THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-001123
Case No. 2008-CP-23-0231

Garry Hoyt,

Appellant,

v.

CollaborativeMed, LLC and
Richard L. Grounsell,

Respondents.

Final Brief of Appellant

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2. Whether the Circuit Court erred in failing to find that Respondent Grounsell owed Appellant a fiduciary duty as an incorporator of a corporation.
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II. STATEMENT OF THE CASE

On March 26, 2008, Appellant filed this action seeking to declare a March 28, 2006 stock transfer from GlucoTec, Inc., by Respondent Richard L. Grounsell to Respondent CollaborativeMed, LLC,[1] void. Appellant contended that as a stockholder in GlucoTec, the stock transfer voted on at a May 18, 2006 meeting of stockholders was invalid because Respondent Grounsell failed to provide Appellant notice of the meeting of shareholders as required by the corporation by-laws and South Carolina law. On August 23, 2012, Appellant filed a Motion for Partial Summary Judgment. Following continuances at the request of Respondents of the hearing on the motion, the case was scheduled for a non-jury trial on September 30, 2013 before the Honorable W. Jeffrey Young.

[1] Respondent Grounsell was an organizer and majority member of CollaborativeMed, LLC.

At trial, the Court heard arguments on Appellant's Motion for Summary Judgment and deferred ruling until after trial. R. p. at 24. Following a three-day trial, the Honorable W. Jeffrey Young issued an Order on July 29, 2014, ruling in favor of Respondents. R. p. at 1. That Order failed to address Appellant's Motion for Summary Judgment and failed to address Appellant's first and primary cause of action for breach of fiduciary duty. Appellant timely filed a Motion to Alter or Amend and for New Trial pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on August 6, 2014. R. p. at 455. The Court denied that motion on May 5, 2015, finally addressing Appellant's breach of fiduciary duty claims, but again failing to address Appellant's Motion for Summary Judgment. R . p. at 12. Appellant timely filed a Notice of Appeal on May 22, 2015.

III. STATEMENT OF THE FACTS

This case involves the corporate formation of GlucoTec, Inc., a corporation initiated to market the Glucommander. Glucommander is a software program to regulate IV insulin delivery to control glucose. It was developed by R. Dennis Steed, MD ("Dr. Steed") and Paul C. Davidson, MD ("Dr. Davidson") in 1984, with small revisions to the programming in 1985 and 1986, and 1990. Dr. Steed programmed the Glucommander for manual IV insulin drip formulas to control blood glucose. Dr. Steed left the program with Dr. Davidson and Dr. Bruce Bode, for research. Starting in 1985, Dr. Bode and Dr. Davidson began using the Glucommander routinely for hospitalizes hyperglycemic patients while these patients were hospitalized. In 2005, Dr. Steed, Dr. Davidson and Dr. Bode published their Glucommander data based on research conducted from 1985 thru 1998. R. p. at 27-29.

Appellant's Motion for Summary Judgment established that in May 2006, Respondent Grounsell informed Dr. Bode and Garry Hoyt that each (Dr. Bode, Garry Hoyt and Defendant

Grounsell) would receive 250,000 founders' shares in GlucoTec, Inc. In order to allow the employees to receive stock in GlucoTec, Dr. Bode, Appellant, and Respondent Grounsell agreed to change the ownership agreement and become one-fourth shareholders. In addition to these founders' shares, employees of GlucoTec also received shares with Hank Durschlag receiving 60,000 shares, Robert Booth receiving 100,000 shares, Anthony Ethridge receiving 50,000 shares and Defendant Grounsell's two sons each receiving 50,000 shares. R. p. at 344.

Contrary to the shareholders' agreement to each be one-third owners of GlucoTec, on or about March 24, 2006, Defendant Grounsell caused to be transferred 18,129,066 shares in GlucoTec to Defendant CollaborativeMed, a South Carolina limited liability company controlled by Respondent Grounsell and his family. R. p. 351. While this transfer occurred in March, 2006, it was not ratified by the stockholders until a special meeting on May 18, 2006. At the time of this special shareholders' meeting, Respondent Grounsell was the president and sole director of GlucoTec.[2] R. p. at 353. This transaction was voted on at a shareholders meeting on May 18, 2006. The shareholders' meeting was invalid because neither Appellant Hoyt nor Dr. Bruce Bode received written notice of the shareholder meeting that took place on May 18, 2006. The bylaws, however, require written notice of a shareholders' meeting be provided. R. p. at 365. Trefor Thomas, a former executive of GlucoTec examined the books and records of GlucoTec and found no evidence of a written notice of the meeting. R. p. at 365; R. p. at 383. Defendant Grounsell confirmed that he did not have any record of written notice. R. p. at 365; R. pp. 357-362, 364. Specifically, Defendant Grounsell testified, "I don't recall personally any U.S. Mail being sent to anybody at that time. We were only seven or eight people." R. p. at 365; R. p. 364. Finally, both Plaintiff and Dr. Bode confirmed that they did not receive written notice

[2] Defendant Grounsell did not abstain from voting on this interested director transaction. Rather, he stepped out of the meeting and directed Hank Durshlag to vote his shares. R. p. at 361.

of the May 18, 2006 meeting. R. p. at 365; R. p. at 388; R. p. at 392. Moreover, Plaintiff Hoyt was not given an opportunity to purchase additional shares to prevent dilution of his ownership interest. In opposition, Respondent Grounsell testified by affidavit that his administrative assistant, Lori LaPoint emailed Appellant regarding the meeting. R. p. at 400.

The trial provided essentially the same testimony regarding the formation of Glucotec with the exception that Respondent Grounsell changed his testimony regarding providing notice by email or telephone following Lori LaPoint's testimony that she did not provide notice of the May 2006 meetings.

Dr. Bode and Appellant Hoyt testified that following several meetings, Dr. Bode, Appellant Garry Hoyt and Respondent Richard Grounsell agreed to form GlucoTec for marketing of the Glucommander in hospitals nationwide and agreed to share ownership in the company in equal one-third shares. R . pp. 31, 66. Respondent Grounsell caused to be filed the articles of incorporation for a new South Carolina Corporation, GlucoTec, Inc., on or about March 28, 2006. R. p. at 230. Respondent Grounsell identified Dr. Bruce Bode and Garry Hoyt, and a number of employees as founding shareholders. R. pp. 121-122.

According to the testimony of both Dr. Bode and Appellant Hoyt, in May 2006, Respondent Grounsell informed Dr. Bode and Garry Hoyt that each (Dr. Bode, Garry Hoyt and Respondent Grounsell) would receive 250,000 founders' shares in GlucoTec, Inc. In order to allow the employees to receive stock in GlucoTec, Dr. Bode, Appellant, and Respondent Grounsell agreed to change the ownership agreement and become one-fourth shareholders. In addition to these founders' shares, employees of GlucoTec also received shares with Hank Durschlag receiving 60,000 shares, Robert Booth receiving 100,000 shares, Anthony Ethridge receiving 50,000 shares and Respondent Grounsell's two sons each receiving 50,000 shares. R .

pp. 32, 67; R. p. 230.

Notwithstanding the shareholders' agreement to each be one fourth owners of GlucoTec, on or about March 24, 2006, Respondent Grounsell caused to be transferred 18,129,066 shares in GlucoTec to Respondent CollaborativeMed, a South Carolina limited liability company controlled by Respondent Grounsell and his family. R. p. 257; R. p. 126. Dr. Bode explained that he understood that 14 million shares of the stock was for the intellectual property for the Glucommander, which was merely housed in CollaborativeMed, a shell company, while GlucoTec was formed. R. pp. 38, 59. While this transfer occurred in March, 2006, it was not ratified by the stockholders until a special meeting on May 18, 2006. At the time of this special shareholders' meeting, Respondent Grounsell was the president and sole director of GlucoTec. R. p. at 259. Respondent Grounsell testified that he did not abstain from voting on this interested director transaction. R. p. at 153. Rather, he stepped out of the meeting and directed Hank Durshlag to vote his shares. R. p. at 153. Likewise, Clark Grounsell was set to receive 20% of whatever stock CollaborativeMed received and both Respondent Grounsell and Clark Grounsell testified that he also voted his shares at the May 18, 2006 meeting in favor of the transaction. R. pp. 149, 178.

This transaction was voted on at a shareholders meeting on May 18, 2006. The shareholders' meeting was invalid because neither Appellant Hoyt nor Dr. Bruce Bode received written notice of the shareholder meeting that took place on May 18, 2006. Moreover, neither received notice of the purpose of the meeting nor an opportunity to appoint a proxy. R. pp. 39, 70. The bylaws, however, require written notice of a shareholders' meeting be provided. R. pp. 239, 243.

In his testimony, Respondent Grounsell confirmed that he did not have any record of

written notice. Instead, initially Respondent Grounsell testified during the Appellant's case in chief that he assumed that notice was emailed by Lori LaPoint, secretary for GlucoTec. R. p. at 135. Lori LaPoint, however, testified that she did not send Appellant notice of the May 11, 2006 and May 18, 2006 meetings. R. p. at 184. During his case in chief, Respondent Grounsell changed his testimony, stating that "Mr. Durshlag was in charge of that project to get in touch with them [Dr. Bode and Appellant]." R. p. at 206. Such a change in testimony seriously diminishes Respondent Grounsell's testimony. Also with respect to notice, Respondent Grounsell's son, Clark Grounsell testified that he did not know if he received notice of either the May 11, 2006 or May 18, 2006 meetings. R. p. at 178.

Both Dr. Bode and Appellant testified that they would not have voted to give shares of GlucoTec to CollaborativeMed. R. pp. at 38, 59. In defense, Respondent Grounsell repeatedly testified that neither Dr. Bode nor Appellant were shareholders at the time because they had not signed a non-compete agreement or written a check for their founder's shares. R. p. at 126. However, both Dr. Bode and Appellant were treated as shareholders on March 24, 2006 when Respondent Gounsell was elected as sole director of GlucoTec. R. p. at 258. In fact, according to the minutes, Dr. Bode and Appellant authorized Respondent Grounsell to file the Articles of Incorporation. R. p. at 258. Additionally, Respondent Grounsell contention that the non-compete agreement was required to be signed based upon his decision as a director is controverted by the May 11, 2006 meeting minutes, which states that the shareholders approved a resolution that non-compete agreements must be executed. R. p. at 257. Again, neither Dr. Bode nor Appellant Hoyt were sent notice of the meeting as required by the bylaws.

Prior to the trial, Appellant filed a Motion for Partial Summary Judgment setting forth proposed undisputed facts establishing that the shareholders meeting on May 11, 2006 was not

properly noticed and the interested direct transaction should be nullified, at least as to Appellant. R. p. 330. Respondents filed a Response, including an affidavit of Respondent Grounsell, which stated that Lori LaPointe provided notice.[3] R. p. at 400. Prior to trial, the Honorable W. Jeffrey Young heard Appellant's Motion for Partial Summary Judgment and deferred ruling, stating:

> Y'all have studied this case for a long time. I have seen it for ten minutes. It would be impossible for me to make a quick decision. I'm going to take it under advisement, but while I take it under advisement we'll start the testimony for the trial.

R. p. at 24. Even after a timely Rule 59(e) motion, the Court still has not addressed Appellant's motion.

Following the trial, the Circuit Court issued an order denying relief as to all causes of action. R. p. at 1. In that Order, the Circuit Court confirmed that at the May 11, 2006 stockholders' meeting, Appellant was not present and "[n]o notice was mailed to him and he maintained he had no notice of the meeting." R. p. at 3. With respect to the May 18, 2006 stockholders' meeting, the Court made no findings regarding providing notice to Appellant of said meeting. However, the Court found that the interested director transaction benefitted Appellant and other stockholders because without such transaction, the intellectual property that the corporation was to market would be titled to ColloborativeMed, LLC, as it has obtained FDA approval. R. p. at 4. In its May 5, 2015 Order, the Circuit Court confirmed its findings that Respondents efforts to acquire FDA approval constituted value to GlucoTec and to Appellant. R. p. at 13. The Circuit Court further stated that "[w]ithout Grousnell's efforts, money and time, the project would never have gotten started. . . .The Court finds these efforts and funds were

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[3] As set forth above, this testimony changed. After Ms. LaPoint testified that she did not notify Appellant, Respondent Grounsell changed his testimony and stated that another employee, Hank Durshlag provided the notice. R. p. at 206. There still remained no dispute that if any notice was provided, it did not comport with the requirements of either the by-laws or South Carolina law.

devoted to a common goal of marketing the Glucometer [sic] successfully. In reality Hoyt benefitted from these efforts and the monetary advances of other people." R. pp. 14-15. As a result, the Circuit Court concluded that Respondents did not breach a fiduciary duty to Plaintiff.

IV. Argument

A. The Circuit Court erred in failing to rule on Appellant's Motion for Partial Summary Judgment prior to trial where said motion had been pending for more than one year before trial.

1. Standard of Review

A losing party must present her issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 441–42, 526 S.E.2d 716, 724 (2000). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e), SCRCP, motion to alter or amend the judgment in order to preserve the issue for appellate review." Karrien v. Sumter County Disabilities and Special Needs, 2015-MO-014, 2015 WL 1396438, *1 (March 25, 2015) citing I'On. "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of South Carolina, 326 S.C. 93, 96, 484 S.E 2d 586, 587 (1997); Café Assocs., Ltd. V. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398

U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In determining whether any triable issue of fact exists which will preclude summary judgment, the evidence, and all inferences that can be reasonably drawn, must be viewed in the light most favorable to the non-moving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E 2d 369, 371 (2000).

2. Argument

In this case, the Circuit Court never addressed Appellant's Motion for Summary Judgment following extensive briefing and oral argument, instead ordering the parties to begin the trial and that it would take the motion under advisement. R. p. at 24. Following the trial, the Circuit Court never addressed Appellant's Motion. Even following a proper Rule 59(e) motion, the Circuit Court still refused to address Appellant's pretrial motions and evidence properly submitted to the trial court more than one year before the trial commenced. Appellant filed his motion, paid his filing fee, appeared through counsel, and was, at minimum, entitled to a ruling based upon his submitted evidence and the counter affidavit presented by Respondent Grounsell.

A fiduciary relationship, as established under South Carolina law, arises where a trust is placed in another party and accepted. Specifically, "[a] fiduciary relationship exists when one reposes 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." O'Shea v. Lesser, 308 S.C. 10, 416 S.E.2d 629, 631 (1992); see also Island Car Wash, Inc., v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (S.C. App. 1987) ("A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith.")

A director of a corporation has a fiduciary duty to the shareholders of a corporation. In recognition of this fiduciary duty, the South Carolina legislature has imposed requirements on a director taking an action that is in conflict with the interests of the corporation and its shareholders. S.C. Code Ann. § 33-8-310 permits an interested director transaction only if one of the following is true:

> (1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors, and the board of directors or a committee authorized, approved or ratified the transaction;
> (2) The material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
> (3) The transaction was fair to the corporation.

S.C. Code Ann. § 33-8-310(a). The transfer of stock here was not fair to the corporation and at the time of the transaction, as Respondent Grounsell was the only director. Thus, only subsection 2 could be applicable here through a special meeting of the shareholders.

Title 33 of the South Carolina Code sets forth the requirements for a special meeting of the shareholders of a South Carolina Corporation. Pursuant to S.C. Code Ann. § 33-7-105(a) provides that shareholders must receive notice of the date, time, and place of any annual or special meeting no fewer than ten days nor more than sixty days before the meeting date. Moreover, for a special meeting, the notice must include a description of the purpose for which the meeting was called. S.C. Code Ann. § 33-7-105(c). S.C. Code Ann. § 33-7-102(d) provides that at a special meeting, "[o]nly business within the purposed described in the meeting notice required by Section 33-7-105(c) may be conducted at the special shareholders' meeting. Under S.C. Code Ann. § 33-1-410(a), notice must be in writing unless oral notice is reasonable under the circumstances. Nonetheless, notice of a shareholder meeting is effective if by mailing it to the shareholder's address shown in the corporation's current record of shareholders. S.C. Code

Ann. § 33-1-410(c). Section 33-1-410(g) provides that the Articles of Incorporation or bylaws control if they are not inconsistent with South Carolina law. Thus, Articles of Incorporation or bylaws can require written notice.

In this case, by failing to provide written notice to the shareholders by mail, particularly Appellant, prior to the shareholder's vote in Respondent Grounsell's interested director transaction to transfer in 18,129,066 shares of stock to a Limited Liability Company he maintained a controlling interest causes this transaction to be void. As set forth above, there was no evidence of written notice tendered to Appellant Hoyt as required under South Carolina law and the corporation's bylaws. As a result, there was no genuine issue of material fact and Appellant Hoyt was entitled to partial summary judgment on his breach of fiduciary duty claim. The Circuit Court committed reversible error in failing to rule on Appellant's Motion for Partial Summary Judgment based upon the evidence supplied prior to trial. This error requires reversal.

B. The Circuit Court erred in failing to find that Respondent Grounsell owed Appellant a fiduciary duty as an incorporator of a corporation.

1. Standard of Review

Whether there is a fiduciary relationship between two people is an equitable issue. Island Car Wash, 292 S.C. at 599, 358 S.E.2d at 152. Generally, legal issues are for the determination of the jury and equitable issues are for the determination of the court. *Id.* "A confidential or fiduciary relationship exists when one 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 imposing the confidence." O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (citing Island Car Wash, 292 S.C. at 599, 358 S.E.2d at 152). Although whether a fiduciary relationship has been breached can be a question for the jury, the question of whether one should be imposed between two classes of people is a question for the court. Hendricks v.

Clemson University, 353 S.C. 449, 459 578 S.E.2d 711, 715 (2003). Thus, the determination of whether a fiduciary duty exists is reviewed *de novo*.

2. Argument

In this case, the Circuit Court never addressed whether Respondent Grounsell owed Appellant a fiduciary duty. Instead, the Court simply stated in its Order denying Appellant's Motion for New Trial or in the Alternative Motion to Alter or Amend, the Circuit Court merely found that "[r]ather than violating any fiduciary duty owed to Hoyt, the Court finds the actions of Grounsell actually benefitted Hoyt and ultimately delivered to him a windfall for which he invested no money and very little time." Here, the fiduciary duty owed to Appellant is set forth in section A of the Argument.

In this case, by failing to provide notice to the shareholders, particularly Appellant, prior to the shareholder's vote in Respondent Grounsell's interested director transaction to transfer in 18,129,066 shares of stock to a company he maintained a controlling interest causes this transaction to be void. As set forth above, there is no evidence of written notice tendered to Appellant Hoyt as required under South Carolina law and the corporation's bylaws.

C. The Circuit Court erred in failing to find that Respondent Grounsell breached his fiduciary duty to Appellant by failing to notify him of a stockholders' meeting under South Carolina law where the purpose of stockholders' meeting was an interested director transaction to transfer almost half of the corporation's authorized shares to Respondent Grounsell.

1. Standard of Review

Because the Court failed to address whether a fiduciary duty exists, any finding as to whether Respondent breached his fiduciary duty should be reviewed *de novo*.

2. Argument

Although the Court in response to Appellant's Motion for New Trial or, in the Alternative, to Alter or Amend, stated that "[r]ather than violating any fiduciary duty owed to Hoyt, the Court finds the actions of Grounsell actually benefitted Hoyt and ultimately delivered to him a windfall for which he invested no money and very little time," such factual finding should not be afforded deference as a factual ruling of the trial court because the Circuit Court improperly failed to find that Respondent Grounsell owed Appellant a fiduciary duty.

Here, as set forth above, Respondent Grounsell, as the sole director, was wholly responsible for failing to provide notice of a called shareholder's meeting. Moreover, Respondent Grounsell continued to actively try to conceal his failure to provide notice by first testifying that his Secretary Lori LaPoint provided notice. R. p. at 135. Following her testimony denying that she supplied notice R. p. at 184., Respondent Grounsell changed his testimony asserting that Mr. Durschlag was responsible for notice. R. p. at 205. The transfer of stock from GlucoTec to CollaborativeMed, a company owned and controlled by Respondent and his family, constituted a breach of fiduciary duty to Appellant.

Moreover, the sale of CollaborativeMed owned stock in GlucoTec by Respondent Grounsell also constituted a breach of fiduciary duty. According to his own testimony, Respondent Grounsell received two million dollars from the sale of CollaborativeMed owned stock.[4] R. p. at 159. Respondent Grounsell's acts of selling CollaborativeMed owned stock that he received improperly and then selling said stock for his own profit while outstanding shares of GlucoTec stock was available and while GlucoTec was undercapitalized constituted an

[4] Respondents may have received in excess of $6.9 million dollars based upon the questioning by counsel. However, the only evidence confirmed was based upon Respondent Grounsell's testimony that he received two million dollars. R. p. at 159.

additional breach of fiduciary duty to Appellant. The Circuit Court's failure to address Respondent's duty to Appellant and the breaches that resulted constitutes reversible error.

V. CONCLUSION

For the above reasons, the Circuit Court's Orders and Judgments should be reversed, and this case should be remanded for further proceedings in the Court of Common Pleas.

RESPECTFULLY SUBMITTED, this 18th day July, 2015.

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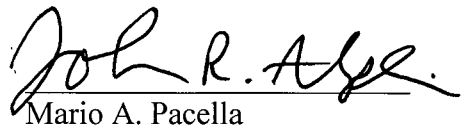
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR and the April 15, 2014, Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.



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