

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable Ralph P. Stroman - Special Referee

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Unpublished Opinion No. 2015-UP-111
(Submitted January 1, 2015 – filed March 4, 2015)
Case Nos.: 2009-CP-26-3596 and
2010-CP-26-11320
Appellate Case No. 2015-001019

JUN 12 2015

S.C. SUPREME COURT

Ronald J. Jarmuth..... Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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STATEMENT OF THE CASE

Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 (hereinafter collectively referred to as “Consolidated Cases”) arise out of a dispute between the *pro se* Petitioner, Ronald Jarmuth (hereinafter “Petitioner”), and the Respondents, the International Club Homeowners Association, Inc. (hereinafter “Association”), Rosemary Toth (hereinafter “Toth”), a former president of the Association, and K.A. Diehl & Associates, Inc. (hereinafter “K.A. Diehl”), the Association’s property management company (collectively hereinafter referred to as “Respondents”), regarding the Association’s authority to enforce the Declaration of Covenants and Restrictions for the International Club filed in Deed Book 2117 at Page 1353 in the Horry County Register of Deed’s Office on February 8, 1999 (hereinafter “Declaration”) against Petitioner and his Pebble Creek property. **(R. pp. 76-88, 101-109, 113-182, 205-237, 288-296).**

The International Club Community (hereinafter “International Club” or “Community”) was developed by Plantation A.D., LLC (hereinafter “Plantation A.D.”), the original developer and declarant named in the Declaration. **(R. pp. 29, 4087).** When the Declaration was filed on February 8, 1999, Pebble Creek, Petitioner’s neighborhood within the Community, was specifically incorporated into the Community by reference to its property description in Exhibit “A” to the Declaration. **(R. pp. 4085-4088, 4114).** After the Declaration was filed, Plantation A.D. conveyed the property that constitutes Pebble Creek to Sunbelt & Associates, Inc., designated builder for Pebble Creek as defined by the Declaration, by deed recorded in Deed Book 2117 at Page 401 in the Horry County Register of Deeds Office on February 8, 1999 (hereinafter the “Pebble Creek Deed”). **(R. pp. 3733-3736).** The Pebble Creek Deed sets forth that “[t]he

property is conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation. . .” (R. pp. 3733-3736).

The Community’s original name was “Murrells Inlet Golf Plantation”, the name reflected in the Declaration. (R. pp. 4085-4087). The Declaration also contemplated that an association by the name of Murrells Inlet Golf Plantation Association, Inc. would be formed to govern the Community, however, Plantation A.D. never incorporated an entity by that name.¹ (R. pp. 4085-4087). On May 9, 2000, the Community’s name was changed to International Club pursuant to the First Amendment to the Declaration filed in the Register of Deeds Office in Deed Book 2258 at Page 1453 (hereinafter “First Amendment”). (R. pp. 4133-4134). The First Amendment also changed the name of the homeowners’ association for the International Club to the “International Club Association”. (R. pp. 4133-4134). Subsequently, Articles of Incorporation for the Association were filed with the Secretary of State on March 1, 2001. (R. pp. 4402-4403). Pursuant to its Articles, the Association was formally named “International Club Home Owners Association”. (R. pp. 4402-4403). Although the names of the Association contained in the Declaration and the Articles of Incorporation are not identical, the Association has exercised the rights and privileges of International Club Association under the Declaration since its incorporation in 2001. (R. pp. 1994-2009, 2864-2865).

On April 7, 2009, Petitioner filed Civil Action No. 2009-CP-26-3596 seeking an order that the Declaration is unenforceable and/or that the Association breached the Declaration and that Toth breached her fiduciary duty as president to the Association and

¹ Petitioner filed articles of incorporation for Murrells Inlet Golf Plantation Association, Inc. on September 30, 2010. (R. pp. 3843-3844).

to its members. (R. pp. 113-182). Shortly after service of the Complaint, on April 28, 2009, Petitioner directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency statuses. (R. pp. 34, 4651-4654). This request was denied by a letter from Ms. Henrietta Golding, the Association's attorney. (R. pp. 34-35, 4651-4654). Before April, 2009, and after, Petitioner submitted other requests for the membership list, and it was provided to Petitioner each time that he requested it. (R. pp. 2865-2868, 2876-2878, 4233). Moreover, Petitioner accessed the list through other members of the Association. (R. pp. 35, 2875-2876).

Around the time of the Petitioner's April, 2009 request for the membership list, the Association Directors met with Ms. Golding to discuss the Complaint and Amended Complaint. (R. pp. 2550-2558). On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Association's position as to the various claims asserted by Petitioner as well as providing information as to Petitioner's involvement in previous litigation. (R. p. 34). A list setting forth cases that Petitioner was a party to was included, as well as published Court decisions. (R. p. 34). The Directors instructed K.A. Diehl to mail Ms. Golding's letter to all Community members. (R. p. 34). After delivery of the May, 2009 letter to the membership, the Complaint was amended on June 9, 2009 to add K.A. Diehl and Ms. Golding as defendants and to add claims for defamation and violation of the South Carolina Non-Profit Corporation Act for failure to provide the membership list. (R. pp. 205-237). Ms. Golding was subsequently dismissed. (R. p. 3012).

In July 2009, Petitioner applied for the installation of a swing set to be placed on the side of his house. (R. pp. 4283-4293). The Association's architectural review board (hereinafter "ARB") denied his request, for his application had the swing set positioned in the side yard and visible to the street. (R. pp. 1385, 2760-2762, 4293-4294). As a result of this denial, Petitioner filed a claim with the South Carolina Human Affairs Commission (hereinafter "SCHAC") contending that the Association discriminated against him due to his foster children. (R. pp. 4299-4303). This discrimination claim was dismissed by SCHAC when it issued its determination of no reasonable cause on December 11, 2009. (R. pp. 4299-4303).

Thereafter, Civil Action No. 2010-CV-26-1072943 was filed in Magistrate's Court on October 12, 2010 seeking a declaratory judgment that the Association does not have the authority to act under the Declaration, the Association waived its architectural review rights, and the Association breached the Declaration by denying his application for the swing set. (R. pp. 76-88). The 2010 case was removed to circuit court and assigned a new case number, Civil Action No. 2010-CP-26-11320, by order of the Court on December 1, 2010. (R. pp. 1-2).

The Respondents answered in both cases and asserted several affirmative defenses. (R. pp. 93-100, 268-287). The Association also alleged counterclaims for attorneys' fees and costs. (R. pp. 93-100, 268-279). In Civil Action No. 2010-CP-26-11320, the Association asserted a breach of the Declaration claim and sought a declaratory judgment that the Association has the right to enforce the Declaration against Petitioner and injunctive relief requesting the removal of unapproved improvements. (R. pp. 93-100). The counterclaims were filed in the Consolidated Cases to recover the

attorneys' fees and costs incurred in enforcing the Declaration against the Petitioner, as well as the fines and late fees associated with the Petitioner's ARB violations.

On April 20, 2010, the Association's Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. (hereinafter "Central Electric"). (R. pp. 35, 2567, 4309-4324). As consideration for this easement, the Association received \$83,000.00, as well as an agreement from Central Electric that it would maintain the easement area in good condition. (R. pp. 35, 4309-4324). Because the Association received unbudgeted revenue for 2010, the Association refunded \$75.00 in assessments to each member to confer a benefit upon the membership. (R. pp. 2566-2573, 2785, 2793-2798). Although Petitioner asserts that Toth is liable for the refund in assessments, he never asserted a cause of action against her based upon these grounds.

The Consolidated Cases were joined on August 22, 2011 and were referred to Ralph Stroman, Special Referee, by consent order. (R. pp. 3-5, 7-12). Thereafter, the Consolidated Cases were tried from August 8, 2012 to August 10, 2012. (R. p. 1863). At trial, the Association presented evidence that it paid \$5,000.00 to McNair Law Firm, P.A. in attorneys' fees and costs to enforce the Declaration against the Petitioner. (R. pp. 2760-2763, 2772-2775, 4298, 4326). Mr. Freiboth's testimony clarified that the \$5,000.00 represented the deductibles paid by the Association for a director's and officer's insurance policy to defend Petitioner's complaints, including the proceeding before SCHAC. (R. pp. 2760-2763, 2772-2775, 4298, 4326).

The final order dismissing Petitioner's claims and awarding judgment in favor of the Association in the amount of \$7,326.00 and granting injunctive relief (hereinafter

“Final Order”) was signed and filed on September 10, 2012. (**R. pp. 28-75**). Post-Trial Motions were denied by a written Order filed on March 11, 2013. (**R. pp. 15-27**).

Petitioner timely filed an appeal of the Final Order on April 3, 2013. (**Notice of Appeal**). After substantial briefing, the Court of Appeals issued an Unpublished Opinion No. 2015-UP-111 on March 4, 2015 affirming the Final Order (hereinafter “Unpublished Opinion”). A Petition for Rehearing was filed by Petitioner on March 12, 2015 and was denied by the Court of Appeals by Order dated April 24, 2015. This Petition for Writ of Certiorari was filed with the Supreme Court on May 12, 2015 and served on the Association on May 14, 2015.

ANALYSIS

I. NO SPECIAL OR IMPORTANT REASON EXISTS TO JUSTIFY GRANTING CERTIORARI.

This Court should deny Petitioner’s request for a writ of certiorari because, despite his protests to the contrary, Petitioner failed to identify any “special and important reasons” to justify granting certiorari.

Rule 242, SCACR, provides that a writ of certiorari “is not a matter of right”, but instead, “will be granted only where there are special and important reasons.” (emphasis added). The Rule identifies “the character of reasons which will be considered” by the Court in making its decision:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.

- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242, SCACR.

Here, the Consolidated Cases possess none of the reasons identified by Rule 242, SCACR as special and important. On the contrary, this is a commonplace homeowners' association dispute involving the construction and application of restrictive covenants to a property owner. The Court of Appeals denied the Petitioner's appeal by the Unpublished Opinion without a dissent, and the decision is consistent with the jurisprudence in this State. Furthermore, no novel, constitutional or federal issues were raised.

Petitioner posits that the Unpublished Opinion "is in conflict with all prior decisions of the Supreme Court as well as thousands of years of legal practice regarding the finality of deeds"; yet, he sets forth no precedent that contradicts the decision. Moreover, he asserts that substantial constitutional issues are raised, however he fails to cite to any constitutional provisions. Additionally, he attempts to contort the ordinary issues related to the construction of documents into matters of first impression. None of the legal acrobatics attempted by Petitioner justifies a grant of writ of certiorari.

II. THE EVIDENCE SUPPORTS THE FINDING THAT PEBBLE CREEK IS SUBJECT TO THE DECLARATION.

Petitioner contends that the Court of Appeals incorrectly affirmed the lower court's decision that Pebble Creek is subject to the Declaration. This contention is without merit.

The Court of Appeals properly held that the Pebble Creek neighborhood of the Community is subject to the Declaration based on the unambiguous language contained

in the Declaration and the Pebble Creek Deed. The basis for Petitioner’s argument is that the Pebble Creek Deed was allegedly delivered on January 29, 1999 before the Declaration was filed by Plantation A.D. on February 8, 1999. Because the Pebble Creek Deed was purportedly delivered after Plantation A.D. conveyed title, Petitioner argues that Pebble Creek was not subject to the Declaration. Petitioner further argues for the first time on appeal that the Declaration does not incorporate by reference Pebble Creek into the Community, which is an issue not preserved on appeal. Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”)

The Pebble Creek Deed was delivered after the Declaration was filed in the Pebble Creek property’s chain of title, thereby subjecting it to the Declaration.² (**R. pp. 3733-3736, 4085-4114, 4415**). 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 (the date the deed became “valid to affect the rights of subsequent purchasers for valuable consideration without notice”), which is the same date the Declaration was filed, February 8, 1999. See Williams 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); see also S.C. Code Ann. § 30-8-10 (2007) (South

² The Declaration incorporates into the Community by reference all property described on Exhibit “A”. (**R. pp. 4085-4114**). Exhibit “A” describes Pebble Creek as “76.08 acres identified as ‘Reserved for Future Development –Parcel 1’ . . . as more specifically shown and set forth on that certain Plat . . . recorded in Plat Book 160 at Page 79 in the Office of Register of Deeds for Horry County.” (**R. p. 4114**). The Pebble Creek property is depicted on the referenced plat. (**R. pp. 3676, 4415**). Therefore, Petitioner’s contention that the property was not subjected to the Declaration by incorporating it by reference, even if preserved, is without merit.

Carolina is a “race notice” state.). The Pebble Creek Deed was filed minutes after the Declaration, which subjects Pebble Creek, and the Petitioner’s property, to the covenants contained in the Declaration.

Moreover, the Pebble Creek Deed specifically subjects Pebble Creek to the Declaration. (R. pp. 3733-3736). By the express language of the Pebble Creek Deed, the Declaration is enforceable, as the grantor and grantee of Pebble Creek intended for the property to be subject to it. Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct. App. 1988) (holding that a restrictive covenant is enforceable if there is “an indication that the parties intended for the covenant to run with the land”).

Accordingly, the Court of Appeals properly affirmed the Final Order finding that Pebble Creek is subject to the Declaration.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE LOWER COURT’S DECISION THAT THE ASSOCIATION HAS RIGHTS UNDER THE DECLARATION.

The request for writ of certiorari alleges that the Court of Appeals erred in affirming that the Association has rights under the Declaration. The basis for this argument is that the First Amendment to the Declaration changed the name of the homeowners’ association for the Community to the “International Club Association”. Because the Association was incorporated as an entity by the name of “International Club Home Owners Association” rather than “International Club Association”, Petitioner suggests that the Association has no rights under the Declaration. He further argues that the finding that the Association has rights under the Declaration is contrary to South Carolina law regarding prescriptive easements, which is a new argument that is not properly before this Court. See Rule 242(d)(2), SCACR. The Association is the only

legal entity that has rights to govern the Community members, and therefore, Petitioner's argument is meritless.

As held by the Court of Appeals, this is an action at law tried without a jury, and the findings of the trial judge will not be disturbed unless evidence does not exist to reasonably support the trial court's findings. O'Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992). Evidence exists to support the lower court's finding that the Association has rights under the Declaration. Pursuant to South Carolina law, a corporation, like the Association, may operate under several different names, however, such operations do not affect the Association's legal rights and duties. McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2004); see also Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992). In other words, slight departures from the name used by the corporation, such as the omission of a part of its name or the inclusion of additional words, generally will not affect the validity of contracts or other business transactions as long as the identity of the corporation can be reasonably established from the evidence. See Sumter Tobacco Warehouse Co. v. Phx. Ins. Co., Ltd., Of London, 76 S.C. 76, 56 S.E. 654, 656 (1907) (holding that a deed to a corporation made before the charter will have effect as soon as the charter is obtained, regardless of any slight change in the name of the corporation).

The Association's transaction of business under different names does not affect the Association's rights under the Declaration. It was incorporated in 2001 by the original developer, and since that time, it has continually acted as the governing organization for the International Club. (**R. pp. 21, 1991-2009, 4402-4403**). Since 2001, the Association has collected assessments, held meetings, provided services to the

International Club members, owned and maintained the common areas, and enforced the Declaration. (R. pp. 21, 37-38, 1991-2009). The evidence reasonably supports the Special Referee's finding that the Association has rights under the Declaration.

IV. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE AWARD OF ATTORNEYS' FEES AND COSTS TO THE ASSOCIATION.

Petitioner assigns error to the Court of Appeal's affirmance of the judgment against him for attorneys' fees and costs based on an alleged fraud at the trial court level, which is a new argument not preserved on appeal. See Rule 242(d)(2), SCACR; see also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1997).³ The Petitioner contends that Mr. Freiboth's and the undersigned counsel's representations that the \$5,000.00 in attorneys' fees was incurred by the Association in enforcing the Declaration are fraudulent, which warrants a reversal of the Unpublished Opinion.

Even if the issue is preserved, the lower court properly awarded attorneys' fees to the Association for enforcing the Declaration against the Petitioner. An award of attorneys' fees based on restrictive covenants is left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Seabrook Island Prop. Owners' Assn v. Berger, 365 S.C. 234, 240, 616, S.E.2d 431, 434 (Ct. App. 2005). No evidence of an abuse of discretion in awarding attorneys' fees exists pursuant to the Declaration.

The Declaration, § 8.9, provides that the Association is entitled to attorneys' fees incurred in enforcing the Declaration: "[s]hould any person employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, because of a

³ This issue was raised for the first time in Petitioner's Motion for Rehearing to the Court of Appeals and is not properly before this Court.

breach of the same, all costs incurred in the enforcement, including a reasonable fee for counsel shall be paid by the Owner of such Unit or Units in breach thereof.” (R. pp. 4112-4113). Moreover, the Bylaws of the Association, § 13.4, echoes § 8.9 of the Declaration: “[s]hould the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys’ fees, shall be paid by the Owner.” (R. pp. 4131-4132). These provisions clearly confer authority upon the trial judge to award attorneys’ fees to the Association incurred while enforcing the Declaration.

At trial, the Association presented testimony from William Freiboth, the Association’s former president, that the Association incurred \$5,000.00 in attorneys’ fees in enforcing the Declaration against the Petitioner. (R. pp. 2760-2763, 2772-2775, 4298, 4326). Pursuant to his testimony, the \$5,000.00 was paid in two deductibles of \$2,500.00 to McNair Law Firm, P.A. (R. pp. 2760-2763, 2772-2775, 4298, 4326). As further proof of the attorney’s fees and costs incurred in enforcing the Declaration, the Association admitted the checks to McNair Law Firm, P.A. as exhibits. (R. pp. 2760-2763, 2772-2775, 4298, 4326). Mr. Freiboth also specifically testified that one of the \$2,500.00 deductibles was paid in connection with the SCHAC proceeding that was initiated after the 2009 lawsuit. (R. pp. 2760-2763). Mr. Freiboth clarified that defending Petitioner’s SCHAC complaint regarding the ARB’s denial of his swing set was an enforcement of the Declaration against the Petitioner, since Petitioner used the

proceeding to challenge the Association's enforcement of architectural restrictions against him.⁴ (**R. pp. 2760-2763**).

The trial judge, in his sound discretion, concluded that defending Petitioner's administrative action filed while the 2009 lawsuit was pending were actions taken to enforce the Declaration against him. Seabrook Island Prop. Owners Assn stands for the proposition that the term "enforcement" of the covenants is broader than filing a lawsuit. 365 S.C. at 240. Under this progeny, "enforcement" includes sending collection letters pre-litigation. Here, the lower court found that the Petitioner breached the Declaration, a finding that is not challenged on appeal. (**R. pp. 28-75**). The administrative proceeding is directly related to the Consolidated Cases, as it challenged the Association's authority to enforce the Declaration. Because the administrative proceeding was filed while the 2009 case was pending, and before the 2010 case seeking similar relief, the trial judge did not abuse his discretion in awarding the attorneys' fees incurred.

Therefore, the award of attorneys' fees to defend the administrative action was not an abuse of discretion.

V. THE EVIDENCE SUPPORTS THE FINDING THAT K.A. DIEHL IS NOT LIABLE FOR DEFAMATION.

The Petitioner also asserts that the Final Order is in error, because K.A. Diehl is liable for defamation by delivering Ms. Golding's May, 2009 letter to the Association

⁴ Upon the dismissal of the SCHAC Complaint, Petitioner filed the 2010 lawsuit asserting that the ARB did not have the right to enforce the architectural restrictions against him and challenging the Association's denial of his swing set. (**R. pp. 76-88**). The Association counterclaimed for breach of the Declaration for building unapproved improvements, sought injunctive relief to remove the improvements, and a declaratory judgment that Petitioner is subject to the Declaration. (**R. pp. 93-100**).

membership.⁵ However, the record clearly supports the finding that K.A. Diehl is not liable for defamation, and therefore, the Final Order should not be disturbed. See Townes Assocs. v. The City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

First, Petitioner stipulated at the trial that the May, 2009 letter from Ms. Golding is not defamatory and that it was sent for litigation purposes. (**R. pp. 27, 68-69, 2447-2449**). The Final Order holding that K.A. Diehl is not liable for defamation is supported by the Petitioner's own testimony.

Secondly, K.A. Diehl's delivery of the May, 2009 letter, at the direction of the Association's Board, for the purpose of notifying the membership about the 2009 case is protected by a qualified privilege. "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." Murray v. Holnam, Inc., 344 S.C. 129, 140-41, 542 S.E.2d 743, 749 (Ct. App. 2000). The privilege protects full and unrestricted communication regarding the subject that the parties share an interest and is not confined to narrow limits. Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971).

K.A. Diehl's delivery of the May, 2009 letter was made in good faith, as it was sent pursuant to the direction of the Board regarding a subject matter that the membership had an interest in, namely the 2009 case. (**R. pp. 2550-2555**). As the property manager, K.A. Diehl had a duty, under its property management contract, to follow the direction of

⁵ Petitioner argues for the first time on appeal that K.A. Diehl failed to plead the defense of privilege. However, privilege was asserted as a defense in K.A. Diehl's Answer to the Amended Complaint. (**R. pp. 280-287**). This argument is not preserve on appeal (Rule 242(d)(2), SCACR) and is without merit.

the Board to provide notice to the membership regarding the parties to and the nature of the 2009 lawsuit. (**R. pp. 3421-3428**). The membership was entitled to this information, as the Petitioner's claims assert that the Declaration is invalid, and the defense of Petitioner's claims was funded, in part, by the Association. (**R. pp. 113-182, 4298**). No evidence exists that K.A. Diehl acted in bad faith, exceeded the scope of the qualified privilege, or sent the May, 2009 letter for an improper purpose.

As a result, the Court of Appeals did not err by affirming the Final Order finding that K.A. Diehl is protected from liability.

VI. THE EVIDENCE SUPPORTS THE FINDING THAT THE ASSOCIATION PROPERLY RESPONDED TO PETITIONER'S REQUEST FOR MEMBERSHIP INFORMATION.

Petitioner argues that his September 17, 2009 request for the Association's membership list was ignored in violation of the South Carolina Non-Profit Corporation Act (hereinafter the "Act"). This issue is not preserved on appeal and should be disregarded by this Court, because Petitioner failed to raise it with lower court by setting forth the specific grounds for his objection and failed to argue it in his brief to the Court of Appeals. See also Rule 242(d)(2), SCACR; see also Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).⁶

Regardless of Petitioner's failure to preserve the issue, the evidence reasonably supports the finding that the Association is not in violation of the Act, and therefore, this finding should not be disturbed on appeal. O'Shea, 308 S.C. at 14, 416 S.E.2d at 631.

⁶ Petitioner challenged the Association's denial of his April, 2009 request for the membership list at trial and in his post-trial motions, however, he did not properly raise objections regarding his September, 2009 request.

Pursuant to the Act, S.C. Code Ann. §§ 33-31-702 and 33-31-1602, Petitioner, as a member of the Association, is entitled to the membership list under certain circumstances. Petitioner argues that the Association violated § 33-31-702 by allegedly ignoring his September, 2009 request for the membership list.

Nothing in the record reflects that the Association received, or failed to respond to, the Petitioner's request dated September 7, 2009. Ms. Beckie Abel, property manager for the Association, testified unequivocally that Petitioner's requests for the membership list were complied with on each occasion, less and excepting the April, 2009 request, which was properly denied. See Unpublished Opinion; (R. pp. 34-35, 2865-2868, 2875-2878, 4233, 4651-4654). The membership list, along with voluminous other documents, were made available to Petitioner upon request on more than one occasion. (R. pp. 34-35, 2865-2868, 2875-2878, 4233, 4651-4654). Ms. Abel's testimony further evidences that a membership list was provided to other members of the Association seeking the list on Petitioner's behalf. (R. pp. 35, 2875-2878). Finally, the evidence established that Petitioner always had access to the membership list through the Association's website, but he choose not to access it. (R. pp. 2545-2546).

Based on the ample evidence that the Association provided Petitioner with the membership list each time that it was requested, the Final Order should not be disturbed to alter the finding that the Association complied with the Act.

VII. THE EVIDENCE SUPPORTS THE FINDING THAT TOTTH IS NOT LIABLE MISHANDLING THE ASSOCIATION'S FUNDS.

Petitioner asserts that Toth is liable under the Act for mishandling the funds of the Association, because she allegedly approved a distribution to the Association's members

in violation of S.C. Code Ann. § 33-31-140. As held by the Court of Appeals, this claim is manifestly without merit and was abandoned on appeal. See Unpublished Opinion.

The evidence reasonably supports the finding that Toth is not liable under the Act, and therefore, should not be disturbed on appeal. O'Shea, 308 S.C. at 14, 416 S.E.2d at 631. Nothing in the record reflects that Toth voted in favor of the transaction at issue. Based on the lack of evidence in the record, the trial judge properly dismissed the claim against Toth.

Furthermore, assuming arguendo that evidence exists that implicates Toth individually, the record clearly reflects that the payment to the members was not a distribution pursuant to the Act. The Act defines distribution as follows:

“Distribution” means the direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers. The term does not include:
(a) the payment of compensation in a reasonable amount to its members, directors, or officers for services rendered;
(b) conferring benefits on its members in conformity with its purposes; or
(c) repayment of debt obligations in the normal and ordinary course of conducting activities.

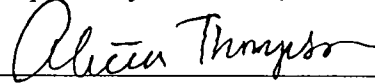
S.C. Code Ann. § 33-31-140(11) (Emphasis added). The official comment to S.C. Code Ann. § 33-31-1302 defining distributions that are lawful specifically states the following: “the return of an overcharge or the providing of services for which members have paid is not a distribution.” Mr. Freiboth testified that assessments were returned to confer a benefit on the membership. (**R. pp. 2785, 2797**).

The return of assessments paid to confer benefits on the members was not an unlawful distribution under the Act.

CONCLUSION

This Court should deny the Petitioner's request for writ of certiorari, because "no special and important" reason exists to justify granting his meritless petition.

Respectfully submitted,



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June 11, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable Ralph P. Stroman - Special Referee

Unpublished Opinion No. 2015-UP-111
(Submitted January 1, 2015 – filed March 4, 2015)
Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320
Appellate No.: 2015-001019

Ronald Jarmuth, *Pro Se* Petitioner,

v.

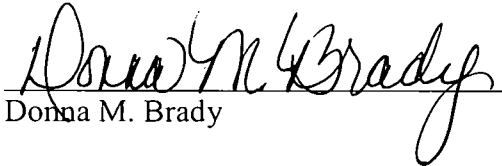
International Club Homeowners
Association, Inc., Rosemary Toth,
K.A. Diehl & Associates, Inc..... Respondents.

PROOF OF SERVICE

I, Donna M. Brady, an employee of McNair Law Firm, P.A., *Pro Se* Petitioner Ronald Jarmuth in the above-entitled action, certify that I have served the Respondents Return to Petition for Writ of Certiorari, 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 11th day of June, 2015.

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