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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-296 (S.C. Ct. App. filed July 19, 2017)
Appellate Case No. 2017-002133

Rivergate Homeowners' Association, ... Petitioner,

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, ... Petitioner,

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.

PETITION FOR A WRIT OF CERTIORARI

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The Court of Appeals issued its decision July 19, 2017. (App.pp.1401-1405). Counsel for the Petitioner certifies the petition for rehearing was made August 14, 2017, (App. pp.1406-1410), and denied September 22, 2017. (App.pp. 1411-1412).

QUESTIONS PRESENTED

I. Can equitable tolling extend the limitations period in a construction defects case against design professionals and contractors during the period of time the developer hiring those entities controlled the development's homeowners' association?

II. Did the Court of Appeals and circuit court incorrectly interpret the Rivergate development's master deed as giving individual home owners the responsibility of repairing their respective units' driveways?

STATEMENT OF THE CASE

The lead issue in this case involves the decision of the Court of Appeals in *Magnolia North Property Owners' Association v. Heritage Communities*, which held the statute of limitations in a construction defect case would be tolled against a developer as long as the developer controls the development's homeowners' association. Petitioner—the Rivergate Homeowners' Association—believes this rule extends to design professionals and outside contractors who performed defective work at the developer's direction.

Rivergate is a residential community in Little River consisting of multiple duplex and quadplex residential buildings. The project was developed from 2001 to 2005. (App.p.10).

In January of 2007, a Rivergate homeowner named Robert Sanger sued Rivergate's developer, the Rivergate Homeowners' Association, the HOA's board of directors, and

multiple contractors. (App.p.101). The suit alleged various construction defects including the improper construction of driveways, roads, and the subdivision's stormwater management system. (App.p.107).

The case was styled as a class action but a class was never certified. The HOA was sued for negligence and breach of contract for allegedly failing to responsibly manage the community. (App.pp.114, 116).

The developer relinquished control of the Rivergate HOA on October 31, 2007. (App.p.1085). There was a pending motion seeking an order for this transfer of control. *Id.*

A second lawsuit was filed in June of 2008. (App.p.146). This suit had the HOA as the plaintiff and was consolidated with the Sanger case in March of 2009. (App.pp.1-3).

Respondents are an engineering firm (AB Consulting Engineers), a concrete firm (Speedee Concrete), and a construction firm (Chuck's Construction). They were named as defendants in the second amended complaint filed April 28, 2010. (App.pp.193-194). All were sued for negligence, breach of warranty, and unfair trade practices. (App.pp.200-206).

Each Respondent moved for summary judgment in 2013 based on the statute of limitations. (App.pp.49-59). Problems with Rivergate's driveways, roads, and stormwater management system had been longstanding and well-known. For example, a 2006 memo from a volunteer committee of owners noted substantial problems with flooding. (App.p.1098). A suit over defects related to flooding in 2006 would ordinarily be untimely as to defendants who were not sued until 2010. See S.C. Code Ann. § 15-3-530(1).

The HOA opposed summary judgment, contending the three-year limitations period should be tolled and should not start until October 31, 2007, which was the date the

Rivergate home owners gained control of the HOA and a meaningful opportunity to sue. (App.p.320, line 23-p.322, line 10). The HOA argued there was evidence Respondents knew or should have known their work was defective and that there was evidence the Rivergate developer had requested this defective work. (App.p.304, lines 23-25; p.309, lines 5-25; p.314, lines 1-24; p.1069, ¶¶6-9). The HOA argued the developer-controlled HOA was not likely to sue contractors who performed deficient work at the developer's direction—those contractors would likely respond by counter-suing the developer. (App.p.328, lines 3-11). The proof of this was of course in the pudding as *nobody* was sued by the HOA until *after* the developer turned the HOA over to the homeowners.

The parties made various other arguments with respect to summary judgment. Those arguments included an argument by Speedee Concrete that driveways in the Rivergate development are the responsibility of each unit's owner and that the Rivergate HOA lacks standing to sue for defective driveway construction. (App.p.330, lines 5-10).

The circuit court conducted a hearing in January of 2014, (App.p.238), and issued separate orders granting summary judgment to each Respondent. (App.pp.9-33). The court reasoned the HOA had notice of potential claims against Chuck's Construction as early as May of 2005. (App.p.14). As to Speedy Concrete, the court reasoned individual owners should have known about their improper driveway slopes when they purchased their units and that the HOA lacked standing with respect to driveways. (App.pp.17-18). As to AB Engineering, the circuit court held there was "uncontroverted evidence" Rivergate's developer, the HOA, and the Rivergate home owners were aware of drainage issues "long before" three years prior to naming AB as a defendant. (App.p.30).

The HOA filed motions to reconsider and the circuit court denied the motions in brief written orders following a hearing. (App.pp.34-44).

The HOA appealed and raised six issues in briefing. (App.pp.1417-1418). At argument, however, the HOA narrowed its focus to two issues, issues II and V. The HOA contended equitable tolling applied because the developer did not relinquish control over the HOA until October 31, 2008. (App.pp.1431-1436). The HOA also contended it had standing to sue over defective driveways. (App.pp.1439-1441).

The Court of Appeals affirmed in an unpublished memorandum decision addressing all six of the briefed issues. The Court of Appeals rejected equitable tolling by string-citing cases for various principles related to tolling. (App.pp.4103-1404, ¶2). It also cited a case for the proposition that a party may not argue a new grounds for reversal in reply brief or oral argument. *Id.* The Court of Appeals rejected the HOA's standing argument with respect to driveways by citing a case explaining the purpose of contract interpretation is to ascertain the parties' intentions. (App.p.1405, ¶5).

The HOA filed a petition for rehearing focused on the two issues it emphasized at argument. (App.pp.1406-1410). The Court denied rehearing in a brief order indicating it did not believe there was a basis for rehearing. (App.p.1412).

ARGUMENTS

The Court should grant certiorari with respect to the first question presented as it involves a novel issue. Precedent has already applied equitable tolling against a developer while the developer controlled the development's HOA. The Rivergate HOA believes the

logical extension of this precedent extends tolling to circumstances where there is evidence contractors and design professionals did faulty work at the developer's request and direction.

The second issue is an error-correction issue involving the interpretation of the Rivergate development's master deed. The master deed explains driveways in the Rivergate development are "limited common elements" as well as "common elements." The master deed also has limiting language explaining individual owners are not required to maintain all limited common elements.

The grant of summary judgment was improper. This Court should reverse the judgment and remand for trial.

I. Equitable tolling should extend the limitations period against design professionals and contractors during the period of time the developer hiring those entities controlled the development's homeowners' association.

Equitable tolling is about relieving the harsh results that sometimes flow from a strict and literal application of time limits. The doctrine is judicially created. *Hooper v. Ebenezer*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). It is to be applied rarely and only in extraordinary circumstances. *Id.* at 117, 687 at 33.

In *Hooper* this Court described three categories of circumstances warranting tolling: cases where the plaintiff filed a timely but defective pleading, cases where extraordinary circumstances outside the plaintiff's control made it impossible for the plaintiff to file a timely claim, and cases where the plaintiff could not have discovered essential information bearing on the claim. *Id.* at 116-117, 687 S.E.2d at 32-33. The Court explained this list was not exclusive because a court's equitable power "is not bound by cast-iron rules[.]" *Id.*

In *Magnolia North Property Owners' Association v. Heritage Communities* the Court of Appeals upheld tolling's application to a construction defect lawsuit against a real estate developer while the developer controlled the development's HOA. 397 S.C. 348, 371-372, 725 S.E.2d 112, 125 (Ct. App. 2012). The court drew its explanation of tolling from *Hooper* and "found unpersuasive" the developer's contention that the development's HOA would have initiated a lawsuit against developer while the developer controlled the HOA's board. *Id.* The court noted the lawsuit was commenced eight months after property owners gained control of the HOA, indicating due diligence. *Id.*

Recognizing tolling's potential application here is the logical extension of *Magnolia North*. As long as the developer controls the development's HOA, the HOA is not going to sue contractors and design professionals who did faulty work at the developer's request and direction. For the same self-centered reason no developer would vote to sue itself, a developer will not vote to sue contractors and design professionals that did deficient work per the developer's instruction. Those entities would likely respond by countersuing the developer. The developer's natural instinct will always be to protect itself from liability. Thus, in a situation involving an unscrupulous developer whose goal was to pocket as much money as it could by requesting shoddy work from others, the developer-controlled HOA is going to do exactly what it did here, which is stall and delay.

In rejecting tolling's potential application the Court of Appeals emphasized certain language from *Hooper*—that tolling applies when "deny[ing] it would permit one party to suffer a gross wrong *at the hands of the other*." (App.pp.1403-1404) (emphasis in original). This suggests the court may have based its decision not to allow the possibility of tolling's

application on the belief that tolling requires wrongdoing by the defendant and that there was no evidence Respondents engaged in any wrongdoing.

That belief is mistaken. One of the things differentiating tolling from estoppel is that tolling does not require a misrepresentation by the defendant. *Magnolia North*, 397 S.C. at 372, 725 S.E.2d at 125. Even so, there *is* evidence of wrongdoing here as there is some evidence each Respondent knowingly did deficient work but allowed that work to be passed off as fit for its intended use.

In rejecting tolling's potential application the Court of Appeals also included language suggesting this argument was raised for the first time at oral argument and not properly presented. (App.p.1404). The relevant section of the HOA's brief to the Court of Appeals runs from pages 1431 to 1436 of the Appendix. The argument includes an extensive quote from *Magnolia North*, contends the developer was not likely to sue Respondents, and explains the Rivergate home owners knew they needed control of the HOA because they knew the HOA was the appropriate entity to bring suit.

The HOA made the same argument below, explaining developer-controlled HOAs are not likely to initiate lawsuits in these circumstances because "they know what will happen, there will be crossclaims and other things." (App.p.328, lines 3-11).

The Rivergate HOA was turned over to the Rivergate property owners in October of 2007. Respondents were sued in April of 2010, less than three years later. Tolling is an issue for the court to decide because it is an equitable issue. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003). The circuit court should have conducted a trial and heard all of the evidence before making a ruling on tolling's application.

II. The Court of Appeals and circuit court incorrectly interpreted the Rivergate development's master deed as giving individual home owners the responsibility of repairing their respective units' driveways.

The Rivergate master deed defines driveways as "limited common elements," but limited common elements are also included in the master deed's definition of "common elements" and must be treated as common elements "except as specifically provided in this Master Deed." (R.p.1107-1108). The master deed does not require individual homeowners to maintain all limited common elements; the deed has limiting language explaining individual home owners are only responsible for maintaining limited common elements when the failure to maintain those elements would "affect the development as a whole or any part belonging to other units." (R.p.1116).

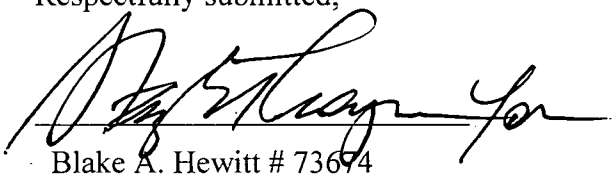
The general rule with respect to horizontal property regimes is that although limited common elements are intended for one unit's exclusive use, everyone owns these elements. *Gaffny v. Reid*, 628 A.2d 155, 157 (Me. 1993). This rule finds expression in persuasive authority. *Id.* It also finds expressions with respect to entrance and exit ways in South Carolina's statutory law. S.C. Code Ann. § 27-31-20(f)(2). The terms of an individual regime's master deed control, but as Petitioner's counsel argued to the circuit court, this particular regime is set up as a condominium complex. (App.pp.392-395). Precedent discloses instances when similar elements are the managing regime's responsibility. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 342, 415 S.E.2d 384, 387 (1992) (front and back yard); *cf. Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 421, 321 S.E.2d 46, 50 (1984) (balconies are not limited common elements).

As with tolling, interpreting the master deed's language presents a question of law. The circuit court incorrectly held the Rivergate HOA lacked standing to sue over alleged defects in construction of Rivergate's driveways.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests this Court grant a writ of certiorari.

Respectfully submitted,



November 2, 2017

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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