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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.

RESPONDENT DANIEL ISLAND COMPANY, INC.'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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Pursuant to South Carolina Appellate Court Rules 221 and 240, and this Court's letter dated July 24, 2024, Respondent Daniel Island Company, Inc. (hereinafter referred to as "Developer"), respectfully submits this Return to Appellant Matthew Zetz's Petition for Rehearing. For the reasons discussed below and those set forth in Developer's Final Brief, Appellant's Petition for Rehearing should be denied.

STANDARD FOR REHEARING

Under Rule 221 of the South Carolina Appellate Court Rules, "[a] petition for rehearing shall be in accordance with Rule 240 and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Retirement Center*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Id.* (citing Jean H. Toal, Shahin Vafai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

ARGUMENT

This Court did not overlook or misapprehend any points or arguments when affirming the trial court's order granting summary judgment in favor of Developer in this case. Instead, this Court properly examined each of the issues raised on appeal and resolved all of them correctly. Appellant's argument is so far afield of any South Carolina law, this Court wisely dispensed with this appeal without oral arguments and with an unpublished opinion. Throughout this litigation, Appellant's strategy has been to muddy the waters between two distinct areas of law. He is now simply flailing more vigorously in the same pool in an attempt to second guess the Court's well-founded opinion.

When one hears hoofbeats in the distance, it is logical to assume that it is a horse and not a zebra. In this case, Appellant would have the Court believe that the hoofbeats are coming from a unicorn—a creature that is not only an improbable source of the sound, but an impossible one. Like a unicorn, a direct duty extending from a developer to an injured third party in a public park under these facts is simply a myth. This Court recognized the legal impossibilities required for Appellant to prevail on his claims against Developer and properly affirmed the circuit court's order granting summary judgment in favor of Developer. The Petition for Rehearing does not present any valid or compelling reasons for questioning or disturbing that result. Accordingly, because Appellant has failed to sufficiently identify anything the Court supposedly overlooked or misapprehended, and because the merits of the arguments advanced by Appellant are simply incorrect and, in any event, do not merit rehearing, this Court should deny the Petition for Rehearing.

I. This Court did not misapprehend Appellant's argument regarding Developer's potential liability based on its purported control.

Appellant first argues that this Court "misapprehended Appellant's argument by stating that Appellant conflated two different theories of control." Pet. For Rehearing at 1. This argument fails for a number of reasons.

As an initial point, Appellant's argument is deficient under Rule 221 of the South Carolina Appellate Court Rules because it fails to "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. In an apparent attempt to support his conclusory statement that the Court's conclusion "mischaracterizes Appellant's argument on appeal," Appellant merely regurgitates the same arguments and factual allegations set forth in his Final Brief. *Compare, e.g.,* Pet. For Rehearing at 1-2; Final Brief of Appellant at 4-5. Despite his clear obligations under Rule 221, Appellant fails to provide any indication as to the

particular aspect of his argument that this Court supposedly misapprehended in reaching its conclusion. The mere resuscitation of previous assertions, all of which have already been presented to and rejected by this Court, is entirely insufficient under Rule 221. What's more, the decision to rehash prior arguments seems to suggest that Appellant seeks rehearing simply because he disagrees with this Court's ruling. Thus, the Petition not only fails to "state with particularity the points supposed to have been overlooked by the court" in accordance with Rule 221, but it is also a transparent attempt to "have the case tried in the appellate court a second time." *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (citing Toal, *Appellate Practice in South Carolina* 309 (1999)). Because the Petition fails to comport with this Court's standards for petitions for rehearing, the Court should deny Appellant's Petition for Rehearing on that basis alone.

Moreover, even assuming, *arguendo*, that Appellant's conclusory assertion that this Court misapprehended his argument is procedurally sufficient, it nevertheless fails to provide any justification for rehearing. As set forth above, Appellant contends this Court mischaracterized his argument by finding that he conflated two separate theories of control; namely, one that applies in the context of premises liability and another one that relates to the law of corporations. However, Appellant's purported attempt to undercut the accuracy of the Court's conclusion actually reinforces it, as the Petition itself clearly demonstrates Appellant's conflation of two distinct areas of law. In his Petition, Appellant clearly and succinctly summarizes his theory of liability against Developer as follows:

> [B]y selecting the Board members, Developer had the right to control the decision-making for the 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 [sic] in a reasonably safe manner, could well be liable under our jurisprudence.

Pet. For Rehearing at 3. Appellant's summary actually underscores this Court's holding that, "[t]o hold Developer liable, this court would need to use the theory of corporate amalgamation." Unpublished Opinion No. 2024-UP-244 (July 3, 2024). Appellant clearly acknowledges that he seeks to hold Developer liable *not* based on its control over the premises itself, but on its ability to select members of the board of the entity. In doing so, Appellant is trying to have his cake and eat it too. On the one hand, Appellant is arguing the Developer has the same duty to Appellant as the Association under the common law of premises liability. On the other hand, Appellant realizes that to make that argument, he must connect the Developer to the premises. The only way to do so is to link the Developer to the Association via their corporate chain. However, that analysis is not simply controlled by the tort concept of vicarious liability, as Appellant apparently recognizes. Nevertheless, Appellant argues that the negligence of the Association may automatically be attributed to the Developer, as it would in a master-servant scenario. As the Court has already properly concluded, that it is not only a misapplication of well-settled law, it is the wholesale rejection of an entire body of law, which is unique to corporate entities.

It bears noting that Appellant sued the Association, the entity that both owns and maintains the park that was the locus of Appellant's injury. The Association reached a settlement with the Appellant. That makes Appellant's attempts to pin liability on a separate upstream corporate entity all the more inappropriate and, frankly, unusual. The legal concepts of corporate veil piercing and corporate amalgamation exist to provide claimants with paths to recovery in situations in which a corporate defendant has improperly attempted to shield itself from exposure to a judgment. In such instances, it may be necessary and appropriate to look to related entities either upstream on the vertical axis (veil piercing) or adjacent on the horizontal axis (amalgamation). In this case, it is neither necessary nor appropriate to look beyond the entity in the first position, the Association.

There is no evidence in the record that the Association was not run with the requisite corporate formalities or that it was underinsured or underfunded. Therefore, the question of "control" of the park should begin and end with the Association.

What's more, Appellant's theory fails to comport with the well-settled law of corporations. Again, Appellant contends Developer is liable to him based on its control over the Association. Paradoxically, Appellant asserts that "by *selecting the Board members*, Developer had the right to control the decision-making for the Association." Pet. For Rehearing at 3 (emphasis added). In other words, Appellant's theory is based on the fact that Developer has the right to appoint members to the Board of the Association. This theory not only relies on entirely immaterial facts, but it also requires the incorrect application of the governing law. To hold Developer liable under Appellant's own "control" theory, Appellant would first have to pierce the corporate veil up to the Board of Directors for the Association, and then pierce the corporate veil up to Developer. Despite his failure to assert a claim against the Board at any point over the course of this litigation, Appellant now contends he should be entitled to impute the Association's alleged negligence directly to Developer. Appellant's contention runs afoul to even the most fundamental principles of corporate law. This fatal flaw, combined with the complete lack of evidence of bad faith or nefariousness, further proves that this Court was correct in affirming the circuit court's award of summary judgment in favor of Developer on Appellant's claims.

Finally, with respect to Appellant's assertion that the Supreme Court's decision in *Walbeck v. I'On Co.* should not be limited to the context of fiduciary duties, Appellant again ignores the lack of evidence of bad faith or nefariousness in this case. In *Walbeck*, the Supreme Court held that amalgamation was proper based on its determination that "the evidence shows that not only were the various entities intertwined and working in concert with each other, *their conduct demonstrates*

'bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.'" *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 594, 889 S.E.2d 537, 550 (2023) (quoting *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280-81 (2018)) (emphasis added). In other words, even if the Supreme Court's application of the single-business enterprise theory in *Walbeck* extended beyond the context of fiduciary duties, the Supreme Court clearly demonstrated that the theory is only applicable and entities may only be amalgamated upon a showing of bad faith, abuse, fraud, wrongdoing, or injustice resulting *from* the blurring of the entities' legal distinctions. Here, as this Court and the circuit court correctly found, there is no evidence of bad faith or nefariousness anywhere in the record, nor does Appellant point to any such evidence in his Petition.

The *Walbeck* case supports Developer's argument as to whether the single enterprise theory applies to the facts of this case, despite Appellant's suggestion to the contrary, the *Walbeck* decision is inapposite. However, to the question of whether Developer owned a duty to Appellant, the *Walbeck* case, unlike this one, dealt with a developer's fiduciary duty to an association. In reaching its conclusion, the Supreme Court in *Walbeck* merely reaffirmed the well-established principle that a developer owes a fiduciary duty to owners within an HOA and that such owners may enforce that duty via a shareholder derivative suit. Nevertheless, Appellant argues that the Supreme Court's holding in *Walbeck* should be expanded beyond the context of fiduciary duties. In doing so, Appellant contends that whether a developer's fiduciary duties to an HOA should be expanded to third parties is a question of fact such that summary judgment was improper. However, it is well settled that the existence and scope of a duty is a question of law for the court. *See, e.g., Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 272, 781 S.E.2d 903, 912 (2016) ("A court must first determine, as a matter of law, whether the law recognizes a particular duty."). It is

also well settled that an appellate court "applies de novo review to questions of law, so it need not defer to the determination of the court below." *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022). Ironically, the fiduciary duties addressed by The *Walbeck* court arise out of corporate law concepts, not tort. In other words, this Court had the authority and ability to expand the scope of developers' duties to third parties when analyzing Appellant's arguments on appeal and ultimately elected not to do so based on its de novo review of the issue. Nevertheless, despite this Court being in the best position to answer the question of law at issue here, Appellant would have this Court remand the issue back to the circuit court. The trial court's decision on that issue most likely be appealed, forcing this Court to review the same question for a second time. Because the Court answered the question correctly the first time, it should reject Appellant's assertion that the case should be remanded to the trial court for a determination as to the existence or scope of Developer's duty, a question of law.

II. This Court properly affirmed the circuit court's order granting summary judgment in favor of Developer.

Appellant argues this Court "overlooked the principle that ordinarily, novel issues should not be resolved on summary judgment." Pet. For Rehearing at 3. Notably, however, the Petition is the first time that Appellant has made this argument during the course of this litigation and appeal. This is entirely improper, as "a party may not raise an issue for the first time in a petition for rehearing." *Herron v. Century BMW,* 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011). Thus, because Appellant failed to raise this new argument in his initial briefs or in his opposition to the motion for summary judgment, the Court should reject the argument in its entirety for that reason alone. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is

it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.").

Setting aside the procedural infirmity, Appellant's argument lacks merit. As an initial point, Appellant is incorrect in characterizing the issue of Developer's control as a novel issue. Whether one entity has sufficient control over another entity such that it can be held liable for the second entity's negligence is not a novel issue in this state. *See, e.g., Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018) (single business enterprise theory); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008) (corporate veil-piercing claims). Appellant cannot simply couch his incorrect application of the law as a novel issue in an effort to overcome summary judgment.

Furthermore, neither this Court's decision nor the circuit court's decision was made at a "premature stage" of this case as Appellant suggests. As set forth in more detail in Developer's Final Brief, the circuit court initially continued Developer's Motion for Summary Judgment for the express purpose of allowing Appellant to conduct additional discovery on the issue of Developer's control over the Association. *See* Final Brief of Respondent at 6-7. At the time the circuit court granted Developer's Motion, Appellant could not present any evidence of nefariousness or bad faith on behalf of Developer, despite having nearly two more years to conduct additional discovery on that exact issue. Moreover, the circuit court awarded summary judgment in favor of Developer on September 9, 2022 – less than two weeks before this case was scheduled for a date certain trial beginning on September 19, 2022. Thus, Appellant's suggestion that it was premature to grant Developer's Motion for Summary Judgment is entirely without merit.

Appellant next claims "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 . . . to Appellant." Pet. For Rehearing at 4. He later contends he "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." *Id.* Appellant's argument improperly conflates the distinct roles of the judge and the jury and directly contradicts the purpose of summary judgment, which is to "expedite the disposition of cases not requiring the services of a fact finder." *S.C. Pub. Interest Found. v. City of Columbia*, 431 S.C. 164, 167, 847 S.E.2d 257, 258 (Ct. App. 2020) (quoting *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011). It is well settled that the existence and scope of a duty is a question of law for the court. *See, e.g., Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 272, 781 S.E.2d 903, 912 (2016) ("A court must first determine, as a matter of law, whether the law recognizes a particular duty.). It is equally as well settled that whether to amalgamate entities is a decision for the court. *See Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 ("As with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy."). Thus, regardless of whether Appellant seeks to hold Developer liable under a negligence theory or corporate amalgamation theory, Appellant's assertion that there is a factual dispute concerning Developer's control is entirely immaterial for purposes of summary judgment.

Finally, Appellant contends this Court "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." Pet. For Rehearing at 4. While not entirely clear, it seems Appellant is attempting to revive his

amalgamation claim despite his clear and unambiguous abandonment of that claim during the circuit court's hearing on the Motion for Summary Judgment as well as in his Final Brief. *See* Final Brief of Appellant at 2 n.1 ("[D]uring the August 24, 2022 hearing, Zetz's counsel clarified that he was not arguing either amalgamation or veil-piercing."). This Court should reject Appellant's efforts to revive his amalgamation claim, as they amount to nothing more than another transparent attempt to shift his theory of liability as prior arguments are rejected. Furthermore, both this Court and the circuit court properly concluded that Appellant's corporate amalgamation theory fails based on the complete lack of evidence of bad faith or nefariousness in the record. The Petition does not present any grounds for questioning or disturbing that result.

CONCLUSION

For the reasons set forth herein, Respondent Daniel Island Company, Inc. respectfully requests that this Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

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Landscape Lighting Systems ..... Defendants

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

PROOF OF SERVICE

I certify that on this 8th day of August, 2024, I served a true and correct copy of Respondent's Return to Appellant's Petition for Rehearing in compliance with Supreme Court Order 2022-05-06-04 on the following counsel for Appellant:

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Please find attached to this email and hereby served upon a true and correct copy of Respondent's Return to Appellant's Petition for Rehearing, in compliance with Supreme Court Order 2022-05-06-04.

Regards, Janet

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