

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Marvin H. Dukes, III, Master In Equity

Case No. 2011-CP-07-0945

William R. Hobson,

Respondent,

v.

Callawassie Island Members
Club, Inc.

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN EXPANDING THE TERM “ACCOUNTING RECORDS” AS USED IN S.C. CODE ANN. §33-31-1601, *et seq.*, TO INCLUDE ITEMIZED RECORDS FOR ALL MULTIPLE MEMBERSHIP HOLDERS AND INFORMATION ON ALL MEMBERSHIPS PLACED ON CIMC’S RESALE LIST, SOLD, RESIGNED OR TERMINATED SINCE DECEMBER 1, 2001?
2. DID THE TRIAL COURT ERR IN FINDING CIMC ACTED IN BAD FAITH AND WITHOUT REASONABLE BASIS IN OBJECTING TO HOBSON’S DEMAND FOR PRODUCTION AS ARTICULATED IN HIS LETTER OF JUNE 29, 2010?
3. DID THE TRIAL COURT ERR IN GRANTING ATTORNEYS’ FEES AND COSTS TO HOBSON?

STATEMENT OF THE CASE

On February 25, 2011, William R. Hobson (“Hobson”) brought this declaratory judgment action pursuant to S.C. Code Ann. §15-53-10, *et seq.*, against The Callawassie Island Members Club, Inc. (“CIMC”) seeking the production of information he claimed he was entitled to under S.C. Code Ann. §33-31-1602, *et seq.* (“The Non-Profit Corporation Act”), §33-31-720, and other case law and equitable requirements. (Complaint, Para. 12). Specifically, Hobson sought information requested in his letter of June 29, 2010 (Complaint, p. 3, Ex. A to Complaint, pp. 1-4), which included, among other things: itemized accounting records for all members holding multiple memberships; as well as an accounting of all memberships placed on CIMC’s resale list, or sold, resigned or terminated since December 1, 2001. (Ex. A to Complaint, pp. 1-4). Hobson also sought his costs, expenses and attorney’s fees for bringing his action pursuant to S.C. Code Ann. §33-31-720(d). (Complaint, p. 3).

CIMC answered, alleging it provided Hobson with all of the information required under The Non-Profit Corporation Act; and if the court should find further disclosure was warranted, that CIMC had nevertheless acted in good faith. CIMC further alleged its good faith compliance should serve to preclude Hobson's request for attorney's fees. (Answer, pp. 2-3).

A hearing of the matter was held on December 19, 2011, followed by several telephone conferences and an additional hearing on February 2, 2012, to ascertain how the requested information was maintained, by whom it was maintained, how it would be provided, and at whose expense. By order of the court dated March 28, 2012 (the "Initial Order"), CIMC was ordered to provide the requested materials to the extent such information was in its possession and control. Said order held the issue of attorney's fees and costs of production in abeyance. (Initial Order, p.9).

CIMC filed a Motion for Reconsideration pursuant to Rule 59, SCRPC, on April 13, 2012, contesting the court's interpretation of "accounting records" under S.C. Code Ann. §33-31-1601, *et seq.*, and objecting to the court's failure to address production costs and confidentiality. (Mot. Reconsideration, pp. 2-3). In partial response thereto, an interim order was issued by the court on June 26, 2012 (the "Interim Order"), directing CIMC to produce the resale lists in its possession and control and the complete file(s) of thirty-four named members, with leave for either party to be heard further on the matter if necessary. (Interim Order, pp. 2-3). The Interim Order specifically did not "modify the scope" of the Initial Order; and left open the issues of production, costs, "or any other issues or open motions" such as CIMC's Motion for Reconsideration. (Interim Order, p. 3).

On August 29, 2013, a final hearing was held to resolve all outstanding issues raised in CIMC's Motion for Reconsideration and to address both parties' requests for attorneys' fees and costs. By order of the court dated January 7, 2014 (the "Final Order"), Hobson's request for attorney's fees and costs was granted, CIMC motion for costs and fees was denied, and CIMC's Motion for Reconsideration was denied. (Final Order, p: 8). CIMC received written notice of the entry of said order on January 17, 2014 and served its Notice of Appeal on February 10, 2014.

FACTS

CIMC is a private, members-only club located on Callawassie Island, Beaufort County, South Carolina. On June 29, 2010, the Plaintiff, by and through his counsel, promulgated several informal interrogatories and made written demand for certain records of CIMC. (Complaint, Ex. A, pp. 2-4). The letter was received by CIMC's counsel on July 6, 2010, and responded to by letter dated July 14, 2010, advising Hobson that the records he requested pursuant to S.C. Code Ann. §33-31-1602, *et seq.*, were available for inspection and copying. (Complaint, Ex. B, pp. 1-2). When Hobson failed to schedule an inspection, CIMC delivered to Plaintiff's counsel all documentation CIMC, in good faith, determined was required under S.C. Code Ann. §33-31-1602, *et seq.*, including, but not limited to: Board of Directors Minutes from 2007 through 2010, Articles of Incorporation, and financial statements for 2008 and 2009. (Answer, Ex. A). By letter dated January 25, 2011, Hobson's counsel reiterated his request for itemized accounting records for all members holding multiple memberships; as well as an accounting of all memberships placed on CIMC's resale list, or sold, resigned or terminated since December 1, 2001. (Complaint, Ex. D).

The only re-sale list maintained by CIMC in its regular course of business is its current Excel spreadsheet. It did not maintain said document prior to 2005, and was therefore unable to readily produce records showing earlier re-sale list activities (Transcript of 8/29/2013, p. 20, lines 8-24; Affidavit, Craig Simonson, pp. 2-3, para. 5-6; Motion for Reconsideration, Ex. C, Supplemental Affidavit of Craig Simonson, pp. 1-2). CIMC does not maintain membership records in such a manner as to allow the ready identification of multiple memberships held by the same individuals, particularly if such individuals are no longer members. (Affidavit, Craig Simonson, p. 2, para. 1-4; Motion for Reconsideration, Ex. C, Supplemental Affidavit of Craig Simonson, pp. 2-3).

ARGUMENTS

I. MEMBERSHIP RECORDS NOT MAINTAINED AND/OR RETAINED IN THE ORDINARY COURSE OF CIMC'S BUSINESS AND GOING BACK OVER A PERIOD OF TEN (10) YEARS ARE NOT "ACCOUNTING RECORDS" AS THAT TERM IS UTILIZED IN S.C. CODE ANN. §33-31-1601, *et seq.*

In its Initial Order, the trial court determined "(t)hat the records requested by the Plaintiff are part of the accounting records of the corporation as identified in S.C. Code Ann. §33-31-1602(b)(2)." (Initial Order, p. 8, para. 7). In so ruling, the trial court went too far. This dangerous precedent leaves CIMC, and other non-profit corporations facing discovery requests, with no alternative but to grant access to any and all files and records, regardless of their nature, or face liability for the requesting party's attorneys' fees and costs.

In reaching this conclusion, the trial court ignored the cardinal rule of statutory interpretation, which is to ascertain and effectuate the intent of the legislature. The court is required by this rule to give the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011). "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Anderson v. South Carolina Election Com'n, 397 S.C. 551, 556-557, 725 S.E.2d 704, 706-707 (2012), *citations omitted*.

What records a non-profit corporation is required to keep are enumerated in S.C. Code Ann. §33-31-1601 and include "appropriate accounting records". Further reference to the Official Comment 2, para. 3 indicates that "appropriate" records are those documents necessary for the preparation of financial statements. The comments also indicate that the remainder of the chapter deals only with members' rights to inspect, copy and receive copies of the records *mandated* therein.

The legislature further imposed reasonable limits on the scope of documents required to be produced in the Official Comment to S.C. Code Ann. §33-31-1602(b)(2), at Section 16.01, Paragraph 2, entitled "Accounting Records". Accounting records are the "*current accounting records*" (emphasis added) of the corporation. The section *does*

not require that the records be kept permanently or address the question of how long accounting records should be kept.

In determining that the requested records were “accounting records” for purposes of S.C. Code Ann. §33-31-1602(b)(2), the trial court disregarded the comments and the statute’s plain meaning in favor of its own view of the equities in awarding Hobson access to **ten years’ worth** of historical data and ultimately awarding him his attorneys’ fees.

Even if the Initial Order had been for some shorter time span, the court’s sweeping inclusion of information, such as the personal billing statements of members not a party to this action who owned more than one membership and membership re-sales data, far exceeded any reasonable interpretation of the term “accounting records”. This is especially apparent in light of comments indicating an intent to confine “current accounting records” to such records as may be required to produce “financial statements”. The legislature even went so far as to limit the scope of such records by not requiring them to conform with generally accepted accounting principles. See Official Comment 2, para. 3.

The information requested by Hobson bore no relationship to CIMC’s financial statements, which were provided prior to the action in compliance with the Non-Profit Corporation Act. Much of what Hobson sought was not even maintained and/or retained by CIMC in the ordinary course of its business. CIMC produced significant testimony, via the affidavits of Craig Simonson, its acting Chief Financial Officer, that it had no readily accessible records showing which members may have owned more than one membership over the course of the past ten years. He further testified that to reconstruct

such records for the entirety of the period requested required resorting to files and information not in its possession or control. (Affidavit, Craig Simonson, p. 2, para. 1-4; Motion for Reconsideration, Ex. C, Supplemental Affidavit of Craig Simonson, pp. 2-3). Additionally, Mr. Simonson testified that CIMC did not maintain the “Re-Sale List” prior to 2005. (Affidavit, Craig Simonson, pp. 2-3, para. 5-6; Motion for Reconsideration, Ex. C, Supplemental Affidavit of Craig Simonson, pp. 1-2). Said testimony was never controverted in the record.

Based on the foregoing, the trial court committed a reversible error when it based its decision to award Hobson attorneys’ fees on its misinterpretation of S.C. Code Ann. §33-31-1602(b)(2).

II. BECAUSE CIMC TIMELY PROVIDED ALL OF THE DOCUMENTS EXPRESSLY REQUIRED UNDER S.C. CODE ANN. §33-31-1601, *et seq.*, PRIOR TO THE COMMENCEMENT OF THE ACTION, THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURT’S CONCLUSION IT ACTED IN BAD FAITH. CIMC’S OBJECTION TO PRODUCING INFORMATION CLEARLY OUTSIDE THE SCOPE OF THE STATUTORY PROVISIONS WAS REASONABLE, PARTICULARLY WHEN MUCH OF THE INFORMATION WAS (A) REQUESTED FOR AN IMPROPER PURPOSE; (B) NOT MAINTAINED AND/OR RETAINED IN THE ORDINARY COURSE OF BUSINESS; AND (C) EXCESSIVELY BURDENSOME TO PRODUCE.

The record clearly indicates CIMC, promptly, upon advice of counsel, and in good faith, delivered all of the documentation expressly mandated by S.C. Code Ann. §33-31-1602; which establishes that a member has a right to inspect, without the showing of good faith or proper purpose, the following documents: articles of incorporation; bylaws; resolutions; minutes of meetings of members for the past three (3) years; written communications to members generally for the past three (3) years; a list of directors and officers; and the most recent reports to the Secretary of State. These documents were either accessible to Hobson via CIMC's member website or provided to him by CIMC, free of charge. (Complaint, Ex. C; Answer, Ex. A). Additionally, S.C. Code Ann. §33-31-1602(b) further allows a member to inspect "(1) excerpts from any records required to be maintained...; (2) accounting records of the corporation; and, (3) subject to Section 33-31-1605, the membership list." This section, however, requires that the member's demand be in good faith and for a proper purpose.

Hobson's contention that CIMC failed to comply with S.C. Code Ann. §33-31-1602(b)(1)-(3) is a non-sequitur, since CIMC provided, free of charge, all records required to be maintained, membership list in the form of its Membership Directory, accounting records for 2008 and 2009 (the most recent two years available as of the date of the request). Even if CIMC did ultimately owe a duty to disclose materials beyond those expressly identified in the Non-Profit Corporation Act, there is no evidence to support the trial court's award of attorneys' fees, because CIMC had reason to believe Hobson's request was not made in good faith for a proper purpose. (CIMC Memorandum, pp. 4-5). CIMC produced evidence that Hobson utilized the membership list to solicit money in support of other litigation in violation of S.C. Code Ann. §33-31-

1605. Such solicitation was, by Hobson's own admission, designed to force the termination, or substantive dissolution and reorganization of CIMC. (Transcript of 12/9/2011, p. 73, line 9 to p.74, line 6). In the face of this admission, it was error for the trial court to conclude, as it did in its Final Order, that Hobson's request was in good faith. (Final Order, p. 7, para. 4).

Even in the absence of the foregoing evidence, CIMC had reasonable grounds for questioning the extent of Hobson's demands on the basis that much of the materials sought were not maintained by it in its ordinary course of business and were, therefore, costly to produce, as addressed in Argument I hereinabove. CIMC's contention is born out in the record, which reflects a continual reduction in scope of the materials sought by Hobson; from that ordered to be produced by the court's Initial Order to his ultimate satisfaction with those materials supplied pursuant to the Interim Order. Although the trial court's ruling in its Initial Order was never expressly modified (Interim Order, p. 3), the Final Order expressed Hobson's satisfaction with the lesser set of materials actually provided by CIMC. (Final Order, p. 8, para. 6). The foregoing lends credence to CIMC's position that Hobson's demands were, from the start, a stalking horse for broad based discovery to be used in other actions rather than a legitimate request for "accounting records" under the Non-Profit Corporation Act. The trial court appeared to admit as much, stating "...this seems to be a declaratory judgment action that's basically a discovery action that seeks nothing more than discovery and attorney's fees...". (Transcript of 12/9/2011, p.33, lines 20-23).

To conclude a non-profit corporation is acting in bad faith for not disgorging materials clearly beyond the express statutory language, especially when it has valid

reason to believe the request is made for an improper purpose, establishes a dangerous precedent. In the face of such a ruling, on what basis can any non-profit object to disclosure requests? The trial court's award of attorneys' fees to Hobson should be reversed given the overwhelming evidence of CIMC's good faith compliance with the plain language of the Non-Profit Corporation Act and the reasonableness of its objections to handing over materials not in its possession or costly to reproduce in the form requested. When a trial court's decision is made without supporting evidence it constitutes reversible error. South Carolina Elec. & Gas Co. v. Hartough, 375 S.C. 541, 546-547, 654 S.E.2d 87, 89 (Ct.App. 2007). In light of the foregoing, the case should be remanded to determine CIMC's cost of production and whether or not it should be reimbursed for its own attorneys' fees in this matter.

III. THE AWARD OF ATTORNEYS' FEES SHOULD BE OVERTURNED BECAUSE NO INDEPENDENT RIGHT TO ATTORNEYS' FEES EXISTS UNDER S.C. CODE ANN. §15-53-100; HOBSON IMPROPERLY PLED UNDER S.C. CODE ANN. §33-31-720(d); AND HOBSON FURTHER FAILED TO PROPERLY PLEAD ATTORNEYS' FEES UNDER S.C. CODE ANN. §33-31-1604(c). EVEN IF PROPERLY PLED, SUCH AWARD IS INAPPROPRIATE IN LIGHT OF CIMC'S GOOD FAITH COMPLIANCE AND HOBSON'S ULTIMATE SATISFACTION WITH THE PRODUCTION OF SUBSTANTIALLY LESS MATERIAL THAN ORIGINALLY DEMANDED AND ORDERED.

S.C. Code Ann. §15-53-100, which authorizes the court in a declaratory action to “make such award of costs as may seem equitable and just”, does not create an independent right to attorneys’ fees absent other statutory or contractual provision therefore. See South Carolina Electric & Gas Co. v. Hartough, 375 S.C. 541, 551, 654 S.E.2d 87, 92 (Ct. App. 2007), where the court, when faced with this same issue, upheld the award of attorneys’ fees only after determining underlying contractual provisions authorized such an award. To conclude otherwise would essentially allow for attorneys’ fees in any declaratory action, irrespective of the underlying cause of action and runs contrary to the well established principle that absent a clear statutory or contractual provision therefore, attorneys’ fees cannot be awarded. Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).

Since S.C. Code Ann. §15-53-100 does not independently support an award of attorneys’ fees, the trial court should have looked to the statutory authority specifically relied upon by Hobson in his Complaint, namely S.C. Code Ann. §33-31-720(d). This statute only requires the production of a membership list in advance of a meeting of the members and no such meeting was pending. Furthermore, a membership list was promptly provided free of charge to Hobson prior to the inception of this declaratory judgment action, ergo no violation of S.C. Code Ann. §33-31-720(d) occurred. CIMC clearly complied with §33-31-720(d), therefore, any award of fees based thereon is unsupportable.

Instead, the trial court independently determined Hobson was entitled to an award of attorneys’ fees under S.C. Code Ann. §33-31-1604, despite the fact that Hobson failed to reference that provision in his Complaint. The trial court overlooked this omission,

finding that CIMC “was apprised that Plaintiff would seek attorneys’ fees if successful.” (Final Order, p. 4). It also found that an appropriate basis for an award of costs and attorneys’ fees existed under the code sections referenced in the pleadings and that Hobson did not have to specify the exact statute by which costs could be assessed. (Id. pp. 4-5). The trial court erred in so finding. Generally, the right to attorney fees must be specifically pled. Judgments must conform to pleadings. Premium Inv. Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984); see Glass v. Glass, 276 S.C. 625, 281 S.E.2d 221 (1981).

Even if Hobson had pled S.C. Code Ann. §33-31-1604(c), any award of fees thereunder was inappropriate given CIMC’s good faith delivery of all documentation required to be produced pursuant to S.C. Code Ann. §33-31-1602, as previously argued. The only other statutory authority relied on by Hobson, S.C. Code Ann. §33-31-1602(d)(2), does recognize the power of a court, “independently of this chapter, to compel the production of corporate records for examination”. However, it makes no provision for the granting of attorneys’ fees if a court should elect to do so; and Hobson cited no other authority, independent of this chapter, for such award.


CONCLUSION

Since (a) Hobson failed to cite any statutory or common law authority in support of his claim that he is entitled to the materials beyond those mandated by S.C. Code Ann. §33-31-1602; (b) CIMC timely, in good faith, and at no charge, provided all the records required thereby; (c) the additional materials requested and ordered to be produced by the trial court were clearly outside the scope of those required to be maintained by a corporation under S.C. Code Ann. §33-31-1601; and (d) the additional materials required

extensive time and expense to compile; the award of attorneys' fees to Hobson unsupported and inappropriate and should be reversed. Additionally, as CIMC acted in good faith in fully complying with The Non-Profit Corporation Act in producing the materials mandated thereby, the matter should be remanded for a determination of its costs and attorneys' fees.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
14th Judicial Circuit

Marvin H. Dukes, III, Master In Equity

Case No. 2011-CP-07-0945

William R. Hobson,

Respondent,

v.


Callawassie Island Members
Club, Inc.

Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondent, William R. Hobson, by depositing a copy of it in the United States Mail, postage prepaid, to his attorney of record, Brian McDaniel, Esq. on July 11, 2014, addressed to Post Office Box 2085, Beaufort, South Carolina 29901.

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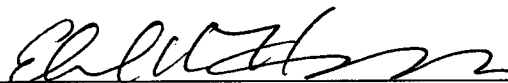
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Re: William R. Hobson v. Callawassie Island Members Club, Inc.
Civil Action No. 2011-CP-07-0945
Appellate Case No. 2014-000266

Dear Ms. Kitchings:

Enclosed for filing are the following: Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please return a clocked copy of the foregoing documents to my attention. A self-addressed, stamped envelope, postage prepaid, is included for your convenience.

With kind regards, I remain



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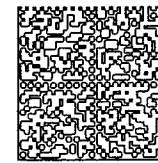
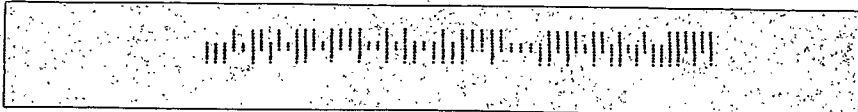
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