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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellate Case No. 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,..... Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas Plankers.....Respondents,

Wild Wing Plantation Owners' Association, Inc.,..... Nominal Defendant.

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ARGUMENT

These claims emanate from clear breaches of fiduciary duties by the Declarants, stemming from their failure to comply with the express terms of the Wild Wing Regime Documents with respect to their Declarant Funding Obligations, and their actions to amend those regime documents to prolong deadlines related to the Declarant Funding Obligations to reduce the Declarant's Funding Obligations.[1] Those claims were abundantly supported by the testimony of both Barry Dykes and Appellants' expert witness, Roy Strickland, as well as the documents and evidence in the case, all of which must be taken in the light most favorable to Appellants at the summary judgment stage. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). That testimony established that the Declarants failed to comply with the Wild Wing Regime Documents and utilize GAAP to determine the Declarant Funding Obligations, which resulted in the Declarants annually underfunding the Wild Wing POA. The evidence also showed that the Declarants twice modified the Wild Wing Regime Documents in favor of the Declarants, at the direct expense to the Wild Wing POA. By granting summary judgment in the face of the above referenced evidence, the Circuit Court disregarded this Court's *express instruction,* enunciated by the Court of Appeals in *Walbeck v. I'On Co.,* 827 S.E.2d 348, 360 (Ct. App. 2019), that circuit courts are obligated to:

> "[S]crutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence."

Rather than zealously scrutinizing the self-dealing transactions by the Declarant, the Circuit Court turned its head and ignored the clear evidence put before it. Since the final briefing in this case, the South Carolina Supreme Court issued its decision in *Walbeck v. I'On Co.*, 439 S.C.

[1] This is set forth in full in Appellants Final Brief, beginning at Page 4.

568, 889 S.E.2d 537 (2023). In that case, the Supreme Court held that the evidence offered at the Circuit Court supported plaintiff's claims that the declarant's in that case had breached their fiduciary duties and their claim for amalgamation of entities under the single business enterprise theory enunciated in *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018). The significance of the Supreme Court's ruling on this appeal is that in its decision, the Supreme Court recognized an expanded evidentiary framework for both of the referenced claims, which directly benefits Appellants. First, the Supreme Court reaffirmed much of the law enunciated by this Court in its decisions. Writing for the Supreme Court, Justice Hearn said:

> "Developers owe fiduciary duties to homeowners and homeowners' associations regarding common areas. *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Specifically, common areas must be conveyed in good repair and if they are not, sufficient maintenance funds must be provided in tandem with the property conveyance. *Id*. In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, this Court likened this duty to those present in a business relationship, holding developers owe homeowners a duty, "much like that owed by promoters of a corporation to investors." 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002). Importantly, in subdivisions with common areas that are subject to covenants, the responsibilities outlined in the covenants control. *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006)."

Walbeck at 585, 546.

> "More broadly, "it is [] well settled" that those in a fiduciary relationship with another party must not act to "make use of that relationship to benefit his own personal interests." *Lesesne v. Lesesne*, 307 S.C. 67, 69, 413 S.E.2d 847, 848 (Ct. App. 1991). Conduct that violates this mandate includes self-dealing, fraud, unconscionable conduct, misrepresentations, etc. See *Bennett v. Estate of King*, 436 S.C. 614, 633, 875 S.E.2d 46, 55 (2022) (Kittredge, J. dissenting). This makes sense because the fiduciary relationship imposes a "special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." Id. at 633, 875 S.E.2d at 56.

Walbeck at 586, 546.

The duties of a declarant flow from the regime documents as "the responsibilities outlined in the covenants control." *See Walbeck* at 586, 546 (citing, *Cedar Cove Homeowners Ass'n, Inc. v.*

DiPietro, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006)) (Notably, the duties do not arise from a convenient reading of those documents when it suits a declarant.) Importantly, the Supreme Court also held that those contractual obligations are intertwined with, and cannot be separated from, the Declarants' fiduciary obligations;

> "as the two relationships between Developers and the HOA—contractual and fiduciary—are inextricably intertwined. Under this analysis, the contractual duty to convey was overlaid by a fiduciary relationship, which means that while the non-conveyance was certainly a breach of contract, the subsequent self-dealing by Developers through the secret sale of the property to a third party constituted a breach of the Developers' fiduciary duties to the HOA."
>
> *Walbeck* at 587, 547.

As made clear in Appellants' briefing, the evidence and testimony in this case is that the Declarants failed to comply with Generally Accepted Accounting Principles ("GAAP") in calculating their funding obligations, which resulted in an almost $900,000.00 shortfall in Declarant contributions to the Wild Wing POA. Given the testimony of Roy Strickland and Barry Dykes to that precise effect, for the purposes of summary judgment, the Circuit Court was required to accept those facts *as true*. The Circuit Court's failure to accept those facts as true, and in a light most favorable to them, is a reversible error.

In *Walbeck*, the Supreme Court explained that conduct beyond the failure to adhere to contractual obligations could also support a breach of fiduciary duty claim. The Supreme Court considered all of the evidence related to the conveyance of the property at issue, including the different positions taken by the Declarants over the years and evidence that supported a finding that the Declarants misrepresented their intentions, vacillated on their obligations and willfully disregarded their property conveyance obligations, all as part of failing to do what they had promised to do. All of those factors, the Supreme Court noted, were relevant to and supported the breach of fiduciary verdict;

> Instead, there was sufficient evidence of bad faith, promises made and broken, and self-dealing presented in addition to the breach of contract, to warrant submission of the fiduciary claim to the jury. This nefarious conduct includes, but is not limited to, the secretive sale to Russo, the false representation regarding the property's rightful ownership, and the easement granted to third parties when the property had been promised to the HOA. This kind of conduct, by those in a fiduciary relationship, has clearly led to breaches in other cases and, though springing from contract in this case, constitutes breaches of fiduciary duty…Accordingly, we reverse the court of appeals and reinstate the jury verdict as to this cause of action.
>
> *Walbeck* at 587 547,

As noted above, here the Declarants not only failed to use GAAP to accurately calculate the Declarant Funding Obligations, they also -*twice*- amended the Wild Wing Regime Documents to reduce their funding obligations to the direct detriment of the Wild Wing POA, despite Dykes informing them on January 23, 2017 that they were failing to properly calculate the Declarant Funding Obligations. (R. pp. 1889). Their admitted reason for that was for the continued viability of the Declarants, but without any material or calculable benefit to the Wild Wing POA. The Declarant argues that the amendments were supported by a homeowner vote but the Declarants completely controlled that vote, which is *precisely* the heavy-handed, self-dealing by a Declarant this Court said demanded zealous scrutiny by the courts and is precisely what the Circuit Court in this case refused to do.[2] In addition, Barbara Eisenhardt offered evidence that, for the first homeowner vote on the issue, the reason for the amendment given by the Declarant came with an admonition that without it, the development would falter and the owners, members of Wild Wing, would be left to fund the development without a Declarant. (R. pp. 1773-1778). Given the Supreme Court's *Walbeck* decision, a jury should be allowed to hear that testimony, and see the relevant issue, to determine whether the Declarants' breach their fiduciary duties to the Wild Wing

[2] Declarant controlled enough voting power to overcome any objection by the homeowners.

POA. In addition, while the Circuit Court rendered the Appellants' amalgamation claim moot, it also held that there was no evidence to support a claim against Mr. Teal or others.

In *Walbeck*, Justice Hearn distinguished *Stoneledge*, (*Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC,* 435 S.C. 109, 866 S.E.2d 542 (2021)) in which the Supreme Court had noted that courts should be reluctant to invade the protections afforded by incorporation:

> While it is true that courts should be hesitant to invade the corporate form, here there is more than enough evidence that the creation of various entities furthered Developers' abilities to refrain from doing that which they repeatedly told the HOA and the residents they would do—turn over the disputed amenities to the HOA. As this Court stated in *Pertuis*, "the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like."
>
> *Walbeck* at 592-93, 550 (internal citations omitted).
>
> Thus, under our de novo review of this issue, the evidence shows that not only were the various entities intertwined and acting 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* at 594, 550, citing *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 280-81.

The Supreme Court decision in *Walbeck* makes very clear that the evidence in this case would support Appellants' single business enterprise theory. That evidence, which the Circuit Court, and this Court, must take as true, included 1) willfully improper accounting that benefitted the Declarants in the amount of almost $900,000.00; 2) failing to correct that accounting and utilize GAAP even after Dykes brought the error to their attention in 2017 (R. pp. 1889); 3) amending the Wild Wing Regime Documents, which directly benefitted the Declarants, to the detriment of the Wild Wing POA, in both 2011 and 2015; 4) utilizing fear tactics as part of the amendment process; 5) and continual efforts to change corporate forms and names (all owned and controlled by the same individuals and development companies), for no consideration and to no benefit to the Wild Wing POA.

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