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 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.

REPLY BRIEF

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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,

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Speedee Concrete, Inc., AB Consulting Engineers, Inc.,
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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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ARGUMENT

A. It is difficult, on summary judgment, to claim the Rivergate homeowners have been anything other than diligent.

Rivergate's homeowners had to sue Rivergate's developer in order to get control of the Rivergate Homeowners' Association and file this lawsuit. (App.p.321, lines 2-12; p.373, lines 17-25). Within three years of gaining control over the HOA, the HOA hired an engineer—a necessary predicate for suing AB Consulting Engineers—and sued all of the respondents.

It is fair to point out that the respondents were not named as defendants in the original complaint or the first amended complaint. That observation, however, misses the point of tolling. There is no reason to grant Rivergate's homeowners something less than the normal three-year period to file a lawsuit after they gained control of the HOA and the opportunity to sue on its behalf. The homeowners got control of the HOA in October of 2007. (App.pp.1085-1086). The HOA sued the respondents in April of 2010. (App.pp.193-194).

The homeowners had difficulty learning who to sue. The developer did not cooperate in discovery, appearing for a deposition only after a court ordered him to do so in March of 2009. (App.p.3, ¶3). At the deposition in April of 2009, the developer said he hired "various people" to work on the project and that those individuals' identities "should be on the Horry County records." (App.p.778, lines 27:2 - 27:12). The developer denied having any documents that would list the development's general contractors and subcontractors. (App.p.778, line 27:18 - p.779, line 35:23). The HOA's attorney told the circuit court why the lack of records led to parties being added "piecemeal." (App.p.415, lines 2-21).

The respondents seem to overlook that this case was heard on their motions for summary judgment. That posture required the circuit court to view the evidence in the HOA's favor. Perhaps the Rivergate homeowners should have sued for control of the HOA before 2007. A reasonable person might take this view, but that is not the only view supported in this record.

B. The HOA has standing to sue over defective driveways because all Rivergate homeowners collectively own the driveways.

As the HOA's principal brief correctly suggested, one reason the HOA has standing to sue over defective driveway construction in the Rivergate development is that all Rivergate homeowners collectively own the driveways. Driveways are "limited common elements." (App.p.1107).

An individual owner must "promptly" maintain and repair the limited common elements to which the owner has exclusive use when the maintenance or repair, if omitted, would affect the entire development or other units. (App.p.1116). Maintenance does not trump ownership: the HOA would be able to sue an individual owner who failed to maintain or repair such a limited common element because the HOA owns the limited common elements. And the problem here is not the failure to "maintain" or "repair" a driveway. The problem is a defective driveway; one that has been inadequate from the beginning.

It is worth noting the record indicates the one Rivergate homeowner who personally paid to have her driveway fixed did so only after giving up on the developer's promise to fix the driveway. (App.p.530, line 1 - p.532, line 16). This undermines the argument that driveways were understood to be the responsibility of individual unit owners.

C. Tolling will not apply in every construction defect case and concerns about increased liability exposure are diminished by the unusual circumstances presented here and by a statute of repose.

The circumstances of this case are not ordinary. They arise out of a situation where the owners in a residential property management regime had to file a lawsuit in order to wrestle control of the regime away from a developer.

Some of the respondents say it would be illogical to extend equitable tolling to this situation. That can be true only if the state of Florida's extension (by longstanding statute) is illogical. It is sensible to apply tolling in appropriate circumstances because, as Florida succinctly explained, "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). Tolling does not have to apply in every development situation, but the Court should leave open the possibility that it can apply when the circumstances of a particular case warrant its application.

Here, the HOA was denied the opportunity to present all of the evidence for tolling's application through a trial. This Court should reverse because there is a plausible case for tolling's application, especially when the record is viewed through the lens of summary judgment. *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 393 n.2, 503 S.E.2d 184, 188 n.2 (Ct. App. 1998) (noting, in reversing summary judgment, that the lower court failed to view the evidence in the non-moving party's favor).

One of the respondents says recognizing the possibility of tolling in these circumstances will lead to unending exposure for design and construction professions. There

are two reasons that is inaccurate. First, a statute of repose forecloses all claims for defective or unsafe improvements to real property once eight years have passed from the improvement's substantial completion. S.C. Code Ann. § 15-3-640 (Supp. 2017). Second, the Rivergate HOA is not asking for equitable tolling to apply in all instances, just for the Court to recognize tolling's potential application when the circumstances warrant.

It is worth considering the effect of following the rule the respondents propose—a rule limiting homeowners and HOAs to suits against the developer. An unscrupulous developer could hold control over the HOA for three years, mislead the homeowners throughout that time that their problems were being addressed, and foreclose the homeowners' ability to pursue valid claims against contractors for defective construction. This is precisely why Florida enacted a statute that applies to all cases. The statute "was intended to prevent a developer from retaining control over an association long enough to bar a potential cause of action which the unit owners might otherwise have been able and willing to pursue." *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condo. Ass'n, Inc.*, 658 So. 2d 922, 925 (Fla. 1994) (internal citation omitted).

The homeowners in such a situation would obviously have claims against the developer for mismanaging the HOA, but nothing makes it necessary to limit the homeowners to that relief. As this Court has noted, equity "exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) (internal citation omitted).

If the respondents acted at the developer's direction, knowingly passing off defective and inferior construction as being fit for its intended use, a court would be justified in finding that they should not profit at the Rivergate homeowners' expense. There is some of this evidence here.

The evidence is leanest as to Chuck's Construction, but there is *some* such evidence. Chuck's did grading work on some of Rivergate's roads before leaving the project. (App.p.275, lines 14-21). The evidence Chuck's knowingly performed defective work is two-fold. First, the report of the HOA's expert in which he opines all of the defendants were aware of the development's deficiencies or should have been aware of them. (App.p.1063, ¶8). Second, there is deposition testimony indicating the grading work had to be repeatedly redone because of erosion due to the development's incline. (App.p.305, lines 15-20).

As to AB Engineering and Speedee Concrete, the evidence of malfeasence is thicker.

AB Engineering observed deficiencies in construction but failed to evaluate them, relying instead on the developer's representations to certify that the construction followed AB's plans and specifications. This is the opinion of the HOA's expert. (App.p.1069, ¶7). It also happens to be the same story one of AB's owners told during her deposition when she indicated that AB observed the developer deviating from AB's design. (App.p.449, line 2 - p.451, line 18). Rather than ensure Rivergate was built according to the proper design, AB had the developer sign a "hold harmless" agreement. (App.pp.460-462).

Speedee Concrete has never claimed the driveways were properly constructed. As the circuit court noted, Speedee admitted telling the developer the driveways were too steep. (App.p.18).

Tolling does not have to apply to all construction defect cases, but there is a plausible case for its application here. The circuit court should not have granted summary judgment. This Court should reverse.

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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/s/ per Blake Hewitt

June 21, 2018

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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 *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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June 21, 2018

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