

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGME IN A CIVIL CASE

CASE NUMBER: 2013CP4002655

Allen Patterson

Herb Witter

Steve Tilton

Colin Campbell

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 April 2014 to attorneys of record or to parties (when appearing pro se) as follows:

S. Jahue Moore

Frederick A. Gertz

Pope D. Johnson III
Lawrence Michael Hershon

William W. Wilkins

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard Sendler)
Lincoln Privette, Marc Ellis, Joey Carter, Barry)
Davis, Michael Nieri, Allen Patterson Residential)
LLC, Tilton Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction Co., Inc.,)
The Barry Davis Company, Inc., Great Southern)
Homes, and J. Carter, LLC, on behalf of)
themselves and others similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie Weaver, Tom)
Markovich, Keith Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina Home)
Builders Self Insurers Fund, and the South Carolina)
Home Builder Self Insurers Fund,)

Defendants.)

**ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER**

2014 MAR 28 PM 2:27
JEANETTE V. MCORRICE
C.C.P. & G.S.
RICHLAND COUNTY
COURT

This matter comes before the Court by way of Plaintiffs' Motion to Reconsider pursuant to Rule 59(e), SCRPC. Specifically, Plaintiffs ask this Court to reconsider its Order (1) Granting Defendant's Motion to Reconsider Order on Motion to Dismiss and (2) Dismissing Complaint filed February 11, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRPC to Reconsider this Court's Order filed February 11, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.


IT IS SO ORDERED.

Columbia, South Carolina
March 28, 2014

RECEIVED

MAY 01 2014

SC Court of Appeals


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-02655

Allen Patterson, et al.

Herb Witter, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____ Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendants' Motion to Reconsider and Motion to Dismiss the Complaint are hereby GRANTED and Plaintiffs' Motion to Amend the Complaint is hereby DENIED.

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

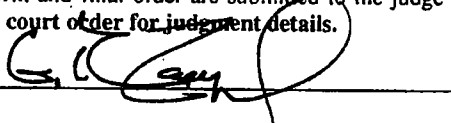
INFORMATION FOR THE PUBLIC INDEX

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		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



Judge Code 2126

Date 2-11-14

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this ____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

Frederick Gertz, S. Jahue Moore

ATTORNEY(S) FOR THE PLAINTIFF(S)

Lawrence Michael Hershon, Pope D. Johnson III, William W. Wilkins

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

) Civil Action No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund,

Defendants.

RECEIVED

MAY 01 2014

SC Court of Appeals

ORDER (1) GRANTING DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND (2) DISMISSING COMPLAINT

JEANETTE W. MCGRIDE
C.C.P. & G.S.
2014 FEB 11 PM 12:39
RICHLAND COUNTY
FILED

This matter came before the Court on January 14, 2014 for a hearing on the Defendants' Motion to Reconsider the Court's Order entered November 12, 2013, denying Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion was brought pursuant to Rule 59(e), SCRPC. For the reasons stated herein, the Court grants the Defendants' Motion to Reconsider, and, therefore, dismisses this action without prejudice pursuant to Rule 12(b)(6), SCRPC.

I.

"A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument

previously presented.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (citations omitted). The decision whether to grant a motion to reconsider is in the trial court’s discretion. *See, e.g., BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006) (so holding in context of motion under Rule 60(b), SCRCP); *Brown v. Pearson*, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997) (so holding in context of motion for summary judgment).

A motion to dismiss pursuant to Rule 12(b)(6) requires this Court to accept as true the well-pleaded facts in the complaint, but the Court need not give any weight to conclusions of law alleged therein. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986); *Charleston County School Dist. v. S.C. State Ports Authority*, 283 S.C. 48, 320 S.E.2d 727 (Ct. App. 1984). It is fundamental that a complaint must allege all facts necessary to satisfy each of the legal elements to support a cause of action or it should be dismissed. The motion to dismiss must be granted if the facts alleged in the complaint, and inferences reasonably deducible therefrom, do not entitle plaintiff to the relief sought. *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 794 (Ct. App. 1998)).

II.

The Plaintiffs have brought a lawsuit alleging causes of action against the South Carolina Home Builders Self Insurers Fund (the “Fund”) and its Board of Trustees, claiming that misconduct by the Trustees has harmed the Fund. The Fund is supported by the members and pays workers' compensation and medical benefits for which its members become liable under the Workers' Compensation Act. Its members are home builders within this state that have applied for, and been granted, membership in the Fund. The Fund is governed by a Board of Trustees, and operated by a chief administrator and his staff. The Plaintiffs allege that the Fund is a trust

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and must be administered and regulated according to the laws of South Carolina governing trusts. The Defendants allege that the Fund is not a trust and, if so, a business trust subject to the pleading rules of the South Carolina Rules of Civil Procedure that apply to derivative lawsuits.

A trust is created where there is a declaration of trust, when there is property to which the trust pertains, and when there are named beneficiaries. *Johnson v. Thornton*, 264 S.C. 252, 214 S.E.2d 124 (1975). The Agreement and Declaration of Trust in this case is replete with references to trustees and trustee duties and obligations. There is no reference to, or provisions for, "beneficiary(ies)" in the document.

While the Fund was created by a document called "Agreement and Declaration of Trust," that document does not create a trust entity, but creates the Fund which is:

"... made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act: to form an overall self insurers fund pursuant to the Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits: to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage: and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry."

Each member pays a predetermined rate for this protection. Moreover, each member is jointly and severally liable for the obligations of the Fund. This is a characteristic of an unincorporated association, as South Carolina Code Section 15-35-170 provides that all members of an unincorporated association are jointly and severally liable for the obligations of the association. *See also Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955) (same); *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E.2d 651 (1936) (same). The funds held by the Trustees are for the protection of its members and the benefit of employees who may be workers' compensation claimants. However, the Plaintiffs and Defendants in this action are not claimants

to the Fund but members who established and maintain the Fund for their protection and the protection of their employees.

Thus, in reconsidering the document as a whole, its purpose, function, and operation, I cannot conclude that the document creates a trust in its commonly recognized form. Based on this, I decide to reconsider my decision of November 12, 2013.

III.

The Defendants' have moved to dismiss the Plaintiffs' Complaint. They argue that this is a derivative action and that it fails to meet the pleading requirement of Rule 23(b)(1), SCRCF. Plaintiffs maintain that their lawsuit is not a derivative action and that the pleading requirements of Rule 23(b)(1), SCRCF, do not apply, or if they do, these requirements were met in paragraph 8 of their complaint.

The allegations and the relief sought by the Plaintiffs confirm that the subject lawsuit is a derivative action. For example, at paragraph 13 of the Complaint, the Plaintiffs allege that their injuries are typical of the claims of the other members. In *Clearwater Trust v. Bunting*, the Supreme Court noted that claims of "identical harm to all shareholders . . . [gives] rise to a classic shareholders' derivative suit." 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). At paragraph 21 of the Complaint, the Plaintiffs allege that the Fund has been harmed by the removal of \$5 million. At paragraphs 24-28 of the Complaint, the Plaintiffs allege that the Board has misappropriated monetary assets of the fund. In *Davis v. Hamm*, the Court of Appeals noted that "the liability of directors or officers of a corporation for loss to the corporation due to their mismanagement is an asset of the corporation and that any recovery on such a cause of action belongs solely to the corporation." 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989). The gravamen of the Plaintiffs' Complaint alleges that the fund has been injured, not that the members have been injured. Accordingly, the Court finds this is a derivative action. *Brown v.*

Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (“A shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.”).

IV.

Having concluded that the Plaintiffs’ lawsuit is derivative, the Court now turns to whether the Plaintiffs have complied with Rule 23(b)(1), SCRCP. This rule provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint **shall** also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Rule 23(b)(1), SCRCP.

In *Carolina First Corp. v. Whittle*, the South Carolina Court of Appeals noted that the “protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence.” 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). To support that proposition, *Carolina First* cited to the 1893 South Carolina Supreme Court decision of *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 51-52, 17 S.E. 258, 260-61 (1893). In *Latimer*, the Supreme Court noted that:

[B]efore the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court.

Id.



Turning to modern jurisprudence, *Carolina First* noted that “[d]emand is required in order to assure compliance with the most fundamental principle of corporate governance—directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs.” *Id.* at 188, 539 S.E.2d at 409. Accordingly, a lawsuit brought by shareholders (or, as in this case, members of an unincorporated association) is a “remedy of last resort.” *Id.* at 187, 539 S.E.2d at 408.

The “protective principles” of Rule 23 have been adopted because a proper pre-suit demand alerts the Board so that it may exercise its reasonable business judgment as to whether any corrective action should be taken without litigation. *Id.* at 188, 539 S.E.2d at 409. A plaintiff must allege the details of his pre-suit demand with particularity. “Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRC, in that it requires particularized allegations.” *Id.* at 188, 539 S.E.2d at 409. By pleading with particularity the actions sought by the plaintiff, the efforts he has made to convince the Board to take those actions, and the resulting decision by the Board, the Court is able to exercise its gatekeeping authority. If a demand is rejected by the Board, then the particularized allegations allow the Court to determine whether the Board’s decision deserves deference and, thus, whether a derivative suit should proceed. *E.g., Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996) (noting that if a demand is rejected, “the board rejecting that demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption”) (overruled on unrelated grounds related to standard of review).

V.

As noted above, under Rule 23(b)(1) a plaintiff must meet certain pleading requirements in an effort to institute a derivative action. Again, compliance with this rule allows the trial court

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to act as a gatekeeper and determine whether the derivative action should proceed in court. In order for the trial court to make this determination, it may look only to the "four corners" of the Plaintiffs complaint. *Carolina First*, 343 S.C. at 190, 539 S.E.2d at 410. The particularized allegations surrounding the demand requirement must describe the efforts made to demand that the board take the action sought, and they must support an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a minimum, the demand must identify the alleged wrongdoers, describe the factual basis of the alleged wrongful acts and the harm caused, and request remedial relief. *Id.* at 189, 539 S.E.2d at 409. A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC must be dismissed pursuant to Rule 12(b)(6). *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339.

A review of the Complaint confirms that the Plaintiffs' have failed to comply with the requirements of this Rule. The Court need look no further than the facts alleged in the Complaint and compare them to the facts alleged in *Carolina First*, which are strikingly similar to those in the case at bar, to find that the pleadings of the Complaint fail to meet the heightened pleading requirements of Rule 23:

1. In *Whittle*, plaintiffs demanded "certain information"; in the instant matter, plaintiffs sent "correspondence to counsel for defendants."
2. In *Whittle*, plaintiffs demanded that "certain action be taken"; in the instant matter, "meetings with counsel for defendants" were held.
3. In *Whittle*, plaintiffs made "supplemental demands"; in the instant matter "Plaintiffs sent correspondence to the Trust."

This Court holds that the Complaint fails to allege with particularity the efforts the Plaintiffs' made to satisfy the pre-suit demand requirements of Rule 23(b)(1). As in *Carolina First*, which was dismissed, the Complaint "does not allege what the [members] demanded and what the Board rejected." Because the Complaint does not comply with Rule 23, the Court is

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unable to exercise its gatekeeping function to determine whether there are grounds for the derivative action to proceed.

During oral argument, the Plaintiffs asserted that on January 30, 2013 they sent a demand letter to the Board setting forth specific demands. The Plaintiffs did not, however, articulate those demands in their complaint, nor did they incorporate that letter into their complaint. Accordingly, the Court may not analyze that letter in ruling on this motion. *Carolina First*, 343 S.C. at 190, 539 S.E.2d at 410. With regard to the January 30, 2013 letter, the Defendants argued that they did not provide a substantive response to the letter because it was sent while awaiting a ruling on their motion to dismiss the previous lawsuit, and that the subject lawsuit was filed before they were able to properly respond.¹ Nevertheless, at oral argument, counsel for the Defendants stipulated that they would accept the January 30, 2013 letter as the Plaintiffs' demand letter and provide a substantive response within a reasonable amount of time.

VI.

The Plaintiffs' Complaint does not comply with the requirements of Rule 23(b)(1), SCRCF. Accordingly, the Court is constrained to grant the motion to reconsider and to dismiss the Complaint without prejudice.


As noted above, at the January 14 hearing, the Defendants stated on the record that the Defendants would accept Plaintiffs' January 30, 2013 letter as a demand under Rule 23, and would respond within a reasonable time. The Court finds that 60 days is a reasonable amount of time to respond to the Plaintiffs' letter. Once the Defendants provide a response to the Plaintiffs'

¹ The subject complaint is the second action brought by the Plaintiffs. The January 30, 2013 letter was sent to counsel for the Defendants while the first motion to dismiss was pending before the Circuit Court. The Circuit Court entered an Order dismissing the first complaint on March 5, 2013; the Plaintiffs filed the subject Complaint on April 9, 2013.

demand, then, if necessary, the Plaintiffs may pursue whatever legal action they determine is appropriate.

The Complaint is hereby dismissed without prejudice.

IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Court Judge, 5th Judicial Circuit

February 11, 2014
Columbia, South Carolina