

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

17037

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

Case No: 2011-CP-22-319

NOV 12 2013

SC Court of Appeals

Litchfield Plantation Association, Inc., Joseph E. Johnson, Thomas Eckard,  
Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips.....Appellants.

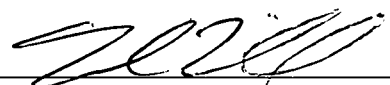
v.

Litchfield Plantation Company, Inc. ....Respondent.

AND,

E.Scott Trotter.....Intervenor.

**RESPONDENT'S MOTION TO STIKE REPLY BRIEF**



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## RESPONDENT'S MOTION TO STRIKE

The Respondent, Litchfield Plantation Company, Inc., pursuant to Rules 240 and 260, SCACR, moves the Court for an order striking portions of Appellants' Reply Brief. In support of the Motion, Respondent will show the Appellants, through their Reply Brief, failed to comply with the requirements of the Appellate Court Rules. Specifically, Appellants' Reply Brief violates Appellate Court Rule 208(b)(1)(C) in that Appellants included in their Initial Brief contested matters which are the subject of a separate, currently pending lawsuit. Appellants also violated Appellate Court Rules 209(b) and 210(c) in that Appellants are attempting to include in the Reply matters not relevant to the Appeal and matters not presented to and/or determined by the lower Court.

### **I. Appellants' Initial Reply Brief Violates Appellate Court Rules:**

Instead of addressing the specific issue on appeal – whether or not the lower Court properly determined Respondent maintains its Class “B” membership status - the Appellants' initial brief improperly includes matters completely irrelevant to that issue, as well as, issues currently litigated in a separate lawsuit pending in Georgetown County. Furthermore, Appellants' brief attempts to mislead the Court by erroneously claiming these matters are undisputed and should form the basis of the Court's decision to reverse the lower Court's Orders.

Because Appellants improperly included irrelevant and contested matters, their Appeal should be dismissed pursuant to the following Appellate Court Rules:

#### a. Rule 260(a) provides:

**Involuntary Dismissal and Reinstatement.** Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have

the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).

- b. As to Appellant's Initial Brief, Rule 208 (b)(1)(C) provides:

**Statement of the Case.** The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

- c. Rule 208(b)(4) further provides as to all briefs:

**References to Record.** The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c) ] to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. After the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1).

## **II. Appellants' Reply Brief Includes Disputed Matters and Falsehoods:**

Appellants' Reply Brief is based upon disputed and irrelevant matters. It is clear that instead of arguing the specific issue that is on appeal, Appellants want to distract the Court by dredging up matters that occurred over thirty years involving parties, facts, and documents not involved in the present dispute.

Appellants' Reply Brief contains the following falsities and claims that have not been determined by the lower court:

- Appellant falsely claims that the HOA has been victimized for thirty years and that Respondent has committed wrongful and illegal acts. (Page 1).
- There is no evidence a court ruled that Respondent has continually breached fiduciary duties by making improper loans, neglected to fund the reserve account, or owed money for repairs to the beach house. (Page 1).
- There is no evidence or court ruling that Respondent breached fiduciary duties and there is no support for this allegation in the record as alleged by Respondent. (Page 3).
- There has been no finding or court ruling that Respondent owes the HOA "almost one million dollars." (Page 4).
- Appellants' arguments are not based on facts but on inflammatory and derogatory allegations.

The false allegation Respondent owes money to the Association arises from Appellants' claims that Respondent breached three promissory notes and is liable for repairs to a beach house owned by the Association. Respondent adamantly denies Appellants' claims. There has been no finding that Respondent "wrongfully took" money from the Association. There has been no finding that Respondent owes "almost one million dollars."

As discussed further below, the only determination as to monies owed by Respondent to the Association is set forth in the lower Court's Order filed May 25, 2012. In that Order, Judge Hyman determined Respondent owed monies totaling \$149,981.60. On August 3, 2012, Respondent made full payment of those monies.

Appellants' claim that the Respondent owes money to the Association is also the subject of a separate lawsuit filed in Georgetown County – Case No: 2012-CP-22-00341 entitled “Litchfield Plantation Association, Inc. vs. Litchfield Plantation Company, Inc.; Louise P. Parsons; South Carolina Dept. of Revenue; BDC Capital, Inc., f/k/a BDC Capital, LLC; Allan L. Kidston; First National Bank of South Carolina; Lawrence A. Shapiro; Info Quest, Inc.; Small Luxury Hotels of the World Limited; and Litchfield Buyout Group, LLC. Appellants filed this action on behalf of the Association on April 10, 2012. In the complaint, Appellants allege Respondent breached four separate promissory notes, breached a fiduciary duty to make repairs to a beach house, and breached its fiduciary duty by not properly funding a reserve account and failing to fund budget shortages. Respondent filed its Answer on June 1, 2012 denying Appellants' allegations and asserting several affirmative defenses.

At the hearing held before the lower Court in the present case on April 19, 2012, Appellants acknowledged there was a separately filed lawsuit against Respondent.

Now **we** have actually filed a lawsuit to collect this money on behalf of our homeowners association and **that lawsuit is a separate action** and it also seeks a mortgage foreclosure...we are seeking a reference to the Master in Equity here in Georgetown County to calculate and establish the amounts owed which include every element of this accounting or the proper way to do it there has to be an evidentiary hearing. Transcript, April 19, 2013, page 12, line 10 – page 13, line 1.

Appellants argued to Judge Hyman that Respondent neglected to fund the reserve account, Transcript, April 19, 2013, page 39, line 17 – 22, and also owed money for repairs to the beach house. Transcript, April 19, 2013, page 45, lines 10-10. Respondent informed the Judge that these matters were in dispute, were not raised in the present lawsuit, and were the subject of the other lawsuit. Transcript, April 19, 2013, page 47, lines 11-20; page 42, lines 6-12; page 28, line 25 – page 29, line 5.

Judge Hyman informed counsel he was trying to treat the parties fairly. He wanted Respondent to have its voting rights restored but did not want the Association to suffer if it was owed monies. Transcript, April 19, 2013, page 19, line 17 – page 19, line 23. The Judge wanted to make sure the Association could operate and determined that it would be best for Respondent to pay what monies it owed **which were not in dispute**. Issues as to the reserve account and repairs to the beach house would be determined at another time. Transcript, April 19, 2013, page 41, line 20 – page 41, line 5. Judge Hyman stated:

I understand, I understand what arrears means and that's what I'm trying to do. We can wait two years and try to find out what is really arrears and in the meantime if they don't have voting rights I don't blame them, I wouldn't pay anything if I don't have to. I'm trying to strike a balance here so that we can have them pay up and make a good faith payment of what I consider to be due as of this date, if we have no litigation what, where would we be right now and that's how I'm trying to calculate these amounts so that they can get their voting rights, they can pay in, and then we can proceed with whatever else we have. Transcript, April 19, 2013, page 42, lines 13 – 24.

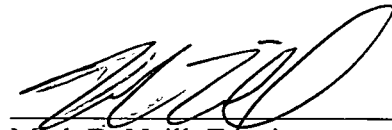
Respondent agreed to pay monies that Judge Hyman determined were currently due. As set forth in the lower Court's Order filed May 25, 2012, attached as Exhibit "B," Judge Hyman determined Respondent must pay the current budget shortage of \$119,148.00, the balance on a Promissory Note dated July 21, 2009 in the amount of \$17,887.12, and the

Balance on a Promissory Note dated June 1, 2011 in the amount of \$12,946.48. As to the other monies the Appellants claimed were owed for the remaining promissory notes and beach house repairs, Judge Hyman determined "it has not been conclusively established at this present time that Defendant is liable to the Association for those monies and therefore, those monies are not currently in arrears."

**III. Conclusion:**

For the reasons set forth above, Appellants' Reply Brief must be stricken pursuant to Rule 260 (a), SCACR.

Respectfully submitted,



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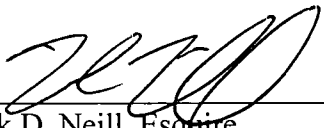
v.

Litchfield Plantation Company, Inc. ....Respondent.

And E.Scott Trotter.....Intervenor.

**PROOF OF SERVICE**

I certify that I have served a copy of Respondent Litchfield Plantation Company, Inc.'s Motion to Strike Reply Brief, by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2013, addressed to counsel, Timothy W. Bouch, and Michael S. Seekings, P.O. Box 59, Charleston, SC 29402 and a copy to Robert S. Shelton, P.O. Box 357, Myrtle Beach, SC 29578.

  
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November 8, 2013

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Court of Appeals Clerk of Court  
1015 Sumter Street  
Columbia, SC 29201

Re: Litchfield Plantation Association, Inc., et al. vs. Litchfield Plantation Co., Inc.  
Case No: 2011-CP-22-319  
Appellate Case No: 2012-212842


Dear Ms. Kitchings:

Enclosed herewith please find an original and seven copies of Respondent's Motion to Strike Reply Brief regarding the above referenced matter as well as the filing fee of \$25.00. Please file the original with the Court and return the filed copy to me in the self-addressed, stamped envelope provided. By copy of this letter and along with a Certificate of Mailing we are serving opposing counsel.

Please do not hesitate to contact me should you have any questions.

With kindest regards, I am,

Sincerely,

  
Mark D. Neill

MDN/lah

Enclosures

Cc: Timothy W. Bouch, Esq., & Michael S. Seekings, Esq. (w/encl.)  
Robert S. Shelton, Esq. (w/encl.)