THE STATE OF SOUTH CAROLINA
In The 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., AB Consulting Engineers, Inc., and Chuck's Construction, Inc. are the

Respondents.

and

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,

Third-Party Defendants,

BRIEF OF RESPONDENT AB CONSULTING ENGINEERS, INC.

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, South Carolina 29302
(864) 327-5000
Attorneys for Respondent AB Consulting Engineers, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES OF THE ISSUES ON APPEAL

Whether the Trial Court and the South Carolina Court of Appeals correctly determined that equitable tolling does not save Petitioner's admittedly time barred claims against Respondent AB Consulting Engineers, Inc.?

STATEMENT OF THE CASE

On January 12, 2007, Robert Sanger, a homeowner in the Rivergate subdivision, filed a complaint in the Horry County Court of Common Pleas, C.A. No. 07-CP-26-0228. (R. pp. 97-117). Sanger, notably represented by Petitioner's counsel, asserted various claims relating to the design and construction of the Rivergate subdivision, including, relevantly here, 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 and joined several additional subcontractors, installers, and design professionals as defendants. (R. pp. 118-141). 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. (R. pp. 142-166). Petitioner did not name AB Consulting as a defendant. Petitioner asserted 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." (Compare R. p. 156 to R. pp. 130-131).

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. (R. pp. 167-187). On March 31, 2009, Petitioner's case was consolidated with the *Sanger* case. (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. (R. pp. 4-5).

By Order dated April 28, 2010, the case was restored and Petitioner was permitted to file a Second Amended Complaint. (, 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. (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. (R. pp. 229-235). On April 12, 2013, AB Consulting filed a motion for summary judgment. (R. pp. 52-55).

On January 17, 2014, Judge Clifton B. Newman held a hearing on the motion for summary judgment. (R. pp. 23-33). 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. (Motion for Reconsideration, R. pp. 75-83). On September 8, 2014, Petitioner's motion for reconsideration was heard by Judge Newman. (R. pp. 34-38). By order filed on December 10, 2014, Judge Newman denied the motion for reconsideration. Id.

Petitioner appealed raising six issues in its brief: (1) The trial court erred in granting summary judgment based upon the statute of limitations because the claims did not accrue until June 18, 2010; (2) the trial judge erred in granting summary judgment because the statute of limitations should be equitable tolled; (3) the trial judge erred in granting summary judgment because Respondents should be estopped from asserting the statute of limitations; (4) the trial judge erred in granting summary judgment because equity and public policy dictate that the Appellant's claims should not be time-barred; (5) the trial judge erred in granting summary judgment based on Appellant's lack of standing because the master deed and by-laws provide that

the appellant, not the homeowners, is responsible for the maintenance, replacement, and repair of the limited common elements; and (6) the trial judge erred in granting summary judgment because there is evidence that Respondents' scope of work failed to conform to industry standards. (R. pp. 1417-1418).

Addressing all six issues, the South Carolina Court of Appeals affirmed the decision of the trial court in an unpublished opinion, string citing various cases, finding: (1) that he statute of limitations began to run when a person could or should have known; (2) that equitable tolling did not apply because equitable tolling should be used sparingly, must be justified under all the circumstances, and the party claiming the statute of limitations should be tolled bears the burden of establishing facts to justify its use; (3) the Respondents should not be estopped from asserting the statute of limitations because a defendant may be estopped where the delay had been induced by the defendant's conduct; (4) the Petitioner's argument the trial court erred in granting summary judgment to Respondents because equity and public policy dictate that appellant's claims should not be barred by the statute of limitations was deemed abandoned because it was a conclusory statements without supporting authority; (5) the appellant lacked standing to litigate issues concerning the driveways because the purpose of contract construction is to ascertain the intention of the parties gathered from the entire agreement; and (6) the appellate court did not need to address the remaining issue because the disposition of the prior issue was dispositive. (R. pp. 1402-1405). (R. pp. 1402-1405). On August 14, 2017, Petitioner filed a petition for rehearing with the South Carolina Court of Appeals. (R. pp. 1406-1410). On September 22, 2017, the South Carolina Court of Appeals denied the petition for rehearing because the Court was unable to discover any material fact or principle of law which had been either overlooked or disregarded. (R. pp. 1411-1413).

This Court granted Petitioner's petition for a Writ of Certiorari on March 28, 2018.

STANDARD OF REVIEW

Reviews of a grant of summary judgment involve the same standard as applied by the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 114, 687 S.E.2d 29, 32 (2009). A trial court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

ARGUMENT

"Some of our important choices have a time line. If we delay a decision, the opportunity is gone forever."
James E. Faust

I. EQUITABLE TOLLING DOES NOT APPLY IN THIS CASE

Petitioner erroneously argues that it seeks a "logical extension" of the doctrine of equitable tolling. To the contrary, Petitioner seeks to avoid its own dilatory conduct and retroactively impose essentially unlimited liability upon design professionals and contractors that work on developer-driven residential projects in South Carolina.

Contrary to Petitioner's argument that the judicially-created doctrine of equitable tolling is "flexible", as this Court noted, equitable tolling is to be applied "rarely" and only in "extraordinary circumstances", not in every case where a developer develops a construction project and controls a homeowner's or property owner's association for an indefinite period of time. Hooper v. Ebenezer Senior Serv. & Rehab. Center, 386 S.C. 108, 116-17, 687 S.E.2d 29, 32-33 (2009) (Equitable tolling "should be used sparingly and only when the interests of justice compel its use"); Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) ("Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations" and is reserved for extraordinary circumstances); American Legion Post 15 v. Horry Cnty, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009) ("South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances.")

Principles of equity simply do not weigh in Petitioner's favor, particularly given its concession that its claims accrued more than three years before it filed suit against AB Consulting. "(A)s a general rule, equity will grant no relief to one against whom an unfavorable judgment has been rendered ... where the aggrieved party could have prevented the return of such a judgment

by the exercise of proper diligence: ..." Center v. Center, 269 S.C. 367, 373, 237 S.E.2d 491, 494 (1977) (Holding that the plaintiff was an experienced litigant whose disregard for the summons and complaint resulted in the judgment and award). Further, equity is not available to relieve parties, under ordinary circumstances, who refuse to exercise reasonable diligence. Montgomery v. Scott, 9 S.C. 20, 34-35 (1877) (ordering a new trial to determine whether the plaintiff was guilty of negligence in signing a bond and mortgage).

The party claiming equitable tolling bears the burden of establishing sufficient facts to justify its use. Hooper, 386 S.C. at 115, 687 S.E.2d at 32. In Hooper, this Court held that equitable tolling is available in three particular circumstances where equity warrants its application:

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 115-16, 687 S.E.2d at 32-33.

In Hooper, this Court found that Ebenezer Senior Services and Rehabilitation Center's failure to properly list its registered agent for service with the Secretary of State, as required by state law, hindered Hooper's ability to serve her pleading. Id. at 117-18, 687 S.E.2d at 33-34. Hooper attempted to effect service upon the agent named by Ebenezer at the address supplied to the Secretary of State. Id. at 118, 687 S.E.2d at 34. Hooper contacted the Lexington County Sherriff's Department multiple times and was told that service was being effected, but was not notified until one month after the statute of limitations expired that service was unsuccessful because the agent could not be found. Id. at 118-19, 687 S.E.2d at 34. This Court cited to Rule 3(a)(2), SCRP, noting that even if the limitations period has expired, service may still be effected

if it is accomplished within 120 days of filing of the summons and complaint. Id. In Hooper, the plaintiff effected service only one week past the 120 day deadline. Id. This Court granted equitable relief stating, "Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent." Id.

Not one of the three circumstances identified in Hooper exist in this case. Petitioner failed to exercise reasonable diligence. Despite having counsel for some time, it did not bring a claim against AB Consulting until well after the statute of limitations had expired. More importantly, there is no evidence in this record that AB Consulting did anything to obfuscate its location, existence, or involvement in the Rivergate project.

Petitioner asks this Court to illogically extend the holding of the South Carolina Court of Appeals' decision in Magnolia North Property Owners Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In Magnolia North Ass'n,, the Court of Appeals applied the doctrine of equitable tolling to toll the statute of limitations that applied to claims against the developer of a condominium project because the board of the property owners' association consisted of the defendant developer's officers until September 9, 2012. Id. at 371-72, 725 S.E.2d at 125. The trial court found that the property owners' association controlled by the developer was unlikely to sue the developer for construction defects.

Surmising that a developer-controlled association is not going to sue the developer is a far cry from Petitioner's argument, without a shred of evidence, that developer-controlled associations will not (and do not regularly) sue unrelated third parties. Construction projects are an important engine of South Carolina's economy. Petitioner suggests that this Court should hold that design and construction professionals that work on developer-led projects should not have the same

protections against stale claims as on other types of construction projects is directly contrary to the purposes of the statutes of limitation. See e.g. Pelzer v. State, 378 S.C. 516, 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."). If this Court were to adopt such a principle in South Carolina, design and construction professionals, who exercise no control over the timing or success of a developer in selling homes, would have unending exposure for claims on those projects. South Carolina construction residential projects would necessarily become both less attractive and more expensive.

II. THE COURT SHOULD NOT LEGISLATE

In an effort to support its illogical argument, Plaintiff incorrectly relies upon a sixteen year old opinion from the Florida Court of Appeals, Seawatch At Marathon Condo. Ass'n v. Charley Toppino & Sons, Inc., 610 S.2d 470 (Fla. Dist. Ct. App. 1992), that interprets a Florida statute, originally enacted in 1977. Unlike South Carolina's legislature, the Florida legislature expressly adopted a statute that applied to the project involved in the case and tolled the statute of limitations until the homeowners gained control over a condominium association. Fla. Stat. § 718.124 (1991).

South Carolina has enacted a statute of limitations which plainly bars Petitioner's claims. S.C. Code Ann. § 15-3-510, 15-3-530(1). The South Carolina legislature has not adopted such a tolling statute. This Court should decline Petitioner's invitation to legislate and apply such judicial

legislation retroactively to services performed by AB Consulting on the Rivergate project more than fifteen years ago. "It is not the province of this Court to perform legislative functions." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 106, 580 S.E.2d 100, 112 (2003); quoting Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 440, 412 S.E.2d 434, 434-35 (Ct. App. 1991), see also Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977), Cooker v. Nationwide Ins. Co., 251 S.C. 175, 178, 182 S.E.2d 175, 178 (1968). "The function of equity is to supplement the law, not to displace it." Wigfall, 354 S.C. at 108, 580 S.E.2d at 117.

CONCLUSION

For the reasons stated above, the trial court correctly granted summary judgment in favor of AB Consulting Engineers, Inc. and the South Carolina Court of Appeals properly affirmed that order. Equitable tolling does not apply to this case and this Court should not extend the doctrine here. Accordingly, this Court should affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,

June 1, 2018

Stephanie H. Burton (#13089)
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: 864-327-5000
Facsimile: 864-327-5001
Attorneys for Respondent AB Consulting Engineers, Inc.

RECEIVED

JUN 07 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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., AB Consulting Engineers, Inc., and Chuck's Construction, Inc. are the

Respondents.

and

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,

Third-Party Defendants,

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 1, 2018

Stephanie H. Burton (#13089)
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, South Carolina 29302
sburton@gibbesburton.com
Telephone: 864-327-5000
Facsimile: 864-327-5001
Attorneys for Respondent AB Consulting Engineers, Inc.

THE STATE OF SOUTH CAROLINA
In The 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., AB Consulting Engineers, Inc., and Chuck's Construction, Inc. are the

Respondents.

and

Chuck's Construction Co., Inc., Third-Party Plaintiff,

v.

Vereen Concrete Co., Inc. and Asphalt Pavement Maintenance of Myrtle Beach, Inc.,

Third-Party Defendants,

PROOF OF SERVICE

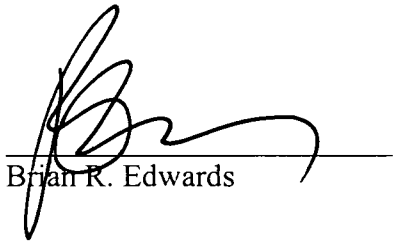
The undersigned, Brian R. Edwards, certifies that he is an employee of Gibbes Burton, LLC and on the 4th day of June, 2018, he served copies of the Brief of Respondent AB Consulting Engineers, Inc. by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed to:

Mr. Stacy L. Stanley
Ms. V. Denise Hamilton
Stanley Law Firm
3303 Highway 9 East
Little River, SC 29566

Mr. G. Michael Smith
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528

Ms. Christina A. Bisset
Mr. J. Christopher Clark
McAngus Goudelock & Courie, LLC
P.O. Box 1349
Myrtle Beach, SC 29578

Mr. Blake A. Hewitt
Bluestein Thompson Sullivan
P.O. Box 7965
Columbia, SC 29202



Brian R. Edwards