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, et al., ... Defendants,

Of Whom

Speedee Concrete, Inc., AB Consulting Engineers, Inc.,
and Chuck's Construction, Inc.,are the ..... Respondents.

BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDING

The complete caption for this appeal is below. The caption on the cover is abbreviated to fit on a single page.

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., AB Consulting Engineers, 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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QUESTIONS PRESENTED

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

II. Did the lower courts incorrectly interpret this development's master deed as giving individual owners the responsibility of repairing their respective units' driveways and as depriving the homeowners' association of standing to sue over defective driveways?

INTRODUCTION

The lead issue in this case involves the decision of the Court of Appeals in *Magnolia North Property Owners' Association v. Heritage Communities*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). *Magnolia North* held the statute of limitations in a construction defect case would be equitably tolled against a developer as long as the developer controls the development's homeowners' association.

This case asks whether tolling can apply to claims against engineers and contractors. The answer should be "yes." Tolling should apply until the homeowners get control.

STATEMENT OF THE CASE

Rivergate is a residential community in Little River consisting of multiple duplex and quadplex 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 defects including the improper construction of driveways, roads, and the subdivision's stormwater management system. (App.p.107, ¶47).

The case was styled as a class action, see (App.p.102, ¶1), but a class was never certified. The claims against the developer-controlled HOA were negligence and breach of contract for allegedly failing to responsibly manage the community. (App.pp.114, 116).

The developer gave control of the HOA to Rivergate's homeowners in October of 2007. (App.pp.1085-1086). A motion sought an order compelling this transfer. *Id.*

A second lawsuit—*this* lawsuit—was filed in June of 2008. (App.p.146). The HOA appears in the caption as the plaintiff and also as a defendant. *Id.* This case was joined with the Sanger case under a single case number 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).

Respondents' timeliness defense relied on the fact that problems with Rivergate's driveways, roads, and stormwater management system had been longstanding and well-known. A volunteer owners committee noted substantial problems with flooding in 2006. (App.p.1095-1098). Speedy Concrete pointed to evidence it told Rivergate's developer about problems with Rivergate's driveways in 2003 or 2004. (App.pp.277-278). A suit over defects discovered in 2003, 2004, and 2006 would ordinarily be untimely as to defendants who were not sued until 2010. Actions for breach of contract and for damage to real property have a three year statute of limitations. S.C. Code Ann. § 15-3-530 (2005).

The HOA opposed summary judgment, contending the three-year limitations period should be tolled until October 31, 2007—the date the Rivergate homeowners 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 because *nobody* was sued by the HOA until *after* the developer released the HOA to the homeowners in 2007. The HOA brought suit 2008. Respondents were added in 2010.

The parties made various other arguments respecting 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). It issued separate orders granting summary judgment to each Respondent. (App.pp.9-33).

The court held the HOA had notice of potential claims against Chuck's Construction as early as May of 2005 and that a suit against Chuck's in 2010 was too late. (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 to sue over defective driveway construction. (App.pp.17-18).

As to AB Engineering, the circuit court held there was "uncontroverted evidence" Rivergate's developer, the HOA, and the Rivergate homeowners were aware of drainage issues "long before" three years prior to naming AB as a defendant in 2010. (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 oral argument, however, the HOA narrowed its focus to two issues, issues II and V.

Issue II was the HOA's argument that equitable tolling applied because the developer did not relinquish control over the HOA to the Rivergate homeowners until October 31, 2007. (App.pp.1431-1436). Issue V was the HOA's argument that it had standing to sue over defective driveway construction. (App.pp.1439-1441).

The Court of Appeals affirmed in an unpublished memorandum decision addressing all six of the briefed issues. (App.pp.1402-1405).

The Court of Appeals rejected equitable tolling by string-citing cases for various principles related to tolling. (App.pp.1403-1404, ¶2). It also cited a case for the proposition that a party may not argue a new ground for reversal in a reply brief or at 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 of Appeals denied rehearing in a brief order indicating it did not believe there was a basis for rehearing. (App.p.1411-1412).

ARGUMENT

There are two reasons this Court should reverse the Court of Appeals.

First, applying equitable tolling to the HOA's right to sue design professionals and contractors is a logical extension of *Magnolia North*, which applied tolling against a developer while the developer controls the development's HOA. This extension is especially appropriate when there is evidence the design professionals and contractors knew they were performing faulty work. There is such evidence here.

Second, the Court of Appeals and the circuit court incorrectly construed the Rivergate development's master deed to prohibit the HOA from suing over defective driveway construction. The master deed explains Rivergate's driveways are "limited common elements" as well as "common elements." When properly construed, the deed further explains individual owners are not required to maintain certain limited common elements like driveways, indicating driveways are the HOA's responsibility. But even if individual owners *were* required to maintain their driveways, it would not negate the HOA's right to sue. The driveways are owned by the "common" development. The HOA has standing.

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

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

The Court should resolve the first issue in this case by holding that the limitations period for a homeowners' association to sue design professionals and contractors is equitably

tolled during the period of time the homeowners' association is controlled by the developer who hired those entities rather than by the homeowners themselves.

a. Tolling is a flexible doctrine created to protect diligent plaintiffs against harsh results.

Equitable tolling is about relieving "the harsh results that sometimes flow" from a strict and literal application of time limits. *Hooper v. Ebenezer*, 386 S.C. 108, 116, 687 S.E.2d 29, 33 (2009). The doctrine is judicially created. *Id.* at 115, 687 S.E.2d at 32. 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*, 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. at 371-372, 725 S.E.2d at 125. The court drew its explanation of tolling from *Hooper* and "found unpersuasive" the developer's contention that the HOA would sue the developer while the developer controlled the HOA's board. *Id.* The court noted the lawsuit was filed eight months after the homeowners gained control of the HOA, indicating due diligence. *Id.* The decision rests on the premise that the HOA does not have a realistic opportunity to sue the developer until the developer relinquishes control.

b. Applying tolling to an HOA's right to sue design professionals and contractors is a logical extension of *Magnolia North*.

Recognizing tolling's potential application to contractors and design professionals is the logical extension of *Magnolia North*. The developer's interest is a short term interest in selling units and finishing construction. It is difficult to imagine buyers would find a development attractive if the development is involved in litigation over construction defects.

An opinion from Florida's intermediate appellate court puts the point well. That opinion explains developers were traditionally the only ones that could sue for defective design and construction but "[e]xperience taught that the developer's interest—in building, selling, and getting out—was not always the same as the longer-term interests of those who bought individual units[.]" *Seawatch At Marathon Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 610 So. 2d 470, 473 (Fla. Dist. Ct. App. 1992).

This record proves the truth of that statement. The first meeting of homeowners to discuss problems in Rivergate was in May of 2005. (App.p.468). People were talking about a lawsuit by at least November of 2006, see (App.pp.749-752), but they knew "we are not an HOA yet." (App.p.750). The head of an ad hoc homeowners' committee said he knew the group needed to hire an engineer and an attorney but he explained there was no HOA "board" to allocate money for these tasks because development was controlled by the developer. (App.p.534, lines 7-21). Homeowners wanted action but they could not get it.

The case for tolling's potential application is even stronger on this record. There is evidence these entities did faulty work at the developer's request and direction. For example, deposition testimony indicated Speedy Concrete followed *the developer's instruction* to

deviate from the appropriate way to construct driveways. (App.p.531, line 12 - p.532, line 25). The developer's design was "a cheaper way to do it." *Id.* An engineer retained by the HOA opined all of the defendants were aware of the development's deficiencies or should have been aware of them. (App.p.1063, ¶8). This engineer's report specifically catalogued instances where AB Consulting Engineers observed deviations from its own deficient design but nevertheless (and inexplicably) certified the project as complete. (App.p.1069, ¶¶6-9).

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 at the developer's instruction and direction. Those entities would likely respond by countersuing the developer. The developer's natural instinct will be to protect itself from liability, and even the most scrupulous developer will likely be hesitant to initiate litigation because of the delay it would certainly cause in sales. Combine that natural resistance with an unscrupulous developer whose goal was to pocket as much money as it could by requesting shoddy work, and the result is that the developer-controlled HOA does exactly what it did here, which is stall and delay.

c. There is no good reason *not* to apply tolling here.

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 to foreclose 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 wrongdoing 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. (App.p.531, line 12 - p.532, line 25; p.1063, ¶8; p.1069, ¶¶6-9).

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 brief contains an extensive quote from *Magnolia North*, argues the developer was not likely to sue Respondents, and explains that the Rivergate homeowners 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 file 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 homeowners' experience is the result of the development's structure. Rivergate is a Horizontal Property Regime—a condominium complex, (App.p.1104)—and the Horizontal Property Act (S.C. Code Ann. §§27-31-10 to -440) does not contain a directive about transferring control of a regime's governing board from the developer to the individual owners. Owners have been forced to file suit to gain control. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 179, 708 S.E.2d 787, 791 (Ct. App. 2011) (the first cause of action was to give control of the homeowners' association to the resident owners). That is what happened here. The gap in the law creates the situation where a

developer can retain control over the governing board long enough to bar potential causes of action the unit owners might otherwise have been able and willing to pursue. Until the HOA is turned over, the homeowners' rights are held hostage to someone else's control.

One distinction between Florida and South Carolina—the Court will recall this brief's earlier use of a Florida case—is that Florida has codified the rule the HOA would have the Court apply, tolling all deadlines until the unit owners in a cooperative association elect a majority of the governing board's members. Fla. Stat. Ann. § 718.124. South Carolina does not have such a statute, but the argument here is based on the Court's equitable power, which "is not bound by cast-iron rules[.]" *Hooper,* 386 S.C. at 116-117, 687 S.E.2d at 32-33. Florida's statute reflects the wisdom of that state's experience. The fact that the statute exists supports the HOA's argument that a developer is not an equal proxy for the homeowners.

The Rivergate HOA was turned over to the Rivergate property owners in October of 2007. By April of 2010—less than three years later—the homeowner-controlled HOA had hired a forensic engineer and sued numerous contractors, including Respondents. Tolling is an issue for the court 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 courts below incorrectly interpreted the Rivergate master deed as giving individual home owners the responsibility of repairing their driveways and as depriving the HOA of standing to sue over defective driveways.

Rivergate residents share ownership of everything other than the interior space of their individual units. The master deed defines driveways as "limited common elements."

(App.p.1107). "Limited common elements" are intended for the exclusive use and benefit of the particular unit with which they are associated, *id.*, but the master deed also includes limited common elements in the deed's definition of "common elements" and explains that they are to be treated as common elements "except as specifically provided in this Master Deed." (App.p.1107-1108). These two categories of property are materially different from the only other type of property in Rivergate—the "units"—which are the living space inside the interior walls of each individual condominium. (App.p.1107). Units are conveyed and treated as individual property "capable of independent use and fee simple ownership," but unit owners share "undivided" ownership interests in the limited common elements and the common elements. (App.p.1108, ¶V).

This scheme follows the general rule with respect to horizontal property regimes. 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).

The circuit court believed the HOA lacked standing to sue over defective driveway construction because it construed the master deed as requiring individual homeowners to maintain their respective driveways. (App.p.17-18). This was wrong for two reasons.

First, it was wrong because the master deed does not require individual homeowners to maintain all limited common elements. The deed has limiting language explaining individual homeowners 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." (App.p.1116). It is difficult to see how failing to maintain a driveway would affect the development as a whole or any other unit.

Second, it was wrong because a maintenance obligation does not negate standing. Standing relies on a party having a recognized interest in the outcome. An association has standing when its members would have standing to sue in their own right, when the interests at stake are germane to the association's purpose, and when neither the claim nor the relief requires the participation of individual members. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). The HOA satisfies this standard, either in its own right (as the governing board for this regime) or in a representative capacity for its members who have shared a shared ownership interest in all of Rivergate's limited common elements.

The idea that driveways in a condominium complex would be treated as common elements is supported by the fact that statutory law puts entrance and exit ways in that category. S.C. Code Ann. § 27-31-20(f)(2) (2007). The terms of an individual regime's master deed can control over the statute, 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). Everything except the space between each condominium's unfinished interior walls is proportionally owned by all of the Rivergate homeowners.

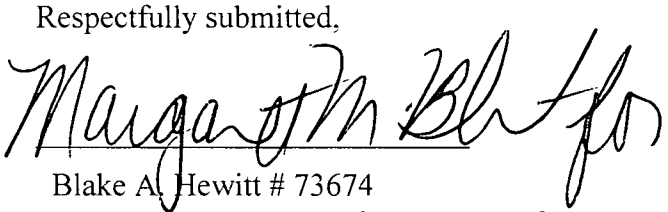
Candor requires acknowledging *Roundtree Villas Ass'n v. 4701 Kings Corp.*, in which this Court held a regime could not sue over balconies because balconies were not "common elements." 282 S.C. 415, 421, 321 S.E.2d 46, 50 (1984). Here, the situation is

different. The Rivergate master deed explains limited common elements are to be treated as common elements and have shared ownership. (App.pp.1107-1108. ¶¶IV & V). Everyone owns a stake in Rivergate's driveways. Owning something includes the right to sue over it.

CONCLUSION

This Court should reverse the Court of Appeals, reverse the grant of summary judgment, and remand this case for trial.

Respectfully submitted,



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