THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2010CP26-3901

Appellant 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 Zeferino, 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,

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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,

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v.

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

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

FINAL BRIEF OF RESPONDENT SPEEDEE CONCRETE, INC.

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STATEMENT OF THE CASE

Robert Sanger, a homeowner at Rivergate, filed a complaint on January 12, 2007, which contained allegations regarding the design and construction of Rivergate. (R. pp. 97-117) Notably, the complaint included allegations regarding improper driveway slopes and drainage issues. Id. Speedee Concrete, Inc. (incorrectly named Speedy Concrete) was not named as a defendant in that lawsuit. Id. Sanger then filed an Amended Complaint on April 20, 2008 where he named additional subcontractors and design professionals as defendants. (R. pp. 118-141). Speedee Concrete, again, was not named as a defendant. Id.

On June 13, 2008, the Appellant filed a complaint against various subcontractors alleging construction defects similar to those alleged in the Sanger lawsuit, including allegations regarding the sidewalks, driveways and drainage system. (R. pp. 142-168). Speedee Concrete was not named as a defendant in that action. Id.

On March 21, 2009, Appellant filed a First Amended Complaint, and Speedee Concrete was again not named as a defendant. (R. pp. 167-187). On March 31, 2009, the Sanger case and the Appellant's case were consolidated. (R. pp. 1-3). The case was stricken pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure on August 18, 2009. (R. pp. 4-5). When the case was

restored on April 28, 2010, the Appellant filed a Second Amended Complaint, which named Speedy Concrete (sic) as a defendant. (R. pp. 188-209). The Second Amended Complaint contained the same allegations regarding the driveways and drainage in the Appellant and Sanger's prior Complaints. Id. Speedee Concrete then filed an Answer and asserted various defenses, including the statute of limitations as a defense. (R. pp. 219-228). On July 19, 2013, Speedee Concrete filed its Motion for Summary Judgement. (R. pp. 56-59).

Judge Clifton Newman heard Speedee's Motion for Summary Judgement on January 17, 2014. On May 7, 2014, Judge Newman granted Speedee's Motion for Summary Judgment. (R. pp. 15-22). The Appellant then filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (R. pp. 84-94). Judge Newman heard Appellant's motion for reconsideration and denied that motion by order filed December 10, 2014. (R. pp. 39-41). The Appellant is now appealing Judge Newman's decision.

STATEMENT OF FACTS

The Rivergate subdivision is located in Little River, South Carolina. The developer, WW&LB Development Company, LLC, was a company owned by Wayne Winderman and Luther Bellamy. Winderman hired AB Consulting to prepare plans and specifications for the site work, including the grading and stormwater management plans. (R. p. 457). Chuck's Construction Co. performed the site grading and installed the storm water management system. (R. p. 463). Speedee Concrete constructed the concrete parking pads and driveways to the individual units from 2004 to 2007. (R. p. 440, line 5 to p. 444, line 13 & Speedee Invoice, R. p. 1073).

On March 16, 2001, the Master Deed for Rivergate Horizontal Property Regime was filed. (R. pp. 1103-1160). The Master Deed defines limited common areas as follows:

> Limited common elements as to the term is used herein shall mean and comprise the following: (A) attic space, if any, and **grade level concrete driveways**, patios, or stoops…(emphasis added).
>
> (R. pp. 1107-1108).

The Master Deed also provides that it is the responsibility of the owner to take care of the maintenance and repair of the limited common elements. (R. pp. 1116-1117) The owner is also responsible for any damages caused by the limited common areas.

(R. pp. 1116-1117). Section XXII of the Master Deed declares as follows:

> 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 do so may engender (emphasis added).

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. pp. 1107-1108).

Additionally, 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. pp. 478 ln. 2 - p. 479, ln. 8). This conversation took place in the presence of owner representative Jim Dunn in 2004 or 2005. Id.

Furthermore, it is not disputed that the slope of the driveways has been consistent since they were originally poured in 2004 through 2007, and Speedee Concrete's last invoice is dated March 22, 2007 (R. p. 1073).

ARGUMENT

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

Pursuant to South Carolina Code Sections 15-3-510 and 15-3-530, Appellant's causes of action for negligence, breach of warranty, and breach of contract must be commenced within three years of when the Appellant knew, or should have known by the exercise of reasonable diligence, that a claim against Speedee Concrete may exist. S.C. Code Ann. §§ 15-3-510 and 15-3-530.

Speedee Concrete completed its work on the project by March 22, 2007, the date of Speedee's last invoice. (R. p. 1073). The homeowners had knowledge of the driveways' slope and the cracking of driveways in 2004 or 2005 (R. p. 478, ln. 2 - p. 479, ln. 8). Both are more than three years before Speedee Concrete was named in the Appellant's Second Amended Complaint filed in April 2010.

"Under the discovery rule, the three-year statute of limitations clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011). "It is not necessary for a party to know the full extent of its alleged damages; it is

sufficient for the party to be put on notice of such facts as would lead a person of common knowledge and experience to conclude that some claim may exist." Hedgepath v. AT&T, 348 S.C. 340, 355-56, 559 S.E.2d 327, 336 (Ct. App. 2001). "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." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333, 334 (1981).

In this case, the evidence shows that the Appellant was aware of the slope of the driveways and drainage issues as early as 2004. Homeowner Jim Dunn admitted in his deposition that he heard Speedee Concrete tell Wayne Winderman of WW&LB in 2004 or 2005 that the slope of the driveways was too steep. (R. p. 478, ln. 2 - p. 479, ln. 8). Furthermore, in May 2005, the homeowners formed the Ad Hoc Committee to address multiple construction issues, including the slope of the driveways. (R. pp. 616-626).

The Appellant argues that its claims against Speedee Concrete did not accrue until Drew Wilkie, Appellant's expert, issued his report on June 18, 2010. That argument is not factually or legally sound. The slope of the individual driveways was immediately known to the purchaser upon arrival to the property. The Appellant did

not need to know the full legal extent of the injury and did not need to hire an expert for the statute of limitations to begin to run. (Hedgepath v. AT&T, 348 S.C. 340, 355-56). The legal standard is that a person of common knowledge and experience would be put on notice that some claim may exist. (Id.) The Appellants had knowledge that a claim may exist in 2004 or 2005 when Jim Dunn heard Speedee Concrete tell Winderman that the driveway slopes were too steep. The Appellants knew that they had a potential claim against Speedee for more than three years before the Second Amended Complaint was filed; therefore, there is no genuine issue of material fact, and the trial court was proper in granting summary judgment.

Equitable tolling "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper v. Ebenezer Senior Serv. & Rehab Center, 386 S.C. 108, 116, 687 S.E.2d 29 (2009).

> 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.

> 3. The Plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Pelzer v. State, 378 SC 516, 662 S.E.2d 618 (Ct.App. 2008)

The Appellant cites Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct.App. 2012) to support its argument that equitable tolling applies. However, that case is distinguishable from this one. In Magnolia North, the Court held that equitable tolling applied as to toll the statute of limitations against the developer where the developer controlled the homeowner's association and the developer would not have initiated an action against itself. Id. Furthermore, the homeowners were diligent in filing a lawsuit only eight months after assuming control. Id.

In this case, there was nothing to prevent the Appellant from timely filing suit. Speedee was never part of the homeowner's association board. Additionally, the Appellant knew the driveway slopes were too steep, they knew Speedee Concrete constructed the driveways, and they still waited nearly five years to file suit against Speedee. Furthermore, Speedee Concrete did not mislead the Appellant. Based on the foregoing, no extraordinary circumstances exist to warrant equitable tolling of the statute of limitations in this case.

The Appellant further argues that Speedee should be equitably estopped from asserting the statute of limitations as a bar to the Appellant's action. For equitable estoppel to apply, the Appellant must show that the delay was induced by Speedee's conduct. See Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc. 286 S.C. 207, 332 S.E.2d 555, 561 (Ct.App. 1985).

There is no evidence that Speedee did anything to cause the Appellant's delay in naming it as a defendant. The Appellant cites a letter from Winderman, the developer, stating that he would address the drainage, road, and maintenance issues. Speedee Concrete did not make any representations to the Appellant that it would make repairs. Furthermore, Winderman is not an agent of Speedee and the acts of Winderman cannot at all be attributed to Speedee. Equitable estoppel is inapplicable as to Speedee Concrete. Speedee did not cause the delay and did not induce the Appellant to believe that Speedee would make repairs.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE THE APPELLANT DOES NOT HAVE STANDING

The Appellant lacks standing to bring a lawsuit against Speedee Concrete for the alleged defects to the driveways because the driveways are defined as limited common elements in the Master Deed (R. pp. 1107-1108) and are thus the responsibility of the

individual homeowners, not the homeowner's association (R. pp. 1116-1117). The Appellant even admits that the driveways are limited common elements pursuant to the Master Deed. Therefore, the Appellant does not have standing to bring a lawsuit regarding alleged defects to the driveways. See Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 421, 321 S.E.2d 46 (1984), in which the Supreme Court of South Carolina held that a homeowners association did not have the authority to bring suit for defects to balconies because they were limited common elements.

The Appellant cites Article IV of the Master Deed for the proposition that the limited common elements are to be treated as common elements giving the Appellant standing to bring suit regarding alleged defects with those limited common elements. The referenced section 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". However, this assertion by the Appellant is misguided in that it ignores the clear and unambiguous language of the clause. The Appellant fails to appreciate the expressed limiting language: "except as specifically provided in this Master Deed…."

Further, any damages created by the slope of the driveways are the responsibility of the owner of the unit to which the driveway is appurtenant. Thus, the Appellant's claims against Speedee Concrete for any damages caused by the slope are misdirected since such damages would be each driveway owner's responsibility. To ignore this conclusion is to torture the plain meaning of the Master Deed. In support of this assertion, the Master Deed provides in Section 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 do so may engender (emphasis added).

CONCLUSION

The trial court correctly granted Speedee Concrete's Summary Judgment motion in this case because the Appellant (and individual members) had notice of the issues pertaining to the driveways more than three years prior to suit being brought against Speedee Concrete. Further, the Appellant has no standing to bring suit against Speedee Concrete because it is not the owner of the driveways. Under the Master Deed, the driveways are limited common elements and as such are the responsibility of each unit owner to maintain or repair. In addition, each owner is liable for any

damages caused by their driveways to other property. Based on the foregoing, the trial court's order granting summary judgment should be affirmed.

Respectfully submitted,

Dated: November 30, 2015

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Appellate Case No. 2015-000248

CERTIFICATE OF COUNSEL

The undersigned, as counsel for Respondent Speedee Concrete, Inc. (inaccurately identified as Speedy Concrete, Inc.), certifies that the Final Brief of Respondent Speedee Concrete, Inc. complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Dated: 11/30/15

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Appellate Case No. 2015-000248

PROOF OF SERVICE

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

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