THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. 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., 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, 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.

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly affirm the Trial Court's finding that Petitioner's claims are barred by the applicable statute of limitations and that the doctrine of equitable tolling is not applicable?

2. Did the Court of Appeals correctly affirm the Trial Court's finding in that the HOA lacked standing to litigate issues concerning the driveways, which are limited common elements?

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 Petitioner'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, Petitioner 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). Petitioner did not name AB Consulting as a defendant. Petitioner 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, Petitioner 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, Petitioner'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 Petitioner was permitted to file a Second Amended Complaint. (Order dated April 28, 2010, R. pp. 6-8). That same day, Petitioner 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 Petitioner 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 May 19, 2014, Judge Newman issued an Order granting summary judgment in favor of AB Consulting. Id. On May 28, 2014, Petitioner 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). By order filed on December 10, 2014, Judge Newman denied the motion for reconsideration. (Order filed December 10, 2014, R. pp. 34-38).

On March 2, 2015, Petitioner filed a notice of appeal of the trial court's decision. (March 2, 2015 Notice of Appeal, R. pp. 236-237). On June 7, 2017, oral arguments were heard by the

South Carolina Court of Appeals and, on July 19, 2017, the Court of Appeals issued its decision affirming the decision of the trial court. (Op. No. 2017-UP-296). Petition filed a petition for rehearing (Petition for rehearing filed August 14, 2017). On September 22, 2017, the Court of Appeals denied the petition. (Order denying rehearing filed September 22, 2017).

ARGUMENT

1. The Court of Appeals Correctly Held that Petitioner's Claims are Barred by the Statute of Limitations and that Equitable Tolling Does not Apply

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

As the Court correctly recognized, pursuant to Sections 15-3-510 and 15-3-530(1) of the South Carolina Code, Petitioner's causes of action for negligence, breach of warranty, and breach of contract must be commenced within three years after Petitioner 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 this 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 in this 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, it clear that Petitioner 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 Petitioner'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.

Petitioner incorrectly argues that its claims did not accrue until its expert Drew Wilkie issued a report on June 18, 2010. Petitioner's argument is not only illogical but also legally defective. Petitioner 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).

B. Equitable Tolling Does Not Apply

There is no novel legal issue presented in this case. Since Plaintiff knows that the statute of limitations bars its claim, its argument rests solely upon its contention that somehow its claims are equitably tolled. Equitable tolling was first adopted by this Court in Hooper v. Ebenezer Senior Serv. & Rehab. Center, 386 S.C. 108, 687 S.E.2d 29 (2009). In that case, this Court held that the person asserting equitable tolling has the burden of establishing sufficient facts to support that defense. Id. This 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. This 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. 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.").

Petitioner seeks to extend the holding in 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. The Court of Appeals 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.

AB Consulting completed its services nearly seventeen years ago. All of the reasons why the statute of limitation exists to bar stale claims is demonstrated by this case. 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.").

Magnolia North simply does not apply; 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 even came into existence. (Jan. 17, 2014 Hr'g Tr. 45:3-12; R. p. 282, lines 3-12). There is no evidence that Petitioner 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 Petitioner 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. No extraordinary circumstances exist warranting the imposition of a doctrine which this Court has determined should be used sparingly. There is no logical extension of the doctrinbe of equitable tolling which applies ot these facts. Accordingly, the Petition should be denied.

Accordingly, the application of the statute of limitations in this case furthers both the principle of equity and public policy of South Carolina.

2. The Court of Appeals Correctly Held that the HOA Lacks Standing to Litigate Issues Concerning the Driveways, Which are Limited Common Elements.

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). Petitioner contends that certain of the concrete driveways which

service individual units are too steep. Petitioner neither owns nor maintains these driveways. Petitioner also does not own the exfiltration drainage system beneath the roads in Rivergate.

Article IV of the Master Deed plainly indicates that "grade-level concrete driveways" are limited common elements. (Master Deed, R. pp. 1103-1160). 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 Petitioner, 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 Petitioner 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). Petitioner's counsel long ago 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).

Petitioner's argument is misplaced, 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. By Petitioner's own admission, driveways are limited common elements. (Brief of Petitioner, p. 26).

CONCLUSION

For the reasons stated above, the trial court correctly granted summary judgment in favor of AB Consulting Engineers, Inc. and the Court of Appeals properly affirmed the order without dissent. This case involves no novel questions of law nor does its decision conflict with any other decisions of this Court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

December 4, 2017

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Defendants.

Of Whom AB Consulting Engineers, Inc. is the

Respondent.

PROOF OF SERVICE

The undersigned, Stephanie H. Burton, certifies that she is a member of Gibbes Burton, LLC and on the 4th day of December 2017, she served copies of the Return to Petition for Writ of Certiorari of AB Consulting Engineers, Inc. by depositing in the

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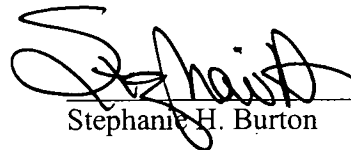

Stephanie H. Burton