

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable 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

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

BRIEF OF RESPONDENT CHUCK'S CONSTRUCTION, INC.

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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 Dasmercse 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 theRespondents.

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

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 does not apply?
2. Did the Court of Appeals correctly affirm the Trial Court's finding in that the HOA lacked standing to litigate issues concerning the concrete driveways, which are limited common elements?

STATEMENT OF THE CASE

On January 12, 2007, Robert Sanger, a homeowner at Rivergate, filed a complaint in Horry County, South Carolina, which contained allegations regarding alleged design and construction deficiencies in the construction of Rivergate. (App.p.101). Specifically, that complaint contained allegations regarding defective construction of roadways, drainage issues and improper driveway slopes. Id. Chuck's Construction Co., Inc., (Chuck) was not a named Defendant in the Sanger Complaint. Id. Thereafter, an amended complaint was filed by Sanger on April 20, 2008, where Sanger named additional subcontractors and design professions, but Chuck was not named in that suit either. (App.p.120).

On June 13, 2008, Petitioner filed a complaint against multiple subcontractors alleging construction deficiencies similar to those alleged in the Sanger lawsuit, including allegations pertaining to the construction of roadways, drainage issues and driveway slopes. (App.p.146). Chuck was still not named as a Defendant in that action at that time. Id. Petitioner filed an Amended Complaint and Chuck was again not named as a defendant in that suit. (App.p.169). The Sanger Complaint and Petitioner's Amended Complaint were consolidated in March of 2009. (App.pp.1-3). Thereafter, On August 18, 2009, the case was stricken pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. (App.pp.4-5). Petitioner's case was restored on April 28, 2010, which named Chuck's as a defendant for the first time. (App.p.188). The allegations contained in Petitioner's Second Amended Complaint pertaining to the roadways, drainage issues and driveway slopes were identical to those allegations contained in the Sanger and Petitioner's Complaints. Id. Chuck's filed an Answer to Petitioner's Second Amended Complaint on June 1, 2010, asserting multiple defenses which included statute of limitations.

(App.p.210). On March 13, 2013, Chuck's filed a motion for summary judgment as to Petitioners claims. (App.pp.48-51).

On March 10, 2014, Judge Newman issued an Order Granting summary judgment in favor of Chuck. (App.pp.9-14). Thereafter, Petitioner filed a motion for reconsideration as to Judge Newman's order dated March 10, 2014, which was denied by Judge Newman in December of 2014. (App.pp.42-44).

On February 4, 2015, Petitioner filed a notice of appeal of Judge Newman's decision as to Chuck. On June 7, 2017, oral arguments were heard by the South Carolina Court of Appeals. The South Carolina Court of Appeals issued its decision affirming Judge Newman's decision on July 19, 2017. (App.pp.1401-1405). Petitioner filed a petition for rehearing on August 14, 2017. (App.pp.1406-1410). The Court of Appeals denied Petitioner's petition on September 22, 2017. (App.pp.1411-1412). Petitioner filed its Petition for Writ of Certiorari on November 2, 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 three-year statute of limitations applies to the causes of action asserted by Petitioner in its civil action against Chuck. S.C. Code Ann. Section 15-3-530(1) (three year statute for express or implied warranty claims); S.C. Code Ann. Section 15-30-530(5) (three year statute for negligence claims); S.C. Code Ann. Section 39-5-150 (three year statute for Unfair Trade Practices claims). Petitioner brought its claims against Chuck in April of 2010, but the Petitioner's Ad Hoc Committee knew of specific problems with drainage at Rivergate by at least May of 2005 (App.p.673). As early as March of 2004, at Petitioner's annual meeting, the homeowners discussed issues regarding drainage, and Wayne Winderman acknowledged the drainage concerns. (App.pp.584-586). In addition, several homeowners, including Don Miller and Pat Connors, wrote to the Ad Hoc Committee and detailed drainage issues. (App.pp.671-672). Wayne Winderman, knew about drainage issues by at least July, 2005, when he wrote to the Ad Hoc Committee specifically concerning an "inspection" of drainage at Rivergate (App.pp.621-623). Thus, the Petitioner's claims were time-barred when brought in 2010 and summary judgment was appropriate in favor of Chuck.

Petitioner claim that it did not have sufficient knowledge of the drainage problems at Rivergate prior to receiving a full report from its expert engineer, Kimley-Horn, in June 2010. The Kimley-Horn report goes into expert detail concerning the alleged cause-in-fact of the drainage problems, including esoterica such as obstruction of drainage structures and improper elevation of outfall ditches. (App. pp.1065-1072). An employee of Kimley-Horn, J. Drew Wilkie, executed an affidavit for consideration at the summary judgment hearing asserting that

the Appellant “may have been aware of undesirable symptoms such as standing water, erosion etc.” prior to June 2010. (App.pp.1062-1064). Nonetheless, the affidavit optimistically concludes that the HOA “would not have been aware” that the symptoms were caused by civil construction or design defects. (*Id.*) Unfortunately for Petitioner, it was not necessary for the HOA to know of specific civil construction defects impacting drainage at Rivergate before the statute of limitations began to run.

“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 (S.C. Ct. App. 2001).

Here, Petitioner knew of substantial and ongoing drainage problems at Rivergate nearly five years before an action was commenced against Chuck. The discovery rule does not require the “most knowledgeable” actor to discover a potential cause of action. Instead, the rule is triggered whenever an ordinary party of common experience is put on notice of facts sufficient to alert them that a claim may exist against another. *True v. Moteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). That test was easily satisfied in this case years before Petitioner’s Second Amended Complaint. A party of average experience would have no trouble recognizing that the conditions brought to the attention of the Ad Hoc Committee in 2005, including standing water and erosion, potentially concerned the grading which Chuck performed at the outset of the project. Even

without the benefit of civil engineering education, people from time immemorial have known that water flows downhill and is trapped in culverts, valleys, and other land masses of uneven grade. Therefore, Petitioner was on notice of a potential claim against Chuck in 2005 and was under a duty to act promptly to defend its interests.

a. Equitable tolling does not apply

Petitioner hopes to avoid summary judgment by application of the doctrine of equitable tolling. Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of a statute of limitations. *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). The doctrine may be invoked only when (a) extraordinary circumstances prevented the party from filing despite due diligence, (b) the party actively pursued his remedies by filing a defective pleading during the statutory period or was induced or tricked by the defendant into allowing the deadline to pass, and (c) the party is unable to obtain vital information bearing on the existence of his claim despite due diligence. *Hooper v. Ebenezer Senior Serv. & Rehab Center*, 386 S.C. 108, 687 S.E.2d 29 (2009). In addition, subsequent cases involving the principle of 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.”).

Here, the HOA - whether controlled by the developer or some other party - had ample capacity to bring suit against third parties such as Chuck at any time prior to the turnover in October, 2007. The pre-turnover HOA had both the incentive and knowledge to bring an action to recover for construction defects brought to light in 2005. Petitioner posits no confidential relationship, collusion, or other factual scenario which would have prevented the developer-controlled HOA from proceeding against third parties who allegedly performed negligent services at Rivergate. In addition, Chuck did not complete its contracted scope of work on the project and left the project due to a disagreement with the Wayne Winderman in 2000. (App.p. 10). The HOA had every incentive to bring suit against Chuck given that Chuck breached its contract and left the construction site in 2000. Thus, there are no facts sufficient to satisfy the equitable tolling factors set forth in *Hooper*.

b. *Magnolia North* should not be extended to apply to this case

Petitioner cites *Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) in support of its equitable tolling claim, but that case is inapposite. In *Magnolia North*, this Court held that the statute of limitations was tolled during the period that the defendant developer controlled the plaintiff homeowner's association. Furthermore, 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.* By contrast, Chuck is not the developer, but a third party, and neither controlled nor had any representation on Petitioner's board while the statute ran. Thus, the Petitioner was not faced with the peculiar prospect of "initiat[ing] an action against itself" during the relevant period - the action would have commenced against an arm's-length actor. (App.p.372). No extraordinary circumstances exist warranting the imposition of a doctrine which this Court has

determined should be used sparingly. There is no evidence that Chuck was aware of any alleged deficiencies with the scope of his work until Petitioner brought suit against Chuck in 2010. At that time, Chuck's had been off the project for approximately 10 years. Petitioner had every incentive to sue Chuck back in 2000, but failed to do so. In addition, there is no evidence that Chuck did any faulty work at the request or direction of the developer, as it is clear that Chuck left the project before completing its contracted scope of work. (App.p.10).

Magnolia North should not be extended to apply to this case nor should the Court be persuaded to apply *Seawatch At Marathon Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 610 So. 2d 470, 473 (Fla. Dist. Ct. App. 1992) as Petitioner seeks. In *Seawatch*, the Court of Appeals for Florida reversed "the court's dismissal of the statutory implied warranty claims on statute of limitations ground," but affirmed the tort claims and violations of building codes reasoning that it was the intent "of the legislature to give condominium associations, as representatives of individual unit owners in matters concerning common elements, the right to sue after taking control, where the developers for reasons of self-interest or oversight, failed to pursue a cause of action for breach of contract or negligent construction." Here, Petitioner has presented claims for not only breach of implied warranties, but also negligence, express warranties and unfair trade practices against Chuck. (App.p.188). It is clear in South Carolina that one of the reasons why the statute of limitation exists is to bar stale claims demonstrated by this case. *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 50, 378 S.E.2d 69, 70 (Ct. App. 1989) ("One purposed of the statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights"). Chuck completed its scope of work on the project in 2000, approximately eighteen years ago. Petitioner could have sued Chuck at any time and the record is void of any allegations that Chuck's did any faulty work at the developer's request or direction

or that the developer had any incentive not to sue Chuck. Extending *Magnolia North* and applying *Seawatch* to the case at hand would not promote the public policy considerations that exist as to the statute of limitations and tolling. As a result, *Magnolia North* should not be extended and *Seawatch* does not apply. Accordingly, the previous Court rulings should be affirmed.

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

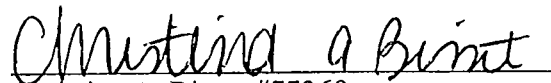
Petitioner alleges that the concrete driveways which lead to individual homeowner units are too steep; however Petitioner neither owns nor maintains these concrete driveways. Property at Rivergate was conveyed by WW&LB to Petitioner by the Master Deed and the associated amendments. (App.pp.1103-1160). Furthermore, Article XXII of the Master Deed indicates that there concrete driveways are Limited Common Elements and thus are not either owned by or maintained by Petitioner. (App.pp.1116-1117). These concrete driveways are the sole responsibility of the unit owners and these owners “shall be expressly responsible for the damages and liability which his failure to do so may engender.” *Id.* In Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 421, 321 S.E.2d 46 (1984), the Supreme Court held that the homeowners association did not have the authority to bring suit for defects to balconies because they were limited common elements. This same reasoning was applied in this matter as the concrete driveways were deemed to be “limited common elements” and solely the responsibility of the individual unit owner and not the HOA.

Petitioner incorrectly relies on Article IV in support of their position that the limited common elements are to be treated as common elements, which would give Petitioner standing to bring suit for the alleged deficiencies with the concrete driveways. 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'." Petitioner's reliance on this specific language of the Master Deed fails to take into account the language pertaining to "except as specifically provided in this Master Deed..." Article XXII of the Master Deed clearly provides that the concrete driveways are limited common elements and that the individual unit owners are solely responsible for any damages or liability for these concrete driveways.

CONCLUSION

For the reasons stated above, the Order of the Trial Court granting summary judgment in favor of Chuck and the Court of Appeals decision affirming the Trial Court's Order was proper and thus should be affirmed.



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Of Whom
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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 *Brief of Respondent Chuck's Construction, Inc.* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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