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May 14 2024

SC Court of Appeals



South Carolina Bar

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THE COMMUNITY ASSOCIATION LAW COMMITTEE PRESENTS: 2022 COM- MUNITY ASSOCIATION LAW SEMINAR

22-58

Friday, November 18, 2022

presented by
The South Carolina Bar
Continuing Legal Education Division

<http://www.scbar.org/CLE>

SC Supreme Court Commission on CLE Course No. 920296

Construction defect claims in South Carolina are subject to a three-year statute of limitations and an eight-year statute of repose.⁴³ The three-year statute of limitations begins to run when an association knew or should have known through the exercise of reasonable diligence that it had a cause of action.⁴⁴ While the eight-year statute of repose purports to be an immutable bar to “actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property,” the statute is subject to a gross negligence exception which, combined with the fact that a building code violation is evidence of gross negligence,⁴⁵ allows construction defect claims to be pursued beyond the eight-year statute of repose.

D. Board Member Fiduciary Duty

While association board members’ fiduciary duties and the potential individual liability resulting from a breach of those duties does not provide a direct requirement that associations have sufficient reserves and engage in reasonable maintenance and repairs, board members should be made aware of their fiduciary duties and should be motivated to act by the consequences of failing to fulfill those duties. A fiduciary is a person legally entrusted with the care of another’s interests. “The term fiduciary implies that one party is in a superior position to the other and that such position enables him to exercise influence over one who reposes special trust and confidence in him.”⁴⁶

Because a corporation’s board members serve in a position of trust, the board members owe a fiduciary duty to the corporation and its shareholders.⁴⁷ The South Carolina Nonprofit Corporation Act provides that a board member must discharge his or her duties: “1) in good faith, 2) with the care an ordinarily prudent person in a like position would exercise under similar

⁴³ See S.C. Code Ann. §§ 15-3-350 & 15-3-640.

⁴⁴ *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (“The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.”).

⁴⁵ See, e.g., *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. , 2018 WL 2305658 (D.S.C. May 21, 2018) (“[E]vidence of a building code violation is not gross negligence *per se*, but it can be evidence of gross negligence, and evidence is sufficient to create a genuine dispute of material fact.”).

⁴⁶ *Burvell v. S.C. Nat. Bank*, 288 S.C. 79, 340 S.E.2d 786 (1986); see also, e.g., *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 537, 611 S.E.2d 922, 925 (2005) (“A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith.”).

⁴⁷ *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 185, 64 S.E.2d 524, 528-29 (1951) (“Undoubtedly the directors of a corporation in the management of the corporate affairs occupy a position of extreme trust and confidence and exercise great power for the good or bad over the corporation and its shareholders. They are agents for the corporation. Toward it and the shareholders they undoubtedly stand in a fiduciary relation as far as corporate business is concerned.”).

circumstances, and 3) in a manner the director reasonably believes to be in the best interests of the corporation.”⁴⁸ Subject to the limitation discussed below, a board member failing to fulfill those duties results in the board member being personally liable for the damages caused by the breach.

Association board members are protected from liability for a breach of fiduciary duty so long as the breach is within the business judgment rule. Under the business judgment rule, a board member is liable for a breach of fiduciary duty only where the breach rises to the level of bad faith, dishonesty, or incompetence.⁴⁹ The business judgment rule applies where board members acted: 1) within their authority, 2) without improper motives, and 3) in good faith.⁵⁰ In many jurisdictions, a board member’s actions generally come within the business judgment rule where the actions were taken pursuant to the advice of a professional.⁵¹ A board’s actions taken in violation of the covenants—like using reserves to pay operating expenses where the covenants prohibit using reserves for other purposes—is outside the board’s authority and therefore cannot be within the business judgment rule.⁵²

Related to reserves, maintenance, and repairs, a board’s failure to provide for reserves or failure to maintain or repair building components, especially where the failure was contrary to the advice of professionals, can be a breach of fiduciary duty. In the same way that tort liability is generally presumed to have some deterrent effect on negligent conduct,⁵³ association board members’ knowledge of their potential personal liability for failing to act competently in managing the association and its property should motivate board members to properly fund reserves and undertake maintenance and repairs.

⁴⁸ S.C. Code Ann. § 33-31-830.

⁴⁹ *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 415 S.C. 256, 270–71, 781 S.E.2d 903, 910 (2016) (“The business judgment rule applies to disputes between directors of a homeowners’ association and aggrieved homeowners, and as the court of appeals has stated, ‘the conduct of the directors should be judged by the ‘business judgment rule’ and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.’” (quoting *Goddard v. Fairway Dev. Gen. P’ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993)).

⁵⁰ *Kiriakides v. Atlas Food Systems & Services, Inc.*, 343 S.C. 587, 606 n.32, 541 S.E.2d 257, 268 n.32 (2001) (“The Business Judgment Rule immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith.”); *Dockside Ass’n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987). (“Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.”).

⁵¹ *In re Residential Capital, LLC*, 491 B.R. 63 (Bankr. S.D.N.Y. 2013); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

⁵² *WSB Investments, LLC v. Pronghorn Devel. Co.*, 344 P.3d 548, 562 (Or. 2015).

⁵³ See generally Lawrence M. Friedman, *Impact* (2016); Richard A. Posner, *Economic Analysis of Law* (1973).