ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2011-CP-32-1393

Clarence Edward Looney and Grover E. Lown, Jr.,.....Respondents,

v.

GrassRoots of South Carolina, Inc., Ed Kelleher, Robert Butler, and Robert Holliday,.....Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This appeal is from an interlocutory order issued by the Lexington County Court of Common Pleas, and entered in the Lexington County Court of Common Pleas on May 19, 2011, finding that (1) "for purposes of this preliminary injunction, the vote accomplished by the mail-in ballot is null and void," (R. p. 8), and that a "mail-in ballot which retrieved votes to amend the Articles of Incorporation to change the corporate structure of the Defendant corporation is now null and void," (R. pp. 8-9); (2) the Plaintiffs were to be provided corporate records and the corporate membership list, (R. p. 8); (3) "pending a trial on the merits, and for purposes of a preliminary injunction, an annual meeting must be held," (R. p. 8), and an annual membership meeting must held, (R. p. 9); and (4) a preliminary injunction continued "until the case is heard on the merits enjoining the Defendants from partaking in any actions on behalf of the corporation," (R. pp. 2-3, 8).

On April 8, 2011, Clarence Edward Looney and Grover E. Lown, Jr. (hereinafter referred to collectively as "Respondents" or individually as "Respondent Looney" and "Respondent Lown") filed a Complaint and a Rule to Show Cause and Order in the Lexington County Court of Common Pleas seeking to assert their alleged rights of membership in the corporate defendant, or in the alternative the dissolution of the corporate defendant, and to "restrain[] [Defendants] from taking any action or doing any act of any type on behalf of the corporate Defendant." (R. p. 10; R. pp. 14-17). The Rule to Show Cause and Order was entered with the Lexington County Court of Common Pleas on April 8, 2010. (R. p. 10). The Complaint names, as Defendants, the following

persons: Grass Roots of South Carolina, Inc., Ed Kelleher, Robert Butler, and Robert Holiday (hereinafter referred to collectively as "Appellants" and individually as "Appellant Kelleher," "Appellant Butler," and "Appellant Holliday").

The Complaint alleges, in sum, the following: (1) Plaintiffs believe they have rights to assert as members of GrassRoots; (2) Plaintiffs believe the mail-in ballot vote of the membership to amend the GrassRoots Articles of Incorporation was not conducted properly; and (3) that Defendants do not conduct the affairs of GrassRoots in a way that represents the wishes of the membership. (R. pp. 14-17).

The Defendants filed an Answer and Counterclaim on April 18, 2011, and essentially denied the allegations of the Complaint, and asked that the Plaintiffs pay Defendants' attorney fees and costs incurred as a result of the defense of this action. (R. p. 26; R. p. 28).

A hearing was held on April 18, 2011, in the Lexington County Court of Common Pleas. (R. p. 2). "The Plaintiffs s[ought] a preliminary injunction, pursuant to SCRCP 65, until the case [was] heard on the merits, enjoining the Defendants from partaking in any actions on behalf of the corporation." (R. p. 2). "Additionally, the Plaintiffs s[ought] to have access to the membership list as well as access to financial records and other corporate records." (R. p. 2). The attorneys for both sides agreed to "handle this case by way of affidavits." (R. p. 37, lines 15-20). The transcript shows the following documents, affidavits, and enclosures were actually presented to the Court: Affidavit of Clarence Edward Looney, (R. p. 37, lines 16-18); GrassRoots Bylaws, (R. p. 38, lines 10-13); Affidavit of Clarence Edward Looney, Exhibit 2, (R. p. 38, line 25-p. 39, line 4);

Affidavit of Clarence Edward Looney, Exhibit 3, (R. p. 38, line 25-p.39, line 4); Affidavit of Clarence Edward Looney, Exhibit 4, (R. p. 39, line 8-p. 40, line 1); Affidavit of Clarence Edward Looney, Exhibit 5, (R. p. 40, line 2-7); mail-in ballot, (R. p. 40, line 17-p. 41, line 22); letter accompanying mail-in ballot, (R. p. 41, line 18-22); Answer and Counterclaim, (R. p. 44, line 24-p. 45, line 4); Affidavit of Thomas Glaab, (R. p. 45, line 5-23; R. p. 52, line 25-p. 53, line 7); Affidavit of Robert Holliday, (R. p. 45, line 24-p. 46, line 5); Affidavit of Robert D. Butler, (R. p. 46, line 6-11); Affidavit of Ed Kelleher with several unspecified enclosures, (R. p. 46, line 12-23; R. p. 47, line 22-25; R. p. 52, line 23-25); Looney's demand letter, (R. p. 46, line 17-23); NAACP v. Alabama Ex. Rel. Patterson, Attorney General, (R. p. 48, line 9-14); various affidavits, (R. p. 58, line 20-24); and "all the documentation", (R. p. 61, line 25-p. 62, line 2).

After a hearing on April 18, 2011, the Trial Court Judge entered his Order on May 17, 2011. (R. p. 2). The Order included the following findings of fact: (1) that Defendants concede Plaintiffs are entitled to access to corporate documents and the corporate membership list, (R. p. 3); (2) that the South Carolina Nonprofit Corporation Act governs the issue of inspection of corporate records and the membership list, (R. p. 4); (3) that Looney's demand for records was in compliance with the South Carolina Nonprofit Corporation Act, (R. p. 5); (4) that S.C. Code Annotated § 33-31-1603 is an option that belongs to the member, (R. p. 5); (5) that Plaintiffs are members of GrassRoots, (R. p. 7); (6) that the mail-in ballot vote was null and void due to the failure of Defendants to "attach" a "copy" of the proposed amendment to the articles of

incorporation within the materials soliciting the mail-in ballot vote, (R. pp. 7-8); and (7) that Defendants are still a membership nonprofit corporation, (R. p. 8).

On June 1, 2011, Appellants served all parties of record with a Notice of Appeal. Also, Appellants filed a Notice of Appeal and Proof of Service of such notice with the South Carolina Court of Appeals on June 1, 2011. (R. pp. 33-34). This appeal followed.

STATEMENT OF FACTS

Grass Roots of South Carolina, Inc., started out as an unincorporated association in 1997, and was incorporated as a nonprofit public benefit corporation on July 9, 1999. (R. pp. 90-91). GrassRoots consistently promised its members, both before and after incorporation, that their privacy would be protected. (R. p. 92). Respondent Looney demanded that Defendants provide him with a copy of the membership list. (R. p. 39, line 14-15; R. p. 40, line 8-9; R. p. 43, line 14-15; R. p. 46, line 17-23; R. p. 47, line 13-16; R. p. 48, line 1-8). Defendants held a mail-in ballot vote of the entire GrassRoots membership soliciting a vote on whether to amend the GrassRoots articles of incorporation to change the corporate structure from one "with members" to one "without members." (R. p. 45, line 15-21; R. p. 46; R. p. 49, line 2-6; R. p. 50, line 13-15; R. p. 53, line 5-7; R. pp. 60-61).

On March 23, 2011, Appellants sent a mail-in-ballot to all members of Grass Roots of South Carolina, Inc., asking the members to vote to amend the GrassRoots articles of incorporation. (R. pp. 107-108). The mail-in-ballot included a letter from GrassRoots that encouraged members to vote and explained that an affirmative vote would amend the articles of incorporation and explained what outcome would be

achieved by the amendment. (R. pp. 109-112). The letter also included copy of the language of the proposed Amendment. (Id.)

Thereafter, the membership of GrassRoots voted to change the corporate structure into one that does not have members, (R. p. 45, line 15-23; R. p. 49, line 23-p. 50, line 1; R. p. 50, line 13-18; R. p. 53, line 5-7; R. p. 57, line 5-8), so as to protect their privacy, (R. p. 47, line 21-25; R. p. 49, line 17-p. 50, line 1; R. p. 51, line 15-19), and extinguish any rights of membership that may have existed prior to the mail-in ballot vote, (R. p. 47, line 13-20; R. p. 49, line 23-p. 50, line 1; R. p. 50, line 9-15). The total number of ballots received was 1,330, of which 1,302 voted to amend the articles of incorporation, and only 28 voted "no." (R. p. 45, line 15-23; R. p. 53, line 5-7).

Respondents brought this suit to force GrassRoots to release corporate information, including its membership list, that is only available as a right of membership in GrassRoots, (R. p. 47, line 13-20; R. pp. 4-9), or, in the alternative, to dissolve GrassRoots (R. p. 17).

STANDARD OF REVIEW

The main purpose of an action should generally be ascertained from the body of the complaint, the prayer for relief, and any other facts and circumstances which throw light upon the main purpose of the action. *Ins. Fin. Serv., Inc. v. The SC Carolina Ins. Co.*, 271 S.C. 289, 247 S.E.2d 315 (1978). In *Miller v. Borg-Warner Acceptance Corp.*, 279 S.C. 90, 302 S.E.2d 340 (1983), the Court treated an action that primarily sought injunctive relief as equitable even though there were ancillary statutory damage claims. Generally, an action for injunctive relief is equitable in nature. *Id.* On appeal of an action in equity, tried by a judge alone, the appellate court may find facts in accordance with its own view of the preponderance of evidence. *Id.*

Here, the Respondent's Complaint seeks injunctive relief as its main purpose, with ancillary statutory issues. (R. pp. 11-19). Therefore, the scope of review for this Court is to review the record and make findings of fact in accordance with its own view of a preponderance of the evidence.

Even if this Court were to deem this a matter of law, the standard of review would allow this Court to make its own findings of fact because the trial court's factual findings were without evidentiary support. In an action at law, tried without a jury, the trial court's factual findings will not be disturbed on appeal unless found to be without evidence that reasonably supports the court's findings. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Here, there is simply no evidence in the record that reasonably supports the court's findings.

ARGUMENT

I. The trial court erred in finding that "[t]he mail-in ballot which retrieved votes to amend the Articles of Incorporation to change the corporate structure of the Appellant corporation is now rendered null and void" because the judge based his finding upon an alleged non existence of evidence that was clearly in the record.

In *Ledford v. Penn. Life Ins. Co.*, 267 S.C. 671, 230 S.E.2d 900 (1976), the Supreme Court noted that it has held in the past that:

> "an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." (*Id.* at 902) (referencing *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 169 S.E.2d 387 (1969).

Appellants submit that "the [trial court] judge issuing the order was controlled by some error of law," and that the order "is without evidentiary support," both of which constitute an abuse of discretion according to *Ledford.*

A. Order Controlled by Some Error of Law

The trial court both misinterprets and misstates the GrassRoots Bylaws and arbitrarily inserts and imposes a requirement not found in either the GrassRoots Bylaws, (R. pp. 68-83; R. pp. 81-82 (Art. XIV, Sec. 3)), or any applicable statute in the South Carolina Nonprofit Corporation Act of 1994, (S.C. Code Ann. § 33-31-101 et. seq. (1976), as amended), i.e., that a copy of the proposed amendment "be ***attached*** to the written ballot or the notice of a meeting." (R. p. 7, fn. 2.) (emphasis added). The trial court's error in the law is repeatedly stressed and used to justify its finding to render the mail-in ballot null and void when the trial court states "[t]he ballot did not have ***attached*** a copy of the proposed amendment to the articles of incorporation," (R. p. 8) (emphasis

added), and "[t]his ballot does not comply with the requirements of the bylaws since it does not contain an ***attached*** copy of the proposed amendment as is required with a notice of a meeting of the members or with a written ballot," (R. p. 8) (emphasis added). The trial judge "was controlled by some error of law" because the GrassRoots Bylaws only require that "***the material soliciting the approval must contain a copy*** of the proposed amendment to the Articles of Incorporation," (R. pp. 68-83; R. pp. 81-82 (Art. XIV, Sec. 3)) (emphasis added), and S.C. Code Ann. § 33-31-1003(c) (1976), as amended, only requires that "***the material soliciting the approval shall contain or be accompanied by a copy or summary*** of the amendment." (emphasis added). "The material soliciting the approval" requirement of both the Bylaws and the statute includes the contents of the envelope which was sent to each member soliciting their vote, which envelope included the letter from Kelleher to the membership, (R. pp. 109-112), and the Membership Ballot, (R. pp. 107-108). Therefore, the trial court's Order, (R. p. 7, fn. 2; R. p. 8), that a requirement not found in either the Bylaws or statutes that a copy of the proposed amendment be "attached" to rather than simply contained within "the materials soliciting the approval" as demanded by the Bylaws and statute is "controlled by some error of law" and is "an abuse of discretion," and is squarely within the holding of *Ledford v. Penn. Life Ins. Co.*, (supra).

B. Order Is Without Evidentiary Support

The trial court correctly stated if "the Board of Directors ... seek to use a ... written ballot, then the material soliciting the approval must also ***contain a copy*** of the proposed amendment to the articles." (R. p. 7) (emphasis added). The trial court then

contradicted itself by adding a footnote to the sentence wherein the footnote contained the misstatement that the proposed amendment must be "***attached***." (R. p. 7, fn. 2.) (emphasis added). Next, the trial court quoted text from Kelleher's letter to the membership, (R. p. 8), wherein Kelleher provided a summary of the proposed amendment as Kelleher explained why the proposed amendment was needed, (R. pp. 109-112). The trial court, quoting Kelleher's letter to the membership as "proof," (R. pp. 109-112), found "[t]he ballot did not have attached a copy of the proposed amendment to the articles of incorporation." (R. p. 8). But, the trial court failed to properly review the evidence before that court, and failed to recognize that a copy of the proposed amendment was included in Enclosure 8 of the Kelleher Affidavit. (R. pp. 107-108). Thus, the trial court's Order is without evidentiary support once it is uncontested that a copy of the proposed amendment does indeed exist in Enclosure 8 of the Kelleher Affidavit.

GrassRoots' mail-in ballot solicitation included a "Membership Ballot" authorizing

> "the Board of Directors to make the following amendment to the Articles of Incorporation: Grass Roots of South Carolina, Inc., incorporated July 9, 1999 as a South Carolina non-profit public benefit corporation, adopts the following Amendment of its Articles of Incorporation: To change from a corporation that will have members, to a corporation that will not have members." (R. pp. 107-108).

The members were then asked to check a box indicating whether "YES: I approve this change," or "NO: I do not approve this change." (R. pp. 107-108).

Appellants requested that the trial court take judicial notice of the South Carolina Secretary of State's official standardized form required to file an amendment to a

nonprofit corporation's Articles of Incorporation. (R. p. 143). The Form is available on the South Carolina Secretary of State's website. Item 4 of this official standardized form is the only place where the issue of a corporation having members is addressed, and it states in its entirety:

> "Check 'a' or 'b', whichever is applicable.
> a. [ ] This corporation will have members.
> b. [ ] This corporation will not have members."

(R. p. 121). The incorporators then check one of two boxes to show either that "[t]his corporation will have members," or that "[t]his corporation will not have members." (R. p. 121).

Appellants also respectfully ask this Court to take judicial notice of the South Carolina Secretary of State's official standardized form required to file an amendment to a nonprofit corporation's Articles of Incorporation. (R. p. 143). The Form is available on the South Carolina Secretary of State's website. Item 3 of this official standardized form is the only place where the text of an amendment is addressed, and states in its entirety: "Specify (a) the text of every amendment adopted, and (b) list when each amendment was adopted." (R. p. 124). This is where the copy of the proposed amendment from Enclosure 8 of the Kelleher Affidavit would be inserted as the adopted amendment, and which reads as follows:

> "Grass Roots of South Carolina, Inc., incorporated July 9, 1999 as a South Carolina non-profit public benefit corporation, adopts the following Amendment of its Articles of Incorporation: To change from a corporation that will have members, to a corporation that will not have members."

There are no check boxes on the official standardized form provided by the SC Secretary of State to amend the articles of incorporation. The amendment must be explained with

words alone, which is clearly what GrassRoots did. (R. pp. 107-108).

It is obvious that the GrassRoots proposed amendment to its Articles of Incorporation found in Enclosure 8 of the Kelleher Affidavit is a copy of the proposed amendment contained within "the material soliciting the approval ... of the proposed amendment to the Articles of Incorporation." Thus, the trial court's finding that Defendants failed to include a copy of the proposed amendment to the Articles of Incorporation is without evidentiary support, and is an abuse of discretion. *Ledford v. Penn. Life Ins. Co.*, (supra).

There is nothing in either the Bylaws or the statutes that prohibit Appellants from providing both a summary, (R. pp. 109-112), and a copy, (R. pp. 107-108), of the proposed amendment to its members, which is exactly what Appellants did. In its Order, (R. p. 8), the trial court quoted language from Appellant Kelleher's letter to the membership, (R. pp. 109-112), wherein Appellant Kelleher explained why the proposed amendment was needed and included a summary of the proposed amendment, (R. pp. 109-112). The trial court then used Appellant Kelleher's summary of the proposed amendment as "proof" that Appellants failed to provide a "copy" of the proposed amendment to the Articles of Incorporation as required by the GrassRoots Bylaws. The trial court's use of the summary language from Enclosure 9 of Appellant Kelleher's Affidavit rather than the actual copy of the proposed amendment from Enclosure 8 of Appellant Kelleher's Affidavit is particularly disturbing because Appellants specifically pointed out to the trial court in their proposed order presented to the trial court on April 29, 2011 that the copy of the proposed amendment to the Articles of Incorporation could

be found in Enclosure 8 of Appellant Kelleher's Affidavit, and quoted the exact language found therein and quoted above. (R. pp. 143-144). Thus, the trial court's finding that Appellants failed to include a copy of the proposed amendment to the Articles of Incorporation is without evidentiary support, and, therefore, that finding is an abuse of discretion. *See Ledford v. Penn. Life Ins. Co.*, (supra).

C. The Power to Review the Record and Make Findings of Fact

This Court has the power to review the record and make findings of fact in accordance with its own view of a preponderance of the evidence. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Appellants now ask this Court to do exactly that, to bring an end to this litigation, and to allow Appellants to go about its business from which it is presently enjoined. The following discussion of the evidence already before the trial court and now this Court should be considered.

The Appellants Bylaws state that a mail-in ballot vote to amend the Articles of Incorporation "must contain a copy of the proposed amendment to the Articles of Incorporation," (R. pp. 68-83; R. pp. 81-82 (Art. XIV, Sec. 3)), "provide an opportunity to vote for or against [the] proposed [amendment]," (R. pp. 68-83; R. p. 71 (Art. III, Sec. 11)), "state the date the ballot must be received by the corporation to be counted," (R. pp. 68-83; R. p. 71 (Art. III, Sec. 11)), and that "[a]pproval by written ballot shall be valid only if the number of votes cast by ballot equals or exceeds the quorum required and the approvals equal or exceed the number of votes required to approve the matter at a meeting," (R. pp. 68-83; R. p. 71 (Art. III, Sec. 11)). The GrassRoots Bylaws state "[t]en percent (10%) of the members entitled to vote on the matter constitutes a quorum on that

matter. (R. pp. 68-83; R. p. 70 (Art. III, Sec. 8)). If a quorum is present, the affirmative vote of a majority of the votes cast is the act of the members." (R. pp. 68-83; R. p. 70 (Art. III, Sec. 8). Thus, at least two hundred fifty votes were needed to constitute a quorum, (R. p. 93; R. p. 115), and a simple majority of those votes would constitute "the act of the members," (R. pp. 68-83; R. p. 70 (Art. III, Sec. 8)).

The South Carolina Nonprofit Corporation Act of 1994, (S.C. Code Ann. § 33-31-101 et. seq. (1976), as amended), addresses the issue of a mail-in ballot to amend a nonprofit corporation's Articles of Incorporation and states "[i]f the corporation has members entitled to vote on the amendment, . . . an amendment to a corporation's articles to be adopted must be approved . . . by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less," (S.C. Code Ann. § 33-31-1003(a)(2) (1976), as amended) (emphasis added); "[i]f the board . . . seek[s] to have the amendment approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment," (S.C. Code Ann. § 33-31-1003(c) (1976), as amended); the "written . . . ballot shall: (1) set forth each proposed action; and (2) provide an opportunity to vote for or against each proposed action," (S.C. Code Ann. § 33-31-708(b) (1976), as amended); and any solicitation "for votes by written . . . ballot shall: (1) indicate the number of responses needed to meet the quorum requirements; (2) state the percentage of approvals necessary to approve each matter . . .; and (3) specify the time by which a ballot must be received by the corporation in order to be counted," (S.C. Code Ann. § 33-31-708(d) (1976), as amended).

A copy of the proposed amendment to the Articles of Incorporation must be included with the mail-in ballot to satisfy the GrassRoots Bylaws, (R. pp. 68-83; R. pp. 81-82 (Art. XIV, Sec. 3)), and either a copy or summary of the amendment must be included with the mail-in ballot to satisfy the South Carolina Nonprofit Corporation Act of 1994, (S.C. Code Ann. § 33-31-1003(c) (1976), as amended).

The GrassRoots mail-in ballot included a copy of the proposed amendment. (R. pp. 107-108). The GrassRoots mail-in ballot satisfied every other requirement set by the GrassRoots Bylaws, (R. pp. 68-83; R. p. 81-82 (Art. XIV, Sec. 3); R. p. 71 (Art. III, Sec. 11); R. p. 70 (Art. III, Sec. 8)), and by the South Carolina Nonprofit Corporation Act of 1994, (S.C. Code Ann. §§ 33-31-708(a); 33-31-708(b); 33-31-708(d); 33-31-1003(a)(2); and 33-31-1003(c) (1976), as amended), as noted in the above paragraphs. (R. pp. 107-108; R. p. 115; R. p. 116; R. pp. 119-120). The GrassRoots mail-in ballot vote satisfied whichever standard was the most stringent standard on any given issue. While S.C. Code Ann. § 33-31-1003(a)(2) (1976), as amended, states "an amendment to a corporation's articles to be adopted must be approved . . . by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less" (emphasis added). GrassRoots satisfied this element both with ninety-eight (98%) percent of the votes cast and a majority of the voting power. (R. p. 116; R. pp. 119-120; R. p. 115). Therefore, the mail-in ballot vote was conducted in accordance with and in complete compliance with both the GrassRoots Bylaws and the South Carolina Nonprofit Corporation Act of 1994.

S.C. Code Ann. § 33-31-708 (1976), as amended, provides that "any action that may be taken at any annual, regular, or special meeting of members may be taken without

a meeting if the corporation delivers a written or electronic ballot to every member entitled to vote on the matter." (emphasis added). Appellants delivered a written ballot to every member entitled to vote. (R. pp. 90-115). Therefore, Appellants holding a vote by mail ballot, (R. pp. 90-115; R. pp. 68-83), and not at a called meeting, was authorized by law.

The record is devoid of any evidence of fraud or irregularity in the vote tally, and none has been alleged by Respondent. Rather, Respondent simply does not like the results of the mail-in ballot. Thus, the vote tally of one thousand three hundred two (1,302) votes in favor of amending the articles of incorporation to only twenty-eight (28) votes against amending the articles of incorporation, and which was properly certified by the Secretary of GrassRoots, (R. p. 116), should stand.

Appellants submit that a mail-in ballot vote was actually a better alternative than a vote at a membership meeting to determine the will of the entire membership because a mail-in ballot vote, with a postage paid return envelope included, (R. pp. 90-115), allowed every member to easily make his vote count. A membership meeting, on the other hand, virtually always forces members to make a choice between 1) attending a far away meeting in order to vote, or 2) attending to work, family, or social obligations at home, missing the vote at the membership meeting, and thus leave the direction of the corporation to those members who were able to attend the meeting. The Appellants affidavits submitted to the trial court indicated that the meetings are poorly attended. (R. pp. 90-115; R. pp. 119-120). Appellants further submit that the likelihood of over fifty-three (53%) percent of the membership, which is the percentage of GrassRoots' members

who responded to the mail-in ballot, (R. p. 116; R. p. 115; R. pp. 119-120), attending a membership meeting is extremely small. Thus, the mail-in ballot provided Appellants with the best guidance as to what the entire membership wanted the Defendants to do on their behalf.

Appellants demonstrated below that they have fulfilled all the legal requirements imposed by both Bylaws and statute in order to amend the Articles of Incorporation as voted by the majority of the membership. Therefore, Appellants respectfully request this Court to find that Appellants fulfilled all the requirements of a mail-in ballot vote, and to allow Appellants to carry out the expressed desire of the membership to change the Appellant corporation into "a corporation that will not have members."

II. The trial court erred in finding that Respondents were still members of Appellant corporation with the rights of members even after the mail-in ballot vote of the membership to change Appellant corporation into a non-member corporation.

A. Only Members Have Rights

The rights of a member of a nonprofit corporation which are found in S.C. Code Ann. §§ 33-31-1602 through 33-31-1605 (1976), as amended, are premised on a nonprofit corporation actually having members. But, S.C. Code Ann. § 33-31-603 (1976), as amended, states "[a] corporation is not required to have members." Therefore, if a nonprofit corporation does not have members, then S.C. Code Ann. §§ 33-31-1602 through 33-31-1605 (1976), as amended, are inapplicable to that nonprofit corporation because there are no members with rights to assert.

B. The Membership Has the Power to Change Corporate Structure

Two days prior to the Respondents filing suit against Appellants, members of GrassRoots completed the mail-in ballot vote to amend GrassRoots' Articles of Incorporation. (R. pp. 107-112). The results of the mail-in ballot vote of April 6, 2011, amended GrassRoots' Articles of Incorporation to change GrassRoots into a nonprofit corporation that does not have members. (R. p. 116; R. pp. 107-112; R. pp. 119-120). The effects of such an amendment and restatement of the articles of incorporation are controlled by S.C. Code Ann. § 33-31-1008 (1976), as amended, which protects, among other rights, "the existing rights of persons other than members of the corporation." (emphasis added) Respondents claim to be members of GrassRoots, and Appellants concede they were. Therefore, Respondents are subject to the provisions of S.C. Code Ann. § 33-31-1008 (1976), as amended, which means their rights of membership can be extinguished by a change in the corporate structure. Furthermore, S.C. Code Ann. § 33-31-1001(c) (1976), as amended, states "a member of the corporation does not have a vested property right resulting from any provision in the articles of incorporation or bylaws." As a result of the foregoing, members of GrassRoots have voted overwhelmingly, (R. p. 116; R. pp. 119-120), to extinguish any rights members, including the Respondents, may have had prior to the mail-in ballot vote. Respondents no longer have any rights of membership to assert based upon S.C. Code Ann. §§ 33-31-1602 through 33-31-1605 (1976), as amended, which form the entire basis of the Respondents' case. Respondents have no right to inspect and copy the nonprofit

corporation records of GrassRoots, and have no right to demand a meeting of members in a corporation that no longer has members.

This case is not a battle between the membership and an out of control, out of touch leadership. This case pits the rights of an overwhelming majority of the members who support their leadership against a few disgruntled members, (R. p. 116; R. pp. 119-120), who are trying to have GrassRoots dissolved, (R. p. 17). The Board of Directors and Officers did not have the power to change the corporate structure. (R. pp. 81-82 (Art. XIV, Sec. 3); R. pp. 76-78 (Art. VII.)). The GrassRoots membership held that power and exercised their right to change GrassRoots into a nonmember organization. (R. pp. 81-82 (Art. XIV, Sec. 3). Appellants are simply doing what the overwhelming majority of the membership, (R. p. 116; R. pp. 119-120), wants it to do, i.e., protect the privacy of the membership list from those who oppose its pro-gun advocacy stance, (R. p. 56; R. pp. 107-112; R. pp. 119-120; R. p. 23 (Paragraph 11)), and to keep GrassRoots in existence as their political voice, (R. pp. 109-112). Therefore, as a matter of public policy, this Court should uphold virtually unanimous will and intentions of the voting members who, in response to the mail-in-ballot, voted to amend the articles of incorporation of Appellant Corporation such that the corporation would become one without members.

C. The Membership Voted to Extinguish All Rights of Membership

GrassRoots' members voted overwhelmingly to change GrassRoots' corporate structure from one with members into one without members. (R. p. 116; R. pp. 107-112; R. pp. 119-120). Over fifty-three (53%) percent of the members entitled to vote (i.e., the voting power) returned their ballots, and ninety-eight (98%) percent of them voted to

change the corporate structure to one that will not have members. (R. p. 116; R. pp. 90-115; R. pp. 119-120). Only a two thirds majority was needed to pass. (S.C. Code Ann. § 33-31-1003(a)(2) (1976), as amended.) Even in the unlikely event that every member who failed to vote was instead counted as a "no" vote, more than fifty-two (52%) percent of the membership entitled to vote (i.e., the voting power) would still have voted "yes" to change the corporate structure to one that will not have members. (R. p. 116; R. pp. 90-115). Only a simple majority was needed to pass. (R. pp. 81-82 (Art. XIV, Sec. 3); S.C. Code Ann. § 33-31-1003(a)(2) (1976), as amended.) Using the most demanding standard required to pass the mail-in ballot vote, only eight hundred eighty-seven (887) votes (i.e., two thirds of 1330) were needed to pass the mail-in ballot vote. (S.C. Code Ann. § 33-31-1003(a)(2) (1976), as amended.) The GrassRoots membership voted overwhelmingly - one thousand three hundred two (1302) votes in favor to twenty-eight (28) votes opposed, (R. p. 116) - to change GrassRoots into a nonprofit corporation that will not have members, (R. pp. 107-108).

The South Carolina Code of Laws as explained above determines the respective rights of the parties herein. The trial court's Order, (R. pp. 8-9), which held that there are still members of GrassRoots who have rights of membership, is both an error of law and without evidentiary support as proven above. The Court should dismiss this case on the basis that Respondents have no rights of membership to assert against GrassRoots and thereby vacate the restraining order so as to allow Appellants to resume business, allow GrassRoots to file the amendment to its Articles of Incorporation, protect the privacy of

the GrassRoots' membership list, and vacate any requirement that a membership meeting be held.

III. The trial court erred in issuing an injunction that changed the status quo by silencing the political speech of Appellant corporation and essentially putting the Appellant corporation out of business pending a trial on the merits.

In *County of Richland v. Willie D. Simpkins, d/b/a Mr. Lucky's*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002), when Richland County attempted to shut down Mr. Lucky's prior to the case being tried on its merits, this Court stated:

> "the inherent purpose behind the equitable remedy of an injunction . . . [is] . . . to preserve the status quo. *See Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973) ('The sole purpose of a temporary injunction is to preserve the status quo . . . .'). '[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation . . . .' *County Council of Charleston v. Felkel*, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) (citations omitted). 'A temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction.' *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)."

Id. at 905. This Court of Appeals then refused to require Mr. Lucky's to be closed pending trial on the merits because protecting the status quo required allowing Mr. Lucky's to remain open for business just as it was prior to the injunction sought by Richland County.

In the present case, GrassRoots was actively involved in heated political speech on behalf of its membership during the legislative session. (R. pp. 109-112). Then, in the midst of this political battle, the trial court silenced the political speech of GrassRoots

and put GrassRoots out of business on April 8, 2011 with its Rule to Show Cause and Order.

Then, after all of the affidavits had been presented to the trial court at the April 18, 2011 hearing, Appellants' counsel explained the dire predicament in which the trial court had placed Appellants and asked for relief as follows:

> "Your Honor, we would ask that the restraining order prohibiting the directors from doing the business of GrassRoots be lifted. ***Obviously there are issues that come before the legislature that need to be addressed***, checks need to you know, bills need to be paid, phone calls need to be answered. Under the Court's current order, none of those things can happen." (R. p. 59, line 2-8) (emphasis added).

The trial court refused to lift the restraining order and stated it remained "in effect," (R. p. 61, lines 17-18), and thus continued to silence the political speech of GrassRoots and keep GrassRoots totally out of business.

Finally, the trial court failed to lift the restraining order in its Order dated May 16, 2011, which has served to continue to silence the political speech of GrassRoots and keep GrassRoots totally out of business. The trial court ruled that GrassRoots could return to business only after it made its corporate records available to the Respondents and after it held a membership meeting, (R. pp. 8 & 9), but doing such would cause this case to be moot as discussed hereinbelow. Thus, the trial court has silenced the political speech of GrassRoots and put GrassRoots out of business for the indefinite future prior to a trial on the merits, which is an abuse of discretion due to an error of law.

IV. The trial court erred in granting an injunction giving Respondents access to documents that Appellants seek to keep private and forcing Appellants to hold a membership meeting as a prerequisite to being allowed to return to business since that is precisely the ultimate relief the Appellants are asking for in their complaint, and such prerequisites would make the case moot.

In *Knight Pub. Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988), the Court stated "[t]he appealed order allows discovery of documents that respondents ultimately seek disclosed as the subject of these FOIA actions. This order is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976) because it in effect determines the action and prevents an appealable judgment." In the present case, the trial court's Order (although not involving a FOIA action) does exactly the same thing by requiring Appellants to turn over its private membership list, (R. p. 8), and to hold a membership meeting "as required by the statute," (R. p. 9). As a prerequisite to holding a membership meeting, a nonprofit corporation must make its membership list available for inspection, (R. p. 70 (Art. III, Sec. 7)), or inspection and copying, (S.C. Code Ann. § 33-31-720 (1976), as amended). Thus, the trial court's Order would force the release of the membership list in two different ways, which would make this case moot and "prevents an appealable judgment." *Knight Pub. Co. v. University of S.C.*, (supra). Because the trial court's Order, (R. pp. 8 & 9), to provide a membership list and to hold a membership meeting both "in effect determines the action and prevents an appealable judgment" it makes this case moot. Therefore, the injunction should be vacated.

V. The trial court erred in finding that the Respondents' demand for corporate records was in compliance with the South Carolina Nonprofit Corporation Act.

A. Member Has Burden to Inspect, Copy, and Deliver Documents

S.C. Code Ann. §§ 33-31-1602(a) and (b) (1976), as amended, state "a member is entitled to inspect and copy" the corporate records if the member "gives the corporation written notice [or a written demand (in S.C. Code Ann. § 33-31-1602(a) (1976), as amended, only)] at least five business days before the date on which the member wishes to inspect and copy" the records. These statutes place the burden of inspecting and copying records upon the member, not the corporation, and require the member to specify a date certain to do so. The record is devoid of the Respondent ever requesting an opportunity to "inspect and copy" any corporate records, nor did Respondent ever specify a date certain to do so. Instead, Respondent Looney demanded ("I Ed Looney demand the following information") that Appellants inspect, copy ("I am asking that these records be reproduced electronically on a Compact Disc in a commonly used digital format, MS Office or PDF"), and deliver ("I am allowing 10, (ten) days to comply with this demand even though the statutes say 5, (five) days is sufficient.") a long list of corporate documents to Respondent. (R. pp. 87-88). Respondent Looney recognized that his demand was a burden upon GrassRoots when he wrote "Grass Roots is a small organization and I do not wish to over burden them with the shorter timetable." (R. pp. 87-88). But, S.C. Code Ann. § 33-31-1602 (1976), as amended, does not allow a member to burden a small nonprofit corporation by directing how its limited resources shall be used. S.C. Code Ann. §§ 33-31-140(3) and 801(b) (1976), as amended, both provide that

the Board of Directors is responsible for directing how the corporation's resources shall be used, as do the Bylaws of GrassRoots, (R. p. 71 (Art. IV, Sec. 1)), which is why the statutes and the Bylaws place the burden upon the member to "inspect and copy" corporate records, not the corporation. Thus, Respondent Looney never complied with the South Carolina Nonprofit Corporation Act with his demand for corporate records, and the trial court committed an error of law and its finding was without evidentiary support that Respondent Looney had satisfied the requirements of S.C. Code Ann. § 33-31-1602 (1976), as amended. (R. pp. 5 & 8).

B. A Corporate Option, Not a Member Option

The trial court was in error as a matter of law when it held that S.C. Code Ann. § 33-31-1603(c) (1976), as amended, provides an option available to the member by which to contravene the express requirements found in S.C. Code Ann. § 33-31-1602 (1976), as amended, that the member bear the burden to "inspect and copy" corporate records and the trial court instead forces the burden to "inspect and copy" and deliver corporate documents upon the small nonprofit corporation. (R. p. 5). The trial court erred in its interpretation of S.C. Code Ann. § 33-31-1603(c) (1976), as amended, which states that "[t]he corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production or reproduction of the records." Defendants allege the option to provide copies of documents to a member rather than having the member come to the corporation to "inspect and copy" documents under S.C. Code Ann. § 33-31-1603 (1976), as amended, is an option that belongs to the corporation for the

corporation's convenience, not the convenience of the member, or else absurd and unintended consequences could follow.

C. Usurping Corporate Powers to Destroy the Corporation From Within

It is important to note that Respondents in this case pray for a dissolution of GrassRoots. (R. p. 17). No citation is needed to recognize that forced dissolution is something requested by a corporation's enemies, not a corporation's supporters. If the trial court's interpretation of S.C. Code Ann. § 33-31-1603 (1976), as amended, (R. p. 5), is allowed to stand, then multiple disgruntled members, or multiple enemy infiltrators, of a small nonprofit corporation engaged in political issue advocacy and run by volunteers could easily destroy the corporation from within. These corporate enemies could simply make multiple demands for various records upon the small nonprofit corporation and thereby force the corporation to use all of its limited volunteer resources doing clerical work for those who wish to see the corporation dissolved. People volunteer their time to help achieve the corporate mission, not to do the clerical work for corporate enemies. Taking volunteers away from working on the corporate mission could easily cause the volunteers to become discouraged and quit, and thereby further harm the corporation. But, both S.C. Code Ann. § 33-31-801(b) (1976), as amended, and GrassRoots Bylaws, (R. p. 71 (Art. IV, Sec. 1)), provide that the Board of Directors has the power and responsibility to direct how the resources of the corporation are used, not individual members. The trial court's interpretation of S.C. Code Ann. § 33-31-1603 (1976), as amended, would usurp the powers of the Board of Directors as provided for in both S.C.

Code Ann. § 33-31-801(b) (1976), as amended, and the GrassRoots Bylaws, (R. p. 71 (Art. IV, Sec. 1)), and aid corporate enemies in destroying a corporation from within.

On the other hand, the Appellants submit that the clear meaning of S.C. Code Ann. § 33-31-1603 (1976), as amended, is to: protect the right of a member to obtain corporate documents under S.C. Code Ann. § 33-31-1602 (1976), as amended; to facilitate the transfer of corporate documents by allowing the corporation to send documents when that would be more convenient than having a member come to inspect and copy documents; and to shield corporations from individuals who would seek to harm the corporation as hereinbefore described. Therefore, as a matter of public policy, this Court needs to direct the lower courts that S.C. Code Ann. § 33-31-1603 (1976), as amended, provides an option to be exercised only by the corporation.

D. Two Wrongs Do Not Make a Right

The trial court, using its erroneous interpretation of who owns the option to provide copies of documents instead of inspection under S.C. Code Ann. § 33-31-1603 (1976), as amended, then compounded its error by holding that a member's demand that the corporation inspect, copy, and deliver documents to the member was a valid request for documents under S.C. Code Ann. § 33-31-1602 (1976), as amended, (R. p. 5), in spite of the S.C. Code Ann. § 33-31-1602 (1976), as amended, requirement that the member bear the burden to "inspect and copy" documents.

The trial court also erred when it found that Appellant Kelleher's act of sending Respondent Looney some documents was an acknowledgment that S.C. Code Ann. § 33-31-1603 (1976), as amended, applied to all documents in this case. (R. p. 5). Respondent

Looney requested many documents, including "[a]ll written communications to members generally within the past three years," which would include newsletters sent to members. (R. pp. 87-88). The documents sent to Respondent Looney by Appellant Kelleher are available in the public domain, and were not sent out pursuant to S.C. Code Ann. § 33-31-1603 (1976), as amended. Appellants submit that it would go against the clear meaning of the statutes to hold, as the trial court did, that sending out newsletters and documents that are in the public domain could serve as the basis to force a nonprofit corporation to surrender otherwise private documents. Thus, it is error to find that Appellant Kelleher's act of sending documents available in the public domain to Respondent Looney entitled Respondents to documents not available in the public domain and thereby bring Respondent Looney into compliance with the South Carolina Nonprofit Corporation Act with his demand for private corporate records.

VI. The trial court erred in finding that Appellants conceded that Respondents were entitled to access to corporate documents and the membership list based upon Paragraph 15 of the Appellants' Answer and Counterclaim.

The trial court erred in finding that "Defendants concede that the Plaintiffs are entitled to access such documents and the defendants are willing to provide the Plaintiffs access for inspection and copying of those records, with the exception of the membership list. (R. p. 23 (Paragraph 15); R. p. 3). Plaintiffs originally demanded that Defendants "account for the financial activities of the corporation since its inception and should be required to produce all documents indicating the activities of the corporation since inception." (R. p. 16 (Paragraph 18)). Appellants responded to the Respondent's unreasonable demand for financial records since inception by pointing out that:

> "Section 33-31-1602 of the SC Code of Laws, as amended, and applicable Federal law only require the Defendants keep financial records for a period of three (3) years, that the defendants are willing and able to provide for the inspection and copying of those records by any member, or officer of this Court, but would allege that to impose a requirement in excess of the mandates of Section 33-31-1602 of the SC Code of Laws, as amended, would be unduly burdensome." (Answer and Counterclaim ¶ 15.)

As is obvious from a plain reading of Appellants' Answer and Counterclaim ¶ 15, Appellants' only concession was to allow "any member, or officer of this Court" to inspect and copy financial records for the last three years. The concession plainly only applied to financial records, it did not apply to any other records. The concession also only applied to "members" and officers of the Court. But, Respondents are no longer "members" of GrassRoots due to the vote of the membership as discussed hereinabove. Thus, the trial court's finding that Appellants conceded that Respondents have a right to corporate documents is without evidentiary support, and is an abuse of discretion. *See Ledford v. Penn. Life Ins. Co.*, (supra).

VII. The trial court erred in finding that Respondent Looney stated a "proper purpose" under S.C. Code Ann. § 33-31-1602 (1976), as amended, for seeking the corporate membership list and that S.C. Code Ann. § 33-31-1605 (1976), as amended, would not be violated by Respondent Looney's stated intention to share the membership list with others.

Respondent Looney's demand, (R. pp. 87-88), to be provided a copy of the membership list was not "for a proper purpose," (S.C. Code Ann. § 33-31-1602(c)(1) (1976), as amended), because on its face he openly stated he was going to share the membership list with others, (R. pp. 87-88). S.C. Code Ann. § 33-31-611(b) (1976), as amended, states "[n]o member of a public benefit ... corporation may transfer a membership or any right arising therefrom." Respondent Looney's right to "inspect and

copy" the membership list is a right arising from his status as a member of GrassRoots, and is personal to him as a member. (S.C. Code Ann. § 33-31-1602 (1976), as amended.) Thus, even if Respondent Looney's demand to inspect and copy had conformed to the requirements of S.C. Code Ann. § 33-31-1602(b) (1976), as amended, which it did not, and even if another GrassRoots member had made a proper demand which would have entitled that other member to inspect and copy the membership list, Respondent Looney is prohibited by S.C. Code Ann. § 33-31-611(b) (1976), as amended, from transferring his right to inspect and copy the membership list to others even if the "others" are themselves members. Violating S.C. Code Ann. § 33-31-611(b) (1976), as amended, cannot be a "proper purpose" under S.C. Code Ann. § 33-31-1602(c)(1) (1976), as amended. Appellants have a duty to their membership collectively to ensure that only a member obtains a copy of the membership list, and only for a proper purpose, (S.C. Code Ann. § 33-31-1602(c)(1) (1976), as amended), which can only be ensured if the corporation is the party distributing the membership list.

A membership list is a valid membership list only for a date certain since memberships are staggered throughout the year depending upon when a person joined, and not on a calendar year basis. Therefore, a membership list issued on a date certain could include members whose memberships expire the very next day. Thus, the only way to ensure that a member only gets the names and addresses of actual members is to require that the membership list be obtained from the corporation, not from other members. While S.C. Code Ann. § 33-31-611(b) (1976), as amended, should be interpreted to require that a member get a copy of the membership list only from the

corporation, Appellants submit that an interpretation of S.C. Code Ann. § 33-31-1605(3) (1976), as amended, that, "sold to or purchased by any person," includes transferring the membership list to others, and that such interpretation would best protect the membership list from abuse.

CONCLUSION

This case should have already been decided in favor of the Appellants because Respondent's entire case is premised upon the rights that Respondent possessed as members of GrassRoots, (S.C. Code Ann. §§ 33-31-1602 through 33-31-1605 (1976), as amended). But, Respondents are no longer members of GrassRoots because the GrassRoots membership voted to amend the articles of incorporation to change the corporate structure of GrassRoots from one with members into one without members as hereinbefore set forth. (R. pp. 90-115; R. p. 116; R. pp. 119-120). The change in corporate structure was done with the specific purpose of protecting the privacy of the GrassRoots membership. (R. pp. 107-112; R. pp. 119-120). S.C. Code Ann. § 33-31-1008 (1976), as amended, allows an amendment to the articles of incorporation to alter or extinguish the existing rights of members of a corporation, i.e., the Respondents in the present case. This should be and should have been all that was needed to determine the outcome of this case.

This case is before this Court now because the trial court erred when it failed to recognize that Appellants had included a copy of the proposed amendment to the articles of incorporation with the materials soliciting the mail-in ballot vote and thus found the mail-in ballot vote to be null and void. Not only was the trial court's finding without

evidentiary support, the evidence in the record clearly contradicted the trial court's finding with regard to the non-existence of the proposed amendment to the articles of incorporation. Appellants submit that they have complied with all the statutory and bylaw requirements to hold a valid mail-in ballot vote. Appellants respectfully request this Court to use its power to review the record and make findings of fact in accordance with its own view of a preponderance of the evidence and bring this case to an end now. Accordingly, Appellants request that this Court reverse the trial court's finding that its mail-in ballot vote was null and void and remand this case with instructions that the vote accomplished its purpose and that the Appellants be permitted to so amend its articles of incorporation.

The other issues on appeal become moot in this case if the Appellants prevail on the issue of the validity of the mail-in ballot vote to amend the articles of incorporation.

If this Court remands the present case, then Appellants respectfully request that this Court vacate the trial court's injunction which changed the status quo and silenced the political speech of GrassRoots and put GrassRoots out of business prior to a trial on the merits.

Furthermore, the Appellants respectfully request that this Court reverse the trial court's Order and remand this case with instruction that Appellants be afforded any and all relief as this Court deems just and proper.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2011-CP-32-1393

Clarence Edward Looney and
Grover E. Lown, Jr., ...Respondents,

v.

GrassRoots of South Carolina, Inc., Ed
Kelleher, Robert Butler, and Robert Holliday,.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I HEREBY CERTIFY, that the following documents were served on the attorney for the appellants by depositing a true and correct copy of the same in the United States Mail, with proper postage affixed thereto, on the 4th day of April, 2012, addressed as follows:

Documents: 1. Four (4) copies of Appellants' Final Brief

Addressee: S. Jahue Moore Attorney
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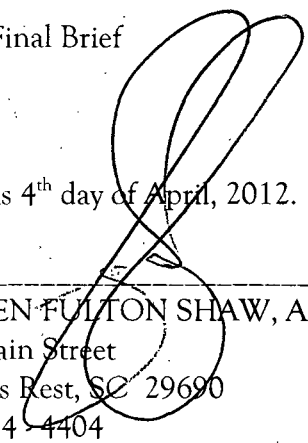
Filed this 4th day of April, 2012.



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