THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Judge

Appellate Case No.: 2015-000263

Oak Pointe Homeowners' Association, Inc.,.....Respondent,

v.

Mackenzie E. Peffley,..... Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

OTHER SOURCES

STATEMENT OF ISSUES

I. **Did the lower court err in granting the Respondent summary judgment on the Appellant's negligent misrepresentation claim, where the Respondent told the Appellant something false and the Appellant relied on that false statement to her detriment?**

II. **Where the Respondent, a property owners' association, has not been empowered by the government to fine its members, and the lower court did not determine as a matter of law that it can, did the lower court err in granting summary judgment to the Respondent on the basis of covenant language purporting to permit the Respondent to impose fines?**

III. **Where the record showed the Respondent breached its covenants with the Appellant, did the lower court err in granting the Respondent's summary judgment motion as to the Appellant's claims for breach of contract and breach of contract accompanied by fraudulent act?**

IV. **Where there was a scintilla of evidence and more that the Respondent slandered the Appellant's title by recording in the land records a document it knew to contain false information, did the lower court err in granting the Respondent's summary judgment motion on the Appellant's slander of title claim?**

V. **Where the Respondent has set itself up to systematically purport to fine its members, was it error for the lower court to grant summary judgment on the Appellant's Unfair Trade Practices Act claim?**

VI. **Was it error for the lower court to grant summary judgment on the Appellant's libel claim, where that ruling was based on an erroneous, straitened reading of the Appellant's pleading at odds with the Rules of Civil Procedure?**

STATEMENT OF THE CASE

The Respondent (hereinafter "the Association"), a private homeowners' association, brought an action seeking foreclosure as to the Appellant (hereinafter "Peffley")'s property involved in this case for a claimed lien that appears to consist largely of what the Association terms "assessments for non-compliance" with restrictive covenants, plus attorney's fees and costs. (R. pp. 11-21, p. 62 ln. 1-11, pp. 110-12.) Peffley answered, denying liability and asserting various counterclaims: 1) for a declaratory judgment that, since the Association is not a governmental entity, it has no power to levy fines (the "assessments for non-compliance"), 2) for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (the UTPA), 3) for breach of contract, 4) for breach of contract accompanied by fraudulent act, 5) for slander of title, 6) for libel, 7) for negligent misrepresentation, 8) for an accounting, and 9) for violation of violation of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501, *et seq.* (the SCRA). (R. pp. 22-31.) The Association served a reply, denying liability on the counterclaims. (R. pp. 32-38.)

The Association later moved for summary judgment. (R. pp. 39-41.) The Association did not serve its motion, which simply states that it seeks summary judgment, with any affidavits. (R. pp. 39-41.) It later served two affidavits, one of Steffhanie Laurel, the association's former president, and one of Mary Kadar, an employee of MJS, the association's management company. (R. pp. 106-48.) Peffley served her own affidavit. (R. pp. 87-103.) Both parties submitted memoranda with regard to the motion. (R. p. 64 ln. 13-14, p. 66 ln. 18-21, p. 78 ln. 3-15, pp. 149-62.)

At the hearing on the motion, the Association clarified that it sought summary judgment on the entire case, on its claim for foreclosure as well as on Peffley's counterclaims. (R. p. 63 ln. 20-24.). The circuit court issued an order that granted summary judgment to the Association on Peffley's counterclaims for negligent misrepresentation, violation of the UTPA, breach of contract, breach of contract accompanied by fraudulent act, libel, and slander of title. (R. p. 9.) The circuit court denied summary judgment on the Association's claim for lien foreclosure, Peffley's claim for a declaratory judgment that the Association has no power to levy fines, Peffley's claim for an accounting, and Peffley's claim for violation of the SCRA.

Peffley moved for reconsideration, clarification, and amendment of the order insofar as it granted the Association summary judgment. (R. pp. 42-54.) The circuit court denied that motion, and this appeal followed. (R. p. 10.)

This appeal seeks remand for trial of the counterclaims on which the lower court granted summary judgment. The other claims were tried before the Honorable Thomas Russo, who has not yet ruled on them.

STATEMENT OF FACTS

Peffley, a member of the Army National Guard, purchased the subject property in 2007, following the completion of an Army aviation flight training course and before her next active duty assignment. (R. p. 87.) The property is subject to restrictive covenants. (R. p. 58 ln. 19 through p. 59 ln. 13, pp. 113-47.) The Association is a corporation that acts as a homeowners' association for the subdivision where the property is located. (R. p. 88.) It is not a part of any state, federal, county, or municipal government. (R. p. 88.)

In 2010, the Association purported to fine Peffley (i.e., levy an "assessment for non-compliance") for placing a sign in her yard without the Association's prior authorization. (R. p. 88.) Peffley requested that the fine be rescinded, but she paid the bill of $490.00 the Association claimed to be owed (including the fine) in full on March 14, 2011. (R. p. 88.) The Association "removed" the fine, and the Association's president emailed Peffley to tell her that she would be reimbursed for her overpayment. (R. pp. 88, 97-98.)

She was not reimbursed. (R. pp. 88, 110-12.) Instead, the Association hired a law firm to record a notice of lien, which it did, on the subject property, in which the Association claimed to be owed the fine and associated fees. (R. pp. 14-15, 99, 104-05, 111.) This notice of lien was recorded after Peffley had already paid the $490.00. (R. p. 14, p. 79 ln. 8-9, pp. 88, 111.) It was also recorded after Peffley had emailed the Association's president and told her that she had overpaid the Association because of the removal of the fine, and it was recorded after the Association's president told Peffley she would be reimbursed for her overpayment. (R. p. 14, p. 79 ln. 8-21, p. 83 ln. 22 through p. 84 ln. 2, pp. 88, 97, 104-05, 111.) The Association charged Peffley $375.00 for attorney's fees for recording the notice of lien, though it did not send Peffley notice that it was assessing her a charge for attorney's fees. (R. p. 78 ln. 22 through p. 79 ln. 3, p. 79 ln. 8-25, p. 83 ln. 15-18, pp. 88-89, 99, 110-12.) The affidavits submitted by the Association indicate that the Association provided Peffley notice that the Association *would* hire a law firm to take collection action if the Association did not pay the full balance the Association claimed to be owed within 10 days, which passed without payment; however, nothing in the record indicates that the Association *did*

inform Peffley that it had hired an attorney, recorded the notice of lien, or incurred charges for doing so. (R. p. 78 ln. 22 through p. 79 ln. 3, p. 79 ln. 22-25, p. 83 ln. 22 through p. 84 ln. 2, pp. 88-89, 106, 110-12.) Indeed, the Association never made any statement to change its president's statement that Peffley would be reimbursed the money she had overpaid. (R. pp. 88-89, 106, 110-12.)

Per the Kadar affidavit, in the summer of 2011, the Association purported to assess three more fines against Peffley, totaling $395.00, "for the condition of her mailbox." (R. p. 111.) The record contains nothing indicating that Peffley was provided any notice of these purported fines, and Peffley's affidavit states that she received no notice of them. (R. p. 78 ln. 22 through p. 79 ln. 3, pp. 88, 106, 110-12.) Neither the Kadar affidavit nor the Laurel affidavit ever mention any notice of these fines being provided to Peffley.

Peffley timely paid her annual assessment to the Association for 2012. (R. p. 111.) In the absence of the attorney's fee and 2011 fines, this would have satisfied Peffley's annual assessment obligations through the 2013 assessment, the year in which this case was brought. (R. p. 14, p. 83 ln. 8-9, p. 111.)

As Peffley's affidavit states, consistently with what the Association's president told her and in light of the overpayment, Peffley believed that she had fully satisfied her payment obligations to the Association. (R. p. 88.) After taking no action for years, even to notify Peffley of other fines, the Association sued her in 2013. (R. pp. 11-21, 88-89, 110-12.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual

issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

ARGUMENT

I. The court erred in granting the Association summary judgment on Peffley's negligent misrepresentation claim, where the Association told her something false and she relied on that false statement to her detriment.

The circuit court granted summary judgment as to Peffley's negligent misrepresentation counterclaim. (R. pp. 4-5, 9.) It appears that the court granted summary judgment on this claim because the covenant documents say that the Association can fine property owners in the subdivision for violating the covenants, or perhaps because of some perceived lack of specificity in what Peffley was claiming was falsely represented to her. (R. pp. 1-5.) Respectfully, Peffley notes that the lower court misapprehended her argument on this claim, the facts of this case, or both. (R. p. 43.) In any event, the lower court's decision on this cause of action was reversible error. Even if the covenants did permit the Association to fine its members, that would have

nothing to do with whether the Association was liable to Peffley for negligent misrepresentation. Peffley was always quite clear in maintaining that the Association, through its then-president, had falsely represented to her that she had not just paid up in full but had overpaid her obligations to the Association and was entitled to reimbursement; thus, this was an express misrepresentation coupled with the Association's tacit misrepresentation by failing ever to correct this misrepresentation. (R. p. 79 ln. 8-25, p. 81 ln. 5-18, p. 83 ln. 11-19, pp. 88-89.) The record contained a scintilla of evidence (and more) of facts supporting each element of the negligent misrepresentation claim, and the lower court's reasoning is flawed on this claim.

"Negligent misrepresentation has been described as an 'emerging and developing field of law.'" Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action 288 (3rd ed. 2006) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992)). It is an action in negligence (thus, not one with a heightened burden of proof). Id. Accordingly, the standard of review this court applies is that set out in Hancock, i.e., whether there is even a scintilla of evidence to support the claim. 381 S.C. at 330.

Negligent misrepresentation has the following elements:

1) a false representation by a party;

2) that party's pecuniary interest in making the statement;

3) that party owed a duty of care to see that he communicated truthful information to the other party;

4) the representing party breached the duty by failing to exercise due care;

5) the claimant party justifiably relied upon the representation; and

6) the claimant suffered damage as the proximate result of his reliance upon the representation.

Bishop Logging Co. v. John Deere Equip. Co. 317 S.C. 502, 528 n. 6, 455 S.E.2d 183 (Ct. App. 1995).

The negligent misrepresentation claim in this case has nothing to do with what the covenant documents purport to authorize the Association to do. (R. p. 44.) It has to do with the Association representing to Peffley that any debt she owed to the Association had been fully paid. (R. p. 44, p. 79 ln. 8-25, p. 81 ln. 5-18, p. 83 ln. 11-19, p. 88.)

Peffley requested of the Association's president that a 2010 fine (i.e., an "assessment for non-compliance") be rescinded, but she paid the bill of $490.00 the Association claimed to be owed (including the fine) in full on March 14, 2011. (R. p. 88.) The Association "removed" the fine, and *the Association's president emailed Peffley to tell her that she would be reimbursed for her overpayment.* (R. pp. 88, 97-98.)

Not only was Peffley not reimbursed, it was not until 2013, in connection with bringing this lawsuit, that the Association ever made any statement to change its president's statement that Peffley would be reimbursed the money she had overpaid. (R. p. 78 ln. 22 through p. 79 ln. 3, p. 79 ln. 22-25, p. 83 ln. 22 through p. 84 ln. 2, pp. 88-89, 106, 110-12.) Never during that time did the Association tell her that it had incurred attorney's fees it was charging to her, nor did the Association tell her that it had assessed any fines (i.e. "assessments for noncompliance"), such that she owed any money to the Association other than yearly assessments, which she had paid more than

a year ahead by paying the $490.00. (R. p. 78 ln. 22 through p. 79 ln. 3, p. 79 ln. 22-25, p. 83 ln. 22 through p. 84 ln. 2, pp. 88-89, 106, 110-12.)

At times, nondisclosure may serve as the "representation" underlying fraud. This typically occurs in one of three ways:

1) If a party chooses to speak, he must disclose enough of what he knows to prevent his words from being misleading. In situations where a party has made an incomplete or ambiguous statement or half-truth that he knew was misleading, he is then under a duty to clarify and to disclose the whole truth.

2) If there is a confidential or fiduciary relationship, there is a duty of full disclosure.

3) A party may be held to a higher standard if he has a special knowledge not available to the other party. A duty to disclose can arise when one party has superior knowledge of certain information and that information is not readily available to the other party and the first party knows or has reason to believe that the second party is acting on the basis of the mistaken knowledge.

Little v. Brown & Williamson Tobacco Corp., 243 F. Supp. 2d 480, 507 (D.S.C. 2001) ("'[o]ne may deceive, though he says nothing which is itself untrue', as '[t]he telling of but part of the truth may sometimes effectually mislead"); Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978) (defendant stood in fiduciary relationship to plaintiff, and as such he had a duty to disclose all relevant facts when purchasing plaintiff's stock); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967) (nondisclosure becomes

fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other); Anthony v. Padmar, Inc., 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995)(parties in fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud).

"Nondisclosure is fraudulent" – not to mention merely *negligent* – "when there is a duty to speak." Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). A South Carolina case, Anchor Point, Inc. v. Shoals of Anderson, Inc., 309 S.C. 486, 424 S.E.2d 521 (Ct. App. 1992), has recognized that a fiduciary relation exists between a homeowners association and its members, and many cases in other jurisdictions have found a such fiduciary duty. E.g., Bd. of Managers of Weathersfield Condominium Ass'n. v. Schaumberg Ltd. Partnership, 717 N.E.2d 429 (Ill. App. 1999); Maercker Point Villa Condominium Ass'n. v. Szymiski, 655 N.E.2d 1192 (Ill. App. 1995); High Country Villas Management Corp. v. Sarnowsky, 14 Cal.Rptr. 62, 65 (Cal. App. 1992); Cohen v. Kite Hill Community Ass'n, 142 Cal.App.3d 642, 191 Cal.Rptr. 209, 214 (1983); Vernon Manor Co-op. Apts, Section I, Inc. v. Salatino, 15 Misc.2d 491, 178 N.Y.S.2d 895 (1958). This is consistent with general principles regarding the relationship between a corporation and its stockholders. See, e.g., Talbot v. James, 259 S.C. 73, 190 S.E.2d 759, 764 (1972). Consistently with this fiduciary relationship, the Association owed Peffley a duty to be truthful or at least to use due care in its representations to her. This is one of those situations in which the Association had a duty to speak to Peffley, at least when it is viewed in the light most favorable to her.

The Association had a pecuniary interest in making these representations. "Proof that the statement was made in the course of the defendant's business, profession, or employment is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it." AMA Management Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). Here, the Association made the representation that Peffley would be reimbursed – thus, agreeing with Peffley's statement that she had paid the Association more than the Association was owed, not the other way around – in the course of its business of operating a homeowners' association. (R. pp. 88, 97-98, 106, 110-12.) This element is satisfied.

Whether Peffley relied on the Association's misrepresentations is a question of fact – not a question that may be decided at summary judgment. Viewed in the light most favorable to Peffley, the record shows that she did rely on these representations. Peffley's affidavit states the following:

> I had been paying my dues to the association and had received nothing further about owing them any money, so I believed, consistently with Ms. Laurel's communications with me, that I had fully satisfied all my payment obligations to the association. Accordingly, I did not inquire into whether the association claimed that I owed it any more money.

(R. p. 88.)

Further, the record shows at least a scintilla of evidence about whether she had a right to rely on them. Whether a party has the right to rely on a statement is ordinarily a fact question for the jury. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368 (Ct. App. 2005) (fact question concerning right to rely).

Peffley's affidavit indicates that, consistently with what the Association's president told her and in light of the overpayment, Peffley believed that she had fully satisfied her payment obligations to the Association. (R. p. 88.) Relying on the Association's representation that she had overpaid any debt she owed the Association, in a large enough amount to have a credit for a year's annual assessment, Peffley handled her payments accordingly. (R. pp. 88, 97-98.)

The Association was aware of incurring the attorney's fee charges and its passing them on to Peffley. (R. pp. 111-12.) The Association is the party that would know whether that happened. Peffley was not aware of that, and the Association made representations to her consistent with her not owing such sums to the Association. (R. pp. 88-89, 97-98.) Peffley acted in reliance on those statements and is now being sued by the Association, which takes the position that Peffley *does* owe the money it had told her she did not. (R. pp. 14-15, 88, 111-12.) Either the Association lied to Peffley about whether she had overpaid (thus, failing to use due care by making a statement it knew was untrue) or the Association made this statement with what would seem to be reckless or at least negligent disregard of whether the statement was true, thus failing to use due care that way.

Regardless of whether the Association is empowered to fine people (which, as discussed below, it is not), the lower court erred in granting the Association summary judgment on Peffley's negligent misrepresentation claim. All the elements of this claim were present in the record. The lower court's grant of summary judgment should be reversed.

II. Because the Association has not been empowered by the government to fine people, and the lower court did not determine as a matter of law that it can, the lower court erred in granting summary judgment to the Association on the basis of covenant language purporting to permit this.

The lower court's order, paradoxically, appears to base its summary judgment rulings in favor of the Association on an assumption that property owners' associations in South Carolina have the power and authority to fine their members, even though the order denied summary judgment on Peffley's claim seeking a declaratory judgment that such associations do not have this power. (R. pp. 2-6.) In granting summary judgment on the UTPA claim, the circuit court ruled that the Association was entitled to summary judgment because "the contract between the parties [the covenants] specifically authorizes the [Association] to take these actions." (R. p. 2.) In granting summary judgment on Peffley's slander of title claim, the circuit court ruled that the Association "was entitled to levy and collect all sums contained in its notice of lien." (R. p. 5.)

a. Inconsistency in the circuit court's rulings requires remand.

If the lower court could not rule as a matter of law that our state's law permits homeowners' associations to levy fines, then the court could not rule against Peffley on any of her causes of action on the grounds that the covenants authorize the Association to fine its members. This is internally inconsistent, and it does not stand up to logical scrutiny.

b. South Carolina law has not been changed to allow homeowners' associations to fine people.

The "assessments for noncompliance" levied by the Association are fines. (R. pp. 88, 97-99, 106, 110-12, 129-30.) Clever nomenclature used by the Association

aside, fines are exactly what these so-called "assessments" are. (R. pp. 88, 97-99, 106, 110-12, 129-30.) This is the same phenomenon from which sprang the famous lines saying "that which we call a rose / By any other name would smell as sweet." William Shakespeare, Romeo and Juliet act II, scene 2. Just as trenchantly, though not as romantically, this principle is expressed in the modern expression "putting lipstick on a pig."

There are no appellate opinions in South Carolina that answer the specific question of whether a property owners' association may impose a punishment, a fine, on another private entity (a natural person) that historically has been and normally is meted out only by the sovereign as a sentence for a criminal infraction.[1] The power to fine is a sovereign power, vested in the government. (R. p. 82 ln. 12-15, pp. 151-56.) Authorities agree. (R. p. 82 ln. 15-21, pp. 151-56.) Consistently with jurisprudence from across the nation, Black's Law Dictionary defines "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury." Black's Law Dictionary 284 (2d pocket ed. 2001). In a 2012 case involving a fine, the Supreme Court of the United States discussed other cases involving "imprisonment or a death sentence" and noted that the distinction between those forms of punishment and fines was immaterial to the issue at hand, stating that "fines, like these other forms of

[1] Three South Carolina cases, River Hills Property Owners Assn. v. Amato, 326 S.C. 255, 487 S.E.2d 179 (1997), Rawlinson Road Homeowners Assn., Inc. v. Jackson, 395 S.C. 25, 31, 716 S.E.2d 337, 340 (Ct. App. 2011), and Seabrook Island Property Owners Assn. v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005), mention fines by property owners' associations. In none of those cases was the issue of the power of such an association to levy fines addressed. Apparently, no one made an issue of that in those cases. "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).

punishments, are penalties inflicted by the sovereign for the commission of offenses." So. Union Co. v. U.S., ___ U.S. ____, 132 S.Ct. 2344, 2350 (2012).

"Bail, fines, and punishment traditionally have been associated with the criminal process," as our nation's Supreme Court stated on another occasion. Ingraham v. Wright, 430 U.S. 651, 664 (1977). "Fines were by far the most common form of noncapital punishment in colonial America." So. Union, 132 S.Ct. at 2350. At the time of the drafting and adoption of the Constitution of the United States, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than private civil, actions." Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, 492 U.S. 257, 265 (1989).

Corpus Juris Secundum speaks of what fines are as follows:

> A "fine" is a sum expressly imposed in lieu of, or in addition to, a term of imprisonment or as any part of the punishment for an offense. A fine is punitive in nature; it is a pecuniary punishment imposed as part of a sentence by a lawful tribunal on a person convicted of a crime or misdemeanor.
>
> . . .
>
> A "fine" is not a debt.
>
> . . .
>
> As generally understood, a fine is a sum of money exacted of a person guilty of a crime, the amount of which may be fixed by law or left in the discretion of the court, . . .
>
> A fine is imposed in a criminal action or proceeding . . .
>
> . . . a fine is discretionary within the limits prescribed and is paid to the State.

. . .

> Subject to constitutional restriction, the imposition and regulation of fines belong to the legislature . . .

36A C.J.S. Fines §§ 1, 2, 3.

South Carolina law is consistent with this. In State v. Stevens, our state Supreme Court appeared to reject rather roundly the idea of a fine being paid to the prosecutor of a criminal case rather than to the government. 116 S.C. 210, 211, 107 S.E. 906 (1921). Our Supreme Court also has also noted that "[a] fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment[.]" S.C. State Hwy. Dept. v. So. Ry. Co., 239 S.C. 227, 230, 122 S.E.2d 422, 424 (1961).

As noted by the Supreme Court of Virginia,

> The imposition of a fine is a governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitution of the United States and of [the state (there, Virginia)].

Unit Owners Assn. of BuildAmerica-1 v. Gillman, 223 Va. 752, 764, 292 S.E.2d 378, 384 (1982).

The South Carolina General Assembly has not delegated to property owners' associations any power to impose fines. (R. p. 82 ln. 12-15, p. 152.) South Carolina has enacted the Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 - -440, which deals with the conduct of property owners' associations that are subject to that act, but the act does not empower any such association to levy fines for anything. The covenants at issue in this case do not appear to have been made pursuant to the Horizontal Property Act, in any event. (R. pp. 113-47.) A writer on South Carolina

law on this subject has noted that "[c]ommentaries have expressed doubt about the legality of levying fines in the absence of statutory authority, of which there is none in the SCHPA [the Horizontal Property Act]. *The courts generally agree that absent statutory authorization a council of co-owners may not levy fines.*" Douglas Scott MacGregor, Condominium Law in South Carolina 49 (3d ed. 2013) (emphasis added). There is no statutory law at all in South Carolina that permits a property owners' association to levy a fine.

There is no authority under the common law for a private corporation formed of property owners to fine anyone. At common law, the power to fine is vested solely in the sovereign. So. Union, 132 S.Ct. at 2350; Browning-Ferris Indus., 492 U.S. at 265; Ingraham, 430 U.S. at 664; S.C. State Hwy. Dept., 239 S.C. at 230; Stevens, 116 S.C. at 211.

The lower court seemed to place great emphasis on a covenant being a contract and the covenants in this case stating that, provided certain conditions are met, the Association can levy "assessments for non-compliance." (R. pp. 2, 5, 129-30.) Replacing the term "fine" or "assessment for non-compliance" with the word "imprisonment" illustrates the fallacy of this reasoning. What if the covenants said that the Association could jail an Oak Pointe property owner for non-compliance with the covenants? While imprisonment is often more harsh than the imposition of a fine, there is no difference between these punishments that is material to the question at hand. They are both punishments that the sovereign is exclusively empowered to impose, and *that* is the reason that a contract is not permitted to provide for imprisonment of a party as a consequence of breach. (R. p. 82 ln. 22 through p. 83 ln. 7; see So. Union, 132

S.Ct. at 2350; Ingraham, 430 U.S. at 664.) It is the same with the death penalty. (R. p. 82 ln. 22 through p. 83 ln. 7.) While killing a person for violating a restrictive covenant would indeed be harsh medicine, that is not what would make a contract that provided death as a remedy for its breach an unenforceable one. What would make such a contract unenforceable is the public policy that only the government has the lawful authority to mete out a death sentence. See So. Union, 132 S.Ct. at 2344.

"Restrictive covenants will be enforced unless they are indefinite or *contravene public policy*." Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006) (emphasis added); accord Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); Vickery v. Powell, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976); Siau v. Kassel, 369 S.C. 631, 632 S.E.2d 888, 893 (Ct. App. 2006) *overruled in part on other grounds by* Buffington v. T.O.E. Enters., 383 S.C. 388, 680 S.E.2d 289, 291 (2009); Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994), *overruled in part on other grounds by* Buffington, 680 S.E.2d at 291. "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342, 345 (2004). The many authorities cited in this brief reveal that public policy is that, like the power to execute and imprison criminals, the power to fine is a punitive power vested solely in the government. A contractual arrangement that purports to vest it in a private entity violates public policy

and is unenforceable. There are some things one just cannot contract to do. (R. p. 82 ln. 20 through p. 83 ln. 7.)

As the author of Condominium Law in South Carolina notes, there is indeed wide agreement by courts that have addressed the issue of whether a homeowners' association can fine its members in the absence of statutory authorization to do so. Wise v. Harrington Grove Community Assn., 357 N.C. 396, 584 S.E.2d 731 (2003) (until enactment of statute that delegated power to fine to homeowners' associations, those associations had no such power); Holbert v. Great Gorge Village South Condominium Council, Inc., 281 N.J.Super. 22, 656 A.2d 1315 (1994)(absent statutory authorization, association could not levy fines, impose penalties, or charge late fees for failure to pay common expenses); Elbadramany v. Oceans Seven Condominium Assn., 461 So.2d 1001 (Fla. 5th DCA 1984); Gillman, 223 Va. At 764; Vernon Manor Co-op Apts., Section I v. Salatino, 178 N.Y.S.2d 895 (1958); see Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1994) (where North Carolina's condominium statute *did* authorize fines and declaration of covenants incorporated the statute, association could levy fines for rule violation). Courts across the country generally agree that the power to impose fines, as a governmental function, cannot be exercised by a private actor unless the sovereign has expressly delegated the exercise of that power. See id.

A number of states have enacted statutes that delegate the power to fine to associations of property owners. E.g., N.C.G.S. § 47F-1-102; Nev. Rev. Statutes § 116.310305; Fla. Code § 718.303(3). South Carolina is not among them. Were our Supreme Court to hold that, in the absence of a statute delegating the fining power to them, homeowners' associations *are* permitted to fine their members, South Carolina

would be the only state in the country to so hold, with the possible exceptions of Wisconsin[2] and Illinois[3]. While the undersigned recognizes that South Carolina has certainly bucked its share of national trends, he is not asking this court to rule with the great majority of courts just because they are in the majority. He is asking this court to do so because those courts are right. The reason that other jurisdictions recognize this principle is not because of quirky differences in those states' law and South Carolina law (and, on this issue, there are no such differences). Their holdings are consistent with legal principles about the nature of the power to fine that are foundational and accepted throughout this nation, including in South Carolina and in Anglo-American jurisprudence generally.

Any reliance by the Association on the powers of nonprofit corporations set out in S.C. Code Ann. §§ 33-31-206 and -302 is unavailing. Our General Assembly provided in S.C. Code Ann. § 33-31-206 that a nonprofit corporation's "bylaws may contain any provision for regulating and managing the affairs of the corporation that is *not inconsistent with law* or the articles of incorporation." (Emphasis added). As a matter of law, the power to fine is vested solely in the government, absent a delegation of that power (which has not been made in this state). See, e.g., So. Union, 132 S.Ct. at 2350; S.C. State Hwy. Dept., 239 S.C. at 230; Gillman, 223 Va. at 764. Enshrining a purported power to fine in an association's foundational documents *is* inconsistent with law.

Further, the plain language of S.C. Code Ann. § 33-31-302 provides that a nonprofit corporation "has the same powers *as an individual*" – not a governmental

[2] Crouse v. Lake Camelot Property Owners' Assn., 122 Wis.2d 773, 362 N.W.2d 446 (Ct. App. 1984))
[3] Poris v. Lake Holiday Prop. Owners Assn., 983 N.E.2d 993, 368 Ill. Dec. 189 (Ill. 2013).

entity – "to do all things necessary or convenient to carry out its affairs[.]" (Emphasis added). Individuals are not governments; they do not have the power to levy fines. Since it is apodictic that the undersigned individual has no power or authority to fine people, neither can the Association have such a power.

Corpus Juris Secundum notes as follows:

> Corporations cannot be created nor exist, nor corporate powers be assumed, by mere agreement of the parties, and they instead require authority from the sovereign power, express or implied. A corporation acquires its existence and authority to act from the state.

18 C.J.S. Corporations § 43.

"State legislatures generally exercise the power to create corporations[,]" and "the legislature of a state has the inherent power to determine and prescribe . . . the powers which will be conferred on them[.]" 18 C.J.S. Corporations § 44. "Legislation confers corporate power through general or specific statutes." Id. "Corporations are creations of state law and can exercise only those powers conferred upon them by statute." Seven Springs Farm, Inc. v. Croker, 801 A.2d 1212, 1216 (Pa. 2002).

> A corporation is a creature of statute. A corporation derives its power and capacity from the statutes, and it can exercise only those powers conferred upon it by statute.

18 C.J.S. Corporations § 49. "[A] corporation is a creature of statute, acquiring its existence and authority to act from the state." Baldwin County Elec. Membership Corp. v. Lee, 804 So.2d 1087, 1090 (Ala. 2001) (quoting 1 Charles Keating & Gail O'Gradney, Fletcher Cyclopedia of the Law of Private Corporation § 3635, at 226 (1990)). "The laws of the state that grants or restricts the powers of the corporation

become part of the articles of incorporation or charter of the corporation." 18 Am.Jur.2d Corporations § 14.

Despite not being able to point to any source from which it could have acquired the government's fining power, the Association argued that the covenants, which do not originate from the government, give it this power. That is not the law in this state. S.C. Code Ann. § 33-31-302. Under South Carolina law of corporations, "[a]ll resolutions and by-laws must be conformable and subordinate to the general laws." King v. Ligon, 180 S.C. 224, 185 S.E. 305, 309 (1936). That includes S.C. Code Ann. § 33-31-302, by which our legislature conferred upon nonprofit corporations only the same powers possessed by an individual, who cannot fine anyone.

The lower court failed to recognize that the provisions of the covenants at issue here that say they permit the placement and enforcement of "assessments for non-compliance" do violate public policy. Imprisonment and execution differ from fining in degree, not in kind. All three are criminal sanctions that only the sovereign possesses the power to inflict, absent a delegation of that authority. So. Union, 132 S.Ct. at 2350; Browning-Ferris Indus., 492 U.S. at 265; Ingraham, 430 U.S. at 664; Gillman, 223 Va. 752.

Whether the law *ought* to allow homeowners' associations to fine people is not a question for this court or any court; instead, it is a question for the South Carolina General Assembly. It is not the role of this court to change the law, whether to empower homeowners' associations to assess fines or to do anything else. The question of whether the law should be changed to allow this remains one for the branch of government that concerns itself with promulgating and changing laws, not the one

whose province is "to say what the law is." Marbury v. Madison, 5 U.S. 137, 138 (1803). "Our constitution mandates that 'the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.' S.C. Const. art. I, § 8." State v. Langford, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012). Our legislature has not empowered homeowners' associations to fine people by delegating that state power to them. Unless and until that happens, they cannot exercise that exclusively governmental power.

The lower court erred in basing its rulings on the Association's purported power to fine Peffly based on the covenants. No such power exists.

c. The "assessments for noncompliance" would be unenforceable penalties in any event.

While *fines* (government-imposed sentences of monetary payment) are not exactly the same thing as contractual penalties, S.C. State Hwy. Dept., 239 S.C. at 230, the Association's claimed power to levy "assessments for non-compliance" fails to meet the requirements of what makes an enforceable liquidated damages provision different from an unenforceable penalty.

If a contract's purported stipulation of liquidated damages owed in the event of breach of the contract actually constitutes a penalty, it will not be enforced. Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); Tate v. Le Master, 231 S.C. 429, 442, 99 S.E.2d 39, 46 (1957). Courts look principally to the intent of the parties to the contract in determining whether a provision constitutes a penalty, usually by looking to the language used in the document. Tate, 231 S.C. at 429; Erie Ins. Co. v. Winter Const. Co., 393 S.C. 455,

461, 713 S.E.2d 318, 321 (Ct. App. 2011). Where the stipulation "is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages." Tate, 231 S.C. at 440. "However, where the stipulation is not based upon contemplated actual damages but *is intended to provide punishment for breach of the contract*, it is a penalty." Moser v. Gosnell, 334 S.C. 425, 432, 513 S.E.2d 123, 126 (Ct. App. 1999) (emphasis added).

Here, the nature of the "assessments for non-compliance" is that they are punitive measures, not an attempt to compensate for actual losses. (R. pp. 129-30.) They relate in no way to damages; rather, they are intended to punish of a lot owner for violating the covenants. (R. pp. 129-30.)

Whether the "assessments for non-compliance" are fines or contractual penalties, they are unenforceable either way. The lower court erred in basing its rulings on these unenforceable provisions.

III. The lower court erred in granting the Association's summary judgment motion as to Peffley's claims for breach of contract and breach of contract accompanied by fraudulent act.

On page 23 of the declaration of covenants attached to Kadar's affidavit in this case, it states that "[a]ny assessments not paid within thirty (30) days after *the due date* shall bear interest *from the due date* at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher." (R. p. 135 (emphasis added).) Here, the Association never gave Peffley a due date by which to pay her fines. (R. p. 79 ln. 21 through p. 80 ln. 1, pp. 88-89, 111-12.) The Association never gave her any advance notice of the imposition of the fines at all. (R. p. 79 ln. 21 through p. 80 ln. 1,

pp. 88-89, 111-12.) But the Association charged her interest on them. (R. pp. 14-15, 89-90, 112.)

To recover for breach of contract, a claimant must prove that there was a binding contract entered into by the parties, the other party breached the contract, and damage as a proximate result. See Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962). By charging interest on the fine amounts and applying Peffley's overpayment to charges it had never set due dates for, as well as by bringing this action, the Association has breached the contract between the parties itself, regardless of the merits of any of Peffley's other claims. (R. pp. 48-49, 135.)

Article IX § 1 of the restrictive covenants at issue provides for various remedies the Association has if assessments are not paid within 30 days after their due dates, including foreclosure of a lien for unpaid assessments. (R. pp. 135-36.) In the light most favorable to Peffley, this implies that all assessments have due dates and that the Association cannot avail itself of these default remedies until the assessments are past due. (R. pp. ___; covenants.)

The concept of a due date for payment of an assessment embraces some notice to the party responsible for paying the assessment of when the payment is due. Here, there is no evidence that the Association ever provided such notice to Peffley of the attorney's fee charges for recording the notice of lien or of the 2011 assessments for noncompliance. (R. p. 78 ln. 22 through p. 79 ln. 3, p. 79 ln. 22-25, p. 83 ln. 22 through p. 84 ln. 2, pp. 88-89, 106, 110-12.) In the light most favorable to Peffley, the record indicates that none of these assessments ever had a due date; thus, no right of action in favor of the Association would have accrued for their non-payment. The Association

appears to have been aware of what notices it did and did not send to Peffley. (R. pp. 110-12.) Accordingly, it knew that it had never given Peffley notice of these assessments or when they were due, yet it charged her interest on them anyway, applied her payments to them anyway, and sued her anyway. (R. pp. 11-17, 111-12.) These are genuine issues of material fact that preclude summary judgment on the Association's claim and on Peffley's claims for breach of contract and breach of contract accompanied by fraudulent act.

To recover for a breach of contact accompanied by fraudulent act, a party must show 1) a breach of contract, 2) fraudulent intent relating to the breach, and 3) a fraudulent act accompanying the breach. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374, 378 (1986); Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). Fraudulent intent with regard to a breach of contract is "normally proved by circumstances surrounding the breach[.]" Floyd v. Country Squires Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). It may or may not involve false representations. Ball v. Canadian American Express Co., Inc., 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994).

A fraudulent act is one characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of someone else's property by design. Harper, 348 S.E.2d at 378; Ball, 314 S.C. 272; Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993). It may happen before, along with, or after the breach. Floyd, 287 S.C. 51.

Viewed in the light most favorable to Peffley, the Association's failure to even correct its representation that Peffley had overpaid the Association, even while the

Association recorded a document in the land records stating that Peffley was delinquent in paying the Association, is at least characterized by unfair dealing.

There is a scintilla of evidence, and more, that required denial of the Association's summary judgment motion on these claims. The lower court erred in granting summary judgment on them.

IV. There was a scintilla of evidence and more that the Association slandered Peffley's title.

"Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). Particularly in light of the Association's president having let Peffley's statement that she had overpaid the Association go uncontradicted and telling her that she would be reimbursed, there is at least a scintilla of evidence that the notice of lien involved here was wrongfully recorded. After Peffley had paid the 2010 fine – the last one of which she was notified – the Association hired a law firm to record a notice of lien, which it did, on the subject property, and in that document the the Association claimed to be owed the fine and associated fees. (R. pp. 14-15, 88-89, 104-05, 110-12.) This document was recorded in the land records after Peffley had already paid the fine the document stated was owed. (R. pp. 14-15, p. 79 ln. 8-9, pp. 88, 111-12.) It was also recorded after Peffley had emailed the Association's president and told her that she had overpaid the Association because of the removal of the fine, and it was recorded after the Association's president told Peffley she would be reimbursed for her overpayment. (R. pp. 14-15, p. 79 ln. 8-21, p. 83 ln. 22 through p. 84 ln. 2, pp. 88, 97, 111-12.) Viewed in the light most favorable to Peffley, the Association wrongfully recorded an unfounded claim against her property.

Further, as discussed above, the law does not permit the Association to fine Peffley. If it does not permit this, then Peffley definitely did not owe the Association for any such assessments or for attorney's fees seeking to collect them, and the statement that she did is a false one. The Association argued that Peffley had not shown any damages as to this claim; however, she has undoubtedly incurred attorney's fees, and attorney's fees can be an item of recoverable damages in a slander of title claim. Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012). Further, the Association, having represented that Peffley did not owe the Association what it stated in the land records she did and having recorded a document stating that she owed a fine she had already paid, *did* act with reckless disregard for Peffley's rights in making this statement in the land records; thus, there is at least a scintilla of evidence of malice here. (R. pp. 14-15, p. 79 ln. 8-21, p. 83 ln. 22 through p. 84 ln. 2, pp. 88, 97, 111-12.)

There was at least a scintilla of evidence, and more, that precluded the lower court from granting summary judgment. It was error for the lower court to do so, and this court should reverse that ruling.

V. Where the Association has set itself up to systematically purport to fine its members, it was error for the lower court to grant summary judgment on the UTPA claim.

An action for violation of the UTPA lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the party asserting the claim. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). "'Trade' and 'commerce' shall include the . . . distribution of any services and

any property, tangible or intangible, . . . 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." S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the UTPA. The text of S.C. Code Ann. § 39-5-10(b) states that:

> "Trade" and "commerce" shall include 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.

Our Court of Appeals has held that "[t]he statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

The Association provides the services of a homeowners' association: maintenance of common elements, for example. (R. pp. 114, 120-23, 126-29.) That is "trade" or "commerce" for these purposes. Further, its actions at issue here impact the public interest: they are capable of repetition, as they are enshrined in the Association's covenants as being applicable to all association members, and it is plain that the purported usurpation of the government's power to fine impacts the public interest. (R.

pp. 129-30.) The law does not countenance the seizing and attempted use of a government punishment power by a private entity, as discussed above.

The lower court should have denied summary judgment on this claim. This court should reverse and remand this claim for trial.

VI. The lower court's ruling on the libel claim is infected by an erroneous, straitened reading of Peffley's pleading.

To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement's falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). For the reasons noted above regarding the slander of title claim, summary judgment should have been denied on the libel claim.

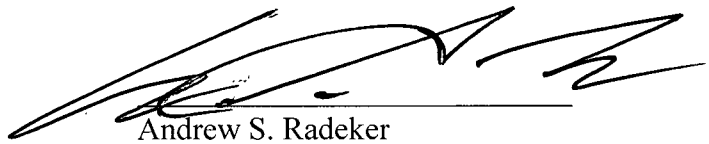
"All pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP. Like the Association did at the hearing, the circuit court too rigidly assessed the allegations in the answer and counterclaim, which, it appears, helped to result in an erroneous grant of summary judgment to the Association on the counterclaims discussed above. (R. p. 6.) The lower court premised its ruling on a typographical error in the answer and counterclaim.

The "loan" allegation in the libel portion of the counterclaim is simply a typographical error, as noted at the hearing. (R. p. 28, p. 72 ln. 8-9, p. 84 ln. 5-8.) The pleadings served their function and put the Association on notice that Peffley was claiming that the Association made a false statement in the notice of lien it filed. (R. pp. 27-28, 52.) The lower court should have recognized this and should not have used the typo of the loan allegation as a basis to grant summary judgment.

CONCLUSION

The lower court erred reversibly in granting summary judgment to the Association. This court should reverse and remand the causes of action upon which summary judgment was granted for trial.

Respectfully submitted,



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June 28, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED
JUN 29 2016
SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Judge

Appellate Case No.: 2015-000263

Oak Pointe Homeowners' Association, Inc.,.....Respondent,

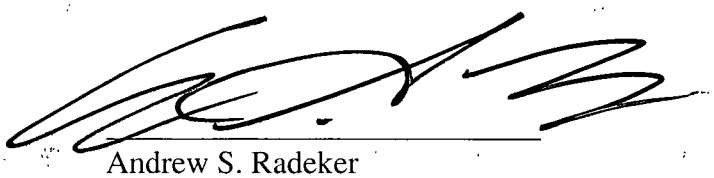
v.

Mackenzie E. Peffley,..... Appellant.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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