No. 23-CV-0720

DISTRICT OF COLUMBIA
COURT OF APPEALS

CASA RUBY, INC.

Appellant,

v.

HASSAN NAVEED, *et al.*

Appellees.

On Appeal from an Order of Partial Final Judgment of the D.C. Superior Court,
The Hon. Danya A. Dayson

REPLY BRIEF OF APPELLANT CASA RUBY, INC.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the decision of the Superior Court and find that the Third-Party Complaint and the Supplemental Response alleged facts sufficient to raise a reasonable inference that Appellees, as members of Casa Ruby's Board of Directors, can be held liable for monetary damages under the Nonprofit Corporation Act ("NCA"). Appellant's Br. 13. Appellees have contended that the Superior Court's decision should be upheld, arguing that: (i) the willful blindness standard is inapplicable to the NCA; (ii) Appellant has misinterpreted the liability standard and intent of the NCA; (iii) Appellees' alleged conduct does not constitute willful blindness; and (iv) Appellant failed to provide facts sufficient to establish each of Appellees' individual liability under the NCA. *See* Appellee Zoltick's Br. 12-24; Appellee Naveed's Br. 3-4; Appellee Harrison's Br. 4-9; Appellee Rivera's Br. 4-15. Appellees Zoltick, Naveed, and Harrison separately argue that they are entitled to attorneys' fees plus reasonable costs and expenses "due to Appellant's frivolous litigation." Appellee Zoltick's Br. 24; Appellee Naveed's Br. iv; Appellee Harrison's Br. 5.

Appellees' arguments lack merit and are unpersuasive. *First*, no court has evaluated the specific question of whether willful blindness—or, in the parlance of the trial court, "deliberate indifference"—may amount to actual knowledge under the NCA, and cited precedent suggests that it may. *Second*, despite Appellees'

claims to the contrary, the legislative history of the NCA does not provide any evidence of legislative intent that is relevant to the NCA's knowledge standard. *Third*, Appellant has sufficiently alleged that Appellees acted with willful blindness where they: (a) violated Casa Ruby's by-laws by conducting only one Board meeting in six years, allowing Ms. Corado to maintain complete authority over the organization, including by allowing her to unilaterally appoint new Board members; (b) allowed Ms. Corado to maintain sole control over Casa Ruby's bank and financial accounts, even after Ms. Corado cut off access to those accounts to anyone but herself, and after the Board met in 2020 and 2021 to discuss a leadership transition without effecting any such transition; and (c) failed to exercise any oversight whatsoever, letting Ms. Corado use Casa Ruby's funds to give gifts to associates and friends.

Fourth, relevant precedent defining the elements of willful blindness does not include any requirement that the party attempting to demonstrate willful blindness allege facts specific to each Appellee. Stated differently, there is no precedent barring a party from alleging that the collective acts or omissions of a group of persons constituted willful blindness. This is particularly true at the motion to dismiss stage of a litigation, where the discovery process is designed to uncover individualized facts pertaining to each Appellee's possible liability. *Fifth* and finally, Appellees' calls for reasonable attorneys' fees plus costs and expenses are baseless.

The award of reasonable attorneys' fees is reserved for instances of bad faith litigation—not the simple act of appealing the decision of a lower court on an issue of first impression and asserting arguments with which Appellees disagree.

ARGUMENT

I. THE PLEADINGS' ALLEGATIONS OF WILLFUL BLINDNESS SATISFY THE LIABILITY STANDARD FOR MONETARY DAMAGES UNDER THE NCA.

A. The NCA and the Limited Applicable Precedent Confirm That Willful Blindness May Allow Inference of Actual Knowledge.

There is no dispute that the NCA is the controlling statute in this case, and that, as relevant to the instant case, the NCA allows nonprofit directors to be held liable to a nonprofit for money damages for "[a]n intentional infliction of harm." D.C. Code § 29-406.31(d)(2). The Superior Court found, and Appellees agree, that "a director's conduct rises to the level of intentional infliction of harm if the director (1) intends the conduct; (2) with the knowledge that the conduct will cause harm." App. 088 (quoting *Bronner v. Duggan*, 317 F. Supp. 3d 284, 292 (D.D.C. 2018)); Appellee Zoltick's Br. 17; Appellee Harrison's Br. 5; Appellee Rivera's Br. 7. It is this second prong upon which the Superior Court dismissed Appellees from the case, and the second prong which is a matter of first impression in this Court: whether allegations of willful blindness to causing harm may establish an adequate factual predicate for the finding of "actual knowledge" of that harm. Construing the

allegations in the Third-Party Complaint and related submissions in the light most favorable to Appellant, they do.

No court has evaluated this specific question under the NCA, and Appellee Zoltick is thus correct that Appellant's substantive position and argument derive from cases in other jurisdictions that analyze other laws. *See* Appellee Zoltick's Br. 18. However, such limited precedent establishes that "evidence of intentional ignorance or willful blindness may support an inference of actual knowledge in particular cases." *Marion v. Bryn Mawr Tr. Co.*, 288 A.3d 76, 92 (Pa. 2023). Indeed, the U.S. Supreme Court has said the same. *See Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 187 (2022) (citing *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. ----, 140 S.Ct. 768, 779 (2020)) ("[The U.S. Supreme Court] ha[s] recognized in civil cases that willful blindness may support a finding of actual knowledge."). Whether this principle may apply to the facts and circumstances of the instant case, thus serving as a plausible basis for the imposition of liability against the Appellees, is an unresolved question under D.C. law and an entirely fair and appropriate ground for this appeal. To be clear, Appellee Zoltick's repeated insistence that Appellant is pursuing "a change in D.C. law"—*see, e.g.*, Appellee Zoltick's Br. 13—is in reality nothing more than a classic example of *ipse dixit* reasoning. Whether the utter and complete abdication of fiduciary duties in which Appellees engaged in their roles as members of Casa Ruby's Board of Directors may

rise to the level of "[a]n intentional infliction of harm" under D.C. Code § 29-406.31(d)(2) is an open question to be determined by this Court's disposition in this appeal. Appellees' insistence that heretofore uninterpreted statutory language can only mean what they say it means is baseless.

B. Appellees' Citations to the NCA's Legislative History Do Not Affect This Conclusion.

While courts may utilize the legislative history of a statute "to determine whether [their] interpretation is consistent with legislative intent," *Cass v. District of Columbia*, 829 A.2d 480, 482 (D.C. 2003), *as amended on reh'g in part* (Oct. 6, 2003), the legislative history of the NCA does not provide the evidence of "legislative intent" regarding whether willful blindness may give rise to an inference of actual knowledge that Appellees seem to hope it does. Appellant does not disagree that the statute "[was] not only agreed upon and implemented by the legislature of the District of Columbia, but [is] also an implementation of language found in the Model Nonprofit Corporation Act . . . ." Appellee Zoltick's Br. 12. Nor does Appellant disagree that the statute "mak[es] explicit the fact that only under extreme and particular circumstances should a nonprofit board member be held liable . . . ." Appellee Zoltick's Br. 15. Appellant further agrees that the NCA differs from the D.C. Business Corporation Act ("BCA"), which does not contain the specific provision at issue here, and certainly agrees that the BCA is "not applicable to this matter . . . ." Appellee Zoltick's Br. 14. None of these propositions have the slightest

bearing on whether willful blindness can give rise to an inference of actual knowledge of harm to constitute an intentional infliction of harm.

This case presents exactly the sort of "extreme and particular circumstances" under which nonprofit directors should be held liable under the statute: a case in which Ruby Corado allegedly "'drained . . . over $800,000 from the organization . . . opened a $600,000 line of credit' and took exponential salary increases" during a multi-year period where the Board of Directors met only once and made no effort whatsoever to protect the organization's interests. Appellant's Br. 19 (quoting App. 040). Moreover, when the Board of Directors *did* meet in 2020 and 2021 to discuss transitioning leadership of the organization, Appellees did not take actions to effectively achieve that result, and instead allowed Ms. Corado to retain exclusive control over Casa Ruby's bank accounts. App. 013; Appellant's Br. 20. Nothing in the legislative history of the NCA suggests, much less definitively indicates, that the legislature desired to shield nonprofit directors from liability in such a case.

II. THE THIRD-PARTY COMPLAINT AND SUPPLEMENTAL RESPONSE ALLEGE FACTS SUFFICIENT TO SURVIVE APPELLEES' MOTIONS TO DISMISS.

A. Appellant Sufficiently Alleges That Appellees Violated the NCA.

The Third-Party Complaint and Supplemental Response, when construed in "the light most favorable" to Appellant as applicable law requires, sufficiently allege that while breaching their fiduciary duties to Casa Ruby, the Appellees acted with

the willful blindness—or "deliberate indifference"—that might satisfy the NCA's actual knowledge requirement. D.C. Code § 29-406.31(d)(2); *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Appellees fail to address their breaches of the fiduciary duty that they each owed to Casa Ruby as a matter of law. Indeed, the NCA requires that each of the Appellees "act: (1) In good faith; and (2) In a manner the director reasonably believes to be in the best interests of" Casa Ruby. D.C. Code § 29-406.30(a).[1]

While Appellee Rivera attempts to water down the Superior Court's findings as to Appellees' conduct, insisting that the Court found that the Third-Party Complaint's "allegations could only amount to indifference to the known risks of inaction," Appellee Rivera's Br. 14, the Superior Court rightly acknowledged that Appellees' inactions "could accurately be described as [their] *deliberate* indifference to the known risks of their inaction." App. 093 (emphasis added). This distinction is important when considering the willful blindness test that Appellees cite—Appellant

[1] Despite Appellee Zoltick's attempt to engage in a game of textual "gotcha" with the NCA's broad articulation of board of director duties in D.C. Code § 29-406.01(b)—*see* Appellee Zoltick's Br. 22-23—D.C. Code § 29.406.30(a) makes clear that individual board members may not act with "deliberate indifference" to the known risks of their inaction. App. 093. Instead they are held to a far higher standard—they must act in a manner that they "reasonably believe[]" to be consistent with "the best interests of the nonprofit corporation." D.C. Code § 29-406.30(a).

must demonstrate, with facts that "nudge their claims across the line from conceivable to plausible," that Appellees took "deliberate actions to avoid confirming a high probability of wrongdoing" such that they "can almost be said to have actually known the critical facts." *Tingling-Clemons v. District of Columbia*, 133 A.3d 241, 246 (D.C. 2016); *see generally Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011).

Here, the Third-Party Complaint clearly meets that threshold, particularly considering Appellees' fiduciary duties to Casa Ruby. Indeed, Appellees took "deliberate actions to avoid confirming a high probability of wrongdoing" when they failed to hold more than a single Board meeting between 2014 and 2020—at the same time when Ms. Corado "'drained . . . over $800,000 from the organization . . . opened a $600,000 line of credit' and took exponential salary increases." Appellant's Br. 19 (quoting App. 040); *Global-Tech*, 563 U.S. at 769. And just as the petitioners in *Global-Tech* knew that the respondent's cool-touch fryer was an innovation in the U.S. market because they performed market research and copied all but the cosmetic features of the device, 563 U.S. at 770-71, Appellees "can almost be said to have actually known" of Ms. Corado's wrongdoing when they met in both 2020 and 2021 to discuss transitioning Casa Ruby's leadership, but ultimately failed to effectively replace Ms. Corado, who was permitted to maintain sole control over all of Casa Ruby's bank accounts. *Id.* at 769; App. 013. Indeed, the 2020-2021 Board

meetings—which were notably more frequent as compared to the one meeting that had taken place in the six years prior—"support an inference or conclusion" that Appellees knew that Ms. Corado's leadership was harming the organization, and therefore, "intentionally, rather than negligently, inflicted harm on Casa Ruby" in violation of D.C. Code § 29-406.31(d)(2). App. 086; Super. Ct. Civ. R. 8(a)(2).

Appellee Rivera also attempts to distinguish three cases cited by Appellant—*Unicolors*, *Intel*, and *Marion*—and claims that they instead "support the Superior Court's finding." Appellee Rivera's Br. 12. However, Appellee Rivera either misreads the holdings or misapplies the facts (or both) in each instance. *First*, Appellee Rivera claims that Appellees cannot be found to have actual knowledge under D.C. Code § 29-406.31(d)(2) because the Supreme Court in *Unicolors* held that if the petitioner in that case "was not aware of the legal requirement that rendered information . . . inaccurate, it could not have included the inaccurate information 'with knowledge that it was inaccurate.'" *See Unicolors*, 142 S. Ct. at 942; Appellee Rivera's Br. 12. However, Appellee Rivera ignores the Supreme Court's recognition that "in civil cases . . . willful blindness may support a finding of actual knowledge" where "[c]ircumstantial evidence . . . may also lead a court to find that an applicant was actually aware of, or willfully blind to," certain legal requirements or factual realities. *Unicolors*, 595 U.S. at 188-89. Indeed, Appellant has maintained that Appellees can be held liable for monetary damages under the

NCA based on an inference that Appellees either *knew* or *consciously avoided knowing*: (1) of the dire problems with Casa Ruby's leadership; (2) that leadership changes needed to be made to rectify the situation; and (3) that failing to make changes was already causing and would continue to cause harm to the organization. Appellant's Br. 20.

Second, Appellee Rivera asserts that the Supreme Court's decision in *Intel* stands for the maxim that that "merely having access to information does not amount to 'actual knowledge' if there is no awareness of the information." Appellee Rivera's Br. 13. Although that principle may be true in the abstract, it does not apply here. In *Intel*, wherein the petitioner was appealing a lower court ruling on a motion for summary judgment, the Supreme Court held that the respondent did not have actual knowledge of information contained in the disclosures that he received but did not read because the respondent "must in fact have become aware of the information." *Intel*, 140 S. Ct. at 777. Here, however, Appellant contends, at the motion to dismiss stage, that it has alleged facts sufficient to support an inference that Appellees took deliberate actions to avoid confirming Ms. Corado's wrongdoing by failing to hold more than a single Board meeting for six years and may have actually known of such wrongdoing when they held Board meetings in 2020 and 2021 to discuss transitioning the leadership of Casa Ruby, but then failed to take action. Indeed, as the Supreme Court in *Intel* explained, its opinion does not foreclose "any of the

'usual ways' to prove actual knowledge at any stage in the litigation." *Id.* at 779. Additionally, the Supreme Court made clear in *Intel* that "actual knowledge can be proved through 'inference from circumstantial evidence[,]'" *id.* (quoting *Staples v. United States*, 511 U.S. 600, 615-16 n.11 (1994)), and that its holding "does not preclude [parties] from contending that evidence of 'willful blindness' supports a finding of 'actual knowledge.'" *Id.* at 779.

Third, Appellee Rivera contends that like *Marion*, this case "emphasizes the significance of awareness to meet the standard of 'actual knowledge[,]'" and that "even if willful blindness constituted actual knowledge, Appellant's allegations could only amount to indifference to the known risks of inaction and not willful blindness . . . ." Appellee Rivera's Br. 14. However, this conclusory comparison is flawed. In the *Marion* case, the court found that the defendant bank did not have actual knowledge of the fraudulent conduct of one of its customers when the customer withdrew a credit application after the defendant bank asked the customer for a favorable credit reference. 288 A.3d at 78-79. Here, Appellant has sufficiently alleged that Appellees were at least "aware of facts that made the primary conduct wrongful" when they held Board meetings in 2020 and 2021 to discuss making Casa Ruby leadership changes after Ms. Corado "'drained . . . over $800,000 from the organization . . . opened a $600,000 line of credit' and took exponential salary

increases," and subsequently retained control over Casa Ruby's bank accounts. Appellant's Br. 19 (quoting App. 040); App. 013, 019.

The Third-Party Complaint and Supplemental Response sufficiently allege claims for monetary damages against Appellees under the NCA, and this Court should therefore reverse the Superior Court's decision and deny the motions to dismiss.

B. Discovery Is Necessary to Uncover Additional Evidence of Individual Appellee Liability.

Appellees insist that Appellant's claims under the NCA must be dismissed as to each Appellee because the Third-Party Complaint and Supplemental Response do not assert specific facts sufficient to establish each Appellee's individual liability. Appellee Harrison's Br. 8-9; Appellee Naveed's Br. 3; Appellee Rivera's Br. 14; Appellee Zoltick's Br. 19. But the willful blindness standard does not require Appellant to identify such facts at this threshold pleading stage. As the Supreme Court explained in *Global-Tech*, to prove willful blindness, a plaintiff must demonstrate, with facts that "nudge their claims across the line from conceivable to plausible," that the Appellees took "deliberate actions to avoid confirming a high probability of wrongdoing" such that they "can almost be said to have actually known the critical facts." *Tingling-Clemons*, 133 A.3d at 246; *Global-Tech*, 563 U.S. at 769. Here, the Third-Party Complaint and Supplemental Response sufficiently allege that Appellees collectively engaged in acts or omissions designed to avoid

confirming a high probability of Ms. Corado's wrongdoing when they (a) held only a single Board meeting between 2014 and 2020 and (b) held Board meetings between 2020 and 2021 to discuss transitioning Casa Ruby's leadership, but ultimately never removed Ms. Corado. App. 013, 019.

Notwithstanding the legal reality that the willful blindness standard does not require a showing of individualized facts as to each Appellee to sufficiently allege a violation of the NCA, the discovery process is designed precisely to uncover individualized facts pertaining to each Appellee's liability *or a lack thereof*. This Court should therefore reverse the Superior Court's ruling and allow Appellant's claims to proceed to discovery, which will provide Appellant with the ability to uncover particularized facts as to the culpability of each of the Appellees under the NCA.

III. CASA RUBY'S APPEAL INVOLVES AN ISSUE OF FIRST IMPRESSION BEFORE THIS COURT, AND APPELLEES' DEMAND FOR ATTORNEYS' FEES AND COSTS IS WITHOUT MERIT.

"The responsibility for paying attorneys' fees stemming from litigation, in virtually every jurisdiction, is guided by the settled general principle that each party will pay its respective fees for legal services." *6921 Georgia Ave., N.W., Ltd. P'ship v. Univ. Cmty. Dev., LLC*, 954 A.2d 967, 971 (D.C. 2008), *as amended* (Nov. 4, 2008). Only under "extraordinary circumstances or when dominating reasons of fairness so demand" will attorneys' fees be shifted due to bad faith litigation.

Synanon Found., Inc. v. Bernstein, 517 A.2d 28, 37 (D.C. 1986). Indeed, "the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts." *Id.* The bar for awarding attorneys' fees for bad faith litigation is thus "necessarily stringent." *Id.* (quoting *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975)). In *Synanon*, a party "perpetrated a fraud on the court" and "cynically attempt[ed] to foil the discovery process," and the other party was thus awarded attorneys' fees. 517 A.2d at 37-38.

This high bar is not met, or even approached, in this case. Appellee Zoltick argues that due to the "demonstrably frivolous" nature of the claims against her, as well as Appellant "pursu[ing] an action against Ms. Zoltick even after a clear ruling from the Superior Court," and "its counsel publishing multiple posts to its public website" about the case,[2] the Court should award her attorneys' fees. Appellee Zoltick's Br. 24.[3] However, neither appealing a "clear ruling" from a trial court nor putting forward a legal theory with which Appellee Zoltick disagrees amounts to "frivolous" litigation. Even if Appellant were seeking to "materially chang[e] the applicable law," as Appellee Zoltick claims, which it is not, the D.C. Rules of

[2] Appellant notes that the three short and factual blog posts of which Appellee Zoltick complains were published by counsel for the Receiver, and not Appellant.
[3] Appellees Harrison and Naveed also request that they be awarded attorneys' fees, though neither presents an argument as to why this case should overcome the "general principle" that parties pay their own fees. Appellee Harrison's Br. 9; Appellee Naveed's Br. 4.

Professional Conduct provide that non-frivolous proceedings "include[] a good-faith argument for an extension, modification, or reversal of existing law." D.C. R.P.C. 3.1. *See also In re Estate of Delaney*, 819 A.2d 968, 999 (D.C. 2003) (holding that a trial court did not err in finding no bad faith where the plaintiff "either had some factual support for her pleadings or was arguing for a modification of existing law"). The Superior Court correctly rejected Appellee Zoltick's plea for fee-shifting, not even dignifying that groundless plea with any comment in its decision below,[4] and the Court should do the same here.

CONCLUSION

For all these foregoing reasons, as well as those set forth in the Appellant's Opening Brief, the Superior Court's ruling should be reversed, and the case should be remanded for further proceedings.

[4] Appellee Zoltick seems to imply that, by granting in part her Motion to Dismiss, the Superior Court also granted her request for attorneys' fees. Appellee Zoltick's Br. 25. The Superior Court did not make any finding as to bad-faith litigation and did not even arguably hold that fees were being awarded. App. 079-094.

Dated: May 16, 2024

Respectfully Submitted,

By: */s/ Theodore A. Howard*

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2024, true and correct copies of the foregoing Reply Brief of Appellant Casa Ruby, Inc. were served upon all counsel of record via electronic mail or by certified mail.

/s/ Theodore A. Howard
Theodore A. Howard