

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

SC Court of Appeals

Marvin H. Dukes, III, Master In Equity

Case No. 2011-CP-07-0945

William R. Hobson,

Respondent,

v.

Callawassie Island Members
Club, Inc.,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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REBUTTAL STATEMENT TO RESPONDENT'S
ENUMERATED ISSUES ON APPEAL

1. THE ISSUES ON APPEAL AS SET FORTH IN CIMC'S INITIAL BRIEF WERE PROPERLY PRESERVED BY THE TIMELY FILING OF A MOTION FOR RECONSIDERATION AND APPEAL OF SAME FOLLOWING FINAL DETERMINATION BY THE TRIAL COURT.
2. CIMC DID NOT WAIVE ITS OBJECTIONS TO THE INITIAL ORDER AT THE FINAL HEARING.
3. UNDER S.C. CODE ANN. §33-31-1602(C) RESPONDENT FAILED TO MEET THE INITIAL BURDEN OF PROVING (A) HIS DEMAND WAS MADE IN GOOD FAITH AND FOR A PROPER PURPOSE, (B) THAT SUCH PURPOSE AND THE REQUESTED MATERIALS WERE DESCRIBED WITH PARTICULARITY; AND (C) THAT THE REQUESTED MATERIALS WERE DIRECTLY CONNECTED TO THAT PURPOSE.

SUPPLEMENTAL STATEMENT OF THE CASE

Several points raised in Respondent's (hereinafter, referred to as "Hobson") Statement of the Case bear clarification. First, the Complaint sought all information requested by Hobson in his counsel's letter dated June 29, 2010, not counsel's later letter dated January 25, 2011. (R. p.24). His request included, amongst many other things: all written communications to members, a list of all members, past or present, who owned multiple memberships; real estate settlement and resale documents for members holding multiple memberships; three years worth of written communications to members; and ten (10) years worth of communications to members regarding resignation, termination or settlement. (R. pp. 26-29).

Second, while the Complaint did assert Hobson had a right to the requested information under S.C. Code Ann. §33-31-1602 *et seq.*, §33-31-720, and *other case law and equitable requirements*, the trial court was never presented with any other authority beyond that cited in the South Carolina Nonprofit Corporation Act.

Lastly, the parties did not, as Hobson suggests, stipulate “that of the issues raised in Defendant’s Motion for Reconsideration, the only issue pending was to address the costs of production...”. This is a complete mischaracterization, as the issues raised in CIMC’s Motion were thoroughly argued before the trial court at the final hearing. (R. p. 140, line 9 through p.173, line 16).

ARGUMENTS

I. THE ISSUES ON APPEAL, AS SET FORTH IN CIMC’S INITIAL BRIEF, WERE PROPERLY PRESERVED BY THE TIMELY FILING OF A MOTION FOR RECONSIDERATION AND APPEAL OF SAME FOLLOWING FINAL DETERMINATION BY THE TRIAL COURT.

“To be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in timely manner, and (4) raised to the trial court with sufficient specificity. *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011); citing *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007). Following the trial court’s Order of March 28, 2012 (the “Initial Order”), which granted Hobson’s request, CIMC timely filed a Motion for Reconsideration contesting, among other things, the court’s sweeping interpretation of “accounting records” under S.C. Code Ann. §33-31-1602, *et seq.* (R. pp. 42-43). Without ruling on CIMC’s Motion for Reconsideration, the trial court issued an interim order on June 26, 2012 (the “Interim Order”), substantially narrowing the scope of information required to only 34 members. The Interim Order did not “modify the scope” of the Initial Order, but rather, held further production in abeyance pending a determination of the costs of producing the materials

previously ordered. (R. pp. 12-13). It was not until after the hearing on August 29, 2013, that a final judgment was issued in this case.

To assert that CIMC was required to appeal the Interim Order as a prerequisite to preserving the issues raised in its Motion for Reconsideration illustrates a complete misunderstanding of the law. Under Rule 201(a), SCACR, an appeal may be taken, as provided by law, from any final judgment, appealable order or decision. “As a general rule, only final judgments are appealable.” *Ex Parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). “(E)xception to general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” *Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008), quoting Justice Pleicones dissent in *Salmonson v. CGD, Inc.*, 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008). CIMC’s Motion for Reconsideration was not heard until August 29, 2013, and a final judgment was not obtained until January 7, 2014, the date on which the trial court issued its Final Order. Thereafter, CIMC timely filed its Notice of Appeal.

II. CIMC DID NOT WAIVE ITS OBJECTIONS TO THE INITIAL ORDER AT THE FINAL HEARING.

At the final hearing, the trial court took up CIMC’s Motion for Reconsideration. (R. p.140, lines 9-10). In fact, counsel for CIMC devoted considerable time to the argument of the issues now before this Court on appeal. (R. p. 140, line 14 - p. 173, line 16). In selectively quoting the hearing transcript, counsel for Hobson completely ignores the preceding argument of CIMC’s motion. It was, and remains, CIMC’s contention that the materials it was ordered to produce, even the substantially narrowed materials under the Interim Order, exceed the scope of those covered by S.C. Code Ann. §33-31-1602(b).

While Hobson may have stipulated that no further production was needed, his ultimate satisfaction with the materials provided cannot be construed as a concession by CIMC as to the issues currently before this Court. This case is clearly distinguishable from cases in which appellate review was declined on the basis of waiver evidenced by consent order. See: *Smith v. Lowery*, 56 S.C. 493, 35 S.E. 129 (1900) (an appeal will not be entertained from an order by consent); *Wilson v. All*, 86 S.C. 586, 68 S.E. 824 (1910) (appeal from such an order is regarded as waived).

III. UNDER S.C. CODE ANN. §33-31-1602(C) RESPONDENT FAILED TO MEET THE INITIAL BURDEN OF PROVING (A) HIS DEMAND WAS MADE IN GOOD FAITH AND FOR A PROPER PURPOSE, (B) THAT SUCH PURPOSE AND THE REQUESTED MATERIALS WERE DESCRIBED WITH PARTICULARITY; AND (C) THAT THE REQUESTED MATERIALS WERE DIRECTLY CONNECTED TO THAT PURPOSE.

Even assuming, arguendo, that CIMC had an obligation under S.C. Code Ann. §33-31-1602 *et seq.* to produce the materials demanded in the Complaint, Hobson failed to meet the burden of proof specified in §33-31-1602(c). For reasons previously argued, the trial court erred in concluding Hobson's request was made in good faith and otherwise comported with the statutory requirements. The burden of showing good faith did not shift to CIMC until the trial court determined Hobson was entitled to the materials demanded. CIMC's challenge to the trial court's overly broad interpretation of the term "accounting records" is, in and of itself, evidence of its "good faith" objection. Given the scope of the materials initially requested; CIMC's belief (and Hobson's admission) that such materials were sought for the purpose of soliciting its members for

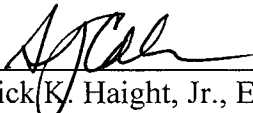
inclusion in litigation designed to undermine its very existence; and CIMC's voluntary disclosure of all documents it reasonably believed the statutes required; there is simply no evidence to support the trial court's conclusion that CIMC acted in bad faith.

CONCLUSION

CIMC timely raised the issues now on appeal, both in writing and in oral argument, on multiple occasions. These issues were clearly ruled upon when the trial court denied CIMC's Motion for Reconsideration and, therefore, there is no question that the issues were adequately preserved for appellate review. Aside from the materials voluntarily and in good faith provided by CIMC prior to the commencement of this action, all other production was done pursuant to court order and not by consent of the parties. At no point in time did CIMC waive its right to appeal the issues raised and ruled on by the trial court. Finally, CIMC could not have anticipated the trial court's unprecedented expansion of the term "accounting records" and, therefore, cannot be said to have acted in bad faith for its lack of clairvoyance. Indeed, this case is one of first impression, as no other South Carolina court has yet to examine the legislative intent behind S.C. Code Ann. §33-31-1602(b). In cases that raise a novel question of law, this Court is free to decide the question without particular deference to the trial court. *Camp v. Camp*, 386 S.C. 571, 574, 689 S.E.2d 634, 636 (2010).

Respectfully submitted,

September 29th, 2014.


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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief and the Final Reply Brief comply with Rule 211(b), SCACR.

September 29, 2014.


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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief and Final Reply Brief 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 September 29th, 2014, addressed to Post Office Box 2085, Beaufort, South Carolina 29901.

September 29th, 2014.



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