THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002343
Opinion No. 27841 (S.C. Sup. Ct. filed September 5, 2018)

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., 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.

REPLY TO RESPONDENTS' RETURN TO THE PETITION FOR REHEARING

Although this Court requested a response from Petitioners, their response is effectively no response at all. It does not address the law identified by Respondents in any meaningful way. Astonishingly, the response is totally void of any citation to any law from any source. Respondents respectfully request that the Court grant the petition for rehearing and issue an opinion affirming the circuit court's order.

I. The Petitioners' Recasting of the Facts Should Be Rejected

Petitioners seek to argue that their belated January 30 letter, which was sent after their original complaint was filed, was the operative demand for **this** case. The facts are at odds with that argument. The January 30 letter specifically referenced the original complaint that was pending before Judge Manning: "C/A No. 2012-CP-40-04311." (App. 253 (*see* line above "Dear Pope")). Indeed, at the time the letter was sent a hearing had already been held and Judge Manning asked for proposed orders from the parties. The letter cited the original complaint because it was sent in an effort to fix defects in Petitioners' original complaint. (App. 254 ("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 action be taken.")). Upon receipt of the January 30 letter, Respondents provided a response on February 11, 2013 stating that the Board would not take any action while the motions to dismiss were pending before Judge Manning. (*See* App. 123, ln. 18 – 124, ln. 7; *see also* App. 89, ln. 6-9). Petitioners acknowledged during a hearing before Judge Cooper that this response had been received. (*Id.*) Petitioners now claim to the Court that they did not receive a response to the letter during this time: "The Beneficiaries[1] did not receive a response to their letter of January 30, 2013, during February or March of 2013." (Response, at 3).

---

[1] The Petitioners continued use of the made-up term "beneficiary" has no basis in the record. The document that created the Fund refers to the participants as "members." (*E.g.*, App. 358 ("Section 6. Approval of New Members . . . The Trustees, after the inception date of the Fund,

On March 7, 2013, Judge Manning signed Petitioners' proposed order in which they requested that **their** complaint be dismissed. One month later, Petitioners filed a second Complaint (this time in probate court) in which they again sought to exercise litigation decisions for the Fund. As detailed in the original briefing to the Court and the petition for rehearing, subsequent motions practice ensued in an effort to demonstrate that Petitioners' Complaint alleged derivative claims. The purpose of the yearlong motions practice was to force compliance with the demand process and create an orderly process to address the derivative claims.

Petitioners argue that Respondents' formal response 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." (Response, at 4). In support of that argument, Petitioners cite to the hearing transcript at Appendix 123. Even a quick review of the transcript shows that that is a **gross misstatement** of the record. The response was made after Respondents proposed responding to the belated January 30 letter from the **prior** lawsuit as if it were a new demand as a means to create an orderly process going forward. (App. 120, ln. 19 – 121, ln. 15). The circuit court agreed with the suggestion. (App. 26-27 ("As noted above, at the January 14 hearing, the Defendants stated on the record that the Defendants would accept Plaintiffs' January 30, 2013 letter as a demand under Rule 23, and would respond within a reasonable time. The Court finds that 60 days is a reasonable amount of time to respond to the Plaintiffs' letter. Once the Defendants provide a response to the Plaintiffs' demand, then, if necessary, the Plaintiffs may pursue whatever legal action they determine is appropriate.")). Petitioners efforts to create a false narrative should be noted and rejected.

---

shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund.")).

Petitioners also attempt to fault Respondents for Petitioners' failure to draft a more detailed (particularized) complaint. They argue that they were unable to include the details of the denial set forth in the April 16, 2014 response from the Board because it was not provided until a year **after** they filed their Complaint. But they alone are at fault, for they failed to make a proper and timely demand on the Board **prior** to filing the Complaint as required by Rule 23(b)(1). Even if the Court were to consider the January 30 letter sent while the original complaint was pending, and before it was dismissed, as a proper demand related to the new Complaint, Petitioners only allowed the Board one month to act on it prior to filing their new Complaint. The original complaint was dismissed by Judge Manning on March 7, 2013 and the second Complaint was filed on April 5, 2013 in probate court. One month is plainly insufficient. Indeed the letter and sequence of events has all the hallmarks of a simulated effort that is contrary to well established law. *Carolina First Corp v. Whittle*, 343 S.C. 176, 190, 539 S.E.2d 402, 410 (Ct. App. 2000) ("The particularized allegations must support an earnest, ***and not a simulated***, effort with the managing body of the corporation to induce remedial action on their part." (emphasis added)).[2] Further, when the Court considers that the demand letter sought a distribution of $5,000,000 as well as a termination and winding up of the Fund (which would negatively affect the roughly 700-900+ non-complaining homebuilder members), the mere allowance of one month for the Board to respond is more properly viewed as a sham effort.

---

[2] *Accord Latimer, et al. v. Richmond & D.R. Co.*, 39 S.C. 44, 52, 17 S.E. 258, 261 (1893) (stating that "before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes").

II. The Petitioners Fail to Allege Direct Claims

Petitioners finally make the conclusory claim that they assert direct claims. They cite **no** law to support this position. The factual basis for this claim is that the "gravamen of the Complaint is that the Trustees have misappropriated over five million dollars in trust assets which belong to the Trust Beneficiaries." (Response, at 4-5). To the contrary, this is a classic derivative claim. "A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (emphasis added), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). Allegations of "corporate malfeasance" that result in "**identical** harm to **all shareholders**" constitute a "breach of fiduciary duty [claim that] gives rise to a classic shareholders' derivative suit." *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (emphasis added). Petitioners also claim they are entitled to a "direct payment to the Beneficiaries of amounts to which they are entitled under the Trust Agreement by its terms." (Response, at 5). That claim is nothing more than a request for a monetary distribution, and under South Carolina law that is a derivative claim. *Johnson v. Brandon Corp.*, 221 S.C. 160, 164-65, 69 S.E.2d 594, 595-96 (1952).

III. Conclusion

The mandatory and heightened pleading requirements of Rule 23(b)(1) exist because derivate lawsuits distract officers and directors of companies and associations from job number one: running the business. It is for that reason that Courts across the country have recognized that when a demand is made upon a Board, a formalized process must be utilized to determine whether litigation should be commenced in the name of the company. As noted in the petition for rehearing, Rule 23 contemplates that the following should occur:

1. The shareholder makes a demand upon the Board by submitting a demand letter.
2. If a determination that meeting the demand is not in the best interests of the corporation, the Board declines to act and issues a response to the demanding shareholder.
3. Upon receipt of the declination letter, derivative litigation may be commenced by the filing of a complaint.
4. The complaint sets forth the demand by repeating **with particularity** what the demand letter requested and addressing **with particularity** the "reason for his failure to obtain the action" by reference to the board's response.[3]
5. Before an answer is filed, the defendant may (and often does) move to dismiss pursuant to Rules 23(b)(1) and 12(b)(6) for failure to rebut the business judgment rule presumption.
6. The circuit court analyzes the particularized wording of the complaint for alleged wrongful refusal, employing a quasi-merits analysis, similar to a summary judgment proceeding.
7. The circuit court's analysis is based on the allegations set forth **with particularity** within the four corners of the complaint (of what was demanded and why was it refused) as to whether the litigation is proper.
8. If the circuit court determines that the plaintiff has not **rebutted** the business judgment rule presumption, then the case is dismissed.

---

[3] The Court can review the Board's response to Petitioners' January 30 demand at Appendix pages 326-50. An examination of the response demonstrates the reasons for the Board's decisions. A review of the response demonstrates that the Board's decisions are entitled to the protection of the business judgment rule.

In the typical case, in an effort to plead wrongful refusal, the demand letter and the board response could be set forth with particularity in the complaint, or simply attached as an exhibit. The plaintiff then sets forth the basis for why the business judgment rule presumption does not apply.

9. If the circuit court determines that the plaintiff has rebutted the business judgment rule presumption, then the case proceeds.

When Judge Cooper issued his order dismissing the Complaint **without** prejudice, he was finally putting in place the above process that Petitioners had resisted, at every step, since the inception of the litigation. As detailed in Respondents petition for rehearing and briefing, Petitioners Complaint, even with incorporation of the January 30 letter, fails to meet the heightened pleading requirements of Rule 23(b)(1). The circuit court faithfully applied binding precedent and dismissed the Complaint. This Court should, respectfully, withdraw the current Opinion and replace it with an Opinion that affirms the circuit court's order.

Respectfully submitted,

William W. Wilkins By BFW

William W. Wilkins (SC Bar #6112)
Burl F. Williams (SC Bar #77901)
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, South Carolina 29603
Telephone: 864-282-1199
Facsimile: 864-477-2699
bwilkins@nexsenpruet.com
bwilliams@nexsenpruet.com

James Lynn Werner (SC Bar #6029)
Lawrence M. Hershon (SC Bar #77514)
Parker Poe Adams & Bernstein LLP
P. O. Box 1509
Columbia, South Carolina 29202
Telephone: 803-255-8000
Facsimile: 803-255-8017
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

Counsel for Respondent the South Carolina Home Builders Self Insurers Fund

LAWRENCE M. HERSHON BY BPJ

Pope D. Johnson, III (SC Bar #3084)
1230 Richland Street
Columbia, SC 29201
Telephone: 803-799-9791
Facsimile: 803-253-6084
pope@popejohnsonlaw.com

James Lynn Werner (SC Bar #6029)
Lawrence M. Hershon (SC Bar #77514)
Parker Poe Adams & Bernstein LLP
P. O. Box 1509
Columbia, South Carolina 29202
Telephone: 803-255-8000
Facsimile: 803-255-8017
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

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

October 11, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002343
Opinion No. 27841 (S.C. Sup. Ct. filed September 5, 2018)

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., 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.

PROOF OF SERVICE

I certify that on this day I have served the Reply to the Return to the Petition for Rehearing by depositing a copy of it in the United States mail, postage prepaid, addressed to the below counsel of record.

James Edward Bradley, Esquire
S. Jahue Moore, Esquire
Moore Taylor Law Firm, P.A.
PO Box 5709
West Columbia, SC 29171

Pope D. Johnson, III, Esquire
1230 Richland Street
Columbia, SC 29201

Lawrence Hershon, Esquire
James L. Werner, Esquire
P.O. Box 1509
Columbia, SC 29202

William W. Wilkins (SC Bar #6112)
Burl F. Williams (SC Bar #77901)
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603
Telephone: 864-282-1199
Facsimile: 864-477-2699
bwilkins@nexsenpruet.com
bwilliams@nexsenpruet.com

Counsel for Respondent the South Carolina Home Builders Self Insurers Fund

October 11, 2018
Greenville, South Carolina