

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 04 2018

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002343

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Company, Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South
Carolina Home Builders Self Insurers Fund, and
the South Carolina Home Builders Self Insurers Fund.....Respondents.

PETITIONERS' RETURN TO
RESPONDENTS' PETITION FOR REHEARING

The Beneficiaries of the Homebuilders Trust submit this return to the Trustees' Petition for Rehearing as requested by the Court's letter of September 28, 2018. The Trustees argue that the Court was mistaken in its decision because the Court 1) found the Beneficiaries' Complaint and January 30, 2013 letter comply with the requirements of Rule 23(b)(1), and 2) found the Beneficiaries' demand for the return of their trust funds was a

direct and not a derivative claim. This Court's opinion is correct and allows the Beneficiaries of the Trust to pursue their action for the return of their funds which the Trustees have misappropriated.

1. THE BENEFICIARIES' COMPLAINT AND JANUARY 30, 2013 LETTER COMPLY WITH RULE 23(b)(1).

This Court properly concluded that the Beneficiaries' letter of January 30, 2013, and the Complaint comply with Rule 23(b)(1). The Trustees challenge this finding arguing that the Beneficiaries did not sufficiently allege the reasons they could not convince the Trustees to return the trust assets to them. *See* Motion for Reconsideration, p.1. This argument overlooks the detailed request in the Beneficiaries' letter and the pleadings.

In particular, the Beneficiaries set forth exactly what the Trustees should do in their January 30, 2013 letter as follows:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.
2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

(App. 253-254).

After this request, the letter sets forth the history of the dispute and the Trustees' position as follows:

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

(App. 254).

This paragraph sets forth the reason the Beneficiaries have not received the relief they have requested – the Trustees “refuse to take the actions as requested above.” *Id.* Thus, the January 30, 2013 letter sets forth why the Beneficiaries failed to receive the relief they requested. The Trustees have refused to grant it. At that point, the Trustees had given no further reasons for their refusal.

The Complaint also sets out the Beneficiaries' attempts to obtain relief and why they failed as follows:

- b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

(App. 54).

The Beneficiaries did not receive a response to their letter of January 30, 2013, during February or March of 2013. So, on April 5, 2013, they filed this action. At that

point, the Trustees had not given a reason for their refusal to grant the relief the Beneficiaries requested. Fourteen months after the filing of this lawsuit, on April 16, 2014, the Trustees' lawyer finally responded with a letter setting forth the Trustees' justification for refusing the Beneficiaries' relief. (App. 326). The letter was sent in response to Judge Cooper's inquiry in court as to why they had not responded to the Beneficiaries written request for over a year. (App. 123).

The Trustees' letter of April 16, 2014, is included in the Appendix and sets forth the Trustees' justification for retaining the five million dollars belonging to the Beneficiaries. The Beneficiaries could not include this in their pleadings because they received it 14 months after their request and more than a year after filing this lawsuit. Thus the Trustees' argument is too perfect. The Trustees argue the Beneficiaries must include more information regarding why their request was denied. The Trustees, however, did not provide this information or respond to the Beneficiaries' request. They did not provide the information until a year after the lawsuit was filed. If this truly is the interpretation of the rule, it destroys any reason to have the rule in the first place. Under the Trustees' logic, the Beneficiaries must come forward with the Trustees' reason in the pleadings when the Trustees' refuse to provide the reason. If this Court adopts this interpretation, there will be no actions which comply with Rule 23(b) because the defendant can prevail by simply refusing to give reasons for denying the relief sought which deprives the plaintiff the ability to include the defendants' reasons in the complaint.

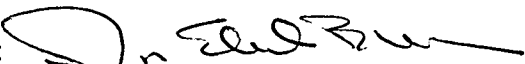
2. THE COMPLAINT PROPERLY INCLUDES DIRECT ACTIONS.

While the Complaint asks for relief under different theories, the gravamen of the Complaint is that the Trustees have misappropriated over five million dollars in trust assets

which belong to the Trust Beneficiaries. Thus, the gravamen of the Complaint is not to force the Trust to bring an action as implied by the motion for reconsideration. Instead, it is for a direct payment to the Beneficiaries of amounts to which they are entitled under the Trust Agreement by its terms. In addition, each Beneficiary is potentially liable for misappropriation of trust assets as the Beneficiaries are guarantors of the trust. As a result, the gravamen of this lawsuit is not derivative. Instead it is a direct claim by the Beneficiaries to receive the proceeds of the Trust according to its terms and to be protected from individual liability according to the Trust's terms.

In conclusion, the Beneficiaries have adequately set forth the reason they did not receive relief. The reason is that the Trustees have refused it and refused to respond to the Beneficiaries' January 30, 2013 letter requesting relief for over 14 months. In addition, the Beneficiaries' claims to be paid according to the Trust's terms are direct actions controlled by trust law which entitles beneficiaries to payments according to a trust's terms and subject to court supervision.

Respectfully submitted,

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October 4, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2016-002343

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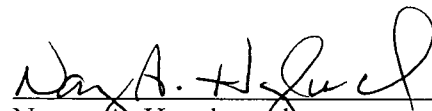
PROOF OF SERVICE

I certify that I have served the Petitioners' Return to Respondents' Petition for Rehearing on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 3, 2018, addressed to their attorneys of record as follows:

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October 4, 2018