THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

App. Case No. 2012-212842

Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips . . . . Appellant,

v.

Litchfield Plantation Company, Inc. . . . . .Respondent,

AND,

E. Scott Trotter . . . . Intervenor.

Appellants' Return to Respondents' Second Motion to Dismiss

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Respectfully submitted,

April 26, 2013

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APPELLANT'S RETURN TO DEVELOPER'S SECOND MOTION TO DISMISS

The Appellants, Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips, request the court to immediately deny the Respondent's Rule 260 Motion to Dismiss. This is Respondent's second Motion to Dismiss. The Motion was filed solely for the purpose of further delaying the appeal, and should be denied. In support, the Appellants offer the following Return.

I. PROCEDURAL HISTORY

Litchfield Plantation is a coastal real estate development located in Georgetown County, South Carolina. The Plaintiff-Appellant, Litchfield Plantation Association, Inc. (hereinafter "Appellant Association") is the official Homeowners' Association of Litchfield Plantation. The individual Plaintiffs/Appellants, Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan Jr., and Thomas Martin Phillips, are all property owners in Litchfield Plantation (collectively with Appellant Association, "Appellants"). The Respondent is the Developer of Litchfield Plantation, Litchfield Plantation Company, Inc. ("Developer").

The Appellants filed suit against the Developer after a special meeting was held pursuant to the Association Bylaws, and a new Board of Governors was elected. The new Board then brought this action against the Developer, which formerly controlled the Board. The Appellants' claims set forth two distinct causes of action. Specifically, the Appellants sought a circuit court declaration that: (1) the newly elected Board of Governors was the lawfully and duly elected Board; and (2), the Developer's majority voting power and control over the Association ended due to (a) the Developer's breaches of fiduciary duties to

the Association, and/or (b), the failure of Developer to meet its financial obligation to the Association. The circuit court permitted Developer's former President, E. Scott Trotter, to intervene. Developer filed several counterclaims that were ultimately dismissed.

Both parties moved for Summary Judgment on differing theories and on differing grounds. The circuit court heard numerous motions on September 8, 2011, December 8, 2011, and April 19, 2012. By way of order filed May 25, 2012, the circuit court denied Appellants' motion for Summary Judgment and granted Developer's Motion for Summary Judgment on Appellants' second cause of action only, finding it did not have the authority to grant the relief requested, but ordering that Developer could not exercise its voting rights until it paid a small percentage of the arrears owed to the Association. The circuit court denied Appellants' Motion for Reconsideration on August 17, 2012. The Appellants appealed the May 25, 2012 order granting Developer Summary Judgment on August 24, 2012.

On September 7, 2012, Developer filed a Motion for Temporary Injunction. The circuit court heard the Motion on September 20, 2012. By way of order dated October 22, 2012, the circuit court granted the Motion and entered a Temporary Injunction, ordering the individual Plaintiffs not to interfere with the voting rights of the Developer. The circuit court's Injunction Order also found its May 25, 2012 Summary Judgment Order was not automatically stayed by Appellants' appeal because the majority voting rights in question constituted both personal property and real property and therefore fell within the exceptions found in Rule 214(b), SCRAP. The Appellants appealed the Temporary Injunction Order on October 31, 2012. Appellants' appeal of the May 25, 2011 Summary Judgment Order and the October 22, 2012 Injunction Order have been consolidated into one appeal, Appellate Case No. 2012-212842. The Developer filed its first Motion to Dismiss on

August 30, 2012. The Honorable Jasper M. Cureton denied that Motion on January 30, 2013. Appellants filed the Initial Brief and Designation of Matter on March 18, 2013. On April 17, 2013, Developer filed its second Motion to Dismiss. The Appellants now submit the following Return.

II. APPELLANTS' INITIAL BRIEF DOES NOT VIOLATE THE APPELLATE COURT RULES.

This time the Developer's argument is premised on the notion that Appellants failed to address the "specific issue on appeal." That issue, Developer claims, is "whether or not the lower Court properly determined Developer maintains its Class 'B' membership status." This is a gross mischaracterization of Appellants' appeal. The Appellants, not the Developer, are required to delineate the issues raised in the appeal.

The Appellants raise numerous exceptions on appeal, the majority of which are rooted in the circuit court's error in finding that it did not have the authority to grant the equitable relief requested by the Appellants. Contrary to Developer's inaccurate recitation of Appellants' appeal, all of the matter included in Appellants' initial brief and designation of matter is relevant to the Appellants' equitable claims. These claims were summarily dismissed by the circuit court. Without this material included in the appeal, the Appellants cannot establish why they are entitled to the equitable relief requested. *See, e.g. Taylor v. Taylor*, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."). Without this material included in the appeal, the Appellants cannot establish how they were prejudiced by the circuit court's errors. *See Baker v. Town of Sullivan's Island*, 279 S.C. 581, 583, 310 S.E.2d 433, 435 (Ct. App. 1983) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

This is an appeal from the grant of summary judgment pursuant to Rule 56, SCRCP. Rule 56 permits the grant of summary judgment only if there is no question of material fact. The Developer's Motion to Dismiss asserts material should not be included in the appeal because the facts are disputed; presumably admitting that summary judgment was improper. Moreover, the Developer misreads the Appellate Court Rules. Rule 208 (b)(1)(C), SCACR does not apply to the entire brief, as Developer suggests. Rule 208 (b)(1)(C) applies only to the Statement of the Case. Appellants' Statement of the Case, pursuant to the Rule, does not contain contested matters. Appellants' Argument section does contain contested matters, which is expressly permitted by Rule 208(b)(1)(D).

The Developer's Motion asserts Appellants' brief improperly includes issues currently litigated in a separate suit. This, too, is a misstatement. That case is a collection action filed by the Appellant Association to collect the money it is owed. The instant case concerns the Developer's voting rights. The individual Plaintiff-Appellants filed the instant action individually and on behalf of the Association seeking to have Developer's majority voting power terminated based on Developer's breaches of fiduciary duties and its failure to meet its financial obligations. The fact that the Appellant Association is attempting to collect monies owed to it in a separate case has nothing to do with whether the Developer's Class B voting rights should be equitably converted to Class A status. The Developer's suggestion that the collection action somehow prevents Appellants from prosecuting this appeal is not well taken. The Developer's second motion to dismiss has the sole purpose of delaying the appeal and should be denied.

III. THE INITIAL BRIEF INCLUDES MATTERS THAT APPELLANTS ALLEGE ARE UNDISPUTED TRUTHS.

The Developer's Motion fails to recognize that the Appellants' claims were summarily dismissed. Those claims allege that the Developer's breaches of fiduciary duty and utter failure to meet its financial obligations to the Association entitle the Appellants to the equitable relief requested. It is preposterous to suggest that the evidence establishing these claims should be excluded from the briefs and the record. The circuit court granted summary judgment to Developer. Disputed or not, without the inclusion of this evidence, the Appellants are unable to successfully prosecute the appeal. Indeed, the standard of review will require this court to view all of this evidence in light most favorable to the Appellants. *See, e.g. Estate of Adair v. L-J, Inc.*, 372 S.C. 154, 156, 641 S.E.2d 63, 64 (Ct. App. 2007) ("On appeal, *when factual matters are in dispute*, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." (emphasis added)).

The Developer asserts that because there has been no finding that it wrongfully took the money, the Appellants cannot include this argument in the brief. These are the disputed facts upon which the Appellants claim that the Rule 56 summary judgment order was in error. The allegations that Developer breached fiduciary duties and wrongfully took the Appellant Association's money are precisely the acts that entitle the Appellants to the equitable relief requested. *See Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832-33 (Ct. App. 1993) (finding fiduciary relationship between developer and homeowner association).

The circuit court found it did not have the authority to grant the equitable relief requested and summarily dismissed Appellants' second cause of action. On appeal,

therefore, the Appellants must establish that (1) the circuit court has the authority to grant the relief requested, and (2) they are entitled to the relief requested. The suggestion that the Appellants cannot include in the brief the allegations that Developer breached fiduciary duties and wrongfully took the Appellant Association's money is contrary to the entire appellate process. Of course Appellants can; they must. These are the allegations that entitle the Appellants to relief. *See Goddard*, 310 S.C. at 415, 426 S.E.2d at 833; *Taylor*, 294 S.C. at 299, 363 S.E.2d at 911; *Baker*, 279 S.C. at 583, 310 S.E.2d at 435.

IV. ALL MATTER INCLUDED IN APPELLANTS' BRIEF IS RELEVANT TO THE APPEAL

The Developer claims that the only matter relevant to this appeal is the 2005 Covenants and Bylaws. That is preposterous. The Developer's argument rises and falls on its flawed premise that the only issue on appeal is whether the lower court correctly determined Developer had not lost its Class B membership status "as that term is defined by the 2005 Covenants and Bylaws." This, again, is simply untrue and constitutes a gross mischaracterization.

The Appellants brought the instant action seeking equitable remedies outside of the relevant Covenants and Bylaws because those documents do not contemplate a scenario where the Developer breaches fiduciary duties and wrongfully takes Association money. The circuit court ruled it did not have the authority to grant this equitable relief. That ruling is being appealed. To prevail, the Appellants must demonstrate not only that the circuit court had the authority to grant the relief requested, but also that they are entitled to the relief requested. Any and all evidence tending to establish that Appellants are entitled to the equitable relief requested is not only relevant to the appeal, it is required. *See, e.g. Taylor*, 294 S.C. at 299, 363 S.E.2d at 911 ("The burden is on the

appellant to furnish a sufficient record on appeal from which this court can make an intelligent review."); *Baker*, 279 S.C. at 583, 310 S.E.2d at 43 ("An error not shown to be prejudicial does not constitute grounds for reversal.").

The evidence establishing Developer's breaches of fiduciary duties and wrongful taking of Association money is relevant to the appeal, as those acts support the Appellants entitlement to the equitable relief requested. The evidence relating to Intervenor E. Scott Trotter's alleged wrongdoing is likewise relevant to the appeal for the same reasons. Trotter was the President of the Developer and controlled the Appellant Association at the time of the alleged wrongdoing. Whether Trotter is the current President is irrelevant. If this were so, Trotter would not be a proper Intervenor. He has been permitted to intervene and that un-appealed ruling is now the law of the case. Finally, the previous lawsuits are relevant to the equitable relief requested. The alleged abuses that entitle the Appellants to the equitable relief have been a continuing problem throughout the history of Litchfield Plantation. These cases establish this fact and further support the use of the court's equitable powers. Whether these cases involved the exact same parties or the same controlling documents is not important. The fact that these cases even existed is what is important and relevant to the instant appeal. This is not the first time the Litchfield Homeowners have been wronged.

V. APPELLANTS' DESIGNATION OF MATTER DOES NOT INCLUDE IMPROPER MATERIALS

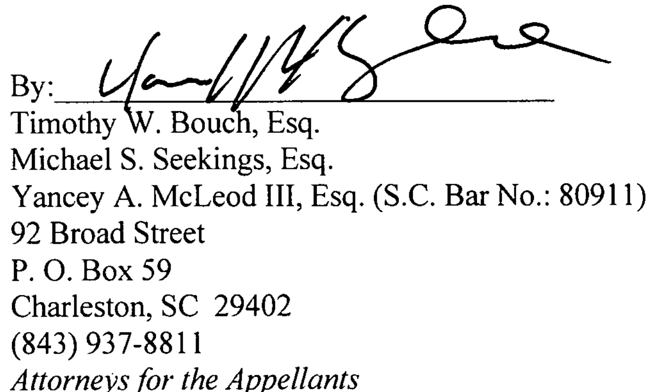
All of the matter designated is relevant to the appeal. The promissory notes, assignments, and mortgage are all relevant to the wrongful taking of Association money, breaches of fiduciary duty, and equitable remedies requested. Moreover, these documents are relevant to the circuit court's error in finding the Developer could regain

its voting rights after payment of the small percentage of the money owed. (*See* Initial Br., issue I(B)(2), pg. 23). The promissory notes, assignments, and mortgage establish the true amount currently owed to the Association. The fact that a separate collection action was filed is irrelevant. This instant case concerns Developer's voting rights. The circuit court found the Developer could not vote until it paid $149,981.60 back to the Association. The Appellants' are appealing this amount. The promissory notes, assignments, and mortgage establish this amount is much higher. These documents are properly included in the designation of matter. Finally, the evidence of the previous lawsuits, as explained, is directly relevant to the Appellants' equitable remedy requested. All of the matter included in the designation of matter is relevant to this appeal. The Developer's Motion should be denied.

Wherefore, the Appellants pray that Developer's Second Motion to Dismiss is denied, and for such other relief as the court deems appropriate.

Respectfully submitted,

LEATH, BOUCH & SEEKINGS, LLP



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April 26, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2011-CP-22-319

Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips . . . . Appellants,

v.

Litchfield Plantation Company, Inc. . . . . Respondent,

and,

E. Scott Trotter . . . . .Intervenor.

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I certify that I served Appellants' Return to Respondents' second Motion to Dismiss on April 26, 2013, by depositing a copy of it in the United State Mail, postage prepaid, addressed as follows:

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COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

April 26, 2013

VIA U.S. Postal Service

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, S.C. 29202

Re: Litchfield Plantation Ass'n, Inc., et al v. Litchfield Plantation Company, Inc.
Case No.: 2011-CP-22-0319
Appellate Case No.: 2012-212842

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Appellants' Return to Respondent's Second Motion to Dismiss in the above referenced case. By a copy of this letter, I am forwarding a copy of this filing to all counsel of record.

Thank you and with best regards, I am

Yours very truly,

LEATH, BOUCH & SEEKINGS, LLP

Yancey A. McLeod III, Esq.

Enclosures
cc: Mark D. Neil, Esq.
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