THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a negligence action brought by the Appellants Steven M. Bernard and Deborah J. Bernard, as representatives of a class, against the Respondent 3 Chisholm Street Homeowners Association, Inc. ("HOA"). The class was certified as follows: "All persons who were owners of condominium units at 3 Chisholm Street between the time of January 1, 2015 and the present including those that were subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fee to make necessary repairs." (R. 4). The HOA is a nonprofit corporation that is organized and existing under South Carolina law. The HOA includes as members all of the owners of the condominium units at 3 Chisholm Street in Charleston, South Carolina.

The residential condominium complex is on the site of the old Andrew B. Murray Vocational School which was built in the early 1900s. From 2000 through 2002, the three buildings of the old school -- consisting of the main building, the gymnasium and the cottage -- were renovated and turned into condominiums. (R. 65). There are 26 individual units, with nineteen in the main building, six in the gymnasium, and one in the cottage. (R. 65). The Certificate of Occupancy was issued on June 28, 2002. (R. 65). In March 2003, the developer turned over control of the HOA to the unit owners.

Beginning in late 2002 and 2003, the condominium unit owners began to complain of condensation on the windows and moisture issues. The HOA retained a forensic architect, Myles Glick, to investigate the complaints. On April 8, 2003, Glick issued a report (referred to hereafter as the "Glick Report") which consisted of a letter to the HOA with the results of his visual inspection of the main building. Glick identified a number of deficiencies which he concluded were "significant" and "pervasive throughout the entire building." (R. 105). He recommended "that these concerns be confirmed and documented through a program of destructive testing so that decisions can be made for corrections." (R. 105). Glick further recommended that "the board seek legal counsel relative to the impacts of the above issues as well as pursuing a forensic report documenting and recording the above issues." (R. 105).

According to the allegations contained in the Appellants' Amended Complaint, the HOA Board acknowledged in May and June 2003 the need to investigate the three buildings to determine the extent of the damage and to identify other potential problems. *See,* Amended Complaint, ¶ 21. (R. 66). The Appellants allege that "[a] person of common knowledge and experience, much less a Board of Directors entrusted with preserving the value of three condominium buildings, would have been on notice at that time that some legal claim might exist." *See,* Amended Complaint, ¶ 23. (R. 66). The Appellants also allege that

the HOA Board ignored Glick's recommendations and failed to obtain the forensic inspection of the three buildings. *See,* Amended Complaint, ¶ 23. (R. 67).

In late 2007, prior to pursuing litigation, the HOA sent correspondence to the developer (Chisholm Street Partners, LLC) and demanded remediation of the construction deficiencies. In response, the counsel for the developer sent a letter dated January 30, 2008 to counsel for the HOA disputing the claims made. In addition, the developer's counsel wrote as follows: "In conclusion, we concur with Mr. Morrison's prior assertions that the individual Board Members and Officers of the Association should instead notify their own D&O insurer. The real issue relates to the negligence in management...." (R. 115). Each of the Board members at that time are part of the current class. (R. 116).

On January 16, 2009, the HOA filed a construction defects lawsuit against the developer, the general contractor, and several subcontractors in an action captioned *3 Chisholm Street Homeowners Association, Inc. v. Chisholm Street Partners, LLC, et al.*, Civil Action Number 2009-CP-10-267 (hereafter referred to as the "Water Intrusion Lawsuit"). The defendants in that action moved for summary judgment based on a statute of limitations defense. The motions were granted in part by Circuit Court Judge Roger Young in orders entered June 9, 2011. (R. 126-138). Judge Young determined that the statute of limitations on the original construction work (in contrast to some remediation work done since 2003)

began to run in 2003 upon receipt of the Glick Report. (R. 138). Judge Young's orders were appealed, and on March 26, 2014, the South Carolina Court of Appeals affirmed by a *per curiam* opinion. (R. 303-306). This Court found "the circuit court properly determined the statute of limitations began to run in 2003 because 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, which both the report and the HOA president recommended." *See, 3 Chisholm Street Homeowners Association, Inc. v. Chisholm Street Partners, LLC,* Op. No. 2014-UP-128 (S.C. Ct. App. March 26, 2014). (R. 304).

In February 2014, a home inspection related to the sale of one of the units discovered issues with the foundation in the main building. (R. 68). On November 4, 2014, the HOA filed another construction defects lawsuit against the developer, the general contractor, and several subcontractors and engineering firms in an action captioned *3 Chisholm Street Homeowners Association, Inc. v. Genoa Construction Services, Inc. et al.*, Civil Action Number 2014-CP-10-6803 (hereafter referred to as the "Foundation Defects Lawsuit"). The defendants in that action moved for summary judgment based on a statute of limitations defense, but those motions were never adjudicated. The HOA agreed to a settlement to resolve that litigation. Accordingly, there was no judicial adjudication of any statute of limitations defense asserted in the Foundation Defects Lawsuit. (R. 125, 263-265).

On January 2, 2015, the Appellants filed the current litigation which is a negligence claim brought against the HOA as the sole party-defendant. (R. 20-36). The original Complaint was subsequently amended with the filing of the Amended Class Action Complaint on April 13, 2015. (R. 63-77). The Appellants allege that the HOA Board failed to follow the recommendations in the Glick Report in 2003, and had the recommended forensic investigation and testing been conducted in 2003, "the deficiency of the foundation would have been discovered." *See,* Amended Complaint, ¶ 41. (R. 69). The Appellants contend that the HOA Board was negligent in failing to carry out the recommended inspection and investigation which resulted in the untimely filing of the Foundation Defects Lawsuit. (R. 9, 158). The Appellants seek damages consisting of the amounts paid by the class members for the foundation repairs. (R. 70).

In the case at bar, the HOA filed a motion for summary judgment on May 30, 2018, based on a statute of limitations defense. (R. 92-100). The parties fully briefed the motion, which was heard on October 22, 2018, by Circuit Court Judge Edward W. Miller. (R. 253-279). On December 7, 2018, Judge Miller issued an order granting the HOA's motion for summary judgment. (R. 5-15). He concluded that "the statute of limitations on Plaintiffs' case against the HOA for failing to timely file the Foundation Defects Lawsuit began to run with the Plaintiffs' class members receipt of the January 2008 letter informing them that the

HOA missed the statute of limitations, or at the latest with Judge Young's June 2011 orders finding that the HOA missed the statute of limitations." (R. 13).

The Appellants filed a Rule 59(e) motion to alter or amend on December 17, 2018. (R. 225-234). Judge Miller denied that motion by order entered June 21, 2019. (R. 16-19). This appeal followed.

STANDARD OF REVIEW

"A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008). "An appellate court reviews the grant of summary judgment under the same standard applied by the trial court." *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct. App. 2009). "The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." *Id.*

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Id.* "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders Firstsource - Southeast Group*, 413 S.C. 630, 776 S.E.2d 434, 437 (Ct. App. 2015).

The question of legal prejudice is subject to an abuse of discretion standard. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313 (1992). "An abuse of discretion occurs when the [circuit court's] ruling is based upon an

error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

ARGUMENT

I. The trial court correctly determined that the Appellants and class members had at least constructive or inquiry notice of the Glick Report and the HOA's alleged failure to follow the recommendations in that report thereby triggering the statute of limitations.

The trial court granted the HOA's motion for summary judgment based upon the expiration of the statute of limitations. Specifically, the court ruled that the Appellants' negligence action against the HOA is time barred regardless of whether the applicable statute of limitations is found in Section 33-31-820(f) or Section 15-3-530(5).

The Appellants argue that the applicable statute of limitations is three-years pursuant to Section 15-3-530(5) and that the trial court erred in its application of the discovery rule. The Appellants insist that there is no evidence that the Appellants and the class members knew or should have known by the exercise of reasonable diligence that they had a claim against the HOA more than three years prior to the filing of this lawsuit on January 2, 2015. The Appellants focus on the January 30, 2008 letter sent by the law firm representing the developer to the HOA Board which raised a statute of limitations defense as to the developer's liability but also stated that the HOA was at fault to its members for failing to pursue the action before the statute of limitations expired. (R. 112-115). The Appellants contend on appeal that there is no evidence that any class members had actual

notice of that letter, and thus they reason that the trial court erred in granting summary judgment.[1]

The Appellants' position in this regard is flawed in two specific ways.

First, the trial court did not rely solely on the January 30, 2008 letter as establishing an accrual date more than three years prior to the filing of this lawsuit on January 2, 2015. The trial court also cited alternatively to the dismissal of the Water Intrusion Lawsuit by Judge Roger Young with the filing of his orders dismissing that litigation on June 9, 2011.

Second, the Appellants have misapprehended and misapplied the discovery rule to the negligence action against the HOA. "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645, 647 (1996). "The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises

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[1] The Appellants are critical that the HOA failed to meet its burden of proof to show that the January 30, 2008 letter had been delivered to the HOA or was provided to members of the HOA. In doing so, however, the Appellants are improperly shifting the burden of proof. The statute of limitations is an affirmative defense for which the HOA has the burden of proof. However, it is well settled that an exception to the statute of limitations, such as tolling by way of the discovery rule or equitable tolling or equitable estoppel, is the burden of the party asserting it to prove. Here, it is the Appellants who are relying on the discovery rule to toll the statute of limitations, and that is their burden of proof. *See*, *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672, 682 (2000) (plaintiff has the burden of proving a person of common knowledge and experience would be on notice that some right of hers has been invaded or that some claim against another party might exist).

from the wrongful conduct." *Id.* "The exercise of reasonable diligence means that an injured party must act promptly 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. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333, 334 (1981).

Importantly, "[t]he date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 90 (1995). "Therefore, the statutory period of limitations begins to run when a person *could or should have known,* through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798, 800 (Ct. App. 1989). (Emphasis in original). The court addresses this as "inquiry notice." In effect, "the discovery rule focuses upon whether the complaining party acquired knowledge of any existing facts sufficient to put said party on inquiry, which, if developed, will disclose the alleged [cause of action]" *Id. See also, Republic Contracting Corp. v. South Carolina Department of Highways & Public Transportation*, 332 S.C. 197, 503 S.E.2d 761, 767 (Ct. App. 1998) (holding the

plaintiff "had sufficient information ... to put it on inquiry notice, which, if developed, would have revealed the defects").

The appeal filed in the Water Intrusion Lawsuit presents an excellent example of a case where this concept of "inquiry notice" was applied to determine the trigger date for the statute of limitations. In the Water Intrusion Lawsuit, this Court found that "the circuit court properly determined the statute of limitations began to run in 2003 because 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, which both the report and the HOA president recommended." (R. 304). This Court further ruled that "[t]he Glick report also triggered the statute of limitations for claims against all three respondents because the report listed specific defects that put the HOA on inquiry notice to discover whether those defects were attributable to design, construction, or manufacturing errors." (R. 304).

The same is true in this case. Importantly, 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 for the developer. Yet, more critically, the class members, as members of the HOA, had at least constructive or inquiry notice, if not actual notice, of the Water Intrusion Lawsuit and the Glick Report that formed the basis for that litigation by January 16, 2009, when that

lawsuit was filed. That cannot be disputed, particularly given the filing of the Water Intrusion Lawsuit which thereby made it part of the public record. (R. 281). The Water Intrusion Lawsuit and the Glick Report, in turn, provided, as this Court has already determined, for "inquiry notice of defects that would have been discoverable through additional inspections and destructive testing." (R. 304). As the trial court described in its Order, the Appellants alleged in their Amended Complaint in the case at bar that the HOA "was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). Thus, by January 16, 2009, the Appellants and class members should have been aware of the Glick Report, which formed the basis for the Water Intrusion Lawsuit, and with due diligence, should have recognized the fact that the HOA had failed to follow the Glick Report's advice to pursue additional forensic testing, which ultimately became the basis for this action against the HOA.

In short, the Appellants are focusing on what they perceive to be the absence of evidence of *actual notice* by each and every class member. Actual notice is synonymous with knowledge, which arguably requires an individualized inquiry

that is not appropriate for a class action.[2] However, as the foregoing case law ably demonstrates, the discovery rule is an objective test, not a subjective one. Actual notice is not the standard. Instead, the standard is inquiry notice -- whether the class member could or should have known, through the exercise of reasonable diligence, that a cause of action might exist "rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Burgess*, 386 S.E.2d at 800. Therefore, the absence of proof that every class member had *actual knowledge* of the January 30, 2008 letter is not fatal to the trial court's grant of summary judgment. Instead, the discovery rule is an objective standard, and as the trial court correctly ruled, the Appellants and the class members had inquiry notice of the January 30, 2008 letter. Alternatively, there can be no reasonable dispute that the Appellants and the class members had inquiry notice of the Water Intrusion Lawsuit and the Glick Report by January 2009, when that lawsuit was filed and placed in the public record.

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[2] In *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), the Supreme Court rejected a request for class certification on the issue of commonality. The Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." 577 S.E.2d at 201. *See also*, *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978) ("[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"). In essence, 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.

II. The trial court was correct in ruling that the dismissal date of the Water Intrusion Lawsuit triggered the statute of limitations which was not tolled by the appeal in that case.

As mentioned above, the trial court also cited alternatively to June 9, 2011, which is the date of the dismissal of the Water Intrusion Lawsuit by Judge Roger Young, as a definite accrual date that would trigger the statute of limitations. The trial court recognized that by that date, the Appellants and class members were or should have been on notice that the HOA failed to follow the recommendations of the Glick Report to conduct additional forensic testing and failed to timely sue the renovators. (R. 13). The Appellants argue that the trial court committed reversible error in relying on the date of dismissal of the Water Intrusion Lawsuit because the accrual date was tolled until this Court affirmed Judge Young's orders on March 26, 2014.

In effect, the Appellant contends that the trial court failed to properly apply the holding in *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). In that case, the Supreme Court overturned prior precedent and adopted a new accrual rule *specifically for legal malpractice claims* where there is an appeal of the underlying litigation that gives rise to the alleged malpractice. The Supreme Court held: "until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues triggering

the statute of limitations." 787 S.E.2d at 495. The Appellants' reliance on *Stokes-Craven* to toll the accrual date in this case fails on both procedural and substantive bases.

The trial court rejected the *Stokes-Craven* accrual test for three separate and distinct reasons. First, the *Stokes-Craven* accrual rule was raised to the trial court for the first time in the Appellants' Rule 59(e) motion and thus was not timely or properly raised. Second, the *Stokes-Craven* accrual rule applies only in the context of legal malpractice actions and has not been extended to other types of negligence cases. And third, even if the *Stokes-Craven* accrual rule could be extended beyond the realm of legal malpractice cases, it would still have no applicability to the case at bar.

The Appellants have appealed only two of the three rulings. The Appellants have not appealed the trial court's ruling that the *Stokes-Craven* accrual rule was not timely raised. As the trial court determined, "the accrual rule in the *Stokes-Craven* case was never cited to nor argued to this Court by the Plaintiffs prior to the filing of their Rule 59(e) motion." (R. 17). *See*, *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014) ("a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not"). The Appellants do not dispute that ruling on appeal, and thus it constitutes the law of the case. *See*,

Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). Similarly, the two-issue rule is implicated as an additional basis for affirmance.[3]

Nonetheless, on the merits as well, the trial court was correct in rejecting the *Stokes-Craven* accrual rule in the context of this litigation. As indicated, *Stokes-Craven* is a legal malpractice case, and the accrual rule as announced in that case has never been extended to other types of causes of action. In fact, the Supreme Court specifically recognized that "the case that we address today is a legal malpractice cause of action that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice." *Stokes-Craven*, 787 S.E.2d at 494. The Supreme Court referred to "that particular scenario" and pointed out that "there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling." *Id.* The present case as brought against the HOA is not a legal malpractice action. The Appellants are suing the HOA, not any attorneys. The alleged negligence was committed by the directors

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[3] In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

of the HOA Board, not by any attorneys. Thus, as the trial court correctly ruled, the accrual rule in *Stokes-Craven* has no applicability to the present case.

Additionally, in its recent decision in *Personal Care, Inc. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019), this Court ruled -- in a legal malpractice action -- that the *Stokes-Craven* accrual rule does not apply where the cause of action is not predicated on an adverse judgment. This Court explained: "We do not believe that the *Stokes-Craven* decision eliminated the discovery rule in favor of a separate bright-line rule that all legal malpractice claims accrue on the date an adverse judgment is entered against the client." 825 S.E.2d at 286. Instead, this Court determined that the client's cause of action was predicated on an allegedly defamatory letter written by the lawyer being sued. Thus, as the trial court correctly ruled, even if the *Stokes-Craven* accrual rule could be extended beyond the realm of legal malpractice cases, it would still have no applicability to the case at bar. In this case, as in *Personal Care*, the Appellants' claim against the HOA is not predicated on an adverse judgment. In fact, the Appellants do not allege as a basis for their Amended Complaint that the HOA was negligent in failing to timely file the Water Intrusion Lawsuit, which is the lawsuit that proceeded through an appeal to the Court of Appeals. Instead, as the trial court described in its Order, the Appellants allege in their Amended Complaint that the HOA "was negligent in failing to follow the Glick Report's advice to pursue additional forensic testing,

which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). As the trial court correctly ruled, that alleged negligent act was discovered or reasonably should have been discovered more than three years prior to the filing of this lawsuit on January 22, 2015.

To reiterate, in an attempt to claim the benefit of the *Stokes-Craven* accrual rule, the Appellants confuse and conflate the two lawsuits. In essence, they treat the Water Intrusion Lawsuit and the Foundation Defects Lawsuit interchangeably or as the same. It was the Water Intrusion Lawsuit that was dismissed by Judge Young on statute of limitations grounds and was appealed to this Court, thereby resulting in an affirmance on March 26, 2014. In contrast, the Foundation Defects Lawsuit was never subject to an appeal. That lawsuit was voluntarily settled, and there was never an adjudication of a statute of limitations defense. (R. 125, 263-265). There was no "adverse judgment" in that litigation that tolled any statute of limitations.

In their opening brief, the Appellants erroneously suggest that the present lawsuit against the HOA is based on the HOA failing to timely file the Water Intrusion Lawsuit. That is not correct. To reiterate, in its Order, the trial court described the Appellants' claims as follows: "the Plaintiffs here allege one claim against the HOA: that it was negligent in failing to follow the Glick Report's

advice to pursue additional forensic testing, which resulted in the HOA's failure to uncover the foundation defects until 2014, which resulted in the Foundation Defects Lawsuit being filed after the statute of limitations expired." (R. 9). That description comports with the Appellants' return to the motion for summary judgment, where the Appellants write: "Plaintiff filed the present action in January 2015 asserting Breach of Duty/Negligence and Gross Negligence for failing to file suit against the renovators within the applicable statute of limitations and the resulting [d]amages to Plaintiffs in having to bear the costs of making necessary repairs to the condominium foundations." (R. 156). Similarly, in the same filing, the Appellants agreed that "the crux of the Plaintiffs' theory of liability is that the HOA failed to file the Foundation Defects Litigation within the statute of limitations." (R. 158). This is also in accord with the class definition which includes only the owners of the condominium units from January 1, 2015 to present who were "subject to the 2015 lump sum payment to make necessary repairs and those subject to the increased regime fees to make necessary repairs." (R. 4). Finally, in their opening brief, the Appellants write: "It is undisputed that the foundation of the condominium buildings is what needed to be repaired." *See*, Appellants' Opening Brief, p. 24. Thus, there is no attempt in this litigation to recover for damages claimed in the Water Intrusion Lawsuit. This litigation is designed solely to collect damages that were sought in the Foundation Defects

Lawsuit. Yet, the Foundation Defects Lawsuit was never adjudicated, never dismissed as untimely, and never appealed. Contrary to the Appellants' new contention on appeal, this action was not about the HOA failing to timely bring the Water Intrusion Lawsuit. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). Accordingly, even if the *Stokes-Craven* accrual rule is expanded to apply in the non-legal malpractice context, it has no applicability to this case. The Appellants did not have to wait and were not waiting on the final adjudication of an adverse judgment to commence this action against the HOA over the timeliness of the Foundation Defects Lawsuit.[4]

III. The trial court correctly ruled that the Appellants and class members knew or reasonably should have known that an assessment would likely be levied against the homeowners to pay for the repairs if the Foundation Defects Lawsuit was untimely filed.

The Appellants further contend that the trial court erred in ruling that the Appellants and class members knew or reasonably should have known that an

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[4] Nonetheless, it is illogical to conclude, as the Appellants seem to suggest, that any negligence action predicated on the expiration of the statute of limitations does not accrue until the plaintiff files that underlying action and obtains a dismissal of that action as being untimely. If that were the case, then there would effectively be no statute of limitations for such a negligence action. A plaintiff could arguably bring the underlying action ten or even twenty years after the statute of limitations expired and still claim that the ensuing negligence action did not "accrue" until an adverse ruling was entered in the underlying action as time-barred.

assessment would likely be levied against the homeowners to pay for the repairs if the Foundation Defects Lawsuit was untimely filed. As discussed at length above, the discovery rule is an objective test. The application of the discovery rule does not turn on actual knowledge but rather what is reasonably known or should be known by an objectively reasonable person, that is, a person of common knowledge and experience. *See, Young v. South Carolina Department of Corrections*, 333 S.C. 714, 511 S.E.2d 413, 416 (Ct. App. 1999) (finding that under the discovery rule, whether the particular plaintiff actually knew he had a claim is not the test; rather, courts must objectively determine whether the circumstances of the case 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).

Here, the trial court recognized that an objectively reasonable person in the position of the Appellants and class members should know 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. That ruling by the trial court is sound and did require any further evidentiary basis. Again, the Appellants treat the discovery rule as a subjective test which requires proof of actual knowledge, which it does not.

IV. The trial court was correct in concluding that the Appellants' claim against the HOA accrued more than three years prior to the filing of this lawsuit.

The Appellants next argue that there was no "justiciable controversy" prior to January 21, 2015, which is the date that the Appellants learned of the special assessment to be levied by the HOA to pay for the repairs of the foundation defects. The Appellants' argument is fairly convoluted and circular, but it appears that they are contending that the accrual date for their negligence claim against the HOA should be deemed January 21, 2015. The trial court was correct in rejecting that argument.

"The question of when a cause of action arises or accrues is a question of law." *Menezes v. W.L. Ross & Co.,* LLC, 403 S.C. 522, 744 S.E.2d178, 182 (2013). In *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004), the Supreme Court held that "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it. The law presumes at least nominal damages at that point. The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." 596 S.E.2d at 46. Similarly, in *Grooms v. Medical Society of South Carolina,* 298 S.C. 399, 380 S.E.2d 855 Ct. App. 1989), this Court ruled that "[a] cause of action or claim for damages accrues the moment the defendant breaches a duty owed to the plaintiff." 380 S.E.2d at 857. "The fact that an injured party may not comprehend the full

extent of the damage is immaterial." *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 532 S.E.2d 1, 3 (Ct. App. 2000). This Court has further recognized that "South Carolina's statute of limitations requires very little to start the clock." *Maher v. Tietex Corp.*, 321 S.C. 371, 500 S.E.2d 204, 208 (Ct. App. 1998). In fact, "in a negligence action, the statute of limitations accrues at the time of the negligence, or when facts or circumstances would put a person of common knowledge on notice that he might have a claim against another party." *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 90 (1995).

As the trial court noted, the Appellants' claimed accrual date of January 21, 2015, is not even consistent with the Appellants' own actions in this litigation. The Appellants filed the Complaint against the HOA on January 2, 2015, which was almost three weeks prior to the date now claimed as the accrual date. (R. 23).[5] If that were true, the Appellants' negligence claim had not accrued when suit was filed and the Appellants would be admitting that there was no "justiciable controversy" when they filed this action. In short, the current argument is suspect from the outset, and quite frankly, the Appellants should be estopped from taking inconsistent positions.

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[5] In the Complaint filed January 2, 2015, the Appellants pled as follows: "Plaintiffs have suffered damages proximately caused by the Defendant's negligent, grossly negligent, reckless, unconscionable, and incompetent conduct and Defendant's lack of good faith." *See*, Complaint, ¶ 69. (R. 35). Thus, there was an affirmative allegation that the Appellants had been damaged by that date.

Nonetheless, as the trial court also correctly ruled, the Appellants did not need to wait for its damages to be fully developed for the accrual of their negligence cause of action. The statute of limitations was triggered when the Appellants had notice that there might be a claim against another party and that there is a legal right to sue on it. As the previously cited case law demonstrates, a determination of damages need not be developed before a cause of action accrues. Instead, an injured party has the legal right to file suit before all of its damages occurred or are discovered. *See, Grooms*, 380 S.E.2d at 857. In effect, the Appellants were injured or harmed by the loss of their claim for foundation defects, and that loss started the clock on the statute of limitations.

In sum, the trial court was correct in ruling that "Plaintiffs knew that they had suffered some damage to their claims against the renovators as soon as they were aware that the HOA might have missed the statute of limitations" which "undeniably occurred more than three years before Plaintiffs filed this suit." (R. 14). The date that the special assessment was levied to pay for the foundation defects does not change that ultimate accrual date.

V. The trial court was correct in finding that the application of Section 15-3-530(5) as the statute of limitations was properly raised and before the court for adjudication.

As a procedural issue, the Appellants argue that the trial court committed

reversible error in analyzing the statute of limitations defense under Section 15-3-530(5). They contend that issue was "not properly before" the trial court because the HOA initially argued that Section 33-31-830(f) supplied the applicable statute of limitations rather than Section 15-3-530(5). They complain that the HOA did not raise Section 15-3-530(5) as a basis for dismissal until the filing of its reply memorandum.

This argument lacks merit and is simply an attempt to elevate form over substance. There is no disputing that the HOA's motion for summary judgment was premised entirely on its statute of limitations defense. In its motion, the HOA addressed the application of the statute of limitations both with and without the benefit of a discovery rule. Thereafter, the Appellants filed an opposition memorandum in which they addressed Section 15-3-530(5) and the application of the discovery rule. In fact, as the trial court noted, in that memorandum, the Appellants write: "The statute of limitations that applies to the instant case is S.C. Code § 15-3-530(5)." (R. 162). Thus, the Appellants argued that the correct statute of limitations is supplied by Section 15-3-530(5) and then proceeded to give an analysis of that statute of limitations including a full discussion of the accrual date and the application of the discovery rule based on the circumstances of this litigation. (R. 162-163). On reply, the HOA included a discussion of Section 15-3-530(5) and stated: "even assuming Plaintiffs are correct

and § 15-3-530(5)'s three-year statute of limitations and § 15-3-535's discovery rule apply, Plaintiffs still failed to file this case on time." (R. 223).

During the hearing, the Appellants never objected to consideration of the statute of limitations defense under Section 15-3-530(5), which they themselves argued was the applicable statute. The 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. (R. 261-271). This objection based on lack of notice was, in fact, raised for the first time in their Rule 59(e) motion, which was untimely. *See*, *Hickman v. Hickman*, 301 S.C. 455, 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).

Ultimately, the trial court ruled that the Appellants' negligence action against the HOA is time-barred regardless of whether the applicable statute of limitations is Section 33-31-820(f) or Section 15-3-530(5). The same principles of law which respect to accrual date and the application of the discovery rule generally apply regardless of which statute is the correct one. Therefore, as the trial court concluded in rejecting the claim of inadequate notice, the Appellants "have not been legally prejudiced." (R. 17).

In *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009), this Court held "[a]s a general rule, a party must establish prejudice as the result of

another's failure to comply with Rule 7(b)(1), SCRCP." 673 S.E.2d at 831. "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case." *Id.* Thus, the appellants "must demonstrate they were unable to marshal an effective defense in opposition to [the] motion for summary judgment," or in other words, the appellants "must show that had they received adequate notice, they would have done something different." *Id.* In *Chastain*, this Court rejected the appellants' argument finding that the appellants "failed to articulate any new argument or factual issue that they were unable to present to the trial court due to a lack of notice." *Id.*

The present case is no different. In their Rule 59(e) motion, the Appellants claim only that they "would have properly prepared a defense against those theories," but they failed to identify or make a proffer of other evidence that would have been submitted or other arguments they would have made. (R. 226-228). Even on appeal, the Appellants have still made no attempt to identify any legal prejudice. Again, using identical language as the Rule 59(e) motion, they generically claim that they "would have properly prepared a defense against those theories." *See*, Appellants' Opening Brief, p. 30. As was the case in *Chastain*, the Appellant have failed to articulate any new argument or factual issue that they

were unable to present to the trial court due to any alleged lack of notice. Obviously, as the record demonstrates, the Appellants were fully prepared and did argue the law applicable to the HOA's statute of limitations defense, including a discussion of the accrual date and the application of the discovery rule under the circumstances.

VI. The trial court correctly ruled in construing the statute of limitations in Section 33-31-830(f) as applying to claims against a nonprofit corporation where the corporation is sued solely for the acts and omissions of the directors.

The Appellants also contend that the trial court erred in interpreting Section 33-31-830, and the statute of limitations as contained in Section 33-31-830(f), as applying to a non-profit corporation. There is no dispute that the HOA is a South Carolina nonprofit corporation. *See*, Amended Complaint, ¶ 6. (R. 64). As a result, the HOA is governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et. seq*. The Nonprofit Corporation Act provides that an action must be commenced "before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered." S.C. Code. Ann. § 33-31-830(f).

Section 33-31-380(f) specifically references "an action against a director asserting the director's failure to act in compliance with this section and

consequent liability." S.C. Code. Ann. § 33-31-830(f). The Appellants claim that the current lawsuit names the HOA as the only party-defendant and does not name any individual director of the HOA Board as a party-defendant. Thus, the Appellants claim that the statute of limitations set forth in Section 33-31-830(f) is not applicable.[6]

However, in making that argument, the Appellants disregard their own pleadings and theory of liability. A fair reading of the Amended Complaint demonstrates that the Appellants are suing the HOA solely for the acts and omissions of the directors of the HOA Board. In paragraph 20 of the Amended Complaint, the Appellants allege that the directors failed to follow the recommendations of the Glick Report that the "HOA obtain a more complete forensic report analyzing and addressing any other potential problems with the [s]tructures." *See*, Amended Complaint, ¶ 20. (R. 66). They allege specifically that "[t]he Board of the HOA in May and June 2003 acknowledged the need to investigate all three buildings constituting the [s]tructures to determine the full extent of damage from the known issues and to identify any other potential problems with the [s]tructures." *See*, Amended Complaint, ¶ 21. (R. 66).

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[6] The Appellants complain that the trial court allowed an excerpt from the deposition of Steven Bernard to essentially amend or "expand" the Amended Complaint to add individual directors as party-defendants. The trial court did not add the directors as party-defendants. Instead, the reference to the Bernard deposition testimony was intended to make the point that the Appellants are suing the HOA specifically for and only for the acts and omissions of the directors of the HOA Board.

Additionally, the Appellant claims that "[a] person of common knowledge and experience, much less *a Board of Directors* entrusted with preserving the value of these condominium buildings would have been on notice at that time that some legal claim might exist." *See*, Amended Complaint, ¶ 23. (R. 66). (Emphasis added). The Appellants assert the foundations were not inspected "[b]ecause the recommended complete forensic examinations were not conducted." *See*, Amended Complaint, ¶ 33. (R. 68). Further, "[h]ad the Defendant conducted the previously recommended inspections in or about 2003 when recommended, the deficiency of the foundation would have been discovered." *See*, Amended Complaint, ¶ 41. (R. 69). Clearly, the Appellants are suing for the acts or omissions committed by the directors of the HOA Board. There can be no reasonable dispute about that based on the allegations contained in the Amended Complaint.

Therefore, as the trial court recognized, the HOA is being sued solely for the acts and omissions of the directors of the HOA Board. In ruling on the Rule 59(e) motion, the trial court confirmed that "S.C. Code Ann. § 33-31-830(f) is applicable to claims brought against a nonprofit corporation and thus bars the Plaintiffs' negligence claim against the HOA." (R. 18-19). Citing the unpublished decision of this Court in *Smith v. Dockside Association, Inc.*, No. 2005-UP-139 (S.C. Ct. App. Feb. 28, 2005), the trial court recognized that "the Nonprofit Corporation Act

applies not only to claims against the individual directors of a nonprofit corporation, but also to claims against the corporation," and "[t]his is because a corporation can only act through its directors, so application of the standards governing a corporation's directors also applies to the corporation itself." (R. 14). The trial court's analysis in this regard is correct. Where the nonprofit corporation -- here the HOA -- is sued solely for the acts and omissions of its directors, there is no legal justification for there to be one statute of limitations governing claims against the corporation and a different statute of limitations governing claims against the individual directors. In fact, if differing statutes of limitations are applied against the nonprofit corporation and its directors for the identical conduct and claims, that will create valid equal protection concerns.[7]

The HOA, like the trial court, recognizes that *Smith v. Dockside Association, Inc.* is not precedent because it is an unpublished decision; yet, it is still instructive in that the same principles discussed above were the underlying basis for this Court's decision in *Smith.* This Court addressed the applicability of Section 33-31-

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[7] An important rule of statutory construction requires that "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State,* 383 S.C. 82, 678 S.E.2d 412, 417 (2009). This is also called the "doctrine of constitutional doubt." *United Student Aid Funds, Inc. v. South Carolina Department of Health and Environmental Control,* 349 S.C. 162, 561 S.E.2d 650, 653 (Ct. App. 2002). Stated similarly, "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans,* 268 S.C. 127, 232 S.E.2d 331, 333-334 (1977). *See also,*

830 to an action against a nonprofit corporation which was only being sued for the acts of the individual directors of an HOA Board, which is the same scenario as in the case at bar. This Court, in fact, noted that "the suit against the Association and the individual directors only complained about the actions of the individual directors. No evidence was produced at the summary judgment hearing to show the Association was separately negligent." 2005 WL 7083482, *5. While *Smith* did not concern a statute of limitations defense, this Court did address whether the provisions of Section 33-31-830 should be equally applicable to the nonprofit corporation as it is to the directors. This Court concluded that the business judgment rule applicable to the directors' action under Section 33-31-830 should likewise preclude the corporation's liability. This Court explained that "since a corporation may only act through its directors, the application of the business judgment rule to the corporate entity with regard to the *business* judgments of the directors is appropriate." *Id.* (Emphasis in original). The same rationale should apply to all of the provisions of Section 33-31-830, including the statute of limitations in subsection (f).

In sum, if the statute of limitations in Section 33-31-830(f) applies to the negligence claim against the HOA which is premised solely on the acts or

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State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008); *Blyth v. Marcus,* 335 S.C. 363, 517 S.E.2d 433 (1999).

omissions of the individual directors, then it is clear that the Appellants' negligence claim is time-barred under either measure provided in the statute. As indicated, Section 33-31-380(f) provides two alternatives for measuring when a suit against the HOA becomes barred by the statute of limitations. The first method bars a suit unless it is filed within three years "after the failure complained of." In other words, the first method does not employ a discovery rule. The second method, which uses the discovery rule, provides that a claim is time-barred unless it is filed within two years "after the harm complained of is, or reasonably should have been discovered." Most importantly, Section 33-31-380(f) provides that suit against the HOA must be filed before the sooner of the two deadlines. Given the undisputed facts of this case, including the very allegations of the Amended Complaint where the Appellants are clearly suing over acts and omissions of the HOA Board committed in 2003, this action is time-barred in accordance with Section 33-31-380(f). The decision of the trial court in granting summary judgment should therefore be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent 3 Chisolm Street Homeowners Association, Inc. respectfully requests that this Court affirm the summary judgment entered by the trial court in its favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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