

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

Appellate Case Number: 2022-001202

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

v.

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

REPLY BRIEF

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Dated: October 13, 2023
Charleston, South Carolina

Respondent 3 Chisolm Street Homeowners Association, Inc., attempts to create the illusion of multiple lawsuits addressing separate damages brought at the direction of the Home Owners Association Board. Respondent entirely ignores the fact that all actions filed by Respondent HOA, 2009-CP-10-267, and 2014-CP-10-6803 sought redress for repair damages and both cases were brought outside of the statutes of limitations.

Respondent's first suit, 2009-CP-10-267 was dismissed in Judge Young's Order of June 2011, for not having been brought by Respondent within the statutes of limitations which resulted in the March 26, 2014 opinion of the Court of Appeals in 2014-UP-128.

Respondent's, next attempt to recover the repair damages against the developer/general contractor was the second action 2014-CP-10-6803. This 2014 action essentially mirrored the first, and was settled for less than a quarter of the amount assessed against the homeowners for those same damages, shortly before Respondent HOA faced the statute of limitations guillotine.

The damages to Petitioner Class members as a result of Respondent's negligence in failing to timely commence, not one but two actions against the developer/general contractors, is the \$2,500,000.00 special assessment levied against Petitioner class members.

In their brief Respondents made no arguments as to the question posed.¹ Instead, Respondent chastised Petitioners for re-asserting nine of eleven questions presented in our Petition for Writ of Certiorari.

Petitioner's argument that the statute of limitations was tolled from June 2011 until March 26, 2014, is acknowledged by Respondent.² However, Respondent's brief is silent as to the

¹ In review of the arguments in Respondent's Brief against the developer/general contractor, Judge Young's June 2011 dismissal of the HOA lawsuit, *3 Chisolm Street Homeowners Association, Inc., v. Chisolm Street Partners, LLC (the developer), Genoa Construction Services, Inc. (Case No. 2009-CP-10-267)* is mentioned a total of three times. Respondent noted the trial court referenced the June 9, 2011 order two times. See, App. 9-10, and 19. Respondent referenced the Court of Appeals ruling in this case on the ruling June 2011 orders at App. 21.

² See Respondent's Brief, pg. 10

application of Rules 205 and 241(a) SCACR, to stay the running of the statute of limitations until the appeal was decided on March 26, 2014, by the South Carolina Court of Appeals, in 2014-UP-128.

Contrary to Respondent's position: that the March 26, 2014, unpublished opinion by the Court of Appeals, is not directly adverse to Petitioners, the outcome of Respondent's 2009 action against the developer/general contractor *controlled* the viability of Petitioner's action against the Respondent HOA. A ruling in favor of Respondent HOA by the Court of Appeals would have allowed Respondent's 2009 action to go forward, and would have obviated Petitioner's actions in this case for the same cost of repair damages for Respondent allowing the statute of limitations to run.

Respondent HOA commenced the 2009 lawsuit, (2009-CP-10-267) against the developer/general contractor on claims relating to original construction work completed in 2002, upon which Respondent HOA had inquiry notice of problems going all the way back to 2003. In June of 2011, Judge Young granted summary judgment for the developer/general contractor in the 2009 action which was affirmed by the court of appeals on March 26, 2014, in 2014-UP-128. The March 26, 2014 affirmation by the Court of Appeals was the adverse judgment which began the running of the statute of limitations in this case.

Respondent brought their 2014 action against the developer/general contractor in an action captioned *3 Chisolm Homeowners Association, Inc., v. Genoa Construction Services Inc., et. al.*, in 2014-CP-10-6803. The 2014 action brought by Respondent was settled for a confidential amount that was grossly insufficient to pay for repairs as evidenced by the special assessment subsequently levied on the Petitioner class members in the amount of \$ 2.5 million dollars.

On January 15, 2015 at a specially called general homeowners meeting, the members of the Regime voted to assess each unit in the Regime \$ 82,000 for repairs payable by June of 2015. Bernard, his wife and all other class members paid the special assessment by June 15, 2015. (Minutes of January 21, 2015 special meeting of the 3 Chisolm Street Homeowners Association, Inc., App. 201-204, Bernard Aff., App. 214-215)

Respondent ignores representational and governing (decision making) roles of the HOA, which were to be performed by the HOA Board of Directors; when Respondent argues that every member of the HOA, is required to investigate and evaluate every conclusion and every action taken by the Board, including legal decisions made while the board was represented by counsel and advised by experts. According to Respondent's theories, the HOA board is without any responsibility to act reasonably and prudently on behalf of the HOA.

Accordingly, the Opinion of the Court of Appeals in this case, 2022-UP-269, which affirmed the Trial Court's granting of Respondent's motion for summary judgement, should be reversed and remanded to the Trial Court for further determination.

Respectfully submitted,



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