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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge
And
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2022-000152
Trial Court Case No. 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends
Property Owners Association, Inc. and Parkland Property Owners
Association, Inc.,Respondent,

v.

LDY Properties, LLC, Estate and/or Trust of Larry D. Young,
Legends Property Owners Association, Inc., Parkland Property Owners
Association, Inc., Legends Properties, LLC, New Town Management, LLC,
Michael R. Latta, Marianne Johnson, Carl A. Rubano, Camden
C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley,
Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC,
and Daniel Larry Young, Jr.,.....Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC;
and Legends Golf Holding, LLC are the Appellants.

**APPELLANTS' RETURN TO RESPONDENT'S MOTION FOR COSTS AND/OR
SANCTIONS**

As explained in Appellants' other Returns, the issues in this appeal are: (1) Respondent's
circumvention of the Rules of Civil Procedure to effectively overturn an adjudication on the merits
dismissing his derivative claims; (2) Appellants' entitlement to *res judicata* based on that prior

adjudication on the merits. This Motion for Costs and/or Sanctions is simply another improper attempt by Respondent to prevent Appellants from enforcing that prior adjudication on the merits in their favor.

According to Respondent's Motion, he is moving for sanctions under Rules 222 and 269 of the South Carolina Appellate Court Rules. (Motion for Costs and/or Sanctions, p. 2). Under Rule 222, "costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed. When a judgment is reversed, costs shall be taxed against the respondent." Rule 222(a), SCACR. At this time, the appeal has not been dismissed, and the Court has not entered any judgment. Therefore, Respondent's Motion is premature. The Motion should be denied because Respondent has no basis for seeking costs under Rule 222 at this time. *See Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 611, 709 S.E.2d 122, 128 (Ct. App. 2011) (declining to address "request for costs on appeal as premature" and "not properly before the court" when costs requested before appellate court decided case). Moreover, Rule 222(d) requires a party seeking costs to file a motion "accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules." Rule 222(d), SCACR. Respondent failed to file any "sworn, itemized statements of costs incurred" with his Motion. Thus, his Motion should also be denied on this basis.

Under Rule 269, the Court may impose sanctions when "an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay." Rule 269, SCACR. As explained in Appellants' Return to Respondent's Motion to Dismiss and Return to Motion to Lift Stay, this is not a frivolous appeal, and it was not taken solely for the purposes of delay. To the contrary, this is an appeal to correct Respondent's circumvention of the Rules of Civil Procedure. This is an appeal to prevent Respondent's continued litigation of claims for which there was an adjudication

on the merits resulting in a final dismissal of those claims. As explained in *Culbertson v. Clemens*, it would be improper for a court “to sanction Appellants for Respondent’s failure to comply with the rules of court.” 322 S.C. 20, 25, 471 S.E.2d 163, 165 (1996).

On August 5, 2020, the Appellants filed a Motion to Dismiss all derivative claims in the action based on Cutlip’s failure to comply with Rule 23(b) of the South Carolina Rules of Civil Procedure. (Ex. A, Mot. to Dismiss). That Rule requires the Plaintiff to make a pre-suit demand on the corporate board or provide specific reasons why such a demand would have been futile. Rule 23(b)(1), SCRCPP; *see Carolina First Corp. v. Whittle*, 343 S.C. 176, 189–90, 539 S.E.2d 402, 409–10 (Ct. App. 2000) (“Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations....The particularized allegations must support an earnest, and not a simulated, effort with the managing body of the corporation to induce remedial action on their part.”). Appellants’ Motion to Dismiss was a Rule 41(b) Motion for Dismissal. *See* Rule 41(b), SCRCPP (“For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.”).

By Order dated March 3, 2021, Judge Benjamin Culbertson granted Appellants’ Motion to Dismiss, stating:

Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. *See* Rule 23(b)(1), SCRCPP.

(Ex. B, March 3, 2021 Order). This dismissal operated as an “adjudication upon the merits.” *See* Rule 41(b), SCRCPP (“[A] dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”).

Rather than appealing this adjudication upon the merits, Cutlip exploited a change in Circuit Court judges and improperly moved to amend his Amended Complaint adding back in the derivative actions that had just been dismissed. (Ex. C, Pl.’s Motion to Amend Complaint ¶ 3 (stating that “allegations have been added to address the Court’s concern and bring the complaint into conformance with Rule 23(b) so that derivative claims may be asserted”). Thus, this is not the mere appeal of a denial of a motion to dismiss or granting of a motion to amend a complaint. It is an appeal to correct Respondent’s circumvention of the Rules of Civil Procedure. As such, it is not a frivolous appeal. As the South Carolina Supreme Court has stated, for purposes of immediate appealability, a trial court order should be evaluated “as what it is—not merely what it appears to be.” *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015). In determining whether a pleading is frivolous, South Carolina courts employ a reasonable belief standard – i.e. whether a reasonable attorney would believe under the facts of the claim that proceeding with the litigation may be valid under the existing law or developing law. *See Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 108, 713 S.E.2d 650, 655 (Ct. App. 2011). As explained in greater detail in Appellants’ Return to Respondent’s Motion to Dismiss, counsel for Appellants reasonably believes that the Orders at issue are immediately appealable under South Carolina Code § 14-3-330. Therefore, Respondent is also not entitled to sanctions under Rule 269.

CONCLUSION

For the above-stated reasons and those set forth in Appellants’ other Returns to Respondent’s Motions, Appellants respectfully request that the Court deny Respondent’s Motion for Costs and/or Sanctions.

MURPHY & GRANTLAND, P.A.



Everett A. Kendall, II, SC Bar No. 8450

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(803) 782-4100

Attorneys for Appellants

March 17, 2022

Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-26-01211

Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc.,

Plaintiffs,

v.

LDY Properties, LLC, Larry D. Young, Legends Property Owners Association, Inc., Parkland Property Owners Association, Inc., Legends Properties, LLC, and New Town Management, LLC, Michael R. Latta, Marianne Johnson, Carl A. Rubano, Camden C. McCarl, and Robert L. Schechter,

Defendants.

DEFENDANTS' JOINT MOTION TO DISMISS ALL DERIVATIVE CLAIMS

TO: CHRISTOPHER M. RAMSEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the Defendants, within ten days hereof, will jointly move before the presiding Judge for the Court of Common Pleas for Horry County, and they do hereby move, for an Order dismissing the Second, Third, Fourth, Fifth, and Sixth Causes of Action set forth in the Amended Complaint dated May 7, 2020. This Motion is based upon the failure of the Plaintiff to meet or plead the conditions precedent to filing a derivative lawsuit as set forth in Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff has failed to

- 1) serve a verified Complaint;
- 2) allege that the actions occurred while the Plaintiff was a member of the association;

- 3) allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members and the reasons for his failure to obtain the action or for not making the effort.

This Motion will be further Supported by a Memorandum of Law.

s/ Arthur e. Justice, Jr.

Arthur E. Justice, Jr.
Turner Padget Graham & Laney, P.A.
Post Office Box 5478
Florence, SC 29502
(843) 656-4412

Attorneys for Parkland Property Owners Association, Inc., New Town Management, LLC, Michael R. Latta, Marienne Johnson, Carl A. Rubano, Camden C. McCarl, Robert L. Schechter, and Larry D. Young

DATE: August 5, 2020

s/ Everett A. Kendall, II

Everett A. Kendall, II
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
(803) 782-4100

Attorney for LDY Properties, LLC, Legend Properties, LLC, Larry D. Young in his capacity as a principal of LDY Properties, LLC and Legends Properties

DATE: August 5, 2020

s/ Tamara Fogner Boyer

Tamara Fogner Boyer
Thompson & Henry, PA
Post Office Box 1740
Conway, SC 29528
(843) 248-5741

Attorney for Legends Property Owners Association, Inc's

DATE: August 5, 2020

EXHIBIT B
FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2601211

Gregory Cutlip et al
PLAINTIFF(S)

LDY Properties LLC et al
DEFENDANT(S)

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.
- 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
- STAYED DUE TO BANKRUPTCY
- 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:

Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. See Rule 23(b)(1), SCRPC.

Defendant's Motion for Complex Case Designation is DENIED due to the dismissal of plaintiff's derivative action.

Plaintiff's Motion to Compel the Deposition of the Defendant filed 10/12/2020 is MOOT.
Defendant's Motion for Protection from Discovery is MOOT.
Plaintiff's Motion to Serve Additional Interrogatories is DENIED.

Plaintiff's Motion to Compel filed 11/18/2020 is PARTIALLY RESOLVED and GRANTED as follows:
Deposition of LDY Properties 30(b)(6) witness is 3/16-3/17/2021;
Deposition of Newtown Managements 30(b)(6) witness is 4/19-4/20/2021;
Deposition of Susan Harper is 5/7-5/8/2021 provided deponent is subpoenaed.
Carl Rubano shall submit to an uninterrupted virtual deposition on 4/29-4/30/2021.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/03/2021 .

Christina Agnes Bisset for Michael Marino
Hannah Davis Stetson for Robert L Schechter, Camden C Mccarl, Carl A Rubano, Marianne Johnson, Michael R Latta, New Town Management LLC, Parkland Property Owners Association Inc, Larry D Young
Reginald Wayne Belcher for Robert L Schechter, Camden C Mccarl, Carl A Rubano, Marianne Johnson, Michael R Latta, New Town Management LLC, Parkland Property Owners Association Inc, Larry D Young
Douglas Michael Zayicek for Jigger Holdings LLC
Joseph Jakob Kennedy for Legends Scnc Golf Holdings LLC, Century Resort Management LLC
Nicholas Clarence Chapman Stewart for Robert L Schechter, Camden C Mccarl, Carl A Rubano, Marianne Johnson, Michael R Latta, New Town Management LLC, Parkland Property Owners Association Inc
Everett Augustus Kendall, II for LDY Properties LLC, Legends Properties LLC, Larry D Young
G. Michael Smith, Sr. for Michael Marino, Legends Property Owners Association Inc
Legends Property Owners Association Inc
Parkland Property Owners Association Inc
Legends Golf Holding LLC
John Douglas Elliott for LDY Properties LLC, Legends Properties LLC, Larry D Young
Christopher Michael Ramsey for Gregory Cutlip
Tamara Fogner Boyer for Carl A Rubano, Legends Properties LLC, Larry D Young
Brian Lincoln Craven for LDY Properties LLC, Legends Properties LLC, Larry D Young

COPIES OF ADDITIONAL LETTERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Gregory Cutlip , plaintiff, et al VS LDY Properties LLC , defendant,
et al
Case Number: 2019CP2601211
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

EXHIBIT C

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	Civil Action No. 2019-CP-26-01211
Gregory Cutlip, individually and as a)	
member of the Legends Property Owners)	
Association, Inc. and Parkland Property)	
Owners Association, Inc.,)	
)	
Plaintiffs,)	
)	
vs.)	Plaintiff's Motion to Amend Complaint
)	
LDY Properties, LLC, Larry D. Young,)	
Legends Property Owners Association, Inc.,)	
Parkland Property Owners Association, Inc.,)	
Legends Properties, LLC, New Town)	
Management, LLC, Michael R. Latta,)	
Marianne Johnson, Carl A. Rubano, Camden)	
C. McCarl, Robert L. Schechter, Richard)	
Apolenis, John K. Manley, Michael Marino,)	
Legends Golf Holding, LLC, and Jigger)	
Holdings, LLC,)	
)	
Defendants.)	
)	

NOW COMES Gregory Cutlip, individually and as a member of the Legends Property Owners Association, Inc. and Parkland Property Owners Association, Inc., and submits his Motion to Amend the Complaint as follows:

1. This action was filed on March 1, 2019. Plaintiff has previously amended the Complaint one time, on September 13, 2020.
2. On March 5, 2021, the Court found that Plaintiff had not plead with particularity his efforts to obtain POA board action, and dismissed the Plaintiff's derivative claims pursuant to Rule 23(b), SCRPC.

3. Plaintiff's proposed Second Amended Complaint (attached hereto) contains additional detail regarding Plaintiff's repeated efforts to obtain action by the POA boards, and includes the demand letters sent by Plaintiff to the Parkland POA and Legends POA as exhibits. The proposed Second Amended Complaint also describes why such actions by the Plaintiff were destined to fail, because of the conflicts of interest inherent in the POA boards. These allegations have been added to address the Court's concern and bring the complaint into conformance with Rule 23(b) so that derivative claims may be asserted.
4. Through discovery, the Plaintiff found evidence that the Boards of Parkland and Legends POAs mismanaged and misappropriated HOA resident-shareholders' funds, which totaled \$2,337,176.95, primarily by spending POA funds on non-POA related expenses, including the business expenses of Legends Golf Courses, and POA funds spent on Defendant and POA Board Member Larry D. Young's business expenses and/or his family business expenses.
5. During discovery, Plaintiff learned that Daniel Larry Young, Jr. was a member of the Parkland POA Board. In the proposed Second Amended Complaint, Plaintiff seeks to add Daniel Larry Young, Jr. as a defendant in his capacity as a Parkland POA Board member. Plaintiff had already made claims against the previously known Parkland POA Board members.
6. On or about February 24, 2021, Defendant Larry D. Young died. Plaintiff seeks to replace Larry D. Young as a defendant with the Estate of Larry D. Young or the relevant trust handling his affairs.

7. The claims against the Defendants are nearly identical. Discovery is ongoing. This case has not appeared on a trial roster.
8. Plaintiff submits that justice requires the amendments be allowed, and the amendments will not prejudice any other party. Thus, the amendments should be freely granted in accordance with Rule 15, SCRPC.
9. At the time of filing this motion, Plaintiff reached out to all defense counsel to see if they would consent to the amendment, but does not expect consent to be forthcoming.

WHEREFORE, the Plaintiff prays this Honorable Court to grant his motion for leave to amend the Complaint.

THE BOSTIC LAW GROUP, P.A.

/s Christopher M. Ramsey

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cramsey@bosticlawn.com
Attorneys for Plaintiffs

March 15, 2021

Charleston, South Carolina

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In the Court of Appeals

APPEAL FROM HORRY COUNTY
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v.

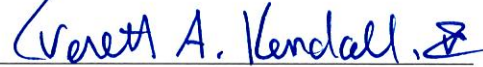
LDY Properties, LLC, Estate and/or Trust of Larry D. Young,
Legends Property Owners Association, Inc., Parkland Property Owners
Association, Inc., Legends Properties, LLC, New Town Management, LLC,
Michael R. Latta, Marianne Johnson, Carl A. Rubano, Camden
C. McCarl, Robert L. Schechter, Richard Apolenis, John K. Manley,
Michael Marino, Legends Golf Holding, LLC, Jigger Holdings, LLC,
and Daniel Larry Young, Jr.,Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC;
and Legends Golf Holding, LLC are the Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Return to Respondent's Motion to Dismiss, Return to Respondent's Motion to Lift Stay, and Return to Respondent's Motion for Costs and/or Sanctions on Respondent Gregory Cutlip by depositing a copy of them in the United States Mail, postage prepaid, on March 17, 2022, addressed to his attorney of record, Christopher T. Ramsey, 2236 Ashley Crossing Drive, Charleston, South Carolina 29414.

MURPHY & GRANTLAND, P.A.



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Attorneys for Appellants

March 17, 2022

Columbia, South Carolina