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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Judge of the South Carolina Business Court

Appellate Case No. 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,..... Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor And Thomas PlankersRespondents,

Wild Wing Plantation Owners' Association, Inc.,..... Nominal Defendant.

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ARGUMENTS

I. CONTRARY TO RESPONDENTS' ARGUMENTS, WALBECK MANDATES JUDICIAL REVIEW OF THEIR ACTIONS AND PRECLUDES ACTION WHICH ADVANCES THE INTERESTS OF DECLARANTS AT THE EXPENSE OF THE WILD WING POA.

While the facts at issue in this case seem complicated and voluminous, the heart of the case, and the critical issue on appeal, is simple and direct: Did the Declarants, who exercised complete control of the Wild Wing Plantation Owners' Association, Inc. ("Wild Wing POA") from 2006 until 2021, have the right to advance their own financial interests at the direct expense of the Wild Wing POA? The Declarants and the other Respondents who are the selected and controlled board members (many of whom are also members and business partners of the Declarants), argue that they had the right to advance those interests at the expense of the Wild Wing POA because the regime documents *they drafted*, and the expert accountants and property managers *that they retained*, allowed it.

The Appellants disagree, arguing instead that this very Court meant what it said in *Walbeck* when it recognized the potential abuse that can occur when a declarant has complete control over an association. Complete control of an association by a declarant creates an opportunity for the declarant to put its own interests ahead of those of the association, and to even advance those interests *at the expense* of the association. Because of that, in the instance where a declarant has complete control over an association, this Court specifically recognized and defined the fiduciary obligations of a controlling declarant by the standards of *Island Car Wash v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (1987). In *Walbeck* this Court held,

Rather, we define Appellants' fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:

[A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. ... [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

Walbeck v. I'On Co., LLC, 827 S.E.2d 348, 360 (Ct. App. 2019). That is precisely the fiduciary obligation that has been breached by the Respondents when the evidence in this case is taken in the light most favorable to Appellants. The evidence and testimony of Barry Dykes and Roy Strickland, an eminently respected Certified Public Accountant, irrefutably establishes that the Declarants' non-compliance with the plain language of the Declarant Funding Alternative, and the Declarants' decision to extend the life of that funding alternative, not once but twice, for a period of ten (10) years past its initial deadline, resulted in "profit or advantage" for the Respondents at the expense of the Wild Wing POA.

The holding of the Circuit Court and the arguments of Respondents effectively ignore the fiduciary obligation recognized in *Walbeck* and render that decision meaningless. According to the Circuit Court and Respondents, there is no fiduciary obligation, there is only an obligation to comply with the regime documents and comply with the advice and opinions of the Declarants' own selected accountants and property managers.

Also, to be crystal clear, as briefed and argued to the Circuit Court, Appellants do not contend that there is anything illegal or unethical about the mechanisms of control the Declarants and their minions created and utilized. The controlling regime documents are not void or of no effect because the Declarants had the right to exclusively appoint the board of directors, had the right to limit their funding by the way of the Declarant Funding Alternative, or had the right to literally pass any measure the Board of Directors proposed because of their completely controlling voting rights. The legality of those rights is not being contested in this lawsuit. However, while

Appellants recognize the legitimacy of those rights, the issue here is that this Court saw fit in *Walbeck* to constrain the otherwise legal rights of a declarant to prevent them from using those legal rights to unfair advantage, at the expense of the association.

The Circuit Court erred by failing to recognize the fiduciary obligations of the Respondents or apply the safeguards this Court promulgated in *Walbeck* to ensure that the Declarants did not profit at the expense of the Wild Wing POA. The Circuit Court's erroneous analysis and findings, and its refusal to abide by this Court's *Walbeck* decision, compels a clear and unequivocal reversal of the Circuit Court. It is important for this Court to reinforce and again make plain the fiduciary obligations announced in *Island Car Wash* and *Walbeck* that exist with respect to declarants in control of an association, regardless of what the regime documents say and regardless of the advice of sycophant accountants and property managers.

II. THE RESPONDENTS ARE ALL DECLARANTS, AGENTS OF DECLARANTS OR PROFITED FROM DECLARANTS.

In arguments before the Circuit Court an on appeal, the Respondents attempt to isolate Declarants from Directors, ignoring that they are one in the same for purposes of Declarant liability and largely for the purpose of Director liability. Appellants explained all of the related interests between the Directors and the Declarants in their initial briefing and will not do so again. However, what must be stated is that the evidence in this case establishes that the Directors, while not individually Declarants, had 1) vested business or professional interests in the Declarants; and 2) were exclusively selected by the Declarants to serve on the various boards of directors; and 3) at all times, with respect to the issues in this case, acted in the best interests of the Declarants, not the Wild Wing POA. Taken in the light most favorable to Appellants, that evidence supports the claims that have been asserted against the Directors as well as the Declarants.

CONCLUSION

For the foregoing reasons, the Circuit Court's Orders granting Respondents Summary Judgment should be reversed and the matter remanded in full to the Circuit Court for a trial on the merits as to all Respondents.

Respectfully submitted,

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