

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively on Behalf of
The I'On Assembly, Inc.; and I'On Assembly, Inc.,

Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC,
and I'On Realty, LLC,

Petitioners.

PETITION FOR WRIT OF CERTIORARI

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INDEX

Certificate of Counsel1

Questions Presented1

 I. Did the Court of Appeals err in stating that a developer’s theoretical control of a homeowners association gives rise to an all-encompassing fiduciary duty pursuant to *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)?

 II. Did the Court of Appeals err in applying the two-issue rule to the trial court’s rulings as to the validity of the 2000 Recreational Easement?

Statement of the Case1

Argument9

Conclusion14

Pursuant to Rules 221 and 240, SCACR, Petitioners The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC, file this Petition for Writ of Certiorari to review *Walbeck v. The I'On Company, LLC*, Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019).

CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the petition for rehearing was made on March 14, 2019 (App. pp. 31-34) and denied by the Court of Appeals on May 22, 2019. (App. pp. 29-30.)

QUESTIONS PRESENTED

- III. Did the Court of Appeals err in stating that a developer's theoretical control of a homeowners association gives rise to an all-encompassing fiduciary duty pursuant to *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)?
- IV. Did the Court of Appeals err in applying the two-issue rule to the trial court's rulings as to the validity of the 2000 Recreational Easement?

STATEMENT OF THE CASE

Petitioners would not request review of this case if a forthcoming petition for certiorari by Respondents was not anticipated.¹ The Court of Appeals filed an opinion that, for the most part, correctly decided the issues presented. However, if the Court grants certiorari on the petition of Respondents, Petitioners request review of two issues: 1) an extraneous discussion that potentially expands the scope of the fiduciary

¹ Respondents have requested an extension of time to file their petition for certiorari.

duty owed by a developer to a homeowners association; and 2) the misapplication of the two-issue rule as to the validity of the 2000 Recreational Easement.²

This case concerns the claim that a developer conveyed different amenity property to a homeowners association than was promised. Not until nearly a decade after construction of the disputed property was complete did two homeowners, Brad Walbeck and Lea Ann Adkins, bring suit individually and on behalf of the homeowners association, the I'On Assembly.

The I'On subdivision, located in Mt. Pleasant, South Carolina, was developed by The I'On Company and was the vision of Vince Graham and his father, Tom Graham. Respondents sued the developer, The I'On Company, LLC, and several related entities: The I'On Club, LLC; The I'On Group, LLC; and I'On Realty, LLC (collectively "Petitioners").³ Respondents also sued 148 Civitas, LLC and Mike Russo, the 2009 purchasers of the disputed property.

I. The 1998 Property Report

The promise at issue is contained in a property report that The I'On Company filed with the United States Department of Housing and Urban Development pursuant to the Interstate Land Sales Act ("ILSA") on November 3, 1998 ("Property Report").

² See *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court").

³ The trial court held that Petitioners were amalgamated. Respondents were never required to prove—and the jury was never asked to evaluate—the liability of each individual defendant. (R. p. 59.) The Court of Appeals reversed this decision. (App. pp. 25-26.)

(R. pp. 2999-3034.) The Property Report applied to a limited number of lots in the overall development, largely those described as “Phase II” of the development.

Two phrases included on a chart in the Property Report created the only obligation Petitioners had to convey property to the Assembly: a “Community Dock” and “Creekside Park” would be conveyed to the Assembly “upon completion of construction.” (R. pp. 3022-3023.) The Property Report indicated in that same chart that 0% of construction was then complete and that construction was estimated to begin in January 1999 and to be complete with these amenities available for use in September 1999. (*Id.*) Importantly, the Property Report also prominently stated that other recreational facilities may be owned by persons other than the Assembly. (R. p. 3024.) The Property Report does not provide any further description of the planned amenities, indicate any proposed locations for the amenities, or contain maps or photographs. (R. pp. 2999-3034; 813:16-816:6.) The Property Report’s promises were generic because much of the plan for I’On was still a vision at the time the report was prepared. (R. p. 806:1-13; 811:1-8; 1110:6-15; 1111:20-1112:18.)

The I’On Company more than delivered on the promises it made. (R. p. 1127:6-11.) As to the “Creekside Park,” The I’On Company conveyed a 2.86 acre linear park, called the Marshwalk, to the Assembly on November 21, 2000. (R. pp. 811:9-812:12; 1122:0-12; 3569; 3571-3578.) On the same day, two community docks were conveyed to the Assembly, satisfying the promise to convey a “Community Dock. (R. pp. 1130:10-1131:7; 3571-3578.)

The scope of the amenities Respondents claim they were promised increased over time. At first, Walbeck claimed that the Property Report’s promise actually

referred to: (1) Lot CV-6, an entire waterfront lot designated for civic use; (2) multiple docks; (3) a boat ramp; (4) a parking lot; and (5) the 2,967 square-foot event facility located on Lot CV-6, the Creek Club. In 2014, the Assembly settled its claims against 148 Civitas, LLC and acquired rights to another parking lot, Lot CV-5. (R. pp. 1313:13-1314:11; 1315:10-1316:5; 2968-2971.) At trial, Respondents claimed for the first time that Lot CV-5, at least ten parcels and 750 feet away from Lot CV-6, was also included in the promise of a “Creekside Park” and a “Community Dock.”⁴ (*Compare* R. pp. 861:15-862:13; 890:3-91:1; 894:11-895:5; 896:1-7 *with* R. pp. 402:1-403:7; 415:24-416:16; 1307:19-24.)

II. Walbeck and Adkins

Brad Walbeck entered into his lot purchase agreement on November 27, 1999. (R. pp. 3164-3165.) Walbeck received a copy of the 1998 Property Report, the amenity portion of which was incorporated into his contract. (R. pp. 958:18-959:2; 3162-3172.) Walbeck built a home in I’On and has lived there and been a member of the Assembly for a decade before he filed suit. (R. pp. 959:21-960:4.)

Lea Ann Adkins is a longtime opponent of the I’On development. (R. pp. 1148:2-1149:1; 1149:19-1150:17.) On February 1, 2003, Adkins executed a purchase contract to buy a lot in Phase V after construction of the Creek Club and the Creek Club dock was complete. (R. pp. 3113-3130; 879:15-21; 906:1-2.) Although Adkins testified that she received the Property Report prior to her purchase, the Property Report

⁴ Prior to trial Respondents informed the trial court that “under no theory of this present case would [the Assembly] have any claim . . . at all” to Lot CV-5. (R. pp. 415:24-416:16.)

had been amended twice and was no longer provided to prospective purchasers by the time Adkins purchased her lot. (R. pp. 846:25-847:14; 912:24-914:25; 3117.)

III. The 2000 Recreational Easement

The I'On Club was created to build and manage the boating facilities, events at the Creek Club, and the swim and tennis facilities. (R. pp. 1124:9-1125:4; 1125:16-1126:2; 2994.) The I'On Club owned and operated the Creek Club as well as the Creek Club dock, the largest dock in the I'On subdivision.

On February 9, 2000, The I'On Club, The I'On Company, and the Assembly executed the Recreational Easement and Agreement to Share Costs. (R. pp. 3131-3145.) The Recreational Easement provided the Assembly rights to access the Creek Club docks, boating facilities and parking lot located at Lot CV-6. (*Id.*) At this early time in I'On's development, the same individual served as manager of The I'On Company, manager of The I'On Club, and President of the Assembly's board of directors and executed the document on behalf of each entity. (*Id.*) The Recreational Easement was recorded and indexed to I'On's Declaration of Covenants, Conditions and Restrictions ("Covenants"). (*Id.*)

The Recreational Easement unequivocally "grants to Assembly...a perpetual, nonexclusive easement" to access the amenities at Lot CV-6. (R. pp. 677:2-8; 3132-3133.) The "Agreement to Share Costs" document sets forth a division of costs between The I'On Club and the Assembly for the maintenance of the boating facilities with "a term of 30 years." (R. p. 3138.) The parties operated pursuant to the terms of this document for nearly a decade before Walbeck filed suit. (R. pp. 1300:9-21; 1329:16-24.)

IV. The I'On Assembly

The Assembly was incorporated by Petitioners on June 4, 1998. The Assembly's responsibilities include managing the organization's annual budget, operating and maintaining the common areas, and administering and enforcing the Covenants. (R. p. 3029.)

Petitioners ceded control of the Assembly Board to I'On homeowners by 2003—well in advance of the scheduled transition set forth in the governing documents. (R. pp. 791:20-792:8; 21; 1184:13-25; 3429-3431; 3475-3477.) By 2014, the Assembly and had long since been self-governing and had reserves on hand totaling \$1.3 million. (R. pp. 1306:13-1308:8.)

Since the inception of this litigation, Petitioners have maintained that the statute of limitations barred the majority of Respondents' claims. Since 2001, Respondents knew that construction of the disputed property was complete and that they did not own this property. Since at least 2004, the Assembly paid The I'On Club to rent and maintain use of the amenities on Lot CV-6 each year. (R. pp. 615:8-25; 3325-3385.) Every member of the Assembly received notice of this as a line item in the budget that was mailed in advance of the annual meeting each year. (R. p. 979:14-980:17.) By May of 2004, the Assembly had received legal advice on the terms of the Recreational Easement—a document that makes absolutely clear that the Assembly did not and would not own the Creek Club or the Creek Club docks. (R. pp. 1073:3-1075:15; 3131-3151; 3436-3440; 3600-3601.)

It belies logic to contemplate purchasing property you claim was supposed to be given to you. The Assembly considered *buying* the disputed property as early as 2005. (R. pp. 3451-3453; 3464-3467; 3482-3502; 3511-3516; 3565-3568.) On August

22, 2007, the Assembly again entertained, and solicited and considered the views of more than a hundred members, a proposal to purchase Lot CV-6, the Creek Club, and the boating facilities for \$700,000.00. (R. pp. 3396-3397; 3566-3568; 3612-3613.)

V. Sale of Lot CV-6

On October 30, 2008, the Assembly met and discussed the potential sale of Lot CV-6 to 148 Civitas, LLC. (R. pp. 3553-3557.) Neither Respondents nor anyone else expressed that the Assembly was supposed to receive Lot CV-6 for free pursuant to the 1998 Property Report. (*Id.*) Instead, the homeowners expressed concerns regarding the use of Lot CV-6 as a wedding venue and what impact that may have on the nearby residents. (*Id.*) On August 5, 2009, The I'On Company sold Lot CV-6 to 148 Civitas, LLC. (R. p. 653:2-12.)

VI. Procedural History

After knowing for nearly ten years that the I'On Company would not convey Lot CV-6 to the Assembly pursuant to the Property Report, Walbeck filed suit on December 22, 2010. (R. pp. 116-128.) He filed an amended summons and complaint on March 8, 2011, alleging violation of ILSA, breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. (R. pp. 129-140.) On February 7, 2012, Adkins joined Walbeck in a second amended complaint asserting claims individually and for the first time derivatively on behalf of the Assembly and added the Assembly as a defendant to the action. (R. pp. 151-167.) On January 2, 2014, Walbeck and Adkins filed a third amended summons and complaint. (R. pp. 183.)

The case originally proceeded to trial in January of 2014 but ended in a mistrial. On May 12, 2014, The I'On Company and The I'On Club filed a separate suit against Respondents seeking a declaration that the 2000 Recreational Easement was valid, and

that the easement for use of the boating facilities contained therein was perpetual. (R. pp. 199-312.) The trial court consolidated that declaratory judgment action with the present action. (R. p. 18.)

The case was tried to verdict from July 28 to August 1, 2014. The jury returned a verdict in favor of Petitioners, except as to all claims for fraud and violation of the South Carolina Unfair Trade Practices Act, and as to all claims brought by Adkins. (R. pp. 1855-1862.) The jury returned a verdict in favor of Walbeck in the amount of \$1.00 for his claim for violation of ILSA; \$10,000.00 for breach of contract; and \$20,000.00 for negligent misrepresentation. (*Id.*) The jury returned a verdict in favor of the Assembly in the amount of \$1,000,000.00 for breach of contract; \$1,750,000.00 for breach of fiduciary duty; and \$1,000,000.00 for negligent misrepresentation. (*Id.*) The court entered judgment on August 11, 2014. (R. pp. 19-20.)

On July 16, 2015, the court denied Petitioners' motion for JNOV and a new trial; declared the 2000 Recreational Easement void and invalid; and awarded Walbeck \$225,000.00 in attorneys fees and costs. (R. pp. 21-63; 64-69; 70-78; 79-83; 84-100.)

Petitioners timely appealed to the Court of Appeals. As to each significant issue, the Court of Appeals reversed the trial court in favor of Petitioners. The Court of Appeals:

- Held that Walbeck and Adkins failed to meet the demand requirement of Rule 23(b)(1) and ordered that the trial court dismiss all derivative claims brought on behalf of the Assembly. (App. pp. 10-12.)
- Reversed the trial court's ruling that Petitioners had a fiduciary duty to convey the disputed property to the Assembly. (App. pp. 12-17.)

- Held that all claims other than Walbeck’s individual breach of contract claim were barred by the statute of limitations. (App. pp. 17-23.)
- Affirmed under the two-issue rule the trial court’s declaration that the Recreational Easement was invalid. (App. pp. 23-25.)
- Reversed the trial court’s conclusion that the Petitioners were amalgamated and ordered a new trial on Walbeck’s breach of contract claim. (App. pp. 25-26.)
- Reversed the trial court’s award of attorney’s fees to Walbeck pursuant to 15 U.S.C. § 1709(c). (App. p. 26.)

The Court of Appeals determined that none of Respondents’ claims should have reached the jury—either at all or as presented.

ARGUMENT

I. THEORETICAL CONTROL DOES NOT CREATE A FIDUCIARY DUTY AS A MATTER OF LAW.

Petitioners do not challenge the decision to reverse the trial court’s denial of JNOV as to breach of fiduciary duty. The Court of Appeals appropriately finds there is no fiduciary duty on the part of a developer to convey real property to a homeowners association. (App. pp. 12-17.) However, the opinion includes additional discussion that is both erroneous and unnecessary to the resolution of the issue. If the Court grants certiorari on Respondents’ petition as to this issue, Petitioners seek certiorari only to correct the factual and legal errors in an extraneous discussion that is dicta.

After addressing the trial court’s basis for denying JNOV, the Court of Appeals separately states: “Appellants retained continuing control of the HOA up to and

including the date they conveyed lot CV-6 to Russo.” (App. p. 14.) This is incorrect.⁵ The Court of Appeals builds on this factual error and concludes that Petitioners’ “continuing control” creates a fiduciary duty as set forth in *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). This discussion does not reflect the law.

The Court of Appeals relies exclusively on two provisions in the Covenants to reach the factual conclusion that Petitioners continued to control the Assembly: 1) the retained right to “appoint, remove[,] and replace members of [the HOA’s] Board of Trustees” for a limited period of time not to exceed twenty years after the Covenants’ recording; and 2) the retained right to disapprove actions, policies or programs of the Assembly that would impair the rights of the I’On Company, interfere with the development of I’On or diminish the services of the Assembly. (App. pp. 14-15.)

The Record does not support the conclusion that Petitioners ever exercised “continuing control” after the undisputed turnover of control no later than December 2005. (R. pp. 641:9-15; 792:18-23; 1346:17-1347:5.) As the Court acknowledges, when the I’On Company placed Chad Besenfelder on the Board in 2014, the Assembly in fact excluded him from participating in decisions involving the developer—the very opposite of developer control. (App. p. 15, n. 7.) The I’On Company not only exercised no control over the Assembly, it was patently impotent. The Assembly Board

⁵ By the end of 2003, I’On homeowners held a majority of the seats on the Assembly Board. (R. pp. 1184:13-25; 791:20-21.) Moreover, Respondents concede and the trial court found that control of the Assembly was turned over to the I’On homeowners by December of 2005. (App. p. 199; R. pp. 33; 791:20-792:8; 3429-3431, 3475-3477.)

refused to allow a representative to participate in Board discussions and votes when the Assembly decided against it. (R. p. 1345:2-15.)

The Court of Appeals builds on its factual oversight and concludes that Petitioners “control” creates a fiduciary duty as set forth in *Island Car Wash*. The discussion suggests that the mere existence of retained rights in the Covenants is sufficient for the law to recognize an unlimited, unqualified fiduciary duty. The implication is that because the rights exist, the duty exists; because the duty exists, the developer can make no decision that places its own interests above the interests of the homeowners association.

The Court of Appeals’ discussion does not comport with South Carolina law; the existence of retained rights alone does not equate to control and does not create an all-encompassing fiduciary duty. If the duty exists as the Court states, it can only be owed when the developer acts in a manner that exerts control over the homeowners association and, according to South Carolina law to date, only when the developer exercises control over financial matters or actions that impose financial obligations on the HOA. *See Goddard v. Fairways Development General P’ship*, 310 S.C. 408, 410-11, 426 S.E.2d 828, 830 (Ct. App. 1993) (recognizing it is “unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that require an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures”); *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (holding failure to turn over common areas in good repair “subjects the developer to liability for

bringing the common areas up to standard”). In all other circumstances, the developer is not in a position of confidence or “special relationship.”

Our courts have also applied a limited fiduciary analysis to the relationship between a bank and a customer. If and when a bank undertakes the duty to advise a customer, the bank owes the customer a fiduciary duty in the provision of that advice. This fiduciary duty does not expand to encompass the bank’s checking or lending services simply because the bank is a fiduciary in the limited context of advising a customer. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Burwell v. South Carolina Nat’l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Nat’l Loan & Exch. Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322, 323 (1929).

Significantly, none of the analysis of Petitioners’ theoretical control was necessary to the Court of Appeals’ decision on the issue. After including this extraneous discussion, the Court of Appeals acknowledges that the discussion was *not* the basis of the trial court’s denial of Petitioners’ JNOV motion:

Nonetheless, the circuit court’s denial of Appellants’ JNOV motion was based on its extrapolation of a specific duty to convey title to common areas from the duty pronounced in *Goddard and Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association.

(App. p. 16.)

Because it does not matter to the Court of Appeals’ resolution of the issue, this entire discussion is dicta. The Court should grant certiorari to correct the legal errors in the Court of Appeals’ discussion or state plainly that the discussion is not the law.

II. THE TWO-ISSUE RULE DOES NOT APPLY TO PETITIONERS' CHALLENGE TO THE TRIAL COURT'S RULINGS AS TO THE RECREATIONAL EASEMENT.

The Court of Appeals' *sua sponte* application of the two-issue rule was misplaced. (App. p. 24.) Petitioners did not separately and expressly offer argument as to the trial court's reference to the "arms-length transaction" in its briefing. However, this is not an additional ground for the purposes of the two-issue rule; it is a reiteration of the trial court's other reasons for declaring the Recreational Easement invalid—all of which were raised to the trial court and thoroughly briefed to the Court of Appeals. (App. pp. 155-160.) Importantly, Respondents have never contended that the two-issue rule is applicable here.⁶

The trial court held that the 2000 Recreational Easement was invalid because it was executed prior to the transfer of the servient property to The I'On Club, LLC. (R p. 73.) The trial court's analysis ignored significant South Carolina precedent which permits parties to ratify such documents by their later conduct. The Court of Appeals did not reach the merits of this issue. (App. p. 24.)

South Carolina has long recognized the "after-acquired title" doctrine, which provides that a deed which conveys property to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title. There is no indication that the after-acquired title doctrine does not apply to servitudes. *See, e.g., Nettles v.*

⁶ *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw").

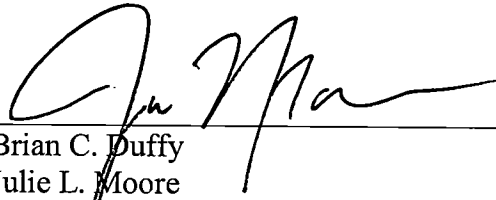
Cummings, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857) (explaining that a grant of goods which were not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratifies the grant by some act done by him with that view, after he has acquired the property); *Tolar v. Marion Cty. Lumber Co.*, 93 S.C. 274, 75 S.E. 545 (1912) (allowing ratification of a deed of conveyance made during infancy after reaching age of majority); *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) (“The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee”).

The Court of Appeals summarily addressed the merits, opining: “Because our supreme court has not spoken on this precise issue, we decline to apply [the after-acquired title] doctrine the Recreational Easement.” (App. p. 24.) The Court should grant certiorari to rule that the after-acquired title doctrine applies to servitudes and determine that the 2000 Recreational Easement was valid.

CONCLUSION

For the reasons and under the circumstances discussed above, this Court should grant certiorari and reverse the Court of Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian C. Duffy", written over a horizontal line.

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CERTIFICATE OF SERVICE


I, Pamela Jones, Paralegal at Duffy & Young, LLC, certify that I have served the
PETITION FOR WRIT OF CERTIORARI on Respondents on June 20, 2019 by U.S. First
Class mail to their attorneys of record as shown below:

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