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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Hon. Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2022-001385

Matthew Zetz, ...Appellant,

v.

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

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

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, Appellant Matthew Zetz respectfully petitions the Court of Appeals for rehearing of the Court's Opinion in this matter No. 2024-UP-244, filed July 3, 2024. In affirming the circuit court's order, this Court misconstrued Appellant's arguments on control, overlooked key facts that created a genuine issue of material fact, and affirmed summary judgment, ignoring the well-settled principle that novel issues should not be decided on summary judgment. These errors warrant rehearing and the issuance of a new opinion reversing the circuit court's grant of summary judgment and remanding the case for disposition on the merits.

I. This Court misapprehended Appellant's argument by stating that Appellant conflated two different theories of control.

The Court held that Appellant conflated two different theories of control: one that purportedly applies in the context of premises liability and one that the Court held is limited to the law of corporations. This conclusion mischaracterizes Appellant's argument on appeal.

Both the controlling documents and the testimony in the record demonstrate there is more than enough evidence to create a genuine issue of material fact as to whether Developer controlled the Association. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). The March 1999 Declaration of Covenants, Conditions, and Restrictions for Daniel Island Town Center Zone provided a control period where Developer had the right to appoint all members. (R. pp. 88, 94). The by-laws at the time clarified that during the control period, the developer-appointed Board has "all the powers and duties necessary for the administration of the Association's affairs," including the duty to "provid[e] for the operation, care, upkeep, and maintenance of the Area of Common Responsibility." (R. p. 67). 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." (R. p. 95).

Developer did not lose the power to exercise control once the "control period" ended. Instead, Developer's power over the Association was substantial. Up to two years after the control period ends, Developer had the ability to "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. (R. p. 68). Further, 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." (R. pp. 73-74, 105, 127-28).

Developer's and Association's officers also testified to the extent of Developer's control. Matthew Sloan, *president of both entities in 2016*, admitted that Developer controlled Association at the time of the incident. (R. p. 1175, 1190). So did Frank Brumley, who at the time of the accident was Association's vice president and Developer's CEO and chairman. (R. p. 309-10, 323). Brumley not only agreed that Association was "developer controlled" in 2016; importantly, he also stated that "the developer absolutely maintain[ed] control" during the control period. (R. p. 1150, line 23-p. 1151, line 16). This testimony was sufficient to render the extent of Developer's control a question for the jury.

Additionally, other high-level employees confirmed Sloan's and Brumley's testimony. In a 2019 email addressed to Matt (Sloan) and Jane (Baker, Association's manager in 2016, (R. p. 1165, lines 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, (R. p. 1248), stated, "I have already explained to the insurance carrier that [Developer] controls the [Association] board," (R. p. 296). Indeed, the president of the Association admitted that the Developer retains control for a period of time because it "want[s] to be able to control what is built and *how it is managed*." (R.

p. 1167, lines 9-19) (emphasis added). It naturally follows that if Developer had the power to control management of the premises, it had a duty to maintain those premises in a safe condition.

Thus, viewed in the light most favorable to the Appellant, by selecting the Board members, Developer had the right to control the decision-making for Association. Because the Association had a duty to maintain the common areas in a reasonably safe manner, that duty also extended to Developer. Thus, the entities that controlled the Association, and thereby failed to maintain the premise in a reasonably safe manner, could well be liable under our jurisprudence.[1]

While it is true that the Supreme Court's decision in *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 587, 889 S.E.2d 537, 547 (2023), concerned fiduciary duties, that decision should not be limited to that context. What was significant in *Walbeck* is also significant here: both developers insisted on having their proverbial cake and eating it too. They wanted the benefits of retaining control over an association while avoiding any concomitant liability. Therefore, contrary to the circuit court's decision, it is irrelevant that the Association also controlled and maintained the premises at issue because the question of who owes a duty is not limited to one entity.

II. Summary Judgment should not have been granted on a novel issue.

This Court concluded that Appellant provided no case law to support applying a developer's control over a property owner's association as a basis of liability to a third party in the context of premises liability. However, this fact underscores the novelty of the issue, and therefore, the Court overlooked the principle that ordinarily, novel issues should not be resolved on summary judgment. *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003) ("We find it extremely troubling this case was resolved on a summary judgment basis, especially

[1] The Court discounted the fact that Developer had the right to control Association. The degree of control exercised compared to the right to control are inherently questions of fact reserved for a jury.

considering the injury to Schmidt and the novel issue involved in this case."). Appellant presented more than enough evidence to create a genuine issue of material fact as to Developer's control, and the grant of summary judgment was improper.

The Court also improperly narrowed the focus of Appellant's legal theory by concluding at this premature stage that the only theory which provided a potential remedy to Appellant was through corporate amalgamation, but that there was no evidence of bad faith or nefarious conduct and that Appellant had denied advancing the theory of amalgamation. In so doing, this Court misapplied the standard in *Pertius* as clarified in *Walbeck*. Initially, the Supreme Court in *Walbeck* cited to the jury's finding of willful and wanton conduct to support its analysis of whether amalgamation was appropriate. 439 S.C. at 594, 889 S.E.2d at 550 ("Although the jury elected not to award punitive damages in this case, its verdict did include a finding that the Developers' conduct was 'willful and wanton.'"). Appellant should be afforded the same opportunity to present his case to the jury on all applicable legal theories so that the circuit court has the benefit of the jury's findings when determining whether amalgamation is proper.

CONCLUSION

This Court should reconsider its decision affirming the circuit court's grant of summary judgment because there is ample evidence to create a genuine issue of material fact that Developer's control of the Association was sufficient to create a jury issue as to whether it owed a duty and breached that duty to Appellant. This argument should be particularly compelling to this Court because summary judgment should not be granted when a novel issue is involved.

[SIGNATURE FOLLOWS]

Respectfully submitted,

s/*Brian Critzer*

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