

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner III, Circuit Court Judge

Appellate Case No. 2018-000853

RECEIVED

FEB 08 2019

SC Court of Appeals

Ryan McAvoy..... Appellant.

v.

Hilton Head Island-Bluffton Chamber of Commerce, Respondent,

RECORD ON APPEAL

Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com
Attorneys for Appellant

Wm Grayson Lambert
S.C. Bar No. 101282
Burr & Forman, LLP
PO Box 11390
Columbia, SC 29211
(803) 753-3261
glambert@burr.com
Attorneys for Respondent

INDEX

Orders

Order Granting Motion to Dismiss (March 9, 2018) 1
Order Denying Motion to Reconsider (April 4, 2018) 9

Pleadings, Petitions, Affidavits, Notices, and Memoranda

Summons and Complaint (August 29, 2017) 13
Defendant’s Motion to Dismiss (January 19, 2018)..... 27
Defendant’s Memorandum in Support of Motion to Dismiss (January 19, 2018)... 30
Plaintiff’s Return to Motion to Dismiss (February 22, 2018) 55
Plaintiff’s Motion to Reconsider (March 19, 2018) 58
Defendant’s Opposition to Motion to Reconsider (March 27, 2018) 61
Plaintiff’s Notice of Appeal (May 4, 2018) 64

Transcripts

Transcript of Motion to Dismiss Hearing (February 27, 2018) 71

Certificate of Counsel

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Ryan McAvoy,)

Plaintiff,)

v.)

Hilton Head Island – Bluffton)
Chamber of Commerce,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-CP-07-01766

Order Granting
Motion to Dismiss

THIS MATTER came before this Court in Beaufort County on February 27, 2018, on the Defendant's motion to dismiss pursuant to Rule 12(b)(6), S.C.R.C.P. Upon review of the parties' filings and arguments, this Court GRANTS the Defendant's Motion to Dismiss pursuant to Rule 12(b)(6), S.C.R.C.P.

Factual Allegations

Ryan McAvoy submitted a membership application to the Chamber on June 15, 2016 along with the \$365 annual dues.¹ Compl. ¶ 8. In July, McAvoy received a letter welcoming him to the Chamber. Compl. ¶ 9. Then, on August 22, 2016, McAvoy demanded to inspect the Chamber's records, citing the Nonprofit Corporation Act. Compl. ¶ 11.

A week after this request, McAvoy received an email from the Chamber's controller informing McAvoy that he was not officially a member of the Chamber because the Chamber's Board had not yet approved his membership application, which meant that McAvoy did not yet have the right to inspect records. Compl. ¶ 12. Shortly after this email, McAvoy received a letter

¹ As it must, the Court accepts the well-pled allegations as true for purposes of this motion. See *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014).

from the Chamber stating that the Board had not approved his membership and returning the \$365 that McAvoy had submitted with his application. Compl. ¶ 13 & Ex. C.

McAvoy was never allowed to inspect the Chamber's records. Compl. ¶ 16. He never alleges that he received any further communication from the Chamber stating that his membership application had been accepted.

Legal Standard

A court must dismiss a complaint whenever the court lacks subject-matter jurisdiction. Rule 12(b)(1), S.C.R.C.P.; *see also Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). One requirement of subject-matter jurisdiction is standing. *Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). A plaintiff has three avenues to prove standing: "(1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). The party bringing a claim has the burden of establishing that he has standing. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

A court must also dismiss a complaint whenever it "fail[s] to state facts sufficient to state a cause of action." Rule 12(b)(6), S.C.R.C.P. A court must view the allegations and draw inferences in the light most favorable to the plaintiff, but even taking this approach, the court must dismiss the complaint if "the facts alleged in the complaint do not support relief under any theory of law." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

Analysis

McAvoy's claims all require that he is (or at least was) a member of the Chamber. His own allegations, however, make clear that one of the three requirements for membership was

never satisfied. Thus, he is not—nor was he ever—a Chamber member. His claims thus all fail as a matter of law.

I. McAvoy Is Not, and Never Was, a Chamber Member.

Corporations are creatures of state law and limited in what they may do by that law. *See Columbia & Greenville R. Co. v. Gibbes*, 24 S.C. 60, 69 (1885). The Chamber is a nonprofit corporation, subject to South Carolina’s Nonprofit Corporation Act. *See* S.C. Code § 33-31-101 *et seq.* Under South Carolina law, nonprofit corporations may have members. *See id.* § 33-31-601. How these members may join a nonprofit corporation is established by the corporation’s “articles or bylaws.” *Id.* § 33-31-601(a).

The Chamber’s bylaws set forth a specific, three-step procedure for admission.² *See* Chamber Bylaws, Article II, Section 3. First, an applicant must apply in writing. Second, an applicant must pay the annual dues. And third, an applicant must be approved by the Board.

Here, McAvoy’s own allegations make clear that only two of these three requirements were met. First, he alleges that he submitted the membership application. Compl. ¶ 8. That meets the first requirement. Second, he alleges that he paid the dues. Compl. ¶ 8. That meets the second requirement.

However, McAvoy fails to meet the third requirement. McAvoy alleges that he received both an email and a letter informing him that the Chamber’s Board had not yet approved his application. Compl. ¶¶ 12–13 & Ex. C. Having pled this fact in his complaint, he cannot escape it now. *See Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (“Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting

² McAvoy specifically references the Chamber’s bylaws in his complaint. *See* Compl. ¶¶ 17, 18. Therefore, this Court may consider those bylaws in deciding the motion to dismiss without converting the motion into one for summary judgment. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

evidence contrary to those assertions.”). The three requirements of the bylaws—which control how someone becomes a member of the Chamber, *see* S.C. Code § 33-31-601(a)—were not met here.

McAvoy attempts to avoid this conclusion by asserting that the Chamber only invoked its bylaws to avoid his request to inspect documents. This argument has no merit. Nowhere in the complaint does McAvoy allege that the Chamber does not follow its bylaws or used them nefariously in this case.

II. McAvoy’s Claims All Fail.

All of McAvoy’s claims require that he is, or at least was, a member of the Chamber. But McAvoy was never a member. None of his claims therefore can survive the Chamber’s motion to dismiss.

A. McAvoy Lacks Standing on His § 33-31-1604 Claim.

McAvoy’s first claim is for relief under § 33-31-1604, the provision of the Nonprofit Corporation Act that provides a remedy to a member whose inspection rights under § 33-31-1602 are wrongly denied.

Of the three types of standing, only statutory standing is potentially applicable to McAvoy’s claim that seeks relief under this statute. As our Supreme Court has explained, a plaintiff has statutory standing only “when a statute confers a right to sue on a party.” *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). “[D]etermining whether a statute confers standing is an exercise in statutory interpretation.” *Id.* The “cardinal rule of statutory construction is to ascertain and effectuate legislative intent.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). To do this, a court must first look to the words of a statute and give those words their plain meaning. *State v. Jacobs*, 393

S.C. 584, 587, 713 S.E.2d 621, 622 (2011). When a “statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.*

Section 33-31-1604 provides a remedy only to a “member” of a nonprofit corporation. *See* S.C. Code § 33-31-1604 (using “member” seven times in setting forth the remedy for a violation of § 33-31-1602); *see also id.* § 33-31-1602 (setting forth the right of inspection of a “member” of a nonprofit corporation); *id.* § 33-31-140(23)(a) (defining who is a “member” of a nonprofit corporation). Someone who is not a member of a nonprofit corporation thus has no standing under this statute.

This is the exact conclusion that another court in this state has recently reached when faced with this same question. In *Hoagland v. Beaufort Regional Chamber of Commerce*, No. 2017-CP-07-1825, the court dismissed a claim under § 33-31-1604 for lack of standing because the plaintiff was not a member of the nonprofit corporation.

Similar to *Hoagland*, McAvoy was not a member of the corporation whose records he sought to inspect under § 33-31-1062. He therefore has no standing to invoke § 33-31-1604.

B. The Negligence *Per Se* Claim Fails for Multiple Reasons.

McAvoy’s second claim is negligence *per se*, based on the Chamber’s alleged violation of § 33-31-1602.

This claim must be dismissed for multiple reasons. First, as discussed in Part II.A., McAvoy had no right of inspection under § 33-31-1062 because he was not a member. Thus, the Chamber could not have violated the Nonprofit Corporation Act by denying McAvoy the right to inspect its records.

Second, the statutory remedy of § 33-31-1604 is the exclusive remedy for a violation of a member's inspection rights under § 33-31-1602. Under South Carolina law, when a statute creates a right and prescribes the remedy for enforcing it, that statutory remedy is exclusive unless the statute clearly shows a contrary intent by the General Assembly. *See Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992); *see also Petition of State ex rel. Hutchinson*, 182 S.C. 369, 189 S.E. 475, 477 (1937); *Bethea v. Allen*, 101 S.C. 350, 85 S.E. 903, 905 (1915). In other words, a plaintiff cannot transmute a statutory claim into a tort claim.

The South Carolina Nonprofit Corporation Act does not contain any showing that the General Assembly intended for a member to have anything other than the statutory remedy for inspection rights. If a member's remedy for a right against a corporation were to go beyond what is explicitly set forth in a statute, then the statute would have to say so. The statute here does not, so McAvoy is limited to the statutory remedy of § 33-31-1604, which, as previously discussed, he does not have because he is not a member.

C. McAvoy's Declaratory Judgment Claims Are Defeated by the Allegations in His Complaint.

McAvoy's last two claims are in the alternative. One seeks a declaration that he is still a member of the Chamber. The other seeks a declaration that, if he is not still a member, that his membership was wrongly terminated. Both claims are premised on the contention that McAvoy was, at some point, elected to membership in the Chamber.

As McAvoy admits in his complaint, the Board never approved his membership. *See supra* Part I. The Board's approval is required by the bylaws for an applicant to become a member. *See* Chamber Bylaws, Article II, Section 3. And the bylaws set the requirements for membership. *See* S.C. Code § 33-31-601(a).

Given that McAvoy was never elected to membership, then he cannot prevail on a claim for a declaratory judgment that he is a member. Similarly, he cannot prevail on a claim for a declaratory judgment that membership was wrongly terminated, because he never had any membership that could have been terminated.

Conclusion

The Chamber's motion is **GRANTED**, and the complaint is dismissed with prejudice.

IT IS SO ORDERED!

The Honorable Perry M. Buckner, III
Circuit Court Judge

March __, 2018

Walterboro, South Carolina



Beaufort Common Pleas

Case Caption: Ryan Mcavoy VS Hilton Head Island Bluffton Chamber Of
Commerce
Case Number: 2017CP0701766
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-03-09 09:28:28 page 8 of 8

ELECTRONICALLY FILED - 2018 Mar 09 12:50 PM - BEAUFORT - COMMON PLEAS - CASE#2017CP0701766

prior ruling. Therefore, this Court hereby respectfully **DENIES** McAvoy's Rule 59 and Rule 52 Motion in its entirety, and affirms the previous Order of Dismissal.

I. The Court's Decision on the Motion to Dismiss Was Correct.

McAvoy's motion to reconsider asks this Court to reconsider the Court's analysis on whether McAvoy had sufficiently pled that he was a member of the Chamber.

A. The Court May Consider the Bylaws.

McAvoy argues that the Court cannot rely on the Chamber's bylaws in deciding the motion to dismiss. *See* Mot. to Reconsider 2.

Generally, in considering a 12(b) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *see Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). There, the South Carolina Supreme Court observed that a court may not look to "matters outside the pleadings" in deciding a Rule 12(b) motion. *Id.* at 527, 511 S.E.2d at 73. However, the South Carolina Supreme Court's holding a decade later in *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), in which the Court explained that a trial court may consider a document referenced in the complaint but not attached to in deciding a Rule 12(b)(6) motion.

That is what the Court did here. McAvoy referenced the bylaws in Paragraphs 17 and 18 of his complaint. *See* Compl. ¶¶ 17, 18. The Court may therefore consider the bylaws when deciding whether McAvoy's claims survive a Rule 12(b)(6) motion.

B. McAvoy Was Not a Member of the Chamber.

McAvoy contends that he has sufficiently alleged that he is a member of the Chamber. The cornerstone of McAvoy's argument is that the "bylaws cannot confer membership" in the Chamber. Mot. to Reconsider 2. The Nonprofit Corporation Act states that the "articles or

bylaws may establish criteria or procedures for the admission of members” in a nonprofit corporation. S.C. Code § 33-31-1601(a).

The Chamber’s bylaws have three requirements for membership: (1) a written application; (2) payment of annual dues; and (3) approval of the application by the Chamber’s board. McAvoy admitted in his complaint that the third requirement was never met. *See* Compl. ¶¶ 12–13 & Ex. C. Thus, McAvoy was never a member of the Chamber, his conclusory allegations to the contrary notwithstanding. *See, e.g., Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (recognizing that a plaintiff cannot survive a motion to dismiss based on conclusory allegations in the complaint).

Conclusion

The Plaintiff’s motion to reconsider is respectfully **DENIED**.

IT IS SO ORDERED!

The Honorable Perry M. Buckner, III
Fourteenth Judicial Circuit

April __, 2018
Walterboro, South Carolina



Beaufort Common Pleas

Case Caption: Ryan Mcavoy VS Hilton Head Island Bluffton Chamber Of
Commerce
Case Number: 2017CP0701766
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-04-04 12:26:40 page 4 of 4

ELECTRONICALLY FILED - 2018 Apr 04 1:40 PM - BEAUFORT - COMMON PLEAS - CASE#2017CP0701766

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO. 2017-CP-07-_____

Ryan McAvoy,

Plaintiff,

vs.

Hilton Head Island – Bluffton Chamber
of Commerce,

Defendant.

**SUMMONS
(JURY TRIAL DEMANDED)**

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint upon the subscriber, at his office, P. O. Box 50143, Columbia, South Carolina 29250, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

/s/ Taylor M. Smith IV
Taylor M. Smith IV
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
August 29, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

CASE NO. 2016-CP-07-_____

Ryan McAvoy,

Plaintiff,

vs.

**Hilton Head Island – Bluffton Chamber
of Commerce,**

Defendant.

**COMPLAINT
(JURY TRIAL DEMANDED)**

The Plaintiff, complaining of the Defendant herein, alleges:

1. Plaintiff Ryan McAvoy (hereinafter "Plaintiff") is a resident of Beaufort County.
2. Defendant Hilton Head Island – Bluffton Chamber of Commerce (hereinafter "Defendant") is a nonprofit corporation, registered with the South Carolina Secretary of State to do business in South Carolina, with its principal place of business in Beaufort County.
3. This Court possesses jurisdiction of this matter under S.C. Code Ann. § 33-31-1604, specifically, the South Carolina Nonprofit Corporation Act of 1994, § 33-31-101 et. seq., (hereinafter "the Act") generally, and the common law of this state.
4. The Act provides that a nonprofit corporation must keep and maintain certain records, including: permanent records of all meeting minutes, actions taken by the members or directors without a meeting, appropriate accounting records, and records/lists of all its members, along with copies of certain enumerated records, which must be kept at the corporation's principal place of business. S.C. Code Ann. § 33-31-1601.
5. "A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time." Id.

6. The Act also provides that a member of nonprofit corporation “is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.” S.C. Code Ann. § 33-31-1602.

7. The Act provides that upon a written notice certain records must be made available for inspection or duplication. Id.

8. On June 15, 2016, Plaintiff became a member of the Defendant nonprofit corporation when he was granted membership in the Defendant Hilton Head Island – Bluffton Chamber of Commerce upon payment of \$365.00, the amount of annual membership dues in the organization. Defendant provided Plaintiff a receipt for this transaction, a copy of which is attached hereto as Exhibit A.

9. The Plaintiff is and at all times material to this case has been a member of the Defendant nonprofit corporation.

10. In July 2016, Plaintiff received correspondence from Defendant welcoming him and his company, Lincoln Wood, to membership in Defendant’s organization. A copy of one such letter is attached hereto as Exhibit B.

11. On August 22, 2016, Plaintiff provided written notice via email and certified U.S. Mail to Defendant of his demand to inspect and copy certain records of Defendant, pursuant to the Act.

12. Defendant initially replied via email on August 29, 2016 to Plaintiff’s written notice.

Ray Deal, controller for Defendant, wrote:

We have received your request for certain documents under the South Carolina Nonprofit Act. You are not yet a member of the Hilton Head Island-Bluffton Chamber of Commerce. Your application to be a member is pending approval by the board of directors. Because you are not yet a member of the Chamber, you are not entitled to the requested information under the Nonprofit Act. Therefore, the

Chamber will not be providing you the requested information at this time. Please let me know if you have any questions.

13. In early September 2016, Defendant mailed Plaintiff a letter stating that the bylaws of the Hilton Head Island – Bluffton Chamber of Commerce required that all new members be approved by the board of directors and that Plaintiff's membership had not yet been approved. A copy of the letter, which enclosed a \$365 check payable to Plaintiff, is attached hereto as Exhibit C.

14. The Defendant has treated the Plaintiff as being a member of the Defendant nonprofit corporation. Plaintiff has repeatedly received communications sent by the Defendant since fall 2016 which have explained the benefits of Plaintiff being a member of Defendant, the ongoing marketing efforts of Defendant in promoting local businesses and the area generally, and other activities of the organization.

15. Plaintiff has not received any further communication from Defendant regarding his request and demand to inspect and copy records of Defendant, pursuant to the Act.

16. Plaintiff has been given no opportunity to inspect and copy records of Defendant.

17. Upon information and belief, neither Defendant's Bylaws nor Articles of Incorporation abolish or otherwise limit a member's rights under the Act to inspect and copy any corporate record of Defendant.

18. The Defendant's Bylaws nor Articles of Incorporation cannot abolish or otherwise limit a member's rights under the Act to inspect and copy any corporate record of Defendant.

19. Defendant has exhibited a pattern of behavior designed to minimize transparency and awareness of the internal affairs of the Hilton Head Island – Bluffton Chamber of Commerce.

20. This effort to minimize transparency has been directed both to Defendant's own members and to members of the public generally.

21. The Defendant desires to keep its doings secret.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Violation of Records Inspection Rights)

22. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

23. There is a justiciable controversy between the Plaintiff and the Defendant with regard to whether the Defendant violated the Act when it denied Plaintiff the ability to inspect and copy records, pursuant to his request and demand for such an opportunity, within a reasonable amount of time.

24. The Defendant violated the Act when it denied Plaintiff the ability to inspect and copy records, pursuant to his request and demand for such an opportunity, within a reasonable amount of time.

25. Plaintiff is entitled to a declaratory judgment, under S.C. Code of Laws Ann. § 33-31-1604, that Defendant violated the Act when it denied Plaintiff the ability to inspect and copy records, pursuant to his request and demand for such an opportunity, within a reasonable amount of time.

26. Plaintiff is entitled to an order, under S.C. Code of Laws Ann. § 33-31-1604, that Plaintiff, and his attorney or agent, may inspect and copy the requested records of Defendant at the corporation's principal place of business at Defendant's expense.

27. Plaintiff is further entitled to an award of attorney's fees and costs, under § 33-31-1604, for having to bring this action to enforce his rights.

28. Plaintiff is entitled to a declaratory judgment that Defendant's violation of his rights under the Act was willful or, in the alternative, reckless.

FOR A SECOND CAUSE OF ACTION
(Negligence Per Se)

29. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

30. The Defendant owed a duty to Plaintiff to comply with the Act.

31. The Plaintiff is a member of the class of people – members of nonprofit corporations – that the records inspection requirements of the Act were created to protect.

32. Defendant violated its duty to the Plaintiff by not affording him his statutory rights under the Act, the rights of membership within the organization, or possibly, by unlawfully terminating his membership in Defendant’s organization.

33. That the denial of Plaintiff’s rights was the direct and proximate cause of the damage suffered by Plaintiff herein.

34. That as the direct and proximate result of Defendant’s negligence and willful violation of the Act, Plaintiff suffered damages.

35. Plaintiff is informed and believes that he is entitled to judgment against Defendant for actual and punitive damages and such other relief as the Court may deem just and proper.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment – Plaintiff is a Member of Defendant Organization)

36. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

37. There is a justiciable controversy between the Plaintiff and the Defendant with regard to whether the Plaintiff is a member of the Hilton Head Island – Bluffton Chamber of Commerce.

38. Plaintiff is a member of the Hilton Head Island – Bluffton Chamber of Commerce.

39. Plaintiff is entitled to a declaratory judgment that Plaintiff is a member of the Hilton Head Island – Bluffton Chamber of Commerce.

FOR A FOURTH CAUSE OF ACTION

(Declaratory Judgment – In the Alternative, Defendant Improperly Terminated Membership)

40. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

41. The Act provides in S.C. Code Ann. § 33-31-621(a) that “[n]o member of a public benefit or mutual benefit corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith.”

42. Plaintiff is informed and believes he is a member of the Hilton Head Island – Bluffton Chamber of Commerce; however, if it is determined that Plaintiff is not a member, then Plaintiff is entitled to a declaratory judgment that Defendant violated the Act when it terminated Plaintiff’s membership.

43. Specifically, Plaintiff is entitled to a declaratory judgment that if Defendant terminated Plaintiff’s membership, it did so using a procedure that was neither fair nor reasonable and was carried out in bad faith to prevent Plaintiff’s exercise of a statutory right.

WHEREFORE, the Plaintiff prays:

- (a) For an order of this Court declaring: (1) that Plaintiff is a member of the Hilton Head Island – Bluffton Chamber of Commerce, (2) Defendant violated the Act when it denied Plaintiff the ability to inspect and copy records within a reasonable time, and (3) that Plaintiff may inspect and copy the requested records of Defendant at the corporation’s principal place of business at Defendant’s expense;
- (b) In the alternative, for an order of this Court declaring: 1) Defendant violated the Act when it denied Plaintiff the ability to inspect and copy records within a reasonable

time, (2) that Plaintiff may inspect and copy the requested records of Defendant at the corporation's principal place of business at Defendant's expense, and (3) Defendant terminated Plaintiff's membership using a procedure that was neither fair nor reasonable and was carried out in bad faith to prevent Plaintiff's exercise of a statutory right;

- (c) To grant Plaintiff his costs and attorneys' fees under S.C. Code Ann. § 33-31-1604;
- (d) For an award of actual and punitive damages;
- (e) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Taylor M. Smith IV
Taylor M. Smith IV
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
August 29, 2017

Exhibit A

RECEIVED

DATE 6/15/16 No. 332588

FROM Beverly Maloney \$ 365.00

Hilton Head Island Bluffton Chamber DOLLARS

FOR RENT
 FOR 1 yr membership

ACCT	1
PAID	365.00
DUE	

CASH FROM _____ TO _____

CHECK

MONEY ORDER BY B. Maloney

1152

Exhibit B

HILTON HEAD ISLAND • BLUFFTON
CHAMBER OF COMMERCE

July 6, 2016

Lincoln Wood
Ryan McAvoy
29 Anchorage Point
Hilton Head, SC 29928

Dear Ryan,

It's a pleasure to welcome you to the Hilton Head Island-Bluffton Chamber of Commerce. You're an integral part of an organization that is 1,600 members strong and growing.

You've chosen to be part of a chamber that not-once, but three times has been honored as the National Chamber of the Year. What does that mean to you? It means that the member benefits and impactful programs you'll find with your chamber are second-to-none in the nation and consistently set the benchmark for other chambers nationwide.

Our members have told us that networking, exposure for their business and marketing opportunities are their top reasons for joining our organization. As a result, we offer over sixty (60) events and programs each year designed to connect the business community and help you grow your client base. There are opportunities for exposure and marketing at every turn through your chamber membership.

To learn more about your chamber of commerce, visit the chamber's website, www.hiltonheadblufftonchamber.org. Our destination website, www.hiltonheadisland.org is a comprehensive resource for dining, shopping and things to do in our community.

Another site you may wish to utilize is www.thinkhiltonheadisland.org which is an excellent source of economic and business metrics for our area. Registration is required to gain access to premium content. You will be asked to submit the personal account number for **Lincoln Wood** which is **00057703**.

I encourage you to get involved and maximize your membership. Don't hesitate to call me or anyone on our chamber staff to let us know how we can meet your needs and exceed your expectations.

Sincerely yours,


William G. Miles, IOM, CCE
President & CEO

Thank you!

Exhibit C

September 1, 2016

Ryan McAvoy
Lincoln Wood
29 Anchorage Point
Hilton Head Island, SC 29928

Dear Ryan,

As we discussed today, the Hilton Head Island-Bluffton Chamber of Commerce board of directors met on August 30, 2016 for its regularly scheduled meeting. During the meeting, the board tabled the approval of your Lincoln Wood membership. The membership application is being forwarded to the board's executive committee for review.

Our bylaws require that all new members must be approved by the board of directors. Due to the fact that you are not currently a member, no dues are owed by you, and the Chamber cannot accept any payment for dues on your behalf. The board of directors asked me to return your check to you. Therefore, check number 32685 in the amount of \$365 is enclosed.

Sincerely yours,



William G. Miles, IOM, CCE
President & CEO

WGM/ck

Enclosure

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	Civil Action No.: 2017-CP-07-01766
)	
Ryan McAvoy,)	
)	
Plaintiff,	)	Motion to Dismiss
)	
v.)	
)	
Hilton Head Island – Bluffton)	
Chamber of Commerce,)	
)	
<u>Defendant.</u>)	

The Hilton Head Island – Bluffton Chamber of Commerce (“Chamber”) moves to dismiss the complaint pursuant Rules 12(b)(1) and 12(b)(6), SCRCF.

First, McAvoy lacks standing to pursue a claim under S.C. Code § 33-31-1604 because he is not and never was a member of the Chamber. Second, McAvoy’s negligence *per se* claim fails both because it merely recasts his statutory claim as a tort claim and because he lacks standing. Third, McAvoy’s two declaratory judgment claims about his alleged membership fail as a matter of law because the allegations in his complaint make clear that the three requirements in the Chamber’s bylaws for membership were not all satisfied.

This Motion is made on the grounds stated in the Motion, the law of South Carolina, and the memorandum that is to be submitted in support of the Motion.

WHEREFORE, the Chamber moves that the Court dismiss the complaint and award the Chamber its costs and any other such relief as the Court may find appropriate.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

Benjamin E. Nicholson, V
S.C. Bar No. 10137
Wm. Grayson Lambert
S.C. Bar No. 101282
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net
glambert@mcnair.net

By: s/ Wm. Grayson Lambert

Attorneys for the Defendant

January 19, 2018
Columbia, South Carolina

I certify that no consultation is needed on this dispositive motion.

s/ Wm. Grayson Lambert
Wm. Grayson Lambert

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

Ryan McAvoy,)
)
)
Plaintiff,)
)
)
v.)
)
Beaufort Regional Chamber)
of Commerce,)
)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2017-CP-07-01766

CERTIFICATE OF SERVICE

I do hereby certify that I served the foregoing **MOTION TO DISMISS** upon counsel for the Plaintiff in the above-captioned matter, by filing the document electronically and having the document served upon the Plaintiff's counsel by virtue of the court's electronic filing system this 19th day of January, 2018:

s/ Wm. Grayson Lambert

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT	)	Civil Action No.: 2017-CP-07-01766
)	
Ryan McAvoy,)	
)	
Plaintiff,	)	Chamber's Memorandum in
	)	Support of Motion to Dismiss
)	
v.)	
)	
Hilton Head Island – Bluffton)	
Chamber of Commerce,)	
)	
<u>Defendant.</u>)	

The Hilton Head Island – Bluffton Chamber of Commerce (“Chamber”) respectfully submits this memorandum in support of its motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6), SCRCP.

Introduction

Other than some dates and names, Ryan McAvoy’s complaint is remarkably similar to the lawsuit that Skip Hoagland—a vocal critic of chambers of commerce—recently filed against the Beaufort Regional Chamber of Commerce. Hoagland’s lawsuit was dismissed, and McAvoy’s should be too.

The fundamental problem with McAvoy’s complaint is that it is premised on his contention that he was (or even still is) a member of the Chamber. That contention is wrong. McAvoy’s own allegations make clear that the three requirements for membership were never all satisfied. Therefore, he was never a member. And without being a member, none of his claims has any merit.

Factual Allegations

Ryan McAvoy alleges that he joined the Chamber on June 15, 2016 by paying the \$365 annual dues, for which he received a receipt.¹ Compl. ¶ 8. In July, McAvoy received a letter welcoming him to the Chamber. Compl. ¶ 9. Then, on August 22, 2016, McAvoy demanded to inspect the Chamber's records, citing the Nonprofit Corporation Act. Compl. ¶ 11.

A week after this request, McAvoy alleges that he received an email from Ray Deal, the Chamber's controller, informing McAvoy that he was not officially a member of the Chamber because the Chamber's Board had not yet approved his membership application, which meant that McAvoy did not yet have the right to inspect records. Compl. ¶ 12. Shortly after this email, McAvoy received a letter from the Chamber informing him that the Board had not approved his membership and returning the \$365 that McAvoy had submitted to pay the annual dues. Compl. ¶ 13. McAvoy was never allowed to inspect the Chamber's records. Compl. ¶ 16.

Based on these allegations, McAvoy asserts four claims. *First*, he brings a claim pursuant to the Nonprofit Corporation's Act provision in S.C. Code § 33-31-1604 that permits a court to order a corporation to allow a member to inspect its records. *Second*, McAvoy alleges a negligence *per se* action, based on § 33-31-1604. *Third*, he seeks a declaration that he is a member of the Chamber. *Fourth*, as an

¹ As it must, the Chamber accepts the well-pled allegations as true for purposes of this motion only. *See, e.g., Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014).

alternative to his third claim, McAvoy asks this Court to declare that his membership in the Chamber was wrongly terminated.

Legal Standard

A court must dismiss a complaint whenever the court lacks subject-matter jurisdiction. Rule 12(b)(1), SCRCP; *see also Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). One requirement of subject-matter jurisdiction is standing. *Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). A plaintiff has three avenues for proving standing: “(1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.” *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). The party bringing a claim has the burden of establishing that he has standing. *See Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

A court must also dismiss a complaint whenever it “fail[s] to state facts sufficient to state a cause of action.” Rule 12(b)(6), SCRCP. A court must view the allegations and draw inferences in the light most favorable to the plaintiff, but even taking this approach, the court must dismiss the complaint if “the facts alleged in the complaint do not support relief under any theory of law.” *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

Argument

The cornerstone of McAvoy’s entire complaint is that he was—and still is—a member of the Chamber. That cornerstone, however, rests on a foundation of sand,

crumbling with the slightest prodding. McAvoy is not, nor has he ever been, a member of the Chamber. Although he conclusorily alleges that he is a member, his specific factual allegations make clear that he is not. Because he is not a member, he has no right to inspect any records, and he cannot obtain any declaration from this Court about his alleged membership.

I. McAvoy Is Not a Chamber Member.

Pursuant to state law, nonprofit corporations may have members. *See* S.C. Code § 33-31-601. As that law makes clear, “[t]he articles or bylaws may establish criteria or procedures for the admission of members.” *Id.* § 33-31-601(a).

The Chamber’s bylaws set forth a specific, three-step procedure for admission:²

Applications for membership shall be in writing, on forms provided for that purpose, and signed by the applicant. Election of members shall be by the Board of Directors at any meeting thereof. Any applicant so elected shall become a member upon payment of the regularly scheduled investment as provided in Section 3 of Article II.

Chamber Bylaws, Article II, Section 3. First, an applicant must apply in writing. Second, an applicant must pay the annual dues. And third, an applicant must be approved by the Board.

² McAvoy specifically references the Chamber’s bylaws in his complaint. *See* Compl. ¶¶ 17, 18. Therefore, this Court may consider those bylaws, which are attached here, in deciding the motion to dismiss without converting the motion into one for summary judgment. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009). A copy of the by-laws is attached to this Memorandum for the Court’s convenience.

Here, by McAvoy's own allegations (which are, of course, binding on him, *see Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.")), these three steps were not all completed. Although he alleges that he satisfied the first two requirements of members by submitting an application and paying the dues, McAvoy admits in his complaint that the Board never elected him to membership. *See* Compl. ¶¶ 12–13. Therefore, under the Chamber's bylaws, he could not have been a member.

That McAvoy claims he "became a member" in June 2016 by submitting the application and paying the dues, *see* Compl. ¶ 8, received a letter welcoming him to the Chamber, *see* Compl. ¶ 9, or was "treated" as a member, *see* Compl. ¶ 14, is of no import. The Nonprofit Corporation Act makes plain that the *bylaws* set the procedure for membership. *See* S.C. Code § 33-31-601(a). The requirements in the Chamber's bylaws were not met in McAvoy's case, so he never was a member—no matter what else he alleges.

II. McAvoy's Claims All Fail.

All of McAvoy's claims require that he is, or at least was, a member of the Chamber. As detailed in Part I, McAvoy was never a member. His claims therefore have no merit and should be dismissed.

A. McAvoy Lacks Standing on His § 33-31-1604 Claim.

Of the three types of standing, only statutory standing is potentially applicable to McAvoy's claim that seeks relief under a particular statute. As our

supreme court has explained, a plaintiff has statutory standing only “when a statute confers a right to sue on a party.” *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

“[D]etermining whether a statute confers standing is an exercise in statutory interpretation.” *Id.* The “cardinal rule of statutory construction is to ascertain and effectuate legislative intent.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). To do this, a court must first look to the words of a statute and give those words their plain meaning. *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). When a “statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.*

Section 33-31-1604 provides a remedy to a “member” of a nonprofit corporation who sought to inspect records pursuant to § 33-31-1602 but was wrongly denied. Section 33-31-1604 provides in full:

(a) If a corporation does not allow a member who complies with Section 33-31-1602(a) to inspect and copy any records required by that subsection to be available for inspection, the circuit court in the county where the corporation’s principal office in this State, or, if none in this State, its registered office, is located may summarily order inspection and copying of the records demanded at the corporation’s expense upon application of the member.

(b) If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with Section 33-31-1602(b) and (c) may apply to the circuit court in the county where the corporation’s principal office in this State, or if none in this State, its registered office, is located for an order to permit inspection and copying of the records demanded.

The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it also shall order the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member.

S.C. Code § 33-31-1604.

The Nonprofit Corporation Act, in turn, defines a "member" as someone who is "entitled, pursuant to a domestic or foreign corporation's articles or bylaws . . . to vote on more than one occasion for the election of a director or directors or any other matter which under the terms of this chapter requires approval by the members."

Id. § 33-31-140(23)(a).

Given that § 33-31-1604 uses "member" seven times in its mere four paragraphs, the statute leaves no doubt that the only person who has standing under it is someone who is a member of a nonprofit corporation. Someone who has merely applied for membership is not yet a member, as that person would have no right to vote on corporate matters.

Indeed, that § 33-31-1604 applies only to members is the very conclusion that the court reached in *Hoagland v. Beaufort Regional Chamber of Commerce*, No.

2017-CP-07-1825. In dismissing that similar case in December 2017,³ the court held that § 33-31-1604 provides a remedy only for current members of a nonprofit corporation. Because Hoagland was a former member and the time for him to challenge the termination of his membership had expired, he had no standing to pursue a claim under § 33-31-1604.

McAvoy has a similar problem as Hoagland. Like Hoagland, McAvoy is not a member. And McAvoy never was. That means that he has no claim under § 33-31-621(d) (the provision that allows someone to challenge the termination of his membership) that he could use to tag along a challenge under § 33-31-1604 with a challenge to a termination. *See infra* Part II.C. After all, someone who was never a member cannot have been terminated as a member. McAvoy thus does not have standing to bring a claim under § 33-31-1604.

B. The Negligence *Per Se* Claim Fails for Two Separate Reasons.⁴

1. McAvoy Cannot Transmogrify a Statutory Claim into a Common-Law Tort.

McAvoy's negligence claim is fatally flawed because he has taken a statutory claim under § 33-31-1604 and contorted it into a common-law negligence claim.

In other words, McAvoy's negligence *per se* claim is simply redundant of his § 33-31-1604 claim. The negligence claim turns entirely on whether the Chamber violated § 33-31-1602 (which sets for the procedure for what and how a member

³ A copy of the court's order granting the motion to dismiss in that case is attached for the Court's convenience.

⁴ This claim fails regardless of whether McAvoy was ever a member of the Chamber.

may inspect a nonprofit corporation's records) and McAvoy is thus entitled to relief under § 33-31-1604. That is, the "duty" that McAvoy claims the Chamber owed him is what the statute requires, *see* Compl. ¶ 30, and a "breach" of that "duty" is nothing more than the declaration that the Chamber wrongly denied McAvoy the ability to inspect its records as allowed by the statute, *see* Compl. ¶ 32. Indeed, McAvoy makes this plain by labeling this claim as "negligence *per se*," which by definition means that the negligence claim is based on a violation of a statute. *See Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) ("Negligence *per se* is negligence arising from the defendant's violation of a statute.").

This redundancy illustrates why McAvoy's only remedy is the one provided by the South Carolina Nonprofit Corporation Act and why his negligence *per se* claim has to be dismissed. Under South Carolina law, when a statute creates a new right and prescribes the remedy for enforcing it, that statutory remedy is exclusive unless the statute clearly shows a contrary intent by the General Assembly. *See Daniel v. Conestee Mills*, 183 S.C. 337, 191 S.E. 76, 79 (1937); *Petition of State ex rel. Hutchinson*, 182 S.C. 369, 189 S.E. 475, 477 (1937); *Bethea v. Allen*, 101 S.C. 350, 85 S.E. 903, 905 (1915).

The South Carolina Nonprofit Corporation Act contains nothing whatsoever that would even hint—much less clearly show—that the General Assembly intended for a member to have anything other than the statutory remedy for inspection rights. Limiting members to the statutory remedy of § 33-31-1604 makes

sense, given that corporations have always been creatures of statute, limited in what they can do by what a state permits them to do. *See, e.g., Columbia & Greenville R. Co. v. Gibbes*, 24 S.C. 60, 69 (1885) (“All corporations are artificial bodies, merely creatures of the State; and as the State may or may not call them into existence, so she may limit their existence and mold and form them in precise accordance with her view of what is right or politic. A corporation, therefore, is purely statutory.”). If a member’s remedy related to a right against a corporation were to go beyond what is explicitly set forth in a statute, then the statute would have to say so. The statute here does not, so McAvoy is limited to the statutory remedy of § 33-31-1604. His negligence *per se* claim should therefore be dismissed.

2. McAvoy Lacks Standing on His Negligence Claim.

Because the statutory remedy of § 33-31-1604 is exclusive, McAvoy also has a standing problem with his negligence claim. This common-law claim would require him to show constitutional standing.

Constitutional standing requires a plaintiff to meet three elements: “(1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769–70 (2016) (internal quotation marks omitted).

McAvoy cannot meet this last element. The U.S. Supreme Court, from which the South Carolina Supreme Court drew this three-part test, *see id.* (quoting *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992)), has explained that the redressibility requirement demands that a plaintiff “personally . . . benefit in a tangible way from the court’s intervention,” *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *cf. Sea Pines Ass’n for Prot. of Wildlife, Inc.*, 345 S.C. at 602–03, 550 S.E.2d at 292 (explaining that when even a favorable decision from a court cannot provide relief, then the plaintiff has not met his burden of proving standing). As explained in Part II.B.1., the statutory remedy is exclusive. This Court cannot fashion some other, nonstatutory remedy. Thus, even if McAvoy could somehow prove that he was injured by the Chamber, he cannot obtain any relief from this Court to remedy that harm through a tort claim. He therefore lacks standing to pursue that tort claim.

C. McAvoy’s Declaratory Judgment Claims about His Membership Fail Because He Was Never a Member.

McAvoy’s last two claims are in the alternative. One seeks a declaration that he is still a member of the Chamber. The other seeks a declaration that, if he is not still a member, that he was wrongly terminated. Both claims are premised on the contention that McAvoy was elected to membership in the Chamber.

But McAvoy was never elected as a member. As he admits in his complaint, the Board never approved his membership. *See* Compl. ¶¶ 12–13. The Board’s approval is required by the bylaws. *See* Chamber Bylaws, Article II, Section 3. And the bylaws set the requirements for membership. *See* S.C. Code § 33-31-601(a).

Given that McAvoy was never elected to membership, then he obviously not prevail on a claim for a declaratory judgment that he is a member. Similarly, he

cannot prevail on a claim for a declaratory judgment that membership was wrongly terminated because he never had any membership that could be terminated. Both of his declaratory judgment claims therefore fail as a matter of law.

Conclusion

McAvoy's complaint should be dismissed with prejudice.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

Benjamin E. Nicholson, V
S.C. Bar No. 10137
Wm. Grayson Lambert
S.C. Bar No. 101282
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net
glambert@mcnair.net

By: s/ Wm. Grayson Lambert

Attorneys for the Defendant

January 19, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

Ryan McAvoy,)
)
Plaintiff,)
)
v.)
)
Beaufort Regional Chamber)
of Commerce,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2017-CP-07-01766

CERTIFICATE OF SERVICE

I do hereby certify that I served the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** upon counsel for the Plaintiff in the above-captioned matter, by filing the document electronically and having the document served upon the Plaintiff's counsel by virtue of the court's electronic filing system this 19th day of January, 2018:

s/ Wm. Grayson Lambert

Attachment

ByLaws of

Hilton Head Island • Bluffton Chamber of Commerce



HILTON HEAD ISLAND-BLUFFTON
CHAMBER OF COMMERCE

BYLAWS
OF
HILTON HEAD ISLAND • BLUFFTON CHAMBER OF COMMERCE

ARTICLE I
GENERAL

SECTION 1: NAME

This organization is incorporated under the laws of the State of South Carolina and shall be known as the Hilton Head Island • Bluffton Chamber of Commerce, Inc.

SECTION 2: PURPOSE

The purpose of the Hilton Head Island • Bluffton Chamber of Commerce is to advance the common interests of our membership, stimulate the expanding regional economy and enhance the quality of life for all.

SECTION 3: AREA

The trade area shall mean to include Hilton Head Island, Bluffton, Beaufort County, and Jasper County.

SECTION 4: LIMITATION OF METHODS

The Hilton Head Island • Bluffton Chamber of Commerce shall observe all local, state and federal laws which apply to a non-profit organization as defined in Section 501(c)(6) of the Internal Revenue Code.

ARTICLE II
MEMBERSHIP

SECTION 1: ELIGIBILITY

Any person, association, corporation, partnership or estate having an interest in the objectives of the organization shall be eligible to apply for membership.

SECTION 2: CLASSES

There shall be four classes of membership: (a) business, (b) individual, (c) honorary, (d) restricted; and there may be such other classes of membership having complete or restricted privileges as may from time to time be established by the Board of Directors.

SECTION 3: ELECTION

Applications for membership shall be in writing, on forms provided for that purpose, and signed by the applicant. Election of members shall be by the Board of Directors at any meeting thereof. Any applicant so elected shall become a member upon payment of he regularly scheduled investment as provided in Section 3 of Article II.

SECTION 4: INVESTMENTS

Membership investments shall be at such rate or rates, schedule or formula as may be from time to time prescribed by the Board of Directors, payable in advance.

SECTION 5: TERMINATION

a) Any member may resign from the chamber upon written request to the Board of Directors; b) Any member shall be expelled by the Board of Directors by a two thirds vote of the directors present for nonpayment of dues after ninety (90) days from the date due, unless otherwise extended for good cause; c) Any member may be expelled by a two thirds vote of the Board of Directors present, at a regularly scheduled meeting thereof, for conduct unbecoming a member or prejudicial to the aims or repute of the chamber, after notice and opportunity for a hearing are afforded the member complained against.

SECTION 6: VOTING

In any proceeding in which voting by members is called for, each member in good standing shall be entitled to cast (1) vote.

SECTION 7: EXERCISE OF PRIVILEGES (Assignment of membership within subscription and any limitations.)

Any firm, association, corporation, partnership, or estate holding membership must nominate individuals whom the holder desires to exercise the privileges of membership covered by its subscriptions, and shall have the right to change its membership nomination upon written notice.

SECTION 8: ORIENTATION

At regular intervals, orientation on the purpose and activities of this organization shall be conducted for the following groups: new directors, officers and directors, committee chairmen, committees and new members. A detailed outline for orientation of each of these groups shall be a part of this organization's personnel and procedures manual.

SECTION 9: HONORARY MEMBERSHIP

Distinction in public affairs shall confer eligibility for membership. Honorary members shall have all the privileges of members, except the right of vote, and shall be exempt from payment of dues. The Board of Directors shall confer or revoke honorary membership by a majority vote.

ARTICLE III MEETINGS

SECTION 1: ANNUAL MEETINGS

The annual meeting of the corporation, in compliance with State law, shall be held each year. The time and place shall be fixed by the Board of Directors and notice thereof delivered to each member via mail, facsimile or electronic transmission at least (10) days before said meeting.

SECTION 2: ADDITIONAL MEETINGS

The Chairman of the Board may call special meetings of the chamber at any time, or upon petition in writing of any 10% of members in good standing. a) Notice of special meetings shall be mailed to each member at least five (5) days prior to such meetings; b) Board meetings may be called by the Chairman of the Board or by the Board of Directors upon written application of three (3) members of the Board. Notice (including the purpose of the meeting) shall be given to each director at least one (1) day prior to said meeting; c) Committee meetings may be called at any time by the Chairman of the Board, the respective department Vice Chairman, or by the committee's chairman.

SECTION 3: QUORUMS

At the annual membership meeting of the chamber, ten percent (10%) of the members shall constitute a quorum. At any other meeting fifty-one percent (51%) shall constitute a quorum.

SECTION 4: NOTICES, AGENDA, AND MINUTES

Written notices of all chamber meetings must be given at least five (5) days in advance unless otherwise stated. An advance agenda and minutes must be prepared for all meetings. A detailed outline for preparation of both shall be a part of this organization's personnel and procedures manual.

ARTICLE IV
BOARD OF DIRECTORS

SECTION 1: COMPOSITION OF THE BOARD

The Board of Directors shall be composed of twenty-one elected members, (one-third) of whom shall be elected annually to serve three (3) years, or until their successors are elected and have qualified. The incoming Chairman of the Board may appoint, subject to approval of the Board, four (4) members to the Board to serve one-year terms. The immediate past Chairman shall serve as a voting member of the Board and the Executive Committee. All other past chairpersons and the President & CEO shall serve as ex-officio non-voting members of the Board.

The government and policy-making responsibilities of the Chamber shall be vested in the Board of Directors, which shall control its property, be responsible for its finances, and direct its affairs.

SECTION 2: SELECTION AND ELECTION OF DIRECTORS

A. Nominating Committee. At the regular September Board meeting, the Chairman of the Board shall appoint, subject to approval by the Board of Directors, a Nominating Committee of seven (7) members of the Chamber. The Chairman of the Board shall designate the chairman of the committee. A minimum of three committee members shall be voting members of the current Board of Directors.

Prior to the October Board meeting, the Nominating Committee shall present to the President & CEO a slate of a minimum of seven (7) candidates to serve three-year terms to replace the directors whose regular terms are expiring. Each candidate must be an employee of an active member in good standing and must have agreed to accept the responsibility of directorship. Should the director's employment change, the director should notify the President and/or Chairman of the Board of such change. Each director must remain employed with a member in good standing throughout his term. In addition, a director shall resign if elected or appointed to serve in any public office. A Board member shall be eligible to serve for a maximum of six (6) consecutive years in either an elected or appointed capacity. A period of one (1) year must elapse before eligibility is restored. The incoming Chairman of the Board may serve an additional one year term. The Chairman of the Board may serve in that capacity for up to three years at the discretion of the Board.

B. Publicity of Nominations. Upon receipt of the report of the Nominating Committee, the President & CEO shall immediately notify the membership by mail, facsimile or electronic transmission of the names of persons nominated as candidates for directors and the right of petition.

C. Nominations by Petitions. Additional names of candidates for directors can be nominated by petition bearing the genuine signatures of at least ten percent of the voting membership as of September 1 of the current year. Such petition shall be filed with the Nominating Committee within ten (10) days after notice (by mail, facsimile, or electronic transmission) has been given of the names of those nominated. The determination of the Nominating Committee as to the legality of the petition (s) shall be final.

D. Determination. If no petition is filed within the designated period, the nominations shall be closed and the nominated slate of seven (7) candidates shall be declared elected by the Board of Directors at their regular October meeting.

If a legal petition shall present additional candidates, the names of all candidates shall be arranged on a ballot in alphabetical order. Instructions will be to vote for seven (7) candidates only. The President & CEO shall deliver this ballot by mail, facsimile or electronic transmission to all active members at least 15 days before the regular November Board meeting.

The ballots shall be marked in accordance with instructions printed on the ballot and returned to the chamber office within ten days. The Board of Directors shall at its November Board meeting declare the seven (7) candidates with the greatest number of votes elected.

E. Judges. The Chairman of the Board shall appoint, subject to the approval of the Board of Directors, at least three (3), but not more than five (5), judges who are not members of the Board of Directors or candidates for election. One will be designated chairman. Such judges shall have complete supervision of the election, including the auditing of the ballots. They shall report the results of the election to the Board of Directors.

SECTION 3: SEATING OF NEW DIRECTORS

All newly elected and appointed Board members shall be seated at the regular January Board meeting and shall be participating members thereafter. Retiring directors shall continue to serve until the January Board meeting.

SECTION 4: VACANCIES

A member of the Board of Directors who shall be absent from three (3) consecutive regular meetings of the Board or who are no longer an employee of an active member in good standing shall automatically be dropped from membership on the Board unless confined by illness or other absence approved by a majority vote of those at any meeting thereof.

Vacancies on the Board of Directors, or among the officers, shall be filled by the Board of Directors by a majority vote. The Chairman shall make recommendations concerning vacancies.

SECTION 5: POLICY

The Board of Directors is responsible for formulating and adopting policies, including position statements, of the organization. These policies shall be maintained in a policy manual, to be reviewed annually and revised as necessary.

SECTION 5: MANAGEMENT

The Board of Directors shall employ a President & CEO and shall fix the salary and other considerations of employment.

SECTION 7: INDEMNIFICATION

The Chamber shall indemnify and hold any and all current or former officers, directors and employees harmless against expenses actually and necessarily incurred by them in connection with the defense of any action, suit, or proceeding in which they or any of them are made parties or a party, by reason of having been officers, directors or employees of the chamber, except in relation to matters as to which such individuals shall be adjudged in such action, suit or proceeding to be liable for willful malfeasance or criminal conduct.

ARTICLE V OFFICERS

SECTION 1: DETERMINATION OF OFFICERS

The Board of Directors (new and retiring) at its regular November meeting, shall reorganize for the coming year. The Nominating Committee for Directors shall also nominate officers each year. At this meeting, with the advice and consent of the incoming chairman, the Board shall elect the Chairman of the Board, Chairman-elect, as many Vice Chairmen as deemed necessary to conduct the activities of the chamber, and the Treasurer. Officers will be elected from members of the new Board. All officers shall take office on the first day of the new calendar year and serve for a term of one (1) year or until their successors assume the duties of office. The maximum term of office for officers shall be two years, except for individuals who are full time employees of the Chamber. Except for officers employed by the Chamber, the officers shall be voting members of the Board of Directors.

SECTION 2: DUTIES OF OFFICERS

A. Chairman of the Board. The Chairman shall serve as the chief elected officer of the chamber of commerce and shall preside at all meetings of the membership, Board of Directors and Executive Committee.

The Chairman of the Board shall, with the advice and council of the President & CEO, assign Vice Chairman to divisional or departmental responsibility, subject to Board of

Directors approval. The Visitors and Convention Bureau Advisory Board of the Chamber shall recommend its nominee for Chairman or divisional Vice Chairman on the chamber board to the chamber Chairman for his consideration, subject to Board of Directors' approval.

The Chairman of the Board shall, with advice and council of Vice Chairmen and the President & CEO, determine all committees, select all committee chairmen, assist in the selection of committee personnel, subject to approval of the Board of Directors.

B. Chairman-Elect. The Chairman-elect shall exercise the powers and authority and perform the duties of the Chairman in the absence or disability of the Chairman. The Chairman-Elect shall also serve as the head of the Program of Action Committee of the chamber. As such, the Chairman-Elect and committee will be responsible for determining that the program activities of the chamber are of such duration as is required, at all times being alert to assure that the activities of the chamber are directed toward achieving business and community needs in the area served by the chamber.

C. Vice Chairmen. The duties of the Vice Chairmen shall be such as their titles by general usage would indicate, and such as required by law, as well as those that may be assigned by the Chairman and the Board of Directors. They will have under their immediate jurisdiction all committees pertaining to their general duties.

D. Treasurer. The Treasurer shall be responsible for the safeguarding of all funds received by the chamber and for their proper disbursement. Such funds shall be kept on deposit in financial institutions, or invested in a manner approved by the Board of Directors. Two signatures are required on each check and checks are to be signed by the President & CEO and any one of the following: Vice President of Finance & Administration, the Controller, or the Treasurer or the Chairman. In the absence of the President & CEO, checks are to be signed by any two of the above. The Treasurer shall cause a monthly financial report to be made to the Board.

E. President & CEO. The President & CEO shall be the chief administrative officer. The President & CEO shall serve as secretary to the Board of Directors, and cause to be prepared notices, agendas and minutes of the meetings of the Board. The President & CEO shall serve as advisor to the Chairman of the Board and Program of Action Committee on program planning, and shall assemble information and data and cause to be prepared special reports as directed by the program of the chamber. The President & CEO shall be responsible for the location and supervision of the Chamber headquarters, subject to Board approval. The President & CEO shall be a non-voting member of the Board of Directors, the Executive Committee and all committees. The President & CEO shall be employed by a majority vote of the Board.

With the assistance of the divisional Vice Chairmen, the President & CEO shall be responsible for administration of the Program of Action in accordance with the policies and regulations of the Board of Directors. The President & CEO shall be responsible for hiring, discharging, directing and supervising all employees, including those of affiliates.

With the cooperation of the Program of Action Committee and Budget Committee, the President & CEO shall be responsible for the preparation of an operating budget covering all activities of the chamber, subject to approval of the Board of Directors. The President & CEO shall also be responsible for all expenditures within approved budget allocations.

SECTION 3: EXECUTIVE COMMITTEE

The Executive Committee shall act for and on behalf of the Board of Directors when the Board is not in session but shall be accountable to the Board for its actions. It shall be composed of the Chairman of the Board, Past Chairman, Chairman-Elect, Vice Chairmen, Treasurer and the President & CEO. The Chairman of the Board will serve as Chairman of the Executive Committee.

SECTION 4: INDEMNIFICATION

The chamber shall provide for indemnification by the chamber of any and all of its officers or former officers as spelled out in Article IV, Section 7 of these bylaws.

ARTICLE VI
COMMITTEES AND DIVISIONS

SECTION 1: APPOINTMENT AND AUTHORITY

The Chairman of the Board, by and with the approval of the Board of Directors, shall appoint all committees and committee chairmen. The Chairman of the Board may appoint such ad hoc committees and their chairmen as deemed necessary to carry out the program of the chamber. Committee appointments shall be at the will and pleasure of the Chairman of the Board and shall serve concurrent with the term of the appointing Chairman of the Board, unless a different term is approved by the Board of Directors.

It shall be the function of committees to make investigations, conduct studies and hearings, make recommendations to the Board of Directors, and to carry on such activities as may be delegated to them by the Board.

SECTION 2: LIMITATION OF AUTHORITY

No action by any member, committee, division, employee, director or officer shall be binding upon, or constitute an expression of, the policy of the chamber until it shall have been approved or ratified by the Board of Directors.

Committees shall be discharged by the Chairman of the Board when their work has been completed and their reports accepted, or when, in the opinion of the Board of Directors, it is deemed wise to discontinue the committees.

SECTION 3: TESTIMONY

Once committee action has been approved by the Board of Directors, it shall be incumbent upon the committee chairmen or, in his absence, whom he designates as being familiar enough with the issue, to give testimony to, or make presentations before, civic and governmental agencies.

SECTION 4: DIVISIONS

The Board of Directors may create such divisions, bureaus, departments, councils, or subsidiary corporations as it deems advisable to handle all the work of the chamber.

The Board shall authorize and define the powers and duties of all divisions, bureaus, departments, councils and subsidiary corporations. The Board shall annually review and approve all activities and proposed programs of such divisions, bureaus, departments, councils, affiliates, or subsidiary corporations, including collection and disbursement of funds.

No such action or resolution of any kind shall be taken by divisions, bureaus, departments, councils, affiliates or subsidiary corporations having bearing upon or expressive of the chamber, unless approved by the Board of Directors.

ARTICLE VII FINANCES

SECTION 1: FUNDS

All money paid to the chamber shall be placed in a general operating fund. Funds unused from the current year's budget will be placed in a reserve account.

SECTION 2: DISBURSEMENTS

Upon approval of the budget, the President & CEO is authorized to make disbursements on accounts and expenses provided for in the budget without additional approval of the Board of Directors. Disbursement shall be by check.

SECTION 3: FISCAL YEAR

The fiscal year of the chamber shall close on June 30.

SECTION 4: BUDGET

The Executive Committee shall adopt the budget for the coming year and submit it to the Board of Directors for approval at or prior to the June Board of Directors meeting.

SECTION 5: ANNUAL AUDIT

The accounts of the chamber shall be audited annually as of the close of business on June 30 by a public accountant. The audit shall at all times be available to members of the organization within the offices of the chamber.

SECTION 6: BONDING

The President & CEO and such other officers and staff as the Board of Directors may designate may be bonded by a sufficient fidelity bond in the amount set by the Board and paid for by the chamber.

SECTION 7: DIRECTOR DISCLOSURE POLICY

Any existing or contemplated business transaction between the Hilton Head Island Bluffton Chamber of Commerce and any entity in which a director, spouse, children, parents, or other family members of a Director has/have any interest, the director will disclose such potential conflict and, after answering any questions of the Board, will withdraw from the meeting while such matter is under discussion. Any Director that declares a conflict of interest or that the Board declares has a conflict of interest shall not be counted to establish a quorum or participate in any deliberations or vote on the matter.

ARTICLE VIII
DISSOLUTION

SECTION 1: PROCEDURE

The chamber shall use its funds only to accomplish the objectives and purposes specified in these bylaws, and no part of said funds shall inure, or be distributed, to the members of the chamber. On dissolution of the chamber, any funds remaining shall be distributed to one or more regularly organized and qualified charitable, educational, scientific or philanthropic organizations to be selected by the Board of Directors as defined in IRS Section 501(c)(3).

ARTICLE IX

SECTION 1: PARLIAMENTARY AUTHORITY

The current edition of Robert's Rules of Order shall be the final source of authority in all questions of parliamentary procedures when such rules are not inconsistent with the charter or bylaws of the chamber.

ARTICLE X
AMENDMENTS

SECTION 1: REVISIONS

These bylaws may be amended or altered by a two-thirds (2/3) vote of the Board of Directors, or by a majority of the members at any regular or special meeting, providing the notice for the meeting includes the proposals for amendments. Any proposed amendments or alterations shall be submitted to the Board or the members in writing, at least ten (10) days in advance of the meeting at which they are to be acted upon.

September 26, 2007
Board of Directors Meeting

Vann asked for a motion to approve the following changes to the bylaws: ***Each candidate must be an employee of an active member in good standing and must have agreed to accept the responsibility of directorship. Should the director's employment change, the director should notify the President and chairman of the board of such change. Each director must remain employed with a member in good standing throughout his term. In addition, a director shall resign if elected or appointed to serve in any public office.*** The motion was made by Bateson, seconded by McGlashan and unanimously approved.

Last amended September 26, 2007

November 30, 2010
Board of Directors Meeting

Vann asked for a motion to amend Article IV, Section 2: Selection and Election of Directors to read as follows, ***"The Chairman of the Board may serve in that capacity for up to three years at the discretion of the Board."*** The motion was made by J. Upshaw, seconded by Owen and unanimously approved.

Last amended November 30, 2010

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07-01766

Ryan McAvoy,

Plaintiff,

vs.

**Hilton Head Island – Bluffton Chamber
of Commerce,**

Defendant.

**RETURN TO DEFENDANT’S
MOTION TO DISMISS**

The Plaintiff submits this return to Defendant’s motion to dismiss the Complaint in the above-captioned action.

Defendant’s principal argument seeking dismissal of this action rests on Plaintiff’s status as a member of the Defendant organization, a factual contention pertinent to this matter generally, but irrelevant to the resolution of Defendant’s Motion to Dismiss. The Plaintiff respectfully asks the Court to accurately construe the words of Plaintiff’s complaint against Defendant’s arguments in his motion and memorandum of law and deny it the relief it seeks at this threshold stage of this proceeding.

“A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. A judgment on the pleadings is considered to be a drastic procedure by our courts. Therefore, pleadings in a case should be construed liberally[.]” Overcash v. S.C. Elect. & Gas Co., 356 S.C. 165, 588 S.E.2d 116, 118 (Ct. App. 2003).

The Complaint accurately states that Plaintiff “at all times material to this case has been a member of the Defendant nonprofit corporation.” ¶ 9. Plaintiff’s status as a member of Defendant’s organization at all times material to this action confers standing on him to maintain this matter under the causes of action pled in the Complaint. Defendant’s reliance on its bylaws to say Plaintiff is not a member is misplaced and irrelevant. The bylaws cannot confer membership in Defendant’s organization, only the actions of Defendant can make someone a member. As sufficiently pled in the Complaint, Defendant welcomed Plaintiff into the organization as a member. ¶ 10.

Ordinarily, the introduction of additional exhibits or affidavits to a memorandum in support of a motion to dismiss pursuant to Rule 12(b), SCRCF, would convert that motion to one for summary judgment under Rule 56, SCRCF.

We have interpreted this language as meaning ‘the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).’

Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69 (S.C. 1999)

Plaintiff is not aware of any intention by Defendant or the Court to convert Defendant’s motion to one for summary judgment. Plaintiff objects to this motion to being so converted, if that is in fact the intention of either. The words of Plaintiff’s complaint state facts sufficient to establish standing in this matter if this motion is construed in accordance with the previously-cited controlling legal standard.

If, though, Defendant does not wish to convert its motion to one for summary judgment, but instead seeks to introduce those bylaws to support its contention that Plaintiff lacks standing, a necessary component of this Court’s subject matter jurisdiction, then those bylaws may be

considered to prove a lack of jurisdiction. See Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct.App.1993), vacated on other grounds by 319 S.C. 240, 460 S.E.2d 392 (1995). Defendant contends that Plaintiff is not a member because all three steps in the bylaws were not completed. Namely that although the Complaint mentions that the application was in writing and that annual dues were paid, the applicant (Plaintiff) was not approved by the board of Defendant. Again, the application of Defendant's bylaws to this factual scenario and claims herein is irrelevant to this Court as Plaintiff was welcomed into the organization as stated in the Complaint. But even if the Court were to consider Defendant's attached bylaws and corresponding argument, conspicuously absent is an exhibit from Defendant which shows Defendant's board rejected or terminated Plaintiff's membership. Absent evidence that Defendant's board in fact rejected Plaintiff's membership, the allegations of the Complaint are uncontroverted even under this Woodward standard.

For foregoing reasons and under any and all applicable law, Plaintiff respectfully asks the Court to deny Defendant's Motion to Dismiss.

Respectfully submitted,

/s/Taylor Smith
 Taylor M. Smith IV (SC Bar No. 101584)
 HARRISON RADEKER & SMITH, P.A.
 Post Office Box 50143
 Columbia, South Carolina 29250
 (803) 779-2211
 (803) 779-6700 (facsimile)
 taylor@harrisonfirm.com (email)
 ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

February 22, 2018

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Ryan McAvoy,

Plaintiff,

vs.

**Hilton Head Island – Bluffton Chamber
of Commerce,**

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07-01766

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Ryan McAvoy moves before this court pursuant to Rules 52(b) and 59(e), SCRCPP, as well as pursuant to all other applicable law, for an order in the above-captioned action that reconsiders, alters, amends, and/or clarifies the court's order granting Defendant's motion to dismiss.

As grounds for this motion, the Plaintiff hereby incorporates as if here set forth verbatim all of the arguments made in his return to Defendant's motion to dismiss and orally to date concerning this matter, and also notes the following:

1. A court must dismiss a complaint whenever it "fail[s] to state facts sufficient to state a cause of action." Rule 12(b)(6), S.C.R.C.P. A court must view the allegations and draw inferences in the light most favorable to the plaintiff, but even taking this approach, the court must dismiss the complaint if "the facts alleged in the complaint do not support relief under any theory of law." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

2. A judgment on the pleadings is considered to be a drastic procedure by our courts. Therefore, pleadings in a case should be construed liberally[.]” Overcash v. S.C. Elect. & Gas Co., 356 S.C. 165, 588 S.E.2d 116, 118 (Ct. App. 2003).
3. The only facts concerning the membership status of Plaintiff were those stated in the complaint. The complaint provides that Plaintiff “at all times material to this case has been a member of the Defendant nonprofit corporation.” As pled in the complaint, Defendant welcomed Plaintiff into the organization as a member, which was evidenced by Exhibit B to the complaint, a letter from William G. Miles, president and CEO of Defendant.
4. As stated in the complaint, it was only after Defendant welcomed Plaintiff into Defendant’s organization as a member and Plaintiff made his information request, that Defendant said Plaintiff was actually not a member yet as “the board tabled approval” of his membership. See Exhibit C to complaint.
5. The Court’s reliance on Defendant’s bylaws in analyzing Defendant’s motion to dismiss is not only improper, under the appropriate legal standard stated above, but irrelevant, as those bylaws cannot confer membership in Defendant’s organization, only the actions of Defendant can do so. If the complaint is clear about anything regarding Plaintiff’s membership status and his request for information, which is the gravamen of his complaint: Plaintiff was a member of Defendant when the aforementioned request was made.
6. This motion is also based upon all other applicable law, the record, and any further memoranda or arguments that the Defendant has submitted or may submit.

Pursuant to Rule 11, SCRCPP, there is no duty of consultation prior to this motion.

Respectfully submitted,

s/ Taylor Smith

Taylor M. Smith IV
HARRISON RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com (email)
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
March 19, 2018

Second, McAvoy's argument fails on the merits. Despite his repeated protestations, the Court can look to the Chamber's bylaws to decide the motion to dismiss, *see Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), and those bylaws control how anyone, including McAvoy, can become a member of the Chamber, *see* S.C. Code § 33-31-1601(a).

These two bases for denying the motion to reconsider are explained more fully in the proposed order that is being e-mailed to the Court, per its instructions.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

Benjamin E. Nicholson, V
S.C. Bar No. 10137
Wm. Grayson Lambert
S.C. Bar No. 101282
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net
glambert@mcnair.net

By: s/ Wm. Grayson Lambert

Attorneys for the Defendant

March 27, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) Civil Action No.: 2017-CP-07-01766

Ryan McAvoy,

) **CERTIFICATE OF SERVICE**

) Plaintiff,

) v.

) Beaufort Regional Chamber
) of Commerce,

) Defendant.)

I do hereby certify that I served the foregoing **OPPOSITION TO MOTION TO RECONSIDER** upon counsel for the Plaintiff in the above-captioned matter, by filing the document electronically and having the document served upon the Plaintiff's counsel by virtue of the court's electronic filing system this 27th day of March, 2018:

s/ Wm. Grayson Lambert

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, III

Case No. 2017-CP-07-01766

RECEIVED
MAY 04 2018
SC Court of Appeals

Hilton Head Island – Bluffton Chamber of Commerce.....Respondent,

v.

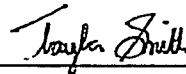
Ryan McAvoy.....Appellant.

NOTICE OF APPEAL

Ryan McAvoy appeals from the Beaufort County Court of Common Pleas, specifically the orders in this matter filed on March 9, 2018 and April 4, 2018 (copies of which are provided to the Court of Appeals with this notice) that dismissed Appellant's complaint against Respondent for violations of the South Carolina Nonprofit Corporation Act of 1994, § 33-31-101 et. seq., and the common law of this state. Ryan McAvoy received written notice of the entry of these orders on the date each order was filed.

May 4, 2018

Respectfully submitted,



Taylor M. Smith IV
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

Other Counsel of Record:

Benjamin E. Nicholson, V
Wm. Grayson Lambert
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
Attorney for Respondent

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

Civil Action No.: 2017-CP-07-01766

Ryan McAvoy,)

Plaintiff,)

Order Denying
Motion to Reconsider

v.)

Hilton Head Island – Bluffton
Chamber of Commerce,)

Defendant.)

RECEIVED
MAY 04 2018
SC COURT of Appeals

THIS MATTER came before the Court in Beaufort County on Defendant Ryan McAvoy’s motion to reconsider pursuant to Rule 52(b) and Rule 59(e), SCRCP. Upon review of the parties’ filings and arguments, the Court respectfully DENIES the motion to reconsider.

Introduction

Plaintiff, Ryan McAvoy ("McAvoy") claims that the Hilton Head Island – Bluffton Chamber of Commerce ("Chamber") wrongly denied his request to inspect its records under the Nonprofit Corporation Act. This Court, however, has determined that, based on the allegations in his complaint, McAvoy was never a member of the Chamber with a right to inspect those records. For the reasons stated, this Court dismissed McAvoy's complaint. Subsequently, McAvoy has timely filed a motion to reconsider pursuant to Rule 52(b) and Rule 59(e), SCRCP.

Analysis

A motion to reconsider under Rule 59(e), SCRCP, is a request to “the trial judge to reconsider matters properly encompassed in a decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (internal quotation mark omitted). Having carefully reviewed the entire record in this matter, this Court finds no basis for altering or amending its

prior ruling. Therefore, this Court hereby respectfully DENIES McAvoy's Rule 59 and Rule 52 Motion in its entirety, and affirms the previous Order of Dismissal.

I. The Court's Decision on the Motion to Dismiss Was Correct.

McAvoy's motion to reconsider asks this Court to reconsider the Court's analysis on whether McAvoy had sufficiently pled that he was a member of the Chamber.

A. The Court May Consider the Bylaws.

McAvoy argues that the Court cannot rely on the Chamber's bylaws in deciding the motion to dismiss. *See* Mot. to Reconsider 2.

Generally, in considering a 12(b) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *see Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). There, the South Carolina Supreme Court observed that a court may not look to "matters outside the pleadings" in deciding a Rule 12(b) motion. *Id.* at 527, 511 S.E.2d at 73. However, the South Carolina Supreme Court's holding a decade later in *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), in which the Court explained that a trial court may consider a document referenced in the complaint but not attached to in deciding a Rule 12(b)(6) motion.

That is what the Court did here. McAvoy referenced the bylaws in Paragraphs 17 and 18 of his complaint. *See* Compl. ¶¶ 17, 18. The Court may therefore consider the bylaws when deciding whether McAvoy's claims survive a Rule 12(b)(6) motion.

B. McAvoy Was Not a Member of the Chamber.

McAvoy contends that he has sufficiently alleged that he is a member of the Chamber. The cornerstone of McAvoy's argument is that the "bylaws cannot confer membership" in the Chamber. Mot. to Reconsider 2. The Nonprofit Corporation Act states that the "articles or

bylaws may establish criteria or procedures for the admission of members” in a nonprofit corporation. S.C. Code § 33-31-1601(a).

The Chamber’s bylaws have three requirements for membership: (1) a written application; (2) payment of annual dues; and (3) approval of the application by the Chamber’s board. McAvoy admitted in his complaint that the third requirement was never met. *See* Compl. ¶¶ 12–13 & Ex. C. Thus, McAvoy was never a member of the Chamber, his conclusory allegations to the contrary notwithstanding. *See, e.g., Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (recognizing that a plaintiff cannot survive a motion to dismiss based on conclusory allegations in the complaint).

Conclusion

The Plaintiff’s motion to reconsider is respectfully **DENIED**.

IT IS SO ORDERED!

The Honorable Perry M. Buckner, III
Fourteenth Judicial Circuit

April __, 2018
Walterboro, South Carolina



Beaufort Common Pleas

Case Caption: Ryan Mcavoy VS Hilton Head Island Bluffton Chamber Of
Commerce
Case Number: 2017CP0701766
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-04-04 12:26:40 page 4 of 4

ELECTRONICALLY FILED - 2018 Apr 04 1:40 PM - BEAUFORT - COMMON PLEAS - CASE#2017CP0701766

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, III

Case No. 2017-CP-07-01766

RECEIVED
MAY 04 2018
SC Court of Appeals

Hilton Head Island – Bluffton Chamber of Commerce.....Respondent,

v.

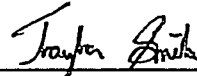
Ryan McAvoy.....Appellant.

PROOF OF SERVICE

I certify that I served the notice of appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Benjamin E. Nicholson, V
Wm. Grayson Lambert
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

May 4, 2018



Taylor M. Smith IV
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
Attorney for Appellant

STATE OF SOUTH CAROLINA)	
	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	2017-CP-07-01766
)	
)	
)	
)	
RYAN MCAVOY,)	
)	
PLAINTIFF,)	
)	
vs.	)	TRANSCRIPT OF RECORD
)	
HILTON HEAD ISLAND/BLUFTON)	
CHAMBER OF COMMERCE,)	
DEFENDANT.)	
)	

February 27, 2018
Beaufort, South Carolina

B E F O R E:

THE HONORABLE PERRY M. BUCKNER, III, JUDGE.

A P P E A R A N C E S:

TAYLOR SMITH, ESQ.
Attorney for the Plaintiff

WILLIAM GRAYSON LAMBERT, ESQ.
Attorney for the Defendant

MONA MANLEY
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 THE COURT: This is Ryan McAvoy vs. Hilton Head
3 Island/Bluften Chamber of Commerce. Mr. Smith is here,
4 Taylor Smith, for the Plaintiff. Mr. William Grayson
5 Lambert is here on behalf of the Defendant.

6 Hold on one second. Let me -- I have read the
7 motion, I just need to go through these. I don't think
8 that we're hearing either one of these, or this one.

9 (Pause.)

10 THE COURT: All right. I have read the motion to
11 dismiss. I have also read the order of Judge McIntosh.
12 And I have read the By-Laws of the Hilton Head
13 Island/Bluften Chamber of Commerce. Counsel asked me for
14 15 minutes.

15 Your 15 minutes begins now, Mr. Lambert. Did you tie
16 your own bow tie?

17 MR. LAMBERT: I did, Your Honor.

18 THE COURT: Congratulations, Mr. Lambert. Your 15
19 minutes begins now, happy to hear from you.

20 MR. LAMBERT: Thank you, and may it please the Court,
21 Your Honor. Ryan McAvoy's lawsuit is based on the
22 nonprofit corporation act in his claim that the chamber
23 wrongly denied his request to inspect records. His entire
24 complaint is premised on the idea that he was a member of
25 the chamber. But his own allegations made clear he was

1 not. And because he was not, all of his claims fail.

2 As a brief overview of the important parts of the
3 complaint, Your Honor, Mr. McAvoy alleges that he
4 submitted his application for membership and the dues in
5 June of 2016. In August, he demanded to inspect the
6 records. About a week after that in August, he received
7 an email from the chamber's controller saying that the
8 board has not yet approved your application, so you're not
9 a member yet who's entitled to inspect records. In early
10 September, he received a letter from the chamber informing
11 him that the board had not approved his application and
12 returning the dues he had paid. Those are the critical
13 allegations for this.

14 So the issue is was he a member? Because all of his
15 claims flow from that. Corporations are creatures of
16 statute and the statute controls what they can do and how
17 they can do it. In our nonprofit corporation act at
18 section 33-31-601(a), it says: The articles or By-Laws
19 may establish criteria or procedures for the admission of
20 members.

21 Well, the chamber has its procedure for the admission
22 of the members in its By-Laws. It's in Article 2,
23 Section 3. And that provides three requirements that must
24 be met. An application must be submitted, dues must be
25 paid and the board must approve the membership

1 application. Well, by his own allegations, which, of
2 course, are binding on him, Mr. McAvoy has alleged I
3 submitted an application, I paid the dues, but the board
4 did not approve my membership. He has pled that one of
5 those three requirements wasn't met.

6 Now, his entire opposition to this Motion to Dismiss,
7 Your Honor, is based on whether or not you can consider
8 the By-Laws that lay out these three things. And he
9 cites, Baird vs. Charleston County, that's a 1999 Supreme
10 Court decision. It's 333 S.C. 519. It says, generally,
11 you've got to look at just the allegations in the
12 complaint.

13 What he ignores is the case from our Supreme Court 10
14 years later, Brazell vs. Windsor, that's 384 512 in the
15 South Carolina reporter, that says: If there's a document
16 specifically referenced in the complaint, but not attached
17 to it, but then it is attached to the Motion to Dismiss,
18 the court can consider it on a 12(b)(6) motion.

19 Well, that was about one statement, this is about
20 By-Laws. If you change the word, the situation --

21 THE COURT: You also argue that I should convert your
22 motion to a Rule 56 Motion for Summary Judgment, are you
23 asking the Court to do that?

24 MR. LAMBERT: Not at all, Your Honor.

25 THE COURT: You want me to confine it to the

1 pleadings?

2 MR. LAMBERT: Absolutely. The pleadings and the
3 documents referenced therein.

4 THE COURT: You understand that I'm bound, therefore,
5 only on the pleadings or its attachments if I proceed
6 under 12(b)(6)?

7 MR. LAMBERT: Correct, Your Honor. But what I think
8 the Brazell case makes clear is you can look at a document
9 on a 12(b)(6) motion that was attached to the motion --

10 THE COURT: I understand that argument. I just want
11 to make sure we're clear on whether we're proceeding under
12 Rule 12(b)(6) or whether we're trying to convert to Rule
13 56.

14 MR. LAMBERT: Not at all, Your Honor, 12(b)(6). And
15 that's why we didn't attach anything to our Motion to
16 Dismiss that were a record of a meeting or minutes from
17 the meeting from the board about his application because
18 he didn't specifically reference that. He referenced the
19 August email in the September letter and the By-Laws. He
20 didn't reference minutes specifically, so we couldn't
21 attach that and keep this as a 12(b)(6) motion. That's
22 why we attached the By-Laws, but nothing else.

23 Well, given that you can consider the By-Laws and
24 then it sets out three requirements, he's admitted that he
25 didn't meet one of them, so he's not a member. And from

1 that, all four of his claims fail.

2 The first one is statutory remedy for the right to
3 inspect in 33-31-1604. The nonprofit corporation act
4 provides a member a right to inspect, that's 33-31-1602,
5 and 1604 provides the remedy. But that remedy is for a
6 member of a nonprofit corporation. And the statute
7 defines member over in 33-31-14023. Sorry for all the
8 statutory sites, but so that they're in there for the
9 record, Your Honor.

10 Mr. McAvoy was not a member. Therefore, the remedy
11 that's created under 1604 doesn't apply. This was Judge
12 McIntosh's conclusion in the Hoagland case. If you look
13 at that case and you look at this case, they're incredibly
14 similar. The original complaint in the Mr. Hoagland's
15 case, Your Honor, if you change some dates and some names,
16 the causes of action are identical. In his amended
17 complaint, it's still very, very similar in the 1604
18 claim, identical to the one here. And Judge McIntosh's
19 conclusion in looking at the statute is that it only
20 applies to someone who is currently a member of a chamber.
21 And Mr. McAvoy here is not.

22 His second claim is negligence per se. And really,
23 all this is, is taking his statutory claim and putting it
24 into a tort claim box. It says the duty is to follow the
25 statute, the breach is you didn't follow the statute.

1 Now, there are two problems here, Your Honor. One is
2 that if the general assembly creates a right, like the
3 right to inspect records, and provides a remedy for that
4 right, the statutory remedy is exclusive unless the
5 general assembly expressly provides that it is not. That
6 goes all the way back to cases from the early part of the
7 20th century, such a *Bethey vs. Allen*, 101 S.C. 350, 1915.
8 It's a longstanding rule. And there is nothing in
9 33-31-1604 that would suggest that right is not exclusive,
10 much less say so explicitly.

11 Secondly, he's also got a standing problem under his
12 tort claim, Your Honor, because to show standing, he's got
13 to meet that third element of redressability. And because
14 there's no remedy under tort law for statutory claim, his
15 claim cannot receive any sort of remedy that would give
16 him a benefit to resolve what he complains of.

17 And finally, Your Honor, his last two claims are for
18 declaratory judgement. One, that he is a member; and the
19 second, in the alternative, that if it's not a member, he
20 was wrongly terminated. But both of those presume he was
21 a member to begin with, but as we discussed earlier, he
22 admits in his complaint the board did not approve his
23 application. Therefore, there was nothing to declare
24 about his membership other than you never were a member.

25 For those reasons, Your Honor, his complaint should

1 be dismissed in its entirety.

2 THE COURT: Thank you very much.

3 Mr. Smith, let me hear from.

4 MR. SMITH: Thank you, Your Honor. Taylor Smith of
5 Harrison, Radeker and Smith from Columbia on behalf of
6 Ryan McAvoy, the Plaintiff in this matter and the
7 nonmoving party.

8 Your Honor, I appreciate you clarifying the legal
9 standard here. We are looking at the complaint. And in
10 doing so, I'm just going to briefly summarize what is in
11 the complaint, as I believe it's pertinent to understand
12 why this motion should be denied.

13 Mr. McAvoy pleads, beginning on Page 2, that he
14 sought information pursuant to the nonprofit corporate
15 code. His description of the law concerning this is not
16 contested regarding that exercise of that statutory right.

17 THE COURT: But is the statutory right only conveyed
18 to a member of a nonprofit entity as opposed to a
19 nonmember, Counsel? That's the issue that is being
20 contended in front of me. I understand that he was
21 exercising what is included in the statute, which is the
22 right to the inspect the books of the nonprofit. But is
23 that right only conveyed statutorily to a member?

24 MR. SMITH: It is, Your Honor. And at the time at
25 which he was made, he was under the understanding from

1 this body, the Defendant, that he was, in fact, a member
2 of the organization.

3 I would respectfully ask Your Honor to look to
4 paragraphs eight, nine, ten, and Exhibits A and B to the
5 complaint. He had an understanding from the chamber and a
6 letter from them explaining, and I quote, It is a pleasure
7 to welcome to the Hilton Head Island/Bluffton Chamber of
8 Commerce. Later on in the second paragraph, it describes
9 the member benefits of being a part of this organization.
10 And at the end of it, if there's any ambiguity as to this,
11 it's resolved here. It says, I encourage you to get
12 involved and maximize your membership.

13 Mr. McAvoy understood and they represented to him at
14 the time he was a member of this organization. Look at
15 the complaint, the time line lays this out, Your Honor.
16 That subsequent to this, he submits a request for seeking
17 information pursuant to the nonprofit corporate code under
18 Title 33 to inspect records of the organization.

19 After that request is made, we go to the next
20 paragraph in our complaint, Your Honor, which says he
21 received a letter back from the Defendant in this matter
22 that because he merely had provided the dues and the
23 written application, the By-Laws said he wasn't yet
24 actually a member, that the board would have to approve
25 his membership.

1 So, next, you would think, Your Honor, that my client
2 would have to wait to receive confirmation that he was a
3 member because they told him, as attached to the complaint
4 as Exhibit C, we can't provide you this information right
5 now. Meaning, your membership is pending, ostensibly.

6 THE COURT: You agree that the By-Laws say that one
7 of the criteria for membership is the approval by the
8 board?

9 MR. SMITH: I do, Your Honor.

10 THE COURT: And you agree that at this point, when he
11 received that letter, he was made aware that the board had
12 not acted on his application for membership?

13 MR. SMITH: That is correct, that was their
14 representation, Your Honor.

15 THE COURT: All right.

16 MR. SMITH: Subsequent to that, Your Honor, you would
17 think that the next thing that would come from the
18 Defendant in this matter would be anything from the board
19 concerning his membership. That was one of the problems
20 with this statutory exercise in this particular context.
21 Because you have a one-year statute of limitations in
22 Title 33 to bring an action for wrongful termination of
23 your membership.

24 So, if you have an understanding, like Mr. McAvoy did
25 as pled in the complaint, that you are a member. You fire

1 off a records request pursuant to this same Title 33, and
2 then they tell you, oh, wait, the By-Laws now say you're
3 not actually a member, you would think the next thing you
4 would get from them is that approval or disapproval of
5 your membership. That's what's contemplated by their
6 By-Laws that they attached to this motion. That never
7 happened here.

8 So, Mr. McAvoy, through my office, filed this
9 complaint. And we pled it in this way, Your Honor,
10 because, even through the point which we filed this
11 complaint, he was a member. He was receiving
12 correspondence from the chamber through email saying --

13 THE COURT: What you're arguing to me, Mr. Smith, is
14 that your client believed that he was a member, but he had
15 not received any official decision about election by the
16 board at the time of the filing of the action?

17 MR. SMITH: That's correct, Your Honor. Meaning, I
18 don't know if what their processes are in practice here
19 differ from what their By-Laws are. But, Your Honor, I
20 highly suspect that if we're able to proceed in this
21 action, what we'll find through discovery is that you
22 become a member of this Defendant chamber when you submit
23 an application and you pay dues, not when -- and I say
24 that, Your Honor, because that's what happened here. They
25 told him you're a member. And then only because he sent

1 off this records request --

2 THE COURT: Just a moment. Just a moment, Counselor.
3 The By-Laws clearly say, which are attached, I can review
4 those for purposes of 12(b)(6), that applications for
5 membership shall be in writing on a form provided by the
6 chamber for that purpose and have to be signed by the
7 applicant, an election of members shall, mandatory
8 language, not may, shall be by the Board of Directors at a
9 meeting thereof. Any applicant so elected shall become a
10 member upon payment of the regularly scheduled dues, as
11 you call it. Not just that you pay dues and apply and
12 become a member.

13 Here, you tell me that not only that your client
14 applied on their form, submitted their dues, the check for
15 their dues, and received a letter that the board had not
16 acted or had voted on his application for membership, and
17 he brought this action and subsequently learned that the
18 board did not approve his application for membership. Is
19 that correct?

20 MS. SMITH: Almost entirely, Your Honor, except for
21 the last point you made. I think that there is a great
22 deal of ambiguity my client has to this day regarding his
23 membership status. They want to use the By-Laws when it's
24 convenient for them to do so. There were not done in this
25 case up until the point of which he understood he was a

1 member and exercised his right under Title 33 to request
2 information. And then, suddenly, the By-Laws are used to
3 say you are not yet a member. The board has to --

4 THE COURT: The By-Laws in existence at the time that
5 he applied, they hadn't been changed in any fashion --
6 from the time he applied for membership until the time he
7 learned by virtue of the returning of his check or
8 returning of the funds, had the By-Laws been changed in
9 any manner at any time to your knowledge?

10 MR. SMITH: No, Your Honor, not to our knowledge. So
11 our understanding that our client -- again, this is what's
12 embodied in the complaint, which I believe is what guides
13 the Court here in this determination, is that he was a
14 member. They represented to him he was a member. Then
15 and only after he submits his request for information do
16 they come at him with the By-Laws and say, wait a second,
17 the check that you gave us, the receipt that we gave you,
18 attached as Exhibit A, needs to come back to you now
19 because the board is considering your application to be a
20 member.

21 My point, Your Honor, is that from the complaint, the
22 only information I believe that can be construed by Your
23 Honor in this Motion to Dismiss indicates that he, in
24 fact, was a member in accordance with the Defendant's own
25 representations.

1 THE COURT: Mr. Smith, you're arguing that he makes
2 the unilateral determination that he's a member by virtue
3 of the fact he submitted a check and completed an
4 application, and therefore, he felt in his mind that he
5 was a member. And yet, you tell me you had received --
6 did you receive notice about the election from the board?
7 Did your client receive that or you're arguing that he did
8 not?

9 MR. SMITH: He has not to date.

10 THE COURT: They just returned his check and said
11 that it was pending?

12 MR. SMITH: That is correct. You can see that from
13 Exhibit C to our complaint. We weren't trying to hide
14 that fact at all. We were just trying to point out that
15 to include an argument that the By-Laws somehow can defeat
16 standing in this case, Your Honor, is to assume --

17 THE COURT: Hold on, let me look at Exhibit C.

18 It says that during the meeting, the board tabled the
19 approval of Lincolnwood -- I assume that's the name of the
20 business of your client, Lincolnwood membership --

21 MR. SMITH: That's correct.

22 THE COURT: The membership application is being
23 forwarded to the board's executive committee for review.
24 Our By-Laws require that all new members must be approved
25 by the Board of Directors. Due to the fact you're not

1 currently a member, no dues are owed by you and the
2 chamber cannot accept any payment for dues on your behalf.
3 The Board of Directors has asked me to return your check
4 to you, therefore, check whatever number that your client
5 submitted, in the amount of \$365 is enclosed. And it is
6 signed by the president and CEO, William G. Miles. Is
7 that right, that's what you're referring to?

8 MR. SMITH: Yes, Your Honor, that's it. And my point
9 is this, if you were to take the By-Laws, as provided in
10 support of their Motion to Dismiss here, Your Honor, you
11 would have to assume that those By-Laws were used in this
12 matter in the way in which they were intended to be used
13 from the complaint, which Your Honor has said governs this
14 case.

15 We only mention the By-Laws to point out, as you can,
16 perhaps, do under Title 33, that that right to request
17 information wasn't abrogated by the By-Laws. That's the
18 only reason we even brought that up in our complaint. But
19 what you would have to do to assume they can prevail on
20 this motion, Your Honor, is to assume that they followed
21 their By-Laws. And that isn't even coming from their
22 motion. They're just saying that these things exist and
23 if we were to follow them, he is not yet a member.

24 Your Honor, I grant Exhibit C is real. That they
25 did, after he submitted the information request, say, hey,

1 we have these By-Laws. But, Your Honor, what you don't
2 see in support of their motion is any affidavit or
3 anything from them concerning what the board's decision
4 was concerning his membership.

5 Coming at almost a year later on the statute of
6 limitations period for wrongful termination under this
7 title, he had no choice but to go ahead and assume he was
8 no longer a member. He didn't have any correspondence
9 from the board concerning his membership, despite
10 receiving emails, despite receiving communications that
11 you are, in fact, a member. So, this action was brought.

12 Your Honor, he also brought up the Hoagland matter.
13 And I'd like to give you a few quick differences here
14 between this case and that case, if I may. The first is
15 that in that Hoagland matter, Your Honor, Mr. Hoagland
16 received a response to his information requests in that
17 case. This is contemplated in the court's order, as you
18 can read. They indicated that his request was not made in
19 good faith. That is a way, Your Honor, to say that you're
20 not entitled by law to receive certain classifications of
21 information available under Title 33. Meaning, they
22 already went to the substance of the potential request for
23 information, which is not subject to this case yet.
24 They're trying to say that as a member, you were never
25 entitled to make sure a request. In Hoagland's case, they

1 indicated you didn't make a good faith determination.

2 Second in the Hoagland case, they then, after that,
3 explicitly terminated his membership. That was a record
4 in that case.

5 And third, Your Honor, Mr. Hoagland, then, didn't
6 bring his action, I believe, until some 16 months, I
7 believe is what the order says.

8 THE COURT: Sixteen months after he was notified of
9 it.

10 MR. SMITH: Right. So, in this case, Your Honor, my
11 client was forced to file this action within a year from
12 when he assumed that Exhibit C dealt with his membership,
13 Despite receiving communications from the Defendant that
14 you were still a member. He didn't have any other way to
15 vindicate his rights, so that's why this action was
16 brought, Your Honor.

17 THE COURT: Thank you very much.

18 Briefly, in reply?

19 MR. LAMBERT: Very briefly, Your Honor, just a couple
20 of points. One, if the By-Laws can be referenced, you can
21 read the whole document. You're not restricted to reading
22 just a paragraph of it.

23 This idea that we didn't attach an affidavit or some
24 other record to our motion, it's a 12(b)(6), Your Honor.
25 We couldn't attach the affidavit. That's why we didn't.

1 THE COURT: I agree with that. I do not go outside
2 the pleadings on a 12(b)(6) motion.

3 MR. LAMBERT: Yes, Your Honor. Third, there's this
4 theme that the chamber doesn't follow its By-Laws, but it
5 did here because it was convenient and the chamber is
6 being nefarious. None of that is in the complaint. No
7 allegation in the complaint is that the chamber only
8 invoked their By-laws here because they thought it would
9 benefit them to not have to give records to McAvoy. That
10 is a theory and concoction that's coming up now to try and
11 say you don't have to look at the By-Laws, when, as Your
12 Honor has noted in your questions to opposing counsel, the
13 By-Laws make three steps very clear and it's clear the
14 third step didn't happen.

15 Finally, as to Hoagland, the factual differences were
16 relevant to where it's instructive here, and that's the
17 question of where and when this 33-31-1604 applied, and
18 that is to someone who is a current member only.

19 THE COURT: Thank you very much.

20 MR. LAMBERT: Thank you, Your Honor.

21 THE COURT: All right. Since I'm very much against
22 the fact that Court Administration requires lawyers to pay
23 for proposed orders, I'm going to ask you to email me your
24 proposed orders. So, write this down, Counsel.

25 I'm going to ask you both to submit proposed orders

1 to me and you're going to give my law clerk a working
2 copy. And that means you're going to email within seven
3 days of today first pbucknerlc@sccourts.org and you're
4 also going to send me a working copy at
5 pbucknerj@sccourts.org. You will copy opposing counsel on
6 any transmittal to the Court, whether it be by United
7 States mail or by email. I would expect your proposed
8 orders on this matter within seven days of today.

9 Any questions about proposed order procedure from
10 Counsel from the moving party?

11 MR. LAMBERT: No, sir, Your Honor.

12 THE COURT: Any questions about the proposed order
13 procedure from counsel for the responding party?

14 MR. SMITH: No, Your Honor.

15 THE COURT: Look forward to getting your proposed
16 orders. Thank you for being prepared. The record is now
17 closed in connection with this hearing.

18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, PENNY M. JOHNSON, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete Transcript of Record of the proceedings had and the
evidence introduced in the hearing of the captioned case,
relative to appeal, in Court of Common Pleas for Beaufort
County, South Carolina, on the 27th day of February, 2018.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

July 30, 2018

Penny M. Johnson
Official Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner III, Circuit Court Judge

Appellate Case No. 2018-000853

RECEIVED

FEB 08 2019

SC Court of Appeals

Ryan McAvoy..... Appellant.

v.

Hilton Head Island-Bluffton Chamber of Commerce,Respondent,

RECORD ON APPEAL

I certify that I have caused the Record on Appeal to be served upon Respondent by United States Mail on February 8, 2019, addressed to its attorney of record, Wm Grayson Lambert, Burr & Forman, LLP, PO Box 11390, Columbia, SC 29211.

Harrison, Radeker & Smith, P.A.

By: Taylor Smith

Taylor M. Smith IV
S.C. Bar No. 101584
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
taylor@harrisonfirm.com

Attorneys for Appellant