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S.C. SUPREME COURT

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 Number 2025-002300

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively on Behalf of the Wild Wing Plantation Property Owners' Association, Inc., ... Appellants/Petitioners,

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.

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Argument in Reply

I. The Circuit Court ruled on and preserved Petitioners' equitable tolling arguments.

Petitioners have not adopted any inconsistent position here. The trial court's orders granting summary judgment specifically state that "[a]ll filed materials, briefs, memoranda, and supporting documents were incorporated as part of the Summary Judgment Motions record with all matters therein *preserved for review*." (R. 12) (emphasis added) and further that "[t]his Court has also reviewed Plaintiffs' remaining arguments and in light of the foregoing this Court finds these arguments unpersuasive and unnecessary to address." (R. 24) Respondents' contention that the Court did not rule on the issue of equitable tolling because it was not explicitly in the order is a fallacy; by expressly incorporating the court's file and granting summary judgment based upon Respondents' statute of limitations defense, the Court rejected Petitioners' equitable tolling argument.

The Individual Respondents' reliance on *Gleaton* is misguided. In *Gleaton*, the court used language that indicated it had not considered the issue. *Gleaton v. Orangeburg Cnty.*, 440 S.C. 350, 359, 891 S.E.2d 390, 395 (Ct. App. 2023) ("The final order contained the observation that '[t]he [County's] efforts were focused on collecting taxes for which [it] *may* be immune from liability.' . . . The word 'may' suggests the master believed the County might be immune . . . but this was not a ruling."). Here, the circuit court issued a definitive ruling after considering and rejecting Petitioners' equitable tolling arguments. (R. 5, 24). In this case, the opposite is true.

As to the theory of adverse domination, Respondents incorrectly assert that this was raised for the first time on appellate review. By its very definition, adverse domination is the doctrinal label for equitable tolling. *Cap. Inv. Funding, LLC v. Field*, No. CIV.A. 6:12-3401-MGL, 2014 WL 130468, at *8 (D.S.C. Jan. 14, 2014). Since the summary judgment stage of this case, Petitioners

have consistently raised equitable tolling in support of their arguments and Respondents responded to the same (R. 1548-49, 1782-84, 1851-52, 1858, 1885, 1887). A Rule 59(e) Motion was not required. *Walsh* is clear—a motion is not necessary where the court's decision is clear. *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006). It became clear here when summary judgment was granted on the grounds of an applicable time bar, Petitioners' tolling argument was rejected. The court's oral and written statements unambiguously demonstrated that it considered all arguments before ruling, which included the equitable tolling argument.

II. Equitable tolling applies to extend the statute of limitations because the Declarants controlled the Board of Directors for the Association, preventing the Association from filing suit.

Magnolia North directly controls here. The issue here is whether the Association's claims were tolled while the Declarants controlled the board. The Wild Wing Association, like the Association in *Magnolia North*, would not and could not sue itself while the Declarant-appointed directors controlled the board. 397 S.C. 348. 372, 725 S.E.2d 112, 125 (Ct. App. 2012) ("We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself."). Respondents assert that Petitioners could have filed this action regardless of whether the board was Declarant-controlled. (Individual Resps. Return, 11-12; Declarant Resps. Return 11). When the Petitioners brought this action, they were required to comply with Rule 23 first. Any demand made by Petitioners while the Declarant-appointed directors controlled the board would have been futile. In fact, Petitioner Dykes made such a demand on the Declarant-controlled board, to which he never received a response. (R. 73).

Because an entity cannot be expected to sue itself, *Magnolia North* requires that an Association's ability to enforce its rights be tolled while the Declarants control the Association's board. 397 S.C. at 372, 725 S.E.2d at 125. The assertion by Individual Respondents that the

Petitioners could have filed this lawsuit at any time misstates the applicable law and burden. Under *Magnolia North*, the prevention from filing suit here is inherent in the Declarant-control of the Board. 397 S.C. at 372, 725 S.E.2d at 125 (the wrongdoer is not going to sue itself). Moreover, the futility of Petitioner Dykes' demand (to which the Board never responded) demonstrates why equitable tolling applies in this case. Respondents' position would require Petitioners to make demands years earlier which would have been equally futile because the Declarants controlled the Board and, ultimately, the Board's response to such a demand.

Individual Respondents' attempt to distinguish *Magnolia North* based on the fact it presents a construction defect claim is irrelevant here. *Magnolia North* establishes an equitable principle for cases where there are claims against controlling parties. The Court of Appeals' decision would allow a declarant to control the Association until the applicable statute of limitations ran. This flies in the face of justice.

III. Summary judgment was improper as there exists genuine issues of material fact regarding when the applicable statute of limitations began to run.

Respondents contend that because cross-motions for summary judgment were filed that the issues are purely legal. (*See* Individual Resps. Return, 6; Declarant Resps. Return 9, 14). Cross-motions for summary judgment does not mean that disputed questions of fact should be resolved against the moving party nor does it mean that genuine disputes do not exist. Here, genuine issues exist regarding the independence, or lack thereof, of the Board from the Declarants, overall Declarant control, funding calculations, and the knowledge of Petitioners. Petitioners presented ample evidence that creates a genuine issue of fact as to these topics and provided such examples in their Petition. (S*ee e.g.,* Pet. 10). It is an objective question as to when the injured party discovered facts giving rise to their claim, and that is the case here. *Walbeck*, 439 S.C. at 581, 889 S.E.2d at 543, *reh'g denied* (July 26, 2023). Notwithstanding such a discovery,

Petitioners' equitable tolling argument is reincorporated here as it bears on when time actually began to run. In determining when time runs, it's important to note that there are some defendants who are not directors and as such, do not get the benefit of a two-year statute of limitation—explicitly drafted to apply to a "director's failure…"—under any circumstance. There is no good faith basis for any argument to the contrary.

Furthermore, Declarant Respondents contend that Petitioner Dykes had constructive notice of the 2011 Amendment because it was recorded in his chain of title when he bought his home. (Declarant Resps. Return 13). Constructive notice of the existence of a document of record is not constructive notice of a claim. *See Walbeck*, 439 S.C. at 568, 889 S.E.2d at 544 (the discovery rule looks at when the homeowners "should have, by the exercise of reasonable diligence, discovered the facts giving rise to their *claims*" (emphasis added)). A chain of title does not outright mean the buyer has constructive notice of a claim regarding improper amendments to covenants or a declarant violating its funding obligations to the Association. Respondents also argue that Petitioners had access to financial information. (Individual Resps. Return, 14-15; Declarant Resps. Return 12-13). In the same vein as the prior analysis, such access does not mean that Petitioners had knowledge of a claim. *Maher v. Tietex Corp.* does not mean that the statute begins to run the moment someone could discover a claim with unlimited investigation, it means that the statute begins running when facts would "put a person of *common knowledge and experience* on notice" of a claim. 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (emphasis added). These issues precisely demonstrate that summary judgment was improper.

IV. The Respondents are not shielded from liability under the Business Judgment Rule or S.C. Code Ann. § 33-31-830 because the record is replete with evidence of self-dealing.

Petitioner seeks review of the full Court of Appeals' decision. Respondents' waiver arguments have no merit, and the two-issue rule has no application here. A petition is not merits brief and does not require a petitioner to re- argue every issue. Petitioners seek review of the entire Court of Appeals opinion, which treated the Business Judgment Rule and § 33-31-830 as a unified analysis. The Court of Appeals held that the Business Judgment Rule is "codified in section 33-31-830" and that "the analysis is essentially the same." *Dykes v. Wild Wing Co., LLC*, at n. 13.

Walbeck controls here. It holds that a developer who controls a homeowners' association owes fiduciary duties to the homeowners. 439 S.C. 569, 585-86, 889 S.E.2d 546 (2023). Here, Declarants extended their own funding option through the superior voting rights and exclusive appointment of Individual Respondents as Board members. (R. 1747-49). Further, Individual Respondents assert that the Board relied upon "outside" accountants and the Association's property manager. (Individual Resps. Return 17, 19). Such reliance on purported "outside" experts does not insulate any of the Respondents, Individual or Declarant, from liability. These experts were hired, paid, and overseen by a Declarant-controlled Board. Reliance on the Business Judgment Rule or S.C. Code Ann. § 33-31-830 to circumvent liability does not sanitize the self-dealing that occurred in this case.

The Respondents' reliance on *Goddard* does not compel a different result here. (*See* Individual Resps. Return, 16-17; Declarant Resps. Return 17-18). *Goddard* protects good-faith business decisions while *Walbeck* removes those protections when the controlling entity exploits control for personal benefit. *Walbeck* thus prohibits self-dealing by controlling parties. These cases are complementary, not contradictory. The record demonstrates a genuine issue of material fact

with respect to self-dealing and violations of the Respondents' fiduciary duties based upon the acts undertaken by the Declarants and Individual Respondents.

Respondents mischaracterize this case by treating Declarants and Board members as separate entities to obscure the self-dealing. Individual Respondents argue the Court of Appeals correctly found Petitioners improperly blended Declarants and Board members. (Individual Resps. Return 15). It is the Respondents who conflate these roles. Declarants exercised *complete* control through their exclusive appointment of Board members, through superior voting rights to pass any amendment without any non-Declarant vote, and through signing both sides of the Amendments at issue to extend their own financial benefit. Ralph R. Teal, Jr., for example, signed the 2011 Amendment as president of the Association and on behalf of the Declarant. (R. 289). He executed a governing document on both sides of the transaction. Tom Plankers, a Declarant-appointed Board member, and Nick Dou, a member of the same Declarant, executed the 2016 Amendment. (R. 1749). Again, we see evidence of a Declarant executing a governing document on both sides of the transaction. This is textbook self-dealing.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth previously in the Petition for Writ of Certiorari, Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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