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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2021-000471

Bull Point Plantation Property Owners Association, Inc.....Respondent

v.

Bull Point SC, LLC, Bull Point, LLC, Bull Point Plantation
Owners Association, Inc., William E. Gavigan, Michael Carey,
Christopher J. Quick, James Riordan, Richard Riney Appellants

BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.'S
FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial judge properly grant summary judgment to Respondent in light of Judge Mullen's orders in the *Attridge* case

SUGGESTED ANSWER: Yes.

2. Did the trial judge properly consider the evidence with regard to whether Respondent was the real party in interest?

SUGGESTED ANSWER: Yes.

3. Did the trial judge properly conclude that Respondent was the appropriate property owners association for Bull Point Plantation under the Declaration?

SUGGESTED ANSWER: Yes.

4. Did Respondent possess standing to assert the claims raised in this case concerning its common properties?

SUGGESTED ANSWER: Yes.

5. Did Respondent timely commence its claims?

SUGGESTED ANSWER: Yes.

6. Did the trial court properly consider the evidence with regard to the existence of "Bull Point Plantation Owners Association, Inc."?

SUGGESTED ANSWER: Yes.

7. Did the trial court properly rule in Respondent's favor that there are no genuine issues of material fact as to Respondent's "conflict of interest" claims?

SUGGESTED ANSWER: Yes.

8. Even if Judge Mullen's *Attridge* ruling does not compel the conclusion that the quitclaim deeds at issue are invalid, should Appellants be required to return the common properties to Respondent?

SUGGESTED ANSWER: Yes.

COUNTERSTATEMENT OF THE CASE

A. The Parties to This Appeal

Appellants are two limited liability companies, a nonprofit corporation, and several individuals:

- Bull Point SC, LLC
- Bull Point, LLC
- Bull Point Plantation Owners Association, Inc.
- William E. Gavigan
- Michael Carey
- Christopher J. Quick
- James Riordan
- Richard Riney

Respondent is a nonprofit corporation, Bull Point Plantation Property Owners Association, Inc., which is the property owners' association for the Bull Point Plantation development. Respondent's name has changed twice over the years — through the filing of proper corporate documents discussed below — as follows: Bull Point Homeowners Association, Inc. → Bull Point Property Owners Association, Inc. (2006) → Bull Point Plantation Property Owners Association, Inc. (2014-present).

B. The Declaration and the Association

On January 20, 1995, Stancel Kirkland and Robert Wolfson created an entity called "Bull Point, LLC" (one of the Appellants) by filing Articles of Organization with the South Carolina Secretary of State. (*See* R. p. 212). Bull Point, LLC was the original developer and "Declarant" of Bull Point Plantation, a private waterfront community located in Beaufort County, South Carolina ("Bull Point Plantation"). On January 17, 2000, Appellant Bull Point, LLC — through Mr. Kirkland and Mr. Wolfson, its Managing Partners — executed the "Ninth Amendment to Declaration of Covenants, Conditions, and Restrictions for Bull Point Plantation" ("Declaration").

(See R. pp. 214-75).¹ The Declaration provided that "Bull Point, LLC" was the original Declarant of Bull Point Plantation and that Bull Point Plantation Owners Association, Inc. was the "Association" under the Declaration. (See R. pp. 217-18 ¶¶ 1.01(e) & (j)).

The same day, Mr. Kirkland executed Articles of Incorporation for a non-profit corporation "Bull Point Homeowners Association, Inc." — which is Respondent under its former name. (See R. pp. 277-78).² These Articles of Incorporation state that the "Bull Point Homeowners Association, Inc." was formed, among other things, "to provide for maintenance, preservation and architectural control of the residence lots and common area within that certain tract of property known as the Bull Point Property." (See R. p.279 ¶3). While the Declaration itself refers to the "Association" by a slightly different name — "Bull Point Plantation Owners Association, Inc., a South Carolina non-profit corporation" (see R. p. 217 ¶ 1.01(e) — the "Bull Point Homeowners Association, Inc.'s" Articles of Incorporation state that it (not Appellant Bull Point Plantation Owners Association, Inc.) shall "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the" Declaration. (See R. p. 279 ¶ 3(a)). In fact, no corporation by the name of Bull Point Plantation Owners Association, Inc. has ever been incorporated until February 5, 2020. The Articles of Incorporation of "Bull Point Homeowners Association, Inc." include multiple provisions that unmistakably identify it as the

¹ Declarant signed the first iteration of the Declaration in 1995, and it was amended eight times. (See R. p. 214). In 2000, the Declaration was restated in the Ninth Amendment. (See R. pp. 214-75). It has been amended a number of times since then in ways that are not relevant to this case. Appellants do not dispute that the 2000 version of the Declaration (*i.e.*, the Ninth Amendment) is the effective version of the Declaration, and that is the version that the trial court considered.

² "Bull Point Homeowners Association, Inc." changed its name twice (while keeping the same corporate existence), settling on "Bull Point Plantation Property Owners Association, Inc." (the current name of Respondent). Appellant Bull Point, LLC has claimed in other legal filings that Respondent (by whatever name) was a "Developer's Holding Company." However, it is clear from its Articles of Incorporation, as the Honorable Carmen T. Mullen ruled in the *Attridge* Litigation (discussed below), that Respondent is in fact the property owners' Association for Bull Point Plantation.

Bull Point Plantation property owners' Association, not a "Developer's Holding Company" as Appellants have argued:

- The Association has the power to fix, levy, and collect assessments and pay expenses (*see* R. p. 279 ¶3 (b));
- Every record owner of a lot which is subject to the Declaration is a member of "Bull Point Homeowners Association, Inc." (*see* R. p. 280 ¶ 4);
- "Bull Point Homeowners Association, Inc.'s" members shall elect its Board of Directors (*see* R. p. 280 ¶ 6);
- "Bull Point Homeowners Association, Inc." shall manage and control the common areas in Bull Point Plantation (*see* R. p. 281 ¶ 10).

On July 5, 2006, "Bull Point Homeowners Association, Inc." changed its name to "Bull Point Property Owners Association, Inc." and changed its address to 97 Bull Point Drive, Seabrook, South Carolina, 29940. (*See* R. pp. 283-84).

Between 2006 and 2008, Appellant Bull Point, LLC, in compliance with the Bull Point Plantation development plan, conveyed the common properties to "Bull Point Homeowners Association, Inc." These conveyances were made through fifteen separate deeds, conveying various elements of the common properties to "Bull Point Homeowners Association, Inc." (*See* R. p. 286 (summarizing deeds)). When the recession hit in 2008, Bull Point, LLC became unable to meet its financial obligations. It ultimately filed for bankruptcy protection and lost its remaining Bull Point Plantation properties to foreclosure in 2012.

On March 6, 2013, the Respondent Association changed its Registered Agent from Stancel Kirkland to Russell Dimke. (*See* R. pp. 288-89). On December 31, 2014, Respondent Association finally changed its name to its current "Bull Point Plantation Property Owners Association, Inc." (*See* R. pp. 291-92). Despite its name changes, Respondent has continuously acted as the Association under the Declaration. It has had the same tax identification number since at least 2006, as far back as records are available. (*See* R. p. 296 ¶ 8). It has served and operated continuously as the Bull Point Plantation property owners' Association since its incorporation in 1995. Among other things, the Association has: (a) annually assessed members for the cost of

keeping the common properties at Bull Point Plantation, including building a contingency fund; (b) kept the Bull Point Plantation common properties; (c) paid the property taxes on the Bull Point Plantation common properties; and (d) insured the insurable Bull Point Plantation common properties.

C. William E. Gavigan's Entry Into Bull Point Plantation

After Bull Point, LLC defaulted on its development loan, BB&T initiated foreclosure proceedings in 2011 in the United States District Court for the District of South Carolina. (*See* R. p. 428 ¶ 9). German American Capital Corporation ("GACC") acquired the BB&T loan. (*See* R. p. 429. ¶ 11). "[O]n July 5, 2012, the [federal] court in the foreclosure action issued its Deed by Judicial Order, and transferred to DB Aster, LLC most of Bull Point, LLC's real property." (*See id.*). On December 28, 2012, Bull Point, LLC purported to assign its Declarant rights to DB Aster. (*See id.*). DB Aster, LLC served as the Declarant of Bull Point Plantation until August of 2017.

On August 21, 2017, GSI, LLC ("GSI"), an entity owned by Appellant William E. Gavigan ("Mr. Gavigan"), bought DB Aster's remaining Bull Point Plantation property. (*See* R. pp. 427, 429 ¶¶ 2, 14). That same day, a document was recorded which purported to assign the Declarant rights from DB Aster to GSI, LLC. (*See id.*; *accord* R. pp. 298-305). GSI immediately assigned most of its interests (including the Declarant rights) to Appellant Bull Point SC, LLC (no relation to Appellant Bull Point, LLC), of which Mr. Gavigan is also the sole member. (*See* R. pp. 307-09).

In August, 2017, Bull Point SC, LLC, through its managing member Appellant Gavigan, began acting as the Declarant of Bull Point Plantation. Even though he did not have authority to do so, Mr. Gavigan appointed himself as President of Respondent Association. He later appointed Appellants Michael Carey, Christopher Quick, James Riordan, and Richard Riney onto the Association's Board of Directors. Bull Point SC, LLC also purported to amend the Declaration and refused to pay assessments on lots that it owned, claiming that the Declarant did not have to do so. Throughout this time, Gavigan improperly held himself out as President of the Association

(although he did not properly hold that position) and ran the Association as he wanted, often to his own benefit and to the Association's detriment. Throughout the time he was in charge, Appellant Mr. Gavigan consistently recognized Respondent Bull Point Plantation Property Owners Association, Inc. as the legitimate property owners' Association. In fact, he repeatedly and invariably represented that it was. (*See, e.g.*, R. pp. 311-28).

D. The Attridge Case

In 2018, Appellant Mr. Gavigan began using the Association's contingency fund – which by then was almost a million dollars – to fund a large operating deficit that began during his tenure as President of the Association. Under the Declaration, the Declarant is responsible for covering budget deficits, but Bull Point SC, LLC never did so. On November 16, 2018 Mr. Gavigan amended the Declaration to dissolve the contingency fund oversight committee and to transfer the contingency funds into the operating fund where he would have direct access to them. (*See* R. pp. 330-35).

On December 3, 2018, a group of members of the Association, both individually and derivatively on behalf of the Association, filed a lawsuit against Appellant Bull Point SC, LLC, Appellant Mr. Gavigan, the then-purported Board of Directors of the Association, and other defendants, challenging the misappropriation of contingency fund money ("*Attridge* Litigation"). The *Attridge* Litigation plaintiffs later amended their Complaint to, *inter alia*, challenge whether Appellant Bull Point SC, LLC was in fact the Declarant, whether it had authority to unilaterally amend the Declaration, and whether it had authority to appoint the Association's Board of Directors. On July 2, 2019, plaintiffs in the *Attridge* Litigation filed a Motion for Partial Summary Judgment seeking an order that Bull Point SC, LLC was not the Declarant of Bull Point and/or that, even if it was, Bull Point SC, LLC did not have the right to appoint the Association's Board of Directors, who according to the Articles of Incorporation were to be elected by the membership. On September 19, 2019, Bull Point SC, LLC and Mr. Gavigan filed a cross Motion for Partial Summary Judgment in *Attridge*, requesting a declaration that Bull Point SC, LLC was the Declarant and had the power to amend the Declaration and appoint the Board of Directors.

On November 18, 2019, Judge Mullen entered an Order in the *Attridge* Litigation granting the plaintiffs partial summary judgment, including the following declaratory judgments:

Defendant Bull Point SC, LLC is not and never was the Declarant and, therefore, all actions it took as purported Declarant, including appointing the POA's directors and amending the Declarations, are void. . . .

The POA members have and always have had the right to elect the POA's Board of Directors. The Court orders that an election will take place within 90 days of the date of this Order. Defendants shall provide the Plaintiffs with the names and every form of contact information they have for all of the POA members. In the meantime, upon entry of this Order, the Defendants, and anyone they appointed to serve, will immediately cease acting as the POA's Board of Directors. . . .

The Eighteenth Amendment to the Declarations is rescinded and the Fifteenth Amendment is reinstated, providing the POA members control over the POA's Contingency Fund. . . .

Defendants shall turn over possession of: (a) the clubhouse offices and all property and records (both physical and electronic) located therein, including but not limited to cellular telephones and keys belonging to the POA; (b) all POA check books, credit cards, debit cards, financial records (both physical and electronic).
credentials

(*See* R. pp. 455-56). Judge Mullen's November 18, 2019 Order in the *Attridge* Litigation is currently on appeal in this Court; however, those *Attridge* appellants have not obtained a stay of that Order pending appeal.

Appellant Mr. Gavigan and other *Attridge* Defendants did not honor Judge Mullen's November 18, 2019 Order. As a result, the *Attridge* Plaintiffs filed a motion for preliminary injunction and motion/petition for rule to show cause, as well as a supplemental motion. In defending those motions, Mr. Gavigan argued that Judge Mullen's Order was of no effect because Respondent Bull Point Plantation Property Owners Association, Inc. (or under its previous names) was never actually the property owners' Association of Bull Point Plantation. Rather, he contended that Appellant Bull Point Plantation Owners Association, Inc. — a new corporation that he created on February 5, 2020 (*see* R. pp. 407-10), *after* Judge Mullen's November 18, 2019 Order — is the true property owners' Association, under the Declaration's definition of "Association." That argument of course contradicted Mr. Gavigan's prior various statements to the Association's

members and others that the Association's correct name was Bull Point Plantation Property Owners Association, Inc.

On December 4, 2020, Judge Mullen entered an Order Granting in Part and Denying in Part Plaintiff's Supplemental Motion for Preliminary Injunction and Motion/Petition for Rule to Show Cause (*See R. pp. 337-53*). Judge Mullen rejected Mr. Gavigan's arguments, saying: "The Declaration certainly does not provide for the POA to remain an unincorporated association for twenty-five years and then blossom into a corporation, as Defendant Gavigan contends. The Court readily concludes that Bull Point Plantation Property Owners Association, Inc. is and has been the Bull Point Plantation POA." (*See R. p. 347*). Judge Mullen reasoned that while the Association's name "is slightly different from the one specified in the Declaration, it is the only corporation that was created contemporaneously with the Declaration and it meets every substantive requirement of the Association described in the Declaration." (*See id.*). In other words, Judge Mullen conclusively ruled in December of 2020 that Respondent is the only proper Bull Point Plantation property owners Association, not Mr. Gavigan's newly created company, Appellant Bull Point Plantation Owners Association, Inc.³

E. The Association's Common Properties

Over time (and long before Mr. Gavigan's arrival at Bull Point Plantation), Appellant Bull Point, LLC transferred the common areas within Bull Point Plantation to the Respondent Association. These conveyances occurred between 2006 and 2008 and included roads, community dock, community boat landing, maintenance area, Clubhouse complex with swimming pool and tennis courts, Magnolia Island, William Bull Park, etc. (*See R. p. 286*). Those deeds named the grantee as "Bull Point Property Owners Association, Inc.," which was Respondent Association's name at that time. As reflected in the Association's November 21, 2008 Annual Meeting Minutes, Stan Kirkland told the Association's members that he recorded the deeds transferring some common property *to the Association*. (*See R. pp. 199, 355-60*). One day prior, Mr. Kirkland, as

³ That Order is currently the subject of another appeal to this Court.

then-Managing Member of Bull Point, LLC, executed some of those deeds transferring roads, trails, a bridge, and drainage easements from Bull Point, LLC to Respondent (then named "Bull Point Property Owners Association, Inc."). (*See R. pp. 362-79*).

Appellants cannot dispute that, throughout Mr. Gavigan's tenure as purported President of the Association, he treated the common area properties as if Respondent Association owned them, which it did. It was only *after* Judge Mullen decided that Mr. Gavigan was *not* the President of the Association that he began to assert that Respondent was not the "true" Association.

Sometime after the buying DB Aster's interest in Bull Point Plantation, Appellant Mr. Gavigan purported to obtain all interests in Appellant Bull Point, LLC, which at that time was a shell corporation with no assets. On September 27, 2019, Judge Mullen notified the parties that she would hear the cross-motions for partial summary judgment in the *Attridge* Litigation on October 15, 2019. (*See R. pp. 381-8220*).

On October 4, 2019 (eleven days before that hearing), Appellant Mr. Gavigan, as the Association's putative president, and Defendant Riney, its putative Secretary, signed two Quit Claim Deeds transferring a large part of the Association's common elements to Bull Point, LLC, which Mr. Gavigan had recently acquired. (*See R. pp. 384-96*). These Quit Claim Deeds were recorded in the Beaufort County Register of Deeds on October 10, 2019. (*See id.*). These deeds purported to transfer from the Respondent Association to Appellant Bull Point, LLC, the clubhouse/business office, swimming pool complex, tennis court complex, boat ramp, community dock, parks, Magnolia Island and its boardwalk, roads, open spaces, leisure trails, drainage easements, and other common areas.

When the *Attridge* Litigation plaintiffs complained to Judge Mullen about this improper transfer of property, Mr. Gavigan explained that the transfer of the common areas to Bull Point, LLC was necessary to remedy certain purported defects in the deeds by which Bull Point, LLC originally transferred the common areas to the Association. Mr. Gavigan represented to Judge Mullen that the properties would be transferred back to the Respondent Association, saying through his counsel: "On the advice of attorney Alysoun M. Eversole, Esq., these quitclaim deeds

were made to enable Bull Point, LLC to convey the properties lawfully to Bull Point Plantation Property Owners Association, Inc.” (See R. p. 400 n.2). Mr. Gavigan’s counsel referenced an email from Attorney Eversole to Mr. Gavigan sent September 25, 2019, in which Attorney Eversole wrote:

In short, what we are doing is having the current owners (BPPOA and BPPOA, Inc. and OSP, Inc.) quit claim their interests back to Bull Point, LLC using the legal descriptions provided in the current recorded deeds. Many of the descriptions in those deeds are vague and incorrect. Once the Quit Claim Deeds are recorded, deeds will be done for Bull Point, LLC to convey each parcel to the BPPPOA, Inc. using correct and proper legal descriptions. It is a fairly simple process, but requires a lot of organization and details to attend to.

(See R. p. 405). Thus, Attorney Eversole wrote (and Mr. Gavigan represented to Judge Mullen in *Attridge*) that the purpose of these transfers was to re-convey the common area properties to Respondent Bull Point Plantation Property Owners Association, Inc. (“BPPPOA, Inc.,” as Ms. Eversole called it).

Despite multiple demands, Mr. Gavigan never transferred the properties back to Respondent Association. Instead, on February 5, 2020, he incorporated a new company with a name deceptively similar to Respondent Association: Appellant Bull Point Plantation Owners Association, Inc.⁴ (See R. pp. 407-10). Mr. Gavigan would ultimately use this newly created entity to circumvent Judge Mullen’s Order and claim the authority and rights of Respondent Association.

On March 6, 2020 (only a month after he formed this new company), Mr. Gavigan executed a Quit Claim Deed as Managing Member of Appellant Bull Point, LLC transferring common property (that he previously transferred in 2019 from Respondent Association to Bull Point, LLC) to his new company, Appellant Bull Point Plantation Owners Association, Inc. (See R. pp. 412-15). Thus, the Bull Point Plantation common property had been taken from Respondent Association by Bull Point, LLC in 2019 and then transferred from Bull Point, LLC to Mr. Gavigan's

⁴ The name of Mr. Gavigan's newly-formed company is identical to Respondent Bull Point Plantation Property Owners Association, Inc., with the word "Property" omitted. It mimics the name originally assigned to the Association in the Declaration.

new company (Appellant Bull Point Plantation Owners Association, Inc.) in 2020, after Judge Mullen's November, 2019 first Order.

Mr. Gavigan's March 6, 2020 transfer to Appellant Bull Point Plantation Owners Association, Inc. (his company) directly contradicts his claimed reason for transferring the properties to Bull Point, LLC in the first place. He transferred the properties from one Gavigan-owned entity to another, not back to Respondent Association. Mr. Gavigan's March 6, 2020 transfer to Bull Point, LLC also violated the trial court's November 18, 2019 Order in the *Attridge* Litigation, because Mr. Gavigan and his entities were asserting control over Respondent Association's common area properties.

To this date, Mr. Gavigan refuses to transfer the properties back to Respondent Association. Instead, he claims that he and his companies now own them. He even flaunts his ownership of them. For example, Mr. Gavigan (proceeding as a *pro se* plaintiff in a defamation lawsuit against a Bull Point Plantation resident) sent notices of depositions to be held at the Bull Point Clubhouse, which Bull Point, LLC has not transferred back to Respondent Association, stating "Bull Point, LLC has graciously allowed us to conduct the depositions at 114 Barnaby Bluff in Bull Point," the address of the Clubhouse (*See R. p. 417*). Despite claiming ownership over the Association's vital properties, Mr. Gavigan has refused to pay insurance premiums or property taxes associated with them. (*See R. pp. 419-25*).

Meanwhile, the Association learned that there were outstanding judgments⁵ against Bull Point, LLC such that those judgments would potentially attach to the properties which Gavigan transferred from the Association to Bull Point, LLC. Accordingly, the Association demanded that in addition to transferring the properties back to the Association, Bull Point, LLC obtain a full release in favor of the Association of any and all rights to enforce any judgments or liens against the properties. It is because of these judgments that Respondent Association asked that the conveyances be nullified, not simply that Appellants should have to give the properties back.

⁵ Another of Mr. Gavigan's companies owns the largest of these judgments, in excess of a million dollars.

F. The Instant Litigation

On April 3, 2020, the Association filed this action seeking (1) a declaration that the October 4, 2019 deeds transferring property from the Association to Bull Point, LLC are void, of no legal effect, and should be set aside because Defendants Gavigan and Riney were not members of the Association's Board of Directors (as the final judgment of this Court in *Attridge* determined) and had no authority to sign the deeds; (2) an order deciding that the transfers of common property from the Association to Bull Point, LLC was a "conflict of interest transaction" because they were to benefit Mr. Gavigan (through Bull Point, LLC); (3) an order requiring Defendants Bull Point, LLC and Bull Point Plantation Owners Association, Inc. to transfer all common properties back to the Association free and clear of all liens and judgments; and (4) an order finding that Mr. Gavigan and Bull Point, LLC committed fraud in transferring the common properties to Appellant Bull Point Plantation Owners Association, Inc.⁶ (*See R. pp. 517-54*).

On October 23, 2020, Respondent Association filed a Motion for Summary Judgment ("Motion for Summary Judgment") in this action. (*See R. pp. 494-502*). Respondent Association supported its Motion for Summary Judgment with the Affidavits of Robert Brendza, Vicki Menard, Mary A. D'Ambrosio, Joseph P. D'Ambrosio, and Michael Pellechia. On February 25, 2021, Respondent Association filed its Memorandum in Support of Motion for Summary Judgment. (*See generally R. pp. 192-458*).

After a hearing on Respondent Association's Motion for Summary Judgment, on March 2, 2021, the Honorable R. Lawton McIntosh entered a Form 4 Order saying:

BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. THE CONVEYANCES ARE NULL AND VOID *AB INITIO* AS THERE WAS NO AUTHORITY TO MAKE THE TRANSFERS. DEFENDANTS ARE ESTOPPED BASED ON COMMUNICATION WITH JUDGE MULLEN AND FOR SUCH

⁶ On February 1, 2021, Respondent Association filed a Motion to Alter or Amend Complaint to add new causes of actions and a new party based on information it discovered since initially filing this lawsuit. The proposed Amended Complaint did not change or affect the claims for which Respondent Association sought the summary judgment that is at issue in this appeal. (*See Feb. 1, 2021 Mot. to Alter or Amend Compl.*). On April 5, 2021, the trial court granted the Motion to Alter or Amend Complaint.

OTHER REASONS AS PLAINTIFFS PLACED IN ORDER. MR. COOKE TO PREPARE A FORMAL ORDER.

(See R. p. 11-13).

On April 15, 2021, the trial court entered its formal Order Granting Plaintiff's Motion for Summary Judgment ("Summary Judgment Order"), which is the subject of this appeal. (See R. pp. 1-10). The Summary Judgment Order ruled as follows:

1. Plaintiffs' Motion for Summary Judgment is granted;
2. Plaintiffs' request for Declaratory Judgment in its first cause of action is granted. Defendants Gavigan and Riney did not have authority to sign the October 4, 2019 Deeds (recorded in the Beaufort County Register of Deeds at Book 3802, Pages 185- 192 and Book 3802, Pages 195-197) and, therefore, the conveyances are void *ab initio*, of no legal effect, and are set aside. Similarly, the March 6, 2020 Deed recorded in the Beaufort County Register of Deeds at Book 3844, Pages 2148-2151) is void *ab initio*, of no legal effect, and is set aside because Bull Point, LLC did not acquire title to the properties it claimed to transfer therein. It is ordered that possession of all real property transferred by way of the October 4, 2019 Deeds and March 6, 2020 Deed be delivered to the Association within 30 days of the filing of this Order.
3. The Court finds for the Plaintiff as to its Second Cause of Action, that the October 4, 2019 Deeds were conflict of interest transactions and, therefore, are void *ab initio*, of no legal effect, and are set aside. Similarly, the March 6, 2020 Deed is void *ab initio*, of no legal effect, and is set aside because Bull Point, LLC did not acquire title to the properties it claimed to transfer therein.
4. The Defendants are estopped and enjoined from taking any action affecting the title to any real property mentioned in the October 4, 2019 Deeds or the March 6, 2020 Deed.

(See R. pp. 8-9). The trial judge based these rulings on the following grounds:

- The 2019 and 2020 Quit Claim Deeds are void because Appellants Mr. Gavigan and Mr. Riney did not have authority to sign them;
- The 2019 and 2020 Quit Claim Deeds are void because the 2019 Quit Claim Deeds were conflict of interest transactions;
- Appellants are estopped from retaining the properties at issue because of their counsel's representations to Judge Mullen in *Attridge*; and

- Respondent Bull Point Plantation Property Owners Association, Inc. is the legitimate property owners association for Bull Point Plantation and is the rightful owner of its common properties.

(See generally R. pp. 2-9).

For the reasons set forth below, the Court should affirm the trial court's grant of Respondent Association's Motion for Summary judgment.

ARGUMENTS

I. STANDARD OF REVIEW

This matter is on appeal from an order granting a partial summary judgment to Respondent Association.

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court.” *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). The standards governing summary judgment are well-settled in South Carolina:

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

NationsBank v. Scott Farm, 320 S.C. 299; 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). “[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is

introduced solely in a vain attempt to create an issue of fact that is not genuine [or material].

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (citations omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted).

When the underlying action requires proof by a preponderance of the evidence, the non-movant must submit a "scintilla of evidence" to survive summary judgment. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

This Court "may affirm the grant of summary judgment on any ground found in the record." See *Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), S.C.A.C.R. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")); accord Rule 208(b)(2) ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

As is clear from the foregoing history, Appellant Gavigan acquired the remnants of the bankrupt developer's interest in Bull Point Plantation, believing that it would give him control of the Association and access to its money. In time, Judge Mullen correctly found that the essential declarant's rights were not assignable commodities and turned control of the Association over to its members. Among Mr. Gavigan's parting shots at the Bull Point Plantation community was to convey its common properties to himself. Appellants face an unsolvable dilemma: either (as Judge Mullen ruled in *Attridge*) Appellants had no authority to act on behalf of the Association and their actions as putative Declarant and Board members were void, or they did have authority to act and they violated their fiduciary duties to the Association in the most extreme way imaginable. Either way, their purported conveyance of the Association's common properties to themselves was void or voidable.

II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DETERMINATION THAT RESPONDENT IS THE PROPER ASSOCIATION BECAUSE OF JUDGE MULLEN'S ORDERS IN THE ATTRIDGE LITIGATION.

First, the question of whether Bull Point Plantation Owners Association, Inc. is the rightful POA is a red herring. The purported conveyances that are the subject of this lawsuit were made in its name, by Respondents as its putative Directors. Bull Point Plantation Owners Association, Inc. was the record titleholder of these properties. The proper way to challenge the Association's entitlement to the property would be through a legal action such as an action to try title, not by executing deeds without authority. Nevertheless, Judge Mullen determined in the *Attridge* Case both that Respondent Association is the legitimate property owners' association for Bull Point Plantation and that the Respondents had no authority to act on the Association's behalf. The quitclaim deeds at issue were thus not legally effective. Judge Mullen's rulings in *Attridge* bind Appellants.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. . . . The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *See Brown v. Sojourner (In re Estate of Brown)*, 424 S.C. 589, 600, 818 S.E.2d 770, 776-77 (Ct. App. 2018) (internal quotation marks and citations omitted) (*quoting Carolina Renewal, Inc. v. South Carolina Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)).

The term "privity," when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. . . . Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

See Carrigg v. Cannon, 347 S.C. 75, 80-81, 552 S.E.2d 767, 770 (Ct. App. 2001). For the reasons that follow, Judge Mullen's November 18, 2019 and December 4, 2020 Orders in *Attridge* collaterally estop the arguments Appellants now make.

The defendants in *Attridge* included most of the Appellants in this appeal: Mr. Gavigan, Mr. Carey, Mr. Quick, Mr. Riordan and Bull Point SC, LLC. There can be no doubt that there is privity between Appellants and the defendants in *Attridge*. Moreover, the only Appellants who were not parties to *Attridge* are Mr. Gavigan's newly created company, Appellant Bull Point Plantation Owners Association, Inc, and Mr. Riney (who executed the subject 2019 Quit Claim Deeds with Mr. Gavigan). There can be no dispute that privity exists here.

Judge Mullen's Orders conclusively decided several dispositive issues underlying the Order granting Respondent summary judgment. First, Judge Mullen's November 18, 2019 Order conclusively decided that Appellants Gavigan and Riney did not have the authority to act on behalf of the Association, which would include executing the October 4, 2019 Quit Claim Deeds. Judge Mullen clearly and unequivocally found: (1) that Bull Point SC, LLC was never the Declarant of Bull Point Plantation; (2) that the Association's members have the exclusive right to elect its Board of Directors; (3) that Bull Point SC, LLC's purported appointments to the Board of Directors were a nullity; (4) that all actions of the illegally appointed Board of Directors were nullities; (5) that all actions Bull Point SC, LLC, took as the purported Declarant (including appointing members of the Association's Board of Directors) are void; and (6) that Appellants Mr. Gavigan and the other individual defendants were not members of Respondent Association's Board of Directors. (*See R.* pp. 438-58).

These decisions by Judge Mullen in *Attridge* preclude Appellants' contention that Appellants Mr. Gavigan and Mr. Riney were authorized to execute the October, 2019 Quit Claim Deeds. A signed instrument is invalid if the signatures were not properly authorized. *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 828 S.E.2d 82, 86 (Ct. App. 2019) (document signed by someone without authority is ineffective). Judge Mullen's November 18, 2019 Order makes clear that they would not have been authorized to sign the 2019 Quit Claim Deeds. Accordingly, the trial judge

properly determined — based on Judge Mullen's November 18, 2019 Order in *Attridge* — that the October 4, 2019 Quit Claim Deeds are void and invalid.⁷

While Judge Mullen's November 18, 2019 Order is on appeal, it has not been stayed and, therefore, it must be enforced. "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal" See S.C.A.C.R., Rule 241(a). Rule 241(b) lists some of the exceptions to the general rule, including orders granting an injunction, judgments directing delivery of documents or personal property, and judgments directing the delivery of possession of real property. Judge Mullen's November 18 Order in *Attridge* did all three. It granted an injunction. (See R. p. 455 ("The Injunction requested in the Plaintiffs' second cause of action is granted. . . . Defendants are enjoined from serving on the POA's Board of Directors (unless elected by the POA members)"). It ordered possession of real property (the Clubhouse), documents, and personal property to be delivered (See R. pp. 455-56 ("[T]he Defendants shall turn over possession of: (a) the clubhouse offices and all property records (both physical and electronic) located therein, including but not limited to cellular telephones and keys belonging to the POA; (b) all POA check books, credit card, debit cards, financial records (both physical and electronic).")). Appellant Mr. Gavigan, through his counsel, recognized that the November 18 Order was not automatically stayed. (See R. p. 399 (complaining proposed order "would rob the Defendants of their rights under Rule 241, SCACR, which provides the Defendants with the benefit of a stay until such time as an appellate court reviews the matters now before this Court . . ."). Judge Mullen's November 18 Order is still in full force and effect during the pendency of the *Attridge* appeal. *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422-23 (2007), *certiorari*

⁷ On March 6, 2020, Bull Point, LLC gave a Quit Claim Deed that purported to transfer to Appellant Bull Point Plantation Owners Association, Inc. (a new entity with a name deceptively similar to Respondent that Mr. Gavigan created only weeks before) the properties that Bull Point, LLC received via the October 4, 2019 deeds. Since the October 4, 2019 deeds are void, Bull Point, LLC never obtained title to the property that it purported to transfer in the March 6, 2020 Quit Claim Deed. Accordingly, the March 6, 2020 Quit Claim Deed is void and ineffective to transfer any property to Appellant Bull Point Plantation Owners Association, Inc.

denied, 128 S. Ct. 136, 552 U.S. 821, 169 L.Ed.2d 29 (finding that order was subject to Rule 241(b) exception while on appeal).

Even if Judge Mullen's November 18, 2019 Order was subject to collateral attack, she would be the only judge authorized to reconsider it. *See Cook v. Taylor*, 272 S.C. 536, 252 S.E. 2d 923 (1979) (one circuit judge may not enter order changing order of another circuit court judge). If the Court of Appeals in *Attridge* reverses Judge Mullen's November 18, 2019 Order, Defendants can seek relief under SCRCP 60(b)(5), which allows relief from a judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated."

Second, Judge Mullen considered and squarely rejected the argument Appellants advance, that the Association is not the real POA. The *Attridge* defendants attempted to circumvent Judge Mullen's November, 2019 Order by claiming that Respondent Association – which was the subject of the Order – was not the real POA. Judge Mullen issued a second Order in December, 2020 finding that Respondent Association *is*, in fact, the true property owners' association of Bull Point Plantation. Judge Mullen's detailed analysis of this issue is set forth below:

The Court also finds unavailing Defendant Gavigan's argument that Bull Point Plantation Property Owners Association, Inc. was never the real Bull Point POA. Defendants argue that Bull Point Plantation Property Owners Association, Inc. is not the POA because the Declaration defines the "Association" as "Bull Point Plantation Owners Association, Inc., a South Carolina non-profit corporation." Defendants point out that this name is different than Bull Point Plantation Homeowners Association, Inc., the predecessor of Bull Point Plantation Property Owners Association, Inc. On February 5, 2020 Defendant Gavigan filed Articles of Incorporation for a company called Bull Point Plantation Owners Association, Inc. He subsequently conveyed to this new corporation some of the POA's common properties that he conveyed from Bull Point Plantation Property Owners Association, Inc. to Bull Point, LLC in October 2019. He contends that his new corporation is the rightful POA because it has the same name as the "Association" defined in the Declaration. This argument overlooks the undisputed facts surrounding the POA. The Articles of Incorporation for the original Bull Point Plantation Homeowners Association, Inc. were filed in September 1995, contemporaneously with the recordation of the Declaration. The name itself suggests that the corporation is a property owners' association, and the Articles of Incorporation specifically say so. In fact, they say that the corporation's purpose is to "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants,

Conditions and Restrictions (hereinafter referred to as the 'Declaration')." All of the duties and powers described in the Articles are those of a property owners' association. The Articles also provide that "Every person or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants of record to assessment by the Association, including contracts, shall be a member of the Association." This corporation has served as the Bull Point Plantation POA since its inception, including the two-plus years of Defendant Gavigan's tenure as its president. Mr. Gavigan himself executed numerous documents as president of Bull Point Plantation Property Owners' Association, Inc., including a recorded affidavit attesting to the authenticity of the company's Bylaws and including the deeds to the POA's common properties that he had the POA convey to Bull Point, LLC. While the name of the corporation is slightly different than the one specified in the Declaration, it is the only corporation that was created contemporaneously with the Declaration and it meets every substantive requirement of the Association described in the Declaration. The Declaration certainly does not provide for the POA to remain an unincorporated association for twenty-five years and then blossom into a corporation, as Defendant Gavigan contends. The Court readily concludes that Bull Point Plantation Property Owners Association, Inc. is and has been the Bull Point Plantation POA.

(See R. pp. 346-47 (emphasis added)). This order definitively decided that, contrary to Appellants' arguments, Respondent is the true Association under the Declaration.

For the foregoing reasons, based on Judge Mullen's prior orders in *Attridge*, the trial court correctly held that Respondent is the legitimate Bull Point Plantation property owners Association and that the actions of the Gavigan-appointed Board are invalid. Therefore, this Court should affirm the trial court's grant of summary judgment.

III. THE TRIAL COURT DID NOT FAIL TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO APPELLANTS.

Appellants' arguments in this appeal are all centered around their contention that the trial court did not properly consider certain evidence that they contend supported their positions at the trial court level. For the reasons that follow, all of Appellants' arguments in their Brief miss the mark.

A. The Trial Court Did Not Disregard Evidence That Respondent Association Was Not the Real Party in Interest (Appellants' Section I.A).

Appellants first argue that "the trial court should have ruled that a genuine issue of material fact existed as to the identity of the 'real party in interest'" because the "evidence in the record

indicated that the Respondent never had an ownership interest in property at issue." (*See* Appellants' Br., at 5). In particular, Appellants assert that trial court should have considered evidence as to "property purportedly transferred in a[n October 21,] 2011 Quit Claim Deed that Respondent [Association] was NOT a party to that deed," while the Grantor was "Bull Point, LLC" and the Grantee was "Bull Point Property Owners Association." (*See id.*). Appellants further state that "seventy-five (75%) percent of the property (nine parcels) at issue" in Respondent Association's Motion for Summary Judgment related to property allegedly transferred by the October 21, 2011 Quit Claim Deed.⁸

In support of their argument, Appellants cite the Affidavit of Gary Grant, which says that "[o]n October 21, 2011, Bull Point, LLC executed a Quit Claim Deed in favor of "Bull Point Property Owners Association." (*See* R. p. 72 ¶ 20 & p. 175). They contend that, because "Bull Point Property Owners Association" is not a registered entity with the South Carolina Secretary of State, Respondent Association was not a party to that quitclaim deed and lacks standing to assert claims. (*See* R. p. 70 ¶ 12; *see also* Appellant's Br., at 6). For the reasons that follow, assuming that the October 21, 2011 Quit Claim Deed is relevant to Respondent Association's Motion for Summary Judgment, Appellants' argument lacks merit.

Initially, Appellants' argument on this point, with no legal citation or analysis, is insufficient to preserve this issue for appellate review. Under South Carolina Rule of Appellate Procedure 208(b)(1)(E), the arguments in an appellate brief must include "discussion and citations of authority." "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Appellants' attempted

⁸ Respondent Association did not rely upon the October 21, 2011 Quit Claim Deed in its Motion for Summary Judgment or Complaint in this matter. While Appellants argue that the October 21, 2011 Quit Claim Deed affects 75% of the common property at issue in Respondent Association's Motion for Summary Judgment, they have not shown that to be the case.

argument on this issue is so "conclusory" that the Court should decide that they have abandoned the issue. *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 254 n.3, 734 S.E.2d 161, 165 n.3 (2012). Therefore, the Court should consider this argument abandoned.

Even if the Court does consider this argument, it does not support Appellants' position in this appeal. As noted above, the October 21, 2011 Quit Claim Deed that Appellants rely upon names the grantee as "Bull Point Property Owners Association[,] 114 Barnaby Bluff[,] Seabrook, SC 29940"). (*See R. p. 175*). As set forth above, the corporate history of Respondent Association was: Bull Point Homeowners Association, Inc. (1995) → Bull Point Property Owners Association, Inc. (2006) → Bull Point Plantation Property Owners Association, Inc. (2014-present). At the time of the Quit Claim Deed (with the transferee designated as "Bull Point Property Owners Association"), Respondent's legal name was "Bull Point Property Owners Association, Inc." (Emphasis added). Thus, Appellants' contention seems to be that the Quit Claim Deed did not convey any property rights to Respondent Association because it omitted the word "Inc." from the grantee's name.

Appellants have presented no evidence to refute that Appellant Bull Point, LLC's October 21, 2011 Quit Claim Deed intended to convey property to Respondent Association, not an unincorporated association bearing a similar name to Respondent Association. As discussed below — and as Judge Mullen conclusively determined in *Attridge* — Respondent is the rightful Bull Point Plantation property owners' Association.

This is an example of Appellants' hyper technical arguments, which fly in the face of common sense and the historical operation of Bull Point Plantation. Instead of presenting substantive evidence that they are entitled to the properties at issue, they quibble about minor differences in name, such as the exclusion of a single word. For decades, there was no dispute about these entities. Now, Appellants look to take advantage of minor scriveners errors and discrepancies to defeat the obvious intentions of the relevant parties. Although in a slightly different context, this Court has previously cautioned against such technical arguments placing form over substance:

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

See Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992) (internal citations omitted). Likewise, (as Judge Mullen correctly concluded in *Attridge*), there is no question that Respondent is the rightful owner of the common properties — as well as the legitimate Association.

Therefore, for the foregoing reasons, the Court should affirm the trial court's grant of Respondent's Motion for Summary Judgment.

B. The Trial Court Did Not Err in Concluding That Respondent Is the Proper Association Under the Declaration, Rather Than Any of the Appellants.

Appellants next argue that the trial court erred in not finding that there was "a 'scintilla' of evidence supporting the Appellants' argument that Respondent is not the owners' association as defined in the Declaration." (*See* Appellant's Br., at 6). Appellants contend that "that status is reserved for Bull Point Plantation Owners Association, Inc." (*See id.*). For the reasons that follow, Appellants' argument is misplaced.

1. The Trial Court Did Not Err in Concluding That Respondent Is the Proper Association Under the Declaration (Appellants' Section I.B.1).

Appellants initially contend that the trial court erred in concluding that Respondent Association was the proper Bull Point Plantation Association under the governing documents because:

[A]t no time during Bull Point Plantation's history has the Declaration referenced "Bull Point Plantation Property Owners Association, Inc." In short, the Covenants do not refer to Respondent, do not identify Respondent, and do not give any rights or powers to Respondent. Rather, the sole owner's association identified in the Declaration is the "Bull Point Plantation Owners Association, Inc."

(*See* Appellant's Br., at 8). For the reasons that follow, this argument is without merit and, as a result, this Court should affirm the trial court's grant of summary judgment.

Appellants' argument is wholly inconsistent with the Declaration of Bull Point Plantation. Under the governing document, "Bull Point, LLC" was the original Declarant of Bull Point Plantation and that Bull Point Plantation Owners Association, Inc. was the "Association." (*See R. pp. 217-18 ¶¶ 1.01(e) & (j)*). More specifically, the "Association" "shall mean and refer to Bull Point Plantation Owners Association, Inc. a South Carolina nonprofit corporation." (*See R. p. 217 ¶ 1.01(e) (emphasis added)*). That was the "Association" named in the first version of the Declaration dated September 22, 1995. (*See R. p. 77 ¶ 1.01(e)*). None of the Association's governing documents express that the Association should be started as an informal, unincorporated association. In fact, the governing documents say only that the Association shall be a nonprofit corporation. By whatever name, the Declaration makes clear that the Association was expressly intended to be a *nonprofit corporation*. The evidence supports that Respondent is the nonprofit corporation referenced as the Association in the Declaration.

Respondent Association was first incorporated under the name "Bull Point Homeowners Association, Inc." on or about September 26, 1995. (*See R. pp. 277-81*). This was only days after the original "Declaration of Covenants, Conditions and Restrictions for Bull Point Plantation on September 22, 1995, which was recorded in Book of Deeds 805 at Page 218 on September 26, 1996." (*See R. p. 214*). At that time, there was no existing entity bearing the name "Bull Point Property Owners Association, Inc." Appellants cannot refute that Respondent acted as the Association for Bull Point Plantation beginning on that date (though its name has changed over the years). Respondent's original Articles of Incorporation make clear that Respondent's purpose, from the very beginning, has been to "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration." (*See R. pp. 279 ¶ 3*).

By Articles of Amendment filed on or about August 14, 2006, Respondent Association changed its "name from Bull Point Homeowners Association, Inc to Bull Point Property Owners Association, Inc with an address change to 97 Bull Point Drive, Seabrook, South Carolina 29940." (*See R. pp. 283-84*). This is the even closer to the name used in the Declaration as the proper name

of the Association. Appellants present no evidence of any objection to Respondent's use of this name. Finally, on November 1, 2014, an amendment to Respondent Association's articles was adopted to the effect "[t]hat the name of the corporation be changed from Bull Point Property Owners Association, Inc. to: Bull Point *Plantation* Property Owners Association, Inc." (See R. pp. 291-92). Appellants have presented no evidence to dispute that, at every stage, Respondent (though its name has changed over the years) has been the Association under the Declaration. In fact (at least until last year), Respondent is the only nonprofit corporation that has purported to act as the Bull Point Plantation property owners Association under the Declaration. Appellants have presented no evidence that — at least until 2020 — any nonprofit corporation ever challenged Respondent's status as the rightful Association.

On the other hand, at the time the Declaration was executed, Appellant "Bull Point Plantation Owners Association Inc." did not exist. In fact, no nonprofit corporation existed on that date called "Bull Point Plantation Owners Association Inc." To the contrary, Defendant Mr. Gavigan did not form the nonprofit corporation "Bull Point Plantation Owners Association Inc." until February 5, 2020. (See R. pp. 407-10). Importantly, this occurred several months *after* Judge Mullen's November 18, 2019 Order in *Attridge* — after Mr. Gavigan was aware that Judge Mullen did not consider his claimed association to be the legitimate Association. (See R. pp. 438-58). Appellant Mr. Gavigan was listed as the *only* registered agent, incorporator and director of Appellant "Bull Point Plantation Owners Association Inc." — which he incorporated in the *former* name of Respondent Association. (See R. pp. 407-10). This was almost 25 years after the original Declaration was filed.

Appellants' contention is that when the Declaration defined the Association as "Bull Point Plantation Owners Association, Inc. a *South Carolina nonprofit corporation*," it actually meant "Bull Point Plantation Owners Association, which is presently an unincorporated association and in 25 years will become a South Carolina nonprofit corporation." Such a construction is nonsensical. The more correct reading of the governing Declaration is that Respondent is the Association. Although it did not have the precise corporate name referenced in the Declaration, it

was a nonprofit corporation with a nearly identical name that acted for decades as the rightful property owners Association of Bull Point Plantation.

As discussed above, prior to the orders on appeal here Judge Mullen ruled on this precise issue in the *Attridge* Case. In that case, she explicitly rejected the same argument Appellants make now:

This argument overlooks the undisputed facts surrounding the POA. The Articles of Incorporation for the original Bull Point Plantation Homeowners Association, Inc. were filed in September 1995, contemporaneously with the recordation of the Declaration. The name itself suggests that the corporation is a property owners' association, and the Articles of Incorporation specifically say so. In fact, they say that the corporation's purpose is to "exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions (hereinafter referred to as the 'Declaration')." All of the duties and powers described in the Articles are those of a property owners' association. The Articles also provide that "Every person or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants of record to assessment by the Association, including contracts, shall be a member of the Association." This corporation has served as the Bull Point Plantation POA since its inception, including the two-plus years of Defendant Gavigan's tenure as its president. Mr. Gavigan himself executed numerous documents as president of Bull Point Plantation Property Owners' Association, Inc., including a recorded affidavit attesting to the authenticity of the company's Bylaws and including the deeds to the POA's common properties that he had the POA convey to Bull Point, LLC. *While the name of the corporation is slightly different than the one specified in the Declaration, it is the only corporation that was created contemporaneously with the Declaration and it meets every substantive requirement of the Association described in the Declaration. The Declaration certainly does not provide for the POA to remain an unincorporated association for twenty-five years and then blossom into a corporation, as Defendant Gavigan contends.*

(See R. pp. 346-47 (emphasis added)). Irrespective of the preclusive effect of Judge Mullen's ruling, Appellants have presented no evidence to call for a different result.

For the foregoing reasons, the Court should affirm the trial court's grant of summary judgment in this matter.

2. **Respondent Does Not Lack Standing to Challenge the Status of the Association Under the Declaration (Appellants' Section I.B.2).**

Appellants further argue that "[t]he trial court failed to address properly the question that Respondent lacks standing to make this challenge as it is untimely, and lacked the requisite property interest to challenge the covenants." (*See* Appellant's Br., at 9). This two-fold argument must fail for the reasons discussed below.

a. **Appellants' Argument That Respondent Was Not Permitted to Bring This Action Because It Did Not Own Property Under the Declaration in 1995, 1996 or 2000 Is Meritless.**

Appellants first assert — without citation to any authority — that "[t]o challenge the covenants, a party would need to be an owner at the time the covenant or amendment was adopted." (*See* Appellants' Br., at 9). They posit that Respondent Association did not own any property in Bull Point Plantation (1) in 1995 when the original Declaration was recorded, (2) in 1996 when the Third Amendment was recorded, or (3) in 2000 when the Ninth Amendment was recorded. (*See id.*). Therefore, they conclude that Respondent Association "cannot now challenge the validity of the covenants as it voluntarily contracted to accept the Declaration, as amended, at the time it acquired a property interest." (*See id.*).

Initially, as discussed *supra*, Appellants' passing discussion of this argument, with no legal citation or analysis, is insufficient to preserve it for appellate review. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Appellants have not made a sufficient argument and have, therefore, abandoned this argument.

Moreover, even if the Court considers this argument, it is plainly without merit. Contrary to Appellants' assertions, Respondent Association is not challenging the validity of the Declaration as a whole or any particular provision thereof. To the contrary, Respondent Association's position

is that it is the rightful Bull Point Plantation owners Association under the Declaration. Appellants cite no legal authority supporting their contention that — assuming Respondent Association did not own property prior to 2000 — this would somehow prohibit the instant action to enforce its rights under the Declaration. Far from being a challenge to the validity of the Declaration, Respondent's lawsuit has arisen out of Appellants' *recent* actions in derogation of the Declaration, usurping Respondent Association's proper authority. Appellants have cited no legal authority supporting this argument.

As a result of the foregoing, the Court should affirm the trial judge's grant to summary judgment to Respondent.

b. **Appellants' Argument That Respondent's Claims Are Time-Barred Is Meritless.**

Appellants next argue that Respondent Association's "claims are banned by the statute of limitations, as the three-year limitation applies." (*See* Appellants' Br., at 9). Appellants argue that Respondent Association "first acquired a property interest in Bull Point Plantation in 2007" and that "by its acceptance of title to its property interest, it ratified the Declaration as amended." (*See id.*, at 9-10). For the reasons that follow, this argument does not support Appellants' position in this appeal.

First, Respondent submits that Appellants have not properly preserved this issue and have waived it. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Additionally, even if the Court considers Appellants' argument on the merits, it must fail. Appellants' position relies on South Carolina Code § 15-3-530(1), under which a three-year statute of limitation governs "action[s] upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." Appellants strained contention is

that Respondent Association's claims are time barred because one of the Appellants first got an interest in Bull Point Plantation in 2007, more than three years ago. They claim that Respondent Association cannot now challenge Appellants' status as Bull Point Plantation's "true" property owners association and rightful owner of the common property. However, they do not cite any evidence supporting this contention and do not make a detailed argument.

This lawsuit is not a challenge to something that occurred fourteen years ago. To the contrary, Respondent Association has been acting as Bull Point Plantation's correct property owners Association for years. It was only recently that Mr. Gavigan (through his various companies) has intervened and tried to usurp Respondent's rightful position as the Association and ownership interest in real property. The Quitclaim Deeds that are the basis for this lawsuit were executed in 2019 and 2020, well within the claimed three-year statutory period.

Therefore, this Court should affirm the grant of summary judgment to Respondent Association.

3. **The Court Did Not Improperly Disregard Evidence of the Existence of Appellant "Bull Point Plantation Owners Association, Inc." (Appellants' Section I.B.3).**

Appellants next argue that the trial judge erred in that it did not give sufficient attention to evidence that Appellant Bull Point Plantation Owners Association, Inc. was the proper Association under the Declaration, not Respondent Bull Point Plantation *Property* Owners Association, Inc. (*See* Appellants' Br., at 10-11). Appellants state: "Respondent argues that the Bull Point Plantation Owners Association, Inc. is a new entity, incorporated in 2020, and not previously involved in the history of Bull Point Plantation. In adopting that view, the trial court erred by failing to give proper weight to evidence in the record that refutes Respondent's argument." (*See id.*). Appellants take the curious position that Appellant Bull Point Plantation Owners Association, Inc. — though only incorporated in 2020 — has actually been in existence since 1995; specifically, they contend that it was originally an "unincorporated nonprofit association" that changed "to a South Carolina

nonprofit corporation with the filing of the Articles of Incorporation on February 5, 2020." (*See id.*).

Appellants' argument is wholly inconsistent with the Declaration of Bull Point Plantation. Under the governing document, "Bull Point, LLC" was the original Declarant of Bull Point Plantation and that Bull Point Plantation Owners Association, Inc. was the "Association." (*See R.* pp. 217-18 ¶¶ 1.01(e) & (j)). More specifically, the "Association" "shall mean and refer to Bull Point Plantation Owners Association, Inc. a South Carolina nonprofit corporation." (*See R.* p. 217 ¶ 1.01(e) (emphasis added)). That was the "Association" named in the first version of the Declaration dated September 22, 1995. (*See R.* p. 77 ¶ 1.01(e)). None of the Association's governing documents express that the Association should be started as an informal, unincorporated association. To the contrary, under whatever name, the Declaration explicitly required that the Association be a nonprofit corporation.

Appellants' only evidence of the claimed "unincorporated association" is the Affidavit of Gary Grant (the claimed President of Mr. Gavigan's imposter Association). There is no evidence supporting that Mr. Grant had any first-hand knowledge about this claimed "unincorporated association" or any involvement with it. Mr. Grant states that "[f]rom as early as 1997, certain owners within Bull Point Plantation carried on certain activity associated with Bull Point Plantation or thought of themselves as a member of an unincorporated association with the name 'Bull Point Property Owners Association.'" (*See R.* p. 70 ¶ 11). Appellants also cite to a BB&T Signature Card (South Carolina), which names the depositor as "Bull Point Property Owners Association" and the account type as "unincorporated association." (*See R.* pp. 150-51). However, they present no evidence to support that the Association was run as an "unincorporated association" for decades in violation of the express language of the Declaration, which said that the Association was a nonprofit corporation.

Finally, as discussed above, in the *Attridge* Case, Judge Mullen conclusively decided that Respondent Association *is*, in fact, Bull Point Plantation's rightful and legitimate property owners Association of Bull Point Plantation: "The Court also finds unavailing Defendant Gavigan's

argument that Bull Point Plantation Property Owners Association, Inc. was never the real Bull Point POA. . . . While the name of the corporation is slightly different than the one specified in the Declaration, it is the only corporation that was created contemporaneously with the Declaration and it meets every substantive requirement of the Association described in the Declaration. The Declaration certainly does not provide for the POA to remain an unincorporated association for twenty-five years and then blossom into a corporation, as Defendant Gavigan contends." (*See* R. pp. 346-47 (emphasis added)). Judge Mullen "readily conclude[d] that [Respondent] Bull Point Plantation Property Owners Association, Inc. is and has been the Bull Point Plantation POA." (*See id.*). Appellants have supplied no factual or legal basis for the Court to disregard Judge Mullen's well-reasoned decision in *Attridge*.

Therefore, the Court should affirm the grant of summary judgment to Respondent in this matter.

C. The Trial Court Properly Held That No Genuine Issue of Material Fact Existed as to Respondent's "Conflict of Interest" Argument (Section I.C).

Appellants next contend that the trial court erred when it ruled that the transactions at issue — *i.e.*, Appellants' wrongful transfer of Bull Point Plantation's common property away from its rightful owner in 2019 and 2020 — "were 'voidable' because they were purportedly infected with a conflict of interest." (*See* Appellants' Br., at 11). They further argue that they "presented evidence to the [trial] Court that any suggestion of a 'Conflict of Interest' transaction must be rejected because of (1) the nature of the transaction was the result of counsel from Attorney Eversole and (2) the nature of the transaction was fully disclosed to the Board." (*See id.*, at 12). For the reasons that follow, Appellants' argument is misplaced.

Assuming *arguendo* that Mr. Gavigan had authority to sign deeds on behalf of the Association (which he did not), using that authority to convey the Association's common properties to his own corporations was a clear conflict of interest. The Association is a South Carolina nonprofit corporation, which is governed by the South Carolina Nonprofit Corporation Act, S.C. Code §¶ 33-31-101, *et seq.* ("Act"). (*See* R. p. 240 ¶ 8.02 ("The duties and powers of the

Association shall be those set forth in the provisions of the South Carolina Code relating to non-profit corporations"). South Carolina Code § 33-31-831(a) of the Act governs the issue of nonprofit corporation director conflicts of interest, stating that "[a] conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into or is approved as provided in subsections (b) or (c)."

Therefore, a conflict of interest transaction *is* voidable (and the basis for imposing liability on a director) if it was *unfair* to the corporation at the time and *was not* approved as under subsections (b) or (c). Under South Carolina Code § 33-31-831(c):⁹

A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:

- (1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or
- (2) the material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

The subject transfers were not approved under this subsection (c).

The October 4, 2019 Quitclaim Deeds transferring the Association's common area properties from the Association to Appellant Bull Point, LLC plainly involved an unfair conflict of interest transaction. Mr. Gavigan signed those deeds as President of the Association. (*See* R. pp. 384-96). However, Mr. Gavigan has also asserted under oath that he is "the owner, either directly or through other entities" of Bull Point, LLC. (*See* R. p. 427 ¶ 2(b)). Consequently, Mr. Gavigan had a direct or indirect interest in the transaction reflected in the October 4, 2019 Quitclaim Deeds, beyond his claimed role as President of the Association (a role that he did not

⁹ South Carolina Code § 33-31-831(b) does not apply to the Association (a mutual benefit corporation), because it is not a public benefit or religious corporation.

legitimately have). The October 4, 2019 Quitclaim Deeds were patently unfair to Respondent Association because they transferred valuable common property away from it and to another entity. It should be obvious that conveying the Association's invaluable common properties to Mr. Gavigan was unfair to Respondent Association. In fact, this would pose an existential threat to Respondent Association, since this common property is its life blood.

Accordingly, the October 4, 2019 Quitclaim Deeds are voidable unless they were approved under §33-31-831(c). They were not. Mr. Gavigan misrepresented his intentions in making the conveyance, claiming that he was just trying to correct title defects and would convey the properties back to Respondent Association. The rightful Board members of Respondent Association never gave approval — informed or otherwise — for Mr. Gavigan's self-dealing. Even if Gavigan's appointed Board — which, in reality and as Judge Mullen concluded, was not Respondent's rightful Board of Directors — was the proper Board to approve the transaction, they were materially misled as to the nature of the transaction memorialized in the October 4, 2019 Quitclaim Deeds.

Mr. Gavigan repeatedly took the public position that the 2019 Quit Claim Deeds transferring of Bull Point Plantation's common areas to Bull Point, LLC were necessary to correct errors in the original deeds by which Bull Point, LLC originally transferred the common areas to the Association. For example, Mr. Gavigan represented to Judge Mullen that: "On the advice of attorney Alysoun M. Eversole, Esq., these quitclaim deeds were made to enable Bull Point, LLC to convey the properties lawfully to Bull Point Plantation Property Owners Association, Inc." (*See* R. p. 400 n.2). Mr. Gavigan's counsel referenced an email from Attorney Eversole to Mr. Gavigan sent September 25, 2019, in which Attorney Eversole wrote:

In short, what we are doing is having the current owners (BPPOA and BPPOA, Inc. and OSP, Inc.) quit claim their interests back to Bull Point, LLC using the legal descriptions provided in the current recorded deeds. Many of the descriptions in those deeds are vague and incorrect. Once the Quit Claim Deeds are recorded, deeds will be done for Bull Point, LLC to convey each parcel to the BPPPOA, Inc. using correct and proper legal descriptions. It is a fairly simple process, but requires a lot of organization and details to attend to.

(See R. p. 405). Thus, Mr. Gavigan's stated position was that the purpose of the 2019 Quit Claim Deeds was to correct errors in the descriptions and re-convey the common area properties back to Respondent Bull Point Plantation Property Owners Association, Inc. ("BPPPOA, Inc." in Ms. Eversole's email).

Appellants contend that on October 3, 2019, Appellants Gavigan, Quick, and Riney, acting as purported Directors of the Association, approved the transactions pursuant to an Action by Unanimous Written Consent. However, that consent does not satisfy §33-31-810(c), as the trial court noted:

According to the document Defendants submitted, the reason given for the transfer was that there was a scrivener's error in the Association's name in two of the deeds by which the Association had received some of the properties. So the purported directors agreed to transfer those properties back to Bull Point, LLC to correct the title defect. The document does not mention Bull Point, LLC or Bull Point Plantation Owners Association, Inc. keeping title to those properties. Further, Mr. Gavigan, through his attorneys, represented to the Court and others that the properties would be transferred back to Bull Point Plantation Property Owners Association, Inc. Accordingly, this Court finds that the Association's putative Board of Directors did not knowingly approve the October 4, 2019 Deeds.

(See R. p. 6). There is no evidence of strict compliance with the statute to ensure that these conflict-of-interest transactions were fairly approved.

Under these circumstances, it is plain that the 2019 Quit Claim Deeds at issue — and Appellants' disregard of the rightful Association (Respondent) involved inherently unfair conflict of interest transactions that prejudiced Respondent Association — and all of its individual component property owning members. Appellant Mr. Gavigan, with the involvement and participation of other Appellants, engaged in these transactions to enrich his own corporate entities at Respondent's expense.

As a result of the foregoing, the trial court correctly held that Mr. Gavigan and his related entities engaged in impermissible conflict of interest transactions. Therefore, the Court should affirm the trial court's grant of summary judgment.

VI. EVEN IF JUDGE MULLEN'S RULING IN *ATTRIDGE* DO NOT COMPEL THE CONCLUSION THAT THE 2019 QUIT CLAIM DEEDS ARE INVALID, THE SUBJECT PROPERTIES SHOULD BE RETURNED TO RESPONDENT.

If the Court disagrees that the October 4, 2019 (and March 6, 2020) Quit Claim Deeds are void and should be set aside, the trial court should have required Bull Point, LLC and Bull Point Plantation Owners Association, Inc. to reconvey those properties back to Respondent Association free of any liens or other encumbrances. Respondent Association is supposed to own the common properties in Bull Point Plantation, not Bull Point, LLC or Bull Point Property Owners Association, Inc. Appellants argue that Appellant Bull Point Plantation Owners Association, Inc. is the true property owners' Association. However, Judge Mullen rejected that argument on December 4, 2020 in the *Attridge* Litigation.

The Declaration provides that “ownership of each Lot and Dwelling shall include and there shall pass with Lot and Dwelling as an appurtenance thereto, whether or not separately described, all of the right and interest in and to the Common Areas as established hereunder, which shall include, but not be limited to, membership in the Association.” (*See* R. p. 224 ¶ 3.01). The Declaration also provides that “every Owner, his family, tenants, and guests shall have a non-exclusive right, privilege, and easement of use and enjoyment in and to the Common Areas transferred to the Association” (*See* R. pp. 224-25 ¶ 3.02). Since every Bull Point Plantation property owner is a member of the Association — and not Bull Point, LLC or Bull Point Plantation Owners Association, Inc. — it is necessary that Respondent Association own the common areas to effectuate the requirements of Section 3.01 and 3.02 of the Declaration. If other entities own those common areas, Bull Point Plantation owners could be prevented from using and enjoying the same. The proper owner of the common properties is clearly Respondent Association.

In fact, when initially confronted about the October 4, 2019 Quit Claim Deeds, Mr. Gavigan (through counsel) represented to Judge Mullen that those deeds were necessary to correct title issues and that Mr. Gavigan (through his company) would be transferring them back to Respondent “Bull Point Plantation Property Owners Association, Inc.” (*See* R. pp. 398-403). Attorney Alysoun Eversole represented the same thing in an email to Mr. Gavigan. (*See* R. p.

405). Mr. Gavigan has now taken a different position, saying under oath that he never represented that he would transfer the properties back to “Bull Point Plantation Property Owners Association, Inc.” but rather that he always intended to transfer them to his new company Bull Point Plantation Owners Association, Inc. (*See* R. p. 434 ¶ 31).

Mr. Gavigan’s transfer of the common properties from Respondent Association to Bull Point, LLC was a prohibited distribution under the Nonprofit Corporation Act. South Carolina Code § 33-31-1301 provides that, “[e]xcept as authorized by Section 33-31-1302, a corporation may not make any distributions.” Section 33-31-1302 lists authorized distributions, none of which apply here. The Act defines “distribution” as a “direct or indirect transfer of assets . . . of a corporation to its members, directors, or officers.” The October, 2019 Quit Claim Deeds were distributions because they resulted in an indirect transfer of the Association’s assets to Mr. Gavigan, who claimed to be a director and/or officer. Accordingly, Mr. Gavigan should have to remedy the prohibited distributions by having his entities deed the common properties back to Respondent Association, free of all liens and judgments that may have since attached.

CONCLUSION

For the foregoing reasons, Respondent Bull Point Plantation Property Owners Association, Inc. respectfully asks that this Court affirm the trial court's entry of partial summary judgment in its favor.

August 31, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2021-000471

Bull Point Plantation Property Owners Association, Inc.....Respondent

v.

Bull Point SC, LLC, Bull Point, LLC, Bull Point Plantation
Owners Association, Inc., William E. Gavigan, Michael Carey,
Christopher J. Quick, James Riordan, Richard Riney Appellants

RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Final Reply Brief complies with Rule
211(b), SCACR.

August 31, 2022

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