THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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SC Court of Appeals

Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320
Appellate No.: 2013-000714

Ronald Jarmuth, ... *Pro Se* Appellant,

v.

The International Club Homeowners
Association, Inc., Rosemary Toth, and
K.A. Diehl & Associates, Inc.,..... Respondents.

RESPONDENTS' RETURN TO APPELLANT'S
MOTION FOR REHEARING

The Respondents, The International Club Homeowners Association, Inc. ("Association"), Rosemary Toth ("Toth"), and K.A. Diehl & Associates, Inc. ("K.A. Diehl") (collectively hereinafter referred to as "Respondents"), hereby submit this Return to the Motion for Rehearing of Appellant, Ronald Jarmuth ("Appellant"), dated March 12, 2015.

ARGUMENT

Appellant asks this Court to reconsider its Unpublished Opinion No. 2015-UP-111 filed March 4, 2015 ("Opinion") to "correct errors of fact and of law". In other

words, Appellant is simply seeking an opportunity to have this Court reconsider the merits of his arguments that have already been considered, presented, and ruled upon. It is axiomatic that the purpose of a petition for rehearing is not to have the case tried by the appellate court for the second time. Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Instead, the petition's purpose is to identify facts or arguments that this Court overlooked or misapprehended. Rule 221, SCACR (2014).

Appellant's assignments of error fail to identify any facts or legal arguments that the Court overlooked or misapprehended. Accordingly, Appellant's argument that the Opinion contains "errors of fact and law" should be rejected summarily. The specific grounds for rejecting each of Appellant's arguments are set forth below.

I. Pebble Creek is Subject to the Declaration of Covenants and Restrictions for the International Club ("Declaration").

Appellant's first ground is that the Court incorrectly affirmed the lower court's decision that Pebble Creek is subject to the Declaration.

He argues that the deed from the developer of the International Club, Plantation A.D., LLC, to the builder of Pebble Creek, Sunbelt & Associates, Inc. ("Pebble Creek Deed"), was delivered on January 29, 1999, and therefore, the Pebble Creek section of the International Club community is not subject to the Declaration, which was filed by the developer on February 8, 1999. No evidence exists in the record to support the finding that the Pebble Creek Deed was delivered on January 29, 1999. In fact, the only evidence of the date of delivery is the date of recording, which was the same date that the Declaration was filed, February 8, 1999. See Willliams v. Lawrence, 194 S.C. 1, 6, 8 S.E.2d 838, 840 (1940) (explaining that the recording of the deed is prima facie evidence

of delivery). Accordingly, the Court did not overlook facts or law in affirming that Pebble Creek is subject to the Declaration.

II. The Villas Horizontal Property Regime is Subject to the Declaration.

Appellant also argues that the lower court's decision should be reversed, because the Villas is not subject to the Declaration.

Importantly, Appellant does not cite to any holding in the Final Order that the Villas Horizontal Property Regime is subject to the Declaration. Instead, he raises this issue for the first time on appeal with no reference to his submissions to the trial court or any holding in the Final Order. An issue raised for the first time on appeal and was not properly ruled upon by the trial judge, and therefore, this argument is precluded on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Moreover, as held by the lower court in denying Appellant's post-trial motions, Appellant does not have standing to challenge the validity of the First and Fourth Amendments bringing in the Villas Horizontal Property Regime, amendments filed before he owned property in the International Club. The order denying Appellant's post-trial motions was not appealed and is the law of the case. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993) (holding that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling). (**R. p. 22**). Because the order is the law of the case, Appellant does not have standing to challenge the validity of the First and Fourth Amendments to the Declaration subjecting the Villas Horizontal Property Regime to the Declaration.

Although Appellant's arguments are precluded for these reasons, the record reflects that the First and Fourth Amendments to the Declaration brought the Villas

Horizontal Property Regime into the International Club community. (**R. pp. 3824-3825, 4133-4134**). Therefore, the evidence presented to the trial judge reasonably supports any implication in the Final Order that the Villas Horizontal Property Regime is subject to the Declaration.

Accordingly, the Court did not misapprehend any facts or law related to the Villas Horizontal Property Regime which warrants a reversal of the lower court's decision.

III. The Association has rights under the Declaration.

Appellant argues that this Court erred by affirming the trial court's decision that the Association has rights under the Declaration, because it failed to apply the legal standard for a quiet title action. Nothing in the record supports the Appellant's legal position that he asserted a quiet title action, nor did the Appellant argue the same in his Brief. This position must be summarily rejected. Rule 221, SCACR (2014).

The Appellant also argues that the Court misapprehended the holding in McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct.App. 2005) by affirming the lower court's decision that the Association has rights under the Declaration. Quite to the contrary, the Court correctly cited IKON for the proposition that "a corporation may be known by several names in the transaction of its general business." 363 S.C. at 652, 611 S.E.2d at 318. The Association's transaction of business under different names does not affect the Association's rights under the Declaration. Appellant's argument is simply another attempt to reargue his preferred construction of the Declaration—an issue that was amply briefed and considered by the Court—which is not proper grounds for a motion for reconsideration.

IV. The Trial Court Properly Awarded Attorney's Fees to the Association.

Appellant assigns error to this Court's affirmance of the judgment against him for attorney's fees, based on an alleged fraud at the trial court level, which is a new argument not preserved on appeal. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

The lower court properly awarded attorney's fees to the Association for enforcing the Declaration against Appellant. An award of attorney's fees based on restrictive covenants is left to the discretion of the judge and will not be disturbed on appeal absent an abuse of discretion. Seabrook Island Property Owners Association, Inc. v. Berger, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct.App. 2005). Appellant does not set forth any evidence that the trial judge abused his discretion in awarding attorney's fees to the Association. Instead, as raised by the Appellant at trial[1] and in his appellate brief, he contends that $2,500.00 of the attorney's fees were incurred in defending a claim he filed with the South Carolina Human Affairs Commission regarding the Association's right to deny his application for a swing set.

Assuming this to true, Seabrook Island Property Owners Association, Inc. stands for the proposition that term "enforcement" of the covenants is broader than filing a lawsuit to enforce the covenants. 365 S.C. at 240, 616 S.E.2d at 434. Under this progeny, "enforcement" includes actions taken pre-litigation, which arguably includes defending an administrative action filed in response to the Association's enforcement of the covenants. Therefore, if Appellant's contentions are true, awarding the Association

[1] Appellant cross-examined the Association's president regarding the $2,500.00 insurance deductible paid for attorney's fees. **(R. pp. 2811-2815)**. The Association's president asserted that the deductible paid to the Human Affairs Commission was incurred in enforcing the Declaration against Appellant. **Id**.

its attorneys' fees paid in the form of the insurance deductible to defend the administrative action was not an abuse of discretion.

Accordingly, this Court did not misapprehend facts related to the award of attorney's fees to the Association that warrants a reversal of its Opinion.

V. Toth and K.A. Diehl are not liable to the Association for mishandling funds.

Appellant argued, without citing to any persuasive evidence, that Toth and K.A. Diehl mishandled the Association's funds. His main argument is that Toth and K.A. Diehl paid an unauthorized distribution to the Association's members in violation of the South Carolina Non-Profit Corporation Act ("Act"), S.C. Code Ann. § 33-31-140. This argument is a regurgitation of the analysis in his brief and is beyond the scope of a petition for rehearing.

Regardless, the record reflects that the payment of funds to the members was a refund in assessments. **(R. pp. 2566-2573, 2793-2798)**. The Appellant has not presented any evidence to contest that the payment was anything but a refund. Because no facts or law support the Appellant's argument that the Association's funds were mishandled, this Court properly affirmed the lower court's decision finding the same. Rule 220(b)(2), SCACR (2014).

VI. K.A. Diehl is protected by the Qualified Privilege.

Appellant's next assignment of error arises from the lower court's ruling that K.A. Diehl's statements regarding the Appellant are protected by a qualified privilege. This assignment of error is another attempt to improperly reargue the grounds set forth in his brief. As the property manager for the Association, K.A. Diehl is an agent of the Association. The record reflects that K.A. Diehl made statements about the Appellant in

good faith as directed by the Association's Board. "A communication made in good faith on any subject matter in which the person communicating has an interest or duty even though it contains matter which, without this privilege, would be actionable. Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 396, 665 S.E.2d 222, 227 (Ct. App. 2008). Appellant is unable to cite to any evidence that K.A. Diehl acted in bad faith or outside the scope of its duties that would imply that the privilege does not extend to K.A. Diehl's actions. Therefore, this Court did not commit error by affirming the lower court's decision that K.A. Diehl's statements were qualifiedly privileged.

VII. The Association Properly Denied Appellant's Request for the Membership List.

Appellant's last assignment of error is related to the Association's proper denial of Appellant's request for the membership list. The main contention is that the list was requested in anticipation of the 2009 Annual Meeting of the Association pursuant to the Act, S.C. Code Ann. § 33-31-720. Accordingly, Appellant asserts that he was not bound by a different provision of the Act, S.C. Code Ann. § 33-31-1602, requiring that a request for the membership list be made in good faith and for a proper purpose, describe with reasonable particularity the purpose, and the records are connected with that purpose.

Appellant is unable to cite to any evidence in the record that reflects that the request was made before the 2009 Annual Meeting and in anticipation of the 2009 election. Nor does any law exist exempting requests for membership lists from S.C. Code Ann. § 33-31-1602. Accordingly, this Court properly applied S.C. Code § 33-31-1602 in affirming that the Association's denial of the membership list request was in conformance with the Act.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Appellant's motion for reconsideration be DENIED.

Respectfully submitted,

McNAIR LAW FIRM, P.A.
Henrietta U. Golding, SC Bar #2173
Alicia E. Thompson, SC Bar #77056
Post Office Box 336
2411 Oak Street, Suite 206
Myrtle Beach, SC 29578
(843) 444-1107

Attorneys for Respondents
The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc.

Myrtle Beach, South Carolina
Date: March 23, 2015

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, Donna M. Brady, an employee of McNair Law Firm, P.A., *Pro Se* Appellant Ronald Jarmuth in the above-entitled action, certify that I have served the Respondents Return to Appellant's Motion for Rehearing, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 23rd day of March, 2015.

Pro Se Appellant of Record:

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
Email: ronaldjarmuth@hotmail.com

Donna M. Brady

Myrtle Beach, South Carolina
MYRTLEBEACH 206909v1

MCNAIR
ATTORNEYS
Alicia Thompson

athompson@mcnair.net
T (843) 443-3058
F (843) 443-9137

March 23, 2015

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

RE: *Ronald Jarmuth v. International Club HOA, Inc. et al.*
Case Track #: 2013-000714
Civil Action Nos.: 2009-CP-26-3596 and 2010-CP-26-11320
Our File No.: 051490.00001

Dear Ms. Kitchings:

With regard to the above matter, enclosed for filing with the Court, please find the following:

- Original (unbound) and seven copies of the Respondents' Return to Appellant's Motion for Rehearing; and
- Proof of Service.

By copy of this letter to parties of record, and as shown on the Proof of Service, I hereby serve a copy of the aforementioned documents to the parties of record.

Please return to me one clocked copy of the enclosed documents in the enclosed self-addressed envelope.

Sincerely,

McNair Law Firm, P.A.

Alicia Thompson

AT/dmb
Enclosures
cc: Ronald Jarmuth
Clients

RECEIVED
MAR 24 2015
SC Court of Appeals

McNair Law Firm, P. A.
Founders Centre
2411 Oak Street, Suite 206
Myrtle Beach, SC 29577

Mailing Address
Post Office Box 336
Myrtle Beach, SC 29578

mcnair.net