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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas R. Keith Kelly, Circuit Court Judge

Appellant Case No. 2022-001557
Civil Action Case No. 2016-CP-42-01854

Chandelle Property Owners Association, Respondent,

v.

James Douglas Armstrong, Jane Armstrong, Warren Johnson, Rhonda Johnson, John K. Payne, Ruth G. Payne, and Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust dated October 25, 2006, Appellant.

REPLY BRIEF OF APPELLANT

Respectfully submitted,

s/ Wendell L. Hawkins
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May 12, 2023
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Table of Contents

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

ARGUMENT

The Appellants herein submit their Reply Brief to Respondent's Initial Brief consistent with the following arguments:

I. THE TRIAL COURT ERRED IN THAT IT IGNORED THE FACT THAT THE BY-LAWS PROHIBITED THE PLAINTIFF FROM INCURRING DEBT IN EXCESS OF $50,000.00 WITHOUT A VOTE OF THE ASSOCIATION AND THE CCR's ONLY ALLOWED THE ANNUAL ASSESSMENTS TO BE USED FOR SUBDIVISION MAINTENANCE.

Respondent's Arguments in Section I (1) of its Initial Brief are flawed, conclusory and in many ways, irrelevant arguments. Appellant's position is quite simple and does not require (20) twenty pages of dialogue to maintain. The assessments the Respondent was seeking to recover through tits legal cause of action of debt collection were incurred through a means that was unambiguously prohibited by the governing documents of the corporation. (Complaint pp. 23-25). The Respondent's position that the Appellants misconstrued or misunderstood the court's order is simply untenable. (Initial Brief of Respondent p.12). Respondent admits that the court specifically considered the provisions of Section 8.2(i) of the corporate By-Laws. (Init Brief of Respondent, p. 12). Respondent then goes on to say the court did not reach the merits of the argument. One could suppose that the Respondent is saying the court did not consider the argument, and the Appellants agree, or perhaps the court considered the argument and committed an error of law. Either way, those are appealable issues which seem quite clear to the Appellants. For the court to not consider the holdings of *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 344 S.E. 599 (Ct. App. 1986) that "a permissible purpose cannot be accomplished by a prohibited means" is a clear abuse of discretion and the lower court's ruling should be overturned on that basis alone. Furthermore, Respondent's argument that because the court made

a conclusory ruling that the violation of the corporate documents was irrelevant to the obligation to pay the assessments imposed through the violation is simply more indicative of the abuse of discretion.

Secondly, Respondent's argument that Article XI, Section 11.7 which provides that "no lot owner may waive or otherwise exempt himself from assessments and that the obligation to pay assessments is a separate and independent covenant on the part of each lot owner" has got to assume that the assessments were assessed in a manner that was rightfully in comport with the restrictions and bylaws. Why would the drafters of the document not have included the terms "even if the assessments were improper?" The answer is simply because the provisions of Article XI, Section 11.7 assume that the assessments were assessed in comport with the provisions of the corporate documents. Respondent's ongoing argument that a violation of Section 8.2(i) does not strip the power of Respondent of its independent power to levy assessments upon its members once again ignores the holdings of *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 344 S.E. 599 (Ct. App. 1986) that "a permissible purpose cannot be accomplished by a prohibited means."

Respondent's next argument regarding *ultra vires* is simply (4) four pages of irrelevant filler. The court's Order specifically held the issue in abeyance as to whether or not the Board of Directors may be held personally liable. (Order on Appeal, p.24).

Respondent then asserts in Section I (2) of it's Initial Brief that the Appellants take the position that the Declaration prohibits "annual assessments" to be used for anything other than maintenance. Respondent further asserts that Appellants therefore conclude that any portion of the "annual assessments" comprised of attorney's fees could not be rightfully assessed. Respondent is absolutely correct in Appellant's position. Respondent then goes on to engage in

a (4) four page essay on contractual law regarding ambiguous contracts despite the fact that neither of the parties argued that the Restrictions or By-Laws were ambiguous. They then argue that when read as a whole, the declaration and bylaws together with the applicable law, clearly and unambiguously allow assessments to be levied and used for attorney's fees and that to find otherwise would lead to absurd results. The real issue on appeal, however, is not how the assessments were used, but rather the incurring of debt in contravention of the By-Laws and then trying to assess the members to pay it. What is further clear from the testimony of Billy Israel is that the attorney's fees were being passed on to the residents as annual assessments, and there were no maintenance activities of any significant nature being performed by the Board. (Israel Dep. p. 93, line24-p. 95, Line 6). It is also clear that the Board was hiding the fees from the residents as some of the residents were "adverse". (*Id* at p. 111, line 10-18). While the Respondent asserts that assessments may be levied to promote the recreation, health, safety and welfare of the Association, the corporate documents do not say anywhere that the Board alone may make such assessments however it feels, even if in circumvention of the remaining provisions of the Bylaws and Restrictions. Respondent once again glosses over the contractual law of *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 344 S.E. 599 (Ct. App. 1986) that "a permissible purpose cannot be accomplished by a prohibited means." Respondent also glosses over the fact that the assessments were to pay Respondent's lawyers who told the Board not to worry about Section 8.2(i) of the By-Laws because the Board was "doing what [they] believed [was] the best thing to do." (Israel Dep. p. 111, line10-18). Unfortunately, Respondent does not provide the contractual case law that allows for ignoring the contractual provisions of the By-Laws for the purposes of "doing the right thing." Contracts are for the purpose of objectivity, not subjectivity. If all the terms were subjective, there would be no purpose of contract law.

Respondent also omits the case law that supports the position that a Board can surreptitiously rack up hundreds of thousands of dollars in attorney's fees and then delivery the bill in "swallowable increments" over time to soften the blow. Respondent's defenses are unsupported by any type of relevant law. While there was no argument at the trial court level that the corporate By-Laws and Restrictions were ambiguous, Appellants would take advantage of Respondent's citing of *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) which says, "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties intentions as determined by the contract language." The holding is exactly on point and there is nothing ambiguous about the fact that Article 8.2(i) of the By-Laws requires a 50% vote of the entire association to incur debt above $50,000.00. It could have only been the intent of the drafters of the document to limit the actions of a runaway Board like the Board in this case. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." (*McGill*, citing, *Schulmeyer v. State Farm Fire and Cas. Co.,* 353 S.C. at 495, 579 S.E.2d at 134, (2003)). Respondent then goes on to talk about budgets, yet Appellants challenge Respondents to produce one yearly budget that includes the anticipated fees incurred in this case. Once again, Respondent waxes eloquent, but attaches no proof to the recitation of the provisions of the Restrictions or By-Laws and did not present evidence at the hearing that any budget actually contained a line item in the nature of anticipated attorney's fees of the magnitude expended. Furthermore, Respondent's arguments that the Annual Assessments for the funding of the Maintenance Fund encompasses the attorney's fees charge in this case under the snip-it, *other purposes*, is the most absurd construction of this contractual provision imaginable. (Initial Brief of Respondent, 25, line 3). To quote the Respondent's law, "[a]n interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an

absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233. It would seem to be a less absurd interpretation of the Maintenance Fund's words of "*other purposes*" to refer to "other purposes of maintenance that we didn't expressly provide for herein because we didn't think about it at the time of the drafting of this document." If the Court adopted Respondent's approach, the Board could go out and buy magical beans and geese that purportedly lay golden eggs.

Respondent exhaustively continues to point to various provisions of the corporate documents that allow the Board to make assessments for various purposes and that potentially allow for the implementation of assessments to pursue the endeavors undertaken in this case, but once again, a lawful purpose cannot be accomplished by a prohibited means. The Board simply could not incur debt in violation of article 8.2(i) to achieve any presumed lawful purpose.

Lastly, Respondent delves into the alternative argument that the SC Non-Profit Act authorized the Board's actions. While the Respondent submitted its proposed order to include those findings, the trial court specifically omitted those arguments from its final Order. (See Respondent's Proposed Order pp. 28-30)

It is unclear to Appellant why Respondent argues anything regarding Section 13.9's Recovery of Costs, but it is interesting that Respondent impliedly takes the position that these provisions only protect Respondent. To the contrary, the Section provides for recovery of fees and costs by the "prevailing party." Respondent's motion before the court, however, was on the equitable issue of implied covenants, quiet title and declaratory judgment which was relief equitable in nature. The issue of the enforcement of the covenants remains for further litigation and Appellants assert that the "prevailing party" has not yet been determined so the award of any attorney's fees as assessments was improper. The problem seems to be, however, that the court

has not required the Respondent or their lawyers, who are the actual creditors, to parse out the legal fees solely allocable to the legal battles with the Appellants. Likewise, the next argument that Appellant's take the position that assessments can never be imposed for the purposes of attorney's fees is way off base. Appellant's position is that the attorneys can't represent the association allowing it to knowingly accumulate massive amounts of debt in violation of the Restrictions and then later sue the residents to pay that debt that was accumulated under a prohibited means under the lawyer's directives. Appellants agree that the Association can hire lawyer, but the Association cannot become in debt to the lawyers in amounts that require approval of the members.

Also, Respondent's further assertions that any challenge to the levying and use of assessments on the basis of *ultra vires* has to be brought as a derivative action is simply misleading to this Court. The trial court specifically addressed the issue in the order filed in the ruling on the Third Party Defendant's motion for summary judgment which was argued simultaneously with the hearing of the Order on Appeal. (Order on Third Party Defendant's Motion for Summary Judgment). The court opined that the members could sue individually. The court opined,

> "Chandelle further argues that the Defendant's counterclaims and third party complaints should be dismissed because the claims sound as a derivative action and do not meet the pleading requirements of SCRCP Rule 23(b)(1). Our Supreme Court, however, has ruled it is possible for claims to be *both* derivative and direct in nature. *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018). "Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923 (2015). Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922 (2015). "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id*. (citing *Carsanaro v.*

> *Bloodhound Techs., Inc*., 65 A.3d 618 (Del. Ch. 2013)); *see also Horizon House-Microwave, Inc. v. Bazzy*, 21 Mass.App.Ct. 190, 486 N.E.2d 70, 74 (1985) (observing a shareholder may pursue both direct and derivative claims in a single action). *Id.* at 687. Because of the holdings of *Patterson*, Chandelle's Motion for Dismissal and Summary Judgment based on SCRCP Rule 23(b)(1) are DENIED."

Lastly, Respondent argues *Lovering* is no longer good law and its holdings were overruled by SC Code of Laws 33-31-302. While S.C. Code Ann. § 33-31-302 provides for things that a corporation may do, that general laundry list also comes with a qualifying preamble. The very first words of § 33-31-302 are, ***"[u]nless its articles of incorporation provide otherwise*** . . ." (emphasis added). The comments to the section go on to say the following,

> "In some instances, it may be desirable or necessary to limit corporate powers. Section 3.02 allows the articles of incorporation to limit the powers of a corporation. Limitations may be imposed to obtain federal or state tax status, because a grantor wishes to limit the activities of a corporation, or for some other reason. Persons forming or operating a nonprofit corporation may want to limit its powers.
>
> A distinction should be drawn between the power of a corporation to do all things necessary or convenient to carry out its activities and the question of whether corporate acts are reasonable or ***otherwise prohibited***. Section 1.50, for example, prohibits private foundations from taking certain actions, even though they have the power to do so. ***Similarly, unless limited by its articles of incorporation, a corporation has the power to guarantee performance of a contract***, enter into a partnership, make political or other noncharitable contributions, but the directors in authorizing such actions may breach their duty of care or loyalty. See sections 8.30-8.33." S.C. Code of Laws Ann. § 33-31-302 (comments)(emphasis added).

The cited cases to § 33-31-32 2 also contain the following:

> "Non-profit property owners association did not have implied or incidental power to levy a special assessment to pay for bridge repairs and beach nourishment projects since such powers was not necessary to enable the association to carry out its express powers, because the bylaws provided mechanism of annual maintenance charge to finance repairs, and the association could have used its statutory powers to borrow funds under § 33-31-100(2). *Lovering v. Seabrook Island Property Owners Ass'n* (S.C. 1987) 291 S.C. 201, 352 S.E.2d 707"

For the foregoing reasons, the Court should overturn the rulings of the lower court and remand the case for trial consistent with the Appellant Court's findings.

II. BECAUSE NEGATIVE RECIPROCAL EASEMENTS/COVENATS ARE TO BE APPLIED RETROSPECTIVELY AND NOT RETROACTIVELY, THE CIRCUIT COURT COMMITED AN ERROR OF LAW IN AWARDING BACK ASSESSMSNETS.

Respondent argues that Appellant's argument of prospective application of the covenants is required under the holdings of is pointless because the trial court made alternate rulings which were not appealed, however those alternate issues were never raised by the Respondent in the motion hearing and need not be considered here. Secondly, this was a designated complex case which judge Kelly presided over from the outset so the court oftentimes deviated from normal procedure for ease of understanding and judicial economy. The review of the order and basically any Rule 59(e) motions were effectively taken care of prior to the order being signed. After receiving the court's instructions on October 4th, 2022, Respondent finally sent its proposed order on October 20, 2022. Appellants immediately objected to the proposed order and at the court's direction, submitted its objections in a memorandum requested by the court. (*See*, Email string dated October 4, 2022 through October 25, 2022 pp. 1-6; and Defendant's Memorandum in Opposition to Order Granting Partial Summary Judgment ("Order Objection Memo.")). This memorandum specifically objected to the first 17 pages of the factual background and finding of fact because the court never heard any argument on those items. *Id*. p. 2. The court never considered those items because the Defendants stipulated they would be bound under the implied covenant theory and the parties stipulated that nothing further was necessary to accomplish the goals of their motion. At the motion hearing, Ely Grote, referring to the rest of the contents regarding the lots being expressly bound and bound by unmistakable implication, speaking to the

court, stated, "[n]ow as far as, you know, I'm not going to waste my time going through all of this then, because we've all, you know, I guess agree that they are at least subject to the restrictive covenants." (Tr. p. 11 lines 16-19). Appellants were very careful to agree only to being bound under the implied covenant theory for the purpose of retaining it argument of prospective application of the covenants. (Tr. p.2 line 21-24) Furthermore, the record tends to indicate that whether or not these Appellants were restricted is separate issue form the duty to pay the assessments and that the parties would try these issues. The court began the dialogue as follows:

> THE COURT: "So the subject defendants didn't like the way the funds were being used. But that's a separate issue as to whether or not they're restricted."
> MR. HAWKINS: "I believe that's correct your honor. And to the extent we can hold that in abeyance and work it out, litigate it, what ever we got to do, that's fine.I don't want to belabor the time with proving that they are subject to the restrictions."
> THE COURT: "Okay. Then you don't have to do that. Mr. Grote."
> MR. GROTE: "That all sounds [fine] to me." (Tr. p.10, line 17 - p. 11, line 7)

It was the impression of Appellant that the court and the parties agreed to try those issues and then the court changed its mind and awarded the assessments instead committing an abuse of discretion and error of law.

III. BECAUSE THE AWARD OF THE DEBT IN THE GRANTING OF SUMMARY JUDGMENT ON THE EQUITABLE ISSUE DEPRIVES THE APPEALANTS OF THEIR RIGHT TO HAVE THE COMPULSORY LEGAL COUNTERCLAIMS TRIED FIRST, THE AWARD OF THE DEBT IN THE MOTION FOR EQUITABLE RELIEF WAS AN ERROR OF LAW.

Respondent argues that Appellants failed to preserve this issue for appeal because the Appellant did not raise the issue to the circuit court. Respondent, however, did not file a motion for summary judgment on its debt collection action which is legal in nature. The Respondent filed for summary judgment for a declaration for the imposition of restrictions on the Appellants. Ryan McCabe even represented to the court that, "their primary motion was to have the -- was to ask the court to grant judgment and find these lots were bound by the declaration." (Tr. p. 8, l

13-19). Ryan McCabe also said, [t]oday we are prepared to argue that we were entitled to summary judgement that the remaining defendant's property are subject to the restrictive covenants." (Tr. p.5, lines 11-12) That issue was conceded to. When it came to the debt the Respondents were seeking to collect, that issue was not before the court. Respondents, Fourth Cause of Action was for the collection of debt. (Third Amended Compl. p. 23-25). Every page of the Respondent's Third Amended Complaint contained the following phrase, "THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *Id*. Ely Grote also recognized at the hearing that the issue of assessments was legal in nature. (Tr. p.19, l 8-13). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *5 Star, Inc. v. Ford Motor Co.,* No. 2014-UP-357, 2014 WL 5035395, at 1 (S.C. Ct. App. Oct. 8, 2014) citing *Vaught v. A.O. Hardee & Sons, Inc.,* 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Any ruling which does not recognize the well settled holdings of *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013) is a clear abuse of discretion which is a basis for overturing on appeal.

IV. BECAUSE THE RESPONDENTS MUST EXHAUST THEIR LEGAL REMEDIES UNDER THEIR LEGAL DEBT COLLECTION CAUSE OF ACTION PRIOR TO RESORTING TO EQUITABLE REMEDIES, THE COURT COMMITTED AN ERROR OF LAW IN AWARDING THE DEBTS IN THE EQUITABLE CAUSE OF ACTION.

In its Initial Brief, Respondent asserts the court awarded the assessments under its legal cause of action for the collection of debt. This issue was not included in the Respondent's motion for summary judgment and therefore was never before the court. (Plaintiff's Motion for Partial Summary Judgment). The issue was also agreed upon to be tried. (*Supra*, II above). Plaintiff's Third Amended Complaint contained (1) A Declaratory Judgement Cause of Action that the

Appellants were bound by the Restrictions; (2) A Quiet Title Action (which specifically requested only equitable relief) *Id*. at p. 22; (3) Reciprocal Negative Easements; (4) the Debt Collection Cause of Action; (5) a Quantum Meruit Action (6) A Reformation Action; and (7) a Cause of Action for Specific Performance against the Brockman Estate. The Brockman's settled with Respondents on December 13, 2021. The Respondents filed their Motion for Partial Summary Judgment on August 19, 2022. If there were anything more before the court other than the issue of whether or not the lots were covered by the restrictions, why would the Respondents not have simply filed a Motion for Summary Judgment instead of a Motion for Partial Summary Judgment? The only issue left for the Respondent to try is the debt collection cause of action. Based on the comments made at the hearing by Ely Grote and Ryan McCabe, any normal person would assume that the determination of whether or not the Appellant's lots were subject to the restrictions was all the hearing was about. *Supra*, III above. For Respondents to summarily conclude that the court made a decision based on it's Forth Cause of Action seems an absurd result within itself and the Respondent's argument should be disregarded by this Court.

V. BECAUSE DISCOVERY WAS NOT COMPLETE ON THE ISSUE OF DEBT INCURRED BY THE BOARD AND THE DEBT STILL OUTSTANDNING, THE COURT COMMITTED AN ERROR OF LAW IN AWARDING BACK ASSESSMENTS THAT WERE A PRODUCT OF THE BOARD'S ACTIONS IN VIOLATION OF THE RECORDED BYLAWS.

Respondent asserts that Appellant's arguments on this discovery issue are solely based on Appellant's previous arguments regarding the violation of Article VIII, Section 8.2(i) of the By-Laws. That may be the case in part, but as argued to the trial court, the only testimony Appellant had up until Jeff Cooper came on board, was the testimony of Billy Israel. Billy Israel was a combative witness to say the least and his deposition was taken on January 25th, 2018 which was some three (3) years old at the time of the upcoming trial. (Israel Dep. p. 4, line 19). Appellants

requested the deposition of Billy Israel again, but counsel refused to produce him even though Respondents had added a new cause of action in its Third Amended Complaint. The Appellants then requested the Deposition of Jeff Cooper and he was scheduled to give his deposition prior to the motion hearing, but Appellants cancelled that deposition. Appellants addressed this issue with the trial court. (*See* Tr. p. 18, line 7-15; *also see*, Appellant's Memorandum in Opp. to Plaintiff's Motion for Partial Summary Judgment pp. 3-4). The status of the accounting was unknow for several reasons. The main reason is that Appellants had to file various discovery motions to get any sort of documentation on the accounting and attorney's fees owed and even after the first motion to compel, Appellants had to bring Respondents back before the court to get any sort of accounting because Respondent's lawyers claimed the propriety of the fees was protected by attorney client privilege. (See, Motion to Compel Filed August 18, 2021; Motion for Sanctions filed October 25, 2021; Motion to Compel filed February 10, 2022; Order on Motion to Compel filed July 22, 2023). The deposition of Jeff Cooper would have revealed to the court that even after every party, except these Appellants, had been excused from the case, the association still owed its lawyers $166,000.00 some odd dollars. Jeff Cooper also provided testimony regarding the total number of paying lot owners that would have helped the Appellants extrapolate how far in debt the HOA was to its lawyers at various points in the case. These items were pointed out to the court in Defendant's Memorandum in Opposition to Order Granting Partial Summary Judgment as discussed in Section II above. While it seems the information provided by Jeff Cooper would have no bearing on the outcome of the motion hearing since the trial judge committed critical errors of law, it could have had some sort of impact on the Appellate Courts.

VI. THE COURT COMMITTED AN ERROR OF LAW IN AWARDING BACK ASSESSMENTS THAT WERE OSTENSIBLY ATTORNEY'S FEES GUISED AS "ASSESSMENTS" AND BECAUSE THE COURT DID NOT CONSIDER THE REQUISITE REQUIREMENTS OF JACKSON V. SPEED.

Respondent argues the Appellant did not preserve the "Jackson v. Speed" issues for appeal, but Appellant argues that the burden of preservation on appeal is squarely upon the Respondent who was asking for the award of attorney's fees. Is the Appellant supposed to give the court the evidence to support the fees of opposing counsel? Secondly, trying to wrap up the attorney fees in the clothing of assessments to escape the requirements of *Jackson v. Speed* is an attempt to place form over substance. Our Appellate Courts have consistently refused to elevate form over substance in various types of cases. (See e.g., *Soil Remediation Co. v. Nu-Way Environmental*, Inc., 317 S.C. 274, 453 S.E.2d 253 (Ct. App. 1994); *Gordon v. Busbee* 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005*; Limehouse v. Hulsey* 404 S.C. 93, 744 S.E.2d 566 (2013)). On appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Taylor v. Medenica*, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998).citing *Jackson v. Speed.* In *Taylor*, the appellate court found that the trial court considered each of the six (6) factors of Jackson v. Speed. The Court of Appeals noted,

> "The trial court considered each of the above factors in setting the attorney's fee award. The trial judge based his award on the affidavits submitted by Mrs. Taylor's three attorneys and the affidavit of an attorney who did not participate in this matter but attested the hourly rates and hours submitted were appropriate.[4] The trial judge noted he had presided over a number of the discovery motions in this case, all of the pretrial motions, and the two and one-half week trial. The court determined the amount of time estimated by Mrs. Taylor's attorneys, approximately 1500 hours, was appropriate, if not conservative. The court recognized all of Mrs. Taylor's attorneys were experienced and capable trial attorneys and agreed the hourly rates for each were appropriate. The court noted the attorneys had accepted this case on a contingency fee basis and opined it thought UTPA actions were one of the most difficult types of cases to try. The trial court recognized the beneficial results obtained by the attorneys, both in terms of the $108,726 recovered under the UTPA by Mrs. Taylor from CIBL and in terms of the public benefit in deterring CIBL from similar conduct.
>
> In addition, the trial court took judicial notice that CIBL vigorously contested Mrs. Taylor's claims it had violated the UTPA, thereby requiring Mrs.

> Taylor to present witnesses in response. Mrs. Taylor's experts testified CIBL's laboratory tests were excessive, "absolutely bizarre," and the results were questionable. One expert testified he believed the tests were conducted for the purpose of generating income. One witness testified there was no medical reason for any of the tests. Another witness testified the tests were painful to Mrs. Taylor yet medically worthless.
>
> We have reviewed the affidavits submitted by counsel and agree they are somewhat deficient. One affidavit includes approximately 78 hours of time for work performed prior to the filing of Mrs. Taylor's second amended complaint. *See* footnote 3. Moreover, the affidavits do not specifically state the time spent on the UTPA claim against CIBL.
>
> In spite of these deficiencies, we conclude there is evidence which supports the approximately 1500 hours of time spent by Mrs. Taylor's attorneys on this matter. The affidavits note the time spent by other attorneys and some legal professionals was not submitted for reimbursement.[5] The judge who presided over the majority of this matter stated the submitted time was, in his view, conservative. Furthermore, time spent is but one factor to consider in setting a reasonable attorney's fee. *Baron Data Systems, Inc. v. Loter, supra.* **462 With regard to the issue of estimates, two of the three affidavits state the attorneys did not keep records of the time spent on this case.[6] Nonetheless, the accompanying time sheets do list specific services rendered and the time spent performing each service. We conclude the affidavits and accompanying time sheets fairly reflect the time spent by the attorneys on this matter."
>
> *Taylor v. Medenica*, 331 S.C. 575, 580–81, 503 S.E.2d 458, 461–62 (1998)

In the case at hand, the Respondents submitted zero evidence to support its claim for attorney's fees. In fact, it should be clear from the number of motions Appellants had to file that Respondent's lawyers have been trying to hide the ball the whole time. As such, the Court should reverse the award of attorney's fees until such time as Respondent, *inter alia*, satisfies the factors of *Jackson v. Speed* on the record.

Lastly, Respondent asserts that if the Court accepted the Appellants' arguments on this issue, it would mean that homeowners associations would first have to apply to the courts for a determination of the reasonableness of the fees. That logic is absurd within itself. What the situation would more likely require is that the homeowner's association would probably have to

take a vote as required by its organizational documents to incur the amount of debt that the attorneys expect to carry for the association, put it in a budget and assess it in advance so that the debt ceilings are not exceeded.

CONCLUSION

Based upon the preceding facts and argument, Appellant respectfully prays that the Court reverse the Order of the lower court for money damages and remand for further proceedings consistent with this opinion.

Respectfully submitted,

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