THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellant Case No. 2016-000553

Matthew L. Dawson and Kateri Dawson, Plaintiffs,
Of whom Matthew L. Dawson is the Appellant,
v.
Ravenel Associates, Inc. d/b/a Ravenel Associates, Defendant.
Mathew L. Dawson, Plaintiff,
v.
Village Green Homeowners Association, Defendant,
Of whom Village Green Homeowners Association is the Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS BASED ON DECISION OF DUTY TO CARE FOR BREACH OF CONFIDENTIALITY?

2. DID THE LOWER COURT ERR IN FILING AN ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENTS REGARDING THE BUSINESS JUDGMENT RULE WHICH WAS IN OPPOSITION OF THE CIRCUIT DECISION RENDERED?

3. DID THE CIRCUIT COURT ERR IN GRANTING SUMMARY JUDGMENT DECISION TO RESPONDENTS SINCE NO MOTION WAS SUBMITTED FOR A SUMMARY JUDGMENT HEARING?

STATEMENT OF THE CASE

On January 25, 2013, Appellant commenced his action with the filing of a summons and complaint for personal injuries seeking actual and punitive damages due to the negligence of the Respondents for issuing a censure and memo of counseling while Appellant was serving on the Board of Directors for the Respondents. Appellant characterized his actions as one in "tort-personal injury" as reflected on the civil action coversheet filed January 25, 2013.

Nearly two months later, Respondents served their answer to summons and complaint on March 21, 2013.

On May 27, 2014 a motion to consolidate two cases for discovery purposes only. Lower Court case numbers 2013-CP-10-457 and 2014-CP-10-2319. Motion order for case consolidation for only discovery purposes was granted September 19, 2014.

Respondents submitted a motion for summary judgment for the two causes of actions 1) defamation and 2) negligence on November 26, 2014 and filed on December 5, 2014.

Appellant filed a motion for continuance on January 22, 2015 due to the fact that discovery had not yet been completed.

Respondents filed a memo in support of motion for summary judgment for the two causes of actions 1) defamation and 2) negligence on January 22, 2015.

Filed on February 6, 2015 summary judgment was granted for only the defamation cause of action and the denying of the Appellant's motion for continuance. No other motion for summary judgment had been filed by Respondents.

However, counsel for Respondents were present for the summary judgment hearing on

September 29, 2015 regarding the motion for summary judgment filed by counsel for Ravenel & Associates, case number 2014-CP-10-2319 on August 31, 2015. During the September 29, 2015 summary judgment hearing Judge R. Markley Dennis, Jr. granted summary judgment in part. A decision was rendered stating no duty to care by Ravenel & Associates, the Property Manager, and the Respondents for breach of confidentiality.

A Notice and Motion for Reconsideration was filed on October 29, 2015 by Appellant. The hearing for the Motion for reconsideration was February 18, 2016 and was denied.

Filed on January 19, 2016, was an Order Granting Respondents Motion for Summary Judgment regarding the business judgment rule which was unrelated to the summary judgment hearing decision on September 29, 2015.

Appellant served his appeal on March 10, 2016 and it was filed on March 16, 2016. Appellant appeals the decision of duty to care for breach of confidentiality by the court since the summary and complaint by Appellant was not contract law theory concerning a breach of confidentiality. In addition, the appeal addresses the incorrectly filed summary judgment order filed.

ARGUMENTS

I. BECAUSE THE DUTY TO CARE FOR BREACH OF CONFIDENTIALITY WAS NOT THE BASIS OF THE APPELLANT'S SUMMONS AND COMPLAINT, THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT.

Appellant filed summons and complaint on January 25, 2013. The summons and complaint contained two causes of actions 1) defamation and 2) negligence. The negligence cause of action was not in regards to contract law with a breach of confidentiality. The summons was in regards to negligence as it relates to Respondent's authority to censure or counsel the Appellant, careless and reckless handling of Resident's allegations, Respondent scope of authority in handling the allegations, no basis in for publicly humiliating the Appellant, no basis for bringing adverse action against the Appellant, Respondent's did not follow proper procedure in handling the matter, and that the Respondent did not act as a reasonable and prudent person would have done under the circumstances then and there prevailing.

There was no contract law theory and breach of confidentiality issue in the summons and complaint for Circuit Court case number 2013-CP-10-457. The Circuit Court motion summary hearing on September 29, 2015 was only regarding case number 2014-CP-10-2319 for which the basis of the case was breach of confidentiality. The Circuit Court erred in rendering a decision in regards to the Appellant's Circuit Court case 2013-CP-10-457 for duty to care for breach of confidentiality.

II. BECAUSE THE SUMMARY JUDGMENT RULE MUST BE SET WHEN THE BOARD ACTS OUTSIDE OF THEIR AUTHORITY, LACKS GOOD FAITH, LACKS COMPETENCE, FAIR DUE PROCESS, AND FAILURE TO EXERCISE DUE CARE IN DISCHARGING THEIR RESPONSIBILITIES IN ACCORDANCE WITH THE BYLAWS, THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT

An order granting summary judgment to Respondent's was filed on January 19, 2016. Although the order is considered to be filed in err, Appellant is compelled to respond to the order. Respondents are not entitled to use the business judgment rule as it does not meet all its elements as noted in *Fisher v Shipyard Vill Council of Co-Owners, Inc,* 409 SC 164, 180-81; 760 SE2d 121, 129-30 (2014).

The Board of Directors were to act within their authority (intra vires), act in good faith, act without fraud, act without corrupt motives, act with competence, and act with honesty. As the argument below presents, the Respondents did not meet any of the business judgment rule elements and therefore the business judgment rule should be set aside.

The summons and complaint was filed on January 25, 2013 with two causes of actions. The summons and complaint filed by Appellant consisted of a cause of action for defamation and a cause of action for negligence. The Respondents acted outside of their authority, did not perform their duty to investigate accusations, and failed to follow the governing document bylaws for due process in issuing a censure and memo of counseling.

The censure and memo of counseling received at a special meeting on April 24, 2012 by the Respondents was unwarranted and outside the Respondents scope of authority

(Affidavit-Matthew Dawson, Exhibit 1 & Special Meeting Minutes-April, 24, 2012). There was no basis for the disciplinary action as there was no wrongdoing by Appellant, as the VGHOA Board member, Treasurer, and/or ARB Chairman, as stated by the VGHOA Board Interim President, Shawn Toole, in his April 17, 2012 email (Affidavit-Matthew Dawson, Exhibit 2 & Deposition-Shawn Toole, Pg 6, Transcript pg 24, lines 1-7).

No evidence exists to support an investigation was conducted by the Respondents. The Respondents failed their duty to investigate the accusations from the residents Dave Malara and Virginia Adrihan residing at 3286 Middleburry Lane (Residents). No investigation was conducted by the Respondents as indicated by the Residents depositions. Residents state they only provided their list of accusations, provided no supporting documentation for their accusations, and were never contacted by the Respondents for any information (Deposition-David Malara, Pg 2, Transcript pg 8, line 11-25, Pg 28, Pg 43, Transcript pg 169, line 12-15, Deposition-Virginia Adrihan, Pg 4, Transcript pg 15, line 9-18, & Deposition-Virginia Adrihan, Pg 8, Transcript pg 32, line 1-13). No meetings were scheduled or conducted by the Respondents with the Residents or the Appellant's spouse who was also named in the list of accusations submitted by the Residents (Exhibit 5 – Residents list of accusations). In addition, no discovery documents from the Respondents have been provided that substantiates any possible claims to an investigation into the accusations or would support a legitimate business decision for any disciplinary action by the Respondents (Deposition-Shawn Toole-Pg 2, Transcript pg 7, lines 18-25, Transcript pg 8, lines 1-3). Although VGHOA Board Member Nadine Evans in her deposition page 3, transcript page 11, lines 12-25, she states that she provided Respondents Attorneys all her documents, however,

Respondent's Attorneys did not provide those documents in the discovery process. In fact the Respondents Attorneys have not provided any discovery documents.

There were only five official meetings beginning when Residents presented their unsupported accusations to the censure meeting. No meeting discussed a censure and/or memo of counseling as Respondents Attorneys claimed in the January 19, 2016 Order Granting Summary Judgment. The first meeting held on March 19, 2012 and was a Regular scheduled meeting where the Residents presented their unsupported accusations.

The second meeting was a Special meeting held on March 26, 2013. The meeting was scheduled to hear from me regarding the accusations by the Residents. However, during the meeting I was told not to respond to the Residents' accusations. The VGHOA Board reviewed the accusations by the Residents and during the meeting agreed they were in a personal in nature between neighbors and not within the VGHOA Board's scope of authority to be involved (ultra vires). VGHOA Board Member Bob Borregard was the first to state it was a personal issue and outside of the VGHOA Board's scope of authority. He later resigned stating in an email his reason was that he was not on the VGHOA Board to resolve personal issues of residents and it was serving the community (Affidavit-Matthew Dawson, Exhibit 26). Another Board Member, Laura Deaton felt I should resign as the ARB Chairman to appease Dave Malara to avoid a legal battle (Affidavit-Matthew Dawson, Exhibit 27). Board Member Nadine Evans was already aware of Dave Malara's behavior. According to Nadine Evans' emails she had known of other community disturbances created by Dave Malara. Nadine Evans stated that she too had been a target of Dave Malara and knew of others in the community that had personal attacks levied on

them as well (Affidavit-Matthew Dawson, Exhibits 28 & 29). Appellant also believes he was a target of a personal attack by the Residents.

The third meeting was a Special meeting held on April 2, 2012. Appellant was unable to attend due to work commitments. In my absence, I submitted a statement to be read by the VGHOA Board during the meeting (Affidavit-Matthew Dawson, Exhibit 31). The meeting was scheduled to review the letter submitted by the Residents containing accusations with a request for my removal from the VGHOA Board and as the ARB Chairman. There were no discussions of any disciplinary actions by the VGHOA Board and there were no motions to either remove Appellant as a VGHOA Board member and/or as the ARB Chairman as written in the meeting minutes. Appellant resigned June 2012 and while on the Board for only six months of service in 2012, he was to be awarded a certificate of appreciation at the 2012 Annual Meeting from Nadine Evans (Affidavit-Matthew Dawson, Exhibit 32). VGHOA Board Member Nadine Evans states in another email that she wanted to "make things right" by awarding me the certificate of appreciation (Affidavit-Matthew Dawson, Exhibit 33). Important note is that Nadine Evans was also one of the VGHOA Boards members at the censure meeting April 24, 2012.

The fourth meeting was a Regular meeting held on April 16, 2012. The meeting only conducted regular meeting business and discussed no disciplinary actions such as a censure or memo of counseling.

The fifth meeting was a Special meeting held April 24, 2012. This meeting was not to discuss a censure and memo of counseling, but rather give a censure and memo of counseling.

The stated purpose of the meeting did not follow the Bylaws of the VGHOA Association as it relates to using the Roberts Rules of Order-revised in conducting meetings. The special meeting was stated as "the proposed censure of HOA Board Member and ARB Chairman from all Homeowner Association business directly pertaining to 3286 Middlebury Lane from this point forward." An expert parliamentarian with over thirty years of experience, Liz Guthridge, reviewed the VGHOA Bylaws, Special Meeting minutes, emails and other correspondence, and Roberts Rules of Order-revised and provided an affidavit (Affidavit-Liz Guthridge). The affidavit supports the fact that the Respondents were incompetent, acted improperly, did not respect a fellow board member's confidentiality, and did not follow the Bylaws in using the Roberts Rules of Order-revised, and misused the censure and memo of counseling.

The Respondents did not bring any charges and hold a trial before the assembly or a committee. Respondents acted in bad faith and dishonesty when they did not notify Appellant of any wrongdoing so that Appellant could prepare and present his case to the Board. Appellant was not provided any due process. There was no notification of a censure and/or memo of counseling until the time and day of the April 24, 2012 meeting. The Respondents acted in bad faith and incompetency when not handling the censure meeting as an Executive Session rather than a Special meeting so to maintain a level of confidentiality (Affidavit-Liz Guthridge, pg 4). To this day the minutes of the censure meeting are still posted on the Respondents website.

The complete process for the April 24, 2012 censure meeting was inappropriate which is supported by the affidavit from an expert Parliamentarian. The Respondents attempted to amend the original motion for censure, but failed to present an appropriate amendment motion. The

original motion had been voted on which made it closed. The original motion was a censure that included no mention of a memo. Any amendment to the original motion needed to be germane to the original motion and not include additional wording or have substituted words (Affidavit-Matthew Dawson, Exhibits 23 & 24). An amendment regarding a censure memo or memo of counseling documents were inappropriate for which to alter an already voted motion (Affidavit-Matthew Dawson, Exhibit 24). Therefore, according to the meeting minutes, it was concluded that a censure was imposed along with a memo of counseling, both of which were never supported with any reason(s) or substantiation. The special meeting voting is also misrepresented because the accused has no voting rights. In conclusion, the meeting in its entirety was inappropriate. The censure was not "FOR" a wrongful act that was committed, but was a censure refraining "FROM" committing a wrongful act.

The Board issued Appellant a censure and memo of counseling based purely on the written accusations from the Residents. As uncovered in accuser resident Dave Malara's deposition under oath, he has a willingness and intention for a disregard of the truth. Three instances from his deposition clearly indentified intent to commit perjury. The first was when asked whether he had any litigation in the State of South Carolina and the second was when asked if he was in litigation with Virginia Adrihan. He clearly states "NO" two separate times to litigation in South Carolina and also "NO" to litigation with Virginia Adrihan (Deposition-David Malara, Pg 6). However, the Charleston County Government website shows numerous cases of litigation with a pending litigation with Virginia Adrihan (Affidavit-Matthew Dawson, Exhibits 9 – 11). The third intent was when asked about being a State Constable. Dave Malara stated he was not a

State Constable because it was a volunteer job that didn't pay anything (Deposition-David Malara, Pg 22, Transcript pg 87). The truth was that Dave Malara violated three sections of South Carolina Law Enforcement Division (SLED) policies and procedures and was required by SLED to surrender his credentials and commission immediately to them (Affidavit-Matthew Dawson, Exhibit 13).

The disciplinary proceedings that took place on April 24, 2012 were unwarranted and without basis and conducted outside the parliamentary procedure guidelines of the Roberts Rules of Order-revised. According to the VGHOA Board By-Laws the VGHOA Board is to conduct parliamentary procedures using Roberts Rules of Order-revised (Affidavit-Matthew Dawson, Exhibit 14). However, Roberts Rules of Order were neglected in the conducting of the meeting. The President at the time of the censure was Shawn Toole and he admits that the Roberts Rules of Order were followed "loosely" and admitted to a particular and important process that was not followed (Deposition-Shawn Toole, Pg 9, Transcript pg 34, line 4). Shawn Toole also noted in his deposition that this whole censure process was not important to him (Deposition-Shawn Toole, Pg 7, Transcript pg 25, lines 18-22). It is unsettling to know that the Respondents did not have any case file with documentation regarding the censure and that the President of the VGHOA Board did not find it important to him. This was very important to the Appellant and he would have expected the VGHOA Board to act professionally and responsibly to conduct an investigation of the Residents accusations. Not following Roberts Rules of Order-revised and acting unprofessionally and negligently was reflected in the disciplinary meeting, as well, as the entire process. Appellant's research of Roberts Rules of Order-revised uncovered that they were not

followed at all.

First, the disciplinary meeting should not have been a "special meeting," but rather an "executive session" according to Roberts Rules of Order in order to maintain confidentially of any and all details (Affidavit-Matthew Dawson, Exhibit 17). A censure is a punishment for an act that has already been committed (Affidavit-Matthew Dawson, Exhibits 18 & 19). The censure given at the special meeting was not within the guidelines of a censure in accordance with Roberts Rules of Order-revised. The censure was egregiously inappropriate as it was for an act not yet committed. There were also no charges presented and no investigation conducted as required (Affidavit-Matthew Dawson, Exhibits 20 & 21). Incompetency by the Respondents was reflected in the deposition of VGHOA Board Member, Nadine Evans. She did not know the meaning of the word "censure" and that it was something to "satisfy" the Residents complaint (Deposition-Nadine Evans, Pg 9, Transcript pg 34, lines 8-25).

On April 17, 2012, Shawn Toole sent an email to all the VGHOA Board members responding to an email from Bob Cherry from Ravenel Associates that a letter that was sent to the Residents Attorney. The letter, dated April 10, 2012 was never mentioned in any meeting minutes and was an unauthorized letter sent to the Residents by the Property Manager, Bob Cherry of Ravenel Associates. The Property Manager, Bob Cherry during his deposition claimed that Shawn Toole was the approver of the April 10, 2012 letter (Deposition-Bob Cherry, Pg 8, Transcript pg 29 & 30). However, Shawn Toole notes in his deposition that the VGHOA President Evan Thorton was the approver of the April 10, 2012 letter (Deposition-Shawn Toole, Pg 6, Transcript pg 22, lines 5-9). The letter stated that a censure would be levied against

Appellant (Affidavit-Matthew Dawson, Exhibit 34). As stated in Shawn Toole's email, it was determined by the VGHOA Board that "Matt did not mis-use his position as ARB Chairman and/or Board Member in this matter. (it is simply a neighbor dispute)." (Affidavit-Matthew Dawson, Exhibit 2). The letter is believed to have been an unauthorized letter sent to the Residents Attorney and that the April 10, 2012 unauthorized letter motivated the Respondents to impose a censure to avoid conflict between the VGHOA Board and the Residents. VGHOA Board Member, Laura Deaton, already indicated earlier on March 29, 2012 a willingness to avoid confrontation with the Residents, in particular Dave Malara. She stated that Appellant should resign his ARB Chairman's position so to appease him (Affidavit-Matthew Dawson, Exhibit 27). It would indicate by the fact there was no contact with the Residents by the VGHOA Board and no investigation conducted by the Respondents that they also wanted to appease the Residents by imposing Appellant with a censure as the unauthorized letter by Bob Cherry of Ravenel Associates had indicated even though as a VGHOA Board it had been determined there was no mis-use of my position as either a ARB Chairman or Board Member as the interim President had stated (Affidavit-Matthew Dawson, Exhibit 2).

The VGHOA Board acted without due care and good faith in determining whether a censure and a memo of counseling were warranted. An accused deserves the right to fair due process as outlined in the Roberts Rules of Order-revised (Affidavit-Matthew Dawson, Exhibit 20). As noted, by the depositions given by the Residents, no contact was made by the Respondents to the Residents nor were any documents supporting the Residents' accusations were provided to the Respondents (Deposition-David Malara, Pg 2, Transcript pg 8, line 11-25, Pg 28,

Pg 43, Transcript pg 169, line 12-15). However, within one week after Shawn Toole's email, a censure and memo of counseling were imposed without any notice of the charge which was required (Affidavit-Matthew Dawson, Exhibit 21 & Affidavit-Liz Guthridge, Pg 4). It is believed that the April 10, 2012 unauthorized letter stating a censure would be imposed, created a situation that compelled the Respondents to respond to avoid further issues with the Residents. Between the period of April 17, 2012 and April 24, 2012, there were no VGHOA Board meetings scheduled to address the letters. Without conducting an investigation regarding the accusations and/or scheduling any meetings to discuss the letter and/or any aspect of the accusations was completely irresponsible, showed incompetence, and lacked a duty of care to Appellant which clearly demonstrated that the Respondents acted without proper business judgment and outside of their scope of authority to respond to any personal issues of a resident. The Respondents was negligent in handling the situation and failed to provide reasonable care and due process to Appellant as a member of the VGHOA Board. Before Appellant resigned, he held the positions of Treasurer, Secretary, and ARB Chairman and the actions by the VGHOA Board presented a lack of respect for the volunteer work I had been providing the VGHOA Board and the Village Green community. The entire emotional incident had not only affected me with undue stress, but also for Appellant's spouse. The negligent, careless, willful, wanton and reckless behavior by the Respondents and Bob Cherry of Ravenel Associates created a humiliating and embarrassing situation as the unwarranted censure meeting minutes have now been posted on the internet for over four years.

III. BECAUSE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT HAD ALREADY BEEN FILED AND ANSWERED BEFORE THE CIRCUIT FOR THE APPELLANT'S TWO CAUSES OF ACTIONS WITH A CIRCUIT COURT SUMMARY JUDGMENT FOR THE ONE CAUSE OF DEFAMATION PRECLUDES CIRCUIT COURT CASE DISMISSAL SINCE NO OTHER MOTION WAS FILED.

Respondent filed a motion for summary judgment on December 5, 2014 for the two causes of actions of 1) defamation and 2) negligence in Appellant's summons and complaint filed January 25, 2013. Appellant filed a motion for continuance on January 22, 2015 since discovery had not yet been completed. In addition to the filing of the motion for summary judgment filed on December 5, 2014, Respondent also filed memo in support of motion for summary judgment for the two causes of action 1) defamation and 2) negligence on January 22, 2015. The Circuit Court answered with only a granting of the defamation cause of action and with a denial of the motion of continuance. The order granting only the cause of action for defamation was filed February 6, 2015. No other motion had been filed by Respondent.

However, Respondent's Attorney was present during a summary judgment hearing for case number 2014-CP-10-2319 for which the particulars did not involve Respondent. The Attorneys for case number 2014-CP-10-2319 filed a motion for summary judgment on August 31, 2015 and a memo of support for its motion for summary judgment on September 26, 2015. The motion for summary judgment and memo in support for summary judgment did not include Respondent as the case was between Appellant, Appellant's spouse, and Ravenel Associates. Case number 2013-CP-10-457 and case number 2014-CP-10-2319 were consolidated for discovery purposes only.

CONCLUSION

It is, therefore, respectfully submitted that the Circuit Court erred and for the reasons stated, this Court should reverse the summary judgment of the Circuit Court.

Respectfully submitted,

April 18, 2016

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