THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2010-CP-26-03901
Appellate Case No.: 2015-000248

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction,William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometries, Inc., Eric Yazwinski, Law

Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey,

Defendants,

Of Whom Speedee Concrete, Inc. and Chuck's Construction, Inc. are the

Respondents.

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,

Third-Party Defendants,

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc.,

Defendants.

Of Whom AB Consulting Engineers, Inc. is the

Respondent.

FINAL BRIEF OF RESPONDENT AB CONSULTING ENGINEERS, INC.

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

ARGUMENT 10

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS 10

A. Appellant's Claims Accrued Before April 28, 2007 10

B. Equitable Tolling Does Not Apply 14

C. Equity and Public Policy Considerations Support the Application of the Statute of Limitations 16

II. THERE ARE ADDITIONAL SUSTAINING GROUNDS TO SUPPORT SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING 18

A. Appellant Does Not Have Standing 19

B. AB Consulting Did Not Owe Any Duty to Appellant 21

i. AB Consulting Does Not Owe Appellant a Duty of Care Arising From Statute 21

ii. AB Consulting's Contract with WW&LB Did Not Create a Tort Duty in Favor of Appellant 23

iii. Appellant is Not Owed a Duty of Care Based on Any Legally Recognized Status 24

iv. Appellant Does Not Have Any Legally Recognized Property Interest 25

v. AB Consulting Did Not Owe a Duty of Care Arising From a Special Relationship 25

C. AB Consulting Did Not Owe or Breach Any Warranty to Appellant 26

D. Appellant Cannot Assert a Claim Against AB Consulting Under the South Carolina Unfair Trade Practices Act 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

16 Jade Street, LLC v. R. Design Constr. Co., LLC, 747 S.E.2d 770 (2013) 23
American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009) 15
Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (2003) 24
Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) 23
Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 13
Beachwalk Villas Condominium Association v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991) 27
Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003) 24
Citizens for Lee Cnty. v. Lee Cnty., 308 S.C. 23, 416 S.E.2d 641 (1992) 22
Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004) 10
Collins Holding Corp. v. Defibaugh, 373 S.C. 446, 646 S.E.2d 147 (Ct. App. 2007) 29
Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 544 S.E.2d 838 (2001) 23, 25, 26
Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996) 11
Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), ... 10, 11, 12, 17
Dorrell v. South Carolina Dep't of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004) 23
Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003) 23
Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003) 21
Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951) 27
Hooper v. Ebenezer Senior Serv. & Rehab. Center, 386 S.C. 108, 687 S.E.2d 29 (2009) 14, 15
Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003) 21
Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) 22, 23
I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 18
Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989) 28
Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) 15
Magnolia North Property Owners Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) 15
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 14
McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 644 S.E.2d 43 (2007) 21, 23
McKinney v. CSX Transp., Inc., 298 S.C. 47, 378 S.E.2d 69 (Ct. App. 1989) 17
Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) 24
Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996) 17

Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986) 29
Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994) 22
Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011) 21
Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008) 17
Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) 22
Republic Contracting Corp. v. S.C. Dep't of Hwys & Public Transp., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998) 11, 13
Reynolds v. Ryland Group, Inc., 340 S.C. 331, 531 S.E.2d 917 (2000) 30
Rogers v. S.C. Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995) 21
Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) 19
Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001) 24
Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) 24
Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008) 28
Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981) 10
South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986) 25, 26
Summers v. Harrison Constr., 298 S.C. 451, 381 S.E.2d 493 (Ct. App. 1989) 22
Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1994) 25, 26, 27
Universal C.I.T. Credit Corp. v. Trapp, 232 S.C. 297, 101 S.E.2d 829 (1958) 25
Vick v. South Carolina Dept. of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). 20
Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 338 S.E.2d 155 (1985) 21
Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486, 502 (Ct. App. 2006). 29

STATUTES

S.C. Code Ann. § 39-5-10 29
S.C. Code Ann. § 39-5-150 10
S.C. Code Ann. § 40-22-250 30
S.C. Code Ann. § 6-9-40 22
S.C. Code Ann. § 6-9-5(A) 22

RULES

Rule 220(c), SCACR 18
Rule 56, SCRCP 14

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS?

    A. DID THE TRIAL COURT CORRECTLY DETERMINE THAT APPELANT'S CLAIM ACCRUED BEFORE APRIL 28, 2007?

    B. DID THE TRIAL COURT CORRECTLY CONCLUDE THAT EQUITABLE TOLLING DOES NOT APPLY?

    C. DID THE TRIAL COURT CORRECTLY DETERMINE THAT EQUITY AND PUBLIC POLICY CONSIDERATIONS SUPPORT THE ENFORCEMENT OF THE STATUTE OF LIMITATIONS?

2. ARE THERE ADDITIONAL SUSTAINING GROUNDS TO SUPPORT THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING?

    A. DOES APPELLANT LACK STANDING BECAUSE THE DRIVEWAYS ARE LIMITED COMMON ELEMENTS AND IT DOES NOT OWN THE ROADS?

    B. DID AB CONSULTING OWE APPELLANT ANY DUTY OF CARE WHEN IT PERFORMED SERVICES IN 1999 AND 2000?

    C. DID AB CONSULTING BREACH ANY WARRANTY OWED TO APPELLANT?

    D. CAN APPELLANT ASSERT ANY CLAIM AGAINST AB CONSULTING UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT?

STATEMENT OF THE CASE

On January 12, 2007, Robert Sanger, a Rivergate homeowner, filed a complaint in the Horry County Court of Common Pleas, C.A. No. 07-CP-26-0228. (*Sanger* Complaint, R. pp. 97-117). Sanger, also represented by Appellant's counsel, asserted various claims relating to the design and construction of the Rivergate subdivision, including, importantly, improper construction of driveways, improper driveway slopes, and deficiencies in the stormwater management system. Id. Although Sanger purported to assert a class action on behalf of all Rivergate homeowners, a class was never certified. Id. Sanger did not name Respondent AB Consulting Engineers, Inc. ("AB Consulting") as a defendant in that lawsuit. On April 20, 2008, Sanger filed a similar Amended Complaint, but joined several additional subcontractors, installers, and design professionals as named defendants. (*Sanger* Amended Complaint, R. pp. 118-141). Again, Sanger did not join AB Consulting as a defendant. Id.

On June 13, 2008, Appellant Rivergate Homeowners Association filed a Complaint against numerous defendants, alleging claims identical to those asserted in the *Sanger* Amended Complaint. (Complaint, R. pp. 142-166). Appellant did not name AB Consulting as a defendant. Appellant alleged the same allegations as those asserted by Sanger relating to "improper construction of sidewalks, driveways, and asphalt roadways...improper driveway slopes...and defective storm water management drainage system." (Id; Sanger Amended Complaint, R. pp. 118-141).

On March 21, 2009, Appellant filed its First Amended Complaint which likewise did not join AB Consulting as a defendant and alleged the same defects. (First Amended Complaint, R. pp. 167-187). On March 31, 2009, Appellant's case was consolidated with

the *Sanger* case. (Order filed March 31, 2009, R. pp. 1-3). On August 18, 2009, the case was stricken by agreement of the parties pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. (Order dated August 18, 2009, R. pp. 4-5).

By Order dated April 28, 2010, the case was restored and Appellant was permitted to file a Second Amended Complaint. (Order dated April 28, 2010, R. pp. 6-8). That same day, Appellant filed its Second Amended Summons and Complaint which for the first time joined AB Consulting as a defendant. (Second Amended Complaint, R. pp. 188-209). The Second Amended Complaint alleged the same defects relating to roadways, driveways, and drainage as had been alleged by both Appellant and Sanger in their original pleadings. Id.

In response to the Second Amended Complaint, AB Consulting filed an Answer and asserted, among other defenses, a defense based upon the statute of limitations. (September 9, 2010 Answer of AB Consulting, R. pp. 229-235). On April 12, 2013, AB Consulting filed a motion for summary judgment. (Motion for Summary Judgment filed April 15, 2013, R. pp. 52-55).

On January 17, 2014, Judge Clifton Newman held a hearing on the motion for summary judgment. (Order filed May 19, 2014, R. pp. 23-33). On May 19, 2014, Judge Newman issued an Order granting summary judgment in favor of AB Consulting. Id. On May 28, 2014, Appellant filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (May 28, 2014 Motion for Reconsideration, R. pp. 75-83). On September 8, 2014, Appellant's motion for reconsideration was heard by Judge Newman. (Order filed December 10, 2014, R. pp. 34-38). By order filed on December 10, 2014, Judge Newman denied the motion for reconsideration. Id. Appellant now appeals the Trial Court's decision. (March 2, 2015 Notice of Appeal, R. pp. 236-237).

STATEMENT OF FACTS

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. (Drucker Dep. Ex. 3, R. pp. 457-459). The services included preparing grading and stormwater management plans for the Rivergate subdivision and submitting such plans to governmental authorities to obtain appropriate permits. Id. On June 21, 1999, Wayne Winderman and Luther Bellamy formed WW&LB Development Company, LLC ("WW&LB") to develop Rivergate, an eight acre subdivision comprised of 37 residential units located near Highway 17 in Little River, South Carolina. (Jan. 17, 2014 Hr'g Tr. 9:1-10:5; R. p. 246, line 1-p. 247, line 5). Pursuant to the Agreement with Winderman, AB Consulting prepared plans and specifications for the Rivergate project in 1999 and 2000. (Jan. 17, 2014 Hr'g Tr. 45:3-12; R. p. 282, lines 3-12). Site work commenced in 2000. Id. Chuck's Construction Co. was retained by WW&LB to perform site grading, which included installation of the storm water management system. (Drucker Dep. Ex. 12, R. pp. 463-466). Speedee Concrete constructed concrete parking pads to individual units in 2004 to 2007 pursuant to an agreement with WW&LB. (Drucker Dep. pp. 68-72, R. pp. 440-444).

Once construction commenced, AB Consulting became concerned that the construction deviated from its design. (Drucker Dep. Ex. 11, R. pp. 461-462). On July 10, 2000, Braxton Lewis of AB Consulting wrote to Winderman concerning deviations from AB Consulting's plans during construction. Id. Lewis wrote that "the proposed stone envelopes around the culverts...were omitted without our consent." Id. Lewis also expressed concern over the grading modifications "which appear to create severe driveway

slopes on the south east side of the proposed buildings." Id. AB Consulting completed its services when WW&LB received operational approval for the water and sewer systems in 2001. (Jan. 17, 2014 Hr'g Tr. 45:3-12; R. p. 282, lines 3-12).

Appellant did not exist when AB Consulting performed its professional services for Winderman. Appellant was subsequently incorporated on February 20, 2001. (Master Deed, R. pp. 1103-1160). On March 16, 2001, a Master Deed for the Rivergate Horizontal Property Regime was filed with the Horry County Register of Mesne Conveyances. Id. The Master Deed created a Horizontal Property Regime. Id. The deed conveyed certain limited real property to the horizontal property regime. Id. The property comprised 0.06 and 0.13 acres 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. Id.

Article III of the Master Deed allowed for the future addition of real property to Rivergate:

> III.
>
> The GRANTOR hereby reserves unto itself, its successors or 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.

Id.

The Master Deed also states that each condominium owner owns an undivided interest in the Common Elements of Rivergate and requires Appellant to maintain the

Common Elements. In that regard, Articles V and XXIII of the Master Deed state in relevant part:

V.

> Each UNIT shall be conveyed and treated as an individual property capable of independent use and fee simple 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.

XXIII.

> 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.

Id.

On the other hand, certain property is not a Common Element and must be maintained by each individual home owner. Articles IV and XXII state in relevant part:

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.

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 CONDOMINIUM in its

> entirety or any part belonging to other Owners, and shall be expressly responsible for the damages and liability which his failure to so do may engender.

Id. (emphasis added)

Between June 5, 2001 and January 20, 2012, the Master Deed of Rivergate Horizontal Property Regime was amended thirty-four times. (Master Deed and Amendments; R. pp. 1103-1160, R. pp. ___). These amendments transferred additional parcels of land from WW&LB to the Rivergate Horizontal Property Regime. Id. Notably, other than a portion of Rivergate Lane described as .58 acres for ingress and egress, the roads in the development were never conveyed by WW&LB to the Regime. Id.

Rivergate includes a main road, Rivergate Lane, that intersects with Highway 17 at the north end of the subdivision. (Wilkie Dep. Ex. 2, R. pp. 928-935). Eight smaller lanes or streets connect to Rivergate Lane. Id. One street is connected to Baker Street, which is a public road that runs parallel to Rivergate Lane. Id. Each unit has a concrete driveway leading to the unit.

The stormwater management system designed by AB Consulting is an exfiltration system. Storm water flows into catch basins or curb inlets into a perforated pipe which allows the water to drain into the soil around the perforated piping. Id. This exfiltration system is located primarily beneath the roads of Rivergate. (Drucker Dep. p. 70, R. p. 442).

Concerns about drainage were expressed by homeowners early in the development of Rivergate and long before this lawsuit against AB Consulting was filed. (Dunn Dep. Ex. 15, R. pp. 584-586). For example, at a local homeowners meeting on March 8, 2004, the minutes note: "Mr. Winderman noted water drains downhill and he cannot do anything in the wetlands area, however he would address **the drainage problems at Rivergate**." Id. (emphasis added). Likewise, on May 12, 2005, at the Rivergate Homeowners'

Association annual meeting, the attendees discussed water drainage issues. (Dunn Dep. Ex. 21, R. pp. 616-626). In fact, on that same day, an Ad Hoc Committee of the Rivergate Homeowners' Association was formed to address various issues, including problems with drainage. Id. Jim Dunn served as chairman of the committee. Id. Dunn contacted numerous governmental agencies on behalf of the Ad Hoc Committee complaining about a wide variety of issues, notably drainage problems. (Dunn Dep. Ex. 2, R. pp. 579-581).

After its creation, the Ad Hoc Committee solicited and received information from numerous Rivergate homeowners regarding their complaints. (Dunn Dep. pp. 22-23; R. pp. 468-469). On May 20, 2005, Pat Connors, a Rivergate homeowner, wrote to the Ad Hoc Committee: "Drainage: The units along the golf course, of which mine is one, have a severe drainage problem running the length of the property. My back yard is literally eroding away after every heavy rainfall." (Dunn Dep. Ex. 24, R. pp. 671-672).

On May 20, 2005, Don Miller, a Rivergate homeowner, sent a memorandum with an attached news article to the Ad Hoc Committee. (Dunn Dep. p. 199-200, R. pp. 533-534). Miller recommended, "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 an Engineer familiar with such issues..." (Dunn Dep. p. 212-213, R. pp. 539-540). The news article attached to Miller's memorandum echoed his recommendation that an engineer should be hired "to inspect the complex as soon as possible" once control of the homeowners' association passes from the developer to the homeowners. (Dunn Dep. Ex 21, R. pp. 616-626).

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." Id. On July 20, 2005, the Ad Hoc Committee wrote to the homeowners, "There is a very serious drainage problem there between these homes and the back of the last home. Requested Horry County Public Works to review drainage issues along Baker Street where it connects to Rivergate." Id. Wayne Winderman was also keenly aware of concerns about drainage issues and wrote a July 6, 2005 letter to the Rivergate Ad Hoc Committee: "We have made inspections of drainage issues and will address the same as quickly as possible." Id.

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 on behalf of the homeowners and identified drainage as one of the complaints. The complaint included, "Nine pages of photography, washed out parking pads, standing water, storm water, erosion..." (Dunn Dep. Ex. 2, R. pp. 579-581). On November 4, 2006, at a meeting of the Rivergate Homeowners' Association, various complaints were discussed by the homeowners, including drainage issues. (Dunn Dep. Ex. 36, R. pp. 749-752). For example, the minutes from that meeting state: "[Two homeowners] have similar issue [sic] with flooding & washout at their corner at Baker Street. At one time in the spring after very heavy rain the water was up to the sidewalk...the last heavy rain you could see water just flowing down Rivergate...the water doesn't go into any of the drains due to the grade being above street level..." Id.

In its Second Amended Complaint, Appellant asserts causes of action against AB Consulting for: (1) negligence; (2) breach of express and implied warranties; and (3) violation of the South Carolina Unfair Trade Practices Act. Appellant contends that AB Consulting did not properly design the slopes of driveways and the stormwater

management system which has resulted in drainage issues at Rivergate. (Second Amended Complaint, R. pp. 188-209).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Appellant's Claims Accrued Before April 28, 2007

Pursuant to Sections 15-3-510 and 15-3-530(1) of the South Carolina Code, Appellant's causes of action for negligence, breach of warranty, and breach of contract must be commenced within three years after Appellant knew, or should have known by the exercise of reasonable diligence, that some claim against AB Consulting might exist. Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds, Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995). Likewise, the South Carolina Unfair Trade Practices Act provides: "No action may brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit." S.C. Code Ann. § 39-5-150.

Under South Carolina's 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, 371, 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, 278 S.E.2d 333, 334 (1981), it is not necessary that the plaintiff know the exact legal claim it might assert or the identity of all 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 the statute of limitations accrues regardless of whether the injured party comprehends the full extent of the 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).

Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996), is on point here. In that case, Plaintiff Dean hired a contractor in November 1984 to inspect a crack that she believed had been caused one month previously when Ruscon Corporation began pile driving for construction of the Omni Hotel in Charleston. The following year, Ruscon continued pile driving and Dean observed that the crack had expanded. Id. Six years later in 1991, Dean sued Ruscon. Id. The trial court granted directed verdict in favor of Ruscon and ruled that Dean's claim accrued in 1984 when she initially discovered the crack. Id. In affirming the decision of the trial court, the South Carolina Supreme Court held that the statute of limitations began to run when Dean first knew of any problem, not when she determined that it might be serious:

> Because Dean had notice in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date... The fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial.

Id.

The Dillon County School District No. 2 case is also instructive. There, a school district hired various construction and design professionals to construct the Dillon County

High School. Dillon Cnty Sch. Dist. No. 2, 286 S.C. at 207, 332 S.E.2d at 555. Even before construction was completed in January 1971, there were reports of roof leaks. Id. On November 30, 1972, the project architect referred to the leaking roof as a "continual problem" and suggested that the school board involve the county attorney. Id. Over the next nine years, numerous attempts to remedy the problem failed and the School District filed suit in June 1981. Id. The trial court granted summary judgment against the District. The District argued on appeal that the statute of limitations did not begin to run until 1980 when it learned that its roof was irreparably damaged. Id. This Court affirmed the trial court's decision, concluding that the statute accrued when the District first had notice of leaks.

> The fact, however, the School District did not appreciate the full extent of the damage until later is immaterial...we are satisfied that by November, 1972, when the architect for the project referred to the roofing problem as a 'continual problem' and suggested possibly involving the county attorney, the School District either knew or reasonably should have known its problem with the roof was a serious one."

Id.

In this matter, no genuine issue of material fact exists; it clear that Appellant was aware of drainage concerns as early as 2004. The uncontroverted evidence establishes that Winderman, the Rivergate Homeowners' Association, and the homeowners were all well aware of potential drainage issues long before April 28, 2007. As early as March 2004 at Appellant's annual meeting, the homeowners discussed issues regarding drainage, and Winderman acknowledged the drainage concerns. (Dunn Dep. Ex. 15, R. pp. 584-586). In May 2005, the homeowners formed an Ad Hoc Committee to address multiple issues, including drainage problems. (Dunn Dep. Ex. 21, R. pp. 616-626). Several residents, including Don Miller and Pat Connors, wrote to the Ad Hoc Committee and detailed

drainage issues. (Dunn Dep. Ex. 24, R. pp. 671-672). Miller even suggested hiring an engineer to investigate the drainage problem. (Dunn Dep. p. 212-213, R. 539-540). In a July 6, 2005 letter to the Ad Hoc Committee, Winderman promised to address the drainage problems "as quickly as possible". (Dunn Dep. Ex. 21, R. pp. 616-626). Complaints were filed with various governmental agencies long before 2007 complaining of drainage issues.

Appellant incorrectly argues that its claims did not accrue until its expert Drew Wilkie issued a report on June 18, 2010. Appellant's argument is not only illogical but also legally defective. Appellant clearly had knowledge of potential claims against AB Consulting long before June 18, 2010. In fact, it filed its Seconded Amended Complaint two months previously. Accrual does not depend on the expertise of the plaintiff or the hiring of an expert to determine the full extent of the injury. See Republic Contracting Corp., 332 S.C. at 209, 503 S.E.2d at 768 (affirming trial court's grant of summary judgment because the record showed ample evidence to prompt the plaintiff to investigate a possible claim more than three years prior to filing suit).

Appellant concedes that its argument that some issue of material fact exists hangs solely upon an affidavit of Drew Wilkie. (Jan. 17, 2014 Hr'g Tr. 120:9-23, R. p. 357, lines 9-23). Wilkie's affidavit does not create any issue of material fact. Wilkie has no personal knowledge regarding the issues at Rivergate before he was hired in 2007 by Appellant's counsel or what Appellant knew prior to 2007. To the contrary, Wilkie merely improperly attempts to offer an unqualified legal conclusion.

By submitting an affidavit that attempts only to reach contradictory legal conclusions than those of the Trial Court, Appellant has failed to create any issue of material fact. See Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d

537, 545 (1991) ("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))(emphasis added); 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.")(Emphasis added). There is no genuine issue of material fact here – Appellant had known for years that there were complaints about drainage in Rivergate. The Trial Court properly determined that Appellant's claims are barred by the statute of limitations.

B. Equitable Tolling Does Not Apply

The Trial Court correctly rejected Appellant's wishful argument that despite the running of the statute of limitations, equitable tolling preserves Appellant's belated claims. 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 a 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. Id. In that case, the Court held that the person asserting equitable tolling has the burden of establishing sufficient facts to support that defense. Id. 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". Id. 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." Id. 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. American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (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.").

Appellant incorrectly relies upon Magnolia North Property Owners Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). There, a property owners' association asserted claims against the developer of a condominium

complex for construction defects. This Court affirmed the trial court's ruling, holding that because the board of the property owners' association consisted of the defendant developer's officers until September 9, 2002, equitable tolling should apply. In that regard, the court stated: "We find unpersuasive [the developer's] 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.

Magnolia North does not apply in this case. AB Consulting did not ever control the homeowners' association. (Gardner Dep. p. 108, R. p. 833). In fact, AB Consulting's work at Rivergate concluded before the homeowners' association came into existence on February 20, 2001. (Jan. 17, 2014 Hr'g Tr. 45:3-12; R. p. 282, lines 3-12). There is no evidence that Appellant made any complaint to or had any contact with AB Consulting before service of its Second Amended Complaint. There is no evidence that AB Consulting ever misled Appellant in any way. There is no evidence that WW&LB would have refrained from asserting any claims against AB Consulting for its role in the design of Rivergate if WW&LB had believed such claims existed. Accordingly, no extraordinary circumstances exist warranting the imposition of a doctrine which the South Carolina Supreme Court has determined should be used sparingly.

C. Equity and Public Policy Considerations Support the Application of the Statute of Limitations

Appellant advances two erroneous arguments to avoid the application of the statute of limitations to its overly stale claims. First, Appellant incorrectly argues that AB Consulting should be estopped from asserting the statute of limitations because AB Consulting's own conduct somehow induced Appellant's delay. There is no evidence that

AB Consulting had any contact with Appellant or engaged in any action which led Appellant astray in any way. "A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been **induced by the defendant's conduct**." Dillon Cnty. Sch. Dist. No. Two, 286 S.C. at 218-19, 332 S.E.2d at 561 (emphasis added). Unlike equitable tolling, equitable estoppel requires a showing that the defendant has made a misrepresentation to the plaintiff. See Magnolia North, 397 S.C. at 372, 725 S.E.2d at 125.

Grappling to find a misrepresentation made by AB Consulting, Appellant mistakenly relies upon a single letter that was not authored by AB Consulting, but instead by Wayne Winderman of WW&LB. In his July 6, 2005 letter to the homeowners, Wayne Winderman indicated that inspections and repairs would be commenced "as quickly as possible" and that an engineer would inspect the site for road repairs. (Dunn Dep. Ex. 21, R. pp. 616-626). This letter is hardly an action of AB Consulting. There is no evidence that AB Consulting even knew that the letter existed.

Contrary to Appellant's arguments otherwise, South Carolina courts have held that the application of the statute of limitations embodies important public policy considerations. 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"); McKinney v. CSX Transp., Inc., 298 S.C. 47, 50, 378 S.E.2d 69, 70 (Ct. App. 1989) ("One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights'"); Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) ("Another purpose of a statute of

limitations is to protect potential defendants from protracted fear of litigation."). Accordingly, the application of the statute of limitations in this case furthers both the principle of equity and public policy of South Carolina.

II. THERE ARE ADDITIONAL SUSTAINING GROUNDS TO SUPPORT THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF AB CONSULTING

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723; See also Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

AB Consulting raised several additional grounds in its motion for summary judgment, although the Trial Court did not address these grounds having found Appellant's claim time-barred: (1) Appellant does not have standing; (2) AB Consulting did not owe any duty to Appellant; (3) AB Consulting did not breach any warranty to Appellant; and (4) Appellant cannot assert a claim against AB Consulting under the South Carolina Unfair Trade Practices Act.

A. Appellant Does Not Have Standing

A homeowners' association formed for the purpose of owning and maintaining common elements of a horizontal property regime lacks standing to bring an action for damages to property that it does not own or manage. Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 417, 321 S.E.2d 46, 47 (1984). Appellant contends that certain of the concrete driveways which service individual units are too steep. Appellant neither owns nor maintains these driveways. Appellant also does not own the exfiltration drainage system beneath the roads in Rivergate.

As Appellant concedes, Article IV of the Master Deed plainly indicates that "grade-level concrete driveways" are limited common elements. (Master Deed, R. pp. 1103-1160; Initial Brief of Appellant, p. 25). Article XXII of the Master Deed unmistakably indicates that these concrete driveways are Limited Common Elements and thus are not either owned by or to be maintained by Appellant but instead by the owners of the adjacent unit. Id. Article XXII further states that the owners of the adjacent unit "shall be expressly responsible for the damages and liability which his failure to do so may engender." Id.

Property was conveyed by WW&LB to Appellant by the Master Deed and the associated amendments. Id. With the limited exception of a portion of Rivergate Lane, WW&LB never transferred the roads to Rivergate. (Amendments to Master Deed; R. pp. ___). At the hearing before Judge Newman, Appellant's counsel conceded that not all of Rivergate, including the roads, was conveyed by deed to Rivergate. (Jan. 17, 2014 Hr'g Tr. 108:6-10, R. p. 345, lines 6-10).

At the hearing, Appellant attempted to proffer a letter from Wayne Winderman dated September 12, 2007 as somehow proof of a land transfer. (Jan. 17, 2014 Hr'g Tr.

107:22-25, R. p. 344, lines 22-25). Appellant mistakenly argues that this letter conveyed the land to the homeowners' association. Contrary to Appellant's argument and as recognized the Court during the hearing, real property interests in South Carolina are conveyed by deed or will. Vick v. South Carolina Dept. of Transp., 347 S.C. 470, 477, 556 S.E.2d 693 (Ct. App. 2001). Appellant simply does not have standing to assert any claim relating to the stormwater management system installed directly under the roads, to defects of the roads or other areas of Rivergate that were never conveyed by WW&LB.

Contrary to Appellant's misplaced argument, Article IV of the Master Deed does not define the driveways as common elements. Article IV provides, "In all other respects, and **except as specifically provided in this Master Deed**, LIMITED COMMON ELEMENTS shall be treated as, and included within the definition of the term 'COMMON ELEMENTS.'" (Master Deed, R. pp. 1103-1160) (emphasis added). An exception is in Article XXII of the Master Deed. Article XXII specifically provides, "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...and shall be expressly responsible for the damages and liability which his failure to do so may engender." (Master Deed, R. pp. 1103-1160). Accordingly, Article XXII specifically provides that all adjacent homeowners must responsibly maintain all nearby limited common elements. Appellant freely admits that driveways are limited common elements under the Master Deed. (Initial Brief of Appellant, p. 25). Thus, by Appellant's own admission, driveways are limited common elements, which are the responsibility of the individual homeowners and not Appellant.

B. AB Consulting Did Not Owe Any Duty to Appellant

AB Consulting owed no legal duty to Appellant. An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Rogers v. S.C. Dep't of Parole & Community Corrections, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995) ("Without a duty, there is no actionable negligence."). Whether AB Consulting owes Appellant a duty of care is a matter of law for the Court. Oblachinski v. Reynolds, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011) ("A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine."); Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003) ("In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff."). In South Carolina, a legal duty exists if created by statute, contract, status, property interest, or other special circumstance or relationship. McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007); Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003).

i. *AB Consulting Does Not Owe Appellant a Duty of Care Arising From Statute*

As a general rule, "a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d Statutes § 432 (1974)). When a statute does not specifically create a private cause of action, such a claim can be implied only if the legislation was enacted for the special benefit

of a private party. Citizens for Lee Cnty. v. Lee Cnty., 308 S.C. 23, 28-29, 416 S.E.2d 641, 645 (1992).

To determine whether a cause of action is implied, the court must consider whether: (1) the essential purpose of the statute is to protect from the kind of harm suffered by the plaintiff; and (2) the plaintiff is a member of the class of persons the statute is intended to protect. Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994) (holding a regulation may create a duty of care and applying the same standard); Summers v. Harrison Constr., 298 S.C. 451, 455, 381 S.E.2d 493, 496 (Ct. App. 1989) (citing Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988)).

In its Second Amended Complaint, Appellant refers generally to the building code. Chapter 9 of Title 6 of the South Carolina Code establishes the South Carolina Building Codes Council and authorizes the Council to review, adopt, modify, and promulgate building codes that regulate construction within this State. See S.C. Code Ann. §§ 6-9-40 to -130. Section 6-9-5(A) of the South Carolina Code sets forth the public policy as follows:

> The public policy of South Carolina is to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens. To secure these purposes, a person performing building codes enforcement must be certified by the South Carolina Building Codes Council, and this act is necessary to provide for certification.

Id. This statute does not give rise to any implied right of action or imposes a legal duty upon AB Consulting in favor of Appellant. This Court and the South Carolina Supreme Court have rejected similar arguments. See Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (holding that Chapter 22 of Title 40 is intended to regulate the practice of engineering by licensing and registration requirements but does not give rise to a cause of

action); 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 747 S.E.2d 770 (2013) (The Residential Home Builders Act does not create a duty on the part of a residential builder license holder.). Accordingly, there is no statute which imposes a duty of care owed by AB Consulting to Appellant.

ii. *AB Consulting's Contract with WW&LB Did Not Create a Tort Duty in Favor of Appellant*

A contract between two parties can create a duty of care to a third party. McCullough, 373 S.C. at 49, 644 S.E.2d 46. A contract may create a duty to a third party if its contractual terms indicate that the contracting parties intended to benefit a third party. See Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) (holding that an insurance broker who contracted with an employer to sell workers' compensation insurance was liable to an employee for negligence in failing to procure the policy because the employee was an intended third party beneficiary of the contract). Whether such a duty is created depends upon the contract's language. See Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 432, 544 S.E.2d 838, 842 (2001) (finding that a factual issue existed whether "special conditions" in the contract documents imposed a duty of care on an architect to assure payment to non-contracting third party); Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) ("It is clear the language of the lease did not intend to make [the plaintiff], as either a tenant or a guest, a third party beneficiary by imposing a duty in tort on the landlord to prevent a tenant's dog from injuring another."); Dorrell v. South Carolina Dep't of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004) (Contractor hired to repave a road owed a duty to the traveling public at large to not negligently perform its work because contract's terms required the contractor to perform its work in a manner to insure the safety of the traveling public); Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d

588 (2003) (In reviewing the terms of an agreement between a utility company and contractor which granted the contractor preferred vendor status, the court held that the agreement did not give rise to a duty of care owed relating to the contractor's negligent installation of an HVAC system).

The Agreement Between Owner and Engineer did not create any legal duty to Appellant. The contract was signed on May 14, 1999 before Appellant came into existence. (Drucker Dep. Ex. 3, R. pp. 457-459). The contract's language mentions only two parties, Wayne Winderman and AB Consulting. Id. The contract neither mentions nor confers any benefit upon any third party. Id. Accordingly, AB Consulting owed no legal duty to Appellant by virtue of its contract with WW&LB.

iii. *Appellant is Not Owed a Duty of Care Based on Any Legally Recognized Status*

South Carolina's courts have limited the imposition of a legal duty based upon "status" to cases involving premises liability, products liability, and volunteers. See Singleton v. Sherer, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008) ("The nature and scope of a duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury."); Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001) (in a premises liability case, the standard of care is dependent upon the plaintiff's status as an invitee, licensee, trespasser, or child); Bray v. Marathon Corp., 356 S.C. 111, 117, 588 S.E.2d 93, 95-96 (2003) (recognizing differing duties of care owed by a manufacturer to a plaintiff based on his status as a user of its products or a bystander); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (when an act is voluntarily undertaken, the actor may owe a duty based on his status as a volunteer). There are no South Carolina cases which hold

that a homeowner's association has any special legal status. Thus, AB Consulting owes no legal duty to Appellant because of its status as a subsequently formed homeowner's association.

iv. *Appellant Does Not Have Any Legally Recognized Property Interest*

A duty may be owed to persons with certain property interests. For instance, courts have held that a third party may owe a duty to the holder of a secured interest in damaged personal property. Compare McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 50-52, 644 S.E.2d 43, 47-48 (2007) (finding that a mortgage servicer did not owe any duty to a lender who had a security interest in the borrower's contractual right to receive payments) with Universal C.I.T. Credit Corp. v. Trapp, 232 S.C. 297, 101 S.E.2d 829 (1958) (holding one who damages personal property owes a duty to the holder of a security interest in the property). Appellant is not a secured party of any property and did not even exist at that the AB Consulting contracted with WW&LB or prepared its design.

v. *AB Consulting Did Not Owe a Duty of Care Arising From a Special Relationship*

Whether a "special relationship" exists "depend[s] on the facts and circumstances of each case." Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc., 320 S.C. 49, 55-56, 463 S.E.2d 85, 88 (1994). In design and construction cases, South Carolina's courts have found a "special relationship" only where there is either a close working relationship between project participants or where a third party foreseeably relies upon the services of the professional in taking some action. See Tommy L. Griffin, at 55-56, 463 S.E.2d at 89; Cullum Mechanical Constr., 344 S.C. at 426, 544 S.E.2d at 838; South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986).

In Tommy L. Griffin, the court found a "special relationship" might exist between a project engineer and a subcontractor giving rise to a tort duty because the engineer closely supervised and controlled construction. Tommy L. Griffin, 320 S.C. at 56, 463 S.E.2d at 89. Similarly, in Cullum, the court found that a "special relationship" might exist between an architect and a subcontractor because the architect assumed responsibility under its contract with the owner to withhold certifications for payments if subcontractors were not paid. Cullum, at 432, 544 S.E.2d at 842.

Here, unlike the engineer in Tommy L. Griffin and the architect in Cullum, AB Consulting did not have any relationship with Appellant. Appellant did not exist at the time AB Consulting performed its design services. Appellant has proffered no evidence to demonstrate that it relied on AB Consulting's design services in taking some action. There is no evidence that Appellant ever even had any contact with AB Consulting. See South Carolina State Ports Authority, 289 S.C. at 376, 346 S.E.2d at 325 (finding that a consultant owes a duty only to "non-contracting parties who have reasonably relied on their reports in taking some action"). AB Consulting owed no legal duty to Appellant necessary to support Appellant's negligence claim, and the Trial Court's grant of summary judgment should be affirmed.

C. AB Consulting Did Not Owe or Breach Any Warranty to Appellant

Appellant's claims against AB Consulting for breach of express and implied warranties are factually and legally deficient. Appellant admitted in discovery that it had no contract with AB Consulting. Counsel for Appellant conceded at the summary judgment hearing that there was no express warranty made to Appellant by AB Consulting

and has abandoned its claim in this regard. (Jan. 17, 2014 Hr'g Tr. 103:18-22, R. p. 340, lines 18-22).

Appellant mistakenly argues that Tommy L. Griffin, 320 S.C. at 49, 463 S.E.2d at 85, creates an implied warranty owed by AB Consulting to Appellant. In Tommy L. Griffin, the South Carolina Supreme Court stated that "if a party furnished plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." Id. (citing Beachwalk Villas Condominium Association v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991)). Appellant's reliance on Tommy L. Griffin is misplaced.

In the first place, there is no law that indicates that an implied warranty of a design professional flows to subsequently formed entities, such as Appellant. To the contrary, the few cases in South Carolina addressing implied warranties involve direct project participants. See e.g. Tommy L. Griffin, 320 S.C. at 49, 463 S.E.2d at 85; Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

Second, the evidence establishes WW&LB and its contractors deviated from the drawings. On July 10, 2000, Braxton Lewis of AB Consulting wrote a letter to Wayne Winderman of WW&LB that "the proposed stone envelopes around the culverts...were omitted without our consent." (Drucker Dep. Ex. 11, R. pp. 461-462). Braxton also expressed his concern about WW&LB's departure from the driveway design "which appear to create severe driveway slopes on the south east side of the proposed building." Id. Likewise, there were other deviations by WW&LB from AB Consulting's plans. (Drucker Dep. pp. 63-69, R. pp. 435-441). For instance, AB Consulting's designed the lanes to be constructed using concrete; however, WW&LB constructed them with asphalt.

Id. The drainage grates and catch basins in the lanes did not match the grading specifications, which prevented water from flowing into the grates and then into the catch basins as originally designed. Id. Although AB Consulting's plans did not include parking pads at the end of each lane, WW&LB constructed several concrete pads at the end of a number of lanes. Id. Because WW&LB installed the parking pads higher than the asphalt, the pads obstructed the flow of water from the catch basins to the grass swales, causing flooding in heavy rains. Id.

Appellant incorrectly relies upon cases involving residential home builders in support of its position that AB Consulting breached an implied warranty to Appellant. Both Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989), and Beachwalk, 305 S.C. at 144, 406 S.E.2d at 372, emphasized that the changing nature of the housing industry required heightened protections for home buyers. Because the purchase of a home is often a one-side transaction where the purchaser is forced to rely upon the skill of the home builder, the Kennedy court imposed additional legal duties upon a residential home builder to refrain from constructing defective homes that would be placed in the stream of commerce. Kennedy, 299 S.C. at 335, 384 S.E.2d at 730. However, these heightened protections announced in Kennedy and Beachwalk are limited only to the residential homebuilder context. See Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008) (holding that the Kennedy policy of protecting home purchasers did not extend to a situation where the seller was not in the business of constructing homes and the seller did not agree to construct the house for the purchaser or anyone else). In this case, AB Consulting provided only civil engineering design services. (Drucker Dep. Ex. 3, R. pp.

457-459). None of the policy considerations cited by Kennedy are implicated here and summary judgment is favor of AB Consulting is warranted.

D. Appellant Cannot Assert a Claim Against AB Consulting Under the South Carolina Unfair Trade Practices Act

Appellant's claim against AB Consulting for violations of the South Carolina Unfair Trade Practices Act is without merit. To establish a claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), Appellant must establish that AB Consulting employed an unfair or deceptive method, act, or practice in the conduct of trade or commerce that proximately caused an ascertainable loss of money or property to Appellant and that such conduct has an impact upon the public interest. See S.C. Code Ann. §§ 39-5-10, -20, -140(a); Collins Holding Corp. v. Defibaugh, 373 S.C. 446, 646 S.E.2d 147 (Ct. App. 2007) (finding that plaintiff could not recover under the Unfair Trade Practices Act where its losses did not result from the deceptive act). A plaintiff may show that unfair or deceptive acts or practices have an impact upon the public interest by demonstrating a potential for repetition. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477-79, 351 S.E.2d 347, 349-50 (Ct. App. 1986). The potential for repetition is generally demonstrated: "(1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

Appellant erroneously contends that it may bring a SCUTPA claim because Braxton Lewis, one of AB Consulting's officers, misrepresented himself as a licensed engineer by signing certain documents on behalf of AB Consulting. In the first place under

South Carolina law, an engineering firm may have officers and agents who are not licensed engineers. See S.C. Code Ann. § 40-22-250(B)(1) (permitting licensed engineering firms to practice if at least one corporate officer of a corporation or one owner or employee of other firms is a licensed engineer and designated as responsible for the professional services).

Second, Appellant's claim is not actionable because AB Consulting had no relationship with Appellant. In Reynolds v. Ryland Group, Inc., 340 S.C. 331, 531 S.E.2d 917 (2000), the South Carolina Supreme Court addressed whether a subsequent home purchaser can assert a claim under SCUPTA against the developer who built and sold the home to a prior purchaser. The plaintiffs urged the Court to hold that privity of contract is not required for a SCUTPA claim. Id. The Court rejected the plaintiffs' argument and concluded that no such claim could be brought under the Act. Id. Like the Reynolds plaintiffs, Appellant did not enter into any contract with AB Consulting. AB Consulting's actions regarding Rivergate took place before Appellant's incorporation, thus Appellant had no relationship with AB Consulting that would support a claim under SCUTPA.

There is no evidence that any representation made by Braxton Lewis was ever communicated to or relied upon Appellant. Appellant has offered no evidence that any representation regarding licensure made by AB Consulting proximately caused any damage to Appellant. Appellant's SCUTPA claims are legally and factually defective and summary judgment in favor of AB Consulting is warranted.

CONCLUSION

For the reasons stated above, this Court should affirm the Trial Court's grant of summary judgment in favor of AB Consulting Engineers, Inc.

Respectfully submitted,

December 2, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED
DEC 07 2015
SC Court of Appeals

Clifton B. Newman, Circuit Court Judge

Case No.: 2010-CP-26-03901
Appellate Case No.: 2015-000248

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, RWG, Inc., Aiello Associates, Daniels Engineering, Inc., Rivergate Homeowners' Association, Rivergate Homeowners' Association Board of Directors, Wayne Winderman, individually, Salvatrice Foran, individually, Gerald Foran, individually, Marcos Soares Construction,William C. DeSouza, individually, James Eason individually and d/b/a James Eason & Company, D&D Cleaning and Construction, Inc., Joel's Framing, Joe Freza, Aroldo Garcia, Joaquin Geraldo Zeferinao, individually and d/b/a Zeferino Framing, Leo Trombley, Judy Schultz, J&D Interior Design, Jose Dasmerces d/b/a J.P. Construction, Scott Chandler d/b/a Coastal Custom Windows & Doors, R&D Construction, Nicasio Ramirez Zunigo, Walchir Morais, Marco Trebbi, Blankenship Roofing, Inc., DLJ Construction, LLC, Dewayne Bates, The Bates Group, LLC, Bridges Construction Co., Brewer Construction, Inc., Speedy Concrete, REB-FEL, Inc., Mark Mychajluk, Eric Jazwinski, Southern Framing Corporation, AB Consulting Engineers, Inc., WWI Development Company, LLC, Michael Dawson Construction, Inc., Asphalt Paving & Maintenance Co., Inc. and Chuck's Construction Co., Inc., Right Way Group, Inc., Stevens Construction Co., Inc., Geometries, Inc., Eric Yazwinski, Law

Engineering, Inc., D & M Builders, Inc., Hill Construction Company, Bonnie Stone a/k/a Bonny Stone, DJL Construction Company, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey,

Defendants,

Of Whom Speedee Concrete, Inc. and Chuck's Construction, Inc. are the

Respondents.

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,

Third-Party Defendants,

Rivergate Homeowners' Association, Appellant,

v.

WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc.,

Defendants.

Of Whom AB Consulting Engineers, Inc. is the

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 2, 2015

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WW & LB Development Company, LLC, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc.,

Defendants.

Of Whom AB Consulting Engineers, Inc. is the

Respondent.

PROOF OF SERVICE

The undersigned, Brian R. Edwards, certifies that he is an employee of Gibbes Burton, LLC and on the 2nd day of December 2015, he served copies of the following:

1. Final Brief of Respondent AB Consulting Engineers, Inc.;

2. AB Consulting Engineers, Inc.'s Motion to Supplement the Record on Appeal; and

3. Supplemental Record on Appeal

by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed to:

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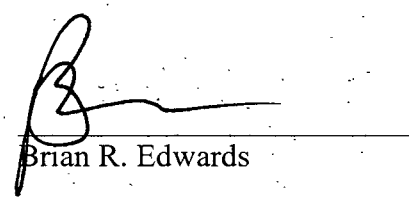
December 2, 2015



Brian R. Edwards