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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE GEORGETOWN COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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Appellate Case No. 2012-212842

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Litchfield Plantation Association, Inc., Joseph E. Johnston, 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.

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**Appellants' Return to Respondent's Motion to Strike Reply Brief**

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**APPELLANT'S RETURN TO RESPONDENT'S  
MOTION TO STRIKE REPLY BRIEF**

The Appellants, Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips, request the court to immediately deny the Respondent's Motion to Strike. The Motion was filed solely for the purpose of further delaying the appeal. The arguments made in Respondent's Motion to Strike are – word for word – the exact arguments asserted in Respondent's second Motion to Dismiss. This court has already ruled upon these issues.

**I. PROCEDURAL HISTORY**

Litchfield Plantation is a coastal real estate development located in Georgetown County, South Carolina. The Plaintiff-Appellant, Litchfield Plantation Association, Inc. (hereinafter "Appellant Association") is the official Homeowners' Association of Litchfield Plantation. The individual Plaintiff Appellants, Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan Jr., and Thomas Martin Phillips, are all property owners in Litchfield Plantation (collectively with Appellant Association, "Appellants"). The Respondent is the Developer of Litchfield Plantation, Litchfield Plantation Company, Inc. ("Developer").

The Appellants filed suit against the Developer after a special meeting was held pursuant to the Association Bylaws, and a new Board of Governors was elected. The new Board then brought this action against the Developer, which formerly controlled the Board. The Appellants' claims set forth two distinct causes of action. Specifically, the Appellants sought a circuit court declaration that: (1) the newly elected Board of Governors was the lawfully and duly elected Board; and (2), the Developer's majority voting power and control over the Association ended due to (a) the Developer's breaches of fiduciary duties to

the Association, and/or (b), the failure of Developer to meet its financial obligation to the Association. The circuit court permitted Developer's former President, E. Scott Trotter, to intervene. Developer filed several counterclaims that were ultimately dismissed.

Both parties moved for Summary Judgment on differing theories and on differing grounds. The circuit court heard numerous motions on September 8, 2011, December 8, 2011, and April 19, 2012. By way of order filed May 25, 2012, the circuit court denied Appellants' motion for Summary Judgment and granted Developer's Motion for Summary Judgment on Appellants' second cause of action only, finding it did not have the authority to grant the relief requested, but ordering that Developer could not exercise its voting rights until it paid a small percentage of the arrears owed to the Association. The circuit court denied Appellants' Motion for Reconsideration on August 17, 2012. On August 24, 2012, the Appellants appealed the May 25, 2012 order granting Developer Summary Judgment

On September 7, 2012, Developer filed a Motion for Temporary Injunction. On September 20, 2012, the circuit court heard the Motion. By way of order dated October 22, 2012, the circuit court granted the Motion and entered a Temporary Injunction, ordering the individual Plaintiffs not to interfere with the voting rights of the Developer. The circuit court's Injunction Order also found its May 25, 2012 Summary Judgment Order was not automatically stayed by Appellants' appeal because the majority voting rights in question constituted both personal property and real property and therefore fell within the exceptions found in Rule 214(b), SCRAP. The Appellants appealed the Temporary Injunction Order on October 31, 2012. Appellants' appeal of the May 25, 2011 Summary Judgment Order and the October 22, 2012 Injunction Order have been consolidated into one appeal, Appellate Case No. 2012-212842.

The Developer filed its first Motion to Dismiss the appeal on August 30, 2012. The Honorable Jasper M. Cureton denied that Motion on January 30, 2013. Appellants filed the Initial Brief and Designation of Matter on March 18, 2013. On April 15, 2013, Developer filed its second Motion to Dismiss. The Honorable John Cannon Few, CJ, denied that Motion on June 6, 2013. Appellants filed the Initial Reply Brief on November 1, 2013. On November 8, 2013, Developer filed the instant Motion to Strike Appellant's Initial Reply Brief. This Motion contains the exact same arguments previously raised in Developer's second Motion to Dismiss.<sup>1</sup> The Motion was filed solely for the purpose of further delaying this appeal. The Appellants, once again, submit the following Return in response to Developer's arguments.

## **II. APPELLANTS' INITIAL REPLY BRIEF DOES NOT VIOLATE THE APPELLATE COURT RULES.**

Developer's argument is once again premised on the notion that Appellants fail to address the "specific issue on appeal." That issue, Developer claims, is "whether or not the lower Court properly determined Developer maintains its Class 'B' membership status." This is a gross mischaracterization of Appellants' appeal. The Appellants, not the Developer, are required to delineate the issues raised in the appeal.

The Appellants raise numerous exceptions on appeal, the majority of which are rooted in the circuit court's error in finding that it did not have the authority to grant the equitable relief the Appellants requested. Contrary to Developer's inaccurate recitation of Appellants' appeal, all of the matter included in Appellants' initial reply brief is relevant to the Appellants' equitable claims. These claims were summarily dismissed by the circuit court. Without this material included in the appeal, the Appellants cannot

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<sup>1</sup> For reference, the Developer's second Motion to Dismiss is attached hereto as Exhibit A.

establish why they are entitled to the equitable relief requested. *See, e.g. Taylor v. Taylor*, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). Without this material included in the appeal, the Appellants cannot establish how they were prejudiced by the circuit court's errors. *See Baker v. Town of Sullivan's Island*, 279 S.C. 581, 583, 310 S.E.2d 433, 435 (Ct. App. 1983) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

Moreover, Developer's reliance on Rule 208(b)(1)(C), SCACR is, once again, misplaced. Rule 208(b)(1)(C) governs the "Statement of the Case" section required in an initial brief. *See* Rule 208(b)(1)(C), SCACR. This Rule does not apply to initial reply briefs. Indeed, pursuant to Rule 208(b)(3), Appellants' initial reply brief does not even contain a Statement of the Case section. *See* Rule 208(b)(3), SCACR (stating reply briefs shall contain table of contents and table of cases). It is patently obvious that Developer's Motion to strike is meritless and was filed solely to further delay this appeal.

The Developer's Motion asserts that Appellants' reply brief improperly includes issues currently litigated in a separate suit. This, too, is a misstatement. That case is a collection action filed by the Appellant Association to collect the money it is owed. The instant case concerns the Developer's voting rights. The individual Plaintiff-Appellants filed the instant action individually and on behalf of the Association, seeking to have Developer's majority voting power terminated based on Developer's breaches of fiduciary duties and its failure to meet its financial obligations. The fact that the Appellant Association is attempting to collect monies owed to it in a separate collection action has nothing to do with whether the Developer's Class B voting rights should be equitably converted to Class A status. The Developer's suggestion that the collection action

somehow prevents Appellants from prosecuting this appeal is not well taken.<sup>2</sup> The Developer's Motion to Strike has the sole purpose of delaying the appeal and should be denied.

### **III. THE INITIAL REPLY BRIEF INCLUDES MATTERS THAT APPELLANTS ALLEGE ARE UNDISPUTED TRUTHS.**

The Developer, once again, argues the Appellants wrongfully included "disputed matters and falsehoods" in their brief. The Developer's Motion fails to recognize that the Appellants' claims were summarily dismissed. Those claims allege that the Developer's breaches of fiduciary duty and utter failure to meet its financial obligations to the Association entitle the Appellants to the equitable relief requested. It is preposterous to suggest that the evidence establishing these claims should be excluded from the briefs.

The circuit court granted summary judgment to Developer. Disputed or not, without the inclusion of this evidence, the Appellants are unable to successfully prosecute the appeal. Indeed, the standard of review will require this court to view all of this evidence in light most favorable to the Appellants. *See, e.g. Estate of Adair v. L-J, Inc.*, 372 S.C. 154, 156, 641 S.E.2d 63, 64 (Ct. App. 2007) ("On appeal, *when factual matters are in dispute*, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." (emphasis added)).

The Developer asserts that because there has been no finding that it wrongfully took the money, the Appellants cannot include this argument in their briefings. These are the disputed facts upon which the Appellants claim that the Rule 56 summary judgment

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<sup>2</sup> Indeed, because of the circuit court's erroneous rulings that are the subject of the instant appeal, the developer is once again in control of the Appellant Association, and the collection action has therefore been severely compromised. In essence, the Developer is now prosecuting the collection action against itself.

order was in error. The allegations that Developer breached fiduciary duties and wrongfully took the Appellant Association's money are precisely the acts that entitle the Appellants to the equitable relief requested. See *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832-33 (Ct. App. 1993) (finding fiduciary relationship between developer and homeowner association).

Finding it did not have the authority to grant the equitable relief requested, the circuit court summarily dismissed Appellants' second cause of action. On appeal, therefore, the Appellants must establish that (1) the circuit court has the authority to grant the relief requested, and (2) the Appellants are entitled to the relief requested. The suggestion that the Appellants cannot include in their briefs the allegations that Developer breached fiduciary duties and wrongfully took the Appellant Association's money is contrary to the entire appellate process. Of course Appellants can; they must. These are the allegations that entitle the Appellants to relief. See *Goddard*, 310 S.C. at 415, 426 S.E.2d at 833; *Taylor*, 294 S.C. at 299, 363 S.E.2d at 911; *Baker*, 279 S.C. at 583, 310 S.E.2d at 435. The Respondent's Motion to Strike should be denied.

Wherefore, the Appellants pray that Developer's Motion to Strike is denied, and for such other relief as the court deems appropriate.

Respectfully submitted,

LEATH, BOUCH & SEEKINGS, LLP

By: 

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November 18, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE GEORGETOWN COUNTY  
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Larry B. Hyman, Jr., Circuit Court Judge

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v.

Litchfield Plantation Company, Inc. . . . . Respondent/Appellant,

and,

E. Scott Trotter . . . . . Intervenor.

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**PROOF OF SERVICE**

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I certify that I served the Appellants' Return to Respondent's Motion to Strike Reply  
Brief on November 18, 2013, by depositing a copy of it in the United State Mail, postage  
prepaid, addressed as follows:

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*E. Scott Trotter*

November 18, 2013

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Timothy W. Bouch  
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# LEATH, BOUCH & SEEKINGS, LLP

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November 18, 2012  
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SC Court of Appeals

**VIA US MAIL**

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

Re: Litchfield Plantation Ass'n, Inc., et al v. Litchfield Plantation Company, Inc.  
Appellate Case No.: 2012-212842

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants Return to Respondent's Motion to Strike for filing in the above-referenced case. I would appreciate your returning a file-stamped copy to me in the enclosed self-addressed stamped envelope. By copy of this letter, and a referenced in the enclosed Proof of Service, I am serving this filing on all counsel of record.

Thank you and with best regards, I am

Very truly yours,

LEATH, BOUCH & SEEKINGS, LLP

Caitlin Amick  
Paralegal to Yancey A. McLeod, III, Esq.

Enclosures (as stated)

cc: Mark D. Neill, Esq.  
Robert S. Shelton, Esq.