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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2015-CP-26-05573
Appellate Case No. 2018-002009

K.A. Diehl and Associates, Inc.,

Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins,
Mark Dos Santos, William Moore, Steven Dame
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Appellant.

**APPELLANT'S RETURN TO RESPONDENT'S MOTION
TO DISMISS THE APPEAL AND COUNTERCLAIMS**

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Attorneys for Appellant

Mr. dos Santos¹ submits this return in opposition to K.A. Diehl's² Motion to Dismiss the Appeal and Counterclaims (the "Subject Motion").

BACKGROUND

K.A. Diehl filed this lawsuit against Defendants³ on July 23, 2015, in the Horry County Court of Common Pleas. (*See generally* R.⁴ pp. 36–52.) Describing the suit as having “arise[n] out of the Defendants’ defamatory statements and unlawful conduct against [it] related to its management of the [Associations] . . . ,”⁵ K.A. Diehl asserted claims against Defendants for defamation, tortious interference with a contractual relationship, intentional interference with prospective contractual relations, and civil conspiracy, seeking both monetary and injunctive relief. (*See generally* R. pp. 38–52.)

¹ “Mr. dos Santos” is Defendant/Appellant, Mark dos Santos, identified in the case caption as “Mark Dos Santos.”

² “K.A. Diehl” is Plaintiff/Respondent, K.A. Diehl and Associates, Inc.

³ “Defendants” refers, collectively, to Mr. dos Santos and the other defendants identified in the above caption. Defendants, i.e., each of them, were unit owners in a Myrtle Beach condominium complex known as Ocean Front Spa and, in turn, members of both the Myrtle Beach Resort, Ocean Front Spa Horizontal Property Regime, Inc., and its master association, the Myrtle Beach Resort Homeowners Association, Inc. (collectively, the “Associations”). (*See* R. pp. 39 ¶¶ 2–8, pp. 64–65 ¶¶ 96–100, pp. 94:24–95:7.) K.A. Diehl was the management company for the Associations. (*See* R. pp. 38 ¶ 1, pp. 65–67 ¶¶ 101–115.)

⁴ “R.” stands for the Record on Appeal, which has already been filed with the Court. *See* Rule 240(c)(3) (“Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.”).

⁵ (R. p. 39 ¶ 9.)

Defendants denied K.A. Diehl’s material allegations and counterclaimed for abuse of process, violation of the South Carolina Unfair Trade Practices Act (the “UTPA”), civil conspiracy, breach of fiduciary duty, negligence, and fraud. (*See generally* R. pp. 53–88.)

In addition to their counterclaims in the instant case, Defendants asserted claims relating to their ownership in Ocean Front Spa/membership in the Associations in four other lawsuits that they themselves commenced in Horry County in 2016: Cases No. 2016-CP-26-00673 and -00674, asserting class claims, and Cases No. 2016-CP-26-00743 and -00744, asserting derivative claims (collectively, the “2016 Cases”). (*See* R. pp. 118–119.)

Mediation was held in all five cases, i.e., in the instant case and the four 2016 Cases, on May 1, 2017. (*See* R. pp. 115–117, p. 119.) It went forward despite the known absence of several parties and adjusters involved in the cases—most notably at present, it went forward with Mr. dos Santos only being available by telephone and not physically present. (*See* R. p. 119.)

Mediation concluded at about 11:45 p.m. with an alleged written settlement agreement that was signed only by the following parties: K.A. Diehl (by its president), James Perkins, Colleen Franke, Nancy Moore, and Errol dos Santos. Of Defendants, neither Mr. dos Santos nor Steve Dame actually signed the agreement, but attorneys purportedly signed for them. (*See* R. p. 100:18–24, pp.

119–120, pp. 126–128.) Mr. dos Santos did not receive a copy of the agreement until sometime after mediation.

On October 18, 2017, K.A. Diehl moved to enforce settlement. (*See generally* R. pp. 118–273.) The attorneys who had represented Mr. dos Santos at mediation were relieved as counsel and, through new counsel,⁶ Mr. dos Santos opposed K.A. Diehl’s motion. (*See generally* R. pp. 15–16, 281–290.)⁷

The motion came on for hearing in the circuit court on March 12, 2018, the Honorable William H. Seals Jr. presiding. (*See generally* R. pp. 89–107.) After first filing a form order on March 19, 2018, indicating it had decided the matter in K.A. Diehl’s favor and a formal order would follow,⁸ the court granted K.A. Diehl’s motion by formal order filed March 21, 2018. (R. pp. 12–32.)

On March 31, 2018, Mr. dos Santos timely moved the circuit court to alter, amend, and/or reconsider its decision pursuant to Rule 59(e), SCRCP,⁹ the court heard the motion on October 8, 2018,¹⁰ and thereafter denied it by order filed October 9, 2018. (R. pp. 33–35.)

This appeal timely followed by notice served November 8, 2018. (R. pp. 302–306.)

⁶ (*See generally* R. pp. 6–11, pp. 274–280.)

⁷ Of Defendants, only Mr. dos Santos opposed the motion.

⁸ (R. pp. 9–11.)

⁹ (R. pp. 12–32, pp. 281–301.)

¹⁰ (*See generally* R. pp. 108–114.)

In short, as fully explained in Mr. dos Santos’s appellate briefs, and further supported via his supplemental citation of authority, the appeal challenges the circuit court’s grant of K.A. Diehl’s motion to enforce settlement (and likewise its denial of Mr. dos Santos’s motion to alter, amend, and/or reconsider that decision) on the basis that the subject settlement agreement did not comply with Rule 43(k), SCRCF. (*See generally* Final Brief of Appellant, Final Reply Brief of Appellant, Letter dated October 27, 2020, submitting supplemental citation pursuant to Rule 208(b)(7), SCACR.) Upon information and belief, but for the pendency of the Subject Motion, the appeal has proceeded to the point where a decision on the merits is imminent.

ARGUMENT

Of the six counterclaims asserted against K.A. Diehl, one of them (abuse of process) was dismissed by the circuit court (via order filed April 27, 2016,¹¹ *partially* granting K.A. Diehl’s motion to dismiss filed March 7, 2016¹²) and three of them (fraud, negligence, and breach of fiduciary duty) were dismissed by stipulation filed April 27, 2016,¹³ leaving, as K.A. Diehl recognizes, two counterclaims still pending at the time the circuit court granted its motion to enforce settlement: civil conspiracy and violation of the UTPA, the latter of which

¹¹ (*See* **Exhibit A.**)

¹² (*See* **Exhibit B.**)

¹³ (*See* **Exhibit C.**)

the circuit court expressly declined to dismiss in its order filed March 27, 2016. (**Exhibit A** (“[K.A. Diehl’s] Motion to Dismiss counterclaim of unfair trade practices is DENIED.”) (original bold print omitted) (capitalization in original).) And, of course, though unmentioned in the Subject Motion, K.A. Diehl’s own claims against Defendants were also still pending, which claims Mr. dos Santos has consistently maintained are without merit¹⁴ and were improperly asserted as a SLAPP suit (i.e., a strategic lawsuit against public participation) against him his co-defendants. (See, e.g., R. p. 66 ¶ 108 (referring to this lawsuit by K.A. Diehl as a “SLAPP suit”), p. 67 ¶ 114 (same), p. 77 ¶ 195 (“K.A. Diehl filed this suit for the purpose of intimidating all other homeowners and to prevent such other homeowners from participating in defendants future action against it, and to prevent them from engaging in conversation about the failures or misconduct of K.A. Diehl and the Master Board.”), p. 78 ¶ 202 (“That K.A. Diehl’s suit against the individual defendants sought to financially harm defendants, intimidate defendants, intimidate others, and thereby prevent disclosure of facts to the other homeowners.”) ¶ 205 (“That K.A. Diehl’s complaint against the individual defendants is replete with fabrications and trumped up causes of action.”) ¶ 206 (“That K.A. Diehl has not suffered any harm or damage as result of the individuals conduct, but that even if such had occurred, it would not substantiate an action

¹⁴ (See generally R. pp. 53–88.)

against these individual homeowners.”) ¶ 207 (“That K.A. Diehl filed suit not to pursue damages but to quiet the individual defendants to prevent their speech regarding matters of great importance to the homeowners.”).)

K.A. Diehl’s argument (in support of the Subject Motion) that, by virtue of the sale of his unit at Ocean Front Spa no longer has standing and is no longer aggrieved by the circuit court orders on appeal is without merit.

1. Mr. dos Santos still has standing with respect to the counterclaim for civil conspiracy.

According to K.A. Diehl, the counterclaim for civil conspiracy only has to do with the allegation that Mr. dos Santos was denied records and information, and since he no longer owns a unit at Ocean Front Spa, he no longer has anything to complain about. (*See* Subject Motion p. 5 (“[Mr. dos Santos] no longer owns a unit in the Regime, is no longer a member of the Associations, and ultimately does not have a personal stake in the financial records or other information of the Associations. Therefore, even if successful on the theory of his claim, he cannot request documents or records related to property he no longer owns.”).) But K.A. Diehl is mistaken, as the counterclaim clearly alleges not only the denial of records and information but also a “conspir[acy] to injure and harm defendants by filing this suit”¹⁵ and money damages (R. p. 84 ¶ 250 (“[T]he defendants have suffered

¹⁵ (R. p. 83 ¶ 247.)

special damages to include attorney fees, costs, and such other damages as jury may determine.”.)

In essence, what K.A. Diehl is asking the Court to do here is to grant a motion to dismiss under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action. The question posed to a court by a Rule 12(b)(6) motion is whether, in the light most favorable to the nonmoving party, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the “facts alleged and inferences reasonably deducible therefrom would entitle the [nonmoving party] to any relief on any theory of the case,” then dismissal under Rule 12(b)(6) is improper. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

K.A. Diehl is asking the Court to take a blinkered view of the allegations set forth in the pleading at issue (i.e., Defendants’ Answer to Plaintiff’s Complaint and Counterclaims, which spans some 36 pages, *see* R. pp. 53–88) that is contrary to the Rule 12(b)(6) standard.

2. Mr. dos Santos still has standing with respect to the counterclaim for violation of the UTPA.

K.A. Diehl's argument regarding Mr. dos Santos's supposed lack of standing with respect to the counterclaim has nothing to do with the fact that he has sold his unit at Ocean Front Spa.¹⁶ Rather, K.A. Diehl's argument is that:

Under South Carolina law, [Mr. dos Santos] lacks standing to assert the SCUTPA claim as pled against K.A. Diehl because [Mr. dos Santos] seeks the damages of the [Associations] for an increased cost of insurance. The allegation is that K.A. Diehl caused the Associations' insurance costs to be unfairly inflated by failing to procure competitive bids, which further caused [Mr. dos Santos's] assessments to increase. South Carolina law is clear that members of a non-profit corporation, like shareholders of a for-profit corporation, cannot recover damages based on losses suffered by the corporation, like the increase costs insurance in this case.

(Subject Motion pp. 5–6.) This is the same argument that K.A. Diehl previously made to the circuit court in its motion to dismiss filed March 7, 2016 (**Exhibit B** pp. 4–11), and that the circuit court previously denied in its order filed March 27, 2016 (**Exhibit A**). K.A. Diehl has not appealed the circuit court's denial of its motion to dismiss the counterclaim for violation of the UTPA and, even assuming that this could have been raised in K.A. Diehl's responsive brief as an additional

¹⁶ The argument that K.A. Diehl makes in a footnote about standing in *derivative* actions (*see* Subject Motion p. 7 n.2) is obviously misplaced because *this is not a derivative action*.

sustaining ground, it was not¹⁷ and is thus rightly deemed abandoned. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723, (2000) (“Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief.”)

Moreover, here again, in essence, what K.A. Diehl is asking the Court to do is to grant a motion to dismiss under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, putting aside the problems addressed above (about the circuit court having already denied such a motion), K.A. Diehl is again asking the Court to take a blinkered view of the allegations set forth in the pleading at issue (*see* R. pp. 53–88) that is contrary to the Rule 12(b)(6) standard. *See Plyler*, 373 S.C. at 645, 647 S.E.2d at 192; *Stiles*, 318 S.C. at 300, 457 S.E.2d at 603.

And as for K.A. Diehl’s argument that “[Mr. dos Santos’s] full relief was recovered by the Associations in the Derivative Actions that reached settlement” and “[t] allow him to recover damages on behalf of the Associations—to which he no longer belongs—for increased insurance costs in the Derivative Actions and individually for increased assessments in this action would allow for double

¹⁷ (See generally Final Brief of Respondent.)

recovery,”¹⁸ it plainly asks the Court to decide, in the first instance (as if it were not an appellate court, but a trial-level court), matters it cannot properly decide, or for that matter, even meaningfully consider, given the obvious presence of factual questions and the obvious absence of the evidence needed to answer them.

- 3. In any event, Mr. dos Santos still has standing to vindicate himself by successfully defending against and defeating the claims he believes K.A. Diehl has wrongfully asserted against him—and indeed his doing is necessary for what he believes to be K.A. Diehl’s malicious prosecution of this action to ripen into a cause of action so that he may attempt to hold K.A. Diehl accountable for the same.**

South Carolina recognizes a cause of action for the malicious prosecution of a civil action. *Cisson v. Pickens Savs. & Loan Ass’n*, 258 S. C. 37, 186 S. E. 2d 822 (1972). The elements of the cause of action are (1) the institution or continuation of original judicial proceedings, either civil or criminal, (2) by, or at the instance of, the defendant, (3) *the termination of such proceedings in plaintiff’s favor*, (4) maliciousness in instituting such proceedings, (5) want of probable cause, and (6) resulting injury or damage. *Gaar v. North Myrtle Beach Realty Co.*, 287 S. C. 525, 339 S. E. 2d 887 (Ct. App. 1986); *see also McDonough v. Smith*, 139 S. Ct. 2149 (2019) (Although the injury caused by a classic malicious prosecution first occurs as soon as legal process is brought to bear on a defendant, favorable termination remains the accrual date for a malicious prosecution claim.);

¹⁸ (Subject Motion p. 7.)

Manuel v. City of Joliet, Ill., 137 S. Ct. 911 (2017) (Element of the common-law tort of malicious prosecution is the termination of the proceeding in favor of the accused, and, accordingly, the statute of limitations does not start to run until that termination takes place.).

Mr. dos Santos contends that K.A. Diehl's claims against him are without merit and were asserted by K.A. Diehl as a pretext for them to try to stifle Mr. dos Santos's legitimate criticisms and concerns with respect to K.A. Diehl's performance of obligations of direct and material importance to him and the other interested parties with whom he shared them.¹⁹ In Mr. dos Santos's view, this is a SLAPP suit strategically deployed against him, as well as against the other stakeholders who spoke out about mismanagement of their property, in an effort by K.A. Diehl to shield itself from legitimate scrutiny and accountability by conflating self-inflicted wounds (i.e., the natural and rightful adverse consequences of their own wrongful acts/omissions) with "damages" he supposedly caused. And notwithstanding the later-filed cases against K.A. Diehl in which Mr. dos Santos was a plaintiff (i.e., the 2016 Cases, which, as the Subject Motion notes, have been concluded), it was K.A. Diehl who first took him to court, forcing him to embark as an involuntary passenger on the burdensome and costly journey (not only in

¹⁹ Regarding the legitimacy of Mr. dos Santos's criticisms and concerns, please see the reviews of K.A. Diehl obtained online attached as **Exhibit D**.

terms of dollars spent but also of wasted effort and valuable time and opportunities lost) that is this lawsuit in order to stand up to the accusations leveled against him.

Notwithstanding the sale of his unit at Ocean Front Spa, Mr. dos Santos certainly still has an interest in prevailing in this appeal and, thereafter, on remand to the circuit court, vindicating himself by successfully defending against and defeating the claims he believes K.A. Diehl has wrongfully asserted against him, which, again, is indeed is necessary for what he believes to be K.A. Diehl's malicious prosecution of this action to ripen into a cause of action so that he may attempt to hold K.A. Diehl accountable for the same.

CONCLUSION

For the foregoing reasons, Mr. dos Santos asks this Honorable Court to deny the Subject Motion and decide this appeal on the merits.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
CLEMENT RIVERS, LLP

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December 15, 2021

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2015-CP-26-05573
Appellate Case No. 2018-002009

K.A. Diehl and Associates, Inc.,

Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins,
Mark Dos Santos, William Moore, Steven Dame
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorney for Appellant, hereby certify that **APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS THE APPEAL AND COUNTERCLAIMS** was served on Respondent on December 15, 2021, via email (see attached) to Respondent's counsel of record:

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Respectfully submitted,
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December 15, 2021

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2015CP2605573

KA Diehl and Associates Inc	Jeff 3Rd Party Richardson	Jim Perkins	Colleen Franke
		Colleen Franke Perkins Nancy Moore Steven Dame 3Rd Party Ocean Front Spa Horizontal Property Regime Inc	Mark Dos Santos William Moore Errol Dos Santos

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

**Plaintiff's Motion to Dismiss counterclaim of unfair trade practices is DENIED. Plaintiff's Motion to Dismiss counterclaim of abuse of process is GRANTED
 Plaintiff's Motion to Strike is MOOT.**

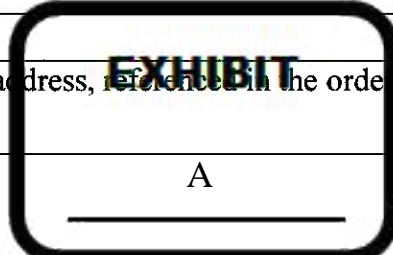
This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, reference in the order:



The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

M. J. Culbertson

2148 4/26/2016

Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Grace Hurley

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

The motion is based upon the pleadings, the controlling law, the memorandum of law incorporated herein, and such other and further material as the Court may deem appropriate. The undersigned, as counsel for K.A. Diehl, hereby certifies that consultation with opposing counsel would serve no useful purpose.

FACTUAL ALLEGATIONS

This action was initiated as a result of the Defendants combining together to interfere with K.A. Diehl's business relationships by publishing defamatory statements regarding K.A. Diehl in various mediums. K.A. Diehl is a South Carolina community association management company with clients located in Horry County, South Carolina. Myrtle Beach Resort Association (hereinafter "**MBR Association**") and Ocean Front Spa Association (hereinafter "**OFS Association**") (collectively hereinafter referred to as "**Associations**") are South Carolina non-profit corporations that govern property located in Myrtle Beach Resorts. MBR Association is the master association for Myrtle Beach Resort that is comprised of 33 acres of oceanfront property, including four horizontal property regimes. OFS Association governs Oceanfront Spa Horizontal Property Regime, which is one of the four horizontal property regimes located in Myrtle Beach Resorts. The Defendants, by virtue of their ownership of Ocean Front Spa Regime units, are members the Associations. The Associations have been K.A. Diehl's clients since 2007.

Several of the Defendants ran for the OFS Association Board of Directors in 2014 and lost the election. In retaliation, the Defendants conspired together to initiate a smear campaign against K.A. Diehl in emails, on several internet platforms, and in various communications with the other members of the Associations and with members of the general public. The defamatory statements were posted on several different websites and widely disseminated in email communications from the Defendants to various third parties. Defendants' statements were published with malice for

the purpose of gaining control of the Board of Directors for MBR Association and OFS Association and in an effort to terminate K.A. Diehl's contracts with all associations that manage Myrtle Beach Resorts property and its other clients.

PROCEDURAL BACKGROUND

As a result, K.A. Diehl filed this action on July 23, 2015 asserting causes of action for defamation, tortious interference with contractual relationships, tortious interference with prospective contractual relationships, civil conspiracy, and seeking damages and injunctive relief. Defendants filed and served their Answer, Counterclaims, and Third-Party Complaint dated September 23, 2015 that contained improperly pled individual and derivative claims against K.A. Diehl, MBR Association, OFS Association, and their directors. The counterclaims asserted against K.A. Diehl included abuse of process and violation of SCUTPA. The parties agreed by Consent Order dated and filed January 8, 2016 to dismiss the Defendants' claims and granted leave to the Defendants to amend their pleading.

Defendants filed and served their Amended Answer and Counterclaims (hereinafter "Answer") on February 2, 2016. Defendants assert counterclaims of abuse of process for filing this action "for the purpose of intimidating all other homeowners and to prevent such homeowners from participating in defendants future action against it, and to prevent them from engaging in conversation about the failures or misconduct of K.A. Diehl and the Master Board"(Answer, ¶ 195) and violation of SCUTPA for failing to procure competitive bids for insurance for MBR Association and OFS Association in breach of K.A. Diehl's contracts with the Associations (Answer, ¶¶ 210-235). Defendants also filed two separate derivative actions against K.A. Diehl for negligence, breach of contract, and breach of contract accompanied by a fraudulent act setting forth nearly identical allegations as the Answer in support and added the Associations and their

board members as defendants. Similarly, the Defendants are pursuing two class action lawsuits against the Associations and their board members upon similar grounds as set forth in the derivative actions.

STANDARD OF REVIEW

Rule 12(b)(6), SCRPC, provides for the dismissal of a complaint for failure to state facts sufficient to constitute a cause of action. See Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). “Where the pleadings are fatally deficient in substance or fail to state a good cause of action in favor of the... [claimant] and against the defendant, judgment on the pleadings is proper.” Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 422, 297 S.E.2d 638, 640 (1982). “Viewing the evidence in favor of the ... [claimant], the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” Brown v. Theos, 338 S.C. 305, 309-10, 526 S.E.2d 232, 235 (Ct. App. 1999), *aff’d*, 345 S.C. 626, 550 S.E.2d 304 (2001) (internal citations omitted) (affirming dismissal of legal malpractice action for failure to state a claim).

ARGUMENT

I. SCUTPA

The SCUTPA was modeled after the Federal Trade Commission Act, which provides “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. 33, 56, 777 S.E.2d 176, 188 (2015) (citing 15 U.S.C. § 45(a)(1)). The SCUTPA “declares unfair or deceptive acts or practices in trade or commerce unlawful.” Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing S.C. Code Ann. § 39-5-20(a) (2002)).

“To recover in an action under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010) (citing Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)); S.C. Code Ann. §§ 39-5-10 to -560 (1976 & Supp. 2009). Under the SCUTPA, a trade practice is unfair when it is offensive to the public policy or when it is immoral, unethical, or oppressive. deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000).

A. Lack of Standing

Under South Carolina law, Defendants lack standing to assert the SCUTPA claim as pled against K.A. Diehl, because K.A. Diehl seeks the damages of MBR Association and OFS Association for increased cost of insurance. The allegation is that K.A. Diehl caused the Associations’ insurance costs to be unfairly inflated by failing to procure competitive bids, which further caused the Defendants’ assessments to increase. South Carolina law is clear that members of a non-corporation, like shareholders of a for a profit corporation, cannot recover damages based on losses suffered by the corporation, like the increase costs insurance in this case.

The threshold requirement of standing is ‘perhaps the most important’ condition of justiciability.” Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 203 F.3d 149, 153 (4th Cir. 2000), quoting Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324 (1984). Requiring a claimant to establish standing ensures that the claimant “has a personal stake in the dispute to render judicial resolution appropriate.” Friends of the Earth, Inc., 203 F.3d at 153. “The standing requirement also tends to assure that the legal questions presented to the court will be

resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Id. quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982).

The irreducible constitutional minimum of standing contains three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136 (1992). The Supreme Court defined “particularized” invasion of a legally protected right to “mean that the injury must affect the plaintiff in a personal and individual way.” Id. n. 1. At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice. Id.

In South Carolina, “[t]he well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of the stock.” Rice-Marko v. Wachovia Corp., 398 S.C. 301, 307-08, 728 S.E.2d 61, 65 (Ct. App. 2012) citing Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (N.C. 1997), see also, Brown v. Stewart, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001) (holding individuals may not sue corporate directors and officers for losses suffered by the corporation). In other words, shareholders do not have standing to pursue actions against third parties for the injuries to the corporation, even if their stock value decreases, because they have not suffered an injury caused by those third parties. Id. “A shareholder may

maintain an individual action [against the alleged wrongdoers] only if his loss is separate and distinct from that of the corporation” and “if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation.” Brown, 348 S.C. at 49, 557 S.E.2d at 684.

The Defendants do not have standing to bring a claim against K.A. Diehl for the Associations’ increased operating expenses. The violation of SCUTPA claim does not allege any losses suffered that are separate and distinct from MBR Association’s and OFS Association’s damages. Instead, the Defendants assert that K.A. Diehl’s failure to procure competitive bids is a breach of K.A. Diehl’s agreements with the Associations and that such breaches caused the Associations to incur higher operating expenses. Further, the higher operating expenses caused the Defendants’ assessments to increase. The only individual damages asserted by the Defendants include an increase in the Defendants’ annual assessments, which like a diminution in a shareholder’s stock in a corporation, cannot be sought from K.A. Diehl in this case. The increase in assessments is not an “injury” caused by K.A. Diehl that gives rise to a cognizable action.

Likewise, similar to the relief sought in Brown, the Defendants’ full relief can be recovered by the Associations in the pending derivative actions. 348 S.C. at 49, 557 S.E.2d at 684. The Defendants seek damages against K.A. Diehl for breach of contract, negligence, and breach of contract accompanied by a fraudulent act for failure to procure competitive bids. To allow Defendants to recover damages on behalf of the Association for increased insurance costs in the derivative action and individually for increased assessments in this action would allow for double recovery. Because Defendants are able to obtain the full relief sought through their derivative actions, their claim for individual damages must be dismissed.

Accordingly, the Defendants lack standing to bring their cause of action for violation of SCUTPA.

B. No Damages or Proximate Cause

The Defendants failed to plead that they suffered any ascertainable loss as a proximate cause of the deceptive acts of K.A. Diehl.

In an action brought by a citizen under section 39-5-140(a) of the South Carolina Code, there is a requirement beyond the tendency to deceive element that the person suffer an “ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice.” State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. at 57, 777 S.E.2d at 189. Thus, SCUTPA requires that a private claimant suffer an actual loss, injury, or damage, and requires a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices. S.C. Code Ann. § 39-5-140(a).

Defendants have not pled an ascertainable loss caused by a deceptive act. The failure to procure competitive insurance bids allegedly caused the *Associations*’, not the *Defendants*’, insurance rates to increase. The loss that was alleged is an increase in the Defendants’ assessments, which as pled, was not proximately caused by any actions of K.A. Diehl, nor was the loss alleged *as a result* of any deceptive act. See Collins Holding Corp. v. Defibaugh, 373 S.C. 446, 451, 646 S.E.2d 147, 150 (Ct. App. 2007) (“The UTPA only creates causes of action in those suffering a loss as a *result* of a deceptive act.”) (emphasis in original). The failure to procure competitive bids is not a deceptive act within the meaning of SCUTPA.

Because Defendants failed to allege damages proximately caused by a deceptive act by K.A. Diehl, the SCUTPA claim should be dismissed.

C. No Unfair and Deceptive Act

The Answer does not contain any allegations that K.A. Diehl engaged in a deceptive act.

“The terms ‘unfair’ and ‘deceptive’ are not defined in SCUTPA; rather, in section 39-5-20(b) of the Act, the legislature directs that in construing those terms, the courts of our state “will be guided by” decisions from the federal courts, the Federal Trade Commission Act, and interpretations given by the Federal Trade Commission. State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. at 57, 777 S.E.2d at 188. “South Carolina has been guided by federal law, which recognizes the public interest involved and requires a showing of a ‘tendency to deceive.’” Id. “An act is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive.” Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808, 816 (2013) (quoting Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137, 143 (1999)). “Whether an act or practice is unfair or deceptive within the meaning of the SCUTPA depends upon the surrounding facts and the impact of the transaction on the marketplace.” State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. at 56-57, 777 S.E.2d at 188. “[T]here is no deception alleged” when disclosure is made to the claimant who asserts deception occurred. Camp v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304 (1993) (dismissing a claim by closing attorney against bank regarding statements made to third parties, because same statements were made to the closing attorney, and thus, no deceptive act occurred).

Defendants allege that K.A. Diehl failed to disclose a familial relationship between the former CEO of K.A. Diehl, Rob Barlow, with a principal of the Associations’ insurance broker, Robin Barlow of ADP Barlow Insurance. (Answer, ¶¶ 148-151). The allegation is that the failure to disclose the relationship and to procure competitive bids caused MBR Association’s and OFS Association’s insurance rates to increase. (Answer § 155). The only act that could be construed

as “deceptive” is K.A. Diehl’s failure to disclose this relationship. The Answer includes allegations that the relationship was “eventually disclosed” to the Associations’ Board of Directors, and that the disclosure occurred no later than December, 2012, however K.A. Diehl failed to inform the membership of the familial relationship. (Answer, §§ 152-153).¹

The failure to disclose the familial relationship, the deceptive act alleged, did not cause the Association’s increased costs of insurance. The alleged failure to procure competitive bids caused damages, which is not a “deceptive act”, but merely a dispute arising out of K.A. Diehl’s contract with the Associations, which is “beyond the Act’s embrace.” See, Noack Enter., Inc., 290 S.C. at 474, 35 S.E.2d at 349-350. Personal allegations arising out of an alleged breach of contract is not actionable conduct under SCUTPA. Id.

Furthermore, even if K.A. Diehl failed to expressly disclose the familial relationship to the membership, which is specifically denied, K.A. Diehl’s CEO Rob Barlow and Robin Barlow share the same last name, as does the insurance company that K.A. Diehl allegedly helped to procure higher rates. As further alleged by the Defendants, K.A. Diehl previously made a link to ADP Barlow Insurance available on its website and allegedly shared office space. (Answer, ¶ 214). The conduct of K.A. Diehl in affiliating with ADP Barlow Insurance, a company that shared the name of K.A. Diehl’s CEO, evidences that there was no effort to “deceive” the Associations of the familial relationship or “unfair[ly]” deal with the Associations in procuring insurance.

Additionally, K.A. Diehl has no duty to disclose the familial relationship to the membership. Disclosure was made to the Associations’ Board of Directors, the governing entities

¹ The alleged deceptive acts are barred by SCUTPA’s statute of limitations. The Defendants admit that K.A. Diehl disclosed the relationship to the Board of Directors more than three (3) years ago. Any alleged deceptive act beyond the three (3) year period of filing is barred by the statute of limitations. See S.C. Code Ann. § 39-5-150 (“A claimant must bring an action under UTPA within three years of discovery of the unlawful conduct.”).

that accepted the bids for insurance, as admitted in the Answer. The Defendants, as members, have no claim against K.A. Diehl for failing to disclose any familial relationship between its principal and its vendor's principal to the membership, because the membership does not accept the bids for insurance.

The pleadings reflect that K.A. Diehl did not act in a deceptive manner in procuring bids for insurance from ADP Barlow Insurance on behalf of the Associations, and accordingly, the SCUTPA claim should be dismissed.

II. Abuse of Process

Defendants' abuse of process claim seeking damages for K.A. Diehl's initiation of this action is also barred under South Carolina law.

The South Carolina Supreme Court has defined abuse of process as "employment of a legal process for some purpose other than which it was intended by law to effect—the improper use of a regularly issued process." Huggins v. Win-Dixie Greenville, Inc., 249 S.C. 206, 208, 153 S.E.2d 693, 695 (1967). "The tort of abuse of process...involves the malicious misuse or perversion of the process, after its issuance, for an end not lawfully warranted by it." Johnson v. Painter, 279 S.C. 390, 391, 307 S.E.2d 860 (1983), quoting Huggins, 249 S.C. 206, 153 S.E.2d 693 (1967). "In order to prevail on a claim for abuse of process, a party must show two essential elements: (1) an ulterior purpose; and (2) a willful act in the use of process not proper in the conduct of the proceeding." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 70-71, 567 S.E.2d 251, 253 (Ct.App. 2002) (dismissing an abuse of process claim pursuant to Rule 12(b)(6) because defendant failed to meet the "willful act" element of the claim). Mere commencement of a civil action by the service of a summons and complaint does not in itself

constitute abuse of process. Bell Lines, Inc. v. Strickland, 254 S.C. 148, 150, 173 S.E.2d 788, 788-89 (1970).

The willful act for an improper purpose “usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club.” Scott v. McCain, 275 S.C. 599, 601, 274 S.E.2d 299 (1981). “There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.” Id. citing Bell Lines, Inc., 254 S.C. 148, 173 S.E.2d 788; Cisson v. Pickens Savings & Loan Association, 258 S.C. 37, 186 S.E.2d 822 (1972); Russell v. Risher, 272 S.C. 182, 249 S.E.2d 908 (1978).

In Bell Lines, Inc., Strickland, challenged the lower court’s dismissal of his counterclaim for abuse of process. 254 S.C. at 150, 173 S.E.2d at 788-89. In the counterclaim, Strickland asserted that Bell Lines, Inc. harassed him for payment of alleged debt which it knew was not due and published the alleged debt to various collecting agencies for the ulterior purpose of injuring Strickland’s credit, and that these acts and the commencement of the action were done maliciously to collect a debt that was never owed. Id. The South Carolina Supreme Court upheld the lower court’s dismissal of Strickland’s counterclaim, explaining that “the commencement of a civil action by the service of a summons, as required by the Code, cannot amount to the tort known as abuse of process”. Id.

Here, K.A. Diehl’s mere commencement of a civil action against the Defendants cannot be an abuse of process under Bell Lines, Inc. No willful act occurred “after ...[the] issuance” of process or was pled that supports a claim for abuse of process in this case. See Painter, 279 at 391, 307 S.E.2d 860. In other words, no form of extortion was carried out by K.A. Diehl after the filing

of this lawsuit to carry out an ulterior purpose, nor were such allegations pled in the Answer as required by South Carolina law. The allegations pled by Defendants include the following:

- Paragraph 193. That Plaintiff failed to respond appropriately to Defendants' inquiries, and threatened to sue one or more of the Defendants. That such threat to use the system was for the purpose of intimidating the Defendants in an effort to prevent them from disseminating the truth.
- Paragraph 194. That upon information and belief, K.A. Diehl became aware of the defendants' intention to file a derivative action on behalf of MBRHOA against K.A. Diehl. That K.A. Diehl then filed suit seeking to intimidate defendants and cause them to hire counsel for the purpose of attempting to make said derivative suit financially impracticable for defendants.
- Paragraph 195. Further, K.A. Diehl filed this suit for the purpose of intimidating all other homeowners and to prevent such other homeowners from participating in defendants future action against it, and to prevent them from engaging in conversation about the failures or misconduct of K.A. Diehl and the Master Board.
- Paragraph 196. That upon information and belief, both K.A. Diehl and MBRHOA posted the lawsuit to make an example of the individual defendants and further intimidate any other homeowners that would question K.A. Diehl's practices.

The above referenced paragraphs merely allege that K.A. Diehl initiated this action for an ulterior purposes of "intimidating Defendants...and all other homeowners" and "to make said derivative suit financially impracticable", however, such allegations alone are insufficient to sustain a cause of action for abuse of process. The Defendants must plead that K.A. Diehl committed a willful act during the process, i.e. a "coercion to obtain a collateral advantage". Scott, 275 at 601, 274 S.E.2d 299. The Defendants' Answer is completely absent of such allegations.

Furthermore, the sole purpose of the litigation is to seek damages and injunctive relief against the Defendants for publishing defamatory statements about K.A. Diehl and improperly interfering with its contracts. K.A. Diehl seeks injunctive relief from this Court for the improperly published defamatory statements and requests that such statements be enjoined after a trial on the merits. Nothing is improper about the commencement of an action for that purpose. The

Defendants' dispute as to the merit of K.A. Diehl's claims does not give rise to an abuse of process claim.

Because K.A. Diehl has merely commenced an action against the Defendants, their claim for abuse of process must be dismissed.

III. Fraud

Defendants failed to allege a cause of action for fraud against K.A. Diehl.

Rule 9(b) requires Plaintiffs to "state with particularity the circumstances constituting fraud or mistake." Rule 9(b), SCRPC. In order to prove to succeed on a fraud claim, the following elements must be pled: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 352 S.C. 319 (Ct. App. 2002); see also, Jones v. Cooper, 234 S.C. 477, 482, 109 S.E.2d 5, 7 (1959). The first element of representation must be pled with particularity to give rise to a cause of action for fraud. Id. (holding that claim for constructive fraud should be dismissed for failure to plead a representation).

"Deceit or fraudulent representation, in order to be actionable, must relate to existing or past facts, and the fact that a promise made in the course of negotiations is never performed does not in and of itself constitute nor evidence fraud. Jones, 234 S.C. 477, 487-88, 109 S.E.2d 5 (1959) (citing Coleman v. Stevens, 124 S.C. 8, 117 S.E. 305, 307 (1923). It is well established that "[a] mere breach of a contract does not constitute fraud." Id. (emphasis added). "Promises as to future conduct and not to existing facts, cannot be construed as false representations." Greer Bank & Trust Company v. Waldrop, 155 S.C. 47, 52, 151 S.E. 920 (1930).

The fraud claim sets forth the following misrepresentations:

- Paragraph 264. That K.A. Diehl represented itself to be a reputable company that would deal fairly and procure competitive bids and provide proper staff.
- Paragraph 267. That to the extent K.A. Diehl informed OFS and MBRHOA that it had a relationship with ADP Barlow, K.A. Diehl did not divulge that utilizing ADP Barlow would cost individual homeowners money.
- Paragraph 269. That K.A. Diehl intended the hearer of the statements act upon said statements to include: not procuring competitive insurance bids; not procuring competitive management bids; and not procuring competitive security bids.

The above referenced representations are not actionable fraud, because they are “promises as to future conduct and not existing facts”. The statements, although not entirely clear, allegedly occurred during K.A. Diehl’s negotiation of its agreements with the Associations. Representations as to contractual obligations that will be completed does not amount to fraud under South Carolina law. Coleman, 124 at 8, 117 at 307. Nor are the statements false, because the Defendants specifically admit that K.A. Diehl informed the Associations of the familial relationship between the principals of K.A. Diehl and ADP Barlow.

Furthermore, the Defendants did not plead that they relied upon K.A. Diehl’s allegedly fraudulent statements, which requires a dismissal of their claim for fraud. The only allegation as to reliance states that “the hearers” of the statements relied upon them:

- Paragraph 270. That the hearers of said statements have relied upon the statements as evidenced by: having purchased insurance with ADP Barlow; maintaining management agreements with K.A. Diehl; and hiring Watchmen Services (K.A. Diehl affiliate) to provide security services.
- Paragraph 271. That upon information and belief, MBRHOA and OFS, and the defendants were ignorant of the truth of the falsity of the statements, and had right to rely upon said statements, and did, in fact, rely upon such statements.


The “hearers” as referenced in Paragraph 270 of the Answer presumably are the Associations’ Board of Directors. The Board members, rather than the Defendants individually, “purchased

insurance”, “maintain[] management agreements”, and “hir[e]... Watchmen Services.”. Accordingly, the Defendants have failed to allege any fraudulent statement relied upon by them that caused individual damages.

CONCLUSION

Because Defendants failed to allege claims for violation of SCUTPA, abuse of process, and fraud, this Court should grant K.A. Diehl’s motion to dismiss pursuant to SCRPC, Rules 12(b)(6) and 9(b).

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Myrtle Beach, South Carolina
March 4, 2016

CERTIFICATE OF SERVICE

I, Donna M. Brady, an employee of McNair Law Firm, P.A., certify the foregoing document was served via United States Mail postage prepaid, and by Electronic Mail, to the Counsel of Record, and/or Pro Se Parties, on this the 4th day of March, 2016, as follows:

- Plaintiff K.A. Diehl & Associates, Inc.’s Motion to Dismiss Counterclaims and Memorandum In Support;
- Motion and Order Information Form and Coversheet; and
- Certificate of Service.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

K.A. Diehl and Associates, Inc.,

Plaintiff,

v.

James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos.

Defendants.

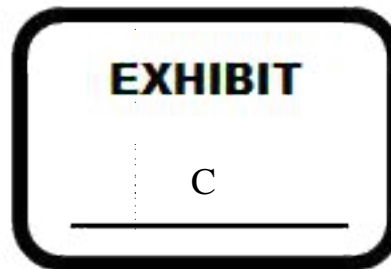
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-26-05573

STIPULATION OF DISMISSAL
WITHOUT PREJUDICE AS TO FRAUD,
NEGLIGENCE, AND BREACH
OF FIDUCIARY DUTY
COUNTERCLAIMS ONLY
PURSUANT TO RULE 41(c), SCRPC

NOT ENDING THE ACTION

Defendants, James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos hereby dismiss the fraud, negligence and breach of fiduciary duty counterclaims against Plaintiff, K.A. Diehl and Associates, Inc., in the above captioned matter, without prejudice, pursuant to Rule 41(c) of the South Carolina Rules of Civil Procedure.

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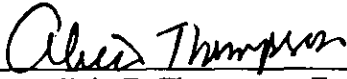
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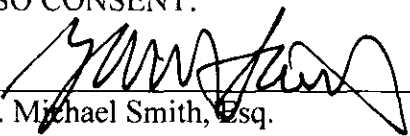
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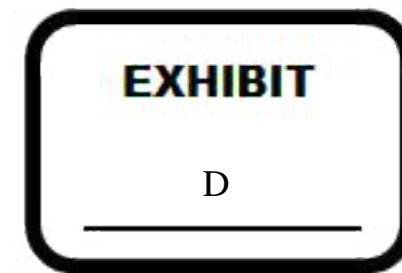
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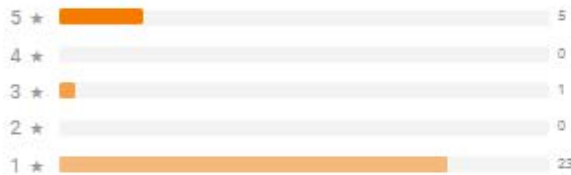


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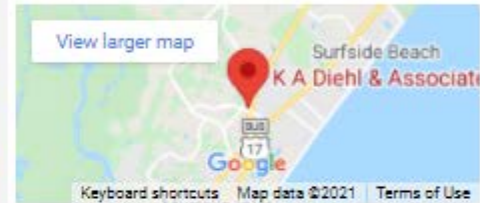
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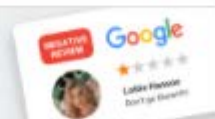
NNLTKL on BirdEye

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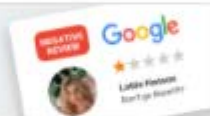
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Kate on BirdEye ★★★★★ 4 years ago

I am moving and KA Diehl in Myrtle Beach, now known as First Residential Services, is the primary reason. It starts at the top and just rolls down hill from there. The receptionist is rude and arrogant. Refuses to transfer you to Jack Boselli including to his voice mail. Tammy, a manager in title only, is the biggest LIAR I have ever come across. She is worthless and her lack of character speaks for itself. She is only on a power trip. Never follows through. Doesn't submit work orders. When work orders are completed, you are never notified. On your community's website you will have a maintenance request tab. It is not utilized and you are just kept in the dark. I will never move where they are the management company and will do my diligence to keep them out. This company is the prime example of why HOA companies get bad reputations. I can not wait until legislators put them in their place. Long overdue. <<less

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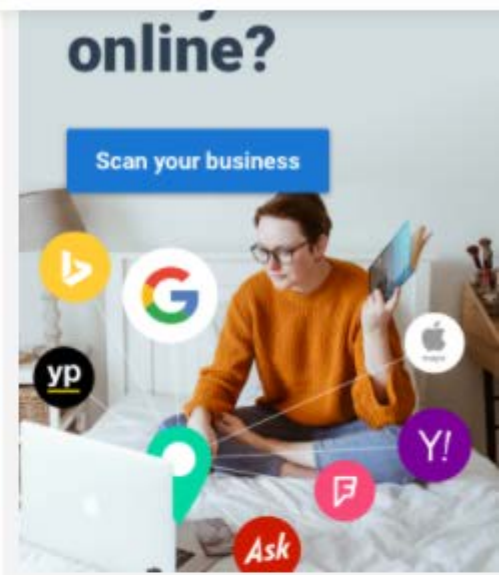
How to Ask for a Review (with Templates)



Mike B. on BirdEye ★★★★★ 4 years ago

They lie and are the worst I've ever seen. I expect to see them in prison. They will do what they want. I seen them get kicked out of 2 different locations. I mean with cops escorting them out.

Learn how to respond to a 1 star review like this one. [Free eBook: How to respond to negative reviews](#)



TOP REAL ESTATE IN YOUR AREA

Century 21 McAlpine 5.0 ★★★★★ (1) · Real Estate 3876 Renee Dr | (843) 903-1500 2 people are looking at this business

Garden Grove Townhomes 5.0 ★★★★★ (44) · Real Estate 706 Pathfinder Way | (843) 651-2870

Resort Brokerage and Consulting, Inc. 4.9 ★★★★★ (31) · Real Estate Agents 15 Causeway Dr | (910) 575-6262 1 person is looking at this business

Condo-World 4.7 ★★★★★ (1904) · Property Management 311 17th Ave South | (800) 753-4537

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Fred S. on BirdEye

★★★★★ 5 years ago

If KA Diehl is going to run your community run for the hills. These people hire the incompetent people for their managers, ours had only one year of college according to his linkedin profile. They have no idea how to hire contractors and are very condescending to the people in their communities. They will raise your dues through the roof.

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Kate on BirdEye

★★★★★ 5 years ago

Simple. Find someone else to manage your property. This company is a joke. They will lie, lie, lie. Will send you nasty threatening letters for not adhering to the "rules", whether by mistake or on purpose, but do not do what is required of them, except take your money. Whoever said the problem starts with Jack Boselli is correct and it filters down to the low level management team. It is hard to find property in Myrtle Beach that does not have an HOA but I will choose one that is not KA Diehl. Yes, I am moving and hopefully KA Diehl does not move in. HOA's want to know why people have such a distaste for them. Just look at KA Diehl, they are a the prime example of incompetence an unethical behavior. I hope someday I will see the owner "clean house". If I could zero rate them, I would <<less

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Liz on BirdEye

★★★★★ 6 years ago

This company, which is supposed to serve my relatives, continuously harasses them and attempts to force them to sell their property to benefit an annoying, covetous neighbor. I would advise anyone seeking an HOA not to consider K.A. Diehl.

Learn how to respond to a 1 star review like this one.

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Boo on BirdEye

★★★★★ 6 years ago

Rude, petty, incompetent. They ignore major issues and carry out petty harassment to suck up to board members that are on their same scummy level. The employees of this company would not last one day at a job that required manners and common human decency. If you are thinking of buying and home and you discover K.A. Diehl is managing the community, look elsewhere.

(1904) · Property Management

311 17th Ave South | (800) 753-4537

Arcadian Management

4.7 ★★★★★

(64) · Property Management

628 Chestnut Rd # 3 | (843) 449-2491

7 people are looking at this business

Affordable Large Properties

4.6 ★★★★★

(502) · Vacation Rental Agents

411 Broadway St | (800) 621-5575

ABOUT

Our management firm specializes in the management of homeowner associations. Since our founding we have been a leader in the management of planned communities, condominiums, and cooperatives. Our staff is comprised of professionals and our services are based upon the best practices within the community associations industry. From professional business, governance, and community management services to leading Internet services that put our management office online for our associations, we offer a complete and unparalleled solution for our clients. To learn more about what we can do for you, click Our Services or select one of the links below and we will send you the appropriate information.

[Suggest edits](#)

BIRDEYE FOR BUSINESSES



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Diehl K A & Associates

<https://reviews.birdeye.com/diehl-k-a-associates-826602368>
(Accessed 8/25/21)



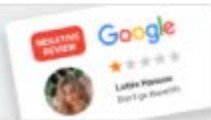
Janis H. on BirdEye

★ ★ ★ ★ ★ 6 years ago

I work for an HOA and we give our owners the benefit of the doubt and only send homeowners that are seriously delinquent to collections. KA Diehl wants to foreclose your home if you owe \$300.00. Take away your home over HOA dues. I understand I need to pay because that is how they pay the bills, however, I doubt the company will go broke and need to kick myself and my family out of our home over that amount. They are the worse company I have ever had the unfortunate pleasure to deal with and will put my name on the list of board members so that I can fight for my community to get a new HOA provider.

Learn how to respond to a 1 star review like this one.

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Diehl K A & Associates

Claim this profile

1.8 ★ ★ ★ ★ ★ 29 reviews | Property Management | Garden City, SC 29576

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Reviews (17)

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Sort By: Latest



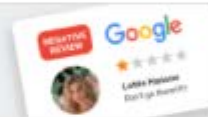
Jennifer M. on BirdEye

★ ★ ★ ★ ★ 6 years ago

Do not move into a KA Diehl managed property! Especially one in New Jersey. The "Community Manager" sharon strange in the Mt. Laurel, NJ office is an incompetent crook that should have her license expunged. She lies, cheats and does whatever necessary in order to get your money, all the while property values are decreasing exponentially because she is sitting around doing nothing to improve the community. Those who do not have the financial and cognitive capability to own their own home should not be managing yours, investigate before you buy in a KA Diehl mismanaged property.

Learn how to respond to a 1 star review like this one.

[Free eBook: How to respond to negative reviews](#)



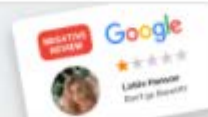
Fred S. on BirdEye

★ ★ ★ ★ ★ 6 years ago

These people are condescending idiots, that also have no idea what they are doing. The only thing they understand is being threatened with a court action. They hire substandard sub contractors to do the work in my community and raise the condo fees as often as they can. My community manager never responds when anything needs to be done, and when this manager does he sent Cement company to fix a roof who did not even do the job. But KA Diehl keeps this bad manager in place. This manager never checks on any contractor after work has been done and if any homeowners complained they put you on a blacklist. This manager never believes the homeowner he believes the substandard contractor instead. This is bad business. <<less

Learn how to respond to a 1 star review like this one.

[Free eBook: How to respond to negative reviews](#)



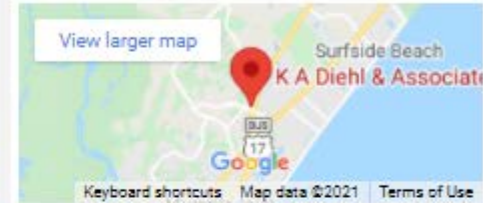
Joe H. on BirdEye

★ ★ ★ ★ ★ 6 years ago

This company is terrible the property manager is worse than that. They spend you're money on do overs, time and time again.,and never get it right the first time. I wish there was a way to get out of this terrible contract we have with them!

Learn how to respond to a 1 star review like this one.

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11822 Frontage Rd, Garden City, SC 29576

Call business

<https://www.fresidential.com/south-ca...>

Real Estate

Closed now

Google

[Suggest edits](#)

Can your customers find you online?

Scan your business





CMC [on BirdEye](#)

★★★★★ 6 years ago

This company is a nightmare and it starts at the top with their CEO Jack Boselli. It took us 16 months to get a simple front step renovation done. We were FORCED to change the color of our existing deck to white in spite of none of the other 89 units being white. The day it was finished, we were told by an elected board member that it was wrong and had to be torn down. Turns out there was another development with the same name as ours in a different state. The very ignorant KA employee was reading the wrong guidelines.

It took us 16 months to finally have the issue resolved and not until we retained a lawyer. Jack ended up having a "buddy" demolish and rebuild the deck as a favor with ... [more>>](#)

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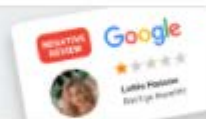
Barbie D. [on BirdEye](#)

★★★★★ 6 years ago

Ive never had a problem my whole life until i moved to mb. This company is unprofessional and h o r i b le...before you buy a home adk who runs poa first...

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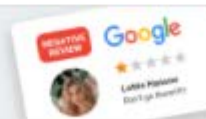
Barbie D. [on BirdEye](#)

★★★★★ 6 years ago

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Learn how to respond to a 1 star review like this one.

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mattwalker [on Yellow Pages](#)

★★★★★ 8 years ago

This is a TERRIBLE management company. Bad customer service. Can't keep records straight. Do not respond to HOA membership notes or requests. BAD, BAD, BAD. Save your money!

Learn how to respond to a 1 star review like this one.

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[Resort Brokerage and Consulting, Inc.](#)

4.9 ★★★★★

(31) - Real Estate Agents

15 Causeway Dr. | (910) 575-6262

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[Condo-World](#)

4.7 ★★★★★

(1904) - Property Management

311 17th Ave South | (800) 753-4537

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4.7 ★★★★★

(64) - Property Management

628 Chestnut Rd # 3 | (843) 449-2491

7 people are looking at this business

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4.6 ★★★★★

(502) - Vacation Rental Agents

411 Broadway St | (800) 621-5575

ABOUT

Our management firm specializes in the management of homeowner associations. Since our founding we have been a leader in the management of planned communities, condominiums, and cooperatives. Our staff is comprised of professionals and our services are based upon the best practices within the community associations industry. From professional business, governance, and community management services to leading Internet services that put our management office online for our associations, we offer a complete and unparalleled solution for our clients. To learn more about what we can do for you, click Our Services or select one of the links below and

Learn how to respond to a 1 star review like this one.

[Free eBook: How to respond to negative reviews](#)



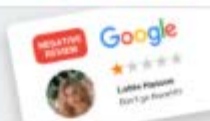
homeowner on Yellow Pages

★ ★ ★ ★ ★ 10 years ago

Absolutley terrible management company. They lie and have particularly dishonest business practices. The agents that work there should have their licenses removed. They lied about everything they can. Once they have their hands on your checkbook look out. Get rid of them

Learn how to respond to a 1 star review like this one.

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associations, we offer a complete and unparalleled solution for our clients. To learn more about what we can do for you, click Our Services or select one of the links below and we will send you the appropriate information.

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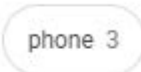
K A Diehl & Associates

11822 Frontage Rd, Murrells Inlet, SC

 Write a review

2.7  13 reviews 

People often mention

 All  phone 3  mail 3

Sort by

 Most relevant  Newest  Highest  Lowest



Maryann Miller

7 reviews



 a year ago

Critical: Quality

Phone number listed on website is not in service.

Every time I try to log into the community website I get a message there is no such name or account listed in their system. So sick of this.

 Like



dimarco

Local Guide · 61 reviews · 21 photos



 2 years ago

A pathetic company now called first service residential just changed names due to lawsuits that supposedly manage this property but doesn't know what God blessed thing about it. If you don't know your job and the legalities behind it don't ... [More](#)

 2

K A Diehl & Associates

11822 Frontage Rd, Murrells Inlet, SC

 Write a review

2.7  13 reviews 



EEANDT

Local Guide · 677 reviews · 1,628 photos

 2 years ago



Martin Pettigrew

342 reviews

 3 years ago

Great company. Highly trust their new management to make the right decision for the association they represent.

 Like



Dogs are my way of life

Local Guide · 29 reviews

 3 years ago



Carly Hall

Local Guide · 27 reviews · 10 photos

 3 years ago



K A Diehl & Associates

11822 Frontage Rd, Murrells Inlet, SC

 Write a review

2.7  13 reviews 

 3 years ago



Doug Fulcher

17 reviews

 3 years ago



Michael Bensom

7 reviews · 1 photo

 4 years ago

What a joke lies all the time got kicked out of HOA in 2 different buildings I know of .. don't do anything they promise. I expect to see them in jail .

 4



Joan Rohrer

1 review

 4 years ago

Terrible. They do not respond to phone calls or emails.

 3



Diehl K A & Associates

★ ★ ★ ★ ★ 1 review

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Location & Hours



11822 Highway 17 Byp
Murrells Inlet, SC 29576

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This provider has not enabled messaging on Yelp, but you can still request a consultation from other businesses like them.

[Start request](#)

(843) 357-9888



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11822 Highway 17 Byp Murrells Inlet, SC 29576



<https://www.yelp.com/biz/diehl-k-a-and-associates-murrells-inlet>
(Accessed 8/25/21)



Tracey U.

Mount Royal, NJ

📷 0 ⭐ 1



⭐⭐⭐⭐ 7/4/2013

📌 First to Review

One of the WORST management companies I have ever dealt with! The fact that they are property "managers" is a joke! They are never held accountable when their vendors damage the homeowner's property and they always take weeks to respond to emergency situations! I am completely ok with them dragging their feet, as long as they take full responsibility, but they tend to bury their head in the sand! The Mt. Laurel, NJ office is a disgrace! I will NEVER live in another community where KA Diehl is the property manager!

📍 Useful

😄 Funny

😎 Cool

[Get Directions](#)

11822 Highway 17 Byp Murrells Inlet,
SC 29576



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<https://www.yelp.com/biz/diehl-k-a-and-associates-murrells-inlet>

(Accessed 8/25/21)

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Dec 16 2021

SC Court of Appeals

Appeal from Horry County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2015-CP-26-05573
Appellate Case No. 2018-002009

K.A. Diehl and Associates, Inc.,

Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins,
Mark Dos Santos, William Moore, Steven Dame
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Appellant.

PROOF OF SERVICE

CLEMENT RIVERS, LLP
D. Jay Davis Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 577-4000

Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorney for Appellant, hereby certify that **APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS THE APPEAL AND COUNTERCLAIMS** was served on Respondent on December 15, 2021, via email (see attached) to Respondent's counsel of record:

Henrietta U. Golding, Esquire
hgolding@burr.com
Alicia E. Thompson, Esquire
athompson@burr.com
Burr & Forman, LLP
P.O. Box 336
Myrtle Beach, SC 29578
Attorneys for Respondent
K.A. Diehl and Associates, Inc.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellant

Charleston, South Carolina

December 15, 2021

From: [Hines, Russell](#)
To: "hgolding@burr.com"; "athompson@burr.com"
Cc: [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#)
Subject: K.A. Diehl v. Perkins (Dos Santos) -- Appellate Case No. 2018-002009 -- Return to Motion to Dismiss
Date: Wednesday, December 15, 2021 11:55:54 PM
Attachments: [image001.png](#)
[K.A. Diehl v. Perkins \(2018-002009\) -- Return to Mot. to Dismiss Appeal.pdf](#)
[Ex. A.pdf](#)
[Ex. B.pdf](#)
[Ex. C..pdf](#)
[Ex. D.pdf](#)

Attached please Appellant's Return to Motion to Dismiss the Appeal and Counterclaims.

Russell G. Hines
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P.O. Box 993 (29402)
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