the "two-issue" rule, the Supreme 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), this Court 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.

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.

Additionally, in its recent decision in *Personal Care, Inc. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019), this Court ruled -- 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. This Court 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, this Court 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 Appellants' claim against the HOA is not predicated on an adverse judgment. In fact, the Appellants 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 Appellants 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 Appellants 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 this Court, 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.

In their opening brief, the Appellants erroneously suggest 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 Appellants' 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 Appellants' return to the motion for summary judgment, where the Appellants 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 Appellants 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, the Appellants 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 Appellants' new contention on appeal, 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. The Appellants 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.⁴

III. The trial court correctly ruled that the Appellants and class members knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for the repairs if the Foundation Defects Lawsuit was untimely filed.

The Appellants further contend that the trial court erred in ruling that the Appellants and class members knew or reasonably should have known that an

⁴ Nonetheless, it is illogical to conclude, as the Appellants 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.

assessment would likely be levied against the homeowners to pay for the repairs if the Foundation Defects Lawsuit was untimely filed. As discussed at length above, the discovery rule is an objective test. The application of the discovery rule does not turn on actual knowledge but rather what is reasonably known or should be known by an objectively reasonable person, that is, a person of common knowledge and experience. *See, Young v. South Carolina Department of Corrections*, 333 S.C. 714, 511 S.E.2d 413, 416 (Ct. App. 1999) (finding that under the discovery rule, whether the particular plaintiff actually knew he had a claim is not the test; rather, courts must objectively determine whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist).

Here, the trial court recognized that an objectively reasonable person in the position of the Appellants and class members should know 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. That ruling by the trial court is sound and did require any further evidentiary basis. Again, the Appellants treat the discovery rule as a subjective test which requires proof of actual knowledge, which it does not.

IV. The trial court was correct in concluding that the Appellants' claim against the HOA accrued more than three years prior to the filing of this lawsuit.

The Appellants next argue that there was no "justiciable controversy" prior to January 21, 2015, which is the date that the Appellants learned of the special assessment to be levied by the HOA to pay for the repairs of the foundation defects. The Appellants' argument is fairly convoluted and circular, but it appears that they are contending that the accrual date for their negligence claim against the HOA should be deemed January 21, 2015. The trial court was correct in rejecting that argument.

"The question of when a cause of action arises or accrues is a question of law." *Menezes v. W.L. Ross & Co., LLC*, 403 S.C. 522, 744 S.E.2d 178, 182 (2013). In *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004), the Supreme Court held that "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." 596 S.E.2d at 46. Similarly, in *Grooms v. Medical Society of South Carolina*, 298 S.C. 399, 380 S.E.2d 855 Ct. App. 1989), this Court ruled that "[a] cause of action or claim for damages accrues the moment the defendant breaches a duty owed to the plaintiff." 380 S.E.2d at 857. "The fact that an injured party may not comprehend the full

extent of the damage is immaterial.” *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 532 S.E.2d 1, 3 (Ct. App. 2000). This Court has further recognized that “South Carolina’s statute of limitations requires very little to start the clock.” *Maier v. Tietex Corp.*, 321 S.C. 371, 500 S.E.2d 204, 208 (Ct. App. 1998). In fact, “in a negligence action, the statute of limitations accrues at the time of the negligence, or when facts or circumstances would put a person of common knowledge on notice that he might have a claim against another party.” *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 90 (1995).

As the trial court noted, the Appellants’ claimed accrual date of January 21, 2015, is not even consistent with the Appellants’ own actions in this litigation. The Appellants filed the Complaint against the HOA on January 2, 2015, which was almost three weeks prior to the date now claimed as the accrual date. (R. 23).⁵ If that were true, the Appellants’ negligence claim had not accrued when suit was filed and the Appellants would be admitting that there was no “justiciable controversy” when they filed this action. In short, the current argument is suspect from the outset, and quite frankly, the Appellants should be estopped from taking inconsistent positions.

⁵ In the Complaint filed January 2, 2015, the Appellants pled as follows: “Plaintiffs have suffered damages proximately caused by the Defendant’s negligent, grossly negligent, reckless, unconscionable, and incompetent conduct and Defendant’s lack of good faith.” See, Complaint, ¶ 69. (R. 35). Thus, there was an affirmative allegation that the Appellants had been damaged by that date.

Nonetheless, as the trial court also correctly ruled, the Appellants did not need to wait for its damages to be fully developed for the accrual of their negligence cause of action. The statute of limitations was triggered when the Appellants had notice that there might be a claim against another party and that there is a legal right to sue on it. As the previously cited case law demonstrates, a determination of damages need not be developed before a cause of action accrues. Instead, an injured party has the legal right to file suit before all of its damages occurred or are discovered. *See, Grooms*, 380 S.E.2d at 857. In effect, the Appellants were injured or harmed by the loss of their claim for foundation defects, and that loss started the clock on the statute of limitations.

In sum, the trial court was correct in ruling that "Plaintiffs knew that they had suffered some damage to their claims against the renovators as soon as they were aware that the HOA might have missed the statute of limitations" which "undeniably occurred more than three years before Plaintiffs filed this suit." (R. 14). The date that the special assessment was levied to pay for the foundation defects does not change that ultimate accrual date.

- V. The trial court was correct in finding that the application of Section 15-3-530(5) as the statute of limitations was properly raised and before the court for adjudication.**

As a procedural issue, the Appellants argue that the trial court committed

reversible error in analyzing the statute of limitations defense under Section 15-3-530(5). They contend that issue was "not properly before" the trial court because the HOA initially argued that Section 33-31-830(f) supplied the applicable statute of limitations rather than Section 15-3-530(5). They complain that the HOA did not raise Section 15-3-530(5) as a basis for dismissal until the filing of its reply memorandum.

This argument lacks merit and is simply an attempt to elevate form over substance. There is no disputing that the HOA's motion for summary judgment was premised entirely on its statute of limitations defense. In its motion, the HOA addressed the application of the statute of limitations both with and without the benefit of a discovery rule. Thereafter, the Appellants filed an opposition memorandum in which they addressed Section 15-3-530(5) and the application of the discovery rule. In fact, as the trial court noted, in that memorandum, the Appellants write: "The statute of limitations that applies to the instant case is S.C. Code § 15-3-530(5)." (R. 162). Thus, the Appellants argued that the correct statute of limitations is supplied by Section 15-3-530(5) and then proceeded to give an analysis of that statute of limitations including a full discussion of the accrual date and the application of the discovery rule based on the circumstances of this litigation. (R. 162-163). On reply, the HOA included a discussion of Section 15-3-530(5) and stated: "even assuming Plaintiffs are correct

and § 15-3-530(5)'s three-year statute of limitations and § 15-3-535's discovery rule apply, Plaintiffs still failed to file this case on time." (R. 223).

During the hearing, the Appellants never objected to consideration of the statute of limitations defense under Section 15-3-530(5), which they themselves argued was the applicable statute. The Appellants never advised the trial court that they were not prepared to proceed with any of the issues or arguments. They did not seek a continuance of the hearing nor assert any legal prejudice. (R. 261-271). This objection based on lack of notice was, in fact, raised for the first time in their Rule 59(e) motion, which was untimely. *See, Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not).

Ultimately, the trial court ruled that the Appellants' 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 which respect to accrual date and the application of the discovery rule generally apply regardless of which statute is the correct one. Therefore, as the trial court concluded in rejecting the claim of inadequate notice, the Appellants "have not been legally prejudiced." (R. 17).

In *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009), this Court held "[a]s a general rule, a party must establish prejudice as the result of

another's failure to comply with Rule 7(b)(1), SCRCF." 673 S.E.2d at 831. "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case." *Id.* Thus, the appellants "must demonstrate they were unable to marshal an effective defense in opposition to [the] motion for summary judgment," or in other words, the appellants "must show that had they received adequate notice, they would have done something different." *Id.* In *Chastain*, this Court rejected the appellants' argument finding that the appellants "failed to articulate any new argument or factual issue that they were unable to present to the trial court due to a lack of notice." *Id.*

The present case is no different. In their Rule 59(e) motion, the Appellants claim only that they "would have properly prepared a defense against those theories," but they failed to identify or make a proffer of other evidence that would have been submitted or other arguments they would have made. (R. 226-228). Even on appeal, the Appellants have still made no attempt to identify any legal prejudice. Again, using identical language as the Rule 59(e) motion, they generically claim that they "would have properly prepared a defense against those theories." *See*, Appellants' Opening Brief, p. 30. As was the case in *Chastain*, the Appellant have failed to articulate any new argument or factual issue that they

were unable to present to the trial court due to any alleged lack of notice. Obviously, as the record demonstrates, the Appellants were fully prepared and did argue the law applicable to the HOA's statute of limitations defense, including a discussion of the accrual date and the application of the discovery rule under the circumstances.

VI. The trial court correctly ruled in construing the statute of limitations in Section 33-31-830(f) as applying to claims against a nonprofit corporation where the corporation is sued solely for the acts and omissions of the directors.

The Appellants also contend that the trial court erred in interpreting Section 33-31-830, and the statute of limitations as contained in Section 33-31-830(f), as applying to a non-profit corporation. There is no dispute that the HOA is a South Carolina nonprofit corporation. *See*, Amended Complaint, ¶ 6. (R. 64). As a result, the HOA is governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq.* The Nonprofit Corporation Act provides that an action must be commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f).

Section 33-31-380(f) specifically references "an action against a director asserting the director's failure to act in compliance with this section and

consequent liability.” S.C. Code. Ann. § 33-31-830(f). The Appellants claim that the current lawsuit names the HOA as the only party-defendant and does not name any individual director of the HOA Board as a party-defendant. Thus, the Appellants claim that the statute of limitations set forth in Section 33-31-830(f) is not applicable.⁶

However, in making that argument, the Appellants disregard their own pleadings and theory of liability. A fair reading of the Amended Complaint demonstrates that the Appellants are suing the HOA solely for the acts and omissions of the directors of the HOA Board. In paragraph 20 of the Amended Complaint, the Appellants allege that the directors failed to follow the recommendations of the Glick Report that the “HOA obtain a more complete forensic report analyzing and addressing any other potential problems with the [s]tructures.” *See*, Amended Complaint, ¶ 20. (R. 66). They allege specifically that “[t]he Board of the HOA in May and June 2003 acknowledged the need to investigate all three buildings constituting the [s]tructures to determine the full extent of damage from the known issues and to identify any other potential problems with the [s]tructures.” *See*, Amended Complaint, ¶ 21. (R. 66).

⁶ The Appellants complain that the trial court allowed an excerpt from the deposition of Steven Bernard to essentially amend or “expand” the Amended Complaint to add individual directors as party-defendants. The trial court did not add the directors as party-defendants. Instead, the reference to the Bernard deposition testimony was intended to make the point that the Appellants are suing the HOA specifically for and only for the acts and omissions of the directors of the HOA Board.

Additionally, the Appellant claims that “[a] person of common knowledge and experience, much less a *Board of Directors* entrusted with preserving the value of these condominium buildings would have been on notice at that time that some legal claim might exist.” *See*, Amended Complaint, ¶ 23. (R. 66). (Emphasis added). The Appellants assert the foundations were not inspected “[b]ecause the recommended complete forensic examinations were not conducted.” *See*, Amended Complaint, ¶ 33. (R. 68). Further, “[h]ad the Defendant conducted the previously recommended inspections in or about 2003 when recommended, the deficiency of the foundation would have been discovered.” *See*, Amended Complaint, ¶ 41. (R. 69). Clearly, the Appellants are suing for the acts or omissions committed by the directors of the HOA Board. There can be no reasonable dispute about that based on the allegations contained in the Amended Complaint.

Therefore, as the trial court recognized, the HOA is being sued solely for the acts and omissions of the directors of the HOA Board. In ruling on the Rule 59(e) motion, the trial court confirmed that “S.C. Code Ann. § 33-31-830(f) is applicable to claims brought against a nonprofit corporation and thus bars the Plaintiffs’ negligence claim against the HOA.” (R. 18-19). Citing the unpublished decision of this Court in *Smith v. Dockside Association, Inc.*, No. 2005-UP-139 (S.C. Ct. App. Feb. 28, 2005), the trial court recognized that “the Nonprofit Corporation Act

applies not only to claims against the individual directors of a nonprofit corporation, but also to claims against the corporation," and "[t]his is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself." (R. 14). The trial court's analysis in this regard is correct. Where the nonprofit corporation -- here the HOA -- is sued solely for the acts and omissions of its directors, there is no legal justification for there to be one statute of limitations governing claims against the corporation and a different statute of limitations governing claims against the individual directors. In fact, if differing statutes of limitations are applied against the nonprofit corporation and its directors for the identical conduct and claims, that will create valid equal protection concerns.⁷

The HOA, like the trial court, recognizes that *Smith v. Dockside Association, Inc.* is not precedent because it is an unpublished decision; yet, it is still instructive in that the same principles discussed above were the underlying basis for this Court's decision in *Smith*. This Court addressed the applicability of Section 33-31-

⁷ An important rule of statutory construction requires that "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412, 417 (2009). This is also called the "doctrine of constitutional doubt." *United Student Aid Funds, Inc. v. South Carolina Department of Health and Environmental Control*, 349 S.C. 162, 561 S.E.2d 650, 653 (Ct. App. 2002). Stated similarly, "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331, 333-334 (1977). See also,

830 to an action against a nonprofit corporation which was only being sued for the acts of the individual directors of an HOA Board, which is the same scenario as in the case at bar. This Court, in fact, noted that “the suit against the Association and the individual directors only complained about the actions of the individual directors. No evidence was produced at the summary judgment hearing to show the Association was separately negligent.” 2005 WL 7083482, *5. While *Smith* did not concern a statute of limitations defense, this Court did address whether the provisions of Section 33-31-830 should be equally applicable to the nonprofit corporation as it is to the directors. This Court concluded that the business judgment rule applicable to the directors’ action under Section 33-31-830 should likewise preclude the corporation’s liability. This Court explained that “since a corporation may only act through its directors, the application of the business judgment rule to the corporate entity with regard to the *business* judgments of the directors is appropriate.” *Id.* (Emphasis in original). The same rationale should apply to all of the provisions of Section 33-31-830, including the statute of limitations in subsection (f).

In sum, if the statute of limitations in Section 33-31-830(f) applies to the negligence claim against the HOA which is premised solely on the acts or

State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008); *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999).

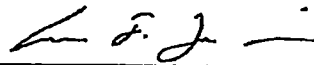
omissions of the individual directors, then it is clear that the Appellants' negligence claim is time-barred under either measure provided in the statute. As indicated, Section 33-31-380(f) provides two alternatives for measuring when a suit against the HOA becomes barred by the statute of limitations. The first method bars a suit unless it is filed within three years "after the failure complained of." In other words, the first method does not employ a discovery rule. The second method, which uses the discovery rule, provides that a claim is time-barred unless it is filed within two years "after the harm complained of is, or reasonably should have been discovered." Most importantly, Section 33-31-380(f) provides that suit against the HOA must be filed before the sooner of the two deadlines. Given the undisputed facts of this case, including the very allegations of the Amended Complaint where the Appellants are clearly suing over acts and omissions of the HOA Board committed in 2003, this action is time-barred in accordance with Section 33-31-380(f). The decision of the trial court in granting summary judgment should therefore be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent 3 Chisolm Street Homeowners Association, Inc. respectfully requests that this Court affirm the summary judgment entered by the trial court in its favor.

Respectfully submitted,

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March 25, 2020

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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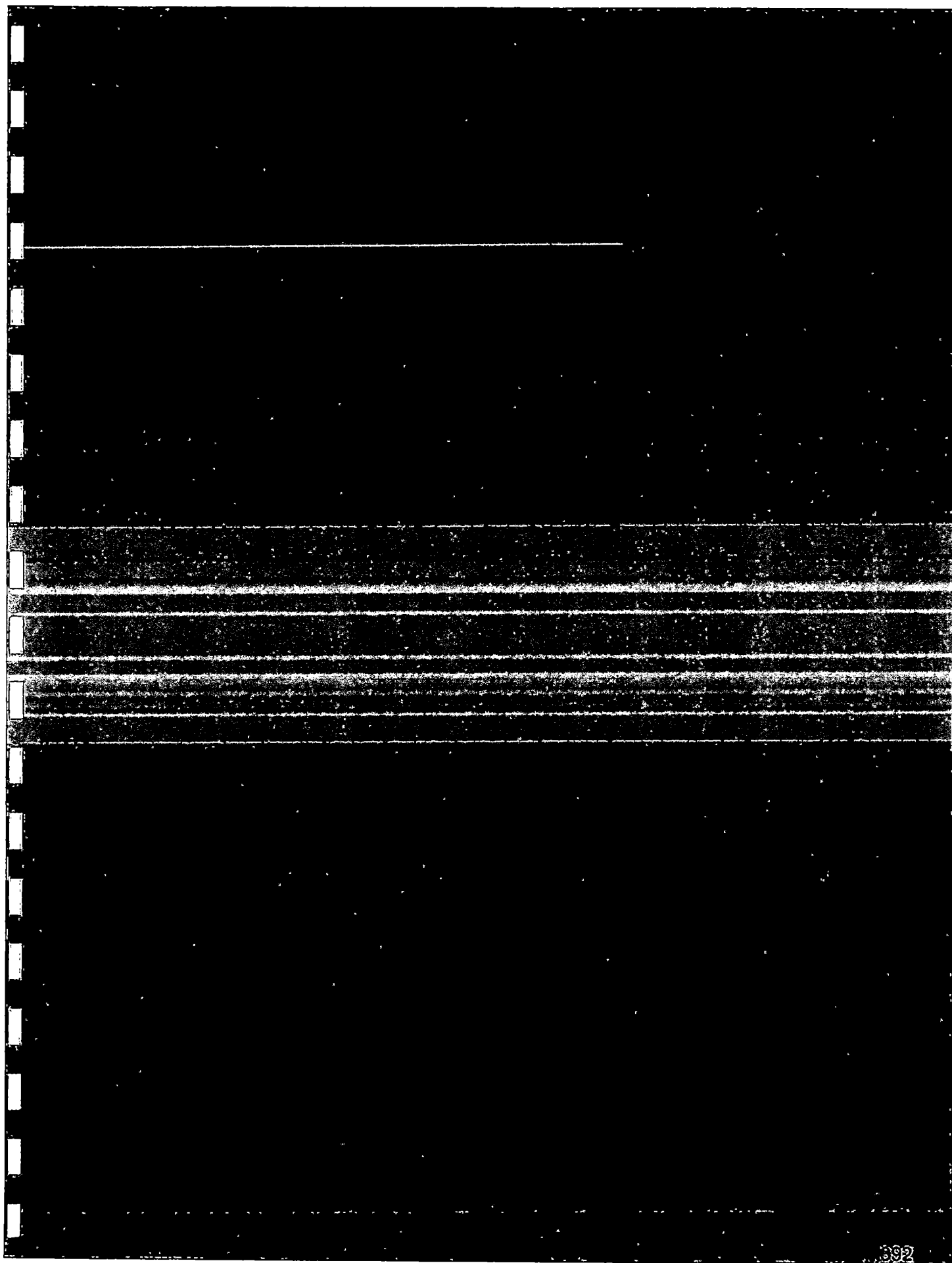
CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of the **Final Brief of Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 25th day of March 2020:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

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SC Court of Appeals

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc., ...Respondent.

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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, Respondent tries to shift the burden of proof to the Appellant, 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 Appellant 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 Appellant had a negligence claim against Respondent.

The January 30, 2008 Letter does not satisfy Respondent's burden of proof

Respondent 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 argument is flawed in numerous respects. Primarily, there is nothing in the record to show that the letter placed Appellant 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 this letter from a third party to it, somehow places third party individuals on notice of a claim. Such a conclusion is without evidentiary support and should be disregarded.

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 Appellant to either know or be in a position where they should have known through reasonable diligence that Appellant had a claim against Respondent. In defense to summary judgment, Appellant 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 Maher 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.

Notice to Respondent Does Not Impute Notice onto Appellant

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 to 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, as more fully briefed in Appellant's Brief: "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).

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) Respondent's counsel has repeatedly disregarded their client's own corporate veil in an attempt to impute Respondent's knowledge onto Appellant, but has shown no reason why the corporate veil should be pierced nor have they pled piercing of their own

("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)).

It is only when the factual differences "are the crux of a predominant legal issue" that a class cannot exist ("...the factual differences (whether prejudice exists) are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case" Gardner, at 22). 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 of should have known of a claim against Respondent should not be disregarded by the court as Respondent argues, 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.

The January 16, 2009 Filing of the Water Intrusion Lawsuit by the Respondent did not put Appellant on Notice of a Claim Against Respondent

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

² Nowhere in the Record does Respondent show that Appellant ever became aware of the Glick Report or that the Glick Report was ever disseminated to the Appellant.

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 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 Appellant was 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.³ 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 Appellant was on notice that Respondent’s actions were suspect and that Appellant should be double checking every action taken by Respondent. Also, Appellant 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

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

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; and 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 Appellant 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. Appellant's 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 Appellant 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 Appellant 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 Appellant, but now argues that the Appellant should have known that whole time that Respondent was wrong.

Appellant's theory of Respondent's negligence has not changed on this appeal.

The trial court erred in ruling that the Appellant 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 Appellant 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 Appellant 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 Appellant 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 Appellant 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.

"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 for arguendo purposes that Respondent is correct that at some point greater than three (3) years prior to the January 2, 2015 filing of this action, the Appellant's 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 Appellant should have known at some undefined moment three (3) year 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 Defendant’s Motion to Dismiss (**Defendant’s March 5, 2015 Motion to Dismiss**) based upon there being sources other than a levy on Appellant to pay for the necessary foundation repairs. In their motion, Respondent argued that it was unreasonable for Appellant 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).

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 Appellant to assume that Appellant 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 funds prior to placing a special levy upon the condominium owners. Respondent failed to show when or why Appellant 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 Appellant 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 Appellant filed this action that it was filed too early because there were sources other than a levy on Appellant to pay for the necessary foundation repairs. The trial court erred in ruling that the Appellant knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for Respondent's negligence.

Appellant has not taken inconsistent positions

Respondent argues that Appellant has 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 Appellant until approximately twenty (20) days later and "...should be estopped from taking inconsistent positions" (Respondent's Initial Brief, p. 24).

First, 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 Appellant filed this action too early as there existed no justiciable controversy but now argue that Appellant filed this action too late.

Second, Appellant has maintained throughout this litigation that whether or not Respondent indeed breached their duty owed to Appellant was an issue in controversy before the court until the March 26, 2014 opinion of the Court of Appeals, and that Appellant suffered no damages as a result of Respondent's negligence until the January 2015 special levy upon Appellant to pay for the necessary foundation repairs.

Appellant's argument that SC Code § 15-3-530(5) was not properly before the court is not meritless

Respondent argues that Appellant's claim of prejudice from the trial court's dismissal based upon § 15-3-530(5) despite Respondent not properly putting § 15-3-530(5) before the court "...lacks merit and is simply an attempt to elevate form over substance" (Respondent's Brief, p. 26) and that "...Appellants never advised the trial court that they were not prepared to proceed with any of the issues or arguments. They did not seek a continuance of the hearing nor assert any legal prejudice" (Respondent's Brief, p. 27). Respondent is correct that Appellant did not seek a continuance of the hearing nor advise the trial court that they were not prepared to proceed with arguments about § 15-3-530(5). Appellant did not know that statute was before the court until the court's judgment dismissing the case based primarily upon that statute. Respondent specifically pled that the statute was not before the court in their written motion:

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

At the hearing before the trial court, Respondent continued to expressly state that § 15-3-530(5) and the discovery rule were not before the court:

(“In our brief we have argued that the discovery rule doesn’t even apply because this is a lawsuit against a nonprofit corporation and the Nonprofit Corporations Act applies. And that statute is governed by Section 33-31-830(f)...”) (Transcript of Record, p. 20: 12-16).

Respondent argues that it was improper to raise the issue of prejudice from the court dismissing Appellant’s action based upon § 15-3-530(5) in a R. 59(e) SCRCP motion based upon Hickman v. Hickman, 392 S.E.2d 481 (Ct.App.1990) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not) (Respondent’s Initial Brief, p. 27). However, it was not until the court’s judgment dismissing this action that Appellant had any notice that the court was considering § 15-3-530(5). As discussed above, Respondent repeatedly and expressly represented that they were not seeking relief based upon §15-5-530(5). Appellant could not have raised to the court, prior to the court’s judgment, that the court’s judgment dismissing Appellant’s case based upon a statute that a movant is expressly telling the court not to consider is extremely prejudicial to Appellant. Therefore it was proper to raise that issue for the first time in a R. 59(e) motion and it is properly preserved for appeal.

Respondent has failed to expand § 33-31-830(f) beyond the legislature’s clear and unambiguous intent that this statute applies only to the directors of a non-profit corporate entity

Respondent argues that in making the argument that § 33-31-830(f) does not apply to this action, “...Appellants disregard their own pleadings and theory of liability” (Respondent’s Initial Brief, p. 30). In truth, this argument is completely consistent with Appellant’s pleadings and theory of liability. § 33-31-830(f) clearly and unambiguously only applies to the individual directors of a non-profit corporation. Appellant has not named any individual directors as defendants. Therefore arguing that § 33-31-830(f) does not apply to the sole named defendant, the non-profit corporation, is completely consistent with Appellant’s pleadings.

At the hearing before the trial court, the only justification that Respondent offered for expanding § 33-31-830(f) beyond its clear and unambiguous meaning was the unpublished opinion of Smith v. Dockside Association, Inc., unpublished opinion No. 2005-UP-139 (Ct.App. 2005). This unpublished opinion should not have been considered by the trial court as it has no precedential value in accordance with R. 220(a) SCACR. Also, the Dockside court was considering the acts of the individual directors under § 33-31-830(f) because the individual directors were named defendants, whereas no individual defendants were named in the present case.

Conclusion

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 Appellant 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 Appellant had a negligence claim against Respondent.

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

RECEIVED
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SC Court of Appeals

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly
Situating, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc., ...Respondent.

PROOF OF SERVICE

I certify that I have served Appellants' Reply Brief upon M. Dawes Cook, Jeffrey
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Dated: 02/06/20

Tracy O'Brien

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2019-001100

Appeal From Charleston County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2022-UP-269
Submitted April 1, 2022 – Filed June 22, 2022

AFFIRMED

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Michael Bogdan, of Parker Poe Adams & Bernstein,
LLP, of Charleston, for Respondent.

PER CURIAM: Steven M. Bernard and Deborah J. Bernard, on behalf of themselves and all others similarly situated (collectively, Appellants), filed an action in 2015 asserting breach of duty, negligence, and gross negligence against 3 Chisolm Street Homeowners' Association, Inc. (the HOA) for failing to file a lawsuit within the applicable statute of limitations and for the resulting damages to Appellants from bearing the costs to repair the foundations at 3 Chisolm Street. Appellants appeal from the trial court's grant of summary judgment to the HOA, arguing the court committed reversible error by: (1) finding a January 30, 2008 letter triggered the applicable statute of limitations; (2) finding the court's June 9, 2011 order dismissing the HOA's 2009 water intrusion lawsuit based upon the statute of limitations triggered the applicable statute of limitations in this case; (3) finding Appellants reasonably should have known they would have to pay the expense to repair or remediate the damages identified and claimed in both the 2009 water intrusion lawsuit and the 2014 foundation defects lawsuit; (4) finding Appellants had a justiciable controversy prior to January 21, 2015; (5) analyzing the HOA's statute of limitations defense under S.C. Code Ann. § 15-3-530(5); and (6) dismissing Appellants' case based upon the statute of limitations provided in S.C. Code Ann. § 33-31-830(f). We affirm pursuant to Rule 220(b), SCACR.

1. We find the statute of limitations for the 2014 foundation defects lawsuit was not tolled by the appeal in the 2009 water intrusion lawsuit because Appellants 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. See S.C. Code Ann. § 15-3-530(5) (2005) (providing for a three-year statute of limitations for "an action for . . . any injury to the person or rights of another, not arising on contract and not enumerated by law"); *Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (stating South Carolina courts apply the "discovery rule" to determine when the statute of limitations begins to run for a cause of action); *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 370-71, 597 S.E.2d 27, 29 (Ct. App. 2004) (providing that under the discovery rule, the statutory period begins when the plaintiff either discovers the injury resulting from the defendant's wrongful conduct, or should have discovered the injury "by the exercise of reasonable diligence").

2. We find 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. *See* S.C. Code Ann. § 15-3-530(5) (2005) (providing for a three-year statute of limitations for "an action for . . . any injury to the person or rights of another, not arising on contract and not enumerated by law"); S.C. Code Ann. § 33-31-830(f) (2006) (providing "[a]n action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered").

3. We also find Appellants are 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). 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. 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. *See Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019) ("Our supreme court has 'interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness' when on notice of a potential claim." (quoting *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996)); *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998) ("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."); *id.* ("[T]he 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."); *Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (stating the fact that an injured party "may not comprehend the extent of the injuries is immaterial"); *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."); *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381 (1995) (finding notice to an attorney is notice to the client).

4. Because we find Appellants failed to timely file their action against the HOA, we decline to address Appellants' remaining issues. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

AFFIRMED.¹

THOMAS, MCDONALD, and HEWITT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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

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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 SCRCF 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, 2015¹⁻²⁻¹⁵ 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 SCRCR 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. Rusconi 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?

not yet.
It is respectfully submitted that Judge Young's Order, Two 2011



Respondent argues that “[b]y January 16, 2009, the Appellant class members should have been aware of the Glick Report¹, 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

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

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) SCRPC.

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).

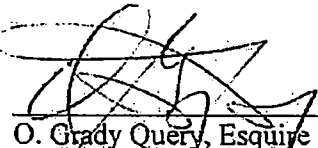
This Court is urged to reconsider reliance upon Smith v. Dockside Ass'n. Inc., No. 2005-UP-139 (Ct. App. 2005) to expand S.C. Code Ann. § 33-31-830(f) beyond its clear and unambiguous application to only the directors of the non-profit corporation to include also the non-profit corporate entity, as that 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.



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July 21, 2022
Charleston, SC

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
Situating, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc., ...Respondent.

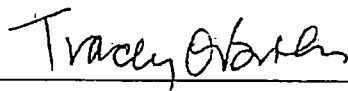
PROOF OF SERVICE

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:

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Dated: July 21, 2022



The South Carolina Court of Appeals

Steven M. Bernard and Deborah J. Bernard, on Behalf of
Themselves and All Others Similarly Situated,
Appellants,

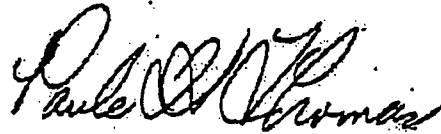
v.

3 Chisolm Street Homeowners Association, Inc.,
Respondent.

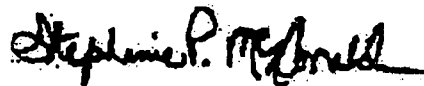
Appellate Case No. 2019-001100

ORDER

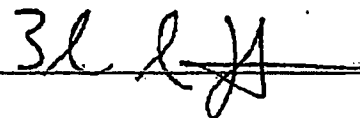
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED
Jul 29 2022

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The Honorable Edward W. Miller