In the

Supreme Court of Virginia

At Richmond

Record No. 141195

BIRCHWOOD-MANASSAS ASSOCIATES, L.L.C.,

Appellant,

– v. –

BIRCHWOOD AT OAK KNOLL FARM, L.L.C. and
BIRCHWOOD AT WADING RIVER, L.L.C.,

Appellees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Brief of Appellees ("Opp.") evidences little understanding of and even less concern for the history or salutary purpose of the doctrine of equitable tolling in Virginia. Instead, with no legal or factual basis, Defendants[1] seek to minimize equitable tolling or even eliminate it altogether in this Commonwealth. To that end, they misstate Birchwood-Manassas's allegations in support of equitable tolling, and mischaracterize this appeal as an effort to create a *per se* judicial exception to statutes of limitations in cases of "common management."[2] Defendants even devote pages of their brief to a footnote from the Circuit Court's opinion relating to derivative actions, an issue so immaterial that Defendants never even briefed it below. *See* J.A. at 92-112, 541-554.

These arguments change nothing. This Court has adopted and held to the centuries old doctrine of equitable tolling applied here and around the country, under which equity will intervene to toll a statute of limitations where extraordinary circumstances delay the timely assertion of a claim

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[1] Capitalized terms have the same meaning here as in the Opening Brief of Appellant ("Opening Br.").

[2] Defendants also repeatedly and materially misrepresent the procedural history below, offer groundless assertions outside the record as fact, and mount various *ad hominem* attacks on the Liquidating Trustee, all in an effort to distract the Court from the real issues on appeal with red herrings and inflammatory rhetoric. Some of the more material distortions will be addressed in this Reply, but most are irrelevant and should be disregarded.

through no fault of the plaintiff. That is exactly what occurred in this case, where an irreconcilable conflict of interest and multiple breaches of the fiduciary duties of undivided loyalty and care prevented Birchwood-Manassas from asserting its claims within the applicable three-year statute of limitations. Birchwood-Manassas asks this Court to clarify the law on equitable tolling in Virginia, and to reverse the Circuit Court.

AUTHORITIES AND ARGUMENT

I. Defendants Misstate the Circuit Court's Rulings, Which Are Accurately Reflected in the Assignments of Error

Defendants begin with the inexplicable assertion that Birchwood-Manassas's Assignments of Error do not "accurately cite" the rulings made by the Circuit Court, and fail to properly assign or preserve error under Rule 5:17 and 5:25. (Opp. at 19, 20-25). That is clearly wrong.

The Circuit Court acknowledged that it must rely "solely on the pleadings" and "accept plaintiff's factual allegations as true," because it did not take evidence on Defendants' Plea in Bar. J.A. at 308 (citing *Station #2, LLC v. Lynch*, 280 Va. 166, 169 (2010)). Birchwood-Manassas does not allege "conclusions of law," as Defendants assert; it alleges ***facts*** setting forth (i) an irreconcilable conflict of interest and (ii) multiple breaches of the fiduciary duties of undivided loyalty and care which (iii) prevented Birchwood-Manassas from asserting its claims within the applicable statute

of limitations. J.A. at 391-432 ¶¶ 8-12, 17-24, 36-50.[3] Indeed, the existence of an "irreconcilable conflict" is not just a factual ***allegation***; it was the Circuit Court's factual ***finding*** when it ordered the dissolution of Birchwood-Manassas in its October 3, 2012 letter opinion. J.A. at 433-37.

The Circuit Court accepted these ***factual*** allegations as true, but held in both the December 23, 2013 and the April 1, 2014 letter opinions that the types of misconduct alleged by Birchwood-Manassas do not, as a matter of ***law***, support equitable tolling. J.A. at 307-10, J.A. at 657-58. In the April 1, 2014 ruling, the Circuit Court quoted *Schmidt v. Household Fin. Corp., II,* 276 Va. 108, 112 (2008), for the proposition that equitable relief "is available only when a defendant misled or deceived a plaintiff," then added:

> In the present case, the Plaintiff does not allege fraud, but misconduct. The misconduct which the Plaintiff contends prevented it from timely filing suit stems from a theory of an irreconcilable conflict of interest. This Court finds, however, that a conflict of interest, even irreconcilable, does not, of itself give rise to the type of misconduct which would preclude the Plaintiff from timely filing suit.

J.A. at 657-58. This is the holding to which Birchwood-Manassas directs its Assignments of Error, challenging the Circuit Court's ***legal*** ruling limiting

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[3] For example, Birchwood-Manassas alleges, amongst other things, that Mr. Horowitz and Mr. Haims were "the sole authorized decision makers on both sides" of the loans, that they "chose to advance the interests of Wading River and Oak Knoll for their benefit … to the detriment of Birchwood-Manassas," and that due to their conflicting loyalties, they failed and refused to take action against Oak Knoll and Wading River within the three-year limitations period. J.A. at 391-432 ¶¶ 19, 42, 45, 49.

equitable tolling in Virginia solely to cases of fraud. (Opening Br. at 1).

Defendants assert that the Circuit Court did not make a finding of ***law***, but rather one of ***fact*** that the irreconcilable conflict of interest did not prevent Birchwood-Manassas from asserting its claims against Defendants. (Opp. at 23). That assertion, however, conflicts with the Circuit Court's acceptance of Birchwood-Manassas's factual allegations as true, and cannot be squared with the Circuit Court's reliance upon *Schmidt* to limit equitable tolling to cases of fraud. J.A. at 308, 657-58. Defendants are simply contorting a legal ruling into a non-existent factual finding.

Defendants further construe the Circuit Court's ruling as factual based on footnote 1 to the April 1, 2014 letter opinion, which speculates that a member of Birchwood-Manassas might have brought a derivative action. J.A. at 658 n. 1. The flaws in that conjecture are addressed in Section II.C, *infra*. In any event, the Circuit Court's speculative discussion of a possible derivative action in a footnote does not render the Assignments of Error inaccurate. Birchwood-Manassas did not fail to identify the Circuit Court's errors with "reasonable certainty" simply because it did not separately assign error to one footnote, nor has Birchwood-Manassas raised any issues outside its Assignments of Error, as was the case in *Friedline v. Commonwealth*, 265 Va. 273, 278 (2003).

II. Defendants Misconstrue Virginia Law and Mischaracterize Birchwood-Manassas's Arguments Requiring the Application of the Doctrine of Equitable Tolling to This Case

A. Virginia Recognizes the Doctrine of Equitable Tolling and Does Not Limit It Strictly to Cases of Fraud

Defendants posit that the doctrine of equitable tolling in Virginia is either a dead letter or a closed box, proposing that this Court should either never apply it or limit it strictly to those circumstances in which the Court has previously pronounced it applicable. (Opp. at 26-30). Defendants rely upon *Casey v. Merck & Co.*, 283 Va. 411 (2012), in which the Court declined to equitably toll the personal injury statute of limitations due to the pendency of a putative class action in another jurisdiction. The Court found that the General Assembly had not created an applicable statutory exception and that there was "no authority in Virginia jurisprudence" for equitable tolling under these circumstances. *Id*. at 416. Defendants read this to mean only a clear statutory exception permits tolling. (Opp. at 26-29). To the extent equitable tolling exists at all, Defendants argue it must be limited exclusively to cases "when a defendant misled or deceived a plaintiff" pursuant to *Schmidt*, 276 Va. at 112. (Opp. at 29-30).

Defendants misconstrue *Casey* and *Schmidt*, and disregard this Court's unambiguous recognition of the doctrine of equitable tolling as part of Virginia law in *Brunswick Land Corp. v. Perkinson*, 153 Va. 603 (1930).

There, the Court identified equitable tolling as an "exception" to the otherwise "absolute" terms of a statute of limitations. *Id*. at 608. It held that equitable tolling applies under "extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel" preclude application of the statute of limitations, and found the doctrine to be "***implicit*** in the general law" and "***independent*** of the exceptions to its operation which the statute itself declares." *Id*. (emphasis added).

Casey and *Schmidt* did not overrule *Brunswick Land Corp*., nor is there any reason to believe that the Court intended to eradicate equitable tolling in Virginia or narrow it solely to cases of fraud. Though this Court has had only limited occasion to address equitable tolling, the discussion in *Brunswick Land Corp.* accords with the enduring understanding of the doctrine as applying where "extraordinary circumstances" impede a party's assertion of its claim through no fault of its own. *See, e.g., Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 615 (2013); *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). Equitable tolling is "centuries old, and dates from a time when the separation of the legislative and judicial powers was incomplete." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting). Legislatures "would have assumed that equitable tolling would attend any statute of limitations they adopted." *Id*. Because "[i]t is

hornbook law that limitations periods are customarily subject to equitable tolling … Congress must be presumed to draft limitations periods in light of this background principle." *Id*. at 1941-42 (*quoting Young v. United States*, 535 U.S. 43, 49-50 (2002)). The same is true of the General Assembly.

Against this backdrop, the Court's holdings in *Casey* and *Schmidt* are easily understood not as the death knell or straightjacketing of equitable tolling in Virginia, but rather as the Court's refusal to expand the doctrine to circumstances where traditional principles of equity do not apply. In both cases, parties sought to apply equitable tolling in circumstances going well beyond traditional equity—in *Casey* to toll the statute of limitations during the pendency of a putative class action in another jurisdiction, and in *Schmidt* to toll the statute of limitations due to a fraud the plaintiff readily could have discovered through the exercise of reasonable due diligence. In neither case was the plaintiff deprived of the ability to assert a cause of action. The Court thus merely declined to ***expand*** equitable tolling to circumstances where equity need not act. *See Casey*,283 Va. at 416; *Schmidt*, 276 Va. at 120. The Court did not, however, ***restrict*** equitable tolling to something less than its traditional application, where a defendant "has by affirmative act deprived the plaintiff of his power to assert his cause of action in due season[.]" *Brunswick Land Corp*., 153 Va. at 608. Where

this occurs—whether by fraud or other extraordinary circumstances—Virginia's doctrine of equitable tolling affords a remedy.[4] There is nothing to suggest Virginia has elected to "go its own way" and either do away with or craft a narrower doctrine of equitable tolling peculiar to this Commonwealth.

B. Equity Supports Applying Equitable Tolling to an Irreconcilable Conflict of Interest or a Breach of Fiduciary Duty Which Prevents the Timely Assertion of a Claim

The remaining question, then, is whether Birchwood-Manassas has alleged facts supporting equitable tolling under the traditional view, which it has. Defendants seek to trivialize the extraordinary circumstances of this case by repeatedly mischaracterizing Birchwood-Manassas's grounds for equitable tolling as a "common management" theory, asserting that the conflict of interest is "conclusory" based on the "sole, simultaneous management" of Birchwood-Manassas, Oak Knoll, and Wading River, and raising the specter that the proposed application of equitable tolling in this case would "create uncertainty in the affairs of any small business" by creating a *per se* "judicial exception" to statutes of limitations for all

[4] Indeed, *Brunswick Land Corp.*'s inclusion of "equitable estoppel" among the circumstances supporting equitable tolling, 153 Va. at 608, is directly contrary to Defendants' (and the Circuit Court's) reading of *Schmidt* to limit equitable tolling to cases of fraud. Equitable estoppel does ***not*** require a showing of "actual fraud," but only an innocent party's action in reliance "upon the ***conduct*** or misstatement by the person to be estopped." *T. v. T.*, 216 Va. 867, 873 (1976) (emphasis added, internal citations omitted).

affiliated companies and inter-company obligations. (Opp. at 6, 16-17, 26-31, 35, 37-38). That is a straw man argument.

As detailed in the Opening Brief, there is nothing "conclusory" about Birchwood-Manassas's irreconcilable conflict of interest or breach of fiduciary duty theories. Without rehashing the full allegations of the Amended Complaint yet again here, Birchwood-Manassas alleges not only that Mr. Horowitz and Mr. Haims commonly managed Birchwood-Manassas, Oak Knoll, and Wading River, but also that they essentially held Birchwood-Manassas as a captive entity for the benefit of Oak Knoll and Wading River, using it and its assets to extend more than $14 million in undocumented, interest-free loans for Oak Knoll and Wading River to use on their own residential real estate projects, and then failing and refusing to collect the outstanding balances and distribute the assets of Birchwood-Manassas to its members.[5] (Opening Br. at 11-20; *see also* J.A. at 391-432

[5] Defendants seek to muddy the waters, arguing, amongst other things, that the loans were not "undocumented" because there was a "meticulous accounting" of them in later records, stating that Birchwood-Manassas "acknowledges significant repayment of principal and interest," and asserting "overlapping" ownership of the entities. (Opp. at 1, 4-5, 10, 12). This is mere distraction. Though later included in company acountings, the original loans were ***never*** documented by loan documents, Oak Knoll and Wading River have ***never*** paid interest on them, and despite some common membership between the entities, there are also differences in the ownership groups giving rise to competing interests. J.A. at 102, 394, ¶ 9, 398-400, ¶¶ 20-24.

¶¶ 1, 8-12, 17-50, 65-95). It is these and other actions involving an irreconcilable conflict of interest and multiple breaches of the fiduciary duties of undivided loyalty and care, not mere "common management," which prevented the timely assertion of Birchwood-Manassas's claims.[6]

These are precisely the circumstances under which traditional equitable principles intervene to toll a statute of limitations. *See* 54 C.J.S. Limitations of Actions §130 (statute of limitation "does not begin to run until there are in being a person capable of suing and a different person capable of being sued"); *Peyton v. Chase County Nat. Bank*, 262 P.595, 596 (Kan. 1928) (finding it "inconceivable" that conflicted executor would maintain suit against himself); *Yager v. Liberty Royalties Corp.*, 123 F.2d 44, 47 (10th Cir. 1941) (tolling statute of limitations "during the time one person represents both sides of a conflicting claim"); *Sheffield Steel Corp. v. HMK Enterprises, Inc.*, 320 B.R. 405, 417 (N.D. Oka. 2004) (tolling statute of limitations due

[6] Plaintiffs profess to be "confus[ed]" as to which of Birchwood-Manassas's claims are at issue in this appeal, based on the Opening Brief's supposed "continual[]" references to "all its claims"—a phrase that does not appear even once in the Opening Brief. (Opp. at 25). To dispel any "confusion," Birchwood-Manassas sought equitable tolling below with regard to Count I (unjust enrichment) and Counts II-III (constructive trust). J.A. at 555-601. Although there is case law going both ways, the Circuit Court held that constructive trust is a remedy for unjust enrichment, not a separate cause of action. J.A. at 307-10, J.A. 657-58. Birchwood-Manassas need not appeal that ruling, as it only requires the remedy of constructive trust. That leaves Count I (unjust enrichment) at issue in this appeal.

to “self-dealing and self-enrichment” by corporate directors).

Defendants’ efforts to distinguish this case fail. First, they suggest equitable tolling jurisprudence is different for *habeas corpus* cases. (Opp. at 24). That is wrong; the “evils of archaic rigidity” language that Defendants seek to limit to the *habeas* context was imported from traditional civil equity law; the laws are one and the same. *See Holland*, 560 U.S. at 650 (*quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). Second, Defendants assert that equitable tolling is different in Virginia as compared to federal or probate courts, or is limited to cases of fraud. (Opp. at 35-38). This ignores the history of equitable tolling in Virginia, which follows the same “centuries old” doctrine as federal courts, probate courts, and every other jurisdiction. *See* § II.A, *supra*. It also ignores the reasoning of the cases themselves, which specifically apply equitable tolling on the grounds of conflict of interest (*see Peyton* and *Yager*), or breach of fiduciary duty (*see Sheffield Steel*). Though several of the cases involved allegations of fraud to a greater or lesser degree, their reasoning is ***not dependent*** upon fraud as the basis for equitable tolling.

C. The Speculative Possibility of a Derivative Action by Non-Managing Members of Birchwood-Manassas Does Not Relieve the Necessity of Equitable Tolling in This Case

Defendants cannot dispute that Mr. Horowitz and Mr. Haims were

irreconcilably conflicted and failed to act with undivided loyalty as the managers of Birchwood-Manassas to pursue its claims. Relying on footnote 1 to the April 1, 2014 letter opinion, however, Defendants assert that Birchwood-Manassas still was not prevented from asserting its claims prior to the Liquidating Trustee's appointment, because a derivative action might have been asserted by one of Birchwood-Manassas' members. J.A. at 658 n. 1. (Opp. at 23, 28, 32-33). This argument is fatally flawed.

It is fundamentally inequitable to construe a member derivative action (or the failure to bring such an action) as conduct by Birchwood-Manassas itself. A limited liability company "is a legal entity entirely separate and distinct from the shareholders or members who compose it." *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161 (2008). A derivative action is ***not*** brought by the limited liability company, but by a "nominal plaintiff" member purporting to act "on behalf of" the company, asserting "a claim that belongs to that entity rather than the member." *Id*. at 161-62. Birchwood-Manassas was a ***manager-managed*** limited liability company. J.A. at 434. Mr. Horowitz and Mr. Haims managed the company, and they were the ones with a duty of undivided loyalty to act in its best interests. J.A. at 394 ¶ 9. It cannot be the case, as Defendants assert, that the survival or forfeiture of Birchwood-Manassas's claims turns on whether

or not a minority member was sufficiently informed and motivated (and had adequate resources) to take on the burden of pursuing a derivative action when the company's irreconcilably conflicted managers refused to act.

Moreover, the ability to even assert a derivative action is heavily fact-dependent. *See* Va. Code §§ 13.1-1042 to 13.1-1043; *Cattano v. Bragg*, 283 Va. 638, 646 (2012) (listing seven factors relevant to the viability of a derivative action). It also requires a written demand and derivative standing. *See id*. Thus, even if a member's purported ability to assert a derivative action were deemed to be an adequate substitute for irreconcilably conflicted management, which it is not, there is nothing in the record to suggest that such a suit was legally or practically viable here.

Defendants' assertion that a derivative action was not brought for "tactical" reasons is sheer speculation, based on nothing more than a vague reference to "other potential causes of action" at oral argument on the first Plea in Bar; it has no basis in fact. (Opp. at 32-33). There is nothing in the record to indicate that Mr. Lieberman, who is ***not*** a party to this case, even knew of the demand obligation claims, much less that he could have overcome the many barriers to assert them derivatively. Likewise, the Circuit Court's suggestion (*see* J.A. at 658 n. 1) that it was somehow Birchwood-Manassas's obligation to allege that its members could ***not***

bring a derivative action erroneously merges the identities of Birchwood-Manassas and its members. *See Mission Residential*, 275 Va. at 161. The entire question of a member derivative action is, in short, a red herring.

III. The Cross-Appeal Fails to Establish Any Error in the Circuit Court' Proper Denials of Oak Knoll's Repeated Attempts to Quash Birchwood-Manassas's *Lis Pendens*

Oak Knoll says little in support of its cross-appeal that has not already been addressed in Birchwood-Manassas's Opening Brief. Once again, it repeatedly mischaracterizes the *lis pendens* filed by Birchwood-Manassas as a "pre-judgment attachment." (Opp. at 7, 14, 19, 39-44). But a *lis pendens* is ***not*** an attachment; it is merely a statutorily-authorized cloud on title that is intended to maintain the status quo pending adjudication of an asserted interest in property, and its use is ***not*** limited to secured loans or claims seeking title to real property. (Opening Br. at 45-47).

Oak Knoll asserts that Birchwood-Manassas does not seek to establish an "interest" in Oak Knoll's real property, because it is pursuing an "action for money damages" with no "specific nexus to a parcel of real property." (Opp. at 40-43). Oak Knoll further contends that a constructive trust does not constitute a property "interest" in this case, because a constructive trust does not arise merely as the result of a loan to a person who owns real property. (Opp. at 43-45). Both arguments completely ignore

the substance of Birchwood-Manassas's unjust enrichment claim and constructive trust remedy. Birchwood-Manassas is not just seeking money damages from a property owner; it asserts an equitable interest in the Remaining Oak Knoll Lots and their future sales proceeds, because Oak Knoll developed those lots using the particular funds it borrowed from Birchwood-Manassas for that specific purpose and has refused to repay. (Opening Br. at 40-45). This nexus clearly satisfies the elements of an unjust enrichment claim and a constructive trust remedy. (*Id*. at 47-49). It is also completely untrue to say, as Oak Knoll does, that it was free to use the loaned funds however it wanted. (Opp. at 44-45). Paragraph 98 of the Amended Complaint is directly to the contrary. J.A. at 422, ¶ 98.

Lastly, Oak Knoll continues to repeat its empty refrain that the *lis pendens* is being used to "leverage" Oak Knoll or "shut down" its business with "nearly catastrophic" consequences. (Opp. at 46-47). That assertion is both wholly unsupported and demonstrably false. As previously discussed in Birchwood-Manassas's Opposition to Oak Knoll's Motion for a Modification of Security, filed with this Court on September 29, 2014, the *lis pendens* has ***not*** prevented the construction or sale of a single Oak Knoll lot. Oak Knoll is directly misrepresenting the true state of its business activities for false argumentative effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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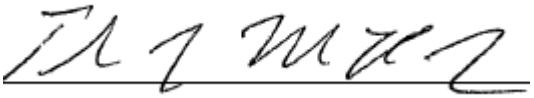

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