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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

APR 05 2016

SC Court of Appeals

James C. Williams, Circuit Court Judge sitting as Special Referee
Trial Case No. 2011-CP-10-2232

Appellate Case No. 2014-001915

The Bristol Condominium
Property Owners
Association,.....Respondent,

v.

John T. Lucas, Sr. as Trustee of the John T. Lucas Revocable
Trust Dated November 10, 2004, and Carolyn C. Lucas
Revocable Trust Dated November 10,
2004,.....Defendants/Counterclaim Plaintiffs,

Of Whom John T. Lucas, Sr. is the Appellant,

v.

The Bristol Condominium
Property Owners Association,.....Counterclaim
Defendant.

APPELLANT'S PETITION FOR REHEARING

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Attorneys for Appellant

The appellant, John T. Lucas, Sr., (Lucas) respectfully petitions this Court pursuant to Rule 221(a), SCACR, for rehearing of the Court's Unpublished Opinion No. 2016-UP-136 (the "Opinion") concerning both issues on appeal in this matter, specifically, whether the Circuit Court erred in holding that The Bristol Condominium Property Owners Association (the Association) did not foreclose on Lucas in bad faith, and further, in awarding attorneys' fees to the Association. Lucas petitions for rehearing on grounds that this Court appears to have overlooked or misapprehended evidence in the record which proves the proposition that the Association selectively foreclosed on Lucas in bad faith, and which further proves the proposition that even if the foreclosure was appropriate, the attorneys' fees requested by the Association were not supported by the evidence the Association presented at trial.

Rule 211 Standard

Rule 221(a), SCACR, allows parties to petition for rehearing within fifteen days after the Court of Appeals files an opinion. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001), *quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Instead, the purpose of a petition for rehearing "is to aid the Court in deciding correctly a case heard by it." *Arnold*, 168 S.C. at 172, 167 S.E. at 238. A proper petition does not simply contain "a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." *Id.*

Instead, a proper petition specifies points the Court supposedly has overlooked or misapprehended. *Id.*; *see also Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

Lucas' Petition for Rehearing (the "Petition") is brought for a proper purpose, *i.e.*, to aid the Court in deciding this case correctly. The Petition also is proper substantively, because it concerns issues properly preserved for this Court's decision, and points out evidence that the Court appears to have overlooked or misapprehended. As shown below, the Petition identifies evidence in the record which is not addressed in the Opinion on both the issues before the Court. Accordingly, and for the reasons explained fully herein, Lucas respectfully requests that this Court rehear the questions whether the Circuit Court properly ruled that the Association's foreclosure was appropriate, and properly awarded attorneys' fees to the Association.

Argument I—Opinion's Findings and Holdings as to the Foreclosure

The Opinion reflects, at Point 1, that this Court has the authority to find facts in accordance with its view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1973). Lucas agrees, and urges the Court to consider the following evidence gleaned from the record but not referenced in the Opinion.

The foreclosure in question was not a bank foreclosure, but a foreclosure to collect multiple assessments by the Association to cover shortfalls in funds available from the settlement of a construction lawsuit to complete repairs to the condominium complex governed by the Association. R. at 155.

Lucas consistently opposed the construction assessment, reasoning that the litigation should not be settled for an amount that created a shortfall to be covered by

the unit owners. Lucas voiced his opposition and concerns about the special assessments to the Association. Further, Lucas requested additional information from the Association through his attorney. R. at 776. Despite his numerous requests, the Association failed to provide Lucas with information. On April 20, 2010, in order to obtain information from the Association, Lucas filed an action against the Association, alleging mismanagement of the condominium regime and disputing the debt that the Association claimed it was owed for various assessments. R. at 155.

On March 25, 2011, the Association filed its action against Lucas, alleging failure to pay special assessments that Lucas had refused to pay as the result of his objections to the mismanagement of construction litigation. R. at 147-148. This foreclosure complaint was based on debts that were clearly in dispute. R. at 776.

The Association had a clear remedy to allow resolution of the dispute with Lucas that was less draconian than foreclosure. The evidence showed Lucas was timely in all payments owed to the Association except those which he disputed. R. at 777. Unlike some of the individuals whom the Association could have foreclosed on, Lucas demonstrated his ability to pay the assessments and Lucas continuously paid his undisputed regime fees. Lona Vest, whose company managed the Bristol's day to day and financial operations at the time of the events in question, indicated that during the pendency of this litigation, Lucas paid approximately \$49,000.00, the amount owed to the Association less the disputed special assessment fees. R. at 193: 1-22. In fact, Lucas had paid regular regime fees in the amount of \$28,093.75, capital reserve contributions of \$4,496.25, insurance assessments of \$8,726.98, and late fees of \$14,104.08. R. at 777. Vest verified in her testimony that Lucas "has always paid the insurance, he's paid the

operating side of the regime fee, and he paid some money toward the special assessment.” R. at 195: 19-22. Lucas specifically disputed \$42,354.90, which dispute led to the foreclosure. Vest acknowledged that Lucas did not make payments because he thought that the money should have come back from the litigation. R. at 94.

At the time of the foreclosure filed against Lucas, there were eight other condominium owners with outstanding balances for assessments and fees. For example, Jay Harmon owed a substantial balance and had advised the Association that he or she would never make another payment, and no foreclosure action was filed, despite the accumulation of a “very sizeable balance.” R. at 503. Ken Nix owed money to the Association, and in lieu of foreclosing, the Association offered him a payment plan. R. at 505. Olga Valledejulia owed \$60,000 to the Association. Further, unlike Lucas, she had no assets or independent ability to pay her arrearage. Nonetheless, the Association did not foreclose. R. at 505. Bishop Rembert owed \$90,000.00. He made one payment under threat of foreclosure, and then a proposed a payment plan of \$150 per month on a \$75,000.00 balance, and the foreclosure was “suspended.” R. at 506. Bill Smith owed more than \$50,000.00. The Association did not foreclose. R. at 508. Other parties owed money, and no foreclosures were filed. Lucas was the only condominium owner who had formally contested the actions of the Association’s Board. He was also the only condominium owner on whom the Board foreclosed to collect unpaid assessments.

Further, the Association elected not to foreclose when various banks instituted foreclosure actions to recover on purchase money mortgages. R. at 212. Brad Sherlock, a board member with the Association, testified that since December 2011 the board had not foreclosed on any properties. R. at 214-215. Bank foreclosures would generally have

extinguished any claims by the Association, as purchase money mortgages would have been primary to liens acquired pursuant to *S.C. Code Ann. § 27-31-210(a)*, but nonetheless, the Association took no action to protect the interests of its members when banks foreclosed.

The foreclosure action against Lucas was filed with the Association's full knowledge of the disputed claim. R. at 203. Lucas's payments, totaling \$55,421.06 for the time period during which the Association alleged an arrearage had accrued, demonstrated Lucas's ability to pay. Lucas had indicated, through counsel, that he was prepared to escrow funds with which to make payment, once he was satisfied that the assessments were appropriate. There was therefore no legal or business reason to foreclose on Lucas. The only reasonable inference to be drawn from the evidence is that the foreclosure was retaliatory and in bad faith.

While the Opinion clearly identifies the legal principles on which its affirmation of the Circuit Court rests, none of the foregoing facts are addressed in the Opinion. Lucas therefore moves this Court to reconsider its Opinion in light of the facts in the record, which are undisputed.

Argument II—Opinion's Findings and Holdings as to Attorneys' Fees

Again, the Opinion clearly and correctly identifies the legal principles that support the award of attorneys' fees in this case. However, the Opinion does not address the trial testimony of Lona Vest, the Association's property manager, that she was unaware of any evidence to support or document the attorneys' fees requested. She specifically testified that the amount being claimed as owed in the foreclosure action was incorrect and an incorrect calculation. R. at 200. Additionally, she stated that she had never sat down and

tallied exactly how much she paid for Dr. Lucas' related legal fees. R. at 197. Vest testified that "I can't speak to the Moore & Van Allen bills. Honestly, I don't know. I can't answer where that \$15,000 came from." R. at 197. Vest testified that it is an inaccurate calculation if the attorneys were awarded an additional third or 10 percent or 15 percent of the amount recovered. R. at 199. The amount that the Association claimed Lucas owed also included a 10 to 15 percent collection fee added for legal services, which Vest acknowledged was incorrect. R. at 200. In fact, Ms. Vest testified that there was not any support for the amounts listed as owed in the foreclosure complaint. R. at 197. Further, the fees proposed and awarded constituted a double recovery for the Association and its counsel, as the fees were paid on an hourly basis and additional fees were apparently awarded as a percentage of the foreclosure recovery.

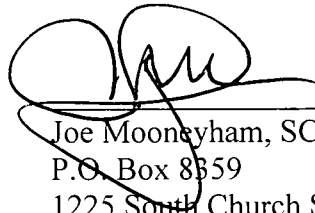
Further, when asked, Vest was unable to identify any specific work performed in the case, other than the filing of the papers, that was performed specifically on the foreclosure matter. For instance, she testified that foreclosure counsel did not attend any depositions, with the exception of Lucas's deposition. R. at 498. Foreclosure counsel elected not to attend the trial. Counsel did, however, submit a memorandum in support of the Association's position. In that memorandum, Lona Vest was identified as the sole witness who could or would substantiate the charges owed. R. at 192. Therefore, even if the foreclosure action is viable, which Lucas denies, the calculations used to determine the amount owed were clearly incorrect as evidenced by the uncontradicted testimony of the property manager, Lona Vest and therefore unsupported by the evidence.

Despite Vest's testimony, the trial court awarded \$14,104.08 in late fees and \$15,990.78 in interim collection costs, which was exactly the amount requested. On reconsideration, that amount was reduced, but only nominally, by \$2,500.00. R. at 20.

As the Opinion pointed out, *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976) holds that an abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Lucas urges the Court to reconsider its decision affirming the award of attorneys' fees in this matter because the evidence presented at trial in fact supports a conclusion contrary to that rendered by the Circuit Court, as the sole witness with knowledge of the fees requested testified that the fees sought were incorrect.

Respectfully submitted,

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Attorneys for Appellant

Greenville, South Carolina
April 4, 2016

THE STATE OF SOUTH CAROLINA
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James C. Williams, Circuit Court Judge sitting as Special Referee
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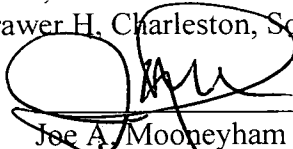
v.

The Bristol Condominium
Property Owners
Association,.....Counterclaim Defendant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on The Bristol
Condominium Property Owners Association by depositing a copy of it in the United States Mail,
postage prepaid, on **April 4, 2016**, addressed to its attorneys of record, David B. Wheeler and
Joseph T. Belton, Post Office Box 22828, Charleston, South Carolina 29413 and K. Michael
Barfield and M. Dawes Cooke, Jr., Post Office Drawer H, Charleston, South Carolina 29402.

April 4, 2016



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VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

**RE: The Bristol Condominium Property Owners Association John T. Lucas, Sr.,
etc., et al v. The Bristol Condominium Property Owners Association
Case No. 2013-CP-10-1066, formerly Case No. 2010-CP-10-3240**

Dear Ms. Kitchings:

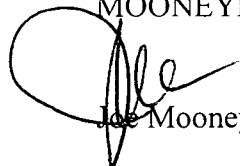
Enclosed for filing please find the original and seven copies of *Appellant's Petition for Rehearing and Proof of Service*. In addition, please find the required filing fee in the amount of \$25.00.

Please return a clocked-in copy of the documents to us in the self-addressed, stamped envelope enclosed for your convenience.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

MOONEYHAM BERRY, LLC



Joe Mooneyham

JAM/kmb
Enclosure(s)

cc: David B. Wheeler, Esq. | Joseph Timothy Belton, Esq.
K. Michael Barfield, Esq. | M. Dawes Cooke, Jr., Esq.