

2014-001578

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas for Charleston County
Honorable Roger M. Young, Circuit Judge
Civil Action No.: 2009-CP-10-267
Unpublished Opinion No. 2014-UP-128 (S.C. Ct. App. filed March 26, 2014)

S.C. Supreme Court

3 Chisolm Street Homeowners Association, Inc., Petitioner,

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, and Troy Pardee Heating and Air
Conditioning (d/b/a Pardee Heating and Air), CT Windows
Limited, and Architectural Materials & Systems, Third-Party Defendants,

Lesco Restoration, Inc., Fourth-Party Plaintiff,

v.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**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**

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

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

Unpublished Opinion No. 2014-UP-128
Heard February 4, 2014 – Filed March 26, 2014

AFFIRMED

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

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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

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)).

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

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.

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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**APPELLANT'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC***

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1. This Court’s unpublished decision ignores the scintilla of evidence standard and improperly concludes that at the time of the 2003 Glick report the HOA should have been on notice of rot in the wood windows that had not yet appeared and did not appear until years later.....2

2. This Court’s decision is improperly based on this Court’s assumption that an investigation of the wood windows in 2003 would have revealed the existence of a problem with the windows.....4

Conclusion5

DISCUSSION

Pursuant to Rules 221(a) and 219(b), SCARC, Appellant 3 Chisolm Street Homeowners Association, Inc. ("HOA") respectfully submits this petition for a rehearing, with a suggestion for a rehearing *en banc*, and requests that the Court of Appeals reverse its decision and remand this case for a jury trial on the facts issues presented

1. **This Court's unpublished decision ignores the scintilla of evidence standard and improperly concludes that at the time of the 2003 Glick report the HOA should have been on notice of rot in the wood windows that had not yet appeared and did not appear until years later.**

The unpublished decision in this case concludes that when the Glick report was issued in 2003, the report put the HOA on "inquiry notice" of defects in the wood windows in the gym and cottage buildings. *3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC*, Unpublished Op. No. 2014-UP-128 (S.C. Ct. App. Filed March 26, 2014) at page 4. In reaching that conclusion, this Court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the HOA, and summary judgment is inappropriate if even a mere scintilla of conflicting evidence exists. *See* Rule 56(c), SCRPC (stating 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); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("[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) ("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.”); *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 532 (Ct. App. 2012) (stating the appellate courts review the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRPC).

The facts before this Court on appeal are as follows: The wood windows at issue in this case are located in the gym building and caretaker cottage. Mr. Glick did not examine those buildings, and the wood windows are not mentioned in his 2003 report. In 2003 the wood windows were brand new (the developer was still selling unsold condominium units in 2003) (Aff. of Jack Burnett, R. p. 663 at ¶ 7). The affidavits and deposition testimony submitted by the HOA indicate that the problem with the windows (i.e., the rotting of the wood window frames) did not exist in 2003 and did not begin until years later. Specifically the HOA’s handyman testified that in 2004 the wood windows in the gym building were “fine, they were all right.” (Dep. Jerry Huddleston, R. p. 709, lines 9-12). The affidavit of the HOA’s former president, Jack Burnett, indicates that the rot did not appear in the wood windows frames until 2008, at which point the HOA hired the forensic engineering firm Applied Building Sciences, Inc. to investigate the cause of the rotting. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; see also Aff. of Scott Harvey, R. p. 664 at ¶ 4). Tellingly, no facts have been presented to this Court suggesting that wood rot was present or visible on the wood windows in 2003. The HOA filed this lawsuit in 2009 after the developer and Genoa refused to repair the problems with the wood windows on the gym building after the rot appeared in 2008. (Aff. of Jack Burnett, R. p. 663 at ¶ 11).

Prior to the appearance of the rot in the windows in 2008, no injury or damage to the wood windows existed, so in 2003 the HOA could not have been placed on notice of then non-existent rot damages. *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (stating that under the discovery rule, the statute does not begin to run from the date the negligent act or the breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.)

The record is devoid of evidence that the wood windows had started to fail (rot) or manifest any problems at the time of the Glick report. The only evidence pertaining to that issue indicates those windows were “fine” in 2004 and the rot did not appear in until 2008. As such, the unpublished decision in this case ignores conflicting evidence and, contrary to the scintilla of evidence standard, improperly concludes that in 2003 the HOA was on notice of a rot problem in the wood windows that was not observed or reported by anyone and that had not yet occurred.

2. This Court’s decision is improperly based on this Court’s assumption that an investigation of the wood windows in 2003 would have revealed the existence of a problem with the windows.

This Court’s decision mentions a 2007 inspection report regarding condensation on the wood windows, and from that concludes the “the defect causing the condensation—the single-pane windows—existed at the time the construction was completed in 2002.” Op. 2014-UP-128 at page 4. This Court’s conclusion that in 2003 the HOA was on notice of defects in the wood windows is based on this Court’s improper assumption—without any factual support—that in 2003 the HOA should have and could have been able to identify the then non-existent rot damage in the wood windows. The question of whether an inspection of the windows in 2003

would have revealed the existence of a problem with those windows requires an analysis of the nature and degree of inspection and testing to which the windows should have reasonably been subjected in 2003 given the absence of any rot damage at that time. Those are questions of fact for a jury to decide. *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (stating that under the discovery rule, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.) It was improper for this Court to weigh conflicting evidence and assume the answers to those factual issues on appeal. *See Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (“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.”) (internal citations omitted).

No evidence indicates that the subsequent rot in the wood windows existed, was apparent, or was reasonably discoverable at the time of the 2003 Glick report, and this Court ignored conflicting evidence and improperly assumed that in 2003 the HOA could have and should have identified wood rot in the windows that had not yet appeared. As such, the unpublished decision in this case fails to properly apply the standard applicable to summary judgment and is based on conflicting facts and on assumptions of facts not appearing in the record.

CONCLUSION

Based upon the foregoing arguments, the HOA respectfully requests that this Court of Appeals grant a rehearing (*en banc* if appropriate), reverse its decision, and remand this case to the Circuit Court to

allow a jury to decide the factual issues presented.

Respectfully submitted,



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April 10, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Robert M. Young, Circuit Court Judge

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RETURN OF RESPONDENT GENOA CONSTRUCTION SERVICES, INC. TO
APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR
REHEARING *EN BANC*

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DISCUSSION

Genoa Construction Services, Inc. ("Genoa") respectfully submits this Return to Appellant 3 Chisolm Street Homeowners Association, Inc.'s ("Appellant") Petition for Rehearing with Suggestion for Rehearing *En Banc*. As explained below, this Court should deny Appellant's Petition.

In order to prevail on a petition for rehearing, appellants must demonstrate that the Court overlooked or misapprehended Appellant's argument. Rule 221, SCACR. The purpose of a petition for rehearing is not to have the case tried in the appellate court a second time. *Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)).

The points listed in Appellant's Petition for Rehearing were fully briefed by counsel for Appellant, discussed by counsel for Appellant during oral argument, and understood by the Court. Appellant's Petition for Rehearing is simply an attempt to re-argue the case that was correctly decided by the Court in its unpublished opinion.

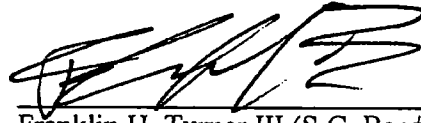
As a result, this Court should deny Appellant's Petition for Rehearing with Suggestion for Rehearing *En Banc*.

CONCLUSION

Based on the foregoing, Genoa respectfully requests that this Court deny Appellant's Petition for Rehearing with Suggestion for Rehearing *En Banc*.

[Signature block on following page.]

Respectfully submitted,



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4/22, 2014



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June 23, 2014

Mr. David Jay Parrish, Esquire
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Charleston SC 29402

Re: 3 Chisolm Street v. Chisolm Street
Appellate Case No. 2012-207850

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy
CLERK

cc: Donald Ryan McCabe, Jr., Esquire
Paul Eliot Sperry, Esquire
Kent Taylor Stair, Esquire
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Franklin H. Turner, III, Esquire
Joshua Allan Bennett, Esquire
Wendy Raina Johnson Keefer, Esquire
The Honorable Roger M. Young, Sr.

The South Carolina Court of Appeals

3 Chisolm Street Homeowners Association, Inc.,
Appellant,

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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,

v.

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

ORDER

After careful consideration of the Appellant's 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.

John Cannon, Jr.

C.J.

Paul G. Short, Jr.

J.

John D. Feather

J.

Columbia, South Carolina

cc:

Donald Ryan McCabe, Jr., Esquire
David Jay Parrish, Esquire
Paul Eliot Sperry, Esquire
Kent Taylor Stair, Esquire
Laurence S. McWhorter, Esquire
John Patrick Turner Norris, Esquire
L. Dean Best, Esquire
Jenny Costa Honeycutt, Esquire
Franklin H. Turner, III, Esquire
Joshua Allan Bennett, Esquire
Wendy Raina Johnson Keefer, Esquire
The Honorable Roger M. Young, Sr.

FILED

6/28/14