STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-000263

Oak Pointe Homeowners' Association, Inc.,

Respondent,

v.

Mackenzie E. Peffley,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

On July 16, 2013 Respondent filed the underlying suit against Appellant seeking foreclosure of its lien for the unpaid homeowners' association assessments. (R. pp. 11-21) Appellant filed her Answer and Counterclaims on November 4, 2013. (R. pp. 22-31.) Respondent filed a Reply to Appellant's Counterclaims on November 15, 2013. (R. pp. 32-38) On July 31, 2014 Respondent filed a Motion for Summary Judgment. (R. pp. 39-41.)

Respondent's motion was heard by The Honorable Thomas G. Cooper on October 7, 2014. By order dated October 23, 2014, Judge Cooper granted partial summary judgement against Appellant's on the counterclaims for Unfair Trade Practices, Breach of Contract, Breach of Contract with Fraudulent Act, Negligent Misrepresentation, Slander of Title, and Libel. Appellant filed a Motion to Reconsider on November 24, 2014. (R. pp. 42-54.) By order dated January 7, 2015, Judge Cooper denied Appellant's Motion to Reconsider. (R. p. 10.) Appellant timely filed a Notice of Appeal on January 30, 2015.

STATEMENT OF FACTS

Respondent is the homeowners' association for the subdivision known as Oak Pointe in Lexington County, South Carolina. (R. p. 88.) Properties within the subdivision are encumbered by the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Oak Pointe ("Declaration"). (R. p. 110.) Appellant is the owner of 313 Oakpointe Lane within Oak Pointe. (R. p. 110.) Appellant has never disputed that her property is encumbered by the restrictive covenants for Oak Pointe.

The Declaration empowers the Respondent to promulgate rules and regulations governing the members of Respondent. The Declaration further empowers the Respondent to levy "non-compliance assessments" against members for violations of the Declaration, Bylaws, or rules and regulations. (R. pp. 129-130.) On April 26, 2010, Respondent levied a non-compliance assessment against Appellant for $150.00 for burning trash in her back yard. (R. p. 110.) Appellant was notified of the assessment by mail. (R. p. 110.) On June 7, 2010, Respondent levied a non-compliance assessment against Appellant for $165.00 for improperly displaying a rental sign. (R. p. 110.) Appellant was again notified of this assessment by mail. (R. p. 110.)

In December 2010, Respondent mailed the Appellant notice of the 2011 Annual Assessment. (R. p. 110.) The 2011 Annual Assessment of $175.00 was due by January 15, 2011. (R. p. 110.) On January 31, 2011, Respondent mailed Appellant a past due notice showing an outstanding balance of $490.00. (R. p. 110.) On February 25, 2011, Respondent sent Appellant a final warning letter warning that her account would be turned over to Respondent's attorney for collection if the account was not paid in full within ten (10) days. (R. p. 111.) Nineteen days later, on March 16, 2011, Respondent directed its attorneys to file a lien against Appellant's property to secure the entire balance due. (R. p. 111). Respondent incurred attorney's fees of $375.00 in connection with the lien filing. (R. p. 111.) On March 18, 2011 Respondent's counsel issued a lien in the amount of $870.83. (R. pp. 104-105.)

On March 17, 2011 Respondent received a check from Appellant in the amount of $490.00 on or about March 17, 2011. (R. p. 111.) Because Respondent had already referred Appellant's account to its attorney, Respondent forwarded the check to the

attorney for application to Appellant's account. (R. p. 111.) After the payment was applied to Appellant's account, her balance was $380.83.

On March 13, 2011 Appellant emailed the Respondent's president, Steffhanie Laurel, and asked the Respondent to waive the June 2010 non-compliance assessment. (R. pp. 97-98.) Laurel responded that she had asked that the non-compliance assessment be removed and would get back to the Appellant. (R. pp. 97-98.) Appellant told Laurel that she had paid her debt to the HOA in full and should have a credit. (R. pp. 97-98.) Relying on Appellant's representation that she had paid the debt in full, Laurel responded that Appellant "reimbursed." (R. pp. 97-98.)

On March 20, 2011 Respondent formally waived the June 2010 non-compliance assessment. (R. p. 111.) On May 6, 2011 MJS, Inc., Respondent's management company issued Appellant a written notice the Respondent had granted her appeal regarding the June 2010 non-compliance assessment. (R. p. 111.)

Respondent issued three new non-compliance assessments to Appellant for the condition of her mailbox in July and August of 2011. (R. p.. 111.) These assessments totaled $395.00. (R. p. 111.) The 2012 regular assessment of $150.00 came due January 1, 2012. (R. p. 111.) Appellant remitted $150.00 to Respondent on or about January 5, 2012. (R. p. 111.) On January 15, 2013 the annual assessment of $150.00 came due. (R. p. 111.) Appellant has not remitted any payments to the Respondent since January 2012. (R. p. 112.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper

when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

ARGUMENT

I. The Trial Court Appropriately Granted Respondent's Motion For Summary Judgment On Appellant's Negligent Misrepresentation Claim Because There Was No Evidence Of A Misrepresentation, Respondent Had No Pecuniary Interest In The Communication At Issue, And Appellant Was Precluded From Asserting Justifiable Reliance.

Appellant argues that Respondent "falsely represented to her that she . . . overpaid her obligations to the Association and was entitled to a reimbursement." (Br. of App. p. 8.) However, Appellant's argument is unpersuasive because it was her own misrepresentation to Respondent that caused Respondent to offer her a reimbursement.

In order to prevail on a claim for negligent misrepresentation, a party must prove "(1) the Appellant made a false representation to the Respondent; (2) the Appellant had a pecuniary interest in making the statement; (3) the Appellant owed a duty of care to see that he communicated truthful information to the Respondent; (4) the Appellant breached that duty by failing to exercise due care; (5) the Respondent justifiably relied on the representation; and (6) the Respondent suffered a pecuniary loss as the proximate result of his reliance upon the representation." AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992).

A. Summary Judgment Was Appropriate Because Respondent's Statement Was Merely A Future Promise Contingent On The Ultimate Veracity Of Appellant's Statement That She Had Paid Her Debt In Full.

The Respondent's alleged misrepresentation must relate to a present or preexisting fact. In re Marine Energy Systems Corp., 362 B.R. 247 (D.S.C. Bankr. 2006). "[A]n actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise." Winburn v. Ins. Co. of N. Am., 287 S.C. 435, 440, 339 S.E.2d 142, 145 (Ct. App. 1985). "The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date." Id., 287 S.C. at 440, 339 S.E.2d at 146. "A future promise is not fraudulent unless such promise was part of a general design or plan, existing at the time, to induce a party to enter into a contract or act as he or she otherwise would not have acted, to his or her injury." Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011). "Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform." Id., 392 S.C. at 124, 708 S.E.2d at 770 (quoting Woods v. State, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct.App.1993)).

Respondent argues that Laurel misrepresented that Appellant was paid in full and entitled to a reimbursement. However, Respondent never represented to Appellant that her account was paid in full. It was Appellant that misrepresented to Laurel that she had paid the full debt. Appellant stated to Laurel that Appellant had "paid [her] debt to the HOA in full [on March 14, 2011] so [she] should have a credit for next years (sic) fees." (R. pp. 97-98.) Laurel never made any representation related to the Appellant's account balance. Laurel merely responded that Appellant would be reimbursed for any

overpayment. (R. pp. 97-98.) Laurel's statement amounts only to a promise to refund any overpayment to Appellant if, in fact, Appellant overpaid the balance owed after the June 2010 non-compliance fine was removed from her account. Appellant presented no evidence that Laurel did not intend to issue a reimbursement when she sent the March 14, 2011 email. Therefore, this future promise cannot be actionable as negligent misrepresentation unless there is some evidence Laurel used this promise to induce Appellant to enter into a contract or take some specific act. However, Appellant's affidavit contained no allegation explaining how Laurel used the reimbursement promise to induce Respondent to take some act. Rule 56, SCRCP requires the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Appellant failed to set forth any facts. Accordingly, the trial court appropriate found that Respondent was entitled to summary judgment against Appellant on her negligent misrepresentation claim.

B. Respondent Did Not Have Any Pecuniary Interest In Stating That Appellant Would Be Reimbursed For Any Overpayment On Her Account.

Appellant similarly fails to meet her burden of demonstrating Respondent had any pecuniary interest in making any purported misrepresentations. "For purposes of proving negligent misrepresentation, evidence that a statement was made in the course of the Appellant's business, profession, or employment is sufficient to prove the Appellant's pecuniary interest in making the statement, even if the Appellant received no consideration for it." Robertson v. First Union Nat. Bank, 350 S.C. 339, 349-50, 565 S.E.2d 309, 314-15 (Ct. App. 2002) (citing AMA Mgmt. Corp., 309 S.C. at 223, 420 S.E.2d at 874). However, "[n]ot every statement made in the course of commercial

dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort." AMA Mgmt. Corp., 309 S.C. at 222, 420 S.E.2d at 874 .

Appellant presented no evidence that Respondent had any pecuniary interest in Laurel's statement. It is clear from the totality of the evidence that Laurel's statement that Appellant would receive a reimbursement was a merely a statement Appellant would receive a reimbursement of any overpayment made on her account. Neither Laurel nor Appellant received any pecuniary benefit by referring Appellant's account to an attorney for legal action when her payment was not received by the final deadline on March 7, 2011. It was actually the opposite – Respondent incurred almost $400 in legal fees because Appellant did not pay her balance timely. (R. p. 111.)

C. Because Respondent's President Did Not Possess Any Special Knowledge Regarding Appellant's Account Balance At The Time She Stated Appellant Would Be Reimbursed, Respondent Owed No Duty Of Care To Appellant.

Where a party "possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made . . ." AMA Mgmt. Corp., 309 S.C. at 223, 420 S.E.2d at 874. Without demonstrating the speaker had such expertise or special knowledge, the claimant is not entitled to rely on those representations.

Appellant emailed Laurel at 9:58 PM and represented that she had paid her debt in full that day. (R. pp. 97-98.) Laurel responded nine minutes later and confirmed that any overpayment would be reimbursed. (R. pp. 97-98.) It is clear that Laurel's email was merely confirming the procedural mechanism by which any overpayment would be handled. There is no evidence that Laurel possessed any special knowledge with respect to Appellant's balance or payment that would impose upon her a duty of care with regard to her response. Certainly Laurel was not in possession of such information at 10:00 o'clock in the evening while having a casual email conversation with Appellant.

If Appellant had informed Laurel that she paid $490.00 to the HOA and Laurel had responded that Appellant was accordingly entitled to a refund of some specific amount then perhaps Appellant would be entitled to argue that Laurel was in possession of specialized knowledge and had a duty to act with care in conveying that information to Appellant. However that is just not the case here. Appellant misrepresented to Laurel that she had "paid by debt to the HOA in full" and Laurel responded based on that misrepresentation. Appellant has failed to demonstrate that Laurel had a duty to confirm the accuracy of Appellant's misrepresentation before responding. Because she failed to demonstrate and Laurel had any duty of care to Appellant with respect to this statement, the trial court appropriate granted summary judgment.

D. Because Appellant Knew Or Should Have Known That She Was Not Entitled To A Reimbursement, Appellant Was Unjustified In Relying On Laurel's Statement.

"As part of [her] case [Appellant] must show that [her] reliance on the misrepresentation was reasonable. There is no liability for casual statements,

representations as to matters of law, or matters which [Appellant] could ascertain on [her] own in the exercise of due diligence." AMA Mgmt. Corp., 309 S.C. at 223, 420 S.E.2d at 874 (Ct. App. 1992). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the Respondent knows the truth of the matter.'" McLaughlin v. Williams, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)). "Thus, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact." Id.

Respondent sent Appellant a letter on February 25, 2011 warning that Respondent's balance of $490.00 had to be paid no later than March 7, 2011 to avoid legal action and additional costs. (R. p. 111.) Appellant admits that she did not remit payment to Respondent until March 14, 2011. (R. p. 88.) Respondent did not receive Appellant's payment until March 16, 2011. (R. p. 111.) Appellant produced no evidence to refute this receipt date. Appellant knew or should have known that her payment was late and that additional charges had been added to her balance. Appellant provided no evidence that she made any attempt to confirm the current balance due before or after remitting payment. Accordingly, Appellant had no right to rely on Laurel's statement that the "credit" Appellant claimed to have would be reimbursed to her.

II. The Trial Court Correctly Granted Respondent's Motion for Summary Judgment on Appellant's Counterclaims for Breach of Contract and Breach of Contract with Fraudulent Intent Because Appellant Failed to Present Any Evidence that Respondent Charged Interest in Contravention of the Provisions of the Declaration.

A. Because The Declaration Clearly Established A Due Date For All Charges Levied, Respondent's Interest Charges Were Calculated In Accordance With The Contract Between The Parties.

The trial court correctly granted Respondent's motion for summary judgment on Appellant's breach of contract claim because Respondent charged interest as required by the contract.

Appellant's original counterclaims for breach of contract and breach of contract with fraudulent intent alleged that Respondent promised to remove a fine on Appellant's account and Respondent subsequently failed to honor that promise. It was only at the summary judgment hearing that Appellant changed her argument to allege that Appellant breached a completely different contract, the Declaration, by charging interest on assessments of which Appellant was not notified of the due date. The record is clear that Respondent agreed to waive the June 2010 non-compliance assessment and did waive said assessment on May 6, 2011. (R. p. 111.) Appellant presented no evidence to refute that the June 2010 non-compliance was waived. Instead, Appellant argues she produced sufficient evidence to survive summary judgment because Respondent failed to present evidence that showed the "due date" on each assessment for the purposes of calculating interest pursuant to Art. IX, Section 1 of the Declaration. Appellant's argument is without basis.

To bring an action for breach of contract the claimant has the burden "to prove the contract, its breach, and the damages caused by the breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The necessary elements of a contract are offer, acceptance and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 484, 486 S.E.2d 771, 773 (Ct. App. 1997). "[B]efore a party can recover for the

breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on." Rabon v. State Finance Corp., 203 S.C. 183, 26 S.E.2d 501, 502 (1943).

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). "[T]erms in a contract provision must be construed using their plain, ordinary and popular meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003).

Article VI, Section 2 provides:

> "The Developer or Board of Directors, When Empowered, shall once each year create a budget and fix the date of commencement, the size and number of installments, the method of determining the amount of all Regular Assessments against each Owner of a Lot, and shall, at that time, prepare a roster of the Owners and the Assessments applicable thereto."

Pursuant to the Declaration, the due date for each assessment is the date set by the Board of Directors. While Appellant argued that she was not aware of the due dates for the various assessments, she provided no evidence that the Association failed to set a due date, thus failing to trigger the right to charge interest on those assessments.

Conversely, Respondent's affidavits establish that each assessment had a due date and Appellant was notified of those dates. In December 2010 Respondent notified Appellant that the 2011 Annual Assessment of $150.00 was due January 15, 2011. (R. p. 110.) Respondent notified of each non-compliance assessment assessed at the time the assessment was levied. (R. pp. 110-111.) The Declaration provides the mechanism by which the "due date" is established for assessments. The Declaration further provides that interest "shall bear interest from the due date." Appellant has presented no evidence that Respondent charged interest from any date other than the "due date" as established by the Declaration. Accordingly, the trial court correctly granted summary judgment on Appellant's counterclaim for breach of contract.

B. Because Appellant Failed To Establish That Respondent Breached Any Contract And Because Appellant Further Failed To Demonstrate Any Fraudulent Intent or Act By Respondent, The Trial Court Correctly Granted Summary Judgment On Respondent's Claim For Breach Of Contract With Fraudulent Intent.

In order to prevail on a claim for breach of contract accompanied by a fraudulent act, a claimant must prove: (a) a breach of contract (b) fraudulent intent relating to the contract's breach (not merely its making) (c) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E. 2d 502 (Ct. App. 1985). A fraudulent act is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." Ro Tec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 472, 597 S.E.2d 881, 883 (Ct. App. 2004).

As with the breach of contract claim, this cause of action fails as Appellant has not put forth the predicate allegations to raise genuine issues of material fact relating as to whether a contract was actually breached. Appellant has similarly failed show ay scintilla of evidence that Respondent had fraudulent intent or acted fraudulently related to charging interest. At best Appellant argues that she did not know that various charges had been levied. Appellant's affidavit fails to allege that Respondent failed to establish due dates for the assessments or mail notice to Respondent. She merely avers that she did not know about the charges. Respondent's ignorance of the status of her account does not constitute even a scintilla of evidence of fraud on the part of Respondent.

III. The Trial Court Correctly Granted Summary Judgment Against Appellant's Claim For Slander Of Title Because Respondent's Lien Was Accurate At The Time It Was Executed And Because Appellant Failed To Demonstrate Respondent Acted With Malice.

The Circuit Judge correctly granted Respondent's motion for summary judgment on Appellant's slander of title claim. In order to maintain an action for slander of title a party "must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to Respondent's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Solley v. Navy Fed.Credit Union, Inc., 397 S.C. 192, 204, 723 S.E. 2d 597, 603 (Ct. App. 2012).

Respondent instructed its counsel to file a notice of lien on March 16, 2011. (R. p. 111.) At the time the lien was filed Appellant owed regular assessments, interest, and attorney's fees in addition to non-compliance assessments. (R. p. 111.) Respondent's payment of $490.00 was not negotiated by the Respondent until March 23, 2011, five days after the lien was executed and sent to the county to be filed. (R. pp. 95-96.) Because the lien was accurate at the time the Notice of Lien was executed, Appellant has

failed to demonstrate that Respondent made any false statement related to Respondent's title.

Appellant has also failed to establish any specific facts to show any statements were made with malice. "In slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification." Huff v. Jennings, 319 S.C. 142, 150, 459 S.E. 2d 886, 891 (Ct. App. 1995). Respondent's lien stated Appellant owed $870.83 for unpaid assessments, interest, costs and attorney's fees. (R. pp. 104-105.) This is substantiated by Kadar's affidavit itemizing these charges. On that date, Appellant's balance included $490.00 of assessments and $375.00 for attorney's fees, leaving $5.83 interest. These charges were neither false nor without legal justification as they were specifically authorized in the Declaration.

Secondly, relevant pleadings, **even if defamatory**, are absolutely privileged and cannot form the basis of an action for slander of title. Pond Place Ptrs., Inc. v. Poole, 351 S.C. 1, 23, 567 S.E.2d 881, 892-893 (2002) (emphasis added). The question as to whether such statements are relevant "is for the determination of the Court and not a jury, and that in determining this issue pleadings must be liberally interpreted and all doubt resolved in favor of relevancy." Id. at 23, 567 S.E.2d at 893. The Notice of Lien was unquestionably relevant to Respondent's suit for foreclosure. The trial court was well within its discretion in holding the Notice of Lien was absolutely privileged.

IV. The Trial Court Correctly Granted Summary Judgment On Appellant's Claim For Libel Because Appellant Failed To Demonstrate That Respondent Made Any Statement That Appellant Was In Default Of Her Loan

Appellant's counterclaim alleges that Respondent made statements that Appellant was "currently delinquent in its payments with regard to the loan subject of this action and is in default thereof." However, there is no loan between the parties in this action so Appellant's claim must fail as a matter of law.

"Libel is actionable per se if it involves written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or render him odious, contemptible, or ridiculous ... in other words, if the trial judge can presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, the libel is actionable *per se*." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 510-511, 506 S.E.2d 497, 502 (1998) (internal quotations omitted).

First, as the trial court eloquently noted, Respondent's has not made any statements about Appellant related to any loan. (R. p. 6.) When Appellant's underlying claim involves tortious "written or printed words," it is manifestly necessary to at least identify the medium of the communication. The object of the pleadings is to frame issues so that the parties to the action may know how to shape their testimony. See Hicks v. S. Ry. Co., 63 S.C. 559, 41 S.E. 753, 756 (1902). Appellant never made any attempt to amend her pleadings at any stage. Appellant only identified one libelous statement by Respondent: that concerning a loan. The record unequivocally shows that Respondent has never made any written statement concerning a loan with Appellant. For this reason the trial court appropriately granted summary judgment.

Furthermore, Appellant's libel claim is without merit even if plead correctly. For reasons previously discussed, the lien was accurate at the time of the filing. Furthermore, the matter at issue concerned privileged material. Pond Place, 351 S.C. at 23, 567 S.E.2d at 892-893.

V. The Trial Court Correctly Granted Summary Judgment On Appellant's Unfair Trade Practices Act Claim Because Respondent Is Not Engaged In Trade Or Commerce, The Disputed Actions Do Not Affect Public Interest, and Levying Non-Compliance Assessments Is Not An Unfair Or Deceptive Act.

The Circuit Judge correctly granted Respondent's motion for summary judgment to dismiss Appellant's claim under the South Carolina Unfair Trade Practices Act ("SCUTPA"). SCUTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). To prevail on a SCUPTA claim, the claimant must show (1) that the opposing party engaged in an unlawful trade practice, (2) that the claimant suffered actual, ascertainable damages as a result of the opposing party's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the opposing party had an adverse impact on the public interest. Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. 1998).

A. Because Respondent's Non-Compliance Assessments Are Not Related To The Sale Of Goods Or Services, SCUPTA Does Not Apply To This Transaction.

Respondent is not engaged in a trade or commerce as defined by SCUPTA. S.C. Code Ann. § 39-5-10(b) defines "trade" and "commerce" as:

> the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other

> article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State

Respondent is a non-profit corporation who, by and through its agents, manage its affairs, enforce restrictive covenants, collect assessments from its members, etc. Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct.App.1986), *modified*, 291 S.C. 201, 352 S.E.2d 707 (1987); Seabrook Island Property Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (1987); Battery Homeowners Ass'n v. Lincoln Fin. Resources, 309 S.C. 247, 422 S.E.2d 93 (1992)). Additionally, the act complained of by the Appellant – levying non-compliance assessments against members – is certainly not within the statutory definition of "trade or commerce." Respondent did not sell or distribute any goods or service to Appellant in levying the non-compliance assessment. Instead, Respondent enforced the rules and regulations of the homeowners' association against Appellant. Whether Respondent may theoretically be involved in trade or commerce in some other functions, such as maintaining common elements, is irrelevant because the SCUPA is inapplicable unless the specific allegedly unfair or deceptive acts are in the conduct of "trade or commerce." The test is whether the specific alleged acts are in the conduct of "trade or commerce," not whether the entity at issue has ever engaged in "trade or commerce." See Foggie v. CSX Transportation, Inc., 313 S.C. 98, 104, 431 S.E.2d 587, 591 (1993). Because levying non-compliance assessments is not trade or commerce, this court should uphold the trial court's grant of summary judgment.

B. Appellant Has Failed To Show That Respondent's Actions Are Capable Of Repetition And That Respondent's Actions Extend To The Public Interest.

Appellant's SCUPTA claim also fails because the acts complained of do not affect the public interest. To be associated with trade or commerce, a defendant's acts must impact the public interest. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). To establish an adverse impact on the public interest, a claimant must demonstrate that the complained of conduct has had the potential for repetition. Id. A potential for repetition may be demonstrated by showing that "similar unfair activities occurred in the past ... or by showing [the current] procedures create a potential for repetition." Beattie v. Nations Credit Finc. Svcs. Corp., 59 Fed. Appx. 585, 589 (2003).

Respondent did not present any evidence that Appellant had committed the complained of conduct in the past. Respondent similarly did not present any evidence regarding any of Appellant's procedures, much less that those procedures create a potential for repetition. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP 56. "Rule 56(e) specifically provides that a party opposing summary judgment may not rest on mere allegations or denials contained in pleadings." Thompkins v. Festival Ctr. Grp.

I, 306 S.C. 193, 196, 410 S.E.2d 593, 594 (Ct. App. 1991). The mere allegation that Respondent's acts affect the public interest is inadequate to defeat summary judgment. Id. Conversely, Respondent's affidavits indicate that its activities are limited to the individual owners of property within Oak Pointe and are for the sole purpose of enforcing the restrictive covenants and the actions authorized therein. (R. p. 110.)

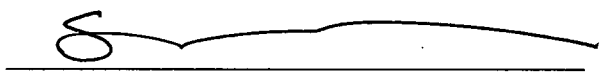
C. Because Appellant Failed To Demonstrate That Respondent Committed An Unfair Or Deceptive Act The Trial Court Properly Granted Summary Judgment To Respondent.

Appellant alleges that Respondent acted unfairly and deceptively in levying and collecting non-compliance assessments against Respondent's property. However, the contract between the parties specifically authorizes the Respondent to take these actions. (Declaration, Article VI, § 3.) The restrictive covenants were recorded with the Lexington County Register of Deeds on December 12, 2002, nearly five years prior to Appellant accepting title to the property. By accepting title to the property Appellant agreed to follow the rules of the community and agreed to pay non-compliance assessments if she failed to do so. Appellant cannot claim that Respondent has taken an unfair or deceptive act merely by enforcing the very contract that Appellant accepted when she purchased her home in Oak Pointe.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this court uphold the trial court's ruling.

Respectfully submitted,



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June 13, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-000263

Oak Pointe Homeowners' Association, Inc.,

Respondent,

v.

Mackenzie E. Peffley,

Appellant.

PROOF OF SERVICE

I, Stephanie C. Trotter, an attorney with the Law Firm of McCabe, Trotter & Beverly, P.C., attorneys for the Respondent, hereby certify that I have served a copy of the foregoing document(s) upon the below named individuals and/or counsel this the 13 day of June, 2016 via U.S. Mail, postage prepaid and addressed as follows:

DOCUMENT(S) SERVED:

Respondent's Final Brief

PARTIES SERVED:

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