

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Mikell R. Scarborough, Master-In-Equity

Case No. 2020-CP-10-04185
Court of Appeals Case No. 2020-001583

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

Petitioners,

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 CERTIORARI

The Court of Appeals correctly decided the issues before it and no considerations merit review of the decision. This Court should deny Petitioners' petition for certiorari for the reasons which follow.

COUNTER-STATEMENT OF THE CASE

Petitioners, the Walls, do not like covered docks. When their neighbors, the Dyes, received approval from the neighborhood architectural review committee for a covered dock and started construction, Appellants sued. All of Petitioners claims and arguments on appeal center on their claim that the appointment of, and decision rendered by, the architectural review committee were both legally invalid. By contrast, the Dyes counter that the appointment and actions of the

architectural review committee were authorized by the restrictive covenants and applicable law. These points of contention were correctly decided in the Dyes' favor by the Court of Appeals.

A. Facts

Shellmore is a waterfront subdivision consisting of fourteen (14) lots¹ located in McClellanville, South Carolina. (*See R.* pp. 15-16.) The lots in Shellmore are subject to certain restrictive covenants set out in a Declaration of Covenants (“Declaration”) dated March 18, 1975 and recorded March 19, 1975 in the Charleston County Register of Deeds Office in Book J106, Page 195. (*See R.* pp. 17-18, 190, 196-209.) No amendments to the Declaration have ever been recorded. (*R.* p. 190.) The Declaration names Cape Romain Lookout Homeowners Association, Inc., as the “Association” having jurisdiction to enforce the restrictive covenants of the subdivision. (*R.* pp. 196-209.) Later, the name of the Association was changed to Shellmore Homeowners Association, Inc. (“Association”), a nonprofit corporation organized pursuant to the South Carolina Nonprofit Corporation Act. (*See R.* pp. 190, 210-12.)

The Declaration contains restrictive covenants vesting architectural control of exterior improvements within Shellmore with the Board of Directors (“Board”) of the Association or an Architectural Review Committee (“ARC”) designated by the Board. (*See R.* p. 203.) Article V, Section 1, of the Declaration states in pertinent part:

Section 1. Architectural Control. No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by

¹ Charleston County property records and related GIS system show fourteen (14) lots within the Shellmore community identified by the following parcel numbers: 712-0000089, 712-0000090, 712-0000091, 712-0000092, 712-0000093, 712-0000094, 712-0000095, 712-0000096, 712-0000097, 712-0000098, 712-0000099, 712-0000100, 712-0000101, and 712-0000102. To the extent necessary, Respondents ask the Court to take judicial notice of facts reflected in public filings and property records. *See S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (“[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.”).

an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

(R. p. 203.) Article V of the Declaration goes on to specifically address the construction of docks in Section 8 and states in pertinent part:

Section 8. Boat Houses, Docks, etc. No boat houses, docks, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.

(R. p. 206.)

Respondents Jonathan and Shaun Dye own and reside at 945 Shellmore Lane within the Shellmore subdivision. (*See* R. p. 270.) In January of 2020, the Dyes submitted a permit application to the Office of Ocean & Coastal Resource Management (“OCRM”) and a federal permit application with the United States Army Corps of Engineers (“USACOE”) with plans and specifications for the construction of a proposed covered dock. (R. p. 271.) The Dyes also submitted the same plans to the ARC which voted to approve the Dyes’ proposed dock. (R. pp. 191, 227, 271.) Subsequently, the Board considered and upheld the ARC’s vote approving the Dyes’ proposed dock. (R. pp. 191, 228-29, 271.) The Dyes later submitted revised plans to both OCRM and the ARC deleting a proposed boat lift but keeping the proposed covered dock. (R. pp. 191-92, 230, 271.) Both OCRM and the ARC approved the Dyes’ revised plans. (R. pp. 191-92, 230, 271.) In all, OCRM, USACOE, the ARC, and the Board approved the Dyes’ plans for the construction of a covered dock with OCRM and USACOE issuing the required permits. (R. p. 271.)

After OCRM issued the Dyes a permit to construct their dock, the Dyes’ immediate neighbors, Larry Fritz to the south and the Appellants, the Walls, to the north, requested review of

OCRM's decision by the Board of Health and Environmental Control to which OCRM staff filed a response. (R. pp. 272-326.) Ultimately, the review requests were denied. (R. p. 272.) Thereafter, the Dyes commenced construction on their covered dock. (R. p. 272.) This litigation ensued.

B. Procedural History

Petitioners commenced the action below via the filing of a summons and verified complaint on September 22, 2020 asserting claims against the Dyes for breach of the restrictive covenants, declaratory and injunctive relief, and nuisance claiming that the Dyes' proposed covered dock had not been properly approved as required under the Declaration. Petitioners also filed a petition for an *ex parte* temporary restraining order and a motion for temporary injunction on September 23, 2020. On September 29, 2020, the Dyes filed a motion to dismiss the complaint and briefing in opposition to the Petitioners' requested injunctive relief. On September 30, 2020, a hearing was held before the Hon. Roger Young, Circuit Judge, on the motions for preliminary injunctive relief. That day, Judge Young issued an order declining to issue the requested injunctive relief and referring the case to the Master-In-Equity in accordance with Rule 53, SCRPC. (R. pp. 1-3.)

On October 2, 2020, the Master-In-Equity issued an order preliminarily granting the Petitioners' requested injunctive relief to preserve the status quo as to the proposed roof on the Dyes' dock but denying the Petitioners' request to halt construction of the other portions of the dock. (R. pp. 4-6.) Additionally, based on the representations and agreement made by the parties at the hearing, the Master-In-Equity ordered a briefing schedule for cross motions for summary judgment.

On October 5, 2020, the Petitioners filed a Verified Amended Complaint naming the Association and John H. Chakides, Jr. ("Chakides"), as additional defendants and asserting claims for injunction and declaratory judgment (against the Dyes and the Association), breach of

restrictive covenants (against the Dyes and the Association), breach of fiduciary duty claims (against the Association and Chakides), civil conspiracy (against Jonathan Dye, Chakides, and the Association), and nuisance (against the Dyes). (R. pp. 13-61.)

On October 15, 2020, the Dyes filed their motion for summary judgment (R. pp. 167-337) and Petitioners filed a motion for partial summary judgment. (R. pp. 127-166.) The Dyes filed their Answer to the Amended Complaint on October 20, 2020. (R. pp. 62-74.) The Dyes also filed a motion to dissolve the preliminary injunction on October 21, 2020 (R. pp. 338-348) to which Petitioners filed opposing briefing the next day. (R. pp. 349-354.) On October 23, 2020, Respondents the Association and Chakides filed their Answer (R. pp. 75-86) and motion for summary judgment. (R. pp. 355.)

The Master-In-Equity held a hearing on the cross motions for summary judgment and the motion to dissolve the preliminary injunction on November 2, 2020. The Master took the matter under advisement and allowed the parties time to submit additional briefing for consideration. The Dyes and the Walls submitted additional briefing on November 6, 2020. (R. pp. 356-378.)

On November 19, 2020, the Master-In-Equity entered an order on the then-pending motions. (R. pp. 10-12.) In the order, the Master granted the Dyes' motion to dissolve the preliminary injunction based on the Petitioners' failure to establish the required elements for preliminary injunctive relief. Next, the lower court granted the Respondents' motions for summary judgment as to the Petitioners' claims for breach of fiduciary duty upon a finding that no fiduciary duty exists in this context. The Master also granted the Respondents' motions for summary judgment as to Petitioners' claim for civil conspiracy finding that Petitioners had failed to present any evidence of special damages. However, the lower court denied the parties' cross motions for summary judgment as to Petitioners' remaining claims of declaratory judgment, breach of the

restrictive covenants, and nuisance and directed the parties to resolve the remaining issues by mediation or by vote at the annual meeting of the Association to be held in January 2021.²

On November 22, 2020, Petitioners filed a notice of appeal of the Master’s November 19, 2020 order. The Court of Appeals held oral argument on February 8, 2024, and it issued its opinion on May 8, 2024, affirming the Master’s decision. Petitioners filed their Petition for Rehearing on May 14, 2024. The Court of Appeals requested a Return. Respondents filed their return on May 23, 2024 and the Petitioners filed a reply on June 17, 2024. On July 11, 2024, the Court of Appeals denied the Petitioners’ rehearing request.

ARGUMENT

I. The Court of Appeals correctly ruled that there is no fiduciary duty owed in this context.³

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, the Court of Appeals 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 Petitioners in the context of this case.

In their petition, Petitioners argue the holding in *O’Shea* is merely a “catchy,” “confusing, out-of-context soundbite” and is no longer controlling in the face of the Non-Profit Corporation Act passed in 1994. Petitioners’ argument fails to recognize, however, that the *O’Shea* opinion has been subsequently cited by the Court of Appeals as controlling on this point—even after enactment of the 1994 statute—and that subsequent decision was affirmed as modified by this Supreme Court.

² After the annual meeting vote, the Respondents renewed their motion for summary judgment as to all the remaining causes of action. The Master granted Respondents’ motion and that order is currently the subject of appellate case number 2021-001014.

³ This argument section addresses questions I and II raised in the petition.

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 the Court of Appeals 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. This Court has previously held 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)). 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.

In this case, just as in *O'Shea*, the restrictive covenants governing Shellmore grant the Board and its designated architectural review committee with the discretion to approve exterior structures within the neighborhood—including covered docks—based on purely aesthetic considerations. The holding in *O'Shea* recognized that when HOA boards have discretion to approve structures on subjective aesthetic considerations, the duties of a fiduciary—an objective standard—cannot apply. Indeed, the *O'Shea* opinion cites to *Palmetto Dunes Resort, Div. of Greenwood Development Corp. v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985), which stated:

The covenant, by making no attempt to set forth objective "aesthetic considerations," implicitly recognizes, as do we, that it is impossible to establish absolute standards to guide a judgment of taste. But this does not compel the conclusion that the covenant is ambiguous. We agree with the trial judge that although people may reasonably differ as to whether a house is aesthetically appropriate, the covenant is unambiguous in leaving this solitary judgment to Palmetto Dunes. The plain and obvious purpose of the covenant is to vest this discretion in Palmetto Dunes, which is constrained only to exercise its judgment reasonably and in good faith.

Id., 287 S.C. at 6-7. Here, the covenants granted the HOA and its designated architectural review board with the solitary judgment to approve or disapprove the Dyes' covered dock. The board and the architectural review committee exercised their discretion in approving the dock and, thus, fiduciary duties do not apply.

The Court of Appeals correctly determined that no fiduciary duty exists in this context pursuant to *O'Shea* and its progeny.

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 of Appeals 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 the Court of Appeal’s opinion that the HOA board had the authority to appoint the ARC, the ARC had the authority to issue written approval of the Dyes’ covered dock, and the Dyes were permitted to build their covered dock upon receiving written approval from the ARC. The Court of Appeals 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.

The remaining question is whether Petitioners presented any competent, relevant, and admissible evidence that Respondents acted unreasonably or in bad faith. This Court of Appeals correctly held there was no such evidence in the record. In the Court of Appeals, Petitioners attempted to point to parts of the record they claim create a factual dispute, but the material cited was incompetent, inadmissible, and/or irrelevant. Consequently, the Court of Appeals correctly ruled that Petitioners 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 of Appeals correctly found that the business judgment rule precludes liability.

III. The Court of Appeals correctly affirmed summary judgment on Petitioners’ civil conspiracy claim.

Petitioners 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 Petitioners' civil conspiracy claim had also been decided by the trial court at the time of the *Paradis* decision. Consequently, the Court of Appeals correctly concluded the trial court's ruling should be analyzed under the *Todd* framework.

Under the *Todd* framework, Petitioners 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."). The Court of Appeals correctly found that Petitioners' 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 Petitioners 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. The Court of Appeals correctly held as much.

Even if the elements set out in *Paradis* were to apply to this matter, the result would be the same. First, the record is devoid of any admissible evidence—only unsupported speculation—indicating, or tending to indicate, any agreement between Respondents Dye, Chakides, and the Association. *See Gordon v. Busbee*, 397 S.C. 119, 136, 723 S.E.2d 822, 831 (Ct. App. 2012) (affirming directed verdict on civil conspiracy claim where the record contained no evidence, only speculation, that any of the parties conspired with each other). Petitioners' sole evidence in this

regard is their conclusory and speculative assertion in their verified Amended Complaint that Mr. Dye and Mr. Chakides “conspired to circumvent the Declaration”. (R. p. 28.) The submitted affidavit of Mr. Fritz contains a similar conclusory and inadmissible allegation made “[u]pon information and belief”. (R. p. 164.) These allegations are insufficient to withstand a summary judgment motion. *Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433 (2003); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2738 (1998) (“ultimate or conclusory facts and conclusions of law, as well as statements made on . . . ‘information and belief,’ cannot be utilized on a summary-judgment motion”).

Moreover, the actions Petitioners challenge—the appointment of the ARC and the ARC’s approval of the Dyes’ covered dock—were carried out exclusively by the Association, its Board, and the duly appointed ARC and were all within the scope of authority set out by the Declaration. As such, there can be no conspiracy. *See McMillan v. Oconee Memorial Hospital, Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006) (“[W]e hold that no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment.”).

Next, the Board’s appointment of the ARC and its members, the Dyes’ submission of their dock plans to the ARC for approval, and the ARC’s approval of the Dyes’ covered dock were proper and authorized actions under the Declaration. There are no unlawful acts or unlawful means upon which to base a claim for civil conspiracy.

Finally, Petitioners cannot show resulting damages. There is no express prohibition on covered docks in the language of the Declaration. Thus, at the time the Petitioners purchased their property, there was a future possibility that a covered dock would be approved and constructed. That such a possibility is now reality does not constitute compensable damages.

CONSIDERATIONS GOVERNING REVIEW

(1) Where there are novel questions of law.

No novel questions of law are presented in this case. This case involves the approval of a covered dock by a neighborhood HOA—a decision well within the discretion granted to the HOA under the applicable restrictive covenants. Case law dating back more than 30 years in South Carolina has repeatedly held that such decisions are within the discretion of the neighborhood governing boards and fiduciary duties do not apply.

(2) Where there is a dissent in the decision of the Court of Appeals.

There was no dissent in the Court of Appeals' decision in this matter.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

There is no conflict between the Court of Appeals decision and any prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

No constitutional issues are involved or implicated by this matter.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

No federal question is involved or implicated by this matter.

CONCLUSION

In conclusion, the Court of Appeals correctly decided the issues before it and the Supreme Court should deny Petitioners' petition for certiorari for the reasons set out above and in Respondents' briefing previously submitted to the Court of Appeals.

Respectfully submitted,

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