STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
Rivergate Homeowners' Association, Plaintiff, v. WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., Chuck's Construction Co., Inc., Defendants.	)	**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING AB CONSULTING ENGINEERS, INC.'S MOTION FOR SUMMARY JUDGMENT** C.A. No. 2010-CP-26-03901

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This matter came before the Court on Plaintiff's Motion for Reconsideration of the Court's April 4, 2014 Order granting Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. A hearing was held on September 8, 2014. Representing the parties at the hearing were Stacy L. Stanley, attorney for Plaintiff, G. Michael Smith, attorney for Defendant Speedee Concrete, Inc., Chris Clark, attorney for Defendant Chuck's Construction Co., Inc., and Stephanie H. Burton attorney for Defendant AB Consulting Engineers, Inc.

PROCEDURAL HISTORY

On April 4, 2014, this Court granted Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. This Court found that the evidence demonstrated that Plaintiff knew or should have known that a claim against AB Consulting existed before April 28, 2007. Thus, the Court concluded that Plaintiff's Complaint which was filed on April 28, 2010, was barred by the three year statute of limitations governing Plaintiff's claims. This Court also disagreed with Plaintiff's contention that the statute of limitations should be equitably tolled until November, 2007. On May 28, 2014, Plaintiff filed its motion for reconsideration.

LEGAL ANALYSIS

In its motion for reconsideration, Plaintiff argues that the statute of limitations did not begin to run until June 18, 2010. Plaintiff admittedly bases its argument upon an affidavit submitted by Plaintiff's expert, J. Drew Wilkie, on January 9, 2014. In his affidavit, Mr. Wilkie suggests that although Plaintiff may have been aware of the "symptoms" of the drainage problems asserted in this lawsuit against AB Consulting, Plaintiff could not have known who was responsible for the problems until Mr. Wilkie issued his report on June 18, 2010.

The Court disagrees. First, Plaintiff filed its Complaint naming AB Consulting as a Defendant on April 28, 2010, two months ***before*** Mr. Wilkie issued his report. Clearly, Plaintiff not only could have known, but it actually knew who could have been responsible for drainage problems before June 18, 2010.

Second, and more importantly, Mr. Wilkie's affidavit fails to create an issue of material fact regarding the accrual of the statute of limitations. This Court's order granting summary judgment sets forth many facts which demonstrate Plaintiff's extensive knowledge regarding the drainage problems that Plaintiff attributes to AB Consulting's deficient design. After considering all of the facts, this Court held that the uncontroverted facts demonstrate that Plaintiff knew or should have known that a claim against AB Consulting existed prior to April 28, 2007. Mr. Wilkie's affidavit does not add any facts to the Court's analysis; Mr. Wilkie simply attempts to offer his legal conclusion from the same set of uncontroverted facts:

> 6. While the HOA may have been aware of undesirable symptoms at the HOA such as standing water, erosion, etc., it is my opinion that the HOA would not have been aware that these symptoms were associated with or caused by civil construction and design defects until the report that I issued on June 17, 2010.
>
> 7. After reviewing the allegations in this matter, it is my opinion that the HOA brought suit against the Defendants as soon as practicable in this case.

By submitting an affidavit which merely reaches contradictory legal conclusions than those of this Court, Plaintiff has failed to create an issue of material fact relating to the accrual of the statute of limitations. See Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (S.C., 1990) ("Once moving party carries its initial burden, opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a genuine issue for trial.'" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986))); See also Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

In its motion for reconsideration, Plaintiff once again submits that the statute of limitations should be equitably tolled. Plaintiff argues that the statute of limitations should be tolled as long as the developer, WW & LB, maintained control of the HOA. Plaintiff reasons that the developer would not sue AB Consulting because the developer hired AB Consulting and thus AB Consulting is an agent of the developer. Plaintiff relies upon Magnolia North Prop Owners' Ass'n, Inc. v. Heritage Cmties., Inc., 397 S.C. 348, 725 S.E.2d112 (Ct. App. 2012) to support its argument.

The Court disagrees. As discussed in this Court's Order Granting AB Consulting's Motion for Summary Judgment, Magnolia North supports the proposition that the statute of limitations should be tolled as long as the potential claims would require a developer to sue itself. Id. Plaintiff argues that AB Consulting was an agent of WW & LB and thus WW & LB

would not assert claims against AB Consulting. Plaintiff fails to provide any facts or legal analysis demonstrating that AB Consulting was an agent of WW & LB or was under the control of WW & LB in performing its design services. To the contrary, the evidence in the record shows that WW & LB retained AB Consulting to perform professional engineering services by written contract. Plaintiff has not presented any evidence that WW & LB would not have asserted claims against parties involved in the design and construction of the Rivergate project. Furthermore, unlike the Plaintiff in Magnolia North, the HOA failed to assert their claims in a timely manner even after receiving full control of the association. Accordingly, no extraordinary circumstances exist warranting imposition of a doctrine which this Court has been directed by the South Carolina Supreme Court to use sparingly.

In its motion for reconsideration Plaintiff provides two additional arguments for avoiding application of the statute of limitations. First, Plaintiff argues that Defendant AB Consulting should be estopped from asserting the statute of limitations because AB Consulting's own conduct induced the Plaintiff's delay. Second, Plaintiff argues that equity and public policy provide that Plaintiff's claims should not be barred by the statute of limitations.

The Court disagrees with both of Plaintiff's arguments. First, Plaintiff fails to provide any facts which demonstrate that any action **by Defendant AB Consulting** induced Plaintiff's delay. There is no evidence in the record before this Court that AB Consulting had any contact with Plaintiff or engaged in any action which led Plaintiff astray in any way. As discussed above, Plaintiff fails to demonstrate that in performing civil engineering services AB Consulting was an agent of WW & LB. Defendant AB Consulting should not be estopped from asserting the statute of limitations because AB Consulting did not induce Plaintiff's delay.

Second, Plaintiff fails to provide any authority for why this Court should not apply the statute of limitations based upon public policy. To the contrary, adjudication of claims in a timely manner and avoiding stale claims is the public policy reason behind application of statutes of limitation. Therefore, for the same reasons as discussed above, the Court finds the Plaintiff's argument unpersuasive.

Lastly, Plaintiff argues in its motion that it has standing to bring a lawsuit related to limited common elements. In its April 4, 2014 Order granting Defendant AB Consulting's Motion for Summary Judgment this Court did not rule regarding the standing issue. Because the Court still finds the statute of limitations to be dispositive in this case, the Court sees no need to reach the issue of standing as it relates to AB Consulting.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reconsideration is DENIED.

AND IT IS SO ORDERED.

Clifton B. Newman,
Circuit Court Judge

December 5, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Rivergate Homeowners' Association,	)	
	)	
Plaintiff,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
WW & LB Development Company, LLC, Speedee Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc.,	)	C.A. No. 2010-CP-26-03901
	)	
Defendants.	)	
	)	

The undersigned, Brian R. Edwards, certifies that he is an employee of Gibbes Burton, LLC and that on the 17th day of February, 2015, he served copies of the Order Denying Plaintiff's Motion for Reconsideration of Order Granting Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment upon all counsel of record by depositing in the United States mail, with due and proper postage affixed thereto, addressed as follows:

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Brian R. Edwards

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	
	)	
Rivergate Homeowners' Association,	)	
	)	**ORDER GRANTING AB CONSULTING ENGINEERS, INC.'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF**
Plaintiff,	)	
	)	
v.	)	
	)	
WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., Chuck's Construction Co., Inc.,	)	C.A. No. 2010-CP-26-03901
	)	
Defendants.	)	

This matter came before the Court on Defendant AB Consulting Engineers, Inc.'s Motion for Summary Judgment. A hearing was held on January 17, 2014. Representing the parties at the hearing were Stacy L. Stanley, attorney for Plaintiff, G. Michael Smith, attorney for Defendant Speedee Concrete, Inc., Douglas C. Baxter, attorney for Defendant WW&LB Development Company, LLC, and Stephanie H. Burton attorney for Defendant AB Consulting Engineers, Inc.

FINDINGS OF FACT

This case involves claims by Plaintiff, a homeowner's association, against WW&LB (the developer), AB Consulting (a civil engineering firm), Chuck's Construction (a grading contractor), and Speedee Concrete (a concrete trade contractor). Plaintiff's claims relate to a housing development known as Rivergate located in Little River, South Carolina. Plaintiff's claims relate to complaints that certain design and construction work at Rivergate is defective. Specifically, Plaintiff contends that certain asphalt roads were not properly constructed and are deteriorating, that concrete driveways were constructed with too steep of a slope, and that the stormwater management system is insufficient causing ponding water and drainage issues.

Wayne Winderman and Luther Bellamy formed WW&LB to develop the Rivergate project which is located off of Highway 17 in Little River, South Carolina. (Bellamy Dep. p. 28-29). It appears that on May 14, 1999, AB Consulting and Wayne Winderman entered into an Agreement between Owner and Engineer for Professional Services pursuant to which AB Consulting agreed to perform certain civil design services, including preparing grading and storm water management plans, for the Rivergate project and submitting such plans to governmental authorities to obtain appropriate permits. (Drucker Dep. Ex. 3). Pursuant to that Agreement, AB Consulting prepared engineering plans and specifications for the project in 1999 and 2000. Site work commenced at the Rivergate project in 2000.

On July 10, 2000, Braxton Lewis of AB Consulting wrote to WW&LB concerning deviations from AB Consulting's plans during construction, including, deviations from the stormwater system design and that modifications to the grading had created "severe driveway slopes on the south east side of the proposed buildings." (Drucker Dep. Ex. 11). AB Consulting and WW&LB entered into a Hold Harmless Agreement pursuant to which WW&LB agreed to defend and indemnify AB Consulting from and against any and all expenses and liabilities related to "installation of the stormwater management system and revisions to the proposed grades at the River Gate project." (Drucker Dep. Ex. 10).

AB Consulting completed its services when WW&LB received operational approval for the water and sewer in the beginning of 2001. (Drucker Dep. p. 140-141). According to records of the South Carolina Secretary of State, Plaintiff Rivergate Homeowners' Association (HOA) was incorporated on February 20, 2001. The Horry County Public records provided to the Court reveal that on March 16, 2001, a Master Deed for the Rivergate Horizontal Property Regime was filed with Horry County Register of Mesne Conveyances. That Master Deed created a

Horizontal Property Regime called Rivergate. That deed also conveyed certain limited real property to the horizontal property regime. The property comprised 0.13 acre and 0.06 acre parcels designated as "Signage," **0.58 acres designated "Ingress & Egress**," 0.30 acres for "Building '2'," and 0.29 acres for "Building '6'," for a total of approximately 1.37 acres. (Master Deed). The Master Deed allowed for the future addition of real property to Rivergate:

> **Article III**
>
> The GRANTOR hereby reserves unto itself, its successors and assigns, the right and option , to be exercised at its sole discretion, to submit the Phases II through XL property, or any one or more of such Phases, or to submit additional COMMON ELEMENTS consisting of, but not limited to **roadways**, clubhouses, pools, open areas, sidewalks, and parking areas, and to the provisions of this Master Deed, thereby causing such Phase(s) or COMMON ELEMENTS, to become and be a part of Rivergate Horizontal Property Regime . . ..

The Master Deed states that each condominium owner owns an undivided interest in Common Elements of Rivergate and requires Plaintiff to maintain the Common Elements. In that regard, the Master Deed states in relevant part:

> **Article V**
>
> Each UNIT shall be conveyed and treated as an individual property capable of independent use and fee simply ownership and the Owner or Owners of each UNIT shall own, as an appurtenance to the ownership of each said UNIT, an undivided interest in the COMMON ELEMENTS, the undivided interest appurtenant to each said UNIT being that which is hereinafter specifically assigned thereto.

> **Article XXII**
>
> The ASSOCIATION, at its expense, shall be responsible for the maintenance, repair and replacement of all of the COMMON ELEMENTS, including those portions thereof which contribute to the support of the building . . ..

> The Board of Directors of ASSOCIATION shall cause the COMMON ELEMENTS to be inspected and evaluated annually by a professional engineer, architect, qualified property inspector, or other qualified professional, who shall then render a maintenance recommendation report to the Board of Directors of the ASSOCIATION and to the Grantor as to the condition of the COMMON ELEMENTs as well as any recommendation for repairs and maintenance of the COMMON ELEMENTS.

On the other hand, certain property is not a Common Element and must be maintained by each individual home owner. To that end, the Master Deed provides:

> **Article IV**
>
> Limited Common Elements as the term is used herein shall mean and comprise the following: (a) attic space, if any, **grade level concrete driveways**, patios or stoops and porches accessible by normal means from the UNIT, immediately adjacent to or above the UNIT; . . . LIMITED COMMON ELEMENTS are intended for the exclusive use and benefit of the UNIT which it is associated with.

> **Article XXII**
>
> **Every Owner must perform promptly all maintenance and repair work within his UNIT and of all LIMITED COMMON ELEMENTS to which such UNIT has exclusive use**, which, if omitted, would affect the CONDOMINIMUM in its entirely or any party belonging to other Owners, and shall be expressly responsible for the damages and liability which his failure to so do may engender . . ..

Between June 5, 2001 and January 20, 2012, the Master Deed of Rivergate Horizontal Property Regime was amended thirty-four times and such amendments were filed with the Register of Deeds Office and are part of the public record. These amendments transferred additional parcels of land from WW&LB to the Rivergate Horizontal Property Regime. Notably, other than a portion of Rivergate Lane described as .58 acres for ingress and egress, the remaining roads were never conveyed by WW&LB to Rivergate.

The stormwater drainage system designed by AB Consulting is an exfiltration system a substantial portion of which is located beneath the roads in Rivergate. (Wilkie Dep. p. 70). It appears that concerns about drainage were expressed by homeowners early in the development of Rivergate. For instance at the annual homeowners meeting on March 8, 2004, the meeting minutes note: "Mr. Winderman noted water drains down hill and he cannot do anything in the wetlands area, however he would address the drainage problems at Rivergate." (Dunn Dep. Ex. 15). For instance, on May 12, 2005, the Rivergate Homeowners' Association held an annual meeting. The minutes reveal that drainage issues were discussed in that meeting. (Dunn Dep. Ex. 21). On May 12, 2005, an Ad Hoc Committee of the Rivergate Homeowners' Association was formed to address various issues, including problems with drainage. Jim Dunn served as chairman of the committee. Much of the deposition testimony of Jim Dunn has been submitted to the Court in connection with this motion. Dunn contacted numerous governmental agencies on behalf of the ad hoc committee complaining about a wide variety of items, including drainage.

On May 20, 2005, Donald Miller, a Rivergate homeowner, sent a memorandum to the Ad Hoc Committee stating that "If some owners believe that areas of the Rivergate property has [*sic*] drainage issues and the committee believes that these issues may be credible, I believe we need to hire and Engineer familiar with such issues to evaluate our property and give the committee a hard report for possible discussion of these issues with Wayne [Winderman]." (Dunn Dep. Ex. 25).

On July 6, 2005, Winderman wrote to the Ad Hoc Committee on Rivergate Homeowners' Association letterhead and advised that "We have made inspections of drainage issues and will address the same as quickly as possible." (Dunn Dep.). On September 19, 2005,

Dunn, as chair of the Ad Hoc Committee, filed a complaint with the South Carolina Department of Labor, Licensing and Regulation (SCLLR) that identified drainage as a complaint filed on behalf of the homeowners; "Nine pages of photography washed out parking pads, standing water, storm water, erosion." (Dunn Dep. Ex. 2).

In January 2006, Dunn contacted the Horry County Planning Department about issues with Rivergate, including "drainage issues." (Dunn Dep. Ex. 47). On page 86, Dunn testified that he attended a zoning ordinance meeting in January 2006:

> Q: Was the zoning meeting that is referenced in your email something you had already been to or something you were getting ready to go to?
>
> A: This is about the drainage issue and the culvert where the illegal street connects to Baker.

On November 4, 2006, a meeting of the Rivergate Homeowners took place. Various complaints were discussed, including drainage issues. (Dunn Dep. Ex. 31). Importantly, on January 12, 2007, Robert Sanger (Sanger), a Rivergate homeowner, filed a complaint in the Horry County Court of Common Pleas, C.A. No. C.A. No. 07-CP-26-0228). Sanger asserted various claims relating to defective design and construction at Rivergate. Specifically, in paragraph 47 of his complaint, he alleged defects relating to:

> k. Improper construction of sidewalks, driveways and asphalt roadway;
>
> l. Improper driveway slopes; and
>
> m. Defective storm water management drainage system.

AB Consulting was not a defendant in that action.

On April 20, 2008, Sanger filed an Amended Complaint in the Horry Court of Common Pleas. The factual allegations and legal claims in Sanger's Amended Complaint are very similar to those contained in his initial complaint. Sanger joined as defendants several additional parties,

alleging that they were contractors, subcontractors, installers, or design professionals who performed defective work on the Rivergate project. Sanger's Amended Complaint did not join AB Consulting as a defendant.

On June 13, 2008, Plaintiff filed its initial Complaint in this Court, which is substantially similar to Sanger's Amended Complaint. Plaintiff did not join AB Consulting as a Defendant. On March 21, 2009, Plaintiff filed its First Amended Complaint, which likewise did not join AB Consulting as a defendant. On March 31, 2009, Plaintiff's case (C.A. No. 08-CP-26-4690) was consolidated with Sanger's case (C.A. No. 07-CP-26-0228). On August 18, 2009, the consolidated case was stricken by agreement of the parties pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. By Order dated April 16, 2010, the case was restored to the docket and Plaintiff was permitted to file a Second Amended Complaint. On **April 28, 2010**, Plaintiff filed its Second Amended Summons and Complaint, which joined AB Consulting as a defendant for the first time in this litigation.

CONCLUSIONS OF LAW

Pursuant to sections 15-3-510 and 15-3-530(1) of the South Carolina Code, Plaintiff's causes of action for negligence, breach of warranty and breach of contract must be commenced within three years after Plaintiff knew, or should have known by the exercise of reasonable diligence, that some claim might exist. See Dillon County Sch. Dist. Two v. Lewis Sheet Metal, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985). Section 39-5-150 provides that an action under the South Carolina Unfair Trade Practices Act must likewise be brought within three years.

Under the discovery rule, the statute of limitations "begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the

exercise of reasonable diligence." Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, __, 597 S.E.2d 27, 29 (Ct. App. 2004). As the South Carolina Supreme Court recognized in Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 302, 278 S.E.2d 333, 334 (1981), it is not necessary that Plaintiff know the exact legal claim it might assert or the identity of all of the possible parties; instead "[t]he exercise of reasonable diligence means simply that an injured party must act with some promptness 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 test is objective and not subjective and the statute of limitations accrues regardless of whether the injured party comprehends the full extent of injury. See Republic Contracting Corp. v. S.C. Dep't of Hwys & Public Transp., 332 S.C. 197, 503 S.e.2d 761 (Ct. App. 1998). Thus, if Plaintiff knew, or should have known through the exercise of reasonable diligence, that a claim against AB Consulting existed on or before April 28, 2007, Plaintiff's claims against AB Consulting are barred by the applicable statute of limitations. The Court concludes that Plaintiff's claims are so barred because, as discussed in detail above, the uncontroverted evidence establishes that Winderman, the HOA, and the homeowners were well aware of drainage issues long before April 28, 2007.

At the hearing, Plaintiff contended that Section 15-3-670 applies, and that if any defendant was guilty of fraud, gross negligence or recklessness, the statute of limitations does not apply. Section 15-3-660 states specifically that its provisions apply only to the limitations imposed under Sections 15-3-640 to 15-3-660 (the statute of repose). Section 15-3-670 does not apply to the statute of limitations set forth in 15-3-510 and 15-3-530 and it is not applicable here.

Plaintiff argues that even if its claims accrued prior to April 28, 2007, the statute of limitations should be equitably tolled until November 2007, when Winderman resigned as

chairman of Plaintiff HOA. Equitable tolling was adopted by the South Carolina Supreme Court in Hooper v. Ebenezer Senior Serv. & Rehab. Center, 386 S.C. 108, 687 S.E.2d 29 (2009). That case involved a wrongful death and survival action against nursing home. Although the complaint was timely filed, it was not served upon Ebenezer in a timely manner because the plaintiff could not locate Ebenezer's registered agent identified on the Secretary of State's website. In that case, the Court held that the person asserting equitable tolling has the burden of establishing sufficient facts to support equitable tolling. The court also noted that "equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control". The Supreme Court cautioned that "[e]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." The court indicated that equitable tolling is available where:

a. Extraordinary circumstances prevented the plaintiff from filing despite due diligence;

b. The plaintiff actively pursued his remedies by filing a defective pleading during the statutory period or where the plaintiff was induced or tricked by the defendant into allowing the deadline to pass; and

c. The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim.

Id. at 231-232, 659 S.E.2d at 220-221.

Subsequent cases involving equitable tolling have generally found that the doctrine did not apply. See e.g. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008)("Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to

human affairs. . . . Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations."); American Legion Post 15 v. Horry County, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009)("In this case, we find no extraordinary circumstances or active misleading by the County to warrant tolling the statutory period of limitations. Nothing prevented the posts from learning of the governing statutes, as we find is required for due diligence."); Kimmer v. Wright, 396 S.C. 53, 62-63, 719 S.E.2d 265, 270 (Ct. App. 2011)("Although we are sympathetic to Kimmer's situation, we are mindful the supreme court cautioned the doctrine of equitable tolling to be used sparingly. We find application of the doctrine is not justified under the circumstance of this case.").

Plaintiff relies upon Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Cmties., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) in support of its argument. Magnolia North, involved claims asserted by a property owners' association against the developer of a condominium complex for construction defects. The developer contended that the claims against it accrued when the POA was formed in 2000. The Court of Appeals affirmed the trial court's ruling holding that because the POA's board consisted of the defendant developer's officers until September 9, 2002, equitable tolling should apply. In that regard, the court stated: "We find unpersuasive Appellants' claims that an organization they controlled would have initiated an action against itself during this period. Further after the property owners gained control over the POA, they exercised due diligence by filing this action on May 28, 2003, approximately eight months after assuming control." Id. at 125, 397 S.C. at 372. Magnolia North does not apply with respect to Plaintiff's claims against AB Consulting. AB Consulting did not ever control the HOA; in fact, AB Consulting's work was largely complete before Plaintiff came into existence. No evidence was presented to this Court that while involved in the HOA, Wayne Winderman

would not have asserted claims against parties involved in the design and construction of Rivergate. Unlike the plaintiff in Magnolia North, this Plaintiff did not timely initiate an action against AB Consulting. There is likewise no evidence that AB Consulting engaged in any conduct which misled Plaintiff from asserting its rights. Accordingly, no extraordinary circumstances exist warranting imposition of a doctrine which this Court has been directed by the South Carolina Supreme Court should be used sparingly.

CONCLUSION

Based upon the findings of fact and conclusions of law in this case, it is

ORDERED that AB Consulting is entitled to summary judgment against Plaintiff.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

April 4, 2014
Columbia, South Carolina