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, 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 Zeferino, 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, L.L.P., Adrian Mondragon, individually and d/b/a Mondragon Construction, Inc., and Glen Causey, Defendants,

Of Whom

Speedy 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,

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BRIEF OF RESPONDENT SPEEDEE CONCRETE, INC.

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QUESTIONS PRESENTED

1. WHETHER SPEEDEE CONCRETE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND EQUITABLE TOLLING DOES NOT APPLY TO SPEEDEE CONCRETE?

2. WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE THE APPELLANT DOES NOT HAVE STANDING TO SUE REGARDING DRIVEWAYS THAT ARE LIMITED COMMON ELEMENTS?

STATEMENT OF THE CASE

Robert Sanger, a homeowner at Rivergate, filed a complaint on January 12, 2007, which contained allegations regarding the design and construction of Rivergate. (App. pp. 97-117) Notably, the Complaint included allegations regarding improper driveway slopes and drainage issues. Id. Speedee Concrete, Inc. (incorrectly named Speedy Concrete) was not named as a defendant in that lawsuit. Id. Sanger then filed an Amended Complaint on April 20, 2008 where he named additional subcontractors and design professionals as defendants. (App. pp. 118-141). Speedee Concrete, again, was not named as a defendant. Id.

On June 13, 2008, the Appellant filed a complaint against various subcontractors alleging construction defects similar to those alleged in the Sanger lawsuit, including allegations regarding the sidewalks, driveways and drainage system. (App. pp. 142-168). Speedee Concrete was not named as a defendant in that action. Id.

On March 21, 2009, Appellant filed a First Amended Complaint, and Speedee Concrete was again not named as a defendant. (App. pp. 167-187). On March 31, 2009, the Sanger case and the Appellant's case were consolidated. (App. pp. 1-3). The case was stricken pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure on August 18, 2009. (App.

pp. 4-5). When the case was restored on April 28, 2010, the Appellant filed a Second Amended Complaint, which named Speedy Concrete (sic) as a defendant. (App. pp. 188-209). The Second Amended Complaint contained the same allegations regarding the driveways and drainage that were in the Appellant and Sanger's prior Complaints. Id. Speedee Concrete then filed an Answer and asserted various defenses, including the statute of limitations as a defense. (App. pp. 219-228). On July 19, 2013, Speedee Concrete filed its Motion for Summary Judgement. (App. pp. 56-59).

Judge Clifton Newman heard Speedee's Motion for Summary Judgement on January 17, 2014. On May 7, 2014, Judge Newman granted Speedee's Motion for Summary Judgment. (App. pp. 15-22). The Appellant then filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. pp. 84-94). Judge Newman heard Appellant's Motion for Reconsideration and denied that motion by order filed December 10, 2014. (App. pp. 39-41). The Appellant appealed Judge Newman's decision. The assertions argued by the Appellant were that equitable tolling should apply to the Respondent subcontractors, and that the HOA had standing to sue for alleged defective driveway construction.

The Court of Appeals affirmed the trial court in an unpublished opinion (App. pp. 1402-1405). The Appellant

thereafter filed a petition for rehearing (App. pp. 1406-1410). The Court of Appeals denied rehearing (App. pp. 1411-1412).

STATEMENT OF FACTS

The Rivergate subdivision is located in Little River, South Carolina. The developer, WW&LB Development Company, LLC, was a company owned by Wayne Winderman and Luther Bellamy. Winderman hired AB Consulting to prepare plans and specifications for the site work, including the grading and stormwater management plans. (App. p. 457). Chuck's Construction Co. performed the site grading and installed the storm water management system. (App. p. 463). Speedee Concrete constructed the concrete parking pads and driveways to the individual units from 2004 to 2007. (App. p. 440, line 5 to p. 444, line 13 & Speedee Invoice, App. p. 1073).

On March 16, 2001, the Master Deed for Rivergate Horizontal Property Regime was filed. (App. pp. 1103-1160). The Master Deed defines limited common elements as follows:

> Limited common elements as to the term is used herein shall mean and comprise the following: (A) attic space, if any, and **grade level concrete driveways**, patios, or stoops…(emphasis added).
>
> (App. pp. 1107-1108).

The Master Deed also provides that it is the responsibility of the owner to take care of the maintenance

and repair of the limited common elements. (App. pp. 1116-1117) The owner is also responsible for any damages caused by the limited common areas. (App. pp. 1116-1117). Section XXII of the Master Deed declares as follows:

> 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 which, if omitted, would affect the condominium in its entirety or any part belonging to other owners, and **shall be expressly responsible for the damages and liability** which his failure to do so may engender (emphasis added).

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." (App. pp. 1107-1108).

An engineer for the project, Amie Drucker, stated that the driveways with the slope issues are individual driveways which service an individual unit. (App. p. 434). The subject driveways do not service any common area facility like a clubhouse or a swimming pool, but each individual unit owner's home.

Speedee Concrete advised the developer/general contractor of the project, WW&LB Development, Inc., through its representative Wayne Winderman, that the driveways were too steep. (App. pp. 478 ln. 2 - p. 479, ln. 8). This

conversation took place in the presence of owner representative Jim Dunn in 2004 or 2005. Id. Mr. Dunn candidly admitted that the conversation between Mr. Winderman and the representative from Speedee Concrete "…kind of gets Speedy (sic) off the hook…" (App. p. 479).

Furthermore, it is not disputed that the slope of the driveways has been consistent since they were originally poured in 2004 through 2007, and Speedee Concrete's last invoice is dated March 22, 2007 (App. p. 1073).

When confronted with the steep driveways, and the potential hazards they presented, one owner took it upon herself to eliminate the steep slope issue. Homeowner Karen Travis paid to remove the slope from her driveway, and constructed a stone retaining wall on her property when the slope was removed. (App. pp. 478, 532 and 555).

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE APPELLANT'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND EQUITABLE TOLLING IS NOT APPLICABLE

a. STATUTE OF LIMITATIONS

Pursuant to S.C. Code Ann. §§ 15-3-510 and 15-3-530, Appellant's causes of action for negligence, breach of warranty, and breach of contract must be commenced within three years of when the Appellant knew, or should have known

by the exercise of reasonable diligence, that a claim against Speedee Concrete may exist. S.C. Code Ann. §§ 15-3-510 and 15-3-530.

Speedee Concrete completed its work on the project by March 22, 2007, the date of Speedee's last invoice. (App. p. 1073). The homeowners had knowledge of the driveways' slope and the cracking of driveways in 2004 or 2005 (App. p. 478 - p. 479, App. p. 530 - p. 531). Both are more than three years before Speedee Concrete was named in the Appellant's Second Amended Complaint filed in April, 2010.

"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 (Ct. App. 2001). "The 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." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333, 334 (1981).

In this case, the evidence shows that the Appellant was aware of the slope of the driveways and drainage issues as early as 2004. Homeowner Jim Dunn admitted in his deposition that he heard Speedee Concrete tell Wayne Winderman of WW&LB in 2004 or 2005 that the slope of the driveways was too steep. (App. p. 478 - p. 479, App. p. 532). Furthermore, in May 2005, the homeowners formed an Ad Hoc Committee to address multiple construction issues, including the slope of the driveways. (App. pp. 616-626).

The Appellant argues that its claims against Speedee Concrete did not accrue until Drew Wilkie, Appellant's expert, issued his report on June 18, 2010. That argument is not factually or legally sound. The slope of the individual driveways was immediately known to a purchaser upon arrival to the property. The Appellant, or the individual unit owners, did not need to know the full legal extent of the injury and did not need to hire an expert for the statute of limitations to begin to run. See Hedgepath v. AT&T, 348 S.C. 340, 355-356. The legal standard is that a person of common

knowledge and experience would be put on notice that some claim may exist. Id.

The Appellant (and each unit owner) had knowledge that a claim may exist in 2004 or 2005 when owner representative Jim Dunn heard a Speedee Concrete employee tell Winderman that the driveway slopes were too steep. Also, sometime after July 6, 2005, in connection with a letter of that date, an engineer hired by WW&LB went to the property and looked at the driveways. A Speedee representative was called to the project to meet with the engineer and homeowners. When asked about the slope, the Speedee representative told the engineer that he had warned WW&LB about the steep slope, but Speedee was instructed to continue with construction in the interest of saving money. (App. p. 532). The Appellant and individual owners knew that they had a potential claim against Speedee for more than three years before the Second Amended Complaint was filed; therefore, there is no genuine issue of material fact regarding that issue, and the trial court was proper in granting summary judgment.

b. EQUITABLE TOLLING

Equitable tolling "… is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper v. Ebenezer Senior Serv. & Rehab Center, 386 S.C. 108, 116, 687 S.E.2d 29 (2009).

Equitable tolling has been deemed available where:

1. Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.

2. The Plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.

3. The Plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct.App. 2008)

The Appellant cites Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) to support its argument that equitable tolling applies. However, that case is distinguishable from this one. In Magnolia North, the Court held that equitable tolling applied to toll the statute of limitations against the developer where the developer controlled the homeowner's association and the developer would not have initiated an action against itself. Id. Furthermore, the homeowners were diligent in filing a lawsuit only eight months after assuming control. Id.

In this case, there was nothing to prevent the Appellant or individual unit owners from timely filing suit. Speedee was never part of the homeowner's association board.

Additionally, the Appellant's members, the unit owners, knew the driveway slopes were too steep, they knew Speedee Concrete constructed the driveways, a representative of the homeowners' ad hoc committee heard Speedee admit to the developer that the driveways were too steep on at least two separate occasions and the Association still waited nearly five years to file suit against Speedee. The individual owners have never filed suit against Speedee. Furthermore, Speedee Concrete did not mislead the Appellant or any unit owners as evidenced by its open admissions. Based on the foregoing, no extraordinary circumstances exist to warrant equitable tolling of the statute of limitations against Speedee in this case.

The Appellant further argues that Speedee should be equitably estopped from asserting the statute of limitations as a bar to the Appellant's action. For equitable estoppel to apply, the Appellant must show that the delay was induced by Speedee's conduct. See Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc. 286 S.C. 207, 332 S.E.2d 555, 561 (Ct.App. 1985).

There is no evidence that Speedee did anything to cause the Appellant's delay in naming it as a defendant. The Appellant cites a letter from Winderman, the developer, stating that he would address the drainage, road, and

maintenance issues. Speedee Concrete did not make any representations to the Appellant that it would make repairs. When the engineer hired by WW&LB met with Speedee about the slope, the Speedee representative stated that he had expressed concern over the slope and was told to proceed anyway. Furthermore, Winderman is not an agent of Speedee and the acts of Winderman cannot at all be attributed to Speedee. Equitable estoppel is inapplicable as to Speedee Concrete. Speedee did not cause the delay and did not induce the Appellant to believe that Speedee would make repairs.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SPEEDEE CONCRETE BECAUSE THE APPELLANT DOES NOT HAVE STANDING TO SUE FOR DRIVEWAYS

The Appellant lacks standing to bring a lawsuit against Speedee Concrete for the alleged defects to the driveways because the driveways are defined as limited common elements in the Master Deed (App. pp. 1107-1108) and are thus the responsibility of the individual homeowners, not the homeowner's association (App. pp. 1116-1117). The Appellant even admits that the driveways are limited common elements pursuant to the Master Deed. Therefore, the Appellant does not have standing to bring a lawsuit regarding alleged defects to the driveways. See Roundtree Villas Association, Inc. v. 4701 Kings Corp., 282 S.C. 415, 421, 321 S.E.2d 46 (1984), in which the Supreme Court of South Carolina held that a

homeowners association did not have the authority to bring suit for defects to balconies because they were limited common elements.

The Appellant cites Article IV of the Master Deed for the proposition that the limited common elements are to be treated as common elements giving the Appellant standing to bring suit regarding alleged defects with those limited common elements. The referenced section 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". However, this assertion by the Appellant is misguided in that it ignores the clear and unambiguous language of the clause. The Appellant fails to appreciate the expressed limiting language: "except as specifically provided in this Master Deed...."

Further, any damages created by the slope of the driveways are the responsibility of the owner of the unit to which the driveway is appurtenant. Thus, the Appellant's claims against Speedee Concrete for any damages caused by the slope are misdirected since such damages would be each driveway owner's responsibility. To ignore this conclusion is to torture the plain meaning of the Master Deed. In

support of this assertion, the Master Deed provides in Section XXII:

> 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 which, if omitted, would affect the condominium in its entirety or any part belonging to other owners, and **shall be expressly responsible for the damages and liability** which his failure to do so may engender (emphasis added).

The Appellant argues that the Court of Appeals, and the trial court, were wrong for determining that the individual owners were required to maintain their limited common areas. The first reason given is that "it is difficult to see how failing to maintain a driveway would affect the development as a whole or any other unit." Appellant's Brief at page 11. However, the Appellant ignores the findings of its expert, Drew Wilkie. Mr. Wilkie testified that the excessive slope of the driveways causes soil piping, resulting in soil erosion at the foot of the driveways. That may in some areas cause heaving of pavement. (App. pp. 847 - 848). According to the Master Deed, if that condition occurs at the foot of an individual unit's driveway, then that owner would be responsible for the damages caused by the slope. Section XXII.

The Appellant's second argument is also without merit. In that argument, the Appellant alleges that it does have

standing because the Association satisfies the legal standing definition set forth in Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014). However, the Court held there was a three part test for associational standing. The third prong of that test is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id. 753 S.E.2d at 851. Here, since the unit owners control the use and repair of their individual driveways, which was evidenced by the repairs made by individual unit owner Karen Travis when she eliminated her slope issue, the Association fails to establish the third prong. For that reason, as in the cited case, the Association's argument for standing must fail.

The Appellant also posits the theory that because a statute (S. C. Code Ann. § 27-31-20(f)(2)) puts entrance ways and exits in a common element category that this court should do the same. However, the Appellant has overlooked the definition of Limited Common Elements in the same statute and its application in the case at bar. "Limited Common Elements" means and includes those common elements agreed upon by all the co-owners to be reserved for the use of a certain number of apartments to the exclusion of the other apartments…" 20-31-20(g). In this case, the individual driveways service the

individual units. The authors of the Association's Master Deed clearly excluded the driveways from the common elements definition.

Finally, the Association mistakenly assumes the case of Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992) supports their position that limited common elements were an association's responsibility. In Janasik, the owners allowed items originating from the limited common elements to move into and encroach upon the common areas. For years, the Janasiks' plants grew in the common areas, wires crossed the common areas and lights illuminated the common areas.

The Association did nothing about the encroachment until two years after the Master Deed violations began. The lower court ruled that the Janasiks had to remove those portions of their limited common elements that encroached onto the common areas. If the Janasiks did not comply, the HOA had the right to come onto the area of common elements overtaken by the items that had originated from the limited common elements so that the Association could retake control of the common elements, at the Janasik's expense. The Supreme Court agreed with the findings of the trial court as it pertained to his handling of the common areas and the limited common elements that encroached thereon. Likewise, this court should

acknowledge the clear language of the Master Deed, find that each homeowner is responsible for his own individual driveway servicing his own individual unit, and affirm that the association has no standing to repair the driveways without the consent of each unit owner. At each stage of this litigation, the Appellant has asked the court to turn its back to the clear language of the Master Deed where it says "except as specifically provided". This court should refuse to do so, and enforce the plain meaning of the Master Deed.

CONCLUSION

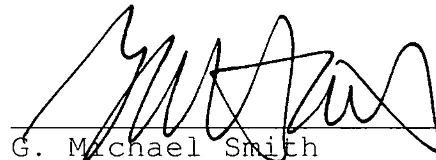
The Court of Appeals correctly affirmed the trial court's order that granted Speedee Concrete's Summary Judgment motion in this case because the Appellant (and individual members) had notice of the issues pertaining to the driveways more than three years prior to suit being brought against Speedee Concrete. Because Speedee did not mislead the Association into failing to take action regarding the concrete work, and since no special circumstances exist to support an application of equitable tolling against Speedee in this case, the Appellant's case should be barred by the Statue of Limitations.

Further, the Appellant has no standing to bring suit against Speedee Concrete because it does not have control of the driveways. Under the Master Deed, the driveways are

limited common elements and as such are the responsibility of each unit owner to maintain or repair. In addition, each owner is liable for any damages caused by their driveways to other property.

Based on the foregoing, the Court of Appeal's decision affirming the trial court's order granting summary judgment should be affirmed thereby ending this case with prejudice.

Respectfully submitted,



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Dated: May 30, 2018

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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,

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PROOF OF SERVICE

I certify that I have served a copy of the Brief of Respondent Speedee Concrete on the following Appellant and Respondents AB Consulting Engineers, Inc. and Chuck's Construction Co., Inc. by depositing the same in the United States Mail, postage prepaid, on the 31 day of May, 2018, addressed to their attorneys of record as follows:

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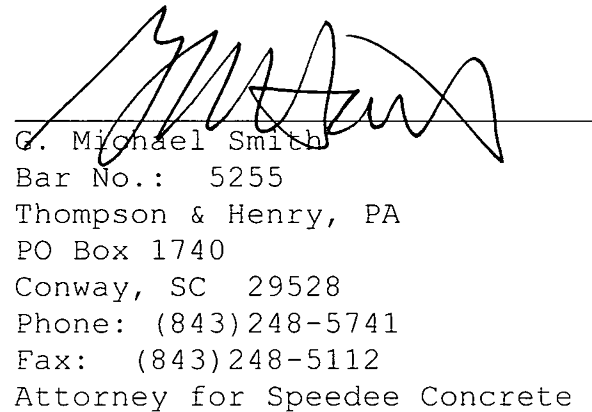
Dated: 5/31/18



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