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SC Court of Appeals

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Unpublished Opinion No. 2014-UP-128 (S.C. Ct.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)

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3 Chisolm Street Homeowners Association, Inc., Plaintiff-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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 23, 2014.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by failing to apply the scintilla of evidence standard applicable to summary judgment when it concluded 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.. Did the Court of Appeals err by assuming that an investigation of the wood windows in 2003 would have revealed the existence of rot in the wood windows that had not yet appeared and did not appear until years later.

STATEMENT OF THE CASE

Petitioner 3 Chisolm Street Homeowners Association, Inc. (the "HOA") is the homeowners association for the condominium horizontal property regime known as the 3 Chisolm Street Condominiums, which are located at 3 Chisolm Street in the City of Charleston, South Carolina.

The Chisolm Street condominiums are located on the site of the old Andrew B. Murray Vocational School, and the condominiums were developed by converting the former school buildings into condominiums. Chisolm Street Partners, LCC and Murray School Partners, LLC (collectively, the "developer") purchased the old Andrew B. Murray Vocational property, converted the property into condominium units, and then marketed and sold the condominiums

to individual condominium unit owners. The developer also controlled and directed the HOA by virtue of its right to appoint a majority of the board of directors of the HOA.

In 2003 the developer transferred control of the HOA to a board of directors elected by the condominium unit owners. (Aff. of Mike Parades, Second Supplemental Record 4 at ¶ 3; Aff. of Jack Burnett, R. p. 662 at ¶ 6). When the developer transferred control of the HOA to the owners, a number of units had not been sold and the developer still owned and was marketing the unsold units. (Aff. of Jack Burnett, R. p. 663 at ¶ 7).

The HOA condominiums are contained in three separate buildings, the "main building," which has metal frame windows, and the "gym building" and "caretaker cottage," which have wood windows. After the developer transferred control, the HOA then hired an architect, Miles Glick, to perform a preliminary assessment because of concerns about potential leaks at the roof parapets in main building. (Aff. of Jack Burnett, R. p. 663 at ¶ 7). Mr. Glick sent a letter to the HOA dated April 8, 2003 (the "Glick report"), which identified some problems in the main building. (Letter from Glick/Boehm & Associates, Inc. dated April 8, 2003, R. p. 745). 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 <u>not</u> reviewed. (Glick Report, R. p. 745 at ¶ A "Introduction") (emphasis added).

The HOA delivered Glick report to the developer's representative and the developer had the general contractor, Genoa, repair the problems identified in the Glick report by installing caulk and seals to address water leaks at the metal windows, repairing roof leaks, and repairing cracks in the stucco on the main building. (Aff. of Mike Parades, Second Supplemental Record p. 4 at ¶¶ 4-5; Aff. of Jack Burnett, R. p. 663 at ¶¶ 7-9; Dep. of Michael Parades, R. p. 722, line

6, to R. p. 723, line 17; Parades Dep. Exhibit 244, R. p. 732). After the Glick report was issued, Genoa's workers were on and off the site for over a year performing repair work to address the issues raised in the Glick report. (Aff. of Jack Burnett, R. p. 663 at ¶ 9). 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. (Aff. of Mike Parades, Second Supplemental Record p. 5 at ¶ 6; Aff. of Jack Burnett, R. p. 663 at ¶ 10).

Several year later, the wood windows in gym building began rotting, which prompted the HOA to hire a forensic engineering firm, Applied Buildings Sciences, Inc. ("ABS"), to investigate the cause of the rotting wood windows. (Aff. of Jack Burnett, R. p. 663 at ¶ 11; Aff. of Scott Harvey, R. p.664 at ¶ 4). The HOA filed this lawsuit after the developer and Genoa refused to repair the problems with the wood windows on the gym building. (Aff. of Jack Burnett, R. p. 663 at ¶ 11). Thereafter, while ABS was on the site looking at the wood windows and firewalls in the gym building, ABS looked at the metal windows in the main building. (Aff. of Scott Harvey, R. p. 664 at ¶ 5). During those observations ABS noted staining and deterioration around some of the metal windows. (Aff. of Scott Harvey, R. p. 664-665 at ¶ 6). 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. (Aff. of Scott Harvey, R. p. 664-665 at ¶ 6). The HOA authorized ABS to conduct some destructive cuts in the walls of the main building, at which point ABS cut open walls and observed water in the walls under some of the metal windows in the main building. (Aff. of Scott Harvey, R. p. 665 at ¶ 7). 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 eliminated water intrusion issues in the main building. (Aff. of Walter G. Seinsheimer, Jr., R. p. 674 at ¶ 4).

Genoa and the architect (Brock Green Architects) filed motions for summary judgment based on the three-year statute of limitations under S.C. Code Ann. § 15-3-530, contending that the HOA took no action and delaying filing this lawsuit more than three years from the date of the "Glick report. Their evidence and arguments presented at the hearing on the summary judgment were focused on the stucco repair work performed around the metal frame windows on main building. They did not argue or suggest that the wood windows in the other two buildings (i.e. the gym building and cottage) had started to fail (rot) or manifest any problems at the time of the Glick report.

Following a hearing on the motions, the trial court issued two separate orders. One order denied the architect's motion on the ground that "the Glick report does not identify any design defects that would place the HOA on notice of design defects applicable to the architect[.]" (Order Denying Summary Judgment as to Brock Green Architects and Planners, LLC filed June 9, 2011, R. p. 9). The other order granted in part and denied in part Genoa's motion (Order Granting in Part and Denying in Party Defendant Genoa Construction Services, Inc.'s Motion for Summary Judgment filed June 9, 2011, R. p. 11). Specifically, the trial court's order granted Genoa partial summary judgment as to any claims related to Units 305 and 306 (a double unit located in the main building), on the ground that the owner of that unit had been involved in

litigation with the developer in 2002 (a year before the Glick report was issued). (R. p. 17).[1]

The remainder of the order applicable to Genoa is contradictory and confusing. For example, the order states: "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." (R. p. 14). The order also states: "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." (R. p. 15). The order further states: "[T]he 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." (R. p. 15). However, the order then states:

> [T]his 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

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1 The owner of the Units 305 and 306 (a double unit) is not a party in this case and the HOA is not appealing the portion of the trial court's orders applicable to Units 305 and 306.

examined the main building in 2009 while it was onsite examining problems with the wood windows on the other two buildings."

(R. p. 16). The order then concludes as follows:

ORDERED, ADJUDGED AND DECREED that:

1. Genoa Construction Services' Motion for Summary Judgment is GRANTED as [sic] claims relating to the original construction work on the conversion project [emphasis added]

2. Genoa Construction Services' Motion for Summary Judgment is DENIED as [sic] claims relating to the repair work conducted in 2003 [emphasis added];

3. Genoa Construction Services' for Summary Judgment is GRANTED as to all claims at they pertain to units 305 and 306.

(R. p. 18). The HOA filed a motion to reconsider (R. p. 536) the order applicable to Genoa because the order is internally contradictory and because Genoa was attempting to construe the terms "original construction work on the conversion project" as contained at the end of the order as applying to the wood windows in the gym building and cottage—even though Genoa's motion was based on the Glick report and that report only applied to the main building and did not in any way suggest that any problems existed or had manifested with the wood windows in the other buildings (the gym building and cottage) at the time of the report. The architect also filed a motion to reconsider the trial court's denial of its summary judgment motion (R. p. 525).

Following a hearing on the motions to reconsider the trial court issue two new orders, one which granted summary judgment to Brock Green on all of the HOA's claims (R. p. 60) and the other which denied the HOA's motion to reconsider the order granting partial summary judgment to Genoa as to all of the "original construction work on the conversion project." (R. p.

69). Both orders are based on the premise that the HOA was on notice of potential problems in all of the buildings (main building, gym building, and cottage) at the time of the 2003 Glick report and took no action, despite the fact that Genoa had repaired the problems identified in the Glick report, the Glick report did not discuss the other two buildings, and no evidence indicates that the wood windows in the other buildings had started to fail (rot) or manifest any problems at the time of the Glick report.

Thereafter the trial court granted summary judgment to Masterpiece Mill Work (which manufactured the wood windows in the gym and cottage buildings), based on the trial court's finding that the 2003 Glick report regarding the main building had placed the HOA "on notice of potential problems" regarding the wood windows in the other two buildings. (R. p. 85).

The HOA appealed from the trial court's orders granting summary judgment to Genoa, the architect, and Masterpiece Millwork, all of whom are sometimes collectively referred to as "Respondents" for ease of reference. The Court of Appeals affirmed the trial court in Unpublished Opinion No. 2014-UP-128 filed on March 26, 2014.

ARGUMENT

1. The Court of Appeals erred by ignoring the scintilla of evidence standard and improperly concluding 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 Court of Appeals' unpublished decision in this case concludes that when the Glick report was issued in 2003 regarding the main building, 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, the Court of Appeal 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), SCRCP (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), SCRCP).

The pertinent facts that were before the Court of Appeals were 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). No facts were been presented 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).

When viewing these facts and the reasonable inferences that may be drawn from those facts in the light most favorable to the HOA, prior to the appearance of rot in the wood window frames 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 problems in those windows. *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 in the gym and cottage buildings had started to fail (rot) or manifest any problems at the time of the Glick report regarding the metal frame windows in the main building. The only evidence presented regarding the condition of the wood windows indicates that those windows were "fine" in 2004 and that the rot did not appear in until

2008. Contrary to the scintilla of evidence standard, the Court of Appeals ignored these conflicting facts and improperly concluded 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. The Court of Appeals err by assuming that an investigation of the wood windows in 2003 would have revealed the existence of rot that had not yet appeared and did not appear until years later.

This Court of Appeals' decision mentions a 2007 inspection report regarding condensation on the wood windows, and from that report concludes "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. The Court of Appeals' 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, and contrary to the facts in the record—that in 2003 the HOA should have and could have been able to identify 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 the Court of Appeal 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 rot in the wood windows existed, was apparent, or was reasonably discoverable at the time of the 2003 Glick report, and the Court of Appeal 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 of the Court of Appeals fails to properly apply the standard applicable to summary judgment and is based on conflicting facts and on its assumption of facts not appearing in the record.

CONCLUSION

The Court of Appeals failed to apply the scintilla of evidence standard applicable to summary judgment and based its decision on conflicting facts and on assumptions of fact not appearing in the record. Based upon the foregoing arguments, the HOA respectfully requests that this Court grant its petition for writ of certiorari, reverse the decision of the Court of Appeals, and remand this case to the circuit court to allow a jury to decide the factual disputes presented.

Respectfully submitted,

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July 22, 2014

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
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v.

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

PROOF OF SERVICE OF PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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I hereby certify that on July 22, 2014, I served a copy of the **Petition for Writ of Certiorari** and **Appendix to Petition for Writ of Certiorari** submitted by the Petitioner, together with a copy of this Proof of Service, upon counsel for the Respondents listed below by mailing a copy to them as addressed below. I further certify that a copy of the Petition and a copy of this Proof of Service is being mailed delivered to the Clerk of the South Carolina Court of Appeals for filing by mailing a copy to the addressed below.

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David J. Parrish
Member
Admitted in SC

June 22, 2014

VIA OVERNIGHT DELIEVERY TO:
The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: ***3 Chisolm Street Homeowners Association, Inc. v. Chisolm Street Partners, LLC, et al., Civil Action Case No.: 2009-CP-10-26, South Carolina Court of Appeals Appellate Case No.: 2012-207850***

Dear Mr. Shearouse:

The following are enclosed for filing on behalf of the 3 Chisolm Street Homeowners Association, Inc.:

1. The original and six copies of a Petition for Writ of Certiorari.

2. Two copies of the Appendix to Petition for Writ of Certiorari, with one copy being unbound. Included with the Appendix are copies of the Briefs submitted to the Court of Appeals and copies of the Record on Appeal (which consists of Volume I, Volume II, Supplemental Record, and Second Supplemental Record).

3. A check for the $100 filing fee.

4. A Proof of Service reflecting service of the Petition for Writ of Certiorari and Appendix on Counsel of Record in this Appeal and filing of a copy of the Petition with the South Carolina Court of Appeals. Pursuant to Rule 242, SCACR, and as reflected in the Proof of Service, a copy of the Petition, Appendix, and Proof of Service are being served on Counsel of Record, and a copy of the Petition and Proof of Service are being filed with the Court of Appeals.

Thank you for your assistance with this matter, and lease let me know if you have any questions or need anything else from me regarding this matter.

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With kind regards,

David J. Parrish

DJP/cll
Enclosures

Cc with copy of Petition, Appendix, and Proof of Service to:
Franklin H. Turner, III, Esquire (via overnight delivery)
Paul E. Sperry, Esquire (via hand delivery)
J. Patrick Norris, Esquire (via hand delivery)
Jenny C. Honeycutt, Esquire (via hand delivery)

Cc with copy of Petition and Proof of Service to:
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