THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2012-CP-18-02583

Jennifer McFarland and Carlton Holcombe,

Appellants,

v.

Thomas Morris and David Hannemann,

Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

In deciding this case in favor of Respondents (following a nonjury trial), did the trial court err in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law?

STATEMENT OF THE CASE

Background re: the Subdivision and the Governing Documents

Made up of just seven single-family homes and a common area, Live Oak Village (the "Subdivision") is a small residential development in Summerville. (*See generally* R. pp. 500–583.)

Property ownership in the Subdivision is subject to certain recorded covenants and restrictions (collectively, the "Covenants"),[1] which are designed to accomplish the following objectives, for the mutual benefit of all owners:

> (a) To maintain the value and the residential character and integrity of the residential portions of the Subdivision and to maintain the quality and value of any recreational portions of the Subdivision;
>
> (b) To preserve the quality of the natural amenities of the Subdivision;
>
> (c) To minimize or eliminate the possibility of any disruptions of the peace and tranquility of the residential environment of the Subdivision;

[1] (*See generally* R. pp. 500–562.)

> (d) To prevent the abuse or unwarranted alteration of the trees, vegetation, lakes, streams and other bodies of water and natural character of the land in the Subdivision;
>
> (e) To prevent any Owner[2] or any other persons from building or carrying on any other activity in the Subdivision to the detriment of any owner in the Subdivision; and
>
> (f) To keep Property[3] values in the Subdivision high, stable and in a state of reasonable appreciation.

(R. pp. 500–501; *see also* R. pp. 531–532.)

Live Oak Village Homeowners Association, Inc. (the "HOA"), is a South Carolina nonprofit corporation. (R. p. 563.) Organized for the purpose of managing the business of the Subdivision's homeowners association,[4] the HOA is empowered to, among other things, administer and enforce the Covenants. (R. p. 505, § 3.1; *see also* R. p. 536, § 3.1.) "Every person or entity who is an Owner of any Lot . . . [is] . . . a member of the [HOA]." (R. p. 506, § 3.2; *see also* R. p. 537, § 3.2.)

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[2] In short, "Owner" means the owner(s) of fee simple title to the "Lots" in the Subdivision. (*See* R. p. 503, § 1.18; *see also* R. p. 534, § 1.18.) Essentially, a "Lot" is any parcel of property in the Subdivision intended for single-family use. (*See* R. p. 502, § 1.14; *see also* R. p. 532, § 1.14.)

[3] "Property or Properties . . . mean[s] . . . all property . . . subject to th[e] [Covenants]." (R. p. 503, § 1.20, R. p. 534, § 1.20.)

[4] (R. p. 563.)

Per its by-laws (the "By-laws"),[5] the HOA is to be governed by a three-member board of directors (the "Board," with each individual member thereof a "Director"). (R. p. 565.) The Board is charged with the "manage[ment] and direct[ion] [of] the affairs of the [HOA]" and is authorized to "exercise all of the powers of the [HOA] subject only to approval by the Owners [(i.e., the HOA members)] . . . when such is specifically required by the[] By-laws." (R. p. 567.) The By-laws provide for the Board's annual election of the HOA's executive officers, most notably the HOA president, who is the HOA's chief executive officer and, like the HOA secretary, must him/herself be a Director, too. (R. p. 569.)

Procedural History

This action was commenced on November 16, 2012. (*See generally* R. pp. 64–72.) The original plaintiffs were the HOA[6] and three HOA members, Jennifer McFarland ("Mrs. McFarland"),[7] Carlton Holcombe ("Mr. Holcombe"), and Ute Holcombe ("Mrs. Holcombe"). (*See generally* R. pp. 65–72.) The original

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[5] Together, the Covenants and the By-laws are the "Governing Documents."

[6] As further explained below, the HOA claims, i.e., the claims asserted in the name of the HOA itself, were initiated by Director and HOA member/president William McFarland ("Mr. McFarland"). (*See* R. pp. 58–62.)

[7] Mr. and Mrs. McFarland are husband and wife. (*See* R. p. 123, lines 19–24; R. p. 131, lines 17–20.)

defendants were Thomas Morris ("Mr. Morris") and David Hannemann ("Mr. Hannemann"), who were the two other Directors besides Mr. McFarland, and two other HOA members, Sofia Mazell ("Mrs. Mazell") and Michael Mazell ("Mr. Mazell," collectively with Mrs. Mazell, the "Mazells"). (*See generally* R. pp. 65–72.)[8]

Of the three causes of action in the original complaint, only one of them—a claim by Mrs. McFarland and Mr. Holcombe for declaratory and injunctive relief against Messrs. Morris and Hannemann (the "Declaratory Judgment Claim")—is relevant to this appeal. The gravamen of the Declaratory Judgment Claim is that Messrs. Morris and Hannemann caused the HOA/Board to become dysfunctional[9] by operating, and continuing to operate, outside the scope of their authority as Directors,[10] their acts/omissions in violation of the Governing Documents including, but not limited to, the following:

A. voting to waive fines that applied to themselves;

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[8] As reflected in the above caption, and as further explained below, the only remaining parties to this action are, on the plaintiffs' side, Mrs. McFarland and Mr. Holcombe and, on the defendants' side, Messrs. Morris and Hannemann. (*See generally* R. pp. 25–35.)

[9] Though ultimately his position did not prevail, it was because of this alleged dysfunction that Mr. McFarland initiated claims in the name of the HOA, taking the position that he was, in addition to being HOA president, the only Director who remained authorized to act on the HOA's behalf. (*See* R. pp. 58–62.)

[10] (*See* R. p. 66, ¶ 5.)

B. failing to hold timely or properly noticed [HOA] or Board . . . meetings;

C. allowing unauthorized persons to vote and participate in Board . . . meetings;

D. voting on matters in which they have a personal financial interest;

E. voting in violation of South Carolina Code § 33-31-83[0];

F. failing to properly handle HOA funds;

G. failing to enforce the [Covenants] in a uniform and unbiased manner;

H. violating the [Covenants].

(R. p. 66, ¶ 6.) As for relief, the Declaratory Judgment Claim seeks (1) a judicial declaration as to Messrs. Morris and Hannemann's wrongful acts/omissions in violation of the Governing Documents (and the legal consequences thereof) and (2) an injunction prohibiting (i.e., protecting against) the continuation/recurrence of those violations. (*See* R. p. 68 at Prayer for Relief.)[11]

[11] The operative complaint here is actually the amended complaint filed October 31, 2014; however, besides correcting a typographical error in Paragraph 6(E), which is shown in brackets in the above quotation from the original complaint's Paragraph 6, the amendment left the Declaratory Judgment Claim unchanged. (*Compare* R. pp. 65–72 *with* R. pp. 99–103.) Accordingly, the above description of the Declaratory Judge Claim goes for the amended (i.e., operative) complaint, too.

Messrs. Morris and Hannemann and the Mazells asserted counterclaims against all original plaintiffs and third-party claims against Mr. McFarland. (*See* R. pp. 73–97, pp. 104–114.) The Mazells' counterclaims and third-party claims were resolved and dismissed by stipulation,[12] and all original plaintiffs and Mr. McFarland were granted summary judgment on Messrs. Morris and Hannemann's counterclaims and third-party claims. (*See* R. pp. 6–14.)

Contemporaneous with the summary judgment granted the original plaintiffs and Mr. McFarland on Messrs. Morris and Hannemann's claims, Messrs. Morris and Hannemann and the Mazells were themselves granted partial summary judgment on the original plaintiffs' claims. (*See* R. pp. 1–5, pp. 15–24.) Between them, and subject to their reversal on appeal, these partial summary judgments disposed of the HOA and Mrs. Holcombe's claims in their entirety and of the Mrs. McFarland and Mr. Holcombe's Declaratory Judgment Claim. (*See generally* R. pp. 1–6, 15–24.)

The HOA, Mrs. McFarland, and Mr. Holcombe immediately appealed the summary judgments granted against them. (*See* R. pp. 824–825.)[13] Ultimately, the appeal resulted in affirmance of the summary judgment against the HOA[14] but

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[12] (*See* R. pp. 685–686.)

[13] Mrs. Holcombe chose not to appeal and, accordingly, ceased to be a party to this case.

[14] Accordingly, the HOA ceased to be a party to this case.

reversal of the summary judgments against Mrs. McFarland and Mr. Holcombe on their Declaratory Judgment Claim,[15] and the case was remitted to the trial court on January 23, 2018. (*See* R. p. 63.)

By consent order filed March 23, 2018, the defamation claim against the Mazells was dismissed with prejudice and the civil conspiracy claim against all original defendants was dismissed without prejudice;[16] the case caption was amended to reflect Mrs. McFarland and Mr. Holcombe (collectively, "Appellants" or "Plaintiffs," with a capital "P," to distinguish them from any other original plaintiffs) and Messrs. Morris and Hannemann (collectively, "Respondents" or "Defendants," with a capital "D," to distinguish them from any other original defendants) as the only remaining parties to this case; and the case was transferred to the nonjury docket for trial of the sole remaining claim, i.e., the Declaratory Judgment Claim. (*See* R. pp. 25–35.)

The case came on for a nonjury trial on October 30–31, 2018, before the Honorable Maite Murphy. (*See generally* R. pp. 115–499.) At the conclusion of trial, the trial court held the record open for additional, post-trial submissions by the parties. (R. p. 497, lines 14–25.) Following receipt of the parties' post-trial

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[15] (*See* R. pp. 58–62.)

[16] Accordingly, the Mazells ceased to be parties to this case.

submissions,[17] the court took the matter under advisement until January 14, 2019, when it filed its order setting forth its findings of fact and conclusions of law, ruling in Defendants' favor. (*See generally* R. pp. 36–53.) Plaintiffs' timely moved for alteration, amendment, and/or reconsideration of the subject decision or, alternatively, for a new trial. (*See generally* R. pp. 781–823.) On March 14, 2019, the trial court entered an order granting in part and denying in part Plaintiffs' motion. (*See generally* R. pp. 54–57.)

By notice served April 12, 2019, this appeal timely follows. (R. pp. 858–859.)

STANDARD OF REVIEW

"This Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). As for the trial court's factual findings, however, the standard of review depends on whether the underlying action is at law or in equity. *Id.* "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); *see, e.g., Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009) ("An action to enforce restrictive covenants by injunction is an action in equity.");

[17] (*See generally* R. pp. 806–824, pp. 841–857.) Included in these post-trial submissions is Defendants' proposed order (found at R. pp. 841–857), which is cited from time to time below.

Hardy v. Aiken, 369 S.C. 160, 165, 369 S.E.2d 539, 541 (2006) ("While this action potentially may require the Court to construe a contract, the underlying action is a declaratory action to declare whether the restrictive covenants are enforceable after January 14, 2005. Accordingly, we hold the proper scope of review is de novo."). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law. The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009). Conversely, "[i]n an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Recreation and Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct. App. 2011).

ARGUMENT

I. In deciding this case in favor of Respondents (following a nonjury trial), the trial court erred in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law.

A. Relevant Facts and Contentions

At all relevant times, Plaintiffs were HOA members[18] and residents[19] of the Subdivision; Defendants were Directors[20] and HOA members[21] and residents[22] of the Subdivision; and the other Director (besides Messrs. Morris and Hannemann) was HOA member/president Mr. McFarland,[23] who resided with his wife, Mrs. McFarland, in the Subdivision. (*See* R. p. 123, lines 19–24; *see also* R. p. 582.)

On September 7, 2011, Mrs. McFarland wrote the Board advising that, "[f]or well over a year," the Mazells had had a non-family member (hereinafter referred to simply as "Mr. F"[24]) "living in the downstairs portion of their home" in violation of the Governing Documents and asking the Board to remedy the violation. (*See*

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[18] (*Compare* R. p. 99, ¶ 2 *with* R. p. 105, ¶ 1; *see also* R. p. 847, ¶ 2.)

[19] (*See* R. p. 123, lines 8–18, p. 173, lines 19–25; *see also* R. p. 582.)

[20] (R. p. 131, lines 8–20; *see also* R. p. 847, ¶ 2.)

[21] (*Compare* R. p. 100, ¶ 3 *with* R. p. 105, ¶ 1.)

[22] (*See* R. p. 582.)

[23] (R. p. 131, lines 8–20; *see also* R. p. 848, ¶ 4.)

[24] Mr. F has never been a party to this litigation, and it is sufficient for the purposes of this brief to refer to him by last initial only.

R. p. 586.)[25] Mrs. McFarland's letter prompted discussion between/among members of the Board about the HOA hiring a property manager to address violations of the Governing Documents. (*See* R. p. 129, line 17 – p. 138, line 13, p. 242, line 8 – p. 246, line 19, pp. 604–605.) Reasonably believing that Messrs. Morris and Hannemann were agreeable with the HOA hiring a property manager, Mr. McFarland, for and on behalf of the HOA, as its president, contracted with K.J. Property Management, LLC (hereinafter referred to collectively with its owner, who at that time went by the name Kathleen Greene, as "Ms. Greene"[26]);[27] whereupon, with Ms. Greene's assistance as HOA property manager, the violation involving Mr. F living with the Mazells was remedied (for the time being, as further discussed, *infra*). (*See* R. p. 139, lines 3–13.)

Defendants contend, however, that Ms. Greene was not properly hired as HOA property manager and that her actions as property manager were illegitimate.

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[25] Although Mrs. McFarland had frequently seen Mr. F (more precisely, the person that she would later learn to be Mr. F) for quite a while before her letter to the Board, it was not until August of 2011, when her teenage daughter, upon returning to the house after a morning run, told her there was "a man standing over on [the] Mazzels's property looking at me and it's kind of creepy," that Mrs. McFarland had reason to focus her attention on the nature of Mr. F's presence in the neighborhood. (*See* R. p. 129, line 24 – p. 130, line 13.)

[26] Ms. Greene now goes by the last name John. (R. p. 430, lines 13–21.) She is, however, referred to herein as Ms. Greene, as that is how she is identified when referenced in various trial exhibits from the subject time period.

[27] (*See* R. pp. 589–591, 597–598.)

(*See, e.g.*, R. p. 228, line 23 – p. 230, line 20, p. 345, lines 18–24; *see also* R. pp. 848–849 ¶¶ 6–7.) The record cannot reasonably support any such finding or conclusion.

First off, while acknowledging that he had discussed the idea of hiring a property manager with Mr. McFarland, Mr. Hannemann testified that he thought the property manager was only going to "[h]andle the bills" and would not be involved in addressing violations of the Governing Documents. (R. p. 232, line 23 – p. 233, line 1.) But this testimony is flatly contradicted by his April 19, 2012, email to Mr. McFarland acknowledging that, "sometime in September 2011," there had been "[a]n unscheduled impromptu discussion of the B[oard] . . . *to review options of hiring a Property Manager* *to deal with a possible violation of the [Governing Documents]*." (R. p. 604 (emphasis added); *see also* R. p. 243, line 20 – p. 244, line 7.)

Moreover, Defendants' assertions that Mrs. McFarland "unilaterally and without Board approval contacted . . . [Ms.] Greene" to procure her services as HOA property manager and that Ms. Greene "reported to and took directives solely from [Mrs.] McFarland"[28] are demonstrably false. Neither of the two written contracts Ms. Greene entered into with the HOA was signed by Mrs. McFarland; both were signed *Mr.* McFarland, for and on behalf of the HOA, as its president.

[28] (R. pp. 848–849 ¶ 8.)

(R. pp. 589–590, 597–598; *see also* R. p. 433, lines 2–5.)[29] Mrs. McFarland did not wrongly represent herself to Ms. Greene as a Director or HOA officer—to be clear, this has never even been suggested. Ms. Greene always knew Mrs. McFarland was not a Director or HOA officer but rather the spouse of Director/President Mr. McFarland,[30] and Ms. Greene considered Mrs. McFarland's involvement to be within the bounds of the normal spousal teamwork. (*See* R. p. 458, line 20 – p. 459, line 12.) Ms. Greene's testimony was to the exact opposite effect of that urged by Defendants. According to Ms. Greene, Mr. McFarland was involved and Mrs. McFarland did not act alone. (R. p. 435, line 23 – p. 436, line 3.) Indeed, Ms. Greene explained, "as far as dealing with Ms. McFarland and Mr. McFarland, it was always via e-mail[,]"[31] and as is well documented in the record, Mr. and Mrs. McFarland share the same email address.

Further still, the evidence shows that neither Mr. Morris nor Mr. Hannemann questioned Ms. Greene's legitimacy as HOA property manager at the time,[32] but rather acted as if she was indeed HOA property manager, both in their direct communications with her and in their inclusion of Ms. Greene on HOA-related

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[29] Like her contracts with the HOA, Ms. Greene's paychecks were also signed by Mr. McFarland. (R. p. 434, lines 1–7.)

[30] (*See* R. p. 432, lines 1–14.)

[31] (R. p. 435, lines 24–25.)

[32] (*See, e.g.,* R. p. 231, lines 4–12.)

communications and documents. (*See* R. pp. 607–611, 627–628, 630–633, 637, 640–644, 654–655, 659–663, 665, 670–673, 675–682.) Indeed, in an October 17, 2012, email to Ms. Greene, Mr. Hannemann writes, "As to your resignation [as HOA property manager], I have spoken with Mr. Morris, and we, as the majority of the Board . . . are willing to accept your resignation, without condition, immediately if you so desire." (R. pp. 670–673.) And in a letter to Ms. Greene dated November 1, 2012, Mr. Hannemann writes, "[A]s stipulated in your contract [to be HOA property manager], you are directed to attend a meeting of the Board on Monday[,] November 5, 2012 . . . . Failure to respond will cause the clause 5 of your agreement with [the HOA] to be activated. You have 30 days from November 5, 2012 to resolve this situation. Failure to comply will terminate your contract." (R. p. 677.) Of course, the very willingness (on the part of Messrs. Hannemann and Morris) to accept Ms. Greene's "resignation" as HOA property manager and, likewise, the threat to invoke clause 5 (entitled "Termination of Agreement"[33]) of "[her] agreement with [the HOA]" necessarily betray Defendants' actual, real-time belief that Ms. Greene was, in fact, HOA property manager pursuant to a contract with the HOA.

Even Mrs. Morris, i.e., Mr. Morris's wife, acted as if Ms. Greene was HOA property manager, as evidenced by her inquiry to Ms. Greene in late March of

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[33] (*See* R. pp. 589–590, 597–598.)

2012 about whether Mr. Holcombe had obtained proper approval for the garden in his side yard. (*See* R. pp. 599.) And at essentially the same time as Mrs. Morris was checking with Ms. Greene to see if Mr. Holcombe had obtained proper approval for his garden, the Morris's were themselves violating the Governing Documents by doing unauthorized landscaping in their front yard. Though he wrote the Board on April 1, 2012, requesting approval "to remove and replace *some* of [his] existing landscaping,"[34] Mr. Morris admitted in his trial testimony that he went ahead with the project—which spanned the better part of April and May 2012 and required heavy equipment and reduced his front yard to a "barren landscape"[35]—before obtaining approval. (R. p. 356, lines 6–13.) When the violation was brought to his attention, Mr. Morris, though himself a member of the Board, insisted there was no violation because—on account of leniency previously shown *him* for *his own* prior unapproved construction and landscaping projects that had gone unpunished—the requirement that he obtain approval for his April 2012 project was "null and void" because of the HOA's supposed inconsistent enforcement of the requirement. (*See* R. pp. 607–611.)

Notwithstanding Mr. Morris's contention that he did not in fact need to obtain approval for the project, he and Mr. Hannemann held a special meeting of

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[34] (R. p. 601 (emphasis added).)

[35] (*See* R. pp. 606–611, 613–617.)

the Board on May 2, 2012, and the two of them voted to approve—retroactively, i.e., after the project had already been started without approval—Mr. Morris's own request. (*See* R. pp. 613–617.)[36] Even Defendants' own retained expert, attorney Capers Barr, acknowledged that Mr. Morris had a conflict of interest under S.C. Code Ann. § 33-31-831 in voting to approve his own landscaping project. (*See* R. p. 489, lines 8–19.)

A special HOA meeting was noticed for May 31, 2012. (*See* R. p. 620.) While the stated object of the May 31, 2012, special HOA meeting was "to discuss future goals of the [HOA] and reestablish harmony of the community . . . ,"[37] the meeting's tone was decidedly acrimonious. (*See* R. p. 222, line 14 – p. 223, line 22, p. 823.)

Indeed, after the meeting, when Mr. Holcombe tried to obtain from Mr. Hannemann copies of the meeting minutes and of the two homeowner proxies he (Mr. Hannemann) claimed to have, Mr. Hannemann refused to provide them, for no reason other than his displeasure with Mr. Holcombe over his objections to the manner in which the meeting was noticed and conducted. (*See* R. pp. 629, 645–

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[36] The record includes a notarized certificate of service that purports show service of notice of the May 2, 2012, special meeting on Mr. McFarland by mail, *but* this certificate indicates that the notice was mailed to Mr. McFarland at 102 Oak Village Lane, *which is not Mr. McFarland's correct address*. (*See* R. pp. 613–617.)

[37] (*See* R. pp. 621–623.)

648.) Mr. Hannemann testified that the reason he refused to provide Mr. Holcombe with copies of the minutes and proxies was because the minutes were in draft form, but the record cannot reasonably support any such finding or conclusion. To begin with, that is not the reason that Mr. Hannemann himself provided at the time. (*See* R. p. 629.) Moreover, the record includes evidence of Mr. Hannemann, and for that matter Mr. Morris, circulating draft minutes on other occasions. (*See* R. pp. 663, 678–682.)

The record also shows Messrs. Morris and Hannemann's odd involvement in respect of the Mazells' 2012 annual HOA assessment. This included the Mazells giving Mr. Hannemann a personal check for payment of their assessment, Mr. Hannemann holding that check (i.e., doing nothing with it at all) for an inordinate amount of time only then to deposit it into the mail in a manner (via certified mail to a mailbox where certified mail could not be received) that guaranteed that Mr. McFarland would not receive it, thereby delaying Mr. McFarland's actual receipt of the check for weeks, and, despite Mr. Hannemann's direct responsibility for the aforementioned delay and confusion in the transmittal of the Mazells' check, Messrs. Morris and Hannemann thereafter writing a joint letter to the entire HOA accusing both Mr. and Mrs. McFarland of some vague but sinister impropriety

with the Mazells' check that could expose the HOA to "legal jeopardy"[38] and demanding Mr. McFarland's immediate resignation from the Board and as HOA president. (*See* R. pp. 654–655.)[39] This also includes Mr. Morris obtaining a cashier's check (drawn on his own account) on October 4, 2012, and bringing it with him (to have "if needed") to the special Board meeting he and Mr. Hannemann had set for that date—which meeting Mr. Mazell attended even though he, a non-Board member, could not actually participate in it—at which they purported to vote Mr. McFarland out as HOA president and to vote Mr. Hannemann in. (*See* R. pp. 656–658.) Plaintiffs dispute the validity of this meeting and of the action supposedly taken by Defendants at it.[40]

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[38] While presented to the whole of the HOA membership as a matter of fact, Mr. Hannemann admitted at trial that this supposed "legal jeopardy" into which the McFarlands had placed the HOA was nothing more than speculation on his part. (*See* R. pp. 630–639, 654–655; R. p. 328, line 6 – p. 329, line 18.)

[39] The letter also demanded Mrs. McFarland's resignation as HOA treasurer despite the fact that she was not then HOA treasurer to begin with. (*See* R. p. 151, lines 1–18.)

[40] Notice of the October 4, 2012, special Board meeting was only placed in the mail to Mr. McFarland on October 1, 2012. (*See* R. pp. 657–658.) He could not have actually gotten it until after that date, and the meeting notice could not possibly have been given in compliance with the By-laws. (*See* R. p. 566 (providing that special Board meetings require "not less than three (3) days notice to each director mailed or presented personally to such director with such time.") Indeed, three full days *after* October 1st could not have possibly passed until October 5th. *See Town of Summerville v. City of North Charleston*, 378 S.C. 107, 112, 662 S.E.2d 40, 42–43 (2008) ("[W]here the time prescription mentions only the passage of a number of days, a 'day' means a calendar day, beginning and ending at midnight.").

When Mr. McFarland properly noticed an annual HOA meeting for September 12, 2012, both Messrs. Morris and Hannemann sent Mr. McFarland one-sentence emails on September 11, 2012, advising they could not attend. (*See* R. pp. 650–651.) Mr. Holcombe testified that he saw both Messrs. Morris and Hannemann at their houses when he was on his way to the meeting. Indeed, Mr. Hannemann admitted at trial that, despite having told Mr. McFarland that he could not attend the meeting because of a "family emergency," the emergency was out of state and he was in fact in town on September 12, 2012, as he was through at least September 26, 2012. (*See* R. p. 683.) Moreover, both Mrs. McFarland and Mr. Holcombe testified that, while neither Mr. nor Mrs. Mazell attended the meeting, they saw Mrs. Mazell in the parking lot adjacent to the meeting location at the time of the meeting.

When Mr. F resumed living with the Mazells in the fall of 2012 as a non-family member/renter in violation of the Governing Documents,[41] Messrs. Morris and Hannemann disregarded credible evidence of the violation presented to them by Ms. Greene and refused to take even so modest an investigatory step as to ask

[41] Whether or not Mr. F was, in fact, renting from the Mazells at this time, his living with the Mazells as a non-family member violated the Covenant's requirement that "[a]ll Lots . . . be used for single-family residential purposes exclusively." (R. p. 517, § 7.5; *see also* R. p. 549, § 7.5.)

Mr. F to provide a copy of a utility bill that could prove he did indeed reside elsewhere. (*See* R. pp. 659–662, 664–665, 670–673.)

B. Discussion of Specific Findings and Conclusions

Re: Finding of Fact No. 4[42]

The October 4, 2012, special Board meeting at which Messrs. Hannemann and Morris purported to vote Mr. McFarland out as HOA president and Mr. Hannemann in in his place could not possibly have been valid. Notice of the meeting was only placed in the mail to Mr. McFarland on October 1, 2012. (*See* R. pp. 657–658.) Mr. McFarland could not have actually gotten it until after that date, and the meeting notice could not possibly have been given in compliance with the By-laws. (*See* R. p. 566 (providing that special Board meetings require "not less than three (3) days notice to each director mailed or presented personally to such director with such time.") Indeed, as explained above, three *full days after* October 1st could not have possibly *passed* until October 5th. *See Town of Summerville*, 378 S.C. at 112, 662 S.E.2d at 42–43. Moreover, with only Messrs. Hannemann and Morris involved in the process of moving, seconding the motion, and voting to remove Mr. McFarland as HOA president and of nominating, seconding the nomination, and voting to elect Mr. Hannemann to take Mr. McFarland's place as HOA president, the proceedings were out of proper order and

[42] (*See* R. p. 43; R. pp. 54–55.)

tainted by conflict of interest and self-dealing. Defendants' own witness Ms. Greene still recognized Mr. McFarland to be HOA president after October 4, 2012, and she also attested to Defendants having aligned themselves against Mr. McFarland, rending the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.)

Re: Finding of Fact No. 5[43]

In a footnote, the trial court states: "[Mrs.] McFarland was a member of the HOA's Board of Directors during the period of 'well over a year' that the tenant was purportedly living in the Mazell's residence. The record is devoid of any evidence that [Mrs.] McFarland took any action regarding this issue while she was a member of the Board of Directors." This criticism of Mrs. McFarland is not supported by the evidentiary record. Although Mrs. McFarland had frequently seen the tenant (more precisely, the person she would later learn to be the tenant) for quite a while before her September 7, 2011, letter to the Board, it was not until August of 2011, when her teenage daughter, upon returning home after a morning run, told her there was "a man standing over on [the] Mazzels's property looking at me and it's kind of creepy," that Mrs. McFarland had reason to focus her attention on the nature of the tenant's presence in the neighborhood. (*See* R. p. 129, line 24 – p. 130, line 13.)

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[43] (*See* R. p. 43.)

Re: Finding of Fact No. 6[44]

While the trial court correctly notes that "[i]n response to [Mrs.] McFarland's letter, an impromptu discussion was held among the members of the Board of Directors regarding the possibility of hiring a property manager to remedy the Mazell tenant issue," the court does not address the contradiction between this finding and Mr. Hannemann's testimony that he thought the property manager was only going to "[h]andle the bills" and would not be involved in addressing violations of the Governing Documents. (R. p. 232, line 23 – p. 233, line 1.) From the moment he gave it, Mr. Hannemann's testimony was irreconcilable with, among other things, the plain language of his own April 19, 2012, email to Mr. McFarland acknowledging that, "sometime in September 2011," there had been "[a]n unscheduled impromptu discussion of the B[oard] . . . *to review options of hiring a Property Manager to deal with a possible violation of the [Governing Documents]*." (R. p. 604; *see also* R. p. 243, line 20 – p. 244, line 7.)

While it is technically correct that "[a]t no time was a Board of Directors meeting noticed or held pursuant to the Bylaws wherein a majority of the Board of Directors members constituting a quorum voted to approve the hiring of a property manager, nor was there unanimous written consent of all Board of Directors

[44] (*See* R. p. 43.)

members approving the hiring of a property manager," the court does not address the overwhelming evidence that—notwithstanding the position they have taken in this litigation—neither Mr. Morris nor Mr. Hannemann questioned Ms. Greene's legitimacy as HOA property manager at the time,[45] but rather, as explained above, they both (as did Mrs. Morris, for that matter) acted as if Ms. Greene was indeed HOA property manager, not only in their direct communications with Ms. Greene but also in their inclusion of Ms. Greene on HOA-related communications and documents. (*See* R. pp. 599, 607–611, 627–628, 630–633, 637, 640–644, 654–655, 659–663, 665, 670–673, 675–682.)

Indeed, even the trial court itself underscores the fact that Defendants acted in conformity with Ms. Greene's legitimacy as HOA property manager. It finds as fact that, at a special HOA meeting held May 31, 2012, "a motion was made to reduce the $1,000.00 fine levied against Morris by [Ms.] Greene to $100.00 since the landscaping and lighting plans were approved at the . . . May 2, 2012 special Board of Directors meeting." (R. p. 47.) It goes on to find that "[t]his motion was approved by a tally of five homeowners in favor of one abstention by [Mr.] Holcombe, with Morris also voting to approve the motion in his capacity as a

[45] (*See, e.g.*, R. p. 231, lines 4–12.)

homeowner." (R. p. 47.)[46] This finding confirms that, even in the absence of formal Board approval, Defendants ratified Ms. Greene's service as HOA property manager by their conduct. Indeed, the very fact that Defendants participated in an effort to reduce a fine assessed by Ms. Greene as HOA property manager only further shows that, notwithstanding their later trial testimony, they did not question her legitimacy as HOA property manager at the time.

Re: Finding of Fact No. 7[47]

While the trial court states, "it is evident from the testimony and evidence that the Board of Directors never voted upon Greene's levying of fines against homeowners,"[48] the court overlooked the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. p. 670–673; R. p. 465, lines 3–21.) In other words, the court overlooked the fact that it would not have been

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[46] Though the trial court's order reads as if there was broad neighborhood support for reducing Mr. Morris's fines, in truth, Mr. Holcombe objected to the meeting, and besides Defendants themselves and the proxies, the only other home participating in the meeting was that of the Knights. (*See* R. p. 627.)

[47] (*See* R. pp. 43–44; R. p. 55.)

[48] (R. p. 44.)

possible to have a vote of the Board wherein Mr. Hannemann and Mr. Morris himself voted to fine Mr. Morris.[49]

Re: Finding of Fact No. 8[50]

The trial court's finding about Mr. Morris's reasonable belief as to the process to be followed for his landscaping project is not supported by the evidentiary record. To begin, this finding does not take into account, and is irreconcilable with, the Governing Documents. The Covenants expressly provide: "The failure to enforce any rights, reservation, restriction or condition contains in this Declaration, however long continued, shall not be deemed a waiver of the right to do so hereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affects its enforcement." (R. p. 528; R. p. 559.) Mr. Morris himself expressly admitted that the above-quoted language from the Covenants directly contradicted the idea that any leniency previously shown him for his own prior unapproved construction and landscaping absolved him of

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[49] And even so, contrary to Defendants' litigation position that Ms. Greene's acts were illegitimate, Mr. and Mrs. Morris did, in fact, pay (to Ms. Greene) the $1,000 fine assessed for their improper landscaping. (R. p. 628.) While Defendants' claim the Morrises' payment of this fine was somehow related to "*continued* . . . complaints [received] from Plaintiffs" "*[s]ubsequent* to the May 31, 2012" special HOA meeting (R. pp. 852–853 ¶ 14 (emphasis added)), given that the Morrises paid the $1,000 fine to Ms. Greene on June 1, 2012 (*see* R. p. 628), the very next day after the referenced May 31st meeting, Defendants' claim cannot possibly be true.

[50] (*See* R. pp. 44–45.)

the need to follow the rules for future projects. (R. p. 418, line 3 – p. 419, line 5; *see also* R. p. 580 ("Each Owner shall comply strictly with the By-laws . . . . [T]he enforcement of the provisions of the Declaration, the By-laws and the rules and regulation of the [HOA] are essential for the effectuation of the general plan of development contemplated hereby and for the protection of present and future Owners . . . . No delay, failure or omission on the part of the Declarant, the [HOA] or any aggrieved Owner in exercising any right, power or remedy herein provided shall be construed as an acquiescence thereto as to the same violation or breach, or as to the enforcement.")

The court's finding here also overlooks the vast difference in the nature and scope of Mr. Morris's prior projects (replacing a stair case and removing a tree) and the April 2012 landscaping project that required heavy equipment and reduced his yard to what he self-described as a "barren landscape" for the better part of two months—and all of this after the April 1, 2012,[51] letter he sent asking for Board approval he did not wait to receive had grossly mischaracterized the nature of his

[51] The trial court states Morris's letter was dated April 10, 2012. In fact, it was April 1, 2012, and, in full, it reads as follows: "I would like to *ask for approval* from the HOA Board of Directors to remove and replace some of our existing landscaping and lighting in accordance with the HOA covenants." (*See* R. p. 601 (emphasis added).) The very fact that he wrote a letter expressly asking for Board approval of his project "in accordance with the HOA covenants," contradicts the idea that he did not really need to obtain approval. But, of course, despite having expressly requested approval, as Mr. Morris himself admits, he never waited for an answer. (R. p. 356, lines 6–13.)

plan as being the removal of "some" landscaping. In addition to disregarding the plain language of the Governing Documents, the court's finding here rewards Mr. Morris's repeated misconduct while punishing the neighborly way in which he was afforded some leniency for his prior violations. For Mr. Morris, the court's ruling is to the effect that three wrongs make a right and that, having been given an inch, it was only right for him to take a mile; but for Plaintiffs it seems the sad lesson is this: all good deeds will be punished. This is error.

Re: Finding of Fact No. 10[52]

The trial court's citation to Section 15(c) of the By-laws overlooks the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) It would not have been possible to follow the referenced procedure, which would have required Mr. Hannemann and Mr. Morris himself to take action against Mr. Morris. Moreover, the court overlooks that the referenced procedures, which begin with "[a] written demand to cease and desist from an alleged violation," could not possibly be followed where Mr. Morris's violation was already full and complete—cease and desist makes no sense when, because of the violation, Mr. Morris's yard was already a "barren landscape."

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[52] (*See* R. pp. 45–46.)

Re: Finding of Fact No. 11[53]

The trial court states, "In response to these complaints from Plaintiffs, the work at Morris' residence ceased, leaving the yard to look like a 'barren landscape.'" This finding is not supported by the evidentiary record. It was on April 17, 2012, that Mr. Shelbourne first wrote the Board on behalf of Mrs. McFarland, voicing her concerns about the Morris landscaping project. (*See* R. pp. 602–603.) As the Court noted in Finding of Fact No. 9, on "April 19, 2012, [Mr.] Holcombe sent an email to [Ms.] Greene memorializing their conversation that occurred the day before, in which [Mr.] Holcombe echoed [Mrs.] McFarland's complaints." (R. p. 55.) In Mr. Holcombe's April 19, 2012, email he stated, "they have cleaned out all of the landscaping. . . . The backhoe has been sitting in the front yard for over a week and no one knows when it will be removed." (R. p. 606.) In an email to Ms. Greene on April 22, 2012, Mr. Morris himself apologized for the "barren landscape in front of our home," explaining, "[u]fortunately the commencement of our landscaping project was delayed due to a death in our family. Thus, our project had to be postponed. We will work diligently to complete the landscaping as soon as possible." (R. p. 609.) Indeed, when questioned by his own counsel about delay in the middle of the project, Mr. Morris expressly attributed the same to a death in the family." (R. p. 392, lines 9–16.)

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[53] (*See* R. p. 46.)

And when directly asked about it at trial by Plaintiffs' counsel, Mr. Morris testified that he did not recall any delay in his landscaping project being caused by Mr. Shelbourne's letter. (R. p. 414, lines 4–20.)

Moreover, the court states that Defendants held a special Board meeting "[t]o specifically address Plaintiffs' concerns and in an attempt to follow the *requested* process." (R. p. 46 (emphasis added).) The idea that the process was merely "requested," as opposed to *required* by the Governing Documents is wrong. And it is required in furtherance of the very objectives the court itself expressly cites in the Subject Order: for instance, "To minimize or eliminate the possibility of any disruptions of the peace and tranquility of the residential environment of the Subdivision;" "To prevent the abuse or unwarranted alteration of the trees, vegetation, lakes, streams and other bodies of water and natural character of the land in the Subdivision;" "To prevent any Owner or any other persons from building or carrying on any other activity in the Subdivision to the detriment of any owner in the Subdivision;" and "To keep Property values in the Subdivision high, stable and in a state of reasonable appreciation." (R. p. 37.)

Further still, Mr. McFarland was not given proper notice of the referenced special Board meeting—the sworn certification of service for the notice itself attests that the notice was sent to 102 Oak Village Lane, which is not the McFarland's address. (*See* R. p. 273, line 3 – p. 274, line 6; R. p. 616.) Even

further, with only Defendants involved in the process of moving, seconding the motion, and voting to approve Mr. Morris's own project, the proceedings were out of proper order and tainted by conflict of interest and self-dealing. The court's finding that Defendants "believ[ed]" they were acting in the best interests of the HOA and following proper procedure is (1) not supported by the evidentiary record and (2) ultimately not relevant, especially as to the procedure. Regardless of their belief, the record leaves no doubt the Defendants did not follow proper procedure. As noted above, even Defendants' own retained expert, attorney Capers Barr, acknowledged that Mr. Morris had a conflict of interest under § 33-31-831 in voting to approve his own landscaping project. (*See* R. p. 489, lines 8–19.)

Indeed, an exchange between Mrs. McFarland's prior counsel, attorney Brandt Shelbourne, and Messrs. Morris and Hannemann on this point (about Mr. Morris voting to approve his own landscaping plan) is particularly illustrative of the problem that Plaintiffs seek to address via the Declaratory Judgment Claim. In the wake of the May 2, 2012, special Board meeting, Mr. Shelbourne wrote Messrs. Morris and Hannemann, questioning, among other things, Mr. Morris's vote to approve his own project, stating, "according to [§] 33-31-831, a company director should not vote when he has personal interest in the vote." (*See* R. pp. 618–619.) In response to Mr. Shelbourne, Messrs. Morris and Hannemann chide,

"In your letter you cite [§] 33-31-831 where you state 'a company director should not vote when he has a personal interest in the vote'. The operative word is 'should' which does not prohibit any action by an individual in which there is a personal interest." (*See* R. pp. 621–623.) Not only is this inaccurate as a proposition of law, it underscores the mindset that led to the HOA/Board dysfunction that is at the heart of the Declaratory Judgment Claim.

Re: Findings of Fact Nos. 12 & 13[54]

Despite the referenced May 31, 2012, special HOA meeting being noticed with the object of "harmony," the record shows it was not harmonious. (*See* R. p. 222, line 14 – p. 223, line 22; R. p. 823.) As Ms. Greene attested, Defendants had aligned themselves against Mr. McFarland, rendering the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) In their capacities as Board Members, Defendants were yelling, insulting, and bullying in an effort to reduce Mr. Morris's fine. (*See* R. p. 823.) Indeed, Ms. Greene documents anything but Defendants' engagement in an amicable, neighborly dialogue, with Mr. Morris even abruptly "interrupt[ing]" remarks his wife was making about the Holcombe's garden to interject his concern "about Mexican's working in [the neighborhood] and did they have green cards . . . ." (*See* R. p. 823.)

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[54] (*See* R. pp. 46–47.)

The trial court also overlooks that the stated object of the meeting did not include addressing Mr. Morris's fine to begin with—a fact made all the more important because a quorum for the meeting was achieved via proxies from homeowners who could not have known the matter was to be discussed and, as the Subject Order itself notes, Mr. Morris voted to reduce his own fine. (*See* R. p. 627.)[55] The court likewise overlooks that Defendants improperly attempted to conduct the *special* HOA meeting as *annual* HOA meeting. And, of course, the only conceivable reason why they would do this would be, in furtherance of their alliance against Mr. McFarland, to try and get him off the Board. The court further overlooks the only conceivable inference that can be drawn from Mr. Hannemann's improper refusal to provide Mr. Holcombe with copies of the meeting minutes and proxies: Defendants' had aligned themselves against Mr. Holcombe, too. (*See* R. pp. 629, 645–648.)

Defendants' ill will and intentions in this regard are only underscored by the by the patently incredible testimony that Mr. Hannemann gave at trial claiming that the reason he refused to provide Mr. Holcombe with copies of the minutes and

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[55] The trial court states Mr. Morris voted to reduce his own fine "in his capacity as a homeowner." (R. p. 47.) The court overlooks that Mr. Morris, like Mr. Hannemann, noticed the meeting expressly in his capacity as a "Board of Director." (*See* R, p. 620.) Additionally, the very fact that the trial court would observe a distinction between Defendants' actions as homeowners versus as Board Members implicitly recognizes that, if Defendants' actions were taken as Board Members, which they were, they were taken outside their authority.

proxies was because the minutes were in draft form. As explained above, that is not the reason that Mr. Hannemann himself provided at the time. (*See* R. p. 629.) Moreover, the record includes evidence of Mr. Hannemann, and for that matter Mr. Morris, actually circulating draft minutes on other occasions. (*See* R. pp. 663, 678–682.)

Re: Finding of Fact No. 14[56]

The trial court states, "Subsequent to the May 31, 2012 meeting in which the homeowners voted to reduce Morris' fine from $1,000.00 to $100.00, [Mr.] Morris continued to receive complaints from Plaintiffs" and was thus prompted to pay the $1,000 fine. This is false. As explained above, Mr. Morris's letter to Ms. Greene with the $1,000 payment was sent on June 1, 2012 (*see* R. p. 628), the very next day after the referenced May 31st meeting. The finding that his payment was prompted by "continued . . . complaints from Plaintiffs" is not supported by the evidentiary record.

Re: Findings of Fact Nos. 15 & 16[57]

The trial court overlooks the fact that the Mazell's payment was already overdue after May 31, 2012 (*see* R. pp. 634–636); thus, when ("[i]n June 2012," as the court states) Mrs. Mazell gave Mr. Hannemann a check for a bill that was

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[56] (*See* R. pp. 47–48.)

[57] (*See* R. p. 48.)

already past due, Mr. Hannemann's actions thereafter are all the more conspicuous. The court incorrectly states that the certified mailing Mr. Hannemann sent Mr. McFarland with the Mazell check was "refused." (*See* R. p. 328, lines 11–15.) Rather, it was never received—nor could it have been—because Mr. Hannemann sent the check via certified mail to a mailbox where certified mail could not be received. (*See* R. pp. 634–636, 638–639.)

Mr. Hannemann effectively prevented Mr. McFarland's receipt of the check for some fifty (50) days, and then, despite Mr. Hannemann's direct responsibility for the delay and confusion in the transmittal of the Mazells' check, he, along with Mr. Morris, wrote a joint letter to the entire HOA accusing both Mr. and Mrs. McFarland of some vague but sinister impropriety with the Mazells' check that could expose the HOA to "legal jeopardy" and demanding Mr. McFarland's immediate resignation from the Board and as HOA president. (*See* R. pp. 634–636, 638–639, 654–655.)[58] The only reasonable inference that can be drawn from these events (especially when considered along with the other evidence of Defendants' alignment against Mr. McFarland) is that Defendants were attempting to arouse negative sentiment against Mr. McFarland in the neighborhood to get him out of office/off the Board.

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[58] Again, the letter also demanded Mrs. McFarland's resignation as HOA treasurer, but she was not HOA treasurer to begin with. (*See* R. p. 151, lines 1–18.)

This is only further supported by Mr. Morris obtaining a cashier's check (drawn on his own account) on October 4, 2012, and bringing it with him (to have "if needed") to the special Board meeting he and Mr. Hannemann had set for that date—which meeting Mr. Mazell attended even though he, a non-Board member, could not actually participate in it—at which they purported to vote Mr. McFarland out as HOA president and voted Mr. Hannemann in. (*See* R. pp. 656–658.) By October 4, 2012, the Mazell dues payment was already over four months late. The Subject Order's statement that Mr. Morris obtained the cashier's check "[i]n the event the Mazell dues check was not received by [Mr.] McFarland" does not make sense in this context.

And, indeed, the trial court's ruling is inconsistent with Mr. Morris's own testimony in this regard. (R. p. 370, lines 11-25 ("[Q.] And the date of that certified check is the same date, is it not? [A.] I don't know, whatever it says on there. [Q.] October 4, 2012? [A.] Says October 4th. That's when it was. That's when I got it. They don't post date certified checks. [Q.] Is there any particular reason that's the same day as the meeting? [A.] I don't have a clue. That's when I got it. [Q.] You said you were going -- you got it just in case it was necessary? [A.] Exactly. [Q.] Why would it have been necessary on October 4th? [A.] I don't have a clue why it would have been necessary October 4th.").)

Re: Findings of Fact No. 17 & 18[59]

As explained above, the trial court's citation to Section 15(c) of the By-laws here overlooks the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. pp. 670–673; R. p. 465, lines 3–21; R. p. 823.) Defendants disregarded credible evidence of the violation presented to them by Ms. Greene and refused to take even so modest an investigatory step as to ask the tenant—the very same person who had improperly resided at the Mazells' before—to provide a copy of a utility bill that could prove he did indeed reside elsewhere. (*See* R. pp. 659–662, 664–665, 670–673.)

Re: Findings of Fact Nos. 19 & 20[60]

Again, the October 4, 2012, special Board meeting at which Messrs. Hannemann and Morris purported to vote Mr. McFarland out as HOA president and Mr. Hannemann in in his place could not possibly have been valid. Notice of the meeting was only placed in the mail to Mr. McFarland on October 1, 2012. (*See* R. pp. 657–658.) Mr. McFarland could not have actually gotten it until after that date, and the meeting notice could not possibly have been given in compliance with the By-laws. (*See* R. p. 566 (providing that special Board meetings require

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[59] (*See* R. pp. 48–49.)

[60] (*See* R. pp. 49–50; R. p. 56.)

"not less than three (3) days notice to each director mailed or presented personally to such director with such time.") Indeed, three full days after October 1st could not have possibly passed until October 5th. *See Town of Summerville*, 378 S.C. at 112, 662 S.E.2d at 42–43.

Moreover, with only Messrs. Hannemann and Morris involved in the process of moving, seconding the motion, and voting to remove Mr. McFarland as HOA president and of nominating, seconding the nomination, and voting to elect Mr. Hannemann to take Mr. McFarland's place as HOA president, the proceedings were out of proper order and tainted by conflict of interest and self-dealing. Again, Defendants' own witness Ms. Greene still recognized Mr. McFarland to be HOA president after October 4, 2012, and she also attested to Defendants having aligned themselves against Mr. McFarland, rendering the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) And even Defendants themselves identified Mr. McFarland as a Board Member *after* October 4, 2012. (*See, e.g.*, R. p. 684 (notice dated *June 12, 2013*, by Messrs. Hannemann and Morris to "Mr. Bill McFarland [/] Member of the Board of Directors [/] Live Oak Village Homeowners Association," purporting to give Mr. McFarland notice of a special Board meeting they had called for *June 17, 2013*).)

Re: All Conclusions of Law[61]

None of the trial court's Conclusions of Law is supported by the record or the applicable law. Addressing general standards for directors of nonprofit corporations, § 33-31-830 provides the following:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner the director reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;
>
> (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;
>
> (3) a committee of the board of which the director is not a member, as to matters within its jurisdiction,

[61] (*See* R. pp. 50–52.)

> if the director reasonably believes the committee merits confidence; or
>
> (4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented.
>
> (c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
>
> (d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.
>
> . . . .

Directors of a nonprofit corporation thus owe the corporation both a duty of care and a duty of loyalty. Also, directors are not to engage in self-dealing or act on corporate matters where they have a conflict of interest. *See* § 33-31-831.

While it is true that, "[i]n a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule[,]'" this simply means that the judgment of the directors will not be set aside "*absent* a showing of bad faith, dishonesty, or incompetence . . . ." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added); *see also Dockside Ass'n v.*

Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing [,] or unconscionable conduct.").

Moreover, "a corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*." *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). "The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones[,]" and "[a] homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative." *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 180, 760 S.E.2d 121, 130 (Ct. App. 2014).

As addressed above, the record contradicts every one of Conclusions of Law Nos. 1–6. The record is replete with evidence of Defendants' dereliction of their duties of care and loyalty in favor of bad faith, self-dealing, incompetence, and dishonesty—that latter further displayed by their dubious trial testimony regarding such matters as their view of Ms. Greene's "legitimacy" as HOA property manager (which is strikingly different than that revealed by the contemporaneous records), including the incredible notion expressed at trial that the idea had been for Ms.

Greene to "[h]andle the [HOA's] bills," and the explanation for why Mr. Holcombe's request for copies of the minutes and proxies from the May 31, 2012, special HOA meeting was refused.

The statute expressly states, "A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted." This is directly on point with regard to the way Defendants disregarded the credible evidence that the very same tenant who had been improperly residing the Mazells before had returned to the Mazell's house. Moreover, with respect to following the Governing Documents, the applicable legal standard mandates that they in fact be followed—there is no such thing as a "reasonable alternative." Without question, Mr. Morris violated the Governing Documents with his April 2012 landscaping project. The very fact that the trial court excused his violation on account of its supposed reasonableness is itself proof positive of Mr. Morris's breach of the legal standard that actually applies. And the breach of this standard—accompanied by bad faith, self-dealing, incompetence, and dishonesty—is evidenced repeatedly throughout the course of Defendants' efforts thereafter to use their positions on the Board, not to promote the HOA's interest in ridding the community of violations of the Governing

Documents,[62] but to rid themselves of the nuisance of following the Governing Documents whenever it did not suit them.

As for Conclusion of Law No. 7, i.e., the court's ruling that Plaintiffs are not entitled to an injunction in any event because they have unclean hands, it too is not supported in law or fact. Regarding Mrs. McFarland, the Subject Order states she "has unclean hands by acting as an officer and/or director in directing the property manager without approval from the Board of Directors." (R. p. 52.) As explained above, neither of the two written contracts Ms. Greene entered into with the HOA was signed by Mrs. McFarland; both were signed by Mr. McFarland, for and on behalf of the HOA, as its president, just as were her checks. (*See* R. pp. 589–590, 597–598; *see also* R. p. 433, lines 2–5.) Mrs. McFarland did not wrongly represent herself to Ms. Greene as a Board Member or HOA officer—again, this has never even been suggested. Ms. Greene always knew Mrs. McFarland was not a Board Member or HOA officer but rather the spouse of Board Member/President Mr. McFarland,[63] and Ms. Greene considered Mrs. McFarland's involvement to be within the bounds of the normal spousal teamwork. (*See* R. p. 458, line 20 – p. 459, line 12.) Ms. Greene simply did not testify that Mrs. McFarland acted

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[62] Indeed, far from protecting the community via protecting the sanctity of the Governing Documents, Mr. Morris took the position that the "covenant" he violated was "null and void." (*See* R. p. 609.)

[63] (*See* R. p. 432, lines 1–14.)

"unilaterally" or that she (Ms. Greene) "reported to and took directives solely from [Mrs. McFarland]." Rather, according to Ms. Greene, Mr. McFarland was involved and Mrs. McFarland did not act alone. (R. p. 435, line 23 – p. 436, line 3.) Indeed, Ms. Greene explained, "as far as dealing with Ms. McFarland and Mr. McFarland, it was always via e-mail[,]"[64] and as is well documented in the record, Mr. and Mrs. McFarland share the same email address.

Regarding Mr. Holcombe, the trial court states he has "unclean hands in loaning the HOA money for attorney's fees and, in the event Holcombe is not awarded attorney's fees, in planning to issue a special assessment to all homeowners for reimbursement—all without a vote of the Board of Directors and/or homeowners." (R. p. 52.) First off, this was not actually Mr. Holcombe's testimony. The most that can be said of his testimony is that he agreed with Defendants' counsel "that if you are unsuccessful in collecting attorney's fees and costs, then you would anticipate a special assessment to all of the owners for the attorney's fees and costs." (R. p. 123, lines 3–7.) Mr. Holcombe's anticipation in this regard is simply not the same thing as him "planning to issue to issue a special assessment to all homeowners for reimbursement . . . without a vote of the Board of Directors and/or homeowners." At most, what Mr. Holcombe actually testified to was his anticipation of a special assessment, not that he himself would somehow

[64] (R. p. 435, lines 24–25.)

be "issuing" such an assessment "without a vote of the Board of Directors and/or homeowners." There is absolutely no suggestion anywhere in this testimony (or elsewhere in the record) that any special assessment he might have anticipated would—or even could—ever come to pass unless and until it was properly approved and issued in accordance with the Governing Documents. And his mere act of fronting money to pursue litigation in good faith[65] in furtherance of the interests of the HOA—for no potential personal gain other than that in which he would share with fellow homeowners by remedying the dysfunction in the community's governance—cannot possibly amount to inequitable conduct or otherwise render his hand unclean.

Moreover, in the evaluating the instant situation the trial court's view of the equities is out of balance. The court states that even if it did find Defendants were acting outside the scope of their authority as Board Members, it nonetheless would not enjoin them from doing so. Besides the fact that the court's finding about Plaintiffs' supposedly unclean hands is not supported by the evidentiary record, and besides the fact that, in any event, the conduct attributed to Plaintiffs on which this finding is based does not, as a matter of law, amount to a proper basis to

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[65] Nowhere has it been suggested (nor could it reasonably be) that Mr. Holcombe's pursuit of this litigation has been in bad faith. The trial court itself, even in finding Mr. Holcombe to have unclean hands, does not find any such bad faith on his part—nor, for that matter, on the part of Mrs. McFarland.

invoke the doctrine of unclean hands,[66] it is patently inequitable to allow Defendants to continue to act/fail to act in a way that is detrimental to the entire community on the basis of what, even as erroneously attributed to them by the trial court, is less significant conduct on the part of just *two* members of the community. Moreover, Plaintiffs' request for the court to stop Defendants' violation of the Governing Documents is in accordance with S.C. Code Ann. § 33-31-810, which expressly authorized it to "(a) . . . remove any director of the corporation from office . . . if [it] finds that: (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, . . . ; and (2) removal is in the *best interest of the corporation*." (emphasis added). Moreover, in subsection (b), § 33-31-810 provides that "[t]he court that removes a director may bar the director from serving on the board for a period prescribed by the court."

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[66] The trial court itself states, "'The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly [1] *in a matter that is the subject of the litigation* [2] *to the prejudice of the defendant*.'" (R. p. 42 (quoting *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 379 (S.C. Ct. App. 1998) (emphasis added).) The supposed conduct on which the court based its finding of unclean hands against Plaintiffs was not, in fact, "the subject of the litigation" and, besides that, the court never identified any prejudice to Defendants thereby, nor does the evidentiary record allow for such a finding. The court merely states, in conclusory fashion, "Plaintiffs' actions violate the same Covenants and Bylaws of which they complain the Defendants are violating and, therefore, Plaintiffs' unclean hands bar the equitable remedy of injunction[,]" without ever actually identifying any provision of the Governing Documents supposedly violated by Mrs. McFarland or Mr. Holcombe. (*See* R. p. 52.)

CONCLUSION

For the foregoing reasons, Appellants ask the Court to reverse the trial court and enter, or direct that the trial court enter, judgment in their favor or, alternatively, remand this matter to the trial court for any further proceedings necessary, to include, without limitation, a new trial.

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Dated: 11/19/19

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2012-CP-18-02583

Jennifer McFarland and Carlton Holcombe,

Appellants,

v.

Thomas Morris and David Hannemann,

Respondents.

APPELLANTS' CERTIFICATION FOR FINAL BRIEFS

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I, Russell G. Hines, do hereby certify that the **Final Brief of Appellants** and the **Final Reply Brief of Appellants** comply with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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