No. 21P13 THIRTY-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THE GLENS OF IRONDUFF PROPERTY OWNERS ASSOCIATION, INC.	)	From Haywood County
	)	No. 10CVS385
v	)	No. COA12-52
JOHN E. DALY and CONSTANCE V. DALY	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 11 January 2013)
and
CONDITIONAL PETITION FOR DISCRETIONARY
REVIEW UNDER G.S. 7A-31
(Filed 22 January 2013)

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No. 21P13 THIRTY-B DISTRICT

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 11 January 2013)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff, the Glens of Iron Duff Property Owner's Association, Inc. ("Glens of Iron Duff POA" or the "Association"), respectfully petitions the Supreme Court of North Carolina to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the summary judgment order of the Honorable Gary E. Trawick, Judge Presiding, Jackson County Superior Court dated 28 September 2011. In support of this petition, Plaintiff shows the following:

FACTS

The Association is a North Carolina non-profit corporation and is a homeowners association organized pursuant to Chapter 47F of the North Carolina General Statutes ("Planned Community Act"). The Glens of Ironduff is an upscale subdivision located in Haywood County and is a planned community as defined in N.C.G.S. §47F-1-103(23). (R pp 68-69). The Association's membership consists of all owners of lots within the Glens of Ironduff planned community. (R pp 68-69). The governing documents for the Glens of Ironduff are recorded with the Haywood County Registry at Book 517, Page 201, as amended ("the Declaration") (R p 69).

The Dalys were the developers of the Glens of Ironduff planned community. (R p 135). Pursuant to the Declaration, the Dalys were the named declarant and were obligated to and did construct roads and other improvements at the Glens of Ironduff. (R p 69). The Planned Community Act provides for "Special Declarant Rights" that include the right "to appoint or remove any officer or executive board member of the association or any master association during any period of declarant control" (emphasis added). N.C.G.S. §47F-1-103 (28)(vii). At least as late as 8 March 2005, the Defendants were the sole directors of the Association. (R p 121). Thus, the declarant control period lasted at least until March 8, 2005. Once the period of declarant control terminates, the lot owners elect their own independent

board of directors to govern the Association. Notwithstanding the end of declarant control of the Association, construction of certain roads within the Glens of Ironduff (which are not the subject of this Complaint) remains incomplete. (R p 100).

Plaintiff the Glens of Ironduff Property Owners Association, Inc. ("the Association") filed its original Complaint against Defendants John E. Daly and Constance V. Daly ("the Dalys") on 30 March 2010, well within the six year statute of repose, and brought causes of action for "Breach of Warranty of Workmanship," "Negligent Construction," "Contribution and Indemnification," and "Damages." (R pp 9-15). The Association filed its Second Amended Complaint on 13 May 2011, including causes of action for "Breach of Implied Warranty of Workmanship and Fitness for Purpose" and "Negligent Construction." (R pp 68-73). The Association's Complaint centers on a portion of Coyote Hollow Road, a private road located within the Glens of Ironduff planned community which runs adjacent to a small creek. The property containing the portion of Coyote Hollow Road at issue was originally purchased by the Dalys on 21 September 2001. (R p 100). At the time of purchase, the property contained a dirt farm road. (R p 100). Subsequent to purchase, the Dalys engaged in certain construction activity whereby they widened the previously existing farm road, removed stabilizing rock, and converted the previously existing farm road for use

as an access road, used by certain Glens of Ironduff lot owners to access their lots. (R p 100). The Dalys have admitted that they "constructed a portion of Coyote Hollow Road [("the Roadway")] in Section 2 of the Glens of Ironduff subdivision." (R pp 69-70, 75).

The evidence presented at Summary Judgment with respect to the date that the Dalys first performed construction work on the Roadway was limited, but tended to show that the first work performed by the Dalys occurred at some point prior to March 2004. (R p 85). Evidence was presented at Summary Judgment that the widened Roadway was not used by lot owners prior to 3 June 2004. (R pp 121 22). The final work performed by the Dalys occurred during Summer 2005, when the Dalys, through a subcontractor, converted the previously dirt road to pavement by adding a six-inch layer of stone and a two-inch layer of hotmix asphalt to the surface of Coyote Hollow Road. (R pp 146-49).

During late 2009, a portion of Coyote Hollow Road began to fall into a tributary of Dotson Branch located immediately adjacent to the road. A portion of the Roadway and bank constructed by the Dalys broke loose and slid down to the edge of the stream, and some of it entered the stream bed. (R p 70). This slope failure was first noticed on 16 November 2009 by lot owner and member of the association. (R p 102). The slope failure has created a hazardous condition for lot owners who use Coyote Hollow Road to access their homes. (R p 120).

The Association retained civil engineer John M. McCann, P.E. F, ASCE, to review the above-referenced Roadway failure. Mr. McCann determined that the Roadway was improperly constructed, with the slope of the creek bank adjacent to the Roadway being too steep and not properly supported. (R p 69). Mr. McCann determined that bank stabilization including construction of a retaining wall and other measures would be necessary to secure the Roadway. (R pp 70-71, 167-68, 174). Mr. McCann further determined that the Roadway was not constructed in accordance with the North Carolina Sedimentation Pollution Control Act of 1973 (N.C.G.S. §113A-50, *et. seq.*), which governed construction of the road. (R pp 38-40). The Association demanded that the Dalys pay for repairs to the Roadway, but the Dalys refused to do so. (R p 71). Plaintiff also retained Roger D. Moore, P.G., P.E., to do analysis on the Roadway, and this analysis indicated that the Roadway's sloped bank was insufficient to support the Roadway. (R pp 150-62).

The Honorable Gary E. Trawick in the Superior Court of Jackson County granted the Dalys' Motion for Summary Judgment pursuant to Rule 56 as to all claims of the Association by written order dated 28 September 2011. (R pp 216-217). The Association's Notice of Appeal was filed with the Court of Appeals on 17 October 2011. (R pp 218-219). The Court of Appeals affirmed the trial court without dissent. ___ S.E.2d ___, ___ NC.App. ____, 2012 WL 6012971 (Dec 4, 2012). The Mandate of the Court of Appeals was issued on 27 December 2012.

REASONS WHY CERTIFICATION SHOULD ISSUE

The decision below interprets North Carolina General Statute § 47F-3-111 in a way that is contrary to the language and intent of the statutory scheme governing the Association during the declarant control period and in a manner that is contrary to the established public policy of the state.

Judge Geer authored the opinion of the Court of Appeals holding that "the Trial Court properly determined that the Association's claims are barred by the statute of repose." The Court of Appeals most critically held that N.C. Gen. Stat. § 47F-3-111 ("Planned Community Act") only tolls statutes of limitation, but not statutes of repose. This is a national issue of first impression concerning the application of the Planned Community Act.

Because the development of property is a process taking years or even decades, the Court of Appeal's narrow reading of N.C. Gen. Stat. § 47F-3-111[1] creates a situation where developers can retain declarant control of the Association for the period of the statute of repose and effectively prevent any litigation by the Association against the declarant for tort or contract liability. As long as the declarant controls the board of directors of the Association, it is highly unlikely that the declarant will allow that declarant-controlled board to seek legal redress

[1] Identical language is found in the Condominium Act, N.C.G.S. §47C-3-111(d).

against the declarant. The sole purpose of the tolling provision in Section 47F-3-111 is to provide the independently-elected, owner-controlled board the normal periods of times to evaluate and to pursue claims. The decision by the Court of Appeals eviscerates the purpose of the tolling provision not only for the Planned Community Act but also the parallel provision in the North Carolina Condominium Act.

I. THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE

a. North Carolina law protects the individual members of the Property Owners Associations while the Declarant is in control of the Association

The Uniform Planned Community Act of North Carolina, Chapter 47F of the North Carolina General Statutes, became law on January 1, 1999, and was based in large part on the Uniform Planned Community Act (1980) ("U.P.C.A."). The language of N.C.G.S. § 47F-3-111(c), which was interpreted by the Court of Appeals, was taken verbatim from Article 3 of the U.P.C.A., which also states in relevant part, "Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates." U.P.C.A. § 3-111(d). Identical language also appears in the N.C.G.S. § 47C-3-111(d) and the Uniform Common Interest Ownership Act (1982) at §3-111. A

provision identical to North Carolina's is used in the law of 20 states.[2] However, none of these states has interpreted the effect of this provision on a Statute of Repose.

The comments to the uniform act make the intention of this section clear – the declarant's control of the association prevents the association from making independent decisions, and the ability of the association to exercise its legal rights on behalf of owner-members free from the influence of the declarant must be protected:

> In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103 [of the U.P.C.A.] provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or unit owner as a result of an action based upon a tort or breach of contract. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

U.P.C.A. § 3-111, Comment 2.

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[2] Ala. Code §35-8A-311 (Alabama); A.R.S. §33-1251(B) (Arizona); A.S. §34.08.420 (Alaska); C.G.S.A. §47-253(d) (Connecticut); C.R.S.A. §38-33.3-311(1) (Colorado); 25 Del. C. §81-311(c) (Delaware); K.R.S. § 381.9183(5) (Kentucky); 33 M.R.S. § 1603-311 (Maine) ; M.S.A. §515A.3-111(a), M.S.A. §515B.3-111(b) (Minnesota); V.A.M.S. 448.3-111 (Missouri); Neb. Rev. St. § 76-869(a) (Nebraska); N.R.S. 116.311(3), N.R.S.116B.555 (Nevada); N.M.S.A. §47-7C-11 (New Mexico); 68 Pa.C.S.A. §3311(a)(3), 68 Pa.C.S.A. §4311(d), 68 Pa.C.S.A. §5311(a)(4) (Pennslyvania); Gen. Laws § 34-36.1-3.11 (Rhode Island); 27A V.S.A. § 3-111 (Vermont); VA Code Ann. § 55-468 (Virginia); West's RCWA 64.34.344 (Washington); W.Va. Code § 36B-3-111 (West Virginia).

Professor Patrick K. Hetricka of Campbell University echoes this justification when analyzing the North Carolina statute:

> One objective of the statute dealing with tort and contract liability is to provide the association or lot owners with a right of action and remedy against the declarant for losses to the plaintiff caused by the declarant's tort or breach of contract during the period of declarant control. A window of opportunity to consider legal options will be reached when a homeowners' association board controlled by the homeowners takes power.

Hetricka, "Of 'Private Governments' and the Regulation of Neighborhoods: The North Carolina Planned Community Act," 22 Campbell L. Rev. 1, 73 (Fall 1999).

Applying a similar statute, the Florida Supreme Court suggests the law is "intended to prevent a developer from retaining control over an association long enough to bar a potential cause of action which the unit owners might otherwise have been able and willing to pursue." *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condo. Ass'n, Inc.,* 658 So. 2d 922, 925 (Fla. 1994).

Because the association during this period is unduly influenced or controlled by the declarant, the commentary to the Uniform Act, Professor Hetricka, and the Florida Court see the declarant control period as a form of disability for the Association when the board is unable to make the decision to take legal action against the declarant which would be in the Association's best interest.[3]

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[3] This can be seen as somewhat analogous to the the disabilities outlined in N.C.G.S. §1-17 and *Bryant v. Adams*, 116 N.C. App. 448, 456-57, 448 S.E.2d 832, 836 (1994), which holds that the disability of a Plaintiff under N.C.G.S. § 1-17,

b. Protection of the owners against the actions of Declarants has been recognized by the Courts of North Carolina.

Because of the unequal power during the declarant control period, laws have been enacted in North Carolina to protect ordinary property owners. The issue of extended declarant control is so critical that the declarant control period of condominiums "terminates no later than the earlier of: (i) 120 days after conveyance of seventy-five percent (75%) of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised." N.C.G.S. §47C-3-103(d). There is no such protection for homeowners associations in the Planned Community Act.

The lack of protections against an extended declarant control period under the Planned Community Act and the resulting potential for abuse is the subject of concern. House Select Committee on Homeowners Associations (2009-2010 Biennium) determined that "the law should be clarified with regard to the obligations of the declarant. Unlike the Condominium Act, the Planned Community Act does not limit the time period during which the declarant (developer) may maintain control of the association." House Select Committee on Homeowners Associations (2009-2010 Biennium), *Final Report: Report to the 2011 Session of the General Assembly of North Carolina*, 16. This issue has not been resolved and the decision of the court of Appeals increases the opportunities for abuse by declarants. "One of the issues raised again during the House Select

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tolls both the statute of limitation and the statute of repose for a products liability action as set forth in N.C.G.S. 1-50(6).

Committee on Homeowners Associations (2011-2012 Biennium) was Developer/declarant control of HOAs, provisions concerning termination of declarant control." House Select Committee on Homeowners Associations (2011-2012 Biennium), *Report to the 2012 Session of the 2011 General Assembly of North Carolina*, 1 May 2012, 5.

II. THE SUBJECT MATTER OF THIS APPEAL HAS SIGNIFICANT PUBLIC INTEREST

The conflict created by the decision of the Court of Appeals significantly affects the public interest because of the particularly widespread nature of homeowners associations. "With regard to current statistics, there is no mandatory registry of homeowners associations and as such, an exhaustive list of associations does not exist. According to Homeowners Associations of North Carolina, however, there are over 17,326 homeowner associations in North Carolina collectively representing over 2,025,000 households or 53% of the owner occupied households in the State. *Final Report* (2009-2010), at 14. Forty million households are part of these associations, and across the country there are over 250,000 homeowner's associations. Presentation of David Swindell, House Select Committee on Homeowners Associations (2011-2012 Biennium), 5 December 2011 meeting, 4. (*located* at http://www.ncleg.net/DocumentSites/Committees/HSCHA2011/2011-12-5%20Meeting/Prof%20%20David%20Swindell%20%20Presentation.pdf). This is an increase from less than 1,000 associations in 1950. *Id.* The number and increasing proliferation of associations means that the loophole created by the court of Appeals threats to impact a large number of citizens of North Carolina.

The opinion of the North Carolina Court of Appeals declining to apply N.C.G.S. § 47F-3-111(c) to a Statute of Repose is an issue of first impression which should be examined by this Court. Without further analysis, this decision will undermine the "window of opportunity to consider legal options...reached when a homeowners' association board controlled by the homeowners takes power" and will encourage developers to effectively avoid liability for defects, torts, and contract claims by remaining in control of the associations until the expiration of the Statute of Repose. The problem will extend beyond the borders of this state. Because the North Carolina Court of Appeals is the first court to consider this issue under the uniform act, this decision will create precedent that may be applied in 19 other states.

ISSUE TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issue in its brief to the Court:

I. Whether Statute of Repose affecting the association's right of action under this section is tolled by N.C.G.S. § 47F-3-111(c) until the period of declarant control terminates?

THIS the 11th day of January, 2013.

The Dungan Law Firm, P.A.

Electronically Submitted
James W. Kilbourne, Jr.
NC Bar # 24354

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically Submitted
Robert E. Dungan
NC Bar #12743

Attorneys for Appellant
One Rankin Avenue, Third Floor
Asheville, NC 28801
(828) 254-4778
jkilbourne@dunganlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing Petition for Discretionary Review on counsel for the Appellees via electronic mail, addressed as follows, pursuant to N.C. R. App. P. 26(c):

Mr. William E. Cannon, Jr.
Cannon Law, P.C.
P.O. Box 207
Waynesville, NC 28786
bcannon@cannonlawpc.net

This 11th day of January, 2013.

Electronically Signed
James W. Kilbourne, Jr.

No. 21P13 DISTRICT THIRTY B

SUPREME COURT OF NORTH CAROLINA

****

THE GLENS OF IRONDUFF PROPERTY OWNERS ASSOCIATION, INC.,	)	
Plaintiff-Appellant,	)	
v.	)	From Haywood County *No. COA 12-52*
JOHN E. DALY and CONSTANCE V. DALY,	)	
Defendants-Appellees.	)	

****

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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No. 21P13 DISTRICT THIRTY B

SUPREME COURT OF NORTH CAROLINA

****

THE GLENS OF IRONDUFF PROPERTY OWNERS ASSOCIATION, INC., Plaintiff-Appellant, v. JOHN E. DALY and CONSTANCE V. DALY, Defendants-Appellees.	)	From Haywood County *No. COA 12-52*

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendants, John E. Daly and Constance V. Daly, respectfully urge the Court to deny Plaintiff's Petition for Discretionary Review. In support of this Response, Defendants show the following:

RESTATEMENT OF FACTS

Defendants disagree with the Plaintiff's Statement of Facts. Plaintiff states that it filed its original Complaint against Defendants on 30 March 2010. This date is correct. However, Plaintiff also states that the Complaint was filed "well within the statute of repose." In its petition, Plaintiff seeks to create a new tolling provision to avoid the impact of its filing after the six year statute of repose had expired. Plaintiff has inappropriately injected argument into its Statement of Facts.

Plaintiff's Statement of Facts also omits a critical fact. The road in question was substantially completed and regularly used as a road more than six years before the plaintiff filed its complaint on 30 March 2010. (R p 85).

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

Plaintiff's Petition for Discretionary Review is nothing more than a plea to amend *N.C.G.S.* § 47F-3-111 to expand its application to statutes of repose. Plaintiff offers no authority suggesting that the Court of Appeals misread the statute, nor does Plaintiff argue that the statute is ambiguous. Instead, Plaintiff argues that adding statutes of repose to the tolling provision represents better public policy that should be adopted by the Court. This argument is better suited for the General Assembly. "The question of the wisdom or propriety of statutory provisions is not a matter for the courts, but solely for the legislative branch of the

state government." *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950).

Plaintiff did not argue to the trial court or the Court of Appeals that *N.C.G.S.* §47F-3-111 is ambiguous or that its plain meaning is not clear. Plaintiff has not preserved this issue for appeal. Given that the statute is unambiguous, it is settled law that there is no need for judicial construction, and the Court should not add language applying the tolling provision to a statute of repose. ". . . [W]hen confronted with a clear and unambiguous statute, courts 'are without power to interpolate, or superimpose, provisions and limitations not contained therein.'" *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978)).

This case would not be a good vehicle to use for changing public policy on tolling a statute of repose. First, there was no evidence forecast as to the precise period of time when the declarant had the right to appoint a majority of directors and control the association. Absent this important evidence, it is impossible to calculate a tolling period applicable to this set of facts under the policy proposed by Plaintiff.

Also, this case is not appropriate for discretionary review because there are other grounds to support the decision of the Court of Appeals. Even if the statute

of repose was tolled, the Plaintiff's claim was barred by the three-year statute of limitations contained in *N.C.G.S.* § 1-52. The latest date of possible declarant control, according to an affidavit presented by Plaintiff would have been 31 March 2005, and that was more than three years prior to the filing of the complaint. (R pp 120-27)

Finally, Plaintiff failed to forecast any evidence tending to show that damage to the road resulting from the location of the road next to a stream was foreseeable by Defendants. There is no allegation in any version of the Complaint that the Defendants knew or should have known that the location of the road and the slope of the existing stream bank could lead to erosion of the shoulder of the road. There is no allegation in the Complaint that the stream was eroding the bank at the time the road was built and that the Defendants should have foreseen erosion of the road shoulder.

OTHER ISSUES TO BE PRESENTED IF PETITION IS GRANTED

If Plaintiff's Petition is granted, Defendants seek to present the following issues, in addition to those presented by the Plaintiff:

1. Are the Plaintiff's claims barred by the three-year statute of limitations contained in *N.C.G.S.* § 1-52?

2. Are the Plaintiff's claims barred by the six year statute of repose in *N.C.G.S.* § 1-50(a)(5)a?

3. Can any tolling of the statute of repose or statute of limitations by *N.C.G.S.* § 47F-3-111 be applied when there is no evidence of declarant control during the three years before Plaintiff filed its complaint?

4. Was summary judgment proper where the Plaintiff did not forecast any evidence tending to show that damage to the road arising from the location of the road next to a stream was foreseeable by Defendants?

CONCLUSION

The Court of Appeals correctly applied an unambiguous statute to undisputed facts and found in favor of the Defendants. There is no significant public interest arising from a decision relying upon settled law and containing no facts to suggest that the Court of Appeals' application of the law was incorrect. Plaintiff's Petition for Discretionary Review should be denied.

Respectfully submitted, this 21st day of January, 2013.

CANNON LAW, P.C.

Electronically Signed
William E. Cannon, Jr.
State Bar No. 33152
bcannon@cannonlawpc.net

N.C. R. App. P. 33(b) Certification:

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically Signed
Michael W. McConnell
State Bar No. 29343
mcconnell@cannnlawpc.net

Attorneys for Defendants-Appellees
P.O. Box 207
Waynesville, NC 28786
(828) 456-4800

CERTIFICATE OF SERVICE

I certify that I served a copy of the forgoing Response to Petition for Discretionary Review on counsel for the Plaintiff-Appellant via electronic mail pursuant to Rule 26(c), to the following persons and addresses:

James W. Kilbourne, Jr., Esq.
The Dungan Law Firm, PA
One Rankin Avenue, Third Floor
Asheville, NC 28801
e-mail address: jkilbourne@dunganlaw.com

Robert E. Dungan, Esq.
The Dungan Law Firm, P.A.
One Rankin Ave., Third Floor
Asheville, NC 28801
e-mail address: robertdungan@dunganlaw.com

This the 21st day of January, 2013.

Electronically Signed
William E. Cannon, Jr.

NO. COA12-52

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

THE GLENS OF IRONDUFF PROPERTY
OWNERS ASSOCIATION, INC.,
Plaintiff,

v.

Haywood County
No. 10 CVS 385

JOHN E. DALY and
CONSTANCE V. DALY,
Defendants.

Appeal by plaintiff from order entered 28 September 2011 by Judge Gary E. Trawick in Haywood County Superior Court. Heard in the Court of Appeals 10 May 2012.

The Dungan Law Firm, P.A., by Robert E. Dungan, for plaintiff-appellant.

Cannon Law, P.C., by William E. Cannon, Jr. and Michael W. McConnell, for defendants-appellees.

GEER, Judge.

Plaintiff The Glens of Ironduff Property Owners Association, Inc. ("the Association") appeals from an order granting summary judgment to defendants John E. Daly and Constance V. Daly ("the Dalys"). Based on our review of the record, we hold that the trial court properly determined that

the Association's claims were barred by the statute of repose, and we accordingly affirm the summary judgment order.

Facts

The Dalys were the developers of The Glens of Ironduff ("The Glens"), a planned community in Haywood County, North Carolina. The Dalys purchased the land that became The Glens in September 2001. At that time, there was an existing unpaved farm road that ultimately became part of Coyote Hollow Road. The road ran approximately parallel to a stream that was about 10 feet below the road. The slope from the road down to the stream was at a 65 to 70 degree angle.

The farm road had been compacted with stones and rocks embedded in the ground. At some point before March 2004, the Dalys widened the farm road for use by lot owners in The Glens. During that process, the stones and rocks were removed by a bulldozer and replaced with packed dirt. Upon completion of the widening of the road, the Dalys began using the road for construction traffic to build two houses. The road continued to be used for construction and by individuals who purchased lots accessed by the road.

In 2005, the Dalys paved the road. Custom Paving placed six inches of stone and two inches of hotmix asphalt on the roadway. The paving did not, however, involve any change in the

grade of the road, the width of the road, or the slope of the stream bank.

In the fall of 2009, a portion of the stream bank adjacent to the road eroded and slid down to the stream. At this point in the roadway, there ceased to be any shoulder to the road. The Association hired Alpha Environmental Sciences, Inc. to evaluate the roadway embankment. The consultant determined that "[b]oth the steepness of the slope and the undercutting from the creek appear to be causing the ongoing slope failure."

On 15 January 2010, the Association, a homeowners association including all of the property owners within The Glens, wrote Mr. Daly regarding the erosion of the bank, which could eventually render the road impassable. The Association requested that Mr. Daly either fix the road or agree to reimburse the Association for the cost of eliminating the hazard.

On 30 March 2010, the Association filed suit against the Dalys asserting claims for breach of the warranty of workmanship, negligent construction, contribution and indemnification, and violation of the Sedimentation Pollution Control Act of 1973. The complaint alleged that the Dalys had negligently designed and constructed the road and that negligence was the proximate cause of the road slipping and

falling into the adjacent creek. The complaint sought damages in the amount of $36,500.00.

Subsequently, the Association filed an amended complaint and a second amended complaint. The second amended complaint asserted only a claim for breach of implied warranty of workmanship and fitness for purpose and a claim for negligent construction. The second amended complaint sought damages in excess of $10,000.00. The Dalys denied the material allegations of the complaint and alleged that the Association's claims were barred by the statute of limitations and statute of repose.

The Dalys subsequently filed a motion for summary judgment supported by an affidavit from John E. Daly and the Association's discovery responses. The Association opposed the motion with the affidavits of William Allen, Secretary of the Association and a property owner whose only access to his home was over the eroded road, and Francis D. Brown, the person who sold the land to the Dalys. The Association also provided the trial court with the Dalys' discovery responses, a report from a consultant who had evaluated the eroded bank, and the response to a subpoena served on an engineer retained by the Association to remedy the hazardous road condition.

At the hearing on the motion for summary judgment, defendants contended that the Association's claims were barred

by the three-year statute of limitations and the six-year statute of repose, that the Association lacked standing to assert a claim of implied warranty, that the Association was contributorily negligent, and that the damages in the case were not reasonably foreseeable. On 28 September 2011, the trial court entered an order concluding, based on its review of the evidence, that "there is no genuine issue as to any material fact and that Defendants are entitle[d] to judgment as a matter of law." The court, therefore, entered summary judgment in favor of the Dalys and against the Association. The Association timely appealed to this Court.

Discussion

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

We first address whether summary judgment was appropriate based on the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5) (2011). *See Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861 (2006) (holding that N.C. Gen. Stat. § 1-

50(a)(5) "is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms"). N.C. Gen. Stat. § 1-50(a)(5)(a) provides: "No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement."

"Whether a statute of repose has run is a question of law." *Mitchell v. Mitchell's Formal Wear, Inc.*, 168 N.C. App. 212, 215, 606 S.E.2d 704, 706 (2005). "Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001).

Here, the Association points to the paving of the road in 2005 and argues that the road was not substantially completed until paved and, in any event, the paving was the last act or omission giving rise to its causes of action. Since this action was filed on 30 March 2010, under the Association's analysis of the facts, the action would be timely for purposes of the statute of repose.

The statute defines "substantial completion" as "that degree of completion of a project, improvement or specified area

or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended." N.C. Gen. Stat. § 1-50(a)(5)(c). Here, it is undisputed that the purpose of the road was to allow vehicular traffic to access lots in The Glens. The evidence is also uncontroverted that following the widening and grading of the road prior to March 2004, the road was adequate for and was used by vehicles traveling to construct houses on lots. The road continued to be used, without change, by lot owners and construction traffic prior to the paving of the road in 2005. Because the road could be used for its intended purpose, it was substantially complete prior to March 2004. *See Moore v. F. Douglas Biddy Constr., Inc.*, 161 N.C. App. 87, 90, 587 S.E.2d 479, 482 (2003) ("A house is substantially completed when it can be used for its intended purposes as a residence.").

The Association, however, argues that part of the overall scheme of the development was that the roads would be paved. Regardless, the Association has presented no evidence that paving was necessary for the road to be used for its intended purpose or that the lack of paving prior to 2005 interfered with the road's use. Without that evidence, the Association has failed to show a genuine issue of material fact as to the date

of substantial completion of the road. *See Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76-77, 518 S.E.2d 789, 791-92 (1999) (in rejecting plaintiff's argument that substantial completion occurred upon completion of house's punch list and not upon issuance of certificate of compliance, noting that "[t]here is no evidence in this record that the items on the punch list prevented or materially interfered with plaintiff using the house as a residence").

Alternatively, the Association argues that the 2005 paving constituted "the specific last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-50(a)(5)(a). Review of the evidence submitted by the Association in support of its claims of defective construction of the road indicates that the Association is contending that the collapse of the shoulder and stream bank was due to the widening of the road bringing it closer to the stream and making the stream bank steeper. Although the Association points to evidence that the Dalys had placed six inches of stone covered by two inches of asphalt on the road in 2005, it has not shown that this paving gave rise to its causes of action for defective construction of the road.

The Association's interrogatory answers asserted that the road was improperly constructed because it "was placed or was

left too near the stream bed, contrary to the intent of NCGS 113A-57(1)" and that "to comply with the intent of 57(2), Defendants Daly would have had to build the road even farther to the southwest so that the angle of the slope below the road surface would not have been so steep as it was left after construction. The steepness of the slope was a direct cause of the subsequent, severe erosion." The Association then asserted that if the Dalys elected to "use the routing of the pre-existing road close to the stream and not to widen the road any further," the Dalys should have then built a retaining wall or used another means to stabilize the shoulder and the stream bank.

The affidavit of William Allen submitted by the Association, although filled with hearsay, asserts that the slope should not have been left so steep. He reports that other witnesses told him that when the Dalys widened the farm road in 2002, they removed rocks that had previously stabilized the road. Mr. Allen also claimed that when widening the road, the Dalys could have removed large rocks from the uphill side of the road and noted that a witness saw equipment working to break rocks during 2002. Mr. Allen also contended that the Dalys could have pushed fill dirt over the creek-side edge of the road, as it appears was done in some places. Ultimately, Mr.

Allen asserted as evidence of the Dalys' defective construction that the Dalys had not shown "how much widening [they] accomplished by moving rocks from the uphill side" of the road and gave no "explanation of why [they] did not remove more rock on the side opposite the creek so as to make space for a sustainable slope on the creek side of the road."

In short, the Association's evidence indicates that the conduct giving rise to its claims was the placement and grading of the road - it is undisputed that those acts occurred prior to March 2004. The Association's evidence makes no reference to the 2005 paving as contributing to the cause of the erosion of the stream bank. Mr. Daly's affidavit remained uncontroverted that "the paving of the road at a later date did not involve any change in the grade of the road, the width of the road or the creek bank or slope of the creek bank that is the subject of this civil action."

The Association argues in its brief on appeal that the eight inches of added material to the surface of the road "most certainly added significant weight to the Roadway itself, which could easily be found to have contributed to the failure of the underlying slope." The brief cites to no evidence supporting this assertion, and we have found none. The Association had the burden of "establish[ing] a direct connection between the harm

alleged and that last specific act or omission." *Nolan*, 135 N.C. App. at 77, 518 S.E.2d at 792. Because the Association failed to present evidence connecting the erosion of the bank to the paving, it has not met its burden of showing that the 2005 paving was the last specific act or omission giving rise to its claims.

Consequently, the Association has not shown that this action was filed less than "six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)(a). The Association further argues, however, that under the North Carolina Planned Community Act, the statute of repose does not apply to its claims. Specifically, the Association points to N.C. Gen. Stat. § 47F-3-111 (2011), which provides:

> (c) Any *statute of limitation* affecting the association's right of action under this section is tolled until the period of declarant control terminates. A lot owner is not precluded from bringing an action contemplated by this section because the person is a lot owner or a member of the association.

(Emphasis added.)

By its plain language, N.C. Gen. Stat. § 47F-3-111 only tolls statutes of limitation. Contrary to the Association's contention, a statute of repose is not merely a type of statute

of limitation that is encompassed by any reference to statutes of limitation. Our Supreme Court has explained how fundamentally distinct a statute of repose is from a statute of limitation:

> The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws.
>
> Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized. If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria* -- a wrong for which the law affords no redress. For this reason we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights.

Boudreau v. Baughman, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (internal citations and quotation marks omitted).

The Association has pointed to nothing indicating that the General Assembly, although referencing only statutes of limitation, also intended to toll statutes of repose. The Association cites only *Bryant v. Adams*, 116 N.C. App. 448, 456-

57, 448 S.E.2d 832, 836 (1994), as support for its position. *Bryant* addressed whether N.C. Gen. Stat. § 1-17, a tolling provision for the claims of minors, applied to toll a statute of repose as well as statutes of limitation. *Bryant*, 116 N.C. App. at 455-56, 448 S.E.2d at 835-36. N.C. Gen. Stat. § 1-17 did not, however, specifically refer to a "statute of limitation," and, therefore, this Court was not asked to construe the phrase "statute of limitation" to include a "statute of repose." Moreover, the Court based its conclusion on the fact that the General Assembly had specifically stated in the Act creating the statute of repose that nothing in the Act should be construed as amending or repealing the provisions of N.C. Gen. Stat. § 1-17. *Bryant*, 116 N.C. App. at 457, 448 S.E.2d at 836. Because of that express statement of intent, the Court held that N.C. Gen. Stat. § 1-17 tolled both statutes of limitation and statutes of repose. *Bryant*, 116 N.C. App. at 457, 448 S.E.2d at 836.

Indeed, in other contexts, when the General Assembly has intended to toll a statute of repose, it has specifically said so. *See* N.C. Gen. Stat. § 1-15.1(a) (2011) (providing that "if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes

of repose, except as established herein, are tolled"); N.C. Gen. Stat. § 58-48-100(b) (2011) (providing that "[a]s to any person under a disability described in G.S. 1-17, the Association may not invoke the bar of the period of repose provided in subsection (a) of this section unless the Association has petitioned for the appointment of a guardian ad litem for such person and the disposition of that petition has become final").

Therefore, the plain language of N.C. Gen. Stat. § 47F-3-111 indicates that it only applies to toll statutes of limitation. It does not toll statutes of repose. The Association failed to meet its burden of showing that this action was timely under N.C. Gen. Stat. § 1-50(a)(5)(a), and, therefore, the trial court properly granted summary judgment to the Dalys. Because the action is barred by the statute of repose, we do not address the parties' other contentions.

Affirmed.

Judges ELMORE and THIGPEN concur.