THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2010-CP-26-03901

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

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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., Geometrics, 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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 13, 2008, the Rivergate Homeowners Association (Appellant/Rivergate HOA) filed a Complaint against numerous defendants alleging negligence, breach of warranties, unfair trade practices, civil conspiracy, and breach of fiduciary duty. (R. pp. 146-166). At the time of the filing of this Complaint, the named defendants were defendants that allegedly constructed the buildings (also referred to as the vertical construction) and not the civil site work (also referred to as the horizontal construction), with the exception of the developer/general contractor, WW & LB Development Co., LLC. Thereafter, on April 21, 2009, Appellant filed an Amended Complaint that further described the scope of work of the named defendants. (R. pp. 169-187). On August 18, 2009, this 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 Appellant was permitted to file a Second Amended Complaint. On April 28, 2010, Appellant filed its Second Amended Complaint. (R. pp. 188-209). This Second Amended Complaint added some defendants that were involved in the vertical construction and the Respondents Speedy Concrete (Speedy), AB Consulting Engineers, Inc. (AB Consulting), and Chuck's Construction Co., Inc. (Chuck's)(collectively, Respondents). The Respondents were involved in the civil site construction only.

In response to the Appellant's Second Amended Complaint, the Respondents filed Answers asserting the statute of limitations and other affirmative defenses. Almost three years after filing their Answers, the Respondents filed Motions for Summary Judgment on

different dates, but generally claimed that Appellant's Second Amended Complaint was commenced more than three years after Appellants knew, or should have known, of the alleged facts and circumstances giving rise to the Second Amended Complaint. (R. pp. 49-51 (Chuck's); pp. 52-55 (AB); pp. 57-59 (Speedy)).

A summary judgment hearing was held on January 17, 2014. (R. pp. 238- 361). The trial judge issued separate Orders on different dates granting summary judgment to the Respondents. (R. pp. 9-14 (Chuck's); pp. 15-22 (Speedy); pp. 23-33 (AB)). Appellant filed separate motions for reconsideration. A hearing was held on September 8, 2014. (R. pp. 363-431). The judge denied Appellant's motions for reconsideration. (R. pp. 34-38 (AB); pp. 39-41 (Speedy); pp. 42-44 (Chuck's)). Appellant served the Notice of Appeal on February 4, 2015.

FACTS

In the late 1990's, Wayne Winderman (Winderman) and Luther Bellamy (Bellamy) formed WW & LB Development Company, LLC (WW & LB) to develop the Rivergate project that is located off of Highway 17 in Little River, South Carolina. (R. p. 784, line 9 - p. 785, line 25). The Rivergate project is a multi-family residential development, which includes thirty-seven duplex and quadplex buildings, a community clubhouse, paved streets, and driveways. (R. p. 1065) (hereinafter, Kimley-Horn report). The controlling documents for the Rivergate project are the Master Deed and Bylaws for the Rivergate Homeowners Association, Inc. (R. pp. 1103-1159).

On approximately May 14, 1999, Winderman contracted with the civil engineer AB Consulting to provide professional services associated with the development of an eight-acre parcel to include approximately 120 multi-family units with associated asphalt parking areas. (R. pp. 1074-1076) (hereinafter, AB Contract). The AB Contract included considerations for zoning, utilities, wetlands, surveying, landscaping, and engineering. (Id.). The engineering services were described to include site planning, infrastructure design and permitting, geotechnical investigation, preparation and administration of contract documents, and services during construction. (Id.).

WW & LB hired Chuck's to perform work at the Rivergate project as detailed in a Contract dated February 24, 2000. (R. pp. 1077-1084) (hereinafter, Chuck's Contract). Pursuant to Chuck's Contract, Chuck's scope of work included, but was not limited to, demolition, road improvements, installation of storm water drainage and sanitary sewer, and driveway improvements. (Id.).

WW & LB hired Speedy to construct the building pads, sidewalks, and driveways from 2004 to 2007. (R. pp. 16-17).

The Rivergate HOA was developer-controlled from the formation of WW & LB in 1999 to late 2007. On or about October 31, 2007, WW & LB transferred control of the Rivergate HOA and its Board of Directors to the homeowners after WW & LB had developed most of the Rivergate project. (R. pp. 1085-1086).

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). "Summary judgment is appropriate when the pleadings, depositions, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Thus, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008); see Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Hancock v. Mid-South Mgmt., Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). All ambiguities, conclusions, and inferences arising from the

evidence must be construed most strongly against the movant. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013). Even when there is no dispute as to evidentiary facts, summary judgment is not appropriate if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in cases in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt., Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. Cunningham v. Anderson County, 402

S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Penza v. Pendleton Station, LLC, 404 S.C. 198, 203, 743 S.E.2d 850, 852 (Ct. App. 2013).

Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 226, 659 S.E.2d 213, 217 (Ct. App. 2008).

ARGUMENTS

I. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BASED ON THE STATUTE OF LIMITATIONS BECAUSE THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL ON OR ABOUT JUNE 18, 2010.

The evidence, viewed in a light most favorable to the Appellant, shows a genuine issue of material fact exists as to whether a reasonable person would have known the existence of their claims against the Respondents until on or about June 18, 2010.

A cause of action for damage to real property must be brought within three years of when the damage occurred. S.C. Code Ann. § 15-3-530(3) (2005). An exception lies in the discovery rule, which tolls the starting of the statute of limitations until a person discovers or should have known through reasonable diligence that a potential claim might exist. S.C. Code. Ann. § 15-3-535 (2005); Watters v. Terminix Serv., Inc., 376 S.C. 632, 658 S.E.2d 110 (Ct. App. 2008).

The 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. Grillo v. Speedrite Products, Inc., 340 S.C. 498, 532 S.E.2d 1 Ct. App. 2000). The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the evidence is conflicting upon the question, it becomes an issue for the jury to decide. Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

In Bayle v. South Carolina Department of Transportation, the Court of Appeals articulated:

> The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case 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.

344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (internal citations omitted).

However, when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide. See Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000) (noting determination of date statute of limitations began to run in particular case is question of fact for jury when parties present conflicting evidence); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (stating jury must resolve conflicting evidence as to whether claimant knew or should have known he had cause of action). The limitations period is triggered by knowledge of facts, diligently acquired, sufficient to put an injured person on notice that a cause of action may exist against another. True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997).

In this case, the person most knowledgeable about civil construction defects at the Rivergate project testified that the homeowner-controlled Rivergate HOA, as opposed to the developer-controlled Rivergate HOA, could not have known about the existence of its claims against the Respondents until on or about June 18, 2010. J. Drew Wilkie of Kimley-Horn

and Associates, Inc. (Wilkie), the Appellant's forensic civil engineer, concluded the following in an affidavit that was presented to the trial court at the summary judgment hearing: "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 18, 2010." (R. p. 1063). Prior to the filing of the Second Amended Complaint, Wilkie obviously advised Appellant's counsel of a potential action against the Respondents although a final written report that detailed the civil construction and design defects was not issued until on or about June 18, 2010.

Based on the above, the evidence viewed in a light most favorable to the Appellant shows a material issue of fact exists as to whether the homeowner-controlled HOA would have known of the existence of its claims against the Respondents until on or about June 18, 2010. As such, the Appellant should not be deprived of a trial on the disputed factual issues involved in this case by such a drastic remedy as summary judgment. Therefore, the court erred in granting summary judgment in favor of the Respondents.

II. EVEN IF THE COURT DETERMINES THAT THE APPELLANT COULD REASONABLY HAVE CONCLUDED THAT A CLAIM EXISTED AGAINST THE RESPONDENTS PRIOR TO JUNE 18, 2010, THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BASED ON THE STATUTE OF LIMITATIONS BECAUSE EQUITABLE TOLLING APPLIES.

Even if the Court determines that the Appellant could reasonably conclude that a claim against the Respondents might exist earlier than June 18, 2010, equitable tolling applies.

Equitable tolling is a doctrine that is applied on rare occasions in South Carolina to stop the running of statutes of limitations. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008). Equitable tolling is reserved for extraordinary circumstances. Id.; see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."). "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff." Pelzer, 378 S.C. at 521, 662 S.E.2d at 620 (internal quotation marks omitted). Equitable tolling, "which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Id. (internal quotation marks omitted). Equitable tolling has been deemed available where:

(1) extraordinary circumstances prevented the plaintiff from filing despite his or her diligence;

(2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has

been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and

(3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

Id. at 521, 662 S.E.2d at 620-21 (internal quotation marks omitted).

In Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Court of Appeals stated:

> Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.
>
> The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.
>
> It has been observed 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 equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it

would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 371-72, 725 S.E.2d at 125 (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr, 386 S.C. 108, 115-17, 687 S.E.2d 29, 32-33 (2009)) (internal citations and quotation marks omitted).

In this case, the evidence reveals that the Appellant's causes of action could not have started to run until on or after October 31, 2007 because the homeowners did not have control of the Rivergate Homeowners Association until on or after October 31, 2007. In a letter on Rivergate HOA letterhead dated September 12, 2007, Winderman, the managing member of the developer/general contractor WW & LB, stated that *"[t]he time is long overdue to turn the HOA over to an elected Board of Directors . . . The resignation is effective October 31, 2007."* (R. p. 1085-1086) (emphasis added). Additionally, Mr. Winderman sent a letter to the management company Atalaya Management, Santee Cooper, and Little River Water & Sewer stating that WW & LB "will be vacating this facility and this will be turned over to the [homeowner-controlled HOA]." (R. p. 1088 (Atalaya); p. 1089 (Santee Cooper); p. 1090 (Little River Water & Sewer)).

As shown by the above-referenced correspondence from Winderman, the HOA and its Board of Directors were controlled by the developer/general contractor WW & LB prior to October 31, 2007. The Board of Directors was the decision-making body that would have decided whether to file a construction defect suit or not. Obviously, the developer-controlled

HOA and its Board of Directors would not have sued itself and it was unlikely that the developer-controlled HOA would have sued the Respondents in this matter.

Additionally, despite all due diligence, the homeowners were powerless to do anything including, but not limited to, bringing suit against any potential defendants until the date of transfer from WW & LB to the homeowners on October 31, 2007. In fact, the homeowners were very aware that they did not have the authority to bring suit because the Rivergate HOA was developer-controlled. In homeowner meeting minutes dated November 4, 2006, a member of the ad hoc committee, Sylvia Lindsay, stated that "these are the issues we are addressing for the whole group, not personal punch list, and nothing can be done until we have an attorney, which we can't get until we are a HOA." (R. p. 1096). As such, the homeowners were acknowledging their lack of authority to bring suit on behalf of the HOA until the developer transferred the Rivergate HOA to the homeowners.

The homeowners' lack of authority to bring suit or do anything else on behalf of the HOA was confirmed by Winderman in a letter dated July 6, 2005. In that letter which was on Rivergate HOA letterhead, Winderman stated, "Please note that your committee will not be recognized for any other purpose [than] to address legitimate concerns of the HOA." (R. p. 1091). In other words, until the turnover to the homeowners on or about October 31, 2007, the HOA was controlled by the developer and only the developer would determine what did and did not happen at the HOA.

Although the Respondents imply that the homeowners should have known of construction defects and brought suit based on the testimony of Jim Dunn, neither Dunn nor any of the other homeowners had authority to investigate potential construction and design

defects or bring suit against the Respondents until the HOA was turned over to the homeowners. Instead, as discussed above, Dunn could only attempt to work with the developer-controlled HOA to address problems and propose improvements. Dunn, like other homeowners, was dependent on the developer/general contractor WW & LB and the developer-controlled HOA to investigate defects, bring suit against any liable parties, and make necessary repairs to the project.

Based on the above, the statute of limitations was tolled until on or after October 31, 2007 because the developer/general contractor WW & LB did not transfer control to the homeowners until on or after October 31, 2007. Stated another way, the homeowner-controlled HOA could not have filed suit prior to the date of transfer on or about October 31, 2007. Thus, by filing its cause of action on April 28, 2010, the Appellant commenced this action well within the three-year statute of limitations period. Therefore, the court erred in granting summary judgment in favor of the Respondents.

III. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BECAUSE THE RESPONDENTS SHOULD BE ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS WHERE THE DEVELOPER INDUCED THE HOMEOWNERS TO BELIEVE THAT THERE WOULD BE FUTURE INSPECTIONS AND REPAIRS.

The Respondents should be estopped from asserting the statute of limitations because the developer/general contractor WW & LB and the developer-controlled HOA induced the homeowners to believe that the developer and its sub-contractors would institute future inspections and repairs to address construction issues.

In South Carolina, "[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." Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (internal citations and quotation marks omitted). "The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue." Id. at 373, 725 S.E.2d at 125.

On or about July 6, 2005, the developer Winderman stated in a letter on Rivergate HOA letterhead that the HOA "made inspections of drainage issues and will address the same as quickly as possible." (R. p. 1091). Obviously, no end date for repairs was given. Moreover, the developer-controlled HOA stated that "[c]oncerning issues of maintenance they will be fairly addressed." (R. p. 1091).

Additionally, the developer-controlled HOA even stated that an engineer would inspect the site for road repairs "[u]pon conclusion of construction." (R. p. 1093) As of today, WW & LB owns at least one lot at the Rivergate development with tax map number 131-02-01-013. (R. pp. 1099-1100). Whether construction was considered complete at the date of transfer from the developer to the homeowners on or about October 31, 2007 or construction is on-going because there is at least one undeveloped Rivergate lot that is still owned by WW & LB is a question of fact for a jury. Regardless, the Appellant could have believed that repairs involving the construction defects were possible by the developer-controlled HOA up to, or even after, October 31, 2007.

Based on the above, the Respondents should be estopped from asserting the statute of limitations because the developer induced the homeowners to believe that there would be future inspections and repairs.

IV. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BECAUSE EQUITY AND PUBLIC POLICY DICTATE THAT THE APPELLANT'S CLAIMS SHOULD NOT BE BARRED BY THE STATUTE OF LIMITATIONS.

In addition to the above, equity and public policy dictate that the Appellant's claims should not be barred by the statute of limitations. The Appellant did not sit on its rights, but acted with due diligence in determining whether a claim existed against the Respondents.

In this case, within three years from the transfer of the HOA to the homeowners from the developer/general contractor, the Appellant hired a forensic engineer, investigated the civil construction and design issues, and brought suit against the Respondents. The HOA was transferred to the homeowners after October 31, 2007 and the final report from the HOA's forensic engineer is dated June 18, 2010, a timeframe well within the three year statute of limitations.

Additionally, Appellant's actions were in-line with the law of South Carolina. In a construction defect lawsuit against a civil engineer such as AB Consulting, South Carolina requires the issuance of an affidavit by a professional prior to bringing a construction defect suit or the Plaintiff may be subject to allegations that the Plaintiff filed a frivolous or meritless lawsuit. See S.C. Code Ann. § 15-36-100 (2005). In properly hiring a civil engineer and investigating any potential construction defects and not filing a frivolous action, the Appellants are being punished with this summary judgment ruling for following the law.

Based on the above, the Appellant took due care to find an expert to investigate and determine the existence of and extent of any construction defects and file suit within three years of taking control of the HOA. Therefore, equity and public policy dictate that the Appellant's claims against the Respondents should not be barred by the statute of limitations.

V. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BASED ON APPELLANT'S LACK OF STANDING BECAUSE THE MASTER DEED AND BY-LAWS PROVIDE THAT THE APPELLANT, NOT THE INDIVIDUAL HOMEOWNER, IS RESPONSIBLE FOR THE MAINTENANCE, REPLACEMENT, AND REPAIR OF THE LIMITED COMMON ELEMENTS.

The Appellant has standing to bring a lawsuit against the Respondents related to limited common elements such as the driveways because limited common elements are defined as common elements by the Master Deed and the Appellant is responsible for maintaining, repairing, and replacing the common elements according to the Master Deed and By-Laws.

At the summary judgment hearing, the Respondents argued the grade-level concrete driveways are limited common elements. Appellant agrees with this definition. However, Respondents overlook the fact that the Master Deed treats limited common elements as common elements. Article IV of the Master Deed states, "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.'**" (R. p. 1108).

In addition to a limited common element being treated as and included within the definition of a common element in the Rivergate Master Deed, courts have ruled that,

although limited common elements are for the exclusive use and benefit of a specific unit, a limited common element is commonly owned and not a part of a unit. See Douglas Scott MacGregor, Condominium Law in South Carolina § 1.02 (S.C. Bar 2000). In the case of Blackwell v. Hanover Ins. Co., 551 So. 2d 47 (La. Ct. App. 1989), the Court of Appeal of Louisiana ruled that limited common elements are part of common elements and any liability arising from them should be insured risk under a statute requiring coverage of claims arising out of common elements. In another case that stands for the proposition that a limited common element is commonly owned by the Association members, the Supreme Judicial Court of Maine, in Gaffny v. Reid, 628 A.2d 155 (Me. 1993), held that building on limited common elements violated the rights of other unit owners.

As to who maintains, repairs, and replaces the common elements such as the grade-level driveways, the Master Deed definitively states that this is the responsibility of the Association and not an individual owner. Article XXIII of the Master Deed provides: "**The ASSOCIATION, at its expense, SHALL** be **responsible for the maintenance, repair and replacement of all of the COMMON ELEMENTS.**" (R. p. 1118) (Emphasis added).

Additionally, Article III(C), Section 18(c) of the By-Laws states:

> The Board of Directors shall be responsible for the affairs of the Association and shall have all the powers and duties necessary for the administration of the Association's affairs . . . [The] Board of Directors shall have the power to and shall be responsible for the following . . . (c) **providing for the operation, care, upkeep, and maintenance of all of the Common Areas.** (R. p. 1152) (Emphasis added).

Based on the above, limited common elements are treated as and included within the definition of common elements and the Appellant is responsible for the maintenance, repair, and replacement of the common elements. Therefore, the Appellant has standing to bring this suit and the trial judge erred in granting summary judgment to the Respondents.

VI. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESONDENTS BECAUSE THERE IS EVIDENCE THAT RESPONDENTS' SCOPE OF WORK FAILED TO CONFORM TO INDUSTRY STANDARDS WHERE APPELLANT'S EXPERT IDENTIFIED CONSTRUCTION AND DESIGN DEFECTS RELATED TO ALL THE RESPONDENTS.

Appellant provided evidence that the Respondents' scope of work failed to conform toindustry standards at the Rivergate project because Appellant's expert identified construction and design defects related to all the Respondents.

According to the Appellant's forensic civil engineer J. Drew Wilkie, the Respondents were responsible for construction and design defects at the Rivergate project. In his affidavit, Wilkie references his report and states that "it is my opinion that the Defendants were aware or should have been aware of the civil construction and design deficiencies at the time of construction and thereafter . . ." (R. p. 1063; R. pp. 1065-1072). This statement provides that all the Respondents were responsible for one or more of the defects at the Rivergate project. Moreover, at his depositions taken on January 19, 2012 and August 16, 2013, Wilkie testified to the failure of the Respondents to conform to industry standards. (R. pp. 838-894; R. pp. 928-935; R. pp. 936-1014).

Additionally, at least one of the Respondents, Speedy, even admitted that its work was defective. As stated in the Order Granting Summary Judgment in favor of Speedy Concrete, "Speedee Concrete advised the developer/general contractor of the project, WW &

LB Development, Inc., through its representative Wayne Winderman, that the driveways were too steep." (R. p. 18). However, Speedy cannot have it both ways. It cannot state that it knew of its defective work and also state that there is no evidence of defective work.

Because there are genuine issues of material fact that the Respondents' scope of work at the Rivergate project failed to conform to industry standards, the trial judge erred in granting summary judgment to the Respondents.

CONCLUSION

Under the summary judgment standard, the Court of Appeals should give the Appellant "every benefit of the doubt." Watters v. Terminix Serv., Inc., 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008). Accordingly, for the reasons argued above, this Court should reverse the order of the circuit court granting summary judgment to the Respondents.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2010-CP-26-03901

Rivergate Homeowners' Association, Appellants,

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., Geometrics, 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 certified that this Final Brief complies with Rule 211(b), SCACR.

November 25, 2015

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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 certified that this Final Brief complies with Rule 211(b), SCACR.

November 25, 2015

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Of Whom AB Consulting Engineers, Inc. is the Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the final Brief of Appellant on the following Respondents, Speedy Concrete, AB Consulting Engineers, Inc., and Chuck's Construction Co., Inc., by depositing a copy of it in the United States Mail, postage prepaid, on December 1, 2015, addressed to their attorneys of record as follows:

Dated: December 1, 2015

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