

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 REPLY BRIEF OF APPELLANT

Matthew L. Dawson
3290 Middleburry Lane
Charleston, South Carolina 29414
(843) 822-4338

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MAY 31 2016

SC Court of Appeals

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ARGUMENT

- I. Respondents' argument that the business judgment rule should not be set aside is not supported and their noted events and statements are inaccurate.

Respondent is 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 Village Green Homeowners Association (VGHOA) 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. Respondents did not meet any of the business judgment rule elements and therefore the business judgment rule should be set aside.

Respondent 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).

Respondent stated that Appellant requested the April 24, 2012 special meeting. This is an inaccurate statement since Appellant was never notified of such a meeting until receiving a phone call at his place of business from President Shawn Toole in the afternoon of April 24,

2012. Appellant was never aware of any wrongdoing as he was never charged and never expected a censure and memo of counseling would be given, so how could he request such a meeting. In fact, the VGHOA By-laws do not permit a single Board Member to request a special meeting. The By-laws specifically state that special meetings can only be called by the President, Secretary or majority of the members of the Board of Directors, or upon written request of the members entitled to one-fourth of the votes appurtenant to Class A Lots (VGHOA By-laws, Article V, page 4). Appellant was neither the Secretary at the time of the meeting or part of any Board of Directors majority to request a special meeting. In addition, no documents were produced by Respondent to support such a claim that Appellant requested the meeting. It was only after the April 24, 2012 special meeting that the Appellant requested a special meeting from President Shawn Toole, but request denied.

Appellant was NEVER required to attend training/educational seminars. The only seminar Appellant willingly attended was a Homeowners Association governing documents seminar before the April 16, 2012 regular meeting that ALL Board Members attended.

Respondent has used the December 9, 2011 profanity-laced email to Resident Dave Malara out-of-context. This email was not in the possession of the Respondent until Appellant provided it during the discovery process. The Respondent presented in their initial brief Appellants reading of the email during his deposition. However, they did not include the Resident Dave Malara's deposition response to several questions regarding the email. When Dave Malara was presented with the email during his deposition, he was asked if he was upset by it. He stated "No" and said he laughed when he received it. He also stated that his feelings

were not hurt. After reading a portion of the email, he was asked again whether his feelings were hurt and he responded again "No" and thought it was funny. He also stated that he was use to that kind of language and further noted that there was nothing offensive there (David Malara, Pg 23, Transcript pg 90-92). When asked another time during the deposition about whether the email bothered him, he stated

it did not bother him and that it was funny (David Malara, Pg 43, Transcript pg 169, lines 18-24)

Respondent does not mention that on December 10, 2011 the day after Appellant wrote the email, Dave Malara and Appellant shook hands, hugged, and later that evening socialized at a mutual friend's Christmas party (Deposition-Matt Dawson – Transcript pg 79, lines 6-22 and Transcript pg 83, lines 19-25 and Transcript pg 84, lines 1-7). Appellant and Dave Malara also rode together and sat beside each other at the January 2012 VGHOA Annual Meeting. Although the November 2011 prior events instigated by Ravenel Associates caused the neighborly relationship to decline, we still had a cordial relationship.

Contacting Residents directly via any communication method was common. It was also common for Board Members to hold Board positions and Chair positions since there were very few Board Members. The ARB Chair and ARB Co-Chair, Nadine Evans on numerous occasions discussed ARB issues with Residents via personal contact and electronically. On March 16, 2012 as the acting Architectural Review Board (ARB) Chairman volunteering because no other Board Member wanted to be the ARB Chair and subsequently voted in as the ARB Chair by fellow Board Members, Appellant sent Resident Dave Malara a text message (Deposition-Matt Dawson – Transcript pg 258, lines 23-24 and Transcript pg 259, lines 2-3). Before any

modification to a residence, an ARB form must be filed. ARB forms are sent to ARB Chairman and since Appellant did not receive an ARB form for the installation of cameras from the Residents at 3286 Middlebury Lane as was the normal process, he kindly texted the Resident Dave Malara. Appellant asked the Resident to "Please" submit an ARB form, identified himself, and "thanked" him for his cooperation. There was only a policy in place addressing the process flow for submitting an ARB Form, not for any communication with Residents (VGHOA ARB Guidelines – 4/5/2009 - page 7). According to the ARB Guidelines it specifically states that lack of any written policy(s), the ARB Committee or the members have NO services restricted by the VGHOA Board (VGHOA ARB Guidelines – 4/5/2009 - page 4).

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 Middlebury Lane (Residents). No investigation was conducted by the Respondent as indicated by the Residents depositions. Residents stated they only provided the VGHOA Board their list of accusations, provided no supporting documentation for their accusations, and were never contacted by any VGHOA Board Member 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). Resident Dave Malara stated in his deposition that the only contact he had with Shawn Toole was the evening he and partner Resident Virginia Adrihan shared their accusations to the VGHOA Board and present guests during the regular scheduled Board Meeting on March 19, 2012. He further stated he did not

know the Board Members President Shawn Toole, Heather McKelvey, or Nadine Evans who were the VGHOA Board Members present at the April 24, 2012 special meeting (David Malara, Pg 2, Transcript pg 109 - 110, Pg 28). Respondent is claiming they interacted with the Residents and received information other than the Residents list of accusations. However, no documentation has been provided by either the Respondent or the Residents.

No meetings were scheduled or conducted by the Respondent 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 Respondent 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 Respondent (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 Respondent's Attorneys all her documents, however, Respondent's Attorneys did not provide those documents in the discovery process. In fact, the Respondent's 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, 2012. 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 personal in nature between neighbors and not within the VGHOA Board's scope of authority to be involved (ultra vires). As the March 26, 2012 special meeting minutes reflect, there was NO Executive Session. In addition, the Respondent has not provided any notes or other documents that would support their claim of a how the VGHOA Board was to resolve any issues. Respondent only provided an excerpt from the deposition of Shawn Toole where he stated he did not remember any specifics and he "thinks" Appellant shared information. For a President of an organization to state he received emails then not save them when litigation is imminent because being on the Board of Directors was not important to HIM is present self-interest behavior (Deposition-Shawn Toole Pg 7, Transcript pg 25). He was the President of the VGHOA and yet he saved NO documentation and generated NO case file to protect the interests of the VGHOA when knowing litigation was imminent from the Residents Dave Malara and Virginia Adrihan and/or Appellant. He did not save documentation nor did he request that other Board Members save and protect documentation. No notes and/or supporting documentation reflects incompetency, lack of due care, dishonesty, and a lack of due diligence by the Respondent.

President Shawn Toole later stated in his deposition a statement that contradicts his earlier statement regarding his receiving of emails. Other than the list of the Residents accusations he received nothing additional and further confirms his email statement stating he felt in was just a neighbor dispute (Deposition-Shawn Toole, Pg 7, Transcript pg 28, lines 21-25

and Pg 8, Transcript pg 29, lines 1-7)

However, when VGHOA President Shawn Toole was presented during his deposition with the email he wrote on April 17, 2012 stating that the VGHOA Board determined that Appellant did not misuse his position as ARB Chairman and/or Board Member and that the Resident's dispute was personal he confirmed the email and the decision by the Board Members (Deposition-Shawn Toole-Pgs 6-7, Transcript pgs 24-26, Affidavit-Matthew Dawson, Exhibit 2). He stated that prior to April 17, 2012, there was a meeting that ALL Board Members determined that Appellant DID NOT misuse his position as an ARB Chairman and/or Board Member. President Shawn Toole's April 17, 2012 email clearly reflects his and other Board Members knowledge that any facts and circumstances were considered and a decision was final. So, what happened in the six days prior to the April 24, 2012 Special Meeting, which should have been an Executive Session for confidentiality, purposes that brought the VGHOA Board to a new and different determination? A determination that issued a censure that was not proper in its form as it was for an event that had not yet taken place and a vague memo of counseling both as stated by an expert Parliamentarian with over thirty years of experience (Affidavit-Liz Guthridge). 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, did not follow the By-laws in using the Roberts Rules of Order-revised, and misused the censure and memo of counseling.

Appellant did not understand why he was censured and what was going through the

minds of the Board Members during the April 24, 2012 meeting. Appellant was asked a series of questions regarding the Board Members thoughts and minds. Appellant answered the question “You understand why they censured you, in their minds, why they did what they did, correct?” Appellant responded with “I don’t exactly know what’s going through their minds, but I understand I was censured, and that’s their belief.” (Deposition-Matt Dawson – Transcript pg 430, lines 9-14). The next question was “That’s their belief. And you understood, at that meeting and sitting here today, why they did what they did. I know you don’t agree with it, but you understand why they censured you, slash, counseled you?” Appellant responded “It’s more than just don’t agree with. I don’t believe it carried any weight.” (Deposition-Matt Dawson – Transcript pg 430, lines 15-21).

March 16, 2012 Appellant also reported Resident Dave Malara to the Charleston Police Department as well as to the South Carolina Law Enforcement Division (SLED). Resident’s erratic behavior with threats of arrest for which he admitted to resulted in the prompt surrender of his badge and commission (Affidavit-Matthew Dawson, Exhibit 13).

Finally, Appellant did not submit Affidavit of Myles I. Glick, AIA on September 2, 2015 as he is not an expert Parliamentarian. Appellant also did not submit a Memorandum in Support of its Motion for Summary Judgment on September 24, 2015.

CONCLUSION

This Reply Brief brings to the surface numerous inaccuracies presented in the Respondent's Initial Brief. The noted inaccuracies emphasize Respondent's lack of support for a Business Judgment Rule claim. Appellant has prepared a supported case. Unlike Respondent, Appellant provided discovery documents and deposition statements that have demonstrated that the VGHOA Board is not entitled to the Business Judgment Rule. Therefore, the Business Judgment Rule should be set aside and the lower court's decision reversed so that a jury may hear and decide the case.

May 25, 2016

Respectfully submitted,



Matthew L. Dawson
3290 Middlebury Lane
Charleston, South Carolina 29414
(843) 822-4338

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PROOF OF SERVICE

I certify that I have served one (1) copy each of the Appellant Initial Reply Brief and Designation of Matter by depositing a copy of it in the United States Mail, postage prepaid, on May 25, 2016, addressed to their attorneys of record, Douglas W. Mackelcan, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401 and Kevin W. Mims, 50 Immigration Street, Suite 200, Charleston, South Carolina 29403.

May 25, 2016



Matthew L. Dawson
3290 Middleburry Lane
Charleston, South Carolina 29414
(843) 822-4338
Appellant

Matthew L. Dawson
3290 Middlebury Lane
Charleston, SC 29414
843.822.4338

May 25, 2016

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The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
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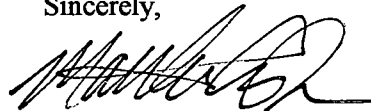
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Appellate Case No. 2016-000553

Dear Ms. Kitchings:

I have enclosed one original of Appellant's Initial Reply Brief and of the Designation of Matter along with Proof of Service to be filed.

Sincerely,



Matthew L. Dawson

CC:

Douglas W. Mackelcan, Esquire
Kevin W. Mims, Esquire

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