THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No: 2019-001100
Case No. 2015-CP-10-0020

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly Situated, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc.,.....Respondent.

APPELLANTS' REPLY BRIEF

Michael H. Ellis, Esquire
O. Grady Query, Esquire
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412

Counsel for Appellant

Other Counsel of Record:

M. Dawes Cook, Esquire
Jeffrey Michael Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402

Andrew F. Lindemann
P.O. Box 6923
Columbia, SC 29260
Counsel for Respondent

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Respondent Failed to Meet Their Burden of Proof in Asserting the Affirmative Defense of the Statute of Limitations

Respondent, as the moving party, has the initial burden to 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" R. 56(c) SCRCP. "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court" Chastain v. Hiltabidle, 673 S.E.2d 826, 829 (Ct.App.2009). "The burden of establishing the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide" Walbeck v. The I'On Company, LLC, et.al., 426 S.C. 494, 520 (Ct.App 2018) *citing to* Bayle v. S.C. Dep't of Transp., 344 S.C. 115 126 (Ct.App.2001).

In contravention of this principle, Respondent tries to shift the burden of proof to the Appellant, as the non-moving party, to show the tolling of the statute of limitations to avoid summary judgment. Reversal is proper since the record is barren of evidence to support the trial court's finding that the Respondent showed beyond a question of material fact that Appellant knew or should have known at some undefined moment greater than three (3) years prior to the January 2, 2015 filing of this action that Appellant had a negligence claim against Respondent.

The January 30, 2008 Letter does not satisfy Respondent's burden of proof

Respondent relies upon the January 30, 2008 letter addressed to Respondent during previous litigation from Respondent's opposing counsel (hereinafter "2008 letter") to commence the running of the statute of limitations. This argument is flawed in numerous respects. Primarily, there is nothing in the record to show that the letter placed Appellant on notice of a claim. Respondent did not produce any affidavits or testimony by the drafters of the letter

authenticating the genuineness of the letter. There was no evidence presented that the letter was indeed mailed or personally delivered to anybody. Respondent did not produce any affidavits, testimony, or other evidence as to whether any Appellant knew of the existence of the 2008 letter much less that any belief had been formed by anyone regarding the 2008 letter.

In their motion for summary judgment, Respondent states of the January 30, 2008 letter: "The developer **further advised the HOA** to notify its own insurance carrier of a potential suit by the HOA members (the Plaintiffs' class here) against the HOA for negligence in management, which would have included failure to timely file suit" (emphasis added) **(Respondent's Motion for Summary Judgment, p. 3).** Respondent admits that this letter is not to the Appellants but to the Respondent. Respondent, however without any evidence in the record, leaps to the conclusion this letter from a third party to it, somehow places third party individuals on notice of a claim. Such a conclusion is without evidentiary support and should be disregarded.

In its brief, Respondent cites a plethora of case law supporting the notion that "The statute runs from the date the injured party knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct" **(Respondent's Brief, p. 10-11)**. However, Respondent does not explain how the January 30, 2008 letter caused Appellant to either know or be in a position where they should have known through reasonable diligence that Appellant had a claim against Respondent. In defense to summary judgment, Appellant produced the affidavit of Steven Bernard **(Affidavit of Steven Bernard)**. Steven Bernard is the only member of the Appellant class whose knowledge as to what was known or should have been known by the Appellant class was before the trial court. Mr. Bernard was the only member of the Appellant class who testified. His testimony was submitted by his affidavit and by his deposition. In neither his affidavit nor his deposition, does Mr. Bernard speak of the

January 30, 2008 letter. In his sworn affidavit, Mr. Bernard testified that he did not purchase a condominium at 3 Chisolm Street until December 21, 2012, less than three years prior to the January 2, 2015 filing date for this action **(Affidavit of Steven Bernard)**. Mr. Bernard further testified in his affidavit that it was not until November of 2014, a mere two months prior to the filing date of this action, that he knew anything about the Glick Report having placed the Respondent on notice of a claim against the developers and that the Respondent failed to take legal action within their applicable statute of limitations **(Affidavit of Steven Bernard)**. Respondent failed to introduce any evidence that showed beyond a question of material fact that Mr. Bernard or any other Appellant class member knew or should have known of the January 30, 2008 letter placing them on notice of a claim against Respondent.

"[T]he determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence" Moriarty v. Garden Sanctuary Church of God, 341 S.C. 324, 338 (S.C. 2000).

> "When testimony conflicts regarding time of discovery of a cause of action, it becomes an issue for the jury to decide" id. *citing to* Arant v. Kressler, 327 S.C. 225, 229 (S.C. 1997); "Whether a claimant knew or should have known that they had a cause of action is question for the jury" id. *citing to* Johnston v. Bowen, 313 S.C. 61, 64 (S.C. 1993); "Application of discovery rule to a claim is a question of fact for jury" id. *citing to* Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 274 (S.C. 1989); "When testimony is conflicting upon the statute of limitations, it becomes an issue for jury to decide" id. *citing to* Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556 (S.C.1995); "In determining whether statute of limitations begins to run under discovery rule, jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action" id. *citing to* Maher v. Tietex Corp., 331 S.C. 371, 377 (Ct.App.1998)

In the present case there is no conflicting evidence of when the statute began to run as Respondent introduced no evidence showing that the Appellant class knew or should have

known of the January 30, 2008 letter. However, assuming arguendo, that the court finds there was some evidence introduced by the Respondent, summary judgment is improper as there is conflicting evidence requiring this issue be sent to the jury.

Notice to Respondent Does Not Impute Notice onto Appellant

In their initial brief, Respondent argues "...the class members are all members of the HOA, and therefore, had constructive or inquiry notice of the January 30, 2008 letter to the HOA from counsel to the developer" **(Respondent's Brief, p. 12)**. As previously explained herein, there is no eviedence in the record authenticating the 2008 letter or proving that it had been mailed or personally delivered to the Respondent or had been received by the Respondent. Further, Respondent failed to prove beyond a question of material fact that the 2008 letter was ever disseminated to the Appellant class members and that it did or should have put them on notice of a claim against Respondent. Respondent, without any evidence, is trying to create an inference that the letter triggered the statute of limitations. However, as more fully briefed in Appellant's Brief: "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Summer v. Carpenter, 492 S.E.2d 55, 58 (1997).

Furthermore, it is undisputed that the Respondent HOA is a corporate entity. "Courts are generally reluctant to disregard the corporate entity: If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears" Mid-South Management Co., Inc. v. Sherwood Development Corp., 649 S.E.2d 135, 140 (Ct.App.2007) Respondent's counsel has repeatedly disregarded their client's own corporate veil in an attempt to impute Respondent's knowledge onto Appellant, but has shown no reason why the corporate veil should be pierced nor have they pled piercing of their own

corporate veil. "[C]ourts generally disregard the corporate entity only where equity requires piercing the corporate veil to assist a third party" id., *citing to* Woodside v. Woodside, 350 S.E.2d 407, 410 (Ct.App.1986). In the present case there is no third-party that needs to be assisted by the court's equity. "The burden of proof is on the party asserting that the corporate veil should be pierced" id., at 140. Respondent has produced no such evidence requiring the piercing of the corporate veil.

Respondent is not relieved of meeting its burden of proof based upon this being a class action

Respondent failed to show how any Appellant class member was put on notice of a claim against Respondent at some undefined date greater than three (3) years prior to the January 2, 2015 filing of this action, but argues that since this is a class action, if any class member had notice of such a claim, then all class members had notice of such a claim. Respondent relies upon Gardner v. S.C. Dept. of Rev., 353 S.C. 1 (S.C.2003).

The Gardner court reversed class certification based upon the proponents of the class failing to show that commonality exists between the proposed members. There is no issue concerning the certification of the present case as the class was certified with the consent of all parties **(Order Certifying Class)**. The Gardner court held that ("[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action") Gardner, at 22 *citing to* O'Quinn v. Beach Associates, 272 S.C. 95, 104(S.C.1978). There is no dispute of commonality regarding the elements of the Appellant's claim of negligence against Respondent. All class members share commonality in that 1. Respondent owed Appellant a duty to institute an action against the developers of the condominium buildings within the applicable statute of limitations; 2. Respondent breached that duty; and 3. all class members suffered damages by being "...subject to the 2015 lump sum

payment to make necessary repairs and...subject to the increased regime fees to make necessary repairs" **(Order Certifying Class)**.

The Gardner court further held that "[c]ritically, 'not every issue in the case must be common to all class members'" Gardner, at 21 *citing to* O'Connor v. Boeing North America, Inc., 184 F.R.D. at 311, 329 (C.D.Cal.1998) and that "[c]ommonality is met only where the class shares a determinative issue" Gardner at 21 *citing to* Stott v. Haworth, 916 F.2d 134, 145 (4th Cir.1990). Respondent failed to show beyond a question of material fact when any member of the Appellant class was placed on notice of a claim against Respondent, and Respondent has failed to show why the court should disregard when every Appellant class member knew or should have known of a claim against Respondent. [1]

Respondent essentially argues that by seeking class certification Appellant has waived Respondent's burden of proof to show beyond a question of material fact that each and every class member knew or should have known of a claim against Respondent three (3) years prior to the January 2, 2015 filing of this action **(Respondent's Brief, p. 14, n.2** "...the Appellants are arguing that the application of the discovery rule requires an individualized inquiry as to when each class members had actual notice of the claim; however, that position is inconsistent with the Appellants' request for and the court's grant of class certification"). However, the Gardner court held that the typical class action members may have factual differences ("This is not a typical class action where minor factual differences exist among the individualized cases of class members" Gardner, at 22). When each member learned of a potential claim against Respondent is a question of fact that Respondent was required to show beyond a question of fact to have each Appellant class member's claim dismissed as a matter of law

[1] Respondent argues that despite class representative Steven Bernard not owning a condominium unit until December 2012 and not moving in until March 7, 2013, Mr. Bernard was placed on notice by the January 30, 2008 letter merely because the class of plaintiffs was certified in 2017.

> ("Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact" Richardson v. The State-Record Company, Inc., 499 S.E.2d (Ct.App.1998), *citing to* Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).

It is only when the factual differences "are the crux of a predominant legal issue" that a class cannot exist ("...the factual differences (whether prejudice exists) are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case" Gardner, at 22). By consenting to the definition of the class, Respondent has agreed that the facts that are the "crux of a predominant legal issue" are whether or not a class member was "...subject to the 2015 lump sum payment to make necessary repairs and...subject to the increased regime fees to make necessary repairs" **(Order Certifying Class).**

When each and every Appellant class member knew of should have known of a claim against Respondent should not be disregarded by the court as Respondent argues, and the trial court should be reversed for Respondent's failure to show when each and every Appellant class member knew of should have known beyond a question of material fact of a claim against Respondent.

The January 16, 2009 Filing of the Water Intrusion Lawsuit by the Respondent did not put Appellant on Notice of a Claim Against Respondent

Respondent argues that "Thus, by January 16, 2009, the Appellants and class members should have been aware of the Glick Report[2], which formed the basis for the Water Intrusion Lawsuit, and with due diligence, should have recognized the fact that the HOA failed to follow the Glick Report's advice to pursue additional forensic testing, which ultimately became the

[2] Nowhere in the Record does Respondent show that Appellant ever became aware of the Glick Report or that the Glick Report was ever disseminated to the Appellant.

basis for this action against the HOA" **(Respondent's Brief, p. 13)**. Respondent's argument is that at the time of filing the action that was ultimately dismissed by Judge Young based upon the statute of limitations, Appellant knew or should have known that the action was doomed, meritless, and frivolous. Nowhere in the record did respondent argue prior to appeal, nor did the trial court find, that the January 16, 2009 filing of the Water Intrusion Lawsuit by Respondent against the third-party developers of the condominiums was a statute of limitations triggering event. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review" Elam v. SCDOT, 361 S.C. 9, 23 (S.C.2004) *citing to* Long v. Dunlap, 87 S.C. 8 (S.C.1910). "It is an error of law for a court to decide a case on a ground not before it Griffin v. Capital Cash, 423 S.E.2d 143, 147 (Ct.App.1992).

Furthermore, Respondent does not address why Appellant was required to perform their due diligence by investigating on January 16, 2009 the merits of Respondent's claims against the third-party developers of the condominiums.[3] The Respondent was incorporated and charged with managing the affairs of the condominium buildings including the bringing of legal actions against third-parties that affect the condominium buildings. Respondent has produced no evidence that on January 16, 2009 Appellant was on notice that Respondent's actions were suspect and that Appellant should be double checking every action taken by Respondent. Also, Appellant had a right to rely on the signature of Respondent's attorney that the January 16, 2009 filing of that action was not meritless *see* SC Code § 15-36-10(A)(3)(b):

> "The signature of an attorney or a pro se litigant constitutes a certificate to the court that:...a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or

[3] This is especially true since Mr. Bernard testified as to not even having purchased his unit until three years later in 2012.

> defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law".

Respondent has introduced no evidence suggesting that Appellants knew or should have known that at the January 16, 2009 filing, Respondent was negligent by filing that lawsuit outside the statute of limitations.

As it is raised for the first time on appeal, and Respondent has failed to show beyond a question of material fact that Appellant knew or should have known that the January 16, 2009 filing of Respondent's action placed Appellant on notice of their claims against Respondent, summary judgment should be reversed.

Appellant's Reliance for Tolling the Statute of Limitations is Based Upon the South Carolina Appellate Court Rules

Respondent misinterprets Appellant's argument of why the statute of limitations was tolled from Judge Young's June 2011 dismissal of Respondent's Water Intrusion Lawsuit until the March 26, 2014 affirmation by the Court of Appeals. "The Appellants' reliance on *Stokes-Craven* to toll the accrual date in this case fails on both procedural and substantive bases" **(Respondent's Brief, p. 16)**. Appellant's argument that the statute of limitations was tolled from June 2011 until March 26, 2014 is based upon Rules 205 and 241(a) SCACR. Appellant merely uses the case of Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517 (S.C. 2016), in conjunction with numerous other cases, to support tolling the statute of limitations while the Water Intrusion Lawsuit was on appeal.

Appellant does not argue that Stokes-Craven gives rise to a new rule separate and apart from the already existing SCACR rules regarding the automatic stay and divesting of the trial court's jurisdiction as Respondent misinterprets. Therefore there is no two-issue rule implication as Respondent argues ("Similarly, the two-issue rule is implicated as an additional basis for

affirmance, **Respondent's Brief, p. 17**). Appellant raised to the trial court the issue of tolling by Respondent's appeal of Judge Young's Order in their Return to Respondent's Motion for Summary Judgment:

> "The issue of whether Defendant's breached their duty to file an action within the statute of limitations was a legal and factual issue involved in pending litigation until the Court of Appeal's March 26, 2014 Opinion... Whether Plaintiffs had a viable claim for negligence against the Defendant was contingent upon the outcome of the Defendant's action against the renovators of the condominiums" **Plaintiff's Return to Defendant's Motion for Summary Judgment, p. 5.**

Appellant cited Stokes-Craven in their R. 59(e) SCRCP motion seeking the trial court's reconsideration and to reiterate their argument that the Respondent's appeal of the Water Intrusion Lawsuit tolled the statute of limitations pending the March 26, 2014 Court of Appeals affirmation.

> "Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes" Home Medical Systems, Inc. v. SC Dep't. of Revenue, 677 S.E.2d 582, 586 (S.C.2009) *citing to* Elam v. SC Dep't of Transp., 602 S.E.2d 772 (S.C.2004). "We explained in Elam that "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. Indeed, it is inherently unfair to disallow such an opportunity" id.

Therefore, there is no two-issue rule implication as argued by the Respondent.

Appellant has not Changed Their Position on Appeal

In pages 19-21 of their brief, Respondent attempts to muddy the waters by arguing that Appellant is interchanging the Water Intrusion Lawsuit and Foundation Defect Lawsuit in an attempt to change their theory on appeal (**Respondent's Brief, p. 19-21**). However, Appellant's theory has remained throughout this case: 1) The Glick Report placed Respondent on notice of multiple construction defects and the need to conduct further forensic investigations; 2) had the

Respondent followed the recommendations of the Glick Report the foundation issues would have been discovered prior to 2014 and the developers of the condominiums would have been liable for the necessary foundation repairs; and 3) Respondent failed to follow the Glick Report recommendations within a timely manner resulting in Judge Young's 2011 dismissal of Respondent's action against the developers of the condominium buildings, the Court of Appeals affirming that order on March 26, 2014, and Appellant being levied with the January 22, 2015 special assessment to pay for the foundation repairs.

The terms "Water Intrusion Lawsuit" and "Foundation Defects Lawsuit" were coined by the Respondent. Respondent used those terms in their Motion for Summary Judgment and in the Order granting summary Judgment that Judge Miller asked Respondent to draft. Appellant's only concern with these lawsuits is that in the Water Intrusion Lawsuit the Court of Appeals established Respondent's breach of their duty owed to Appellant as an adjudicated fact ("...the circuit court properly determined the statute of limitations began to run in 2003 because of the Glick report, issued in April 2003, put the HOA on inquiry notice of defects that would have been discoverable through additional inspections and destructive testing..." 3 Chisolm Street Homeowner's Ass'n., Inc. v. Chisolm Street Partners, LLC, et.al., Unpublished Opinion No.: 2014-UP-128). Prior to March 26, 2014, the issue of whether or not Respondent breached their duty owed to Appellant was a pending issue in controversy which Respondent and their attorneys were arguing had not been breached. Prior to March 26, 2014 Respondent believed that they had not missed the statute of limitations in suing the developers and thereby breached their duty to Appellant, but now argues that the Appellant should have known that whole time that Respondent was wrong.

Appellant's theory of Respondent's negligence has not changed on this appeal.

The trial court erred in ruling that the Appellant knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for Respondent's negligence

The only evidence offered by Respondent to the trial court that speaks towards what Appellant knew or should have known regarding any levy to pay for repairs to the foundations of the condominium buildings is the Minutes of the January 21, 2015 Special Meeting **(Defendant's Motion for Summary Judgment, Exhibit B)** which was approximately twenty (20) days after the January 2, 2015 filing of this action. The excerpts from the deposition transcript of Steven Bernard **(Defendant's Motion for Summary Judgment, Exhibit E)** state that Respondent maybe learned of the foundation defects at the time that Stantec completed their investigation and issued a report to Respondent **(Depo. of Steven Bernard Tr. p. 41: 5-25)**. According to the Minutes of the January 21, 2015 Special Meeting **(Defendant's Motion for Summary Judgment, Exhibit B)**, Stantec's report was first presented to Appellant on November 6, 2014, a mere fifty-seven (57) days prior to the January 2, 2015 filing of this action. Respondent does not even establish a point in time that they themselves knew that the condominium buildings' foundations would need to be repaired and that they would have to levy Appellant for the funds to effectuate those repairs.

Despite no other evidence, Respondent's position is that the trial court was correct in finding that at some undefined moment greater than three years prior to the January 2, 2015 filing of this action, Appellant should have known that:

> "...(1) repairs would need to be made, (2) the repairs would need to be paid for, and (3) if a recovery cannot be made from third parties because the construction defect litigation was not timely filed, then there would likely be an assessment levied to pay for the repairs" **(Respondent's Initial Brief, p. 22)**.

However the burden of proof respondent bore at the motion for summary judgment hearing was to show no existence of a question of material fact that Appellant knew or should have known at a definite moment in time greater than three (3) years prior to the January 2, 2015 filing of this action that they would be subject to the January 21, 2015 special levy that was Appellant's damages as a result of Respondent's negligence.

> "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party" Summer v. Carpenter, 492 S.E.2d 55, 58 (1997).

Further, assuming for arguendo purposes that Respondent is correct that at some point greater than three (3) years prior to the January 2, 2015 filing of this action, the Appellant's knew or should have known that "there would **likely** be an assessment levied to pay for the repairs" **(Respondent's Initial Brief, p. 22)** (emphasis added), summary judgment is still improper. "Likely" is just another word for "speculative". "Neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation" Gray v. Southern Facilities, Inc. et. al., 256 S.C. 558, 567 (S.C.1971) *citing to* Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705 (S.C.1968).

Respondent argues that Appellant should have known at some undefined moment three (3) year prior to the January 2, 2015 filing of this action that maybe or maybe not Respondent would be levied to pay for foundation repairs. However, "'[i]t is fundamental and elemental that, in order to reap the benefit of negligence, the person pleading negligence must show that he has been injured by the negligence, and that the negligence was the proximate cause of the injury"

Gray, 256 S.C. 558, 567 (S.C.1971) *citing to* National Loan & Exchange Bank v. Lachovitz, 131 S.C. 432 (S.C.1925).

> "It is basic that a negligent act is not in itself actionable and only becomes such when it results in injury or damage to another" Gray v. Southern Facilities, Inc. et. al., 256 S.C. 558 (S.C.1971) *citing to* 38 Am. Jur., Negligence, § 28, page 73.

It is this same line of reasoning that resulted in Respondent's filing of their March 5, 2015 Defendant's Motion to Dismiss **(Defendant's March 5, 2015 Motion to Dismiss)** based upon there being sources other than a levy on Appellant to pay for the necessary foundation repairs. In their motion, Respondent argued that it was unreasonable for Appellant to seek their damages in this action as there were other avenues for recovery:

> "Here, Plaintiffs claim against Defendant is not ripe because Plaintiffs can recover the damages sought here, the estimated $2,500,00 cost to repair the foundation defects by way of the Defendant's Foundation Defects Action. In fact, the Defendant will only be exposed to any liability in this action if the Foundation Defects Action is dismissed because of some failure on behalf of the Defendant with regards to the timeliness of its additional forensic inspections or prosecution of the Foundation Defects Action. Notably, the Complaint does not contain any allegations that the Plaintiffs or the Defendant are precluded from pursuing an action against any construction defendants to recover the costs to repair the foundation defects because of some act of negligence on part of the Defendant...**Plaintiffs have not yet been exposed to any liability in this case, making it not ripe" (Defendant's March 5, 2015 Motion to Dismiss)** (emphasis added).

Respondent introduced no evidence concerning Respondent's financial condition at the time that the foundation repairs were needed. Absent a showing of why the Respondent was incapable of paying for the necessary repairs and Appellant's knowledge of Respondent's inability, Respondent cannot even create an inference that it was reasonable for Appellant to assume that Appellant would be required to pay for the foundation repairs through a special levy. It is reasonable for homeowner's associations to take out bank loans to pay for necessary repairs

to the common elements such as the foundation. It is reasonable for homeowner's associations to create reserves to pay for exigent and unexpected repairs to common elements such as the foundation repairs in the present case. It is reasonable for homeowners to exhaust all other avenues for funds prior to placing a special levy upon the condominium owners. Respondent failed to show when or why Appellant knew or should have known that it was reasonable that that there was no other source to pay for the necessary foundation repairs.

There was no evidence before the court to show beyond a question of material fact that Appellant knew or should have known at some undefined point greater than three (3) years prior to the January 2, 2015 filing of this action that they would have to pay for the foundation repairs through a levy and even if they did, the damages would have been speculative. Respondent argued two (2) months after Appellant filed this action that it was filed too early because there were sources other than a levy on Appellant to pay for the necessary foundation repairs. The trial court erred in ruling that the Appellant knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for Respondent's negligence.

Appellant has not taken inconsistent positions

Respondent argues that Appellant has taken inconsistent positions by filing this action on January 2, 2015 while arguing that there was no justiciable controversy until the special levy on the Appellant until approximately twenty (20) days later and "...should be estopped from taking inconsistent positions" **(Respondent's Initial Brief, p. 24)**.

First, estoppel is not properly before the court as it was never raised at the trial level, and Respondent is making this argument with unclean hands as they took inconsistent positions by arguing in their March 5, 2015 filed motion to dismiss that Appellant filed this action too early as there existed no justiciable controversy but now argue that Appellant filed this action too late.

Second, Appellant has maintained throughout this litigation that whether or not Respondent indeed breached their duty owed to Appellant was an issue in controversy before the court until the March 26, 2014 opinion of the Court of Appeals, and that Appellant suffered no damages as a result of Respondent's negligence until the January 2015 special levy upon Appellant to pay for the necessary foundation repairs.

Appellant's argument that SC Code § 15-3-530(5) was not properly before the court is not meritless

Respondent argues that Appellant's claim of prejudice from the trial court's dismissal based upon § 15-3-530(5) despite Respondent not properly putting § 15-3-530(5) before the court "...lacks merit and is simply an attempt to elevate form over substance" **(Respondent's Brief, p. 26)** and that "...Appellants never advised the trial court that they were not prepared to proceed with any of the issues or arguments. They did not seek a continuance of the hearing nor assert any legal prejudice" **(Respondent's Brief, p. 27)**. Respondent is correct that Appellant did not seek a continuance of the hearing nor advise the trial court that they were not prepared to proceed with arguments about § 15-3-530(5). Appellant did not know that statute was before the court until the court's judgment dismissing the case based primarily upon that statute. Respondent specifically pled that the statute was not before the court in their written motion:

> ("The Defendant HOA is a South Carolina Nonprofit Corporation and, thus, any suit against it must be filed within the statute of limitations prescribed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq.* The statute of limitations for claims against a Nonprofit Corporation [is]... S.C. Code. Ann. § 33-31-830(f)" **(Respondent's Motion for Summary Judgment, p. 1-2)**).

At the hearing before the trial court, Respondent continued to expressly state that § 15-3-530(5) and the discovery rule were not before the court:

> ("In our brief we have argued that the discovery rule doesn't even apply because this is a lawsuit against a nonprofit corporation and the Nonprofit Corporations Act applies. And that statute is governed by Section 33-31-830(f)...) **(Transcript of Record, p. 20: 12-16)**.

Respondent argues that it was improper to raise the issue of prejudice from the court dismissing Appellant's action based upon § 15-3-530(5) in a R. 59(e) SCRCP motion based upon Hickman v. Hickman, 392 S.E.2d 481 (Ct.App.1990) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not) **(Respondent's Initial Brief, p. 27)**. However, it was not until the court's judgment dismissing this action that Appellant had any notice that the court was considering § 15-3-530(5). As discussed above, Respondent repeatedly and expressly represented that they were not seeking relief based upon §15-5-530(5). Appellant could not have raised to the court, prior to the court's judgment, that the court's judgment dismissing Appellant's case based upon a statute that a movant is expressly telling the court not to consider is extremely prejudicial to Appellant. Therefore it was proper to raise that issue for the first time in a R. 59(e) motion and it is properly preserved for appeal.

Respondent has failed to expand § 33-31-830(f) beyond the legislature's clear and unambiguous intent that this statute applies only to the directors of a non-profit corporate entity

Respondent argues that in making the argument that § 33-31-830(f) does not apply to this action, "...Appellants disregard their own pleadings and theory of liability" **(Respondent's Initial Brief, p. 30)**. In truth, this argument is completely consistent with Appellant's pleadings and theory of liability. § 33-31-830(f) clearly and unambiguously only applies to the individual directors of a non-profit corporation. Appellant has not named any individual directors as defendants. Therefore arguing that § 33-31-830(f) does not apply to the sole named defendant, the non-profit corporation, is completely consistent with Appellant's pleadings.

At the hearing before the trial court, the only justification that Respondent offered for expanding § 33-31-830(f) beyond its clear and unambiguous meaning was the unpublished opinion of Smith v. Dockside Association, Inc., unpublished opinion No. 2005-UP-139 (Ct.App. 2005). This unpublished opinion should not have been considered by the trial court as it has no precedential value in accordance with R. 220(a) SCACR. Also, the Dockside court was considering the acts of the individual directors under § 33-31-830(f) because the individual directors were named defendants, whereas no individual defendants were named in the present case.

Conclusion

Reversal is proper since the record is barren of evidence to support the trial court's finding that the Respondent showed beyond a question of material fact that Appellant knew or should have known at some undefined moment greater than three (3) years prior to the January 2, 2015 filing of this action that Appellant had a negligence claim against Respondent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2015-CP-10-0020

Steven M. Bernard and Deborah J. Bernard, on Behalf of Themselves and all others Similarly Situated, ...Appellants,
v.
3 Chisolm Street Homeowners Association, Inc.,.....Respondent.

PROOF OF SERVICE

I certify that I have served Appellants' Reply Brief upon M. Dawes Cook, Jeffrey Michael Bogdan, and Andrew Lindemann, attorneys for Respondent by depositing a copy of it in the United States Mail, with sufficient postage attached thereto and addressed as follow:

M. Dawes Cook, Esquire
Jeffrey Michael Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402

Andrew F. Lindemann, Esquire
P.O. Box 6923
Columbia, SC 29260

Dated: 02/06/20

Tracy O'Daniel

O. Grady Query

Certified Circuit Court
Arbitrator & Mediator

Certified National Trial
Advocacy Civil Trial Specialist

Michael W. Sautter
Managing Partner

Michael Ellis
Attorney

Query Sautter & Associates
Attorneys and Counselors at Law

February 6, 2020

Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

RE: Bernard v. 3 Chisolm Street Homeowners Association
Appellate Case No.: 2019-001100

Dear Ms. Kitchings:

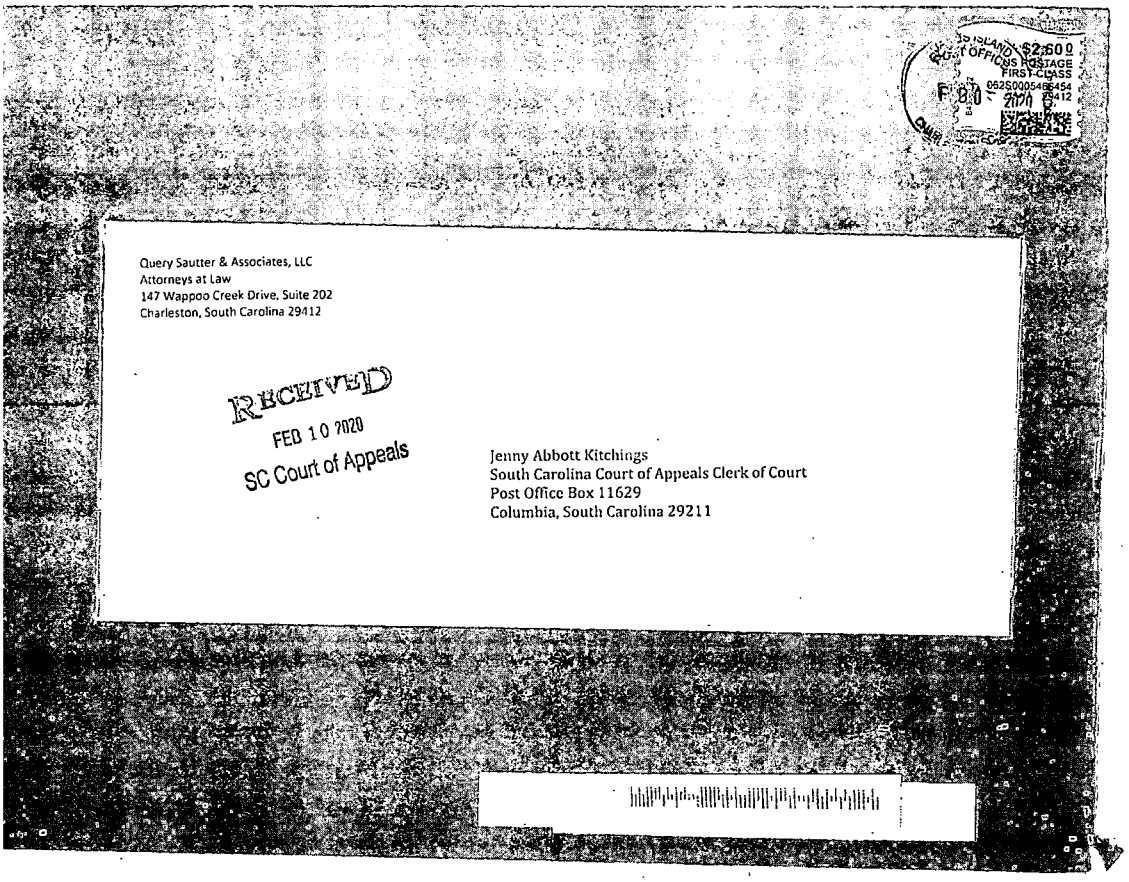
Enclosed herewith for filing, please find an original and one copy of Appellants' Reply Brief regarding the referenced matter. Please file the original and return a clocked copy to me in the enclosed envelope. By copy of this letter with enclosure, I am serving M. Dawes Cook, Jeffrey Michael Bodgan and Andrew Lindemann.

Thank you for your assistance. Should you have any questions, please do not hesitate to contact this office.

Sincerely,

Tracey O'Brien
Assistant to Michael Ellis

Enclosures
cc: M. Dawes Cook, Esquire
Jeffrey Michael Bogdan, Esquire
Andrew F. Lindemann, Esquire



Query Sautter & Associates, LLC
Attorneys at Law
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412

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SC Court of Appeals

Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211