

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2022-001385
Supreme Court Case No. 2024-001509

Unpublished Opinion No. 2024-UP-244 (S.C. Ct. App. filed July 3, 2024)

Matthew Zetz.....Petitioner,

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 Lighting Systems.....Defendants

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

Petition for a Writ of Certiorari

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and denied by the South Carolina Court of Appeals on August 19, 2024.

QUESTION PRESENTED FOR REVIEW

Did the trial court err in granting summary judgment on a question of fact involving whether a developer retained sufficient control of an association that was responsible for maintaining a community park or sufficient control of the park itself to be liable in a premises liability lawsuit?

STATEMENT OF THE CASE

On October 2, 2017, Matthew Zetz brought a premises liability negligence action against the Daniel Island Community Foundation, and subsequently added the Daniel Island Town Association in his first amended complaint and the Daniel Island Company, Inc. (“Developer”) in his second amended complaint. (R. p. 14, 20). Developer filed a motion for summary judgment on September 14, 2020, arguing that Developer had no legal duty at the time of the incident. (R. p. 47). The trial court stayed the motion on October 22, 2020, holding that because discovery was incomplete, the motion was not yet ripe. (R. pp. 4-5).

On August 16, 2022, Developer filed a second memorandum in support of its motion for summary judgment. (R. p. 353). The trial court held a hearing and granted summary judgment for Developer, holding that although Developer controlled the entity which owned the premises, the kind of control that Developer had was insufficient to render Developer liable in a premises liability action. (R. pp. 10-12). On October 4, 2022, Zetz timely filed and served his notice of appeal, and on July 3, 2024, the court of appeals affirmed without oral argument in an unpublished opinion pursuant to Rule 220, SCACR. Petitioner timely filed a petition for rehearing, which was

denied. This Petition follows.¹

STATEMENT OF FACTS

Matthew Zetz fell into an unmarked and unlight shallow concrete trench at the Daniel Island Children’s Park (“the Park”), suffering severe injuries that required multiple surgeries, cost more than \$500,000 in medical bills, and ultimately led to the partial amputation of his leg. (R. pp. 31, 36, 49).² What began as an ordinary premises liability lawsuit against the Daniel Island Community Foundation (“Foundation”), which owned the public park, expanded as discovery revealed other entities that also owned or controlled the Park. This included the Daniel Island Town Association (“Association”), which is the legal entity in charge of the Foundation, and later, the Daniel Island Company (“Developer”), which controls the Association.

Zetz discovered that—according to Association’s founding documents and the deposition testimony of Association’s officers and employees—Developer ultimately controlled Association and Association’s properties. The March 1999 Declaration of Covenants, Conditions, and Restrictions for the Association states that for a certain “Control Period,” the Developer “is entitled to appoint all of the members of the Board of Directors.”³ (R. pp. 87, 88, 94) (Developer is sole Class “B” Member). The Association’s March 1999 by-laws clarify that during the control period,

¹ The deadline to file this Petition originally was September 30, 2024 after the Court granted a ten-day extension. Due to the effects of Hurricane Helene, the Court issued three orders that declared filing “holidays” from September 27, 2024 through October 9, 2024. Accordingly, this Petition is timely.

² The Park featured an innovative element designed to captivate child and adult alike: a three-dimensional map of the Charleston area, including a water feature with “shallow concrete trenches” which depicted local waterways. (R. p. 354).

³ The founding documents list Daniel Island Town Center Zone as the entity, but in 2004, the Board changed Daniel Island Town Center Zone’s name to Daniel Island Town Association, Inc. (R. p. 332). For ease of reference, Petitioner refers to this entity under its current name.

the developer-appointed Board has “all the powers and duties necessary for the administration of the Association’s affairs,” (R. p. 67), 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 had 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).

In fact, even after the control period, Developer’s power over Association was substantial. Up to two years after the control period ends, Developer can “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). Furthermore, as long as Developer owns certain property “or has the right to annex” some of that same property, “and for a period of twenty years thereafter,” Developer can amend the declaration and bylaws “without vote or consent of the Owners for any . . . purpose.” (R. pp. 73-74; pp. 105, 127-28).

Developer’s and Association’s officers confirmed during their depositions that Developer was in control of the Association. Matthew Sloan, president of Developer and the Association in 2016, (R. p. 1175, ll. 15-17; p. 323), admitted that Developer controlled Association at the time of the accident. (R. p. 1190, ll. 4-7). So did Frank Brumley, who at the time of the accident was Association’s vice president and Developer’s CEO and chairman. (R. pp. 309-10, 323). Brumley not only agreed that Association was “developer controlled” in 2016; he also stated that “the developer absolutely maintain[ed] control” during the control period. (R. p. 1150, ll. 23-p. 1151, ll. 16) (emphasis added).

Other high-level employees confirmed Sloan’s and Brumley’s testimony. In a 2019 email addressed to Sloan, Jane Baker (the Association’s manager at the time of the accident), and Amy

Moyer (who had held roles as Developer’s Director of Finance, Vice President of Finance, and Chief Financial Officer) stated, “I have already explained to the insurance carrier that [Developer] controls the [Association] board,” (R. p. 296; p. 1165, ll. 17-20). Additionally, the Daniel Island Property Owners Association’s (“POA”) finance manager and community-services manager also agreed that at the time of the accident, Developer controlled the Association Board. (the “Board”). (R. p. 1091, ll. 23-p. 1093, ll. 1; p. 1138, ll. 2-11). The POA’s architectural review board administrator also “underst[ood]” that Developer controlled the Board in 2016. (R. p. 1124, ll. 1-13). Finally, the Association’s field-operations manager also believed that Developer controlled the Board in 2016. (R. p. 1081, ll. 23-p. 1082, ll. 2; p. 1084, ll. 12-16; p. 1086, ll. 8-13).

This control was more than nominal. When Sloan described developer control, he explained that developers “always control[] up to a certain point,” and that because a developer puts so many assets and so much energy “into building a community,” it “want[s] to be able to control what is built and how it is managed.” (R. p. 1167, ll. 9-19). Sloan agreed that a developer controls both building and managing a community “by putting its own people on the board.” (R. p. 1204, ll. 13-23). Because Sloan and Brumley were two of the Board’s members, “[t]he votes at the [Association] were,” as Sloan himself admitted, “controlled by [Developer’s] officers.” (R. p. 1190, ll. 9-11; 1093, ll. 6-24; p. 1177, ll. 25-p. 1178, ll. 1; p. 1156, ll. 21-p. 1157, ll. 6).

According to Sloan, a developer’s control includes ensuring that problems are addressed—even against the wishes of the rest of the Association, if need be. (R. p. 1196, ll. 7-23). Thus, although Developer allowed a manager to run the Association, (R. p. 1203, ll. 9-11), Developer’s officers “could have given . . . command[s]” through the Board if they saw “a need that [they] felt strongly enough about.” (R. p. 1191, ll. 2-5). Brumley concurred with Sloan’s view, admitting that if Developer had wanted to “just ram [a proposition] through,” it could have. (R. p. 1151, ll. 17-p.

1152, ll. 9).

This evidence of Developer’s control was raised in response to Respondent’s motion for summary judgment, which was predicated on Developer’s supposed absence of a legal duty owed to Zetz. The trial court held that Developer did not control Association—at least, not in the sense that “control” is used in premises liability cases. In essence, the court concluded that the word “control,” as used in horizontal property regimes, is a term of art which does not denote a real relationship of control. (R. p. 10). The court concluded the Developer’s control was merely nominal—even when Developer can appoint all the Association’s board members.

The trial court erroneously concluded that Developer did not have sufficient control to owe a legal duty. (R. p. 10-11). This despite the fact that the chain of relationships linked Developer to the Park—that Developer selected the Board, which made upper-level decisions for Association; Association’s “employees and vendors carr[ied] out those decisions”; the Park “is one of the common elements owned by the many property owners that actually own all of the property that comprises” Association; and “[a]n injury occurred” at the Park due to the failure to maintain a reasonably safe premises. (R. p. 10-11).

The court of appeals compounded this error by affirming the grant of summary judgment without oral argument when the analysis of control is heavily fact dependent. Accordingly, this Court should grant the Petition for a Writ of Certiorari to correct the court of appeals’ erroneous conclusion that Developer did not owe a duty of care to patrons of the Park.

ARGUMENT

Did the trial court err in granting summary judgment on a question of fact involving whether a developer retained sufficient control of an association that was responsible for maintaining a community park to be liable in a premises liability lawsuit?

I. A genuine issue of material fact exists as to how much control Developer maintained over the Association or the Park, thereby precluding summary judgment.

The court of appeals erred in upholding the grant of summary judgment because a genuine issue of material fact existed as to the degree of control the Developer maintained over the Association or the Park. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Because it is abundantly clear that the Association controlled the common area for purposes of premises liability, the Developer could also be liable if it exerted sufficient control over the Association or the Park itself. Accordingly, the trial court’s conclusion that the Developer owed no legal duty is an error of law because whether the Developer owed a duty depended on the degree of control it exerted over the Association or the Park. The degree of control is a factually driven inquiry, and there are sufficient facts to survive summary judgment. Thus, this Court should grant Petitioner’s petition for a writ of certiorari.

Premises liability “depends on control, rather than ownership, of the premises.” *Dunbar v. Charleston & W. C. Ry. Co.*, 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (quoting 38 American Jurisprudence Negligence § 94). “One who controls the use of property has a duty of care not to harm others by its use,” while “one who has no control owes no duty.” *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Foc Lawshe, Ltd. P’ship v. Int’l Paper Co.*, 352 S.C. 408, 411, 574 S.E.2d 228, 229 (Ct. App. 2002) (acknowledging in a similar context that “control over its lands [is] a question of fact”). Thus, because the Association was responsible for maintaining the common areas, it clearly exerted sufficient control to owe a duty of care in the context of a premises liability case.

Logically, the next question concerns whether an entity that controls the Association may also be liable in premises liability. While the question of whether a developer-controlled

association may be liable in premises liability does not appear to have been addressed in this state, the legal analysis to answer this question is the same as in any premises liability case: the person or entity that “controls the use of property has a duty of care not to harm others by its use.” *Miller*, 329 S.C. at 314, 494 S.E.2d at 815. And whether Developer exerted sufficient control is inherently factual. *See, e.g., Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 221, 826 S.E.2d 285, 295 (2019) (acknowledging in certain circumstances, resolution of “unique factual questions [are] pertinent to the existence of a duty”); 57A Am Jur 2d Negligence § 75 (“Where the facts upon which the existence of a duty depends, are disputed, the factual dispute is for resolution by the jury[.]”).

Here, Developer had—and exercised, as its senior officers admitted—at least the usual amount of developer control. The evidence, viewed in the manner most favorable to Zetz, created a genuine issue of material fact as to the following chain: Developer, by selecting the Board members, controlled the upper-level decision-making for Association; Association carried out Developer’s decisions; the Park is a common element owned, controlled, and managed by the Developer-controlled Association; and an injury occurred at the Park, due to Developer’s negligence in managing Association’s affairs.

The Association’s manager, finance manager, and community-services manager all confirmed that Developer controlled the Association at the time of the accident in 2016. This was confirmed by the Developer as well. Indeed, Matt Sloan, the president of the Developer and the Association at the time of the accident, confirmed that Developer retained control because it “want[ed] to be able to control what is built and how it is managed.” (R. p. 1204, ll. 13-23). This control was more than just in theory, as Developer retained two of the Association’s board members. (R. p. 1177, ll. 25-p. 1178, ll. 1; p. 1156, ll. 21-p. 1157, ll. 6; p. 1093, ll. 6-24). This created a genuine issue of material fact as to whether Developer’s control of the Association

proximately caused Petitioner's injuries.

This level of control is analogous to a general manager at a store, whereby despite the fact that the general manager does not own the premises (the store does), the general manager may be liable based on controlling the premises. *See Dunbar*, 211 S.C. at 216, 44 S.E.2d at 317 (noting a party who operates a premises but is neither an owner nor a lessee may also have a duty of reasonable care with respect to an allegedly dangerous condition based on control of that premises); *see also Mobley v. Wal-Mart Stores, Inc.*, No. 2:09-cv-3019-DCN, 2010 U.S. Dist. LEXIS 10783, at *13 (D.S.C. Feb. 8, 2010) (noting a general manager of a store could be liable and therefore was not fraudulently joined for jurisdictional purposes because “‘by virtue of [her] position,’ defendant Rana has a ‘high level of control over the store’”); *Benjamin v. Wal-Mart Stores, Inc.*, 413 F. Supp. 2d 652, 655-56 (D.S.C. 2006) (interpreting South Carolina law and noting “[i]n considering whether an individual has exercised such control of the premises so as to impose a duty to reasonably inspect the premises, a court will generally consider the individual's power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property”).⁴

Further, the record demonstrates that Developer controlled the Association and the Park within the plain meaning of that term. According to Black's Law Dictionary, “control” is “[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.” *Control, Black's Law Dictionary* (11th ed. 2019). And the Uniform

⁴ The trial court seemed to focus on ownership rather than the legal requirement of control. The court stated, “The question is ownership. Ownership has a lot more to do with it than just control.” (R. p. 1238, ll. 12-13). This was error, as the test is not ownership, but control. *See Dunbar*, 211 S.C. at 216, 44 S.E.2d at 317 (“In fact, such liability depends upon control, rather than ownership, of the premises.”).

Common Interest Ownership Act’s (“the Uniform Act”) definition of an “[a]ffiliate of a declarant”— sheds additional light on policymakers’ view of the line between influence and control, explaining that an affiliate includes an entity “controlled by . . . a declarant” and that an entity “is controlled by a declarant” if the declarant “controls in any manner the election of a majority of the directors of the” entity, or where the declarant “directly or indirectly . . . owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the entity.” Unif. Common Interest Ownership Act § 1-103(1) (2021). Developer easily exceeded the 20% threshold and was contractually obligated by virtue of retaining majority control of the Association to maintain the Park in a reasonably safe condition. The court of appeals erred in affirming the trial court’s grant of summary judgment, which warrants this Court’s review.

II. This Court should grant certiorari to clarify whether principles of control in corporate law are relevant in ascertaining control in the context of premises liability.

More broadly, this Court has emphasized that developers may owe certain fiduciary duties to homeowners when it controls or has the right to control an association’s board. *See Adkins v. I’On Co.*, 439 S.C. 568, 585 n.11, 889 S.E.2d 537, 546 (2023) (noting that a developer owes fiduciary duties while in control of a homeowner’s association and that these duties can be extended if the developer retains veto authority and displays other facts demonstrating continued control); *Concerned Dunes W. Residents, Inc. v. Georgia- Pac. Corp.*, 349 S.C. 251, 260–61, 562 S.E.2d 633, 638–39 (2002) (noting developer has duty to transfer common areas in good repair or provide sufficient funds for repair). The court of appeals contended Petitioner conflated principles of corporate law and premises liability when discussing control and only cited cases in the corporate context. *See Zetz v. Daniel Island Co., Inc.*, et al, Op. No. 2024-UP-244 (Filed July 3, 2024). But the dearth of case law examining a developer’s potential liability in a premises liability

case underscores the importance to grant certiorari for the benefit of the bench and the bar. Of course, Petitioner acknowledges a difference between a breach of fiduciary duty claim and a negligence claim based on premises liability. But this distinction does not fundamentally change the analysis; rather, these cases demonstrate that a Developer who maintains control through positions on an association's board, may be liable based on the control they exert. And if the facts show that a developer has exerted sufficient control, then the fact that the entity is a developer rather than an owner of the premises is irrelevant. Stated differently, ordinary principles of premises liability mandate that “[o]ne who *controls* the use of property has a duty of care not to harm others by its use.” *See, e.g., Miller*, 329 S.C. at 314, 494 S.E.2d at 815 (emphasis added). This Court should grant certiorari to specifically clarify whether corporate principles are relevant in the context of premises liability, especially when a developer chooses to retain control of an association for an extended period of time.

Further, not only should this Court grant certiorari to examine the interplay between control under corporate law and premises liability, but even if the court limited its review to solely the premises liability context, there is a need to set forth what factors should be considered to determine whether an entity exhibits sufficient control so that trial courts do not improperly grant summary judgment on issues that present “unique factual questions [that are] pertinent to the existence of a duty.” *Wright*, 426 S.C. at 221, 826 S.E.2d at 295; 57A Am Jur 2d Negligence § 75. While federal courts have set forth factors to consider, it does not appear this Court has specifically established a framework to analyze the degree of control necessary for a duty of care to arise. *See Ellis v. Tall Ships Charleston, LLC*, 593 F. Supp. 3d 253, 263 (D.S.C. 2022) (noting that in determining control, “a court is to consider the individual's ‘power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property’”)

(quoting *Benjamin*, 413 F. Supp. 2d at 656).

Here, under the standard employed by federal courts in this state, Developer exerted sufficient control to be liable under a premises liability theory. Significantly, Developer retained control at the time of the accident and even at the time of Brumley’s deposition five years later.⁵ (R. p. 1034, ll. 3-7, 23 – p. 1035, ll. 2). Brumley admitted, “the developer absolutely maintains control until he transfers.” (R. p. 1035, ll. 15-16). Thus, under *Ellis*, Developer had sufficient control to give rise to a duty of care.

Moreover, if a developer can enjoy the benefits of control, it must also be subject to potential consequences when it fails to use that control to ensure the premises is maintained in a reasonably safe manner. *See generally Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603 n.13, 799 S.E.2d 912, 917 (2017) (noting that a party previously enjoyed the benefit of a decision and stating, “[a]s the old saying goes, what’s good for the goose is good for the gander”). Developer had years to relinquish control of the Association yet chose not to do so. That choice has legal ramifications.⁶

Finally, the court of appeals also determined that “the Association’s board conducted its business without input from Developer.” But even if the evidence only pointed to that conclusion, which Petitioner rejects, that does not support the grant of summary judgment. Developer had sufficient control over the Association by virtue of its appointed board members, so pointing to

⁵ Sloan admitted that the Developer intended to turn over control of the Daniel Island Town Association sometime in 2025. (R. p. 1167, ll. 14).

⁶ The degree of control in this case creates factual issues, reserved for a jury to decide, and does not open the floodgates for unending liability on developers. Once the developer turns over control to the association and does not retain the ability to exert control in the future, liability is extinguished. *See Adkins*, 439 S.C. at 585 n.11, 889 S.E.2d at 546. Therefore, this case does not represent a wholesale change in the law that would subject developers to continuous liability for years on end.

the Developer's apparent silence in using that control illustrates precisely why Developer may be liable. Developer's failure to use the power it had does not excuse its culpability; it reinforces it. *See generally Clyburn v. Sumter Cty. Sch. Dist. #17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) ("Negligence is the *failure* to exercise due care.") (emphasis added). To be sure, whether a jury accepts that Developer had sufficient control to render itself liable for Petitioner's injuries is an open question, but because the degree of control is heavily fact dependent and a genuine issue of material fact exists, it is a decision for the jury, not for the trial court to make at the summary judgment stage.

CONCLUSION

For the foregoing reasons, the court of appeals erred in affirming the trial court's decision to grant summary judgment to Developer. This Court should grant the Petition so that these factual issues can be considered, reverse the court of appeals' decision, and remand for trial.

Respectfully submitted,

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