

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BEAUFORT COUNTY

COURT OF COMMON PLEAS

CARMEN T. MULLEN, JUDGE

CASE NO. 2012-CP-07-3746

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APPELLATE CASE NO. 2014-000-827

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Albert and Eileen  
LaFleur.....Appellants

v.

Coral Resorts, LLC, Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services,  
Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Stephen Deutsch,  
Katherine Swisher, and Reba Management, Inc.....Respondents

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**INITIAL BRIEF OF APPELLANTS**

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**RECEIVED**

MAY 20 2014

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Part B  
Statement of Issues on Appeal

1. Whether the Lower Court improperly issued the *ex parte* temporary restraining order
2. Whether the Lower Court erred in issuing conflicting, inconsistent, and unclear Orders and Rulings
3. Whether the Lower Court erred in restraining Appellants' use of the January 23, 2013 South Carolina Real Estate Commission hearing transcript
4. Whether the Lower Court erred in restraining Appellants' use of the Island Links timeshare registration
5. Whether Appellants may use the January 23, 2103 South Carolina Real Estate Commission hearing transcript and/or the Island Links timeshare registration documents in the prosecution of their lawsuit and/or at trial
6. Whether the Lower Court's Orders and Rulings preclude Appellants from use of information contained within such documents or reference thereto in the prosecution of their lawsuit and/or at trial

Part C  
Statement of the Case

**A. The date of the commencement of the action or matter, the nature of the action or matter, and the nature of the defense or of the response**

Appellants, a retired married couple, commenced the subject civil action on October 30, 2012 with the filing of a Summons and Complaint against Respondent Coral Resorts, LLC, a South Carolina timeshare development company, with the nature of the action being for Fraud/Intentional Misrepresentation, Violations of the South Carolina Timeshare Act, and Violations of the South Carolina Unfair Trade Practices Act, such claims arising from a timeshare sale and purchase transaction between the parties of a timeshare property contained within Respondent's Island Links timeshare resort occurring in March, 2010 in Hilton Head Island, South Carolina. The gravamen of Appellants' claims include that Respondent timeshare development company employed fraudulent, unfair, and deceptive practices during and in connection with the subject timeshare sale and purchase transaction, and in so doing, as well as in other ways, including selling timeshares without the required regulatory approval, therein violated the South Carolina Timeshare Act. In response to the action Respondent filed a Motion to Dismiss, which was denied by the Lower Court on March 22, 2013.

Thereafter Appellants amended their Complaint to add additional causes of action for Declaratory Judgment, Breach of Contract, Breach of Duty of Good Faith and Fair Dealing, Negligent Misrepresentation, Civil Conspiracy, Rescission of Contract, as well as additional Defendants, including Respondents Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Reba Management, Inc., Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, Stephen Deutsch, and Katherine Swisher. In response to

same such additional Defendants have filed Motions to Dismiss, which have not yet been heard by the Lower Court.

Additionally, Appellants presently seek to further amend their Complaint to add a further additional Defendant, Tori Bergelt, and the hearing as to such motion to amend has not yet been heard by the Lower Court.

**B. The action of the Lower Court, the dates of hearing, the amount involved on appeal, and the date and nature of the order, judgment or decision appealed from**

On May 30, 2013 Appellants filed and served a Memorandum of Law in support of their motion to amend complaint, with such Memorandum of Law including and incorporating by reference three exhibits, Exhibit A being the Island Links timeshare registration, Exhibit B being the January 23, 2013 South Carolina Real Estate Commission hearing transcript, and Exhibit C being Appellants' proposed Second Amended Complaint.

In response, on June 10, 2013 Respondent Coral Resorts, LLC moved for and obtained an *ex parte* temporary restraining order from the Lower Court following an *ex parte* hearing of the matter by Judge Mullen on June 10, 2013. Respondent's motion for *ex parte* temporary restraining order, which was served upon Appellant on June 11, 2013, included several supporting affidavits.

Pursuant to such *ex parte* temporary restraining order and upon separate motion dated June 11, 2013 by Respondents for injunction, protective order, and confidentiality order, a subsequent hearing was held by the Lower Court on June 17, 2013, with counsel

for Appellants then first being provided notice and the opportunity to attend and be heard. At the conclusion of such second hearing the Lower Court informed the parties of its intent to review the subject documents, and thereafter schedule further hearing of the matter, and in the interim restrain the use by Appellants of the subject documents.

The Lower Court extended the *ex parte* temporary restraining order by Order dated June 20, 2013, and set the matter for further hearing on June 26, 2013.

At the conclusion of such third hearing on June 26, 2013, the Lower Court at first indicated that it was going to lift the temporary restraining order, then indicated that the Lower Court was removing the subject documents from the public record / case file pending further review of the documents.

Without further hearing on the matter on October 31, 2013 the Lower Court issued a Form 4 Order, filed on November 1, 2013, granting in part and denying in part Respondent's motion to reconsider the Court's ruling on Defendant Coral Resort's rule to show cause motion for restraining order without a hearing. The Lower Court ordered that the materials at issue were not relevant to discovery, that the materials reviewed that were not publicly available constituted a trade secret and thus were protected from discovery as such, and that the materials listed as publicly available were public record and were discoverable as such. The Lower Court denied Respondent's motion to reconsider in part as to the materials that were not publicly available, and granted the Respondent's motion to reconsider in part as to the materials that were publicly available.

For unknown reasons, the October 31, 2013 Form 4 Order was not sent to or received by Appellants until its transmission via electronic mail on March 12, 2014. Appellants thereafter filed and served a motion for reconsideration of such Order on

March 19, 2014, which the Lower Court denied without hearing by Form 4 Order dated April 4, 2014.

**C. 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 that may have affected the appeal, or may throw light upon the questions involved in the appeal**

Appellants served notice of appeal in this matter on April 18, 2014. Appellants hereby appeal the following orders and rulings of the Lower Court:

- April 4, 2014 Form 4 Order denying reconsideration
- October 31, 2013 Form 4 Order denying reconsideration in part and granting reconsideration in part
- June 26, 2013 oral rulings both lifting the temporary restraining order and indicating that the Lower Court was removing the subject documents from the public record / case file pending further review of the documents
- June 20, 2013 Order extending the temporary restraining order
- June 17, 2013 oral rulings restraining Appellants' use of the subject documents
- June 10, 2013 *ex parte* Order granting temporary restraining order

**D. Any changes made in the parties by death, substitution, or otherwise**

None.

Part D  
Argument

Appellants' Additional Statement of the Case

Appellants filed and served their memorandum and exhibits only in response to Respondent Coral Resorts, LLC's opposition to Appellants' motion to amend their complaint to add additional Defendants and causes of action, as set forth above, with Respondent's opposition being based upon its assertion that Coral Resorts, LLC was the only necessary party to the action and that none of the proposed additional defendants should properly be joined. Insofar as the documents at issue clearly contradict such assertions, Appellants filed such memorandum and exhibits for consideration by the Court.

The January 23, 2013 South Carolina Real Estate Commission hearing transcript reveals several potential violations of State Ethical Rules by public officials pursuant to S.C. Code 8-13-700(B) and S.C. Code 8-13-745(B), potential violations of Rules of Professional Conduct by members of the South Carolina Bar pursuant to Rules 3.3, 3.5, 3.7, and 3.9, and an admission of potential professional negligence by an agent of Respondents. The January 23, 2013 South Carolina Real Estate Commission hearing transcript also reveals potential class action liability of Respondents based upon selling timeshares to the general public within the State of South Carolina for several years without the proper registration to do so, in violation of S.C. Code 27-32-10 et seq.

The Island Links timeshare registration materials document the relationships between Respondents and responsibilities and liabilities for claims such as those of Appellants. Further, the Island Links registration materials document the ownership interests associated with Respondents' businesses.

On June 10, 2013 Respondent Coral Resorts, LLC moved for and obtained an *ex parte* temporary restraining order from the Lower Court following an *ex parte* hearing of the matter on June 10, 2013. Respondent's motion for *ex parte* temporary restraining order, which was served upon Appellant on June 11, 2013, included several supporting affidavits prepared and executed up to four (4) days prior to the June 10, 2013 *ex parte* hearing of such motion, yet no consultation as to the motion for *ex parte* relief was either had or attempted by Respondent. For such dates, see Affidavit of McDaniel, dated June 6, 2013, and Affidavit of Pierce, dated June 7, 2013. Further, counsel for Respondent actually telephoned the offices of counsel for Appellant *less than three (3) hours prior* to the execution of the *ex parte* temporary restraining order, on June 10, 2013, yet made no mention that she was necessarily then driving from Columbia to the Horry County Courthouse, where Judge Mullen was then presiding, in order to present the *ex parte* motion and proposed *ex parte* temporary restraining order. See Affidavit of Malphrus, dated June 26, 2013.

#### Argument

**1. Whether the Lower Court improperly issued the *ex parte* temporary restraining order**

Respondent purposefully and intentionally sought to obtain an *ex parte* temporary restraining order from the Lower Court without consultation with counsel for Appellants. Rule 65, SCRCF provides that "No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had

thereon." A review of the timeline in this matter reveals that the subject documents were filed with the Beaufort County Clerk of Court on June 3, 2013, Respondent began preparing and gathering Affidavits on June 6, 2013, Respondent presented its Motion for *Ex Parte* Temporary Restraining Order on June 10, 2013 to the Lower Court, and during this period of time counsel for Respondent was in actual communication with counsel for Appellants, yet made no effort to advise of its intent to seek injunctive relief or expedited hearing.

Appellants assert that Respondent's seeking an *ex parte* temporary restraining order was done for an improper purpose wholly and entirely without merit, and that the granting of an *ex parte* temporary restraining order under these circumstances was wholly and entirely improper. For such reasons all orders and rulings relating thereto should be vacated.

**2. Whether the Lower Court erred in issuing conflicting, inconsistent, and unclear Orders and Rulings**

The Lower Court's October 31, 2013 Form 4 Order is conflicting, inconsistent, and unclear.

Firstly, the Court references "Defendant Coral Resorts's [sic] Motion to Reconsider the Court's Ruling on Defendant Coral Resort's Rule to Show Cause Motion for Restraining Order." However, no such Motion to Reconsider exists.

Secondly, the Court then states "the materials at issue are not relevant to discovery." However, neither relevancy nor rules of discovery were at issue before the

Court, insofar as the subject documents were within Appellants' possession and originated from the South Carolina Real Estate Commission.

Thirdly, the Court then states "the materials reviewed that are not publicly available constitute a trade secret and thus are protected from discovery as such." However, the Court fails to indicate to which documents it is referring as "not publicly available", and further fails to indicate whether the documents referred to either *are* publicly available or *should properly be* publicly available. Additionally, and presuming that the Court here describes the Island Links timeshare registration, the Court ignores the factual reality that the entire Island Links timeshare registration was received by Appellants from the South Carolina Real Estate Commission pursuant to FOIA request. Thus, a vague designation dependent upon "public availability" is nonsensical. Finally, discovery production was not at issue before the Court, insofar as the subject documents were within Appellants' possession and originated from the South Carolina Real Estate Commission.

Fourthly, the Court then states "the materials listed as publicly available are indeed public record and are discoverable as such." However, the Court fails to indicate to which documents it is referring as "listed as publicly available", and further fails to indicate whether the documents referred to either *are* publicly available or *should properly be* publicly available. Moreover, discovery production was not at issue before the Court, insofar as the subject documents were within Appellants' possession and originated from the South Carolina Real Estate Commission.

Fifthly, the Court then states "the Court hereby respectfully denies Defendant Coral Resort's Motion to Reconsider in part as to the materials that are not publicly

available, and grants the Defendant's Motion to Reconsider in part as to the materials publicly available. However, no such Motion to Reconsider exists. Additionally, the Court fails to indicate to which documents it is referring as "not publicly available", and further fails to indicate whether the documents referred to either *are* publicly available or *should properly be* publicly available.

For the foregoing reasons, the Lower Court's October 31, 2013 Form 4 Order is conflicting, inconsistent, and unclear, and should be vacated.

**3. Whether the Lower Court erred in restraining Appellants' use of the January 23, 2013 South Carolina Real Estate Commission hearing transcript**

Appellants received the approximately 120-page transcript of a January 23, 2013 South Carolina Real Estate Commission hearing anonymously by mail on or around April, 2013.

Pursuant to S.C. Code 30-4-20(a), the South Carolina Real Estate Commission is a "public body." Pursuant to S.C. Code 30-4-20(d) and (e), the January 23, 2013 hearing was a "meeting" of a "quorum" of such Commission. Pursuant to S.C. Code 30-4-20(c), the transcript of such hearing is a public record insofar as it a "recording" and "documentary material... prepared, owned, used, in the possession of, or retained by" the Commission.

Pursuant to S.C. Code 30-4-30, "any person has a right to inspect or copy any public record of a public body, except as otherwise provided by Section 30-4-40." Further, S.C. Code 30-4-30(d)(1) specifically provides that minutes of the meetings of the public body for the preceding six months must be made available.

As set forth in the hearing transcript itself, the Commission, as the request of Respondent to close the hearing to the public, considered the question as to whether the hearing was public or private during the subject hearing, on the record, and after due consideration determined that such was public.

S.C. Code 30-4-40 provides that certain meetings *may* be closed (emphasis added). However, none of the conditions set forth in S.C. 30-4-40 apply to the January 23, 2013 hearing of the South Carolina Real Estate Commission insofar as the employment, compensation, nor discipline of Respondent was at issue. Regardless, S.C. 30-4-40 is permissive, not mandatory, and clearly the South Carolina Real Estate Commission, after consideration of the matter, decided to keep the meeting public.

For the foregoing reasons, the Lower Court's restriction of Appellants' usage of the January 23, 2013 South Carolina Real Estate Hearing Transcript was error, and any order as to same should be vacated.

**4. Whether the Lower Court erred in restraining Appellants' use of the Island Links timeshare registration**

Appellants received the Island Links timeshare registration from the South Carolina Real Estate Commission pursuant to FOIA request via pdf files contained within a disc enclosed in the July 6, 2011 letter from Sheridan H. Spoon.

Pursuant to S.C. Code 30-4-40(a), "a public body *may but is not required to* exempt from disclosure the following information: (1) trade secrets..." which are thereafter defined to include plans for materials and articles and marketing studies and

evaluations for public bodies that market services in competition with others. (Emphasis added).

The Island Links timeshare registration was received by Appellants from the South Carolina Real Estate Commission pursuant to FOIA request. Even if it had the statutory authority to do so, which it did not pursuant to S.C. Code 30-4-40(a), the South Carolina Real Estate Commission did not exempt from disclosure any part of the Island Links timeshare registration. Moreover, the cover page to same specifically indicated that "the transfer of the paper files to pdf files on this disc was accomplished with the goal of simply duplicating what the reader would see if he had come into our office and opened the file their self [sic]."

Further, pursuant to S.C. Code 30-4-40(b), "if any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter." The South Carolina Real Estate Commission did not separate any material from the Island Links timeshare registration, and, accordingly, no portion of such materials can be said to be exempt from disclosure.

For the foregoing reasons, the Lower Court's restriction of Appellants' usage of the Island Links timeshare registration was error, and any order as to same should be vacated.

**5. Whether Appellants may use the January 23, 2103 South Carolina Real Estate Commission hearing transcript and/or the Island Links timeshare registration documents in the prosecution of their lawsuit and/or at trial**

As set forth above, insofar as both the January 23, 2103 South Carolina Real Estate Commission hearing transcript and the Island Links timeshare registration are not properly confidential, private, or otherwise restricted, Appellants should be free to use same in the prosecution of their lawsuit and/or at trial.

**6. Whether the Lower Court's Orders and Rulings preclude Appellants from use of information contained within such documents or reference thereto in the prosecution of their lawsuit and/or at trial**

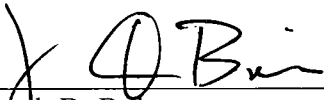
As set forth above, insofar as both the January 23, 2103 South Carolina Real Estate Commission hearing transcript and the Island Links timeshare registration are not properly confidential, private, or otherwise restricted, Appellants should be free to use the information contained within such documents, or make references thereto, in the prosecution of their lawsuit and/or at trial.

Part E  
Conclusion

This matter demonstrates the improper efforts a company may go to in order to obfuscate and conceal improper business practices, and then subsequently the record relating to the means by which such concealment was obtained. Respondents seek to white-out to every interested party, including their potentially limitless number of disgruntled customers, that their business sold timeshares to the general public for years without possessing a valid South Carolina timeshare registration. To allow such not only defies sound reason and justice, but South Carolina law as well.

Based upon the foregoing, Appellants hereby request that the Orders and Rulings of the Lower Court be vacated.

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May 16, 2014  
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