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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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Unpublished Opinion No. 2024-UP-244 (S.C. Ct.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.

Reply in Support of Petition for a Writ of Certiorari

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TABLE OF CONTENTS

Table of Authorities iii

Argument in Reply 1

I. Whether a duty exists depends on factual questions for a jury to decide…..……1

II. Developer owes a duty based on its control of the Board and its direct control of the Park……..…….…3

Conclusion 5

TABLE OF AUTHORITIES

CASES

Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (D.S.C. 2006) ……4

Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3 (1997) ……..……1, 2

Dunbar v. Charleston & W. C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947) ……4

Ellis v. Tall Ships Charleston, LLC, 593 F. Supp. 3d 253 (D.S.C. 2022) ……...……3,4

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023) ……5

Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) ……..……2

Nesbitt v. Lewis, 335 S.C. 441, 517 S.E.2d 11 (Ct. App. 1999)…….……4

S.C. Dep't of Soc. Servs. v. Benjamin, 430 S.C. 235 (2020)……...…….1

Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006)……1, 2

Wright v. PRG Real Estate Mgmt., 426 S.C. 202, 826 S.E.2d 285 (2019) …….……..1

OTHER AUTHORITIES

57A Am Jur 2d Negligence § 75.....2

Reply Argument

Respondent wants the proverbial cake and to eat it too. On the one hand, it contends it can exercise control over a board whose responsibility is to maintain the common elements, including the Daniel Island Children's Park ("the Park"), and yet have absolute immunity from liability when it fails to provide a reasonably safe premises. This is not the law, and therefore, this Court should grant the Petition.[1]

I. Whether a duty exists depends on factual questions for a jury to decide.

As an initial matter, Petitioner acknowledges that Respondent is correct that whether a duty arises is a legal question; however, Respondent apparently fails to recognize that in some circumstances, the existence of a duty turns on factual questions that render summary judgment improper. *See Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3 (1997) ("In some circumstances, however, the question of whether a duty arises depends on the existence of particular facts. Where the existence or non-existence of a duty depends on facts, it is the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to the facts is reached."). A long line of cases from this Court only reinforces this principle. *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"); *Vaughan v. Town of Lyman*, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006) ("The question of whether such a duty arises in a given case may depend on the existence of particular facts.")

[1] Respondent contends the Rule 242(b) standard for granting a writ of certiorari is not met, but it is mistaken. The cases Respondent cite represent categorical rules where this Court will not entertain a petition for certiorari because the court of appeals has dismissed an appeal rather than decided an issue on the merits. *See, e.g., S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 237 (2020) ("[T]his Court will no longer entertain petitions for writs of certiorari when the court of appeals has dismissed an appeal after conducting a *Cauthen* review."); *Id.* at 237 n.1. Neither *Banjamin* nor the cases cited in footnote 1 therein have any bearing here.

(internal citation omitted); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (when determining whether an act is voluntarily undertaken, "the question whether such a duty arises in a given case may depend on the existence of particular facts" and "the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder"); *see also* 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[.]"). Thus, the general rule that the existence of a duty is solely for the court to decide is not applicable in every case and particularly inapplicable here, where factual questions clearly exist.

For example, in *Miller*, this Court reversed summary judgment when a factual question existed as to whether the defendant volunteered to monitor the water levels at Kendall Lake. *Miller*, 329 S.C. at 312-13, 494 S.E.2d at 814. The plaintiffs brought a tort action following injuries that resulted when a dam failed. Despite the only evidence in the record that supported imposing a duty being that the defendant's employee was listed on an emergency notification form and that an employee was present during a meeting where an emergency plan was prepared, the Court held that it was for the jury to determine whether the defendant voluntarily assumed a duty. *Id.* at 315, 494 S.E.2d at 815.

In *Vaughan*, the Court again reversed summary judgment because a factual question existed whether the defendant undertook a duty to maintain a town's sidewalks that were not owned by the defendant. 370 S.C. at 448, 635 S.E.2d at 637-38. While there was strong evidence that the defendant did not exercise control over the sidewalks, including deeds that showed the street was transferred to the county and photographs showing the street was part of the state highway system, this Court reversed the trial court's grant of summary judgment, stating,

The lower court's reliance on factual allegations of ownership is not determinative

> of whether [defendant] voluntarily undertook the duty to maintain the town's streets and sidewalks. Instead, the factual issues regarding whether the defendant did in fact voluntarily undertake the maintenance of the town's sidewalks, including Lawrence Street, is a mixed question of law and fact which should be resolved by the fact finder.

Id.

These cases demonstrate that when the question of duty depends on the resolution of factual questions, the matter is not appropriate for determination at the summary judgment stage. Just as in the case of whether a defendant voluntarily assumes a duty of care, the issue here—whether a developer that voluntarily continues to retain control of a board years after construction is completed and whose responsibility is to maintain a reasonably safe premises—presents factual issues for a jury to decide. Accordingly, Respondent is wrong that Petitioner "improperly conflates" the roles of the judge and jury. (Return at 7). Rather, Petitioner's assertion that the trial court erred in granting summary judgment is amply supported by the law, and in arguing otherwise, Respondent ignores the factual issues which exist in this case.

II. Developer owes a duty based on its control of the Board and its direct control of the Park.

Respondent is wrong that Petitioner's claims are only based on the degree of control that the Daniel Island Company ("Developer") maintained over the Association's Board. Indeed, Respondent conveniently ignores multiple aspects of Petitioner's Petition. First, the Question Presented clearly encompasses both theories: that Developer retained sufficient control over the association *or* the Park to be liable in a premises liability lawsuit. *See* Petition at 1. The first argument also clearly includes both theories of liability. *See* Petition at 6. Further, the only corporate entity named at the Park is Developer, whose name is listed on a plaque. (R. p. 50).

Additionally, the reason why there is not a "smoking gun" demonstrating control of the Park, which Petitioner is certainly not obligated to prove at the summary judgment stage or even

at trial, is because Respondent failed to exercise the control it possessed. In other words, Respondent cannot complain of a lack of evidence of control when it is the very absence of using the control and authority it had to maintain a reasonably safe premises that caused Petitioner's debilitating injuries.

There is also sufficient evidence to survive summary judgment regarding the degree of control of the Association. While this Court has not established a framework for determining what level of control is required to impose a duty of care on a defendant, a recent federal district court has explained:

> Similarly, under South Carolina law, a person or entity who operates an establishment but is neither an owner nor a lessee may nonetheless have a duty to exercise reasonable care to maintain safe premises. *Dunbar v. Charleston & W.C. Ry. Co.*, 211 S.C. 209, 44 S.E.2d 314, 317 (S.C. 1947). Liability in such a situation depends upon control of the premises, not necessarily ownership. *See Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813, 815 (S.C. 1997); *Nesbitt v. Lewis*, 335 S.C. 441, 517 S.E.2d 11, 14 (S.C. Ct. App. 1999). When deciding whether an individual has exercised such control of the premises so as to impose a duty to reasonably inspect the premises, 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." *Benjamin v. Wal-Mart Stores, Inc*., 413 F. Supp. 2d 652, 656 (D.S.C. 2006) (applying South Carolina law).

Ellis v. Tall Ships Charleston, LLC, 593 F. Supp. 3d 253, 263 (D.S.C. 2022). Whether this Court should explicitly adopt the factors from *Benjamin* provides another reason for this Court to grant certiorari because the evidence shows that Developer had the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property." *Id.* Indeed, as discussed in the Petition, 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. (R. p. 1177, ll. 25-p. 1178, ll. 1; p. 1156, ll. 21-p. 1157, ll. 6; p. 1093, ll. 6-24). This was confirmed by the Developer as well. 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).

Sloan also admitted that Developer had not transferred control of the Board to the residents at the time of the accident in 2016. (R. p. 379, ll. 14-18). The finance manager for the Daniel Island Property Association reiterated that Developer retained control of the Board in 2016 and also stated, "the [B]oard was basically officers of Danieal Island Company." (R. p. 400, ll. 8-9). Because Developer had the power and authority to exercise control over the premises, the fact that Developer chose not to utilize that power and authority does not excuse Developer's liability; rather, it reinforces it. Accordingly, because a genuine issue of material fact exists, the court of appeals erred in affirming the trial court's grant of summary judgment. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023).

CONCLUSION

For the foregoing reasons and those set forth in the Petition, 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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