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May 23 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No. 2020-CP-10-04185

Bonnie Wall, individually and derivatiely,
and Walter B. Wall, Jr., Appellants,
v.

Jonathan Dye, Shaun Dye, Shellmore Homeowners’
Association, Inc., and John H. Chakides, Jr., individually and
in his capacity as Director of Shellmore Homeowners’
Association, Inc., Respondents.

RETURN TO PETITION FOR REHEARING

The Court of Appeals correctly decided the issues before it and should deny Appellants’
petition for rehearing for the reasons which follow.

**I. The Court of Appeals correctly ruled that there is no fiduciary duty owed in
this context.**

Whether a fiduciary duty “should be imposed between two classes of people is a question
for the court.” *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (S.C. 2003). In
deciding this question, this Court correctly followed *O’Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d
629 (1992), in finding the Shellmore board and its members do not owe a fiduciary duty to the
Walls in the context of this case.

In their petition, Appellants argue the holding in *O’Shea* is merely a “catchy soundbite”
and is no longer controlling in the face of the Non-Profit Corporation Act passed in 1994.

Appellants' argument fails to recognize, however, that the O'Shea opinion has been subsequently cited by this Court as controlling on this point—even after enactment of the 1994 statute—and that decision was affirmed as modified by the Supreme Court.

In *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014), *aff'd as modified*, 415 S.C. 256, 781 S.E.2d 903 (2016), the Court of Appeals, citing *O'Shea*, found that the incorporated association, "Shipyard Village Council of Co-Owners, Inc.", did not owe a fiduciary duty to the members of the association. *Id.*, 409 S.C. at 177 n. 2, 760 S.E. at 128 n. 2 (reversing trial court to the extent a fiduciary duty was found to exist). Thus, the enactment of the Non-Profit Corporation Act in 1994 and the status of a planned community organization as unincorporated or incorporated makes no difference. Even after enactment of the Non-Profit Corporation Act, *O'Shea* remains good law and this Court correctly relied on it in affirming the trial court.

The reason HOA directors are not held to the standard of a fiduciary when evaluating and approving architectural improvements under the HOA's covenants is because their obligations in doing so are defined in the controlling covenants. The Supreme Court has reiterated this Court's ruling that, rather than giving rise to fiduciary duties, "in subdivisions . . . that are subject to covenants, the responsibilities outlined in the covenants control." *Walbeck v. I'On Co.*, 439 S.C. 568, 586, 889 S.E.2d 537, 546 (S.C. 2023) (citing *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006)). As previously argued to this Court, these holdings mirror the economic loss rule which prohibits tort liability for duties imposed by contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie.").

Because “[r]estrictive covenants are contractual in nature,” *Hardy v. Aiken*, 631 S.E.2d 539, 369 S.C. 160 (S.C. 2006), the duties arising from the covenants do not give rise to tort liability—e.g., fiduciary duty liability.

Here, Appellants have based their fiduciary duty claims on allegations that Respondents failed to abide by and enforce the neighborhood covenants.¹ Yet, any duties imposed by the covenants on the Dyes, the HOA, and Mr. Chakides for approval of the Dyes’ covered dock are contractual in nature and, therefore, do not give rise to tort liability. Accordingly, this Court correctly determined that no fiduciary duty exists in this context.

II. Assuming *arguendo* the existence of a fiduciary duty, the Court of Appeals correctly ruled that the business judgment rule precludes liability.

The interpretation of unambiguous covenants is a question of law for this Court. *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). In its opinion, this Court correctly interpreted the unambiguous covenants to determine that the Dyes’ covered dock could be constructed if the plans were approved by either the HOA board or the ARC. It necessarily follows from this Court’s opinion that the HOA board had the authority to appoint the ARC, the ARC had the authority to issue written approval of the Dye’s covered dock, and the Dyes were permitted to build their covered dock upon receiving written approval from the ARC. The Court correctly recognized that the undisputed facts presented in the record indicate that the HOA board appointed the ARC (and separately approved the Dyes’ dock), the ARC issued written approval for the Dyes’ covered dock, and the Dyes constructed their dock after having written approval of the ARC—all actions the Court held to be authorized under the covenants.

¹ See Appellants’ Petition, p. 8 (“Moreover, the Walls relied on the Association to enforce the covenants running with the land and the common scheme of development, which are expressly tied to the property values of every owner and member of the corporation.”)

The remaining question is whether Appellants presented any competent, relevant, and admissible evidence that Respondents acted unreasonably or in bad faith. This Court correctly held there was no such evidence in the record. Appellants point to parts of the record they claim create a factual dispute, but the material cited is either incompetent, inadmissible, or irrelevant. While the grounds for Respondents' objections to the admissibility of Appellants' citations are exhaustively explained in Respondents' briefing, the citations in Appellants' petition are briefly addressed, in turn, below:

- Appellants cite to the 2016 vote “to prohibit covered docks and lifts.” Petition, p. 14. But, as this Court correctly held, the vote was ineffective—and, therefore, irrelevant—because it was never recorded.
- Appellants cite the historical absence of covered docks and previous denials of covered docks. Petition, p. 14. Again, unless a prohibition on covered docks was properly passed and recorded to amend the covenants, these facts are irrelevant and properly disregarded.
- Appellants cite a quote from Mr. Fritz's affidavit which is both inadmissible hearsay and inadmissible because it offers a legal conclusion. Petition, p. 14.
- Appellants cite to voting agreements by directors. Petition, p. 14. But, such voting agreements are specifically authorized by statute. S.C. Code § 33-31-730.
- Appellants cite inadmissible conclusory allegations in their complaint and Mr. Fritz's affidavit. Petition, p. 14.
- Appellants cite incompetent allegations in Mr. Fritz's affidavit as the affidavit does not establish appropriate foundation for the statements. Petition, p. 15.

- Appellants argue, through counsel, that they dispute whether the Dyes submitted plans to the ARC or the board or that the board approved the plans. Yet, the only citation to the record is the incompetent allegations, lacking foundation, in Mr. Fritz’s affidavit. Petition, p. 15. Meanwhile, the admissible evidence submitted in the record, indicates that the Dyes did submit their plans and the plans were approved.
- Appellants claim Mr. Chakides independently breached fiduciary duties through self-dealing. But, as correctly recognized by the Court, the undisputed facts in the record indicate that—regardless of Mr. Chakides’ motives—his involvement in the vote to appoint members to the ARC and in the board vote to approve the Dyes’ dock was immaterial because the votes were unanimous. Even if he had voted differently, the votes would still have passed 2-1 and the end result would be unchanged.

Consequently, this Court correctly ruled that Appellants failed to present any admissible evidence in the record that Respondents acted unreasonably or in bad faith in acting within their authority under the covenants. Thus, even if a fiduciary duty existed, the Court correctly found that the business judgment rule precludes liability.

III. This Court correctly affirmed summary judgment on Appellants’ civil conspiracy claim.

Appellants first attempt to differentiate a summary judgment ruling from a trial for purposes of determining the application of the *Paradis* opinion to their claim. The relevant portion of the *Paradis* opinion reads: “Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis.” *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774, 781 (S.C. 2021). This matter was on appeal at the time of the *Paradis* decision. Furthermore, regardless of the procedural vehicle used, the merits of Appellants’ civil conspiracy claim had also been decided by the trial court at the time of the *Paradis* decision.

Consequently, this Court correctly concluded the trial court’s ruling should be analyzed under the *Todd* framework.

Under the *Todd* framework, Appellants were required to show “acts done in furtherance of the conspiracy and special damages that are separate and independent of the other acts and damages that underlie the other causes of action within the same complaint.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 118, 682 S.E.2d 871, 876 (Ct. App. 2009); *see also Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (“Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in the other causes of action.”). This Court correctly found that Appellants’ allegations of wrongdoing under the civil conspiracy claim were the same allegations of wrongdoing under the other causes of action—that Respondents had breached the covenants and their fiduciary duties. Because of this, no matter how the Appellants creatively word their assertions of special damages, the underlying acts and damages claimed are inseparable from those of the other causes of action. Under *Todd*, this precludes their civil conspiracy claim as a matter of law.

In conclusion, the Court of Appeals correctly decided the issues before it and should deny Appellants’ petition for rehearing for the reasons set out above and in Respondents’ briefing previously submitted to this Court.

Respectfully submitted,

By: /s/ Andrew M. Connor

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PROOF OF SERVICE

I certify that on May 23, 2024, I served Respondents' Return to Appellants' Petition for Rehearing on Appellants by sending the same to their attorneys of record, Ainsley F. Tillman and Ian S. Ford, at their email addresses of record with the AIS.

By: /s/ Andrew M. Connor _____
Andrew M. Connor