THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2022-001385
Berkeley County Case No. 2017-CP-08-02238

Matthew Zetz, Appellant,

v.

Daniel Island Company, Inc., Respondent.

INITIAL BRIEF OF APPELLANT

Angeline M. Larrivee
S.C. Bar No. 105466
Angeline.larrivee@akimlawfirm.com
Lane Jefferies
SC Bar No. 101764
Lane@akimlawfirm.com
Roy T. Willey, IV
SC Bar No. 101010
Roy@akimlawfirm.com
Eric Poulin
SC Bar No. 100209
Eric@akimlawfirm.com
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888
CLD@akimlawfirm.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEVELOPER, WHERE THERE WAS MORE THAN A SCINTILLA OF EVIDENCE THAT DEVELOPER'S CONTROL OF ASSOCIATION WAS SUFFICIENT TO RENDER DEVELOPER LIABLE IN THIS PREMISES-LIABILITY ACTION?

STATEMENT OF THE CASE

On October 2, 2017, Matthew Zetz brought a premises-liability negligence action against the Daniel Island Community Foundation. S&C p. 1. In Zetz's first amended complaint, filed November 8, 2019, he added several defendants, including Daniel Island Company, Inc. ("Developer"), the Respondent on appeal. 1st Amend. S&C p. 1. On April 29, 2020, Zetz filed his second amended complaint. 2d Amend. Compl. p. 1.

A few months later, on September 14, Developer filed a motion for summary judgment, arguing that Zetz's "claims against [Developer] were filed well beyond the applicable statute of repose and that [Developer] owed [Zetz] no legal duty at the time of the incident." MSJ p. 1. However, the trial court stayed the motion on October 22, 2020, holding that because discovery was incomplete, the motion was not yet ripe. Oct. 22 Order pp. 2–3.

On August 16, 2022, Developer filed a second memorandum in support of its motion, Aug. 16 Memo in Support p. 1, and on August 24, 2022, the trial court heard the motion, Transcript p. 1. In an order filed September 9, 2022, the court granted summary judgment for Developer, holding that although Developer controlled the entity which owned the premises, the kind of control that

Developer had was insufficient to render Developer liable in a premises-liability action. Sept. 9 Order pp. 4–6.[1]

On October 4, 2022, Zetz timely filed and served his notice of appeal of the September 9, 2022 order, bringing the appeal properly before this Court. NOA p. 1.

STANDARD OF REVIEW

This Court "reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *State Farm Mut. Auto. Ins. Co. v. Windham*, No. 2020-001693, 2022 WL 16627087, at *1 (S.C. Nov. 2, 2022) (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). It recognizes that "because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citing *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006)).

Therefore, "[i]n determining whether any triable issues of fact exist," this Court views "the evidence and all inferences which can be reasonably drawn therefrom . . . in the light most favorable to the nonmoving party." *Ray v. City of Rock Hill*, 434 S.C. 39, 44–45, 862 S.E.2d 259, 262 (2021) (quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361–62, 563 S.E.2d 331, 333 (2002)). In a negligence action, this Court must deny summary judgment where the non-moving party presents "a mere scintilla of evidence" showing a dispute as to either a material fact or "the conclusions to be drawn from" undisputed facts. *Nelson v. Charleston Cnty.*

[1] The trial court (believing that during the hearing, Zetz "argued that he had asserted claims for corporate amalgamation and veil piercing") held that Developer was "not liable . . . based on a single enterprise or corporate amalgamation theory." Sep. 9 Order pp. 5–6. However, during the August 24, 2022 hearing, Zetz's counsel clarified that he was not arguing either amalgamation or veil-piercing. Transcript pp. 10, 17.

Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004); *Easterling v. Burger King Corp.*, 416 S.C. 437, 445, 786 S.E.2d 443, 447 (Ct. App. 2016) (quoting *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011)).

FACTS

I. A Walk in the Park

This case arose from an accident that occurred in the Daniel Island Children's Park ("the Premises") on or about November 11, 2016. 2d Amend. Compl. pp. 2, 7. The Premises featured an innovative element designed to captivate child and adult alike: a three-dimensional map of the Charleston area, including a water feature with "shallow concrete trenches" which depicted local waterways. Aug. 16 Memo in Support p. 2. Unfortunately, whoever controlled the park failed to ensure that the concrete trenches were adequately lighted or marked. 2d Amend. Compl. p. 1.

Zetz paid the price when he "fell into an unlighted and unmarked . . . trench." 2d Amend. Compl. p. 1. The fall caused serious injuries which required partial amputation of his leg. 2d Amend. Compl. p. 1.

II. In Control

When Zetz tried to obtain some recompense for his disabling injuries, he discovered that the Premises belonged to Daniel Island Town Association ("Association"), 2d Amend. Compl. p. 3, Answer to 2d Amend. Compl. p. 2, and that Association's Field-Operations Manager was supposed to ensure that the lighting contractor performed appropriate work on the Premises, *see* Hamil Depo pp. 13:10–15, 18:16–23, 23:15–24:1. Zetz also discovered that—according to Association's founding documents and the testimony of Association's officers and employees—Developer ultimately controlled Association and Association's properties.

The March 1999 Declaration of Covenants, Conditions, and Restrictions for Daniel Island Town Center Zone[2] states that for a certain "Control Period," the Developer "is entitled to appoint all of the members of the Board of Directors." By-laws & Decl. pp. 29; *see id.* at 30, 36 (Developer is sole Class "B" Member).

The Association's March 1999 by-laws[3] clarify that during the control period, the developer-appointed Board has "all the powers and duties necessary for the administration of the Association's affairs," By-laws & Decl. p. 9, including the duty to "provid[e] for the operation, care, upkeep, and maintenance of the Area of Common Responsibility," By-laws & Decl. p. 9. Specifically, according to the Declaration, the Association has a duty to "manage and control the Common Area and all improvements thereon (including, without limitation, landscaping . . .)," and to "keep it in attractive condition and good repair." By-laws & Decl. p. 37.

In fact, even after the control period, Developer's power over Association is substantial. Up to two years after the control period ends, *see* By-laws & Decl. p. 36 (length of Class "B" membership), Developer can "disapprove any action, policy or program of the Association, the Board and any committee which," in Developer's "sole judgment," "would tend to impair" Developer's rights. By-laws & Decl. p. 10. Furthermore, as long as Developer owns certain property "or has the right to annex" some of that same property, "and for a period of twenty (20) years thereafter," Developer can amend the declaration and bylaws "without vote or consent of the Owners for any . . . purpose." By-laws & Decl. pp. 15–16; By-laws & Decl. pp. 47, 69–70.

[2] In 2004, the Board changed Daniel Island Town Center Zone's name to Daniel Island Town Association, Inc. (Association's current name). Sept. 10, 2004 Art. of Amend. p. 1.

[3] Date taken from file name. By-laws & Decl. p. 1.

Developer's and Association's officers also testified to the extent of Developer's control. Matthew Sloan, president of both entities in 2016, Sloan Depo p. 35:25–27, Assoc.'s Answer to Interrogatories p. 11, admitted point-blank that Developer controlled Association at the time of the accident, Sloan Depo p. 50:4–6. So did Frank Brumley, who at the time of the accident was Association's vice president and Developer's CEO and chairman. Assoc.'s Answer to Interrogatories p. 11; Developer's Answer to Interrogatories pp. 13–14. Brumley not only agreed that Association was "developer controlled" in 2016; he also stated that "***the developer absolutely maintain[ed] control***" during the control period. Brumley Depo pp. 20:23–21:16 (emphasis added).

Other high-level employees confirmed Sloan's and Brumley's testimony. In a 2019 email addressed to Matt (presumably Matt Sloan) and Jane (presumably Jane Baker, Association's manager in 2016, Sloan Depo p. 17:17–20), Amy Moyer, who had been with Developer since 1999 in the roles of Director of Finance, Vice President of Finance, and Chief Financial Officer, Moyer Affidavit p. 1, stated, "I have already explained to the insurance carrier that [Developer] controls the [Association] board," Moyer Email p. 1. Additionally, finance manager Kay Fabrizio[4] and community-services manager Barbara McLaughlin[5] agreed that at the time of the accident, Developer controlled the Association Board (the "Board"). Fabrizio Depo pp. 11:23–13:1;

[4] Finance manager for the Daniel Island Property Owners Association since February 2016. Fabrizio Depo p. 8:8–22. Daniel Island Property Owners' Association ("POA") is a collective name for entities including Association, the Daniel Island Community Association, and the Daniel Island Community Foundation. *See* Fabrizio Depo p. 11:6–11; Cuthbert Depo p. 14:1–14; Hamil Depo pp. 35:17–25, 51:2–18; Sutton Depo pp. 22:23–23:11; and McLaughlin Depo p. 10:5–13.

[5] The POA's Manager of Community Services. McLaughlin Depo p. 119:15–19.

McLaughlin Depo p. 131:2–11. Mary Stuart Sutton[6] "underst[ood]" that Developer controlled the Board in 2016. Sutton Depo p. 20:1–13. Finally, G. Chris Hamil, Association's Field-Operations Manager, Hamil Depo p. 8:24–9:7, also believed that Developer controlled the Board in 2016, Hamil Depo pp. 39:23–40:2, 42:12–16, 45:8–13.

This control was more than nominal. When Sloan (again, the president of both entities in 2016) described developer control, he explained that developers "always control[] up to a certain point," and that because a developer puts so many assets and so much energy "into building a community," it "***want[s] to be able to control what is built and how it is managed***." Sloan Depo p. 19:9–19 (emphasis added).

Sloan agreed that a developer controls both building and managing a community "by putting its own people on the board." Sloan depo p. 68: 13–23. Because Sloan and Brumley (again, a senior officer of both entities in 2016) were two of the Board's three members, *see, e.g.*, Sloan Depo pp 37:25–38:1; Brumley Depo pp. 27:21–28:6; Fabrizio Depo p. 13:6–24, "[t]he votes at the [Association] were," as Sloan himself admitted, "controlled by [Developer's] officers." Sloan Depo p. 50:9–11.

According to Sloan, a developer's control includes ensuring that problems are addressed—even against the wishes of the rest of the Association, if need be. Sloan Depo p. 56:7–23. Thus, although Developer allowed a manager to run Association, Sloan Depo p. 65:9–11, Developer's officers "could have given . . . command[s]" through the Board if they saw "a need that [they] felt strongly enough about," Sloan Depo p. 51:2–5. Brumley concurred with Sloan's view, admitting that if Developer had wanted to "just ram [a proposition] through," it could have. Brumley Depo pp. 21:17–22:9. For example, Brumley agreed that if Developer wanted to hand out free lifejackets

[6] The POA's Architectural Review Board Administrator. Sutton Depo pp. 8:18–10:6.

for safety reasons, it could have decided to do so, even against the homeowners' wishes. Brumley Depo pp. 22:20–23:14.

III. The Trial Court's Ruling

Eventually, Developer sought summary judgment against Zetz, alleging that it "owed no legal duties to [Zetz] at the time he was injured." Oct. 12 Memo in Support p. 1.

Despite the evidence of extensive Developer control, the trial court agreed with Developer. It held that Developer did not control Association—at least, not in the sense that "control" is used in premises-liability cases. In essence, the court concluded that the word "control," as used in "horizontal property regimes," is a term of art which does not denote a real relationship of control.

According to the court, "[i]n the context of horizontal property regimes" (a type of "common-interest community" or "CIC," an umbrella term which includes condominiums, co-ops, time shares, and the like),[7] the phrase "declarant control period" "is simply common parlance for the time during which the original developer of a community may appoint the board members of a property owners association it has formed." Sept. 9 Order p. 4. The court explained that in a CIC, "if proper corporate formalities are observed, the declarant does not actually exercise direct operational control over the POA, much less the common elements . . . owned by its members." Sept. 9 Order p. 4. In other words, during a declarant control period, the developer's control is merely nominal—even when the developer can appoint all the association's board members.

[7] South Carolina's Horizontal Property Act does not define "horizontal property," but rather refers to "apartments." S.C. Code Ann. § 27-31-20(a). It defines an "[a]partment" as "a part of the property intended for . . . independent use," "including one or more rooms . . . located on one or more floors (or parts thereof) in a building or if not in a building in a separately delineated place whether open or enclosed and whether for the storage of an automobile, moorage of a boat, or other lawful use, and with a direct exit to a public street or highway." *Ibid.* Because this definition seems inapplicable to the development at issue, the court was likely using the term to refer to common-interest communities.

In contrast, the court concluded that in the premises-liability context, control denotes "the circumstances under which a legal duty arises to protect occupants and visitors to a property." Sept. 9 Order p. 4. Therefore, it continued, the analysis of "control" in a premises-liability context is very different from the analysis "appropriate to examine the relationships between separate corporate entities" involved in a CIC. Sept. 9 Order p. 4.

The court neither cited authority for this distinction nor clarified the differences between the analyses; rather, it simply described the "chain" of relationships linking Developer to the Premises. Sept. 9 Order pp. 4–5. Developer selects the Board, which makes upper-level decisions for Association; Association's "employees and vendors carry out those decisions"; the Premises "is one of the common elements owned by the many property owners that actually own all of the property that comprises" Association; and "[a]n injury occurred" on the Premises, "allegedly because of inadequate lighting." Sept. 9 Order pp. 4–5. Then, without explaining how the existence of a "chain" of relationships proved Developer's lack of control, the court concluded that Zetz "failed to provide any support for the notion that [Developer] has sufficient control over the [Premises] to create a legal duty in that entity," and it granted summary judgment for Developer. Sept. 9 Order p. 5.

ARGUMENT

Because Developer had substantial control over Association, this Court must reverse the trial court's decision to grant summary judgment for Developer.

As our courts have emphasized, control, not mere ownership, is the basis for premises liability. And CIC developers (as our courts, out-of-state-legislatures, and persuasive secondary sources have recognized) heavily control the associations they create. There is indeed a chain

which extends from developers to associations to association property—but it is a chain of control, not merely a chain of technical corporate relationships.

Here, in order to survive summary judgment, Zetz only needed to present a scintilla of evidence showing a dispute as to either a material fact (whether the evidence demonstrated that Developer controlled Association) or as to the conclusions to be drawn from the undisputed facts (whether, based on the evidence of Developer's control, it is fair to hold Developer accountable for Association's negligence in a premises-liability action). Here, Zetz presented more than a scintilla of evidence not only that Developer controlled Association, but also that Developer controlled Association enough to be held liable for Association's poorly maintained grounds. Based on this evidence, the trial court—which was obliged to view the evidence and all reasonable inferences in the light most favorable to Zetz—should have allowed the matter to reach the jury. But it did not. Rather, it decided to invoke the drastic remedy of summary judgment, a decision that this Court must reverse.

I. Considering the evidence and all reasonable inferences in Zetz's favor, there is more than a scintilla of evidence that Developer controlled Association enough to be liable for Association's negligent groundskeeping.

a. Control is the basis of premises liability.

Premises liability "depends on control, rather than ownership, of the premises." *Dunbar v. Charleston & W. C. Ry. Co.*, 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (quoting 38 American Jurisprudence *Negligence* § 94). "One who controls the use of property has a duty of care not to harm others by its use," while "one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing *Dunbar*, 211 S.C. at 214–16, 44 S.E.2d at 316–17; *Peden v. Furman University*, 155 S.C. 1, 151 S.E. 907, 913–14 (1930); and *Clark v. Greenville Cnty.*, 313 S.C. 205, 210, 437 S.E.2d 117, 119 (1993)).

Thus, our Supreme Court has held that a landowner is generally not liable for injury caused by conditions on leased property, because the leaseholder, not the landowner, "control[s]" the property. *Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992). This is as true in commercial contexts as in personal ones. *See Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 610–12, 620 S.E.2d 54, 55–56 (2005) (holding that even though appellant was corporate sub-lessee's invitee, commercial landlord had no duty "to protect [appellant] from the criminal acts of third parties inside the leased premises, an area which [the landlord] did not control or possess.").

Clearly, then, a party can be responsible in a premises-liability action even without owning the premises. Furthermore, two or more parties can simultaneously "control" premises. In *Richards v. Great Atl. & Pac. Tea Co.*, the plaintiff sued not only the store's owner, but also its manager (evidently because of the manager's control over the store). 226 S.C. 119, 121, 125, 83 S.E.2d 917, 918, 920 (1954). The Supreme Court approved, stating that "the evidence made issues of negligence for the jury upon which they might have found a verdict against any one or more or all of the defendants." *Id.* at 125, 83 S.E.2d at 920.[8]

b. <u>During the "control period," Developer substantially controlled Association.</u>

As the trial court admits, Association controlled the common areas, including the Premises, and the Board controlled Association. Therefore, Developer controlled the Premises if Developer controlled the Board.

According to Black's Law Dictionary, "control" is "[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." *Control*, *Black's*

[8] Relatedly, numerous cases from the District of South Carolina have held that store managers are not sham defendants in premises-liability cases. *See, e.g.*, *Bryant v. Hodges Mgmt. Co., Inc.*, No. 9:20-CV-04217-DCN, 2021 WL 2003188 (D.S.C. May 19, 2021); *Laing v. Truist Bank*, No. 3:20-CV-01134-JMC, 2020 WL 4462977 (D.S.C. Aug. 4, 2020).

Law Dictionary (11th ed. 2019). And the Uniform Common Interest Ownership Act's ("the Uniform Act") definition of an "[a]ffiliate of a declarant"—which appears in West Virginia's Uniform Common Ownership Interest Act, W. Va. Code Ann. § 36B-1-103(1) (West), the Delaware Uniform Common Interest Ownership Act, Del. Code Ann. tit. 25, § 81-103(1) (West), and the North Carolina Condominium Act, N.C. Gen. Stat. Ann. § 47C-1-103(1), among others—sheds additional light on policymakers' view of the line between influence and control, explaining that an affiliate includes an entity "controlled by . . . a declarant" and that an entity "is controlled by a declarant" if the declarant "controls in any manner the election of a majority of the directors of the" entity, or where the declarant "directly or indirectly . . . owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the" entity. Unif. Common Interest Ownership Act § 1-103(1) (2021).

Here, Developer controlled the Board. It insisted on "be[ing] able to control what [was] built and how it [was] managed" in the development in order to protect its investment in the development. Developer gained that right to control the Association—even to micromanage it, if necessary—by putting its officers on the Board. This right, at the very least, constitutes "indirect" power to "manage, direct, or oversee" Association's affairs, including Association's management of the Premises, and creates the final link in the chain of control.

But lest there be any doubt that a developer has real control over development associations, the following discussion will show that South Carolina common law, the Uniform Act and the Restatement (Third) of Property (Servitudes), and foreign statutory law all recognize the reality—and the risks—of developer control.

Our Supreme Court has recognized that developers have a privileged position of power over development associations. For example, in *Concerned Dunes W. Residents, Inc. v. Georgia-*

Pac. Corp., the Court noted that under the governing documents, "the developer exert[ed] *de facto* control over the POA." 349 S.C. 251, 260–61, 562 S.E.2d 633, 638–39 (2002); *see id*. at 255 n.1, 562 S.E.2d at 636 n.1.

This control is not objectionable *per se*, as seen in the Court of Appeals' requirement in *Cullen v. McNeal* that "the Homeowners . . . recogniz[e] and adher[e] to the rights of the Developer to control the Association." 390 S.C. 470, 480, 492, 702 S.E.2d 378, 383, 390 (Ct. App. 2010). However, the courts have also recognized that such power can lead to abuse, and they have made legal accommodations for that reality. The Court of Appeals granted equitable tolling to preserve an association's rights where the "board consisted of Appellants' [the developer and two subsidiaries] officers until the date of 'turnover,'" rejecting "Appellants' claim that an organization they controlled would have initiated an action against itself during this period." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 356 n.2, 371–72, 725 S.E.2d 112, 117 n.2, 125 (Ct. App. 2012). The Court also clarified that "a developer owes" "a fiduciary duty to an HOA when it controls the HOA." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 276, 293, 821 S.E.2d 509, 517–18 (Ct. App. 2018) *aff'd in part, rev'd in part on other grounds*, 435 S.C. 109, 866 S.E.2d 542 (2021).

One way for a developer to control an association is by packing the board with the developer's representatives, as Developer did here. *See Stoneledge*, 425 S.C. at 285, 293, 821 S.E.2d at 513, 517–18. Indeed, even mere "superior voting power" may establish enough control over an association to require the developer's fiduciary care. *See Walbeck v. I'On Co., LLC*, 426 S.C. 494, 515–16, 827 S.E.2d 348, 359 (Ct. App. 2019) (citing *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) ("[R]ather than rejecting the existence of a fiduciary relationship arising from the developer's superior voting power, the court

declined to hold that the developer's assessment determinations violated a fiduciary duty . . . .") So may the rights to appoint board members and to veto association action, even if the developer chooses not to exercise those rights. *See Walbeck*, 426 S.C. at 516–17, 827 S.E.2d at 359–60 (rejecting appellants' argument that absence of developer-appointed directors, together with developer's "restraint from exercising the veto power[,] precludes the existence of a fiduciary relationship").

South Carolina is not alone in its cautious attitude toward developer control. For example, many states limit the length of the developer-control period;[9] hold developer-appointed board members to a heightened duty of care;[10] grant owner-controlled boards the right to end or limit contracts entered by developer-controlled boards;[11] and hold the developer responsible for wrongs that the association committed during the control period.[12]

---

[9] At least thirty-two states limit the length of the developer-control period in various forms of CICs. *See, e.g.*, Del. Code Ann. tit. 25, § 81-303(c) (West); Nev. Rev. Stat. Ann. § 116.31032(1) (West); Vt. Stat. Ann. tit. 27A, § 3-103(d) (West); Ala. Code § 35-8A-303(d); Ga. Code Ann. § 44-3-101(a) (West); and N.M. Stat. Ann. § 47-16-8(A), (B), (D) (West).

[10] At least fourteen states hold developer-appointed board members to a higher duty of care. *See, e.g.*, Kan. Stat. Ann. § 58-4609(a) (West); W. Va. Code Ann. § 36B-3-103(a) (West), and Va. Code Ann. § 55.1-2134(A) (West).

[11] At least thirty-six states allow owner- or lessee-controlled boards to terminate, or at least limit, contracts, leases, and the like that developer-controlled boards entered. *See, e.g., see* Alaska Stat. Ann. § 34.08.360(a) (West); Colo. Rev. Stat. Ann. § 38-33.3-305(1) (West); Ariz. Rev. Stat. Ann. § 33-1245(A); D.C. Code Ann. § 42-1903.02(b)(1) (West); Fla. Stat. Ann. § 718.302 (West); Ga. Code Ann. § 44-3-101(d) (West); and PA ST 68 Pa.C.S.A. § 4305.

[12] At least twenty-two states have provisions not only establishing developer liability for wrongs committed associations during the developer-control period, but also tolling the relevant statute of limitations until after the control period. *See, e.g.*, Minn. Stat. Ann. § 515B.3-111(a)–(b) (West); Vt. Stat. Ann. tit. 27A, § 3-111(b)–(c) (West); Wash. Rev. Code Ann. § 64.90.460(2)(b), (3)(a) (West); Me. Rev. Stat. tit. 33 § 1603-111; and PA ST 68 Pa.C.S.A. § 5311(3)–(4).

The Restatement and the Uniform Act articulate the policies behind these precautions. When developers create associations, they "control the association through election or appointment of the directors or officers." Restatement (Third) of Property (Servitudes) § 6.20 cmt. a (2000). However, both "[t]he developer and the purchasers of property in a common-interest community have interests in controlling the common property and the association," and those interests "may come into conflict." Restatement (Third) of Property (Servitudes) § 6.19 cmt. a (2000). Specifically, "[t]he developer's primary interest is in completing and selling the project"—that is, in profiting on its investment—"while that of the purchasers is in maintaining their property values and establishing . . . quality of life." *Ibid.* For example, developers may wish to "obligate[] the association[s] to long-term arrangements that effectively deprive the owners of control of the common property" and that may oblige the owners "to pay . . . exorbitant costs for services and facilities." *Id.* at cmt. d. Obviously, such abuses would harm the owners; however, "[w]hile the association is under the developer's control, the [owners] have little opportunity to protect themselves." *Ibid.*

Similarly, the Uniform Act notes the "great potential for conflicts of interest between the unit owners and the declarant," including the "common" "temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with [it]self or with an affiliated entity." Unif. Common Interest Ownership Act § 3-103 n.1, § 3-105 (2021). Therefore, although the Act "recognize[s] the practical necessity for the declarant to control the association during the developmental phases of a project," it requires declarant-appointed board members to act "as trustees of the unit owners." *Id.* at § 3-103 n.1, n.3. Furthermore, "[i]n 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," the Act "provides that the association or any unit owner has a right of action against the declarant for any losses . . . suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control," and "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." *Id.* at § 3-111 n.2 (emphasis added).

One crucial point gleams through this cascade of words: during the developer-control period, developers have so much control over associations that courts and legislatures feel the need to take strong measures against developer overreach. If a developer's control is enough to require the law's watchful eye from start to finish, it should be enough to render a developer liable for an association's negligent maintenance of association property.

Here, Developer had—and exercised, as its senior officers admitted—at least the usual amount of developer control. The evidence, viewed in the manner most favorable to Zetz, sketches the following chain: Developer, by selecting the Board members, controls the upper-level decision-making for Association; Association carries out Developer's decisions; the Premises is a common element owned, controlled, and managed by the Developer-controlled Association; and an injury occurred on the Premises, due to Developer's negligence in managing Association's affairs.

To be sure, there is no guarantee that this sketch will pass a jury's careful scrutiny. Regardless, that is a decision for the jury, not for the trial court. For justice to prevail, the jury must receive the opportunity to determine whether Developer's control in 2016 was sufficient to render it liable for Zetz's extensive injuries.

CONCLUSION

For the foregoing reasons, and for any other reason that may be evident from the record, the trial court's decision granting summary judgment to Developer should be reversed, and the case should be remanded for trial.

Respectfully submitted,

December 14, 2022

s/ Angeline M. Larrivee
Angeline M. Larrivee
S.C. Bar No. 105466
Angeline.larrivee@akimlawfirm.com
Lane Jefferies
SC Bar No. 101764
Lane@akimlawfirm.com
Roy T. Willey, IV
SC Bar No. 101010
Roy@akimlawfirm.com
Eric Poulin
SC Bar No. 100209
Eric@akimlawfirm.com
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888
CLD@akimlawfirm.com

Attorneys for Appellant

RECEIVED
Dec 14 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2022-001385
Berkeley County Case No. 2017-CP-08-02238

Matthew Zetz, Appellant,

v.

Daniel Island Company, Inc., Respondent.

PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Initial Brief on Respondent by Electronic Mail and U.S. mail on December 14, 2022, addressed to Respondent's attorneys of record, Kenneth Michael Barfield and Diane Summers Clarke, II, of Barnwell Whaley Patterson & Helms, LLC, 211 King Street, Suite 300, P.O. Drawer H, Charleston, SC 29402.

s/ Angeline M. Larrivee
Angeline M. Larrivee
S.C. Bar No. 105466
Angeline.larrivee@akimlawfirm.com
Lane Jefferies
SC Bar No. 101764
Lane@akimlawfirm.com
Roy T. Willey, IV
SC Bar No. 101010
Roy@akimlawfirm.com
Eric Poulin

SC Bar No. 100209
Eric@akimlawfirm.com
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888
CLD@akimlawfirm.com

Attorneys for Appellant

Williamston, South Carolina
December 14, 2022

Other Counsel of Record:

Kenneth Michael Barfield
S.C. Bar No. 69400
E-Mail: mbarfield@barnwell-whaley.com
Diane Summers Clarke, II
S.C. Bar No. 74829
E-Mail: sclarke@barnwell-whaley.com
Barnwell Whaley Patterson & Helms, LLC
211 King Street, Suite 300
P.O. Drawer H
Charleston, S.C. 29402
(843) 577-7708

Attorneys for Respondent

TOLL FREE: 1(800) 313-2546
FACSIMILE: (843) 494-5536

REPLY TO ANN STREET OFFICE
CLD@AKIMLAWFIRM.COM

Commercial Litigation Division

POULIN | WILLEY ANASTOPOULO

AKIM A. ANASTOPOULO (SC)
ERIC M. POULIN (SC)(GA)(NC)(CA)
ROY T. WILLEY, IV (SC)(KY)

BLAKE G. ABBOTT (SC)(NC)
CONSTANCE ANASTOPOULO (SC)*
A. ELLIOTT HUGER BARROW, JR. (SC)*
HANNA K. BATHRICK (NC)
BRADLEY BURGESS (SC)
MATTHEW J. BURGESS (SC)
JOSHUA P. CANTWELL (SC)
CHASE H. COBLE (SC)
RALPH JAMES D'AGOSTINO III (DC)
JENNIFER S. DICKERSON (SC) (FL)
ERICA M. DOBRICH (SC)
PAUL DOOLITTLE (SC)
JACQUELINE A. DUFOUR (SC)
HERB F. GLASS (SC)(GA)
RENATE HOHMAN (SC)
LANE D. JEFFERIES (SC)
NIKIRA M. LAFRANCE (NC) (SC)
ANGELINE LARRIVEE (NJ) (SC)
RYAN A. LOVE (SC)(NC)
STEPHANIE L. MASCELLA (SC)
FREDRICK J. MOGAB (SC)(NE)
LAUREN E. MOORE (SC)
JESSICA S. NELSON (SC)
J.C. NICHOLSON (SC)
JULIA K. PIRILLO (WV)
REBECCA A. RAYNER (OH)(SC)
INDIA D. SHAW (SC)(DC)
ANDREW D. SMITH (SC)
JOSEPH E. THOENSEN (SC)
BRADLEY TINGER (SC)

*OF COUNSEL

December 14, 2022

VIA U.S. MAIL and E-MAIL ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O Box 11629
Columbia, SC 29211

RE: *Matthew Zetz v. Daniel Island Community Foundation, et al.*
Case No.: 2022-001385

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Initial Brief, Appellant's Designation of Matter to be Included in the Record on Appeal, and Proofs of Service for both the Brief and the Designation in the above-mentioned case.

Sincerely,

s/Angeline M. Larrivee

Cc: Kenneth M. Barfield, Esq. (via email and mail)
Diane Summers Clarke, II, Esq. (via email and mail)
Barnwell Whaley Patterson & Helms, LLC
211 King Street, Suite 300
P.O. Drawer H
Charleston, SC 29402