

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Perry M. Buckner, III, Circuit Court Judge

Appellate Case No. 2018-000583

Case No. 2017-CP-07-01766

RECEIVED
MAR 20 2019
SC Court of Appeals

Ryan McAvoy, Appellant,

v.

Hilton Head Island-Bluffton Chamber of Commerce, Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

Whether the circuit court properly granted the motion to dismiss when McAvoy's complaint made clear that one of the requirements for membership in the Chamber was not satisfied.

INTRODUCTION

As our supreme court has long held, corporations are creatures of statute. Thus, what they may do and how they may operate are dictated by statute.

The Nonprofit Corporation Act—pursuant to which the Chamber was created—allows a nonprofit corporation to use its bylaws to establish the “procedures for the admission of members.” S.C. Code § 33-31-601(a). That's exactly what the Chamber did. In its bylaws, it established three steps for membership: (1) submission of a written application; (2) approval by the Board; and (3) payment of dues.

McAvoy's complaint makes clear that this second requirement was never met: The Board never approved his membership application. Therefore, he was never a member of the Chamber with a right to inspect its records, so all of his claims fail.

STATEMENT OF THE CASE

The Chamber and Its Bylaws

The Chamber works to advance the interests of its members, spur economic growth in Hilton Head and Bluffton, and generally enhance the quality of life for everyone in the region. (R. p. 44).¹ Anyone—an individual, corporation, partnership,

¹ In deciding a Rule 12 motion, a court may consider a document that is attached to or referenced in the complaint 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).

or estate—sharing the Chamber’s goals is eligible for membership in the Chamber. (R. p. 44).

For someone to become a member, he must comply with three requirements. First, he must submit a written, signed application. (R. p. 45). Second, his “[e]lection . . . shall be by the Board of Directors.” (R. p. 45). And third, he must pay the dues required of members. (R. p. 45).

McAvoy Seeks to Join the Chamber and Inspect Its Records

Ryan McAvoy alleges that he joined the Chamber in June 2016 by submitting an application and paying the \$365 annual dues.² (R. pp. 15, 22). In July, McAvoy received a letter welcoming him to the Chamber. (R. pp. 15, 24). Then, on August 22, 2016, McAvoy demanded to inspect the Chamber’s records, citing the Nonprofit Corporation Act. (R. p. 15).

A week after this request, Ray Deal, the Chamber’s controller, emailed McAvoy and informed him that he was “not yet a member of” the Chamber because his application was still pending the Board’s approval. (R. pp. 12–13). Because he was not yet a member, the Chamber did not allow him to inspect its records. (R. pp. 12–13).

In the trial court, McAvoy argued—both on the motion to dismiss, (R. p. 56), and on the motion to reconsider, (R. p. 59)—that considering the bylaws was improper. On appeal, he appears to have abandoned that position. See Br. 6. Having made no argument on this subject on appeal, it is now waived. See, e.g., *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n.4, 677 S.E.2d 32, 36 n.4 (Ct. App. 2009). And even if he hadn’t waived this argument, it could not prevail, in light of *Brazell*.

² As it must, the Chamber accepted the well-pled allegations as true for purposes of its Rule 12(b) motion. See, e.g., *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014).

Shortly after this email, the Chamber wrote a letter to McAvoy informing him that its bylaws required that the Board approve all new membership applications. (R. pp. 16, 26). McAvoy's application had been tabled during the Board's August 30 meeting, so as of the Chamber's September 1 letter, McAvoy was not a member of the Chamber. (R. pp. 16, 26). With that letter, the Chamber enclosed a \$365 check for the dues that McAvoy had prematurely submitted. (R. pp. 16, 26).

McAvoy was never allowed to inspect the Chamber's records. (R. p. 16). And McAvoy never alleges that he followed up with the Chamber about the status of his membership application before filing his lawsuit. (R. pp. 14–20).

McAvoy Sues the Chamber

Almost a year after receiving the Chamber's September 1, 2016 letter, McAvoy filed this lawsuit, asserting four claims. First, he brought 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. (R. p. 17). Second, McAvoy alleged a negligence *per se* action. (R. p. 18). Third, he sought a declaration that he is a member of the Chamber. (R. p. 18). Fourth, as an alternative to his third claim, McAvoy asked the court to declare that his membership in the Chamber was wrongly terminated. (R. p. 19).

The Chamber moved to dismiss, arguing that McAvoy lacked standing and his claims failed on the merits. (R. pp. 27–28). The circuit court heard the motion on February 27, 2018, (R. p. 71), and it granted the motion ten days later, (R. pp. 1–8).

McAvoy moved to reconsider. (R. pp. 58–60). On April 4, 2018, the circuit court denied that motion. (R. pp. 9–12).

McAvoy then timely appealed. (R. p. 64).

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss under the same standard as the circuit court. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014).

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 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. Although a court must view the allegations and draw reasonable inferences in the light most favorable to the plaintiff, a court nevertheless 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

I. McAvoy Was Never a Member of the Chamber.

The crux of McAvoy’s argument on appeal is that he was actually a member of the Chamber once he submitted his application and the \$365 because the Chamber

never regularly enforced its requirement that the Board approve applications, but did so in this case only after McAvoy demanded to inspect its records. This argument, however, ignores the Nonprofit Corporation Act and the Chamber's bylaws and is unsupported by the allegations in his complaint.

A. The Bylaws Control the Membership Process, and McAvoy Did Not Satisfy Each Requirement.

The Chamber was created under South Carolina's Nonprofit Corporation Act. *See id.* § 33-31-101 *et seq.* That means it is a "creature[] of statute." *Stephenson Fin. Co. v. S.C. Tax Comm'n*, 242 S.C. 98, 104, 130 S.E.2d 72, 74 (1963). It therefore "must depend for [its] powers, and the mode of exercising them, upon the true construction of the statute." *Runyan v. Coster's Lessee*, 39 U.S. 122, 128 (1840).

The critical section of the Nonprofit Corporation Act here is § 33-31-601, which provides that "[t]he articles or bylaws may establish criteria or procedures for the admission of members" to a nonprofit corporation. S.C. Code § 33-31-601(a). The Chamber availed itself of the option to establish procedures for membership in its bylaws. And part of the procedure that it established was having the Board approve membership applications. (R. p. 45).

McAvoy's complaint makes clear that the Board never approved his application. In fact, he alleges that two different Chamber officials informed him of this. First, Ray Deal, the Chamber's controller, emailed McAvoy on August 29, 2016, telling him that the Board hadn't approved his application. (R. p. 15). Next, William Miles, the Chamber's president, wrote McAvoy a letter on September 1, 2016, repeating this message. (R. pp. 16, 26). McAvoy does not allege that these actions were false or did

not occur. Thus, he is, of course, now bound by these allegations, which means that he has essentially admitted that he did not satisfy all three requirements for membership. *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.”).

B. McAvoy Cannot Circumvent the Bylaws.

Nowhere in his argument does McAvoy acknowledge, much less engage with, § 33-31-601. Understandably so, given that by applying that provision and the bylaws, McAvoy cannot plausibly contend that he was a member of the Chamber.

Instead, he argues that the Chamber waived the requirement that the Board approve his membership application. McAvoy relies heavily on a July 6 letter from William Miles and the fact that he continues to receive communications from the Chamber. *See* Br. 6–7 (citing Compl., Ex. B). The critical part of his argument is the supposed reason for the Board’s failure to approve his application: his demand to inspect records.

But there is no allegation in his complaint that justifies the leap from the July 6 letter or other communications to the idea that the Chamber wanted to avoid letting McAvoy inspect its records. He has not alleged any facts that support such a tenuous theory. *See Gaskins v. State Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (explaining that South Carolina has retained the fact-pleading standard that is more stringent than the Federal Rules notice-pleading

standard); *Brown v. Inv. Mgmt. & Research, Inc.*, 323 S.C. 395, 400 n.3, 475 S.E.2d 754, 756 n.3 (1996) (discussing the requirement to plead “ultimate facts”).

Indeed, McAvoy never alleged in his complaint that the Chamber did not consistently follow its bylaws. He argued below that the trial court should infer as much, (*see* R. p. 82, lines 19–24; p. 83, lines 23–24), but there’s simply nothing in the complaint to support such a claim.

And McAvoy cannot contend that he had a right to join the Chamber. *Cf. McMaster v. Ford Motor Co.*, 122 S.C. 244, 115 S.E. 244, 247 (1921) (“All authorities agree that the right to refuse to enter into business relations with another is an absolute right.”). The Board was free to approve, not to approve, or even not to act on his application.

Furthermore, he never alleged that the reason that the Chamber gave for refusing his request to inspect records (*i.e.*, that he wasn’t yet a member of the Chamber) was false or a mere pretext. Rather, the only reasonable conclusion that can be drawn from the allegations in the complaint is that the Chamber told McAvoy the truth: the Board hadn’t approved his application.³

Thus, all McAvoy has are “speculative, theoretical and hypothetical views” that the Chamber was afraid to let him inspect those records. *Hartfield v. Getaway*

³ Even if McAvoy were correct that the Chamber didn’t want him to inspect its records and even if that were—hypothetically—the reason that the Board didn’t approve his application, McAvoy still loses. The Board was not required to admit him to membership, and because McAvoy never was admitted to membership, he never had the right to demand to inspect the Chamber’s records.

Lounge & Grill, Inc., 388 S.C. 407, 421, 697 S.E.2d 558, 565 (2010). Those are insufficient for this case to survive a Rule 12(b) motion.

II. All of McAvoy's Claims Fail Because He Was Not a Chamber Member.

McAvoy's entire focus on appeal is whether he sufficiently alleged that he was a member of the Chamber. He never even bothers to address his four specific claims directly. Yet even if he had, he has no argument that any of them should survive.

A. McAvoy Lacks Standing to Pursue His Statutory Claim.

Standing comes in three forms: (1) statutory; (2) constitutional; and (3) the public-importance exception. *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Of these, only statutory standing is potentially applicable to McAvoy's claim that seeks relief under § 33-31-1604.

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.*

A careful review of the Nonprofit Corporation Act shows that only a member of a corporation has standing to bring a claim under § 33-31-1604. That section provides a remedy to a “member” of a nonprofit corporation who sought to inspect records pursuant to § 33-31-1602 but was wrongly denied. See S.C. Code § 33-31-1604 (using “member” seven times in four subsections to describe who may seek relief after being denied the right to inspect records). 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).

Common sense reinforces this conclusion. Cf. *S.C. Dep’t of Revenue v. Collins Entm’t Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000) (adopting “a logical, reasonable, common sense reading of the statute”). Only a person who has joined a corporation (that is, only a member) should have the right to inspect corporate records under § 33-31-1602. If this inspection right weren’t so limited, then any person could demand to see all of the records of any corporation—hardly a policy result that our General Assembly (or any legislature) would commend. The remedy for being denied the right to inspect records should likewise be limited to the same people: members.

Both the language and logic of the Nonprofit Corporation Act limit the statutory remedy for inspection rights to members. Someone who has merely applied for membership (like McAvoy) is not yet a member, as that person would have no

right to vote on corporate matters. Such an applicant therefore has no standing to pursue a claim under § 33-31-1604.⁴

B. McAvoy Has Not Stated a Negligence *Per Se* Claim.

McAvoy's negligence *per se* claim fails for two, separate reasons. First, he has simply—and improperly—repackaged his statutory claim as a tort claim. And second, he does not have constitutional standing on his tort claim. These flaws are fatal regardless of whether he has alleged that he was a member of the Chamber.

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

McAvoy's tort claim is nothing more than his statutory claim by a different name. South Carolina law, however, does not allow a plaintiff to reframe a statutory claim as a tort one.

A quick comparison of these two claims shows that they are essentially identical. The negligence claim is premised on McAvoy's assertion that the Chamber violated § 33-31-1602 and that he is therefore entitled to relief under § 33-31-1604. (R. p. 19). In other words, the “duty” that McAvoy claims the Chamber owed him is what the statute requires, (R. p. 19), and a “breach” of that “duty” is simply that the Chamber wrongly denied McAvoy the statutory right to inspect its records, (R. p. 19).

⁴ This conclusion is the same one reached by another circuit court recently in *Hoagland v. Beaufort Regional Chamber of Commerce*, No. 2017-CP-07-1825. (See R. pp. 93–99). That case—brought by vocal critic of chambers of commerce Skip Hoagland—was remarkably similar to this one, both in its legal theory and the verbiage of its complaint. Hoagland has also brought other lawsuits against chambers of commerce. See, e.g., *DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2d 513 (2018) (rejecting the argument that a chamber is a “public body” subject to FOIA).

McAvoy implicitly admits as much by labeling this claim as “negligence *per se*.” 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 proves that McAvoy’s only potential remedy is the one provided by the South Carolina Nonprofit Corporation Act. 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 even hints—much less clearly shows—that the General Assembly intended for a member to have anything other than the statutory remedy for statutory inspection rights. If a member’s statutory remedy related to a statutory 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 was therefore properly dismissed.

2. McAvoy Lacks Constitutional 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, even if he were a member of the Chamber.

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. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 602–03, 550 S.E.2d 287, 292 (2001) (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 for the statutory inspection right, so under South Carolina law, a court cannot fashion some other, nonstatutory remedy for a member’s right to inspect corporate records. Thus, even if McAvoy did somehow have the statutory right to inspect the Chamber’s records, he cannot obtain any relief on a common-law claim to remedy being denied that right.

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

McAvoy's last two claims were in the alternative. One sought a declaration that he is still a member of the Chamber. The other demanded a declaration that, if he is not still a member, his membership was wrongly terminated. Both claims are premised on the contention that McAvoy actually had become a member of the Chamber, despite the lack of the Board's approval of his application.

But McAvoy never was a member. As he admitted in his complaint, the Board never approved his membership. (*See R.* pp. 15–16). The Board's approval, of course, is required by the bylaws. (*See R.* p. 45). And that requirement was never waived.

Given that McAvoy was never a member, then he obviously 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—he never had any membership that could be terminated. Both of his declaratory judgment claims therefore fail as a matter of law, and the circuit court correctly dismissed them.

CONCLUSION

The circuit court's judgment should be affirmed.⁵

⁵ McAvoy's conclusion makes no sense in the context of this case. The Chamber assumes that McAvoy is asking for this Court to reverse the circuit court's decision. [*Note: This footnote addressed the conclusion in McAvoy's initial brief. His final brief has changed the conclusion, which now makes sense. The Chamber has no objection to this change under Rule 211(b), SCACR. This Note is added to the Chamber's final brief for clarity.*]

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Benjamin E. Nicholson, V", written over a horizontal line.

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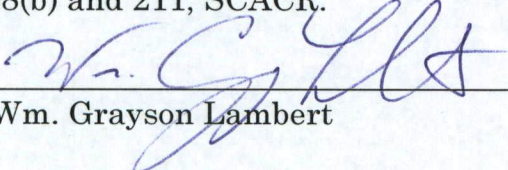
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CERTIFICATE OF SERVICE

This Final Brief complies with Rules 208(b) and 211, SCACR.



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CERTIFICATE OF SERVICE

I certify that this RESPONDENT'S FINAL BRIEF was served on counsel for the
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