

5
ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-4111
APPELLATE CASE NO.: 2014-001799

RECEIVED

JUN 22 2015

SC Court of Appeals

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby Respondents.

vs.

Danville Business Advisors, LLC and Marion D. Turbeville. Defendants,

Of whom Marion D. Turbeville is Appellant.

SUPPLEMENTAL RECORD ON APPEAL

Robert G. Rikard, Esquire
Charles E. Usry, Esquire
Rikard & Protopapas, LLC
P.O. Box 5640
Columbia, SC 29250-5640
Attorneys for Appellant

Thomas F. Dougall, Esquire
Robert M. Peele, III, Esquire
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, SC 29045
Attorneys for Appellant

Henry P. Wall, Esquire
Benjamin C. Bruner, Esquire
Bruner Powell Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
Attorneys for Respondents

Matthew Hydrick Stabler, Esquire

INDEX

Trial Transcript pg. 192	2
Trial Transcript pg. 279	3
Trial Transcript pg. 316	4
Trial Transcript pg. 317	5
Trial Transcript pg. 318	6
Trial Transcript pg. 319	7

JAMES BIGBY CROSS BY MR. DOUGALL

- 1 A. It was his partner, who I never once had any contact
2 with whatsoever during the course of the project.
- 3 Q. So Mr. Turbeville himself individually never even
4 signed this contract, did he?
- 5 A. Appears not.
- 6 Q. Okay. When Danville Business Advisors, through one of
7 its partners, signed this contract, what did they put
8 under the signature line? Doesn't that say as
9 development manager and disbursement agent?
- 10 A. Yes.
- 11 Q. It doesn't say as construction manager, does it?
- 12 A. This does not.
- 13 Q. It doesn't say as architect, does it?
- 14 A. No.
- 15 Q. It doesn't say as general contractor, does it?
- 16 A. No.
- 17 Q. It's just as development manager and disbursement
18 agent, correct?
- 19 A. That's correct.
- 20 Q. Let's go to Exhibit 14 that you just discussed?
- 21 A. Okay.
- 22 Q. Down towards the bottom of that list, you've got net OL
23 June, July, correct?
- 24 A. That's correct?
- 25 Q. What does net OL June, July mean?

BENJAMIN KELLY DIRECT BY MR. PEELE

- 1 Q. All right. Were you a party to this lease?
- 2 A. I am.
- 3 Q. All right. What is 15.15 mean to you?
- 4 A. That, there's leasing agents involved in this
- 5 transaction and they will be paid per a separate
- 6 agreement within NAI Avant.
- 7 Q. And who were those leasing commissions split with in
- 8 this transaction?
- 9 A. Danville Business Advisors and NAI Avant, LLC.
- 10 Q. And who is your employer?
- 11 A. NAI Avant, LLC.
- 12 Q. Okay. Is this normal in commercial real estate
- 13 transactions?
- 14 A. Yes.
- 15 Q. All right. Based upon your personal knowledge, do you
- 16 have any idea why Mr. Bigby is claiming he did not know
- 17 about the real estate commissions?
- 18 A. Ask that question again.
- 19 Q. Based upon what you know, your personal knowledge, do
- 20 you have any idea why Mr. Bigby is claiming he does not
- 21 know about the real estate commissions?
- 22 A. No.
- 23 Q. Do you know -- all right. Let's go to page two of this
- 24 lease. What is annual rent through lease year one
- 25 through five?

1 anything, so.

2 MR. DOUGALL: I think we've tried to e-mail it.

3 MR. BRUNER: I thought I would have the ability to
4 e-mail and I do not, but I can, certainly, get it to Your
5 Honor or to your law clerk before 4:30.

6 THE COURT: I need to get it before 4:30,
7 including -- and if there's a difference as to what's in a
8 verdict form, I need to receive proposal on both of those
9 and I will go from there.

10 MR. BRUNER: I think we've already agreed on the
11 verdict form and tried to e-mail it, it just hasn't come
12 through yet, but that's -- of course, that will be subject
13 to whatever rulings Your Honor makes. We can get that to
14 you as well.

15 THE COURT: Okay. All right. Then I'll see you
16 all at 9:30 tomorrow morning. Please make sure that all the
17 exhibits are here.

18 (The following proceedings were
19 concluded for May 28, 2014.)

20 (The following proceedings were held on
21 May 29, 2014.)

22 THE COURT: Good morning. I believe what I
23 indicated yesterday was that I would send the unfair trade
24 practices and the breach of contract to the jury as it
25 relates to Danville as well as the breach of fiduciary duty.

1 I've had the opportunity to review case law
2 relating to whether the Defendant, Marion Turbeville, those
3 claims, at least, as it relates to the breach of fiduciary
4 duty and the unfair trade practices could be submitted to
5 the jury for his personal liability. And I've read those
6 cases. And based upon the information that I have read
7 arising out of BPS, Incorporated v. Worthy, and -- I find
8 that if there's evidence that the Defendant individually
9 directed or participated in or engaged in conduct that would
10 create a tort, whether it's unfair trade practices or breach
11 of fiduciary duty, then he can be held individually liable.

12 I understand that there was some discussion as to
13 liability under the limited liability corporate statutes and
14 there's been -- there was some discussion about the Jade
15 Street cases. I noticed that in the 2012 case, the -- the
16 Supreme Court made the decision that a member was not
17 shielded under the limited liability act. In the rehearing,
18 which is a 2013 case, the Supreme Court specifically did not
19 address that issue and went so far as to state that although
20 the case poses a novel question of whether the uniform
21 limited liability act shields an LLC member from personal
22 liability from his own torts, we save that discussion for
23 another day. And that specific case found specifically that
24 there was no duty on the part of an individual and thus, did
25 not even reach the question as to whether or not there was

1 personal liability under the act.

2 I don't find that either case, either the 2012 or
3 the 2013 case is an additional sustaining ground for making
4 such a ruling. Despite the fact that he may be a member
5 under the limited liability company, I think the case law
6 is, certainly, clear as it relates to the breach of
7 fiduciary duty. And as to the unfair trade practices that a
8 person who is an officer or director -- and I understand
9 that the case law says corporation, but its officers,
10 directors can be liable for their own specific acts under
11 the unfair trade practices and under the -- and for breach
12 of fiduciary duty. And I find that, certainly, would apply
13 in this particular circumstance.

14 There appears to still be some question and some
15 discussion as to whether or not there would be occasion for
16 specific liability under the LLC the LLC provisions. I did
17 look at Judge Cooper's order in which he found basis to
18 follow the rationale that was set forth by the Supreme Court
19 in the 2012 Jade Street case, finding that it was not the
20 legislative intent to exclude or shield an individual from
21 personal liability for torts that were specifically
22 committed even in light of the statutory frame work. And so
23 I'm leaving that as the law of the case and as it relates to
24 his order in the motion to dismiss the claim. I'm not going
25 to be inconsistent in going forward at this particular

1 point. I think that there's evidence in the record for
2 which the jury could make the decision as to whether or not
3 the Defendant acted -- committed unfair trade practices
4 and/or committed breach of fiduciary duty, so I'm going to
5 allow it to go to the jury.

6 As it relates to the negligence claims as to both,
7 the corporation and as to Mr. Turbeville individually, I
8 received the information that you sent to me this morning.
9 I had the opportunity to read the cases. Frankly, the cases
10 did not change my opinion from what I reached -- the
11 conclusion I reached last night, but I did look at them and
12 read them again. I do find that the economic loss rule
13 would apply in this particular case. The duties that are
14 alleged to be -- by the Defendants in this case arise purely
15 out of the contract. In other words, in absence of the
16 contract, there would be no duties. And for that reason, I
17 find that, therefore, there can be no negligence.

18 I understand that the Plaintiff is asserting a
19 claim that because of the special relationship between the
20 parties that there should be some duties. And I think
21 that -- and I'm assuming that the Plaintiffs are trying to
22 rely upon the fact that the expert's testimony that they
23 were engaging in conduct that was a construction management
24 for which they needed a license. I don't think that the
25 special relationship as the Plaintiff asserts that's created

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 22 2015
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
* Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

CIVIL ACTION NO.: 2011-CP-40-4111
APPELLATE CASE NO.: 2014-001799

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby.....Respondents.

vs.

Danville Business Advisors, LLC and Marion D. Turbeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

PROOF OF SERVICE

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that on the 22nd day of June 2015, I served the **Supplemental Record on Appeal** upon counsel of record by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

Robert G. Rikard, Esq.
Rikard & Protopapas, LLC
Post Office Box 5640
Columbia, SC 29250
Attorney for Appellant



Robert M. Peele, III
DOUGALL & COLLINS
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29405
803.865.8858

June 22, 2015

Columbia, South Carolina

5

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

RECEIVED

JUN 22 2015

SC Court of Appeals

CIVIL ACTION NO.: 2011-CP-40-4111
APPELLATE CASE NO.: 2014-001799

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby.....Respondents.

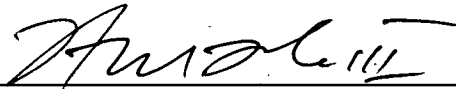
vs.

Danville Business Advisors, LLC and Marion D. Turbeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

CERTIFICATION OF COUNSEL

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that the Supplemental Record on Appeal contains all material proposed to be included by all parties to this action and not any other material.



Robert M. Peele, III
DOUGALL & COLLINS
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29405
803.865.8858

June 22, 2015

Columbia, South Carolina

5

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

JUN 22 2015

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

CIVIL ACTION NO.: 2011-CP-40-4111
APPELLATE CASE NO.: 2014-001799

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby.....Respondents.

vs.

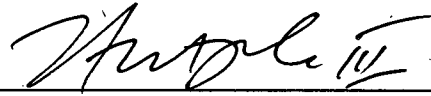
Danville Business Advisors, LLC and Marion D. Turbeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

PROOF OF SERVICE

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that on the 22nd day of June 2015, I served the **Supplemental Record on Appeal** upon counsel of record by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

Henry P. Wall, Esq.
Benjamin C. Bruner, Esq.
Bruner Powell Wall & Mullins, LLC
Post Office Box 61110
Columbia, SC 29260-1110
Attorney for Respondents



Robert M. Peele, III.
DOUGALL & COLLINS
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29405
803.865.8858

June 22, 2015

Columbia, South Carolina