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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable 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.,
Daniel Island Community Foundation, Inc.,
Daniel Island Town Association, Inc., and
MGR Resources, Inc. d/b/a Moonlighting
Landscape Lighting Systems ..... Defendants

Of which Daniel Island Company, Inc. is the .....Respondent

INITIAL BRIEF OF RESPONDENT DANIEL ISLAND COMPANY, INC.

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SUGGESTED ANSWER: *Yes.*

B. Did the trial court properly grant DIC's Motion for Summary Judgment where the Plaintiff failed to carry his burden of establishing that DIC exercised sufficient control over the subject premises such that it could be held liable for the injuries that occurred on that property?

SUGGESTED ANSWER: *Yes.*

C. Did the trial court properly grant DIC's Motion for Summary Judgment where the Plaintiff failed to carry his burden of establishing that DIC exercised sufficient control over the entity that owned the subject premises such that DIC could be liable for that entity's negligence?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Factual Background

1. The Subject Incident

This case arises out of an incident that occurred in what was known as the Children's Park on Daniel Island on the night of November 11, 2016. The Appellant, Matthew Zetz ("Appellant"), accompanied his brother to inspect a vendor's booth that had been set up to promote his brother's orthodontics practice during Daniel Island Park Day, which was to take place the following day. Appellant's brother walked into the park with the guidance of a police officer with a flashlight. Appellant, who was unfamiliar with the park, walked some distance behind them without the aid of a flashlight.

The Children's Park, which was recently razed to allow for the construction of a new park and public marina, was originally built to resemble a map of the Charleston area. Some of the local waterways depicted on the hardscape surface of the children's play area were built as an actual water feature, consisting of a fountain that filled shallow concrete trenches with water. On the night of the incident, the fountain had been turned off and, by all accounts, there was no water in the trenches. Unfortunately, Appellant took the proverbial "step in the dark" and stepped into one of the water feature trenches, fracturing his left ankle.

2. The Development of Daniel Island

After his fall, Appellant sued four different "Daniel Island entities": Respondent Daniel Island Company ("DIC"), Daniel Island Town Association ("DITA"), Daniel Island Community Association ("DICA"), and Daniel Island Community Foundation ("DICF"), as well as MGR

Resources, Inc. d/b/a Moonlighting Landscape Lighting Systems.[1] Because Appellant's arguments rely heavily on the relationship between DIC and DITA, it is necessary to explain these entities' respective involvement in the development of Daniel Island.

DIC, a for-profit corporation, was the original developer entity for the entirety of Daniel Island. Prior to developing the island, and in compliance with the South Carolina Horizontal Property Act, DIC executed a master deed setting forth the necessary details of the development. As development progressed and DIC began selling the lots, DIC created several property owners' associations comprised of property owners for the various geographical sections of Daniel Island. These associations, including DITA, are non-profit corporations managed by boards of directors and operated in accordance with the master deed. DIC, as the declarant entity listed in the DITA master deed, has the right to appoint DITA's directors until a specified percentage of the properties within that association have been sold to third party owners, at which time its board members will be elected from the association's members. In other words, the master deed expressly states that DIC, as the developer of the property, has the power to appoint members to the boards of the property owners' associations until that power is automatically and completely turned over to the members of the associations.

3. The Children's Park

At the time of Appellant's fall, the Children's Park was owned by DITA. Prior to DITA, the Park was owned by an entity called DIBS-Sales Center, LLC ("DIBS-SC"), which had taken title to 8.33 acres, including the property on which the Park was built, from DIC on March 24, 1999. In late 1998 or early 1999, Lee Skolnick Architecture and Design Partnership was hired to

[1] At the time it was granted summary judgment, Respondent was the only defendant remaining in the case.

design the Children's Park. Thereafter, The Greenery, a landscape contractor, was hired to build the Park in accordance with Skolnick's designs. The Greenery then sub-contracted the landscape lighting design and installation component of the project to MGR Resources, Inc., d/b/a Moonlighting Landscape Lighting Systems. Construction of the Children's Park was not completed until 2002, after DITA took title to the property. However, DIBS-SC conveyed the property where the Park was being built to DITA in 2001. At the same time, DITA also took title to several other park areas on Daniel Island. The conveyance by DIC of numerous parks to DITA in 2001 was the fulfillment of DIC's obligations to the City of Charleston under the June 1, 1995 Development Agreement for Daniel Island. That document states:

> **All parks and other similar features shall be dedicated to the City upon completion by a Developer** in accordance with the Land Development Regulations with the exception of those tracts of land with the improvements located thereon which an Owner Party **or Developer may elect to convey to a non-profit property owners' association**. All roads shall be built in accordance with road standards of the City of Charleston, except where deviation therefrom may be permitted by permit in connection with the project shall be subject to all city-imposed application processing and permit fees and charges with respect to applications for development and construction within the property which are in effect on the date on which each application is filed so long as such fees and charges are in force and effect on a citywide basis. (emphasis added).

B. Procedural History

On October 2, 2017, Appellant Matthew Zetz filed suit against Daniel Island Community Foundation ("DICF"), alleging negligence. (*See generally* Pl.'s Compl.). More than two years later, on November 8, 2019, Appellant filed his First Amended Complaint, adding claims against the following entities: (a) Respondent Daniel Island Company, Inc. ("DIC"), (b) Daniel Island Town Association, Inc. ("DITA"), (d) Daniel Island Community Association, Inc. ("DICA"), (e) MGR Resources, Inc. d/b/a Moonlighting Landsape Lighting Systems, and (f) Daniel Island Town Center Owners Association. On April 29, 2020, Appellant filed his Second Amended Complaint,

dropping Daniel Island Town Center Association from the list of Defendants and asserting negligence claims against DIC, DITA, DICA, DICF, and MGR Resources.

In his Second Amended Complaint, Appellant alleged:

> The fall and resulting injuries and damages to [Appellant] were caused directly and proximately by one or more of the following negligent, negligent *per se,* grossly negligent, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendants in any one or more of the following ways:
>
> a. In negligently designing the Public Park;
>
> b. In negligently constructing the Public Park;
>
> c. In negligently lighting the Public Park;
>
> d. In negligently maintaining the Public Park;
>
> e. In negligently managing the Public Park;
>
> f. In negligently repairing the Public Park repair;
>
> g. In negligently renovating the Public Park;
>
> h. In negligently securing the Public Park;
>
> i. In failing to observe the dangerous condition presented by the trench;
>
> j. In failing to properly keep the Public Park clear of dangerous unlighted and unmarked concrete trenches;
>
> k. In failing to appreciate the gravity of the dangers associated with dangerous unlighted and unmarked concrete trenches in the Public Park;
>
> l. In failing to enact policies that would ensure the safety of licensees and invitees in the Public Park;
>
> m. In failing and omitting to take any precaution whatsoever of a reasonable nature to protect this Plaintiff from the dangers of the Public Park on the occasion that the Plaintiff was using the same;
>
> [and]
>
> n. In failing to adequately warn the Plaintiff as to any dangers that may be present in the Public Park.

(*See* Pl.'s Second Am. Compl. ¶ 55).

Additionally, Appellant's Second Amended Complaint contained copious allegations "upon information and belief" for which no supporting evidence has ever appeared in the record. The focus of the majority of those allegations was a gentleman named Matt Sloan. Mr. Sloan was involved with the development of Daniel Island for many years. While it was never stated anywhere in the pleadings, these allegations were seemingly Appellant's attempt to hold DIC liable under a corporate veil piercing and/or amalgamation theory, arguing that Matt Sloan was some kind of puppet master behind everything that happened on the island. Nevertheless, Appellant's only stated cause of action was negligence. For the reasons set forth herein, DIC was properly awarded summary judgment on all of Appellant's claims against DIC.

C. <u>The Order From Which Appellant Appeals</u>

On September 14, 2020, DIC filed its Motion for Summary Judgment. In that Motion, DIC sought summary judgment on all of Appellant's claims against it on the grounds that the claims were filed well beyond the applicable statute of repose and that DIC owed Appellant no legal duty at the time of the incident that is the subject of this litigation.

On October 20, 2020, the Honorable Roger Young heard oral arguments on DIC's Motion for Summary Judgment. At that hearing, Judge Young indicated that he was inclined to grant the Motion but continued it to allow Appellant more time to conduct discovery into certain issues. Specifically, Appellant's counsel explained the need for further discovery into its corporate amalgamation theory, or DIC's alleged control over the other Daniel Island associations:

> MR. JEFFERIES: Specifically this, Your Honor. There are three other defendant entities that are controlled by this defendant. We would like e-mails that are to and from those defendant entities that relate to the control of those entities.

And, specifically, one is called the Daniel Island Town Association that this defendant controls the board of. So if there are e-mails back and forth that show that level of control, how much control it has, we would want those e-mails related to the Daniel Island Town Association.

THE COURT: Well, I'm trying to think out loud here as to what an e-mail under that category would include, when you say it relates to the control of them, I understand your theory as you've brought it under the single business entity theory the supreme court has, but it's not just, yeah, these people all own the same companies.

You have to show some kind of abuse or injustice somewhere. It's not just, yeah, these people all own or control. What's the injustice inequity theory you're going for here? I mean, it's okay that one company owns other companies. That's not a problem.

MR. JEFFERIES: We agree with that, Your Honor. Our theories are actually two-fold and the single business enterprise theory is probably the weaker of the two.

The primary theory is simply this. There is an entity called the Daniel Island Town Association that admits that it owns that park. And there is evidence that the Daniel Island Town Association is controlled by this defendant, Daniel Island Company.

(*See* Oct. 20, 2020 Transcript of Hrg., at 7:23-9:7). In response to this argument, the Court continued the Motion in order to allow Appellant more time to conduct discovery into this issue:

THE COURT: It's not ripe. It's not ripe. You've got to finish discovery at least on this issue of this corporate ownership before I can entertain a summary judgment motion on it. So you're entitled to some discovery on that, Mr. Jefferies. I'll let them renew that summary judgment motion after discovery is done on that issue.

(*See id.* at 19:13-20). Thereafter, following a second hearing on DIC's Motion for Summary Judgment, on October 9, 2022, the Court entered an Order Granting Defendant Daniel Island Company's Motion for Summary Judgment ("Order"). (*See generally* Sept. 9, 2022 Order Granting DIC's Mot. for Summ. J.).

In granting summary judgment to DIC on all of Appellant's claims against DIC, the Order states: "The Plaintiff's negligence claim against DIC can be divided into two general categories: 1) negligent design/construction of the park; and 2) failure to properly maintain the park. The Plaintiff cannot prevail on either of these theories." (*See* Order, at 4). As to Appellant's claim for negligent design/construction of the park, the trial court held that "the statute of repose bars the Plaintiff from any recovery." (*See* Order, at 4). In addition, as to the failure to properly maintain claim, the court held that "the Plaintiff failed to provide any support for the notion that DIC had sufficient control over the park to create a legal duty in that entity." (*See* Order, at 5). Finally, the court held that Appellant "was not able to point to any facts in the record to support either [a corporate amalgamation or veil piercing claim]." (*See* Order, at 5).

On October 4, 2022, Appellant filed his Notice of Appeal from the Order. (*See* Appellant's Oct. 4, 2022 Notice of Appeal). For the reasons that follow, the Court should affirm the trial judge's Order Granting DIC Summary Judgment.

ARGUMENT

A. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), SCRCP. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP.

"Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995); *accord Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (*quoting Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

"On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist." *Murphy v. Tyndall*, 384 S.C. 50, 53, 681 S.E.2d 28, 30 (Ct. App. 2009). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Blumenthal Mills*, 365 S.C. at 220, 616 S.E.2d at 730. "Summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Guinan v. Tenet Healthsystems of Hilton Head*, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009) (quoting *Davis v. McLeod Reg'l Med. Center*, 367 S.C. 242, 250, 626 S.E.2d 1, 5) (2006)).

For the reasons that follow, this Court should affirm the trial court's grant of summary judgment to DIC.

B. The Trial Court Properly Granted Summary Judgment to DIC on Appellant's Negligent Design/Construction Claim.

In its Order, the trial court granted summary judgment to DIC on Appellant's negligent design/construction claim. (*See* Order, at 4). Importantly, because Appellant did not appeal that portion of the Order, that decision is not before this Court.

Nevertheless, even if the Court finds that Appellant properly preserved the issue for appeal, it is clear that the trial court properly granted summary judgment on that claim. Our courts have never held that a prior owner/developer of real estate can be held liable for bodily injuries to an invitee of a subsequent owner for design or construction defects. At the time of Appellant's fall, DIC had not owned the Children's Park for 17 years. As such, the law of construction defects is inapplicable to this case.

Assuming, *arguendo*, that a cause of action may lie against a distant former owner of real property for design and construction defects, the statute of repose barred Appellant from any recovery under construction law principles. The Children's Park was completed in 2002. Appellant's injuries were sustained in 2016. This action was filed in 2017. Given that the project was completed prior to 2005, the old thirteen-year statute of repose applies. *See* S.C. Code Ann. § 15-3-640 (2005). Thus, the statute of repose expired roughly two years before this action was commenced. For that reason, the trial court properly awarded summary judgment to DIC on Appellant's negligent design/construction claim.

C. The Trial Court Properly Granted Summary Judgment to DIC on Appellant's Claims Based on "Control."

The remainder of Appellant's claims, which are the focus of his appeal against DIC all hinge on a single word: "control." However, Appellant's definition of "control" has been a moving target throughout the litigation. On the one hand, Appellant claims that DIC is liable because DIC had direct control over the Children's Park. On the other hand, Appellant claims that DIC is liable because DIC has control over DITA, a separate corporate entity that owns the Children's Park. In making these arguments, Appellant has conflated entirely separate areas of law. In its Order, the trial court distinguished between the different concepts of control that Appellant purports to use in asserting his claims against DIC, stating:

> 'Control' is not a word with a single legal definition. In the context of horizontal property regimes, master deeds frequently refer to a "declarant control period." That 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. That said, if proper corporate formalities are observed, the declarant does not actually exercise direct operational control over the POA, much less the common elements that are owned by its members. In the context of the kinds of premises liability cases upon which the Plaintiff relies, "control" is used as a way to describe the circumstances under which a legal duty arises to protect occupants and visitors to a property. That is a very different analysis than what is appropriate to examine the relationships between separate corporate entities.

(*See* Order, at 4). Importantly, while Appellant has, at various times, attempted to rely upon several different bodies of law to support his claims against DIC, it has become abundantly clear that each of Appellant's arguments is focused on "control" as it relates to the relationship between two separate corporate entities, DIC and DITA. That relationship, as well as DIC's connection to the Children's Park, was properly summarized in the trial court's Order:

> DIC is a for profit corporation. It was the original developer entity for the entirety of Daniel Island. As part of the master plan to develop the island, the City of Charleston mandated a number of parks and greenspaces be built and be open to the public. The City also mandated that all such parks must be conveyed to one of the nonprofit property owners' association on the island or to the City itself. The Children's Park where the [Appellant] was injured was constructed by DIC in 1999 and conveyed to the Daniel Island Town Association ("DITA") immediately upon its completion, per the City's requirements. DITA has been the sole owner of the Children's Park since that conveyance. DITA, a South Carolina non-profit corporation, is managed by a board of directors and operated in accordance with a Master Deed, DIC, as the declarant entity listed in the DITA Master Deed, has the right to appoint DITA's directors until a given number of properties with that association have been sold to third party owners, at which time its board members will be elected from the association's members.

(*See* Order, at 2-3). As the discovery phase of the litigation progressed, Appellant realized the facts could not sufficiently support a basic premises liability theory against DIC. Appellant then set out to establish DIC's liability under a corporate amalgamation or corporate veil piercing theory, as is required under the law of corporations. Then, when the evidence did not support either of those theories, Appellant again shifted gears and began to develop a *respondeat superior* or vicarious

liability theory. This new theory was discussed at length during the second hearing on DIC's Motion for Summary Judgment, at which time Appellant's counsel compared the relationship between DIC and DITA to a typical master-servant relationship:

> MR. JEFFERIES: . . . I mean, it's like, for instance, my boss controls me and I control my paralegal. There's nothing wrong with that. That's a typical structure. But it also means that my boss has control over my paralegal. That if my paralegal commits some sort of tort, not only am I potentially on the hook because I had control, but my boss could be, too, because he had control. The same way the superintendent of the school controls the principal and the principal controls the teacher. So the superintendent has control over the teacher. The fact that's there [sic] an intermediary in that chain of control doesn't wipe it out.

(*See* Aug. 24, 2022 Transcript of Hrg., at 14:14-25). In making his vicarious liability argument, Appellant applies common law master-servant concepts to the relationship between two entirely separate corporate entities. He effectively claims that it is entirely irrelevant that both DIC and DITA are corporate entities that are afforded certain protections under South Carolina law.

It is axiomatic that corporations exist for one basic purpose: to shield their officers, directors, and shareholders from individual liability. *See Pertuis v. Front Roe Rests., Inc.,* 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018) ("[C]orporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that."); *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980) ("Generally the reason for the creation of a corporation is to limit liability. While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees.").

Under South Carolina law, the only way to legally nullify a corporation's legal protection is to pierce the corporate veil on the vertical axis or seek to have entities amalgamated on the

horizontal axis. *See Drury Dev. Corp. v. Found. Ins. Co*., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) ("If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons. The party seeking to pierce the corporate veil has the burden of proving that the doctrine should be applied."); *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 528, 827 S.E.2d 348, 366 (Ct. App. 2018) ("the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.").

1. Appellant cannot prevail against DIC under a premises liability theory.

Appellant originally sought and, to some degree, continues to seek to hold DIC liable by arguing that DIC had direct control over the Children's Park. He contends that DIC had an ongoing duty to maintain the park. However, the trial court properly held that DIC did not owe a legal duty to Appellant under the basic principles of premises liability law. At the time of Appellant's injury, DIC had not owned the subject property for approximately seventeen years. In fact, DIC was not even the most recent prior owner at the time of the incident. DIC passed title to DIBS-SC, which then conveyed the park property to DITA, as mandated by the City of Charleston. The notion that a past owner of real property cannot be held liable for bodily injury to a subsequent owner's licensee or invitee is so fundamental to the principles of premises liability law that no South Carolina case has ever had to articulate it. However, other authorities do so very clearly:

> Once the landowner sells the land or leases it to a tenant, his duties to make conditions on the land reasonably safe are limited or nonexistent. The reasons for and effects of the limitation are not like those in landowner cases already covered. In other landowner cases, the question was whether anyone owed a duty of any kind. In cases of vendors and landlords, however, the question is not so much whether a duty is owed but who owes it. It is not the existence of responsibility but the allocation of it. Subject to some qualifications, the traditional common law regarded the transfer of land title as a shift of responsibility for conditions that might cause physical harm to others on the land.
>
> Once the purchaser of land takes title and possession, he becomes responsible for dangers to himself or others on the land; and correspondingly the vendor is freed from responsibility.

DAN B. DOBBS ET AL, THE LAW OF TORTS § 280 (2d ed. 2011); *accord Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009) (vendor owes no duty to protect from dangerous condition, because vendor no longer controls condition of property); *Brady v. 5644 Ave. U Assocs., L.P.*, 291 A.D.2d 523, 524, 737 N.Y.S.2d 640, 642 (2002) ("Where an owner of property is no longer in possession and control of the property, and retains no right to re-enter for purposes of inspection and repair, the owner cannot be held liable for defects in the property."); *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640, 649 (Tex. 2016) (previous owner owes no duty under premises liability law for injuries caused to entrant by dangerous condition on land, even where previous owner had role in creating condition; "liability ends with the property's sale"); *Brenner v. Amerisure Mutual Insurance Company*, 374 Wis.2d 578, 893 N.W.2d 193 (2017) (former property owner owes no duty with respect to hazardous condition on property, even if former owner created condition).

The Restatement has taken a similar approach. It provides that "[e]xcept as stated in [section] 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession." *See* Restatement (Second) of Torts § 352.

Despite these fundamental principles, Appellant nevertheless maintains that DIC is liable for his injuries. In support of his argument, Appellant cites to a myriad of basic premises liability cases that are wholly inapplicable to the facts of this case. The cases upon which Appellant relies analyze the liability of a landowner and a leaseholder when an injury occurs on leased property. (*See* Appellant's Brief, at 10). According to Appellant, these cases prove that "a party can be responsible in a premises-liability action without evening owning the premises." (*See id.*). While that principle may be true in the context of leaseholders, it is entirely irrelevant to this case. Here, unlike a leaseholder who has a direct connection to a property, DIC's connection to the Children's Park is extremely attenuated if not entirely nonexistent. In fact, one can see just how removed DIC is from the park and Appellant's injury simply by going through each link in the chain: DIC selects the board of DITA. DITA's board makes upper-level decisions for that entity. DITA's employees and vendors carry out those decisions. The Children's Park is one of the common elements owned by the many property owners that actually own all of the property that comprises DITA. An injury occurred in that park, allegedly because of inadequate lighting. Appellant now seeks to hold DIC liable for that injury based on DIC's alleged control over the park. However, the undisputed evidence unequivocally demonstrates that DIC did not own, maintain, control, or even use the park around the time of Appellant's injury. As the trial court stated in its Order, Appellant has not and, frankly, cannot provide "any support for the notion that DIC has sufficient control over the park to create a legal duty in that entity." (*See* Order, at 5). Accordingly, Appellant's attempts to hold DIC liable based on its direct control of the park fail.

2. Appellant cannot prevail against DIC under a corporate amalgamation or corporate veil piercing theory.

Later in the life of the case, Appellant adopted a new approach and sought to impute DITA's alleged negligence to DIC by claiming that DIC had "control" over DITA, the entity that

actually owns the park. Regardless of the way Appellant uses the term "control," his argument focuses on the relationship between two corporate entities, thereby implicating the law of corporations.

Under South Carolina law, the only way to impute one corporation's negligence to a separate corporate entity is to either pierce the corporate veil on the vertical axis or amalgamate the entities on the horizontal axis. Both of these theories require a showing of some nefariousness or injustice. In this case, Appellant himself has conceded that he cannot prevail under either of these theories and, in fact, expressly abandoned those claims. (*See* Appellant's Br., at 2 n.1). Faced with a complete lack of proof to establish the necessary elements of a corporate amalgamation or corporate veil piercing claim, Appellant now asks that this Court utterly ignore the body of law that governs the facts of this case: the law of corporations. However, for the reasons that follow, this Court should affirm the trial court's award of summary judgment to DIC because Appellant cannot establish the necessary elements of the applicable claims in accordance with the governing law.

As previously mentioned, the trial court initially continued DIC's Motion for Summary Judgment so that Appellant could conduct additional discovery on his corporate amalgamation and corporate veil piercing theories. In the aftermath of that continuance, Appellant deposed numerous employees and representatives from the various Daniel Island entities in an attempt to find some evidence of nefariousness or injustice in the context of DIC's relationship with the Daniel Island associations. Finding none, Appellant sought to hold DIC liable based on the existence of the declarant control period and its ability to appoint members to the board of DITA during that period. However, Appellant cannot point to any facts indicating that either of these theories support his claim that DIC is liable for his injuries.

i. DIC's ability to appoint DITA's board members does not support Appellant's claim that DITA's negligence should be imputed to DIC.

According to Appellant, the existence of a "developer control period" is sufficient proof of DIC's "control" to hold it liable for his injuries. However, the evidence clearly demonstrates that DIC did not actually exercise direct operational control over any of the Daniel Island entities or any of their common elements, including the Children's Park where Appellant was injured. Prior to developing the island, and in compliance with the South Carolina Horizontal Property Act, DIC executed a master deed setting forth the necessary details of the development. That master deed expressly states that DIC, as the developer of the property, would retain the ability to appoint members to the boards of the property owners' associations until that right was automatically and completely turned over to the individual members of the association. In his deposition, Matt Sloan, a minority owner of DIC, explained DIC's role as developer and its level of control over the various associations:

Q We -- you know, we kind of talk -- talked about control and, you know, developer control and board control and all of these terms. I want to -- I want to dial down on this, to clarify. So Daniel Island Company is the developer, right?
A Yes, sir.
Q Three property owners' associations were created on Daniel Island, right?
A Yes, sir.
Q Including Daniel Island Town Association, that's one of them, correct?
A Yes, sir.
Q Okay. Daniel Island Company had the right to appoint the board members of those associations, right?
A Yes, sir.
Q Okay. But that -- but -- and this is -- this is kind of splitting hairs, but it's important because ***the boards control those associations, right?***
A ***Yes, sir.***
Q ***Okay. Not -- not Daniel Island Company directly?***

A ***Yes, sir.***
Q Okay. And so Daniel Island Company, we know, appointed you and Frank and David Crawford to those boards, right?
A Yes.
Q Okay. But it could have appointed anybody?
A It could have.
…
Q That's right. That's right. So, again, the Daniel Island Company, just to kind of close the loop, has the ability to appoint the people that have authority over those associations, but ***Daniel Island Company does not have direct control over those associations?***
A ***No. The associations are turned over, and direct control is turned over*** to the manager, and sometimes the manager's a third-party.

(*See* Deposition of Matthew Sloan, at 63:7-65:11 (emphasis added)). Mr. Sloan further explained the reason for having a developer-control period when developing a property:

Q Okay. Now, we've heard some -- we had some testimony in the record of this case about the fact that the Daniel Island Company, as part of the master deed or development plan, what have you, would have control of the boards of the various property owners' association for a given period of time or up till some triggering event. Can you tell me -- tell us why that is, why -- why the developer would keep control or the right to control those boards?
A Well, that's just how it is -- ***that's industry standard in my world. The developer always controls up to a certain point.*** Sometimes it's tied to you sold a certain percentage of your property, or sometimes there's an end date. So as an example, the Daniel Island Town Association, which this gentleman represents, has a turnover date of 2025, regardless of how many people own what, but as the developer, you're putting all of your assets into -- and all of your energy into building a community, and you want to be able to control what is built and how it is managed and add value to the community that way.

(*See id.* at 18:24-19:19 (emphasis added)).

Mr. Sloan's testimony clearly established that there is nothing unusual or nefarious about a developer maintaining control of the property owners' association's board for some period of time. Indeed, Appellant conceded as much during the deposition of Kay Fabrizio, the finance manager for the Daniel Island Property Owners Association:

Q Right. So Daniel Island Company that, as Mr. Barfield said, conceived of the plan of Daniel Island and built it and sold the lots and created these -- these associations and hired the management and put its own people on the board of every single one. ***Nothing wrong with that; right? That's the way it's done?***

A Yes.

(*See* Deposition of Kay Fabrizio, at 66:19-25 (emphasis added)). Accordingly, despite Appellant's attempts to hold DIC liable based on the existence of a developer control period, the evidence unequivocally establishes that there is nothing remotely nefarious in DIC's ability to appoint DITA's board members. Nefariousness is a key element of both veil piercing and corporate amalgamation. *See Pertuis*, 463 S.C. at 655, 817 S.E.2d at 281; *Walbeck*, 462 S.C. at 528, 827 S.E.2d at 366. As such, Appellant cannot rely on the existence of a developer control period as evidence that DITA's negligence should be imputed to DIC.

ii. The relationship between the Daniel Island entities does not support Appellant's claim that DIC can be held liable for the other entities' negligence.

Appellant also seemed to claim that DIC is so intertwined with the various Daniel Island entities that he could hold DIC liable for the negligence of any of those entities. In support of this theory, Appellant argued that Matt Sloan's involvement with the various Daniel Island entities and the relationship between those entities proves that DIC was able to control the associations, including DITA. However, the evidence clearly proves that the opposite is true: DIC is completely separate from the other Daniel Island entities and there is nothing remotely unusual or nefarious

about Mr. Sloan, as an owner of DIC, acting as President on the property owners' association boards for a set period of time.

The evidence leaves no doubt that DIC is entirely separate from the various Daniel Island entities. DIC has always been a for-profit company, while the Daniel Island associations are non-profit entities. (*See* Dep. of Sloan, at 15:5-15; 16:16-18). As a closely-held private company, DIC operates behind closed doors, while the board meetings for the Daniel Island associations are open to the public. (*See id.* at 19:22-21:4). DIC operates from a different office than the Daniel Island associations. (*See id.* at 18:5-23). DIC's financials are kept completely separate from each of the other Daniel Island entities. (*See id.* at 21:15-24). Given these key distinctions, it seems Appellant's entire theory is based solely on the fact that Mr. Sloan has served on the boards of the various property owners' associations. However, as set forth in more detail above, Mr. Sloan's involvement in the development in Daniel Island is standard in the industry. His membership on the boards of the various Daniel Island associations does not even remotely suggest that either he or DIC controlled the associations in any way whatsoever. Accordingly, without any evidence of nefariousness or injustice, Appellant again cannot claim that any negligent acts or omissions by the Daniel Island entities can be imputed to DIC based on the relationship between those entities.

3. Appellant cannot prevail against DIC under a vicarious liability theory.

In realizing that he could not establish the nefariousness element required to assert a claim for corporate amalgamation or corporate veil piercing, Appellant abandoned those theories. (*See* Appellant's Br., at 2 n.1). However, now Appellant is merely cloaking his claim for corporate amalgamation or corporate veil piercing by simply calling it something else. He is seeking to hold one corporate entity liable for a separate corporate entity's alleged negligence, using vicarious liability arguments to get around the inconvenient fact that he could not prove the elements of any

legitimate cause of action that would give rise to such liability. Once again, the Trial Court said it best:

> 'Control' is not a word with a single legal definition. In the context of horizontal property regimes, master deeds frequently refer to a "declarant control period." That 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. That said, if proper corporate formalities are observed, the declarant does not actually exercise direct operational control over the POA, much less the common elements that are owned by its members. In the context of the kinds of premises liability cases upon which the Plaintiff relies, "control" is used as a way to describe the circumstances under which a legal duty arises to protect occupants and visitors to a property. That is a very different analysis than what is appropriate to examine the relationships between separate corporate entities.

(*See* Order, at 4). Thus, when this case is examined through the proper lens of the law of corporations, it is clear that Appellant's claims fail. Indeed, as set forth in more detail above, it is clear that in each instance of "control" that Appellant cites, there is absolutely no evidence of nefariousness or injustice that would justify disregarding each entity's status as a corporation. As a result, because Appellant is unable to establish the necessary elements of a corporate amalgamation or corporate veil piercing claim as is required to properly impute DITA's negligence to DIC, Appellant's claims fail and DIC was properly awarded summary judgment.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's grant of summary judgment to Respondent DIC.

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