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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2022-001557
Common Pleas Case No. 2016-CP-42-01854

Chandelle Property Owners Association ....Respondent,

v.

James Douglas Armstrong, Jane Armstrong, Kenneth L. Galloway, Molly C. Galloway, Warren Johnson, Rhonda Johnson, John K. Payne, Ruth G. Payne, and Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust, dated October 26, 2006, and also all other persons unknown, claiming any right, title, estate, interest in or lien upon the real estate described in the complaint herein, Defendants,

and

James Douglas Armstrong, Jane Armstrong, Warren Johnson, Rhonda Johnson, John K. Payne, Ruth G. Payne, and Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust dated October 25, 2006, Third-Party Plaintiffs,

v.

Billy J. Israel, Bruce R. Goldberg, Cindy R. Goldberg, and George Lynn Fleming in their personal and official capacities, Third-Party Defendants,

and

Kenneth L. Galloway and Molly C. Galloway, Third-Party Plaintiffs,

v.

Billy J. Israel, Bruce R. Goldberg, Cindy R. Goldberg, and George Lynn Fleming, in their personal and official capacities, Third-Party Defendants,

Of whom James Douglas Armstrong, Jane Armstrong, Warren Johnson,

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Rhonda Johnson, John K. Payne, Ruth G. Payne, and Jane Van Wieren
as Trustee of the Greer R.G. Irrevocable Property Trust dated
October 25, 2006, are the .... Appellants.

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STATEMENT OF THE CASE

Chandelle subdivision is a residential aviation community located in Spartanburg County. Chandelle subdivision generally consists of residential lots surrounding a centrally located aircraft runway. Respondent, Chandelle Property Owners Association, is the property owners association for Chandelle subdivision. Appellants are the owners the properties generally known as Lots 1, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 55, 56, and 57 within Chandelle subdivision (hereinafter, the "Subject Lots").[1]

Plaintiff instituted this action by filing its initial Summons and Complaint on May 16, 2016 (Initial Summons and Complaint, all pages). In a nutshell, and in a general sense, this action has involved issues pertaining to the development of Chandelle subdivision and pertaining to the aircraft runway located therein, including without limitation, which properties are subject to the restrictive covenants for Chandelle subdivision, membership in Respondent, and ownership, maintenance, control, and use of the aircraft runway. On June 2, 2016, Respondent filed an Amended Summons and Complaint. (Amended Summons and Complaint, all pages).[2] By Order filed on October 14, 2016, this action was designated as complex and assigned to the Honorable R. Keith Kelly. (Complex Case Order filed 10/14/16, all pages). By subsequent Order filed on April 5, 2017, this action was again designated as complex and was also consolidated with several other associated cases, with the consolidated cases being assigned to the Honorable R. Keith Kelly. (Order as to Complex Case Designation and Consolidation filed 4/5/17, all pages). Respondent filed its Second Amended Summons and Complaint on July 19,

[1] (See Order granting partial summary judgment filed 10/29/22, pp. 6-16)

[2] Those Appellants that had been served with the Amended Complaint filed motions to dismiss in response.

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2017.[3] (Second amended summons and complaint, all pages). Thereafter, Appellants filed answers, which included various counterclaims and third-party claims. (Answer of Johnsons, Armstrongs, and Paynes filed 8/15/17, all pages; Answer of Van Wieren filed 11/15/17, all pages). Respondent filed replies to such counterclaims on August 30, 2017 and on December 8, 2017. (Reply to counterclaims filed 8/30/17, all pages; Reply to counterclaims filed 12/8/17, all pages).

On April 23, 2018, two former defendants in this action, CSC Developers, LLC and Chandelle Runway, LLC, filed for bankruptcy protection, and copies of the notices of bankruptcy were filed with the Circuit Court on September 27, 2018 and October 4, 2018. (notices of bankruptcy filed with circuit court on 9/27/18 and 10/4/18, all pages). As a result of the automatic stay arising from the bankruptcy filings, the trial court issued an Order staying this matter during the pendency of the bankruptcy actions, which Order was filed on September 13, 2019. (Order filed 9/13/19, all pages). On May 21, 2020, the United States Bankruptcy Court issued Orders lifting the automatic stay, and a copy of these Orders was filed with the Circuit Court on July 15, 2020. (Notice of bankruptcy Order filed July 15, 2020, all pages).

On November 3, 2020, Respondent filed its Third Amended Summons and Complaint, which remains the current and operative Complaint. (Third Amended Summons and Complaint, all pages). Of relevance to this appeal, Respondent's Third Amended Complaint asserts several causes of action against Appellants seeking a determination and ruling that Appellants and their properties (including the Subject Lots) are subject to the restrictive covenants for the Chandelle subdivision and thus that Appellants are also correspondingly mandatory members of

[3] While Appellants assert in their Statement of the Case that they had been previously dismissed from this action by an order filed on April 24, 2017, Respondent disagrees. Orders filed on March 22, 2017, and April 24, 2017 reflect that the parties stipulated that no unauthorized practice of law claim was being asserted against any of the Appellants; however, by order filed on March 30, 2017, the Appellants' motions to dismiss were otherwise denied.

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Respondent, which causes of action are as follows: (1) Declaratory Judgment; (2) Quiet Title; and (3) Reciprocal Negative Easements. (Third Amended Complaint; pp. 16-23). Further, of relevance to this appeal, Respondent's Third Amended Complaint also asserts a cause of action against Appellants to collect assessments and other charges that Respondent asserts are owed to it under the restrictive covenants and other governing documents for Chandelle subdivision, said cause of action being entitled "Breach of Governing Documents/Collection of Assessments and Other Allowable Charges." (Third Amended Complaint, pp. 23-25).

On November 24, 2020, Appellants filed their Answer to Respondent's Third Amended Complaint, which also asserted various counterclaims against Respondent and third-party claims against certain current/former directors of Respondent. (Appellants' Answer to Third Amended Complaint, all pages). In their Answer, Appellants seemed to generally deny, or at least not outrightly admit, that they and their properties are subject to and bound by the restrictive covenants for Chandelle subdivision. (Appellants' Answer to Third Amended Complaint, pp. 4-5). Further, in their Answer to the Third Amended Complaint, Appellants denied owing Respondent assessments and other charges under the restrictive covenants and other governing documents for Chandelle subdivision. (Appellants' Answer to Third Amended Complaint, p. 5). As it relates to the issues involved in this appeal, the counterclaims and third-party claims of Appellants allege various improprieties regarding the levying and use of assessments and other charges under the restrictive covenants for Chandelle subdivision and Respondent's bylaws, which will be addressed in more detail *infra*. (Appellants' Answer to Third Amended Complaint, pp. 10-17). Respondent filed its reply to such counterclaims on December 7, 2020. (Reply to Counterclaims filed 12/7/20, all pages).

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On July 26, 2022, Respondent and Third-Party Plaintiffs filed a partial motion to dismiss or alternatively for partial summary judgment as to Appellants' counterclaims and third-party claims. (motion to dismiss/summary judgment as to counterclaims and third-party claims, all pages). Thereafter, on August 19, 2022, Respondent filed a motion for partial summary judgment as to some of its claims against Appellants. (Respondent's motion for partial summary judgment, all pages). Specifically, Respondent's motion for partial summary judgment filed on August 19, 2022, sought an order granting summary judgment (1) that the Subject Lots are subject to and bound by the restrictive covenants for Chandelle subdivision; (2) that Appellants are members of Respondent; (3) for a monetary award of assessments and associated late charges and interest; and (4) for an award of attorney's fees and costs. (Respondent's motion for partial summary judgment, all pages).

Prior to the hearing on the two aforesaid motions, both Appellants and Respondents submitted legal memoranda and supporting documentation to the trial court. Specifically, Respondent and Third-Party Defendants filed a memorandum in support of their partial motion to dismiss or alternatively for partial summary judgement as to Appellants' counterclaims and third-party claims. (Respondent's and 3rd Party Defs.' Memo in support of motion to dismiss, all pages). Respondent also filed a memorandum in support of its motion for partial summary judgment against Appellants. (Respondent's memo in support of motion for partial summary judgment and exhibits, all pages). Appellants filed a memorandum in opposition Respondent's motion for partial summary judgment, and Appellants also filed a separate memorandum in opposition to the Respondent's and Third-Party Defendants' partial motion to dismiss or alternatively for partial summary judgment as to Appellants' counterclaims and third-party claims. (Both of Appellants' memoranda in opposition, all pages).

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On September 13, 2022,[4] a hearing took place before the Honorable R. Keith Kelly on the two aforesaid motions. (Transcript of hearing, all pages). By Order filed on October 19, 2022, the trial court denied Respondent's and Third-Party Plaintiffs' motion to dismiss or alternatively for partial summary judgment as to Appellants' counterclaims and third-party claims. (Order on Respondent's and Third-Party Defendants' motion to dismiss/summary judgment, all pages).

On October 25, 2022, Appellants, by and through their counsel, emailed the trial court a "Memorandum in Opposition to Plaintiff's Proposed Order Granting Partial Summary Judgment", raising objections to the proposed order that had been circulated by Respondent's counsel. (10/25/22 email from Wendell Hawkins to Judge Kelly's law clerk; and attached memo in opposition, all pages). On October 26, 2022, Respondent, via its counsel, emailed the court responding to the objections or concerns raised in Appellants' memorandum. (10/26/22 email from Ely Grote to Judge Kelly's law clerk).

On October 29, 2022, the trial court filed its order granting, in part, Respondent's motion for partial summary judgment as to its claims against Appellants. (Order granting Plaintiff's motion for partial summary judgment filed 10/29/22, all pages). Specifically, the trial court's order held that the Subject Lots were bound by the restrictive covenants for Chandelle subdivision during the entirety of Appellants' ownership of the same on several different grounds: (1) through being expressly bound; (2) by plain and unmistakable implication/reciprocal negative easements; and (3) through the exercise of the court's inherent equitable powers. (Id. at pp. 16-22, 25). Further, the trial court held that Appellants, by virtue of their ownership of property subject to the restrictive covenants for Chandelle subdivision, were

[4] The hearing transcript incorrectly lists the date of the hearing as September 12, 2022.

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mandatory members of Respondent. (Id. at pp. 22, 25). Further, the trial court's order found that because the Subject Lots are subject to the restrictive covenants for Chandelle subdivision, the Appellants and the Subject Lots are subject to assessments under the restrictive covenants for Chandelle Subdivision and Respondent's bylaws. (Id. at p. 23). The trial court's order found that there was no genuine issue of material fact as to the amount of the assessments owed by Appellants, but found there to be a genuine issue of material fact as to the amount of interest and/or late fees that may be owed by Appellants. (Id. at pp. 23-24). Therefore, the trial court's order granted summary judgment to Respondent for the amount of the assessments only, exclusive of any late charges and/or interest. (Id. at pp. 23-24). Specifically, the trial court's order granted judgment to Respondent and against Appellants in the following amounts:

- John K. Payne and Ruth G. Payne – $22,000.00
- Warren Johnson and Rhonda Johnson – $24,000.00
- Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust, dated October 25, 2006 – $55,250.00
- James Douglas Armstrong and Jane Armstrong – $44,000.00

(Id. at pp. 23-25). However, the trial court held that Respondent's request for an award of attorney's fees should be held in abeyance for a determination at a later date. (Id. at p. 24). On October 31, 2022, a Form 4 Order was filed with respect to the aforesaid order granting partial summary judgment to Respondent. (Form 4 Order filed 10/31/22, all pages). Appellants did not thereafter file any Rule 59(e), SCRCP, motion(s). Appellants served/filed their Notice of Appeal on November 1, 2022, appealing the trial court's order granting partial summary judgment to Respondent. (Notice of appeal filed 11/1/22, all pages).

STATEMENT OF FACTS

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At the outset, Respondent would generally raise concerns with Appellants, throughout their brief, failing to include references to the record on appeal to support various alleged "facts." See Rule 209(b)(4), SCACR. Likewise, "factual statements" of counsel are not evidence. See, e.g., Owens v. Stirling, 438 S.C. 352, 359 882 S.E.2d 858, 862 (2023), reh'g denied (Feb. 9, 2023) (the arguments of counsel are not evidence and an appellate court cannot rely on arguments of counsel to fill in the record); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) ("factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.").

Additionally, Respondent would note that its memorandum in support of its motion for partial summary judgment against Appellants that was submitted to the trial court,[5] which is part of the record on appeal, contains a detailed recitation of facts relevant to its motion and to the trial court's order, and also includes extensive exhibits[6] containing evidence supporting those facts. To avoid unnecessary duplication and repetition, Respondent would crave reference to its memorandum and supporting documents included therewith for a detailed recitation of relevant background information and facts. (Respondent's memo in support of MSJ against Appellants and all supporting exhibits, all pages). Likewise, the trial court's order includes detailed factual findings, and Respondent craves reference to those factual findings as well. (Order, all pages). However, a few of the relevant background facts are summarized below.

CSC Developers, LLC was the primary developer of Chandelle subdivision.[7] In connection with the development of Chandelle subdivision, CSC Developers, LLC recorded a

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[5] (Respondent's memo in support of MSJ against Appellants, all pages).
[6] (Exhibits to Respondent's memo in support of MSJ against Appellants, all pages).
[7] (Respondent's memo p.2; Stewart Depo Vol. 1 (Exhibit 1 to Respondent's memo), p. 42, lns. 1-2; Order, p.2).

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Declaration of Covenants, Conditions and Restrictions for Chandelle Subdivision on December on 16, 1997, in the Office of the Register of Deeds for Spartanburg County in Deed Book 67-A at Page 0583 (the "Original Declaration").[8] The Original Declaration, as amended and supplemented, shall hereinafter be referred to as the "Declaration".[9] After the Original Declaration was recorded, Chandelle subdivision (including the Subject Lots) was developed pursuant to common scheme of development and restrictions under the Declaration, and Appellants engaged in various conduct in conformity them/the Subject Lots being part of Chandelle subdivision and subject to the Declaration, as more fully set forth in Respondent's memorandum in support of its motion for summary judgment and the trial court's order.[10]

However, after various questions or disputes arose surrounding the development of Chandelle subdivision, this action was brought, at least in part, to remove any uncertainty as to which properties were subject to and bound by the Declaration. Likewise, as part of this action, Respondent has sought to collect from Appellants unpaid assessments and other charges authorized by the Declaration and Respondent's bylaws. (Third Amended Complaint, pp. 23-25). With respect to the assessments and other charges asserted as owed by Appellants, in support of its motion for partial summary judgment, Respondents submitted an affidavit of Respondent's President, Billy J. Israel, Jr.,[11] to the trial court which detailed the amounts owed by Appellants to Respondent for assessments, late charges, and interest. (Affidavit of Billy Israel, pp.1-6; Exhibit E to the Affidavit of Billy Israel, all pages). Per his affidavit, at the time

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[8] (Original Declaration (included in Exhibit A to Affidavit of Billy Israel which is Exhibit 4 to Respondent's memo in support), all pages)

[9] A copy of the Original Declaration all amendments and supplements to the Original Declaration known to the Board of Directors of Respondent are included in Exhibit A to the Affidavit of Billy J. Israel, Jr., which was attached as Exhibit 4 to Respondent's memorandum in support of its motion for summary judgment. (Affidavit of Billy Israel, p. 2; Exhibit A to the Affidavit of Billy Israel, all pages)

[10] (Respondent's memo, pp. 2-26; Exhibits 1-33 to Respondent's memo, all pages; Order, pp. 2-15)

[11] The affidavit was Exhibit 4 to Respondent's memorandum in support of its motion for partial summary judgment.

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of the affidavit, Billy J. Israel, Jr. had been the President of Respondent and a member of its Board of Directors continuously since 2010. (Affidavit of Billy Israel, p. 2). Per the affidavit of Billy J. Israel, Jr., during his tenure on the Board of Directors: (1) Appellants John K. Payne and Ruth G. Payne had paid all assessments levied by Respondent up until 2017, and they also paid a special assessment levied in 2021; however, they have maintained a delinquent balance at all times since 2017; (2) Appellants Warren Johnson and Rhonda Johnson had paid all assessments levied by Respondent up until 2016; however, they have maintained a delinquent balance at all times since 2016; (3) Appellant Jane Van Wieren as trustee of the Greer R.G. Irrevocable Property Trust, dated October 25, 2006 had paid all assessments levied by Respondent up until 2016; however she/the trust has maintained a delinquent balance at all times since 2016; and (4) Appellants James Douglas Armstrong and Jane Armstrong had paid all assessments levied by Respondent up until 2017, and they also paid a special assessment levied in 2017; however, they have maintained a delinquent balance at all times since 2017. (Affidavit of Billy Israel, pp. 3-6). Exhibit E to the Affidavit of Billy J. Israel, Jr. sets forth with specificity the amounts owed for assessments, interest, and late charges and how those amounts were calculated. (Exhibit E to Affidavit of Billy Israel, all pages). While Appellants seem to suggest that all of the assessments were annual assessments, this is not the case. Some of the assessments were special assessments,[12] and with respect to Appellant Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust, dated October 25, 2006,[13] some were also individual/default assessments for runway use violations.[14]

[12] (See Exhibit E to Affidavit of Billy Israel, pp. 12-14, 19)
[13] Referred to as "Graham" in Exhibit E to the Affidavit of Billy J. Israel, Jr.
[14] See (Exhibit E to Affidavit of Billy Israel, pp. 3-4 , 25-34).

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While Respondent would disagree with Appellants' general characterization of discovery matters in this case, it should be noted that the sole discovery matter raised by Appellants to the trial court for their contention that summary judgment was premature was their desire depose the then treasurer of Respondent, Jeff Cooper.[15] Therefore, any other alleged discovery matters were not raised to the trial court in connection with Respondent's motion for partial summary judgment. Further, Respondent disputes Appellants' counsel's contention that Respondent's counsel unilaterally cancelled the deposition of Jeff Cooper originally scheduled for August 23, 2022, or that Respondent's counsel otherwise refused to produce Jeff Cooper for a deposition prior to the hearing.[16]

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard that governs the trial court under Rule 56, SCRCP. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006); Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). Pursuant to Rule 56, SCRCP, a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 453, 814 S.E.2d 643, 654 (Ct. App. 2018) (quoting NationsBank v. Scott

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[15] (See Appellants' Memo in Opposition to Respondent's MSJ, pp. 3-4; Appellants' Memo in Opposition to motion to dismiss/MSJ as to counterclaims and 3rd party claims, p. 4; Appellants' Memo with objections to proposed order, p. 4; Hearing transcript, p. 18, lines 7-15).

[16] Further, no evidence outside of the statements of Appellants' counsel was submitted to the trial court to support such contentions by Appellants' counsel.

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Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). "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." Id. "Rather, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial." Wells, 331 S.C. at 302, 501 S.E.2d at 749. "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." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 85–86, 502 S.E.2d 78, 81 (1998).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT FOR THE AMOUNT OF ASSESSMENTS OWED BY APPELLANTS DESPITE THEIR ASSERTION THAT RESPONDENT HAD INCURRED DEBT IN EXCESS OF $50,000.00 AND DESPITE THEIR ASSERTION THAT THE DECLARATION PROHIBITS ANNUAL ASSESSMENTS FROM BEING USED FOR ANYTHING OTHER THAN MAINTENANCE.

1. *The Trial Court Did Not Err in Granting Summary Judgment to Respondent for the Amount of the Assessments Owed by Appellants Despite Appellants' Assertion That Respondent Had Incurred Debt In Excess of $50,000.00.*

In their brief, Appellants argue, in part, that they presented sufficient evidence to the trial court to establish a question of fact as to whether Respondent's Board of Directors violated Article VIII, Section 8.2(i) of Respondent's bylaws and that the trial court ignored the terms of Article VIII, Section 8.2(i) of Respondent's bylaws. Thus, Appellants assert that the grant of summary judgment awarding Respondent a judgment in the amount of $145,250.00 for delinquent assessments (exclusive of late charges, interest, and attorney's fees) was improper.

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Appellants' argument is based on Section 8.2 of Respondent's bylaws, which provides in relevant part:

> **Section 8.2. Specific Powers and Duties.** Without limiting the generality of powers and duties set forth in Section 8.1 above, the Board of Directors shall be empowered and shall have the powers and duties as follows:
>
> …
>
> (i) To borrow funds in order to pay for any expenditure or outlay required pursuant to the authority granted by the provisions of the Declaration and these By-Laws and to authorize the appropriate officers to execute all such instruments evidencing such indebtedness as the Board of Directors may deem necessary; provided, however, that the Board shall not borrow more than Fifty thousand and no/100 ($50,000.00) Dollars or cause the Association to be indebted for more than $50,000.00 at any one time without prior approval of a majority of votes of both classes of membership.
>
> …

(Bylaws, Sec. 8.2 – Bylaws, pp. 10-11).

However, Appellants' arguments seem to misconstrue or misunderstand the trial court's Order. The trial court did specifically consider and address Appellants' arguments and allegations asserting that Respondent's Board of Directors violated Section 8.2(i) of Respondent's bylaws by allegedly borrowing more than $50,000.00 or incurring more than $50,000.00 in debt without a vote of Respondent's members. (Order, pp. 23-24). The trial court simply and correctly disagreed with Appellants as to the legal significance of any alleged violation of Section 8.2(i) of Respondent's bylaws. (Order, pp. 23-24). The trial court did not reach the merits of whether there had been a violation of Section 8.2(i) of Respondent's bylaws, but instead found that even if a violation had occurred, it did not relieve the Appellants of their obligation to pay assessments. (Order, pp. 23-24). Specifically, the trial court's order states: "While I don't reach the merits of whether there has been any violation of Section 8.2(i) of the Bylaws, I find that even assuming *arguendo* that a violation has occurred, it does not relieve

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[Appellants] of their obligation to pay assessments." (Order, p. 23). Further, the trial court's order also states that "if there has been any violation of Section 8.2(i) of the Bylaws, I find that it does not obviate the [Appellants'] obligation to pay assessments…." (Order, p. 24). However, the trial court's ruling was nonetheless made without prejudice to whatever rights the Appellants may have to pursue claim(s) against Respondent or its directors, individually or derivatively, arising out of any alleged violation of Section 8.2(i) of Respondent's bylaws. (Order, p. 24).

Because the trial court's ruling was not based upon or dependent on whether a question of fact existed as to any alleged violation of Section 8.2(i) of Respondent's bylaws, Appellants' arguments regarding whether a question fact exists as to any alleged violation of Section 8.2(i) of Respondent's bylaws are irrelevant. If fact, the trial court's order was made even assuming *arguendo* that a violation of Section 8.2(i) of Respondent's bylaws had in fact occurred, although the trial court did not reach the merits of whether a violation of Section 8.2(i) of Respondent's bylaws had occurred.[17] Thus, Appellants are arguing a point on appeal that was already assumed by the trial court for the sake of argument in its order. Therefore, even if Appellants are correct in their assertion that they presented sufficient evidence to the trial court to create a question of fact as to whether there had been a violation of Section 8.2(i) of Respondent's bylaws, it does not affect anything contained in the trial court's ruling, and thus such issue is irrelevant to the trial court's ruling and the rationale underlying the same.

Instead, the trial court was correct in determining that any alleged violation of Section 8.2(i) of Respondent's bylaws, even if any such alleged violation is assumed to exist for the sake of argument, would not relieve Appellants of their obligation to pay assessments. First, Article XI, Section 11.7 of the Declaration provides that no lot owner may waive or otherwise exempt

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[17] Respondent does not concede that there has been any violation, though.

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himself from assessments, and that the obligation to pay assessments is a separate and independent covenant on the part of each lot owner. (Declaration Sec. 11.7). Specifically, Section 11.7 of the Declaration provides:

> Section 11.7. Owner Liability. *No Owner may waive or otherwise exempt himself from liability for the assessments provided for herein*, including, by way of illustration, but not limitation, abandonment of the Lot. No diminution or abatement of any assessment shall be claimed or allowed by reason of any alleged failure of the Association to take some action or perform some function required to be taken or performed by the Association under this Declaration or the By-Laws or for inconvenience or discomfort arising from the making of repairs or improvements which are the responsibility of the Association, or from any action taken by the Association to comply with any law, ordinance, or with any order or directive of any municipal or other governmental authority, *the obligation to pay assessments being a separate and independent covenant on the part of each Owner*.

(Declaration Sec. 11.7) (emphasis added). Thus, Appellants' obligation to pay assessments is independent of whether they disagree with the business judgment of Respondent's Board of Directors with respect to pursuing litigation or the use of the assessments. Likewise, Appellants' obligation to pay assessments is independent of whether Respondent failed to take some action required of it under the Declaration or its bylaws, including any alleged failure to seek member approval prior to allegedly borrowing more than $50,000.00 or incurring more than $50,000.00 in debt under Section 8.2(i) of Respondent's bylaws. Notably, Appellants' argument with respect to an alleged violation of Section 8.2(i) of Respondent's bylaws is not really an argument that Respondent lacked authority to levy assessments or that the levying of assessments itself is *ultra vires*. Whether there has been some alleged violation of Section 8.2(i) of Respondent's bylaws is independent of whether Respondent has the power to levy assessments, and an alleged violation of Section 8.2(i) of Respondent's bylaws does not somehow strip Respondent of its independent power to levy assessments upon its members.

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Second, as a South Carolina nonprofit corporation,[18] Respondent is subject to and governed by the South Carolina Nonprofit Corporation Act of 1994 (S.C. Code Ann. §§ 33-31-101 to -1708) (hereinafter, the "Nonprofit Corporation Act"). Section 33-31-304 of the Nonprofit Corporation Act addresses *ultra vires* acts and provides as follows:

> **§ 33-31-304. Ultra vires.**
>
> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.
>
> (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General.

S.C. Code Ann. § 33-31-304. The Official Comments to Section 33-31-304 make clear that the object of this section is to do away with the *ultra vires* doctrine. The Official Comments and the South Carolina Reporters' Comments to section 33-31-304 elaborate and make clear that once an ultra vires transaction has been entered into or completed, it is enforceable and the remedy at that point would be to pursue an action against the person(s) who caused the corporation to act in an *ultra vires* manner. In any event, S.C. Code Ann. § 33-31-304 requires that any challenge to a corporate action by a member based on the action being *ultra vires* must be brought derivatively (regardless of whether or not any third party has acquired rights). Pursuant to S.C. Code Ann. § 33-31-304 (and as further explained in the comments thereto), individual members have no right to bring a direct attack or challenge to a corporate action as allegedly being *ultra vires*. In this

[18] See, e.g., Section 1.1 of Respondent's bylaws. (Bylaws, Section 1.1 – p. 4).

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case, Appellants, who are members of Respondent, have not brought any claims derivatively,[19] and therefore, their attempt to directly challenge actions of Respondent as *ultra vires* is improper and cannot be sustained. Clearly, issues of whether Respondent allegedly acted *ultra vires* by allegedly exceeding a debt limit without member approval or whether any subsequent assessments are *ultra vires* affect the corporation itself and all members of Respondent generally (not just Appellants), and would involve alleged harm to the corporation and all members generally, as opposed to any particularized harm to Appellants.[20]

Third, as mentioned above, with respect to Appellants' arguments concerning an alleged violation of Section 8.2(i) of Respondent's bylaws, the alleged *ultra vires* act is allegedly exceeding a debt limit, and not that Respondent lacks the power to levy assessments against its members. Whether there has been a violation of Section 8.2(i) of Respondent's bylaws is independent of Respondent's power and authority to levy assessments, and a violation of Section 8.2(i) of Respondent's bylaws would not somehow negate or destroy Respondent's power and

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[19] See Appellants' Answer to the Third Amended Complaint, Counterclaims, and Third-Party Complaint filed on November 24, 2020, which does not make any claims derivatively and fails to satisfy the pleading requirements for a derivative action under Rule 23(b)(1), SCRCP. (Appellants' Answer to Third Amended Complaint, all pages).

[20] While the separate order of the trial court denying Respondent's and Third-Party Defendants' motion to dismiss or in the alternative for summary judgment as to Appellants' counterclaims and third-party claims touches upon whether Respondent and Third-Party Defendants were entitled to dismissal of the counterclaims and third-party claims on the basis that they needed be brought derivatively, anything stated in that order is not binding on Respondent or this Court. (Order denying motion to dismiss/summary judgment as to counterclaims and 3rd party claims, all pages). First and foremost, an order denying a motion for summary judgment decides nothing about the merits of the case and simply decides whether the case should proceed to trial – "[t]he denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again in later proceedings…." Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "In short, the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." Id. at 477, 443 S.E.2d at 380. Additionally, the aforesaid order dealt with whether certain counterclaims and third-party claims must be asserted derivatively, and it did not specifically address Appellants' claim of *ultra vires* actions as a defense to Respondents' affirmative claim for collection of assessments. (Order denying motion to dismiss/summary judgment as to counterclaims and 3rd party claims, all pages). Likewise, that order did not specifically address the application of S.C. Code Ann. § 33-31-304 and instead referenced the case of Patterson v. Witter, 425 S.C. 213, 821 S.E.2d 677 (2018). Id. Respondent would respectfully assert that any reliance on Patterson is misplaced because that case did not involve a nonprofit corporation and thus did not address the application of S.C. Code Ann. § 33-31-304. Patterson, 425 S.C. 213, 821 S.E.2d 677. It is respectfully asserted that S.C. Code Ann. § 33-31-304 modifies general principles concerning what claims must be brought derivatively when a nonprofit corporation is involved.

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authority to levy assessments under the Declaration and its bylaws. To find otherwise would lead to absurd results. Like most homeowners associations, Respondent's primary means of funding its obligations is through assessments levied against its members. See Declaration, Art. XI. (Declaration Art. XI – pgs. 28-31). See also, Respondent's bylaws, § 8.2 (Bylaws, § 8.2 – pgs. 7-8). If Appellants' argument were to be accepted, it would mean for example that if Respondent were to borrow more than $50,000 without member approval, then it could never assess its members to pay off that loan, forcing Respondent to default on the loan and suffer the adverse consequences of a default. Likewise, if Appellants' argument were to be accepted, it would mean that if Respondent were ever to incur in excess of $50,000.00 in debt without member approval, it could then never assess its members to reduce or payoff that debt, forcing Respondent into financial ruin to the detriment of its members. Clearly, these are absurd results.

Additionally, a simple examination of Appellants' arguments concerning the alleged incurrence of debt in excess of $50,000.00 without member approval reveals that Appellants rely, at least in part, on their own nonpayment of assessments to support their contentions regarding alleged *ultra vires* acts for alleged violations of Section 8.2(i) of Respondent's bylaws. In their brief to this Court, Appellants rely on the amount of their own unpaid assessments as a basis for asserting that Respondent has incurred in excess of $50,000.00 in debt without member approval (which they assert is a violation of Section 8.2(i) of Respondent's bylaws).[21] Appellants then in turn argue that such alleged violation of Respondent's bylaws then relieves them from the obligation to pay such assessments. Consequently, Appellants arguments with respect to Section 8.2(i) of Respondent's bylaws, appear, at least in part, to be circular attempt to

[21] For example, Appellants state in their brief that "It is clear and unmistakable that the Article 8.2(i) of By-Laws prohibited Plaintiff from incurring debt in excess of $50,000 without taking a vote of the members." Appellants then state in their brief: "It is further clear that the assessments charged to these Appellants alone ($145,240.00) exceeded that limit."

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rely on their own nonpayment of assessments to try to excuse them from the payment of such assessments. Therefore, for this reason as well, Appellants' contention that an alleged violation of Section 8.2(i) of Respondent's bylaws somehow relieves them from their obligation to pay assessments cannot be accepted or sustained.

Further, despite Appellants' apparent assertion otherwise, the trial court's grant of summary judgment to Respondent for the amount of assessments owed by Appellants is not inconsistent with its other order denying Respondent's and Third-Party Defendants' motion to dismiss or alternatively for summary judgment as to Appellant's counterclaims and third-party claims. Again, as set forth above, the trial court's grant of summary judgment was not based upon or dependent on whether a question of fact existed as to a violation of Article VIII, Section 8.2(i) of Respondent's bylaws, and the trial court's ruling was made even assuming *arguendo* that a violation had occurred. Again, as set forth above, the trial court's ruling was made without prejudice to whatever rights the Appellants may have to pursue claim(s) against Respondent or its directors, individually or derivatively, arising out of any alleged violation of Section 8.2(i) of Respondent's bylaws. Additionally, this result is consistent with S.C. Code Ann. § 33-31-304 and the comments thereto which generally indicate that once an *ultra vires* transaction has been entered into or completed, it is generally enforceable and the remedy at that point would be to pursue an action against the person(s) who caused the corporation to act in an *ultra vires* manner. <u>See</u> S.C. Code Ann. § 33-31-304 and the comments thereto.

Based on all of the foregoing, the trial court did not err.

2. <u>*The Trial Court Did Not Err in Granting Summary Judgment to Respondent for the Amount of the Assessments Owed by Appellants Despite Appellants' Assertion That the*</u>

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Declaration Prohibits Annual Assessments From Being Used for Anything Other Than Maintenance.

Appellants also assert that the Declaration only allows annual assessments to be used for subdivision maintenance, and that assessments cannot be used to pay any attorney's fees that may be incurred by Respondent. Therefore, Appellants assert that the trial court erred in granting summary judgment against Appellants for the amount of the assessments, as they contend that the assessments, at least in part, were levied for the purpose of paying attorney's fees and/or were used to pay attorney's fees incurred by Respondent.

Notwithstanding Appellants' contentions concerning the levying of assessments for the purpose of paying attorney's fees and/or the use of assessments to pay attorney's fees incurred by Respondent, the trial court did not err in granting summary judgment to Respondent for the amount of the assessments owed by Appellants.

Restrictive covenants are contractual in nature, are construed like contracts, and may give rise to actions for breach of contract. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006); Kinard v. Richardson, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014). "The construction of a clear and unambiguous contract is a question of law for the court to determine." Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). See also, Crenshaw v. Erskine Coll., 432 S.C. 1, 26, 850 S.E.2d 1, 14 (2020) (written contracts are to be construed by the Court unless the contract is ambiguous.); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997); Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("As a general rule, written contracts are to be construed by the Court…."). See also, Curry v. Carolina Ins. Grp. of SC, Inc., 428 S.C. 60, 71, 832 S.E.2d 760,

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765 (Ct. App. 2019) ("Generally, 'the construction of contracts is a question of law for the court."); Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995) ("The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment."); Moss v. Porter Bros., 292 S.C. 444, 447, 357 S.E.2d 25, 27 (Ct. App. 1987) ("Where a motion for summary judgment presents a question concerning the construction of a written contract, the question is one of law if the language employed by the contract is plain and unambiguous.").

Likewise, whether the language of a contract is ambiguous is a question of law for the court. Williams, 409 S.C. at 594, 762 S.E.2d at 710; S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). "'A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" Williams, 409 S.C. at 595, 762 S.E.2d at 710 (quoting Hawkins, 328 S.C. at 592, 493 S.E.2d at 878); See also, S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. at 623, 550 S.E.2d at 302 ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."); Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one."). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Williams, 409 S.C. at 595, 762 S.E.2d at 710 (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Whether a contract is ambiguous is to be determined from examining the entire

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contract, not by reviewing isolated portions of the contract." Williams, 409 S.C. at 595, 762 S.E.2d at 710 (2014). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill, 381 S.C. at 185, 672 S.E.2d at 574. See also, Curry, 428 S.C. at 70, 73, 832 S.E.2d at 765-66. "'Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.'" Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (quoting Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958)). "To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Id. at 498, 649 S.E.2d at 501. See also, McGill, 381 S.C. at 185, 672 S.E.2d at 574. ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."); Jordan, 311 S.C. at 230, 428 S.E.2d at 707 ("Resort to construction by a party is only done when the contract is ambiguous or there is doubt as to its intended meaning."); Curry, 428 S.C. at 71, 832 S.E.2d at 765 ("Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."); Watson v. Underwood, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014) (when a contract is unambiguous, a party cannot use extrinsic evidence to give the contract a meaning different from that indicated by its plain terms). "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). See also, Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) ("Where an agreement is clear and capable of legal interpretation, the court's

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only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."). Summary judgment is proper "where the intentions of the parties regarding the legal effect of the contract may be gathered from its four corners." Moss v. Porter Bros., 292 S.C. 444, 447, 357 S.E.2d 25, 27 (Ct. App. 1987).

Additionally, with respect to the construction or interpretation of restrictive covenants:

> Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution. [T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. When the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property. However, this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument.

Kinard, 407 S.C. at 257–58, 754 S.E.2d at 893–94 (internal quotation marks and internal citations omitted).

Further, in the case of Koon v. Fares, which notably involved an appeal from a grant of summary judgment, the South Carolina Supreme Court stated:

> Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.

Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).

In the case at hand, when read as a whole, the Declaration and Respondent's bylaws, together with applicable law, clearly and unambiguously allow assessments to be levied and used for the purpose of paying attorney's fees. If fact, to find otherwise would lead to absurd results,

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as will be set forth more fully below. Therefore, the trial court did not err in granting summary judgment in favor of Respondent for the amount of the assessments owed by Appellants.

Appellants' argument that assessments may only be used for subdivision maintenance and cannot be levied or used for the purpose of paying attorney's fees seems to be based solely on a single sentence of the Declaration found in Article XI, Section 11.1, which states that lot owners are required to pay "Annual assessments or charges as provided in this Declaration for the purpose of funding the maintenance fund." Appellants' argument appears to solely focus on the use of the words "maintenance fund" in that provision. For reference, the entirety of Article XI, Section 11.1 of the Declaration is set for the below:

> **Section 11.1. Creation of the Lien and Personal Obligation for Assessments**. Declarant, for each Lot owned within the Property, hereby covenants, and each Owner of any Lot, by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed, is deemed to covenant and agree to pay to the Association:
>
> (a) Annual assessments or charges as provided in this Declaration for the purpose of funding the maintenance fund.
>
> (b) Special assessment for capital improvements and other purposes as stated in this Declaration; such annual and special assessments to be fixed, established and collected from time to time as provided below.
>
> (c) Default assessments which may be assessed against an Owner's Lot pursuant to the Chandelle Documents for failure to perform an obligation under the Chandelle Documents or because the Association has incurred an expense on behalf of the Owner under the Chandelle Documents. The annual, special and default assessments, together with interest, costs and reasonable attorney's fees, shall be a charge upon the land and shall be a continuing lien upon the Lot against which each such assessment is made until paid. Each such assessment, together with interest, costs and reasonable attorney's fees, shall also be the personal obligation of the Owner of such Lot at the time when the assessment fell due.

(Declaration Sec. 11.1 – p. 28). However, Appellants' argument ignores the definition of "maintenance fund" set forth in the Declaration, other provisions of the Declaration and Respondent's bylaws, and applicable law providing broad powers and authority to nonprofit

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corporations. Appellants' argument is simply an attempt to rely on a single clause in the Declaration without looking at the provisions of the Declaration and Respondent's bylaws as a whole. The Declaration and Respondent's bylaws, when viewed as a whole, clearly and unambiguously allow assessments to be levied and used for purposes beyond subdivision maintenance, including for attorney's fees.

Article I, Section 1.6 of the Declaration defines "Assessments" to "mean and refer to annual, special and default assessments levied pursuant to Article XI below *to meet the estimated cash requirements of the Association.*" (emphasis added). (Declaration Sec. 1.6 – p. 7). Further, Article XI, Section 11.2 of the Declaration, entitled "Purpose of Assessments," does not limit the use of assessments to subdivision maintenance and allows assessments to be used for a broad array of purposes. (Declaration Sec. 11.2 – p. 28). Specifically, Article XI, Section 11.2 of the Declaration provides, in part: "The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of the Owners and occupants of Chandelle and for the improvement and maintenance of the Common Area…." (Declaration Sec. 11.2 – p. 28). Thus, Common Area maintenance is only one of the many purposes for which assessments may be used under the Declaration. Further, Article XI, Section 11.4 of the Declaration, entitled "Calculation and Apportionment of Annual Assessments," addresses budgeting for the purposes of establishing the annual assessments, and the terms thereof indicate that annual assessments and the budgets upon which they are based are not limited to subdivision maintenance. (Declaration Sec. 11.4 – p. 29). Specifically, Article XI, Section 11.4 of the Declaration provides in relevant part that the Board of Directors shall prepare a budget "estimating its *net cash flow requirements for the next year* and an estimate of the assessments to be charged each Owner" and that "Each Budget shall include funds for establishing and

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maintaining reserves for periodic repairs, replacement and maintenance of any improvements on the open space and Common Area which must be replaced on a periodic basis, and for taxes, capital improvements, deficiencies for the prior years maintenance fund and *other purposes*, and shall include any expected income and surpluses from the prior year's fund." (emphasis added). (Declaration Sec. 11.4 – p. 29). Further, Article XI, Sections 11.1 and 11.5 of the Declaration reference special assessments for "capital improvements and *other purposes stated in this Declaration*" and/or to "make up any shortfall in the current year's budget," among other things. (emphasis added). (Declaration Secs. 11.1 and 11.5 – pp. 28-29). Additionally, subparts (e) and (f) of Article VIII, Section 8.2 of Respondent's bylaws provide that the Board of Directors has the power to "fix, determine, levy, and collect the prorated annual Assessments to be paid by each of the Members towards the *gross expenses of Chandelle*" and to levy and collect special assessments to "meet increased *operating or* maintenance expenses or costs, or additional capital expenses, or because of emergencies." (emphasis added). (Bylaws, Sec. 8.2 – p. 10-11).

Further, Article I, Section 1.18 of the Declaration defines "Maintenance Fund" to "mean and refer to the fund created by assessments and fees levied pursuant to Article XI below to provide the Association with the funds required to carry out its duties under this Declaration." (Declaration Sec. 1.18 – p. 8). It is clear from the Declaration and Respondent's bylaws that Respondent's powers, duties, and purposes are broad and extend beyond solely subdivision maintenance, and thus the "maintenance fund" is not strictly limited to subdivision maintenance. Relevant provisions of the Declaration evidencing Respondent's broad powers, duties, and purposes include the following:

- First page of Declaration: "WHEREAS, the Declarant has deemed it desirable for the efficient preservation of the values and amenities in said planned development to create an agency to which will be delegated and

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assigned the powers of maintaining and administering the planned development properties and facilities and administering and enforcing the covenants and restrictions and collecting and disbursing the assessments and charges hereinafter created. For this purpose the Declarant has caused to be incorporated under the laws of South Carolina as a non-profit corporation Chandelle Property Owners Association, Inc." (Declaration, p. 1).

- Art. II, § 2.9: "Implied Rights and Obligations. The Association may exercise any other right or privilege given to it expressly by the Chandelle Documents, and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association under this Declaration or reasonably necessary to effectuate any such right or privilege. The Association shall perform all of the duties and obligations imposed upon it expressly by the Chandelle Documents,[22] together with every other duty or obligation reasonably to be implied from the express provisions of the Chandelle documents where reasonably necessary to satisfy any such duty of [sic] obligation." (Declaration, p. 11).

Further, the provisions of Respondent's bylaws also evidence Respondent's broad powers, duties, and purposes. Specifically, Article II, Section 2.1 of Respondent's bylaws provides:

> The specific purposes for which the Association is formed are: to provide for the maintenance, preservation and control of the Common Area which is part of the real property located in Spartanburg County, South Carolina (the "Property"), which has been submitted to the Declaration of Covenants, Conditions, Restrictions Chandelle dated and recorded December 15, 1997, in the R.M.C. Office for Spartanburg County, South Carolina in Deed Book 67-A at Page 583 (the "Declaration"); *and to promote the health, safety and welfare of the Owners within Chandelle*.[23] (emphasis added)

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[22] Article I, Section 1.11 of the Declaration defines "Chandelle Documents" to "mean and refer to the basic documents creating and governing Chandelle, including but not limited to the Declaration, the Articles of Incorporation and Bylaws of the Association, the Architectural Guidelines and any Procedures, Rules, Regulations or Policies adopted under such Documents by the Association of [sic] the Architectural Control Committee." (Declaration, p. 7)

[23] The foregoing language is the amended language as found in an instrument entitled "AMENDMENTS TO COVENANTS, CONDITIONS AND RESTRICTIONS OF CHANDELLE SUBDIVISION" recorded on April 17, 2007 in the Office of the Register of Deeds for Spartanburg County in Deed Book 88-H, Pg. 448. The original language of Article II, Section 2.1 of Respondent's bylaws as originally recorded was as follows: "The specific purposes for which the Association is formed are: to provide for the maintenance, preservation and control of the Common Area which is part of the real property located in Spartanburg County, South Carolina, which has been submitted to the Declaration of Covenants, Conditions, Restrictions and Easements for Chandelle dated _________, and recorded on __________________, in the R.M.C. Office for Spartanburg County, South Carolina in Deed Book _____ at Page ______ (the "Declaration"); and to promote the health, safety and welfare of the Owners within Chandelle." (Bylaws as originally recorded, p. 1).

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(Amendment to Declaration/Bylaws recorded in Book 88-H, Pg. 448, pp. 3-4). Likewise, Article VIII, Section 8.1 of Respondent's bylaws provides that "The Board of Directors shall have the powers and duties necessary for the administration of the business affairs of the Association" and that "The Board of Directors may do all such acts and things as are not by law or by the Articles of Incorporation, these By-Laws or the Declaration directed to be exercised or done by the Members." (Bylaws Sec. 8.1 – p. 7). Further, Article VIII, Section 8.2 of Respondent's bylaws provides: "Without limiting the generality of powers and duties set forth in Section 8.1 above, the Board of Directors shall be empowered and shall have the powers and duties as follows….", and then sets forth a laundry list of powers and duties. (Bylaws Sec. 8.2 – pp.7-8). The enumerated powers and duties clearly go beyond merely subdivision or common area maintenance, including: (1) administering and enforcing the Declaration; (2) making and enforcing rules and regulations; (3) procuring insurance; (4) levying and collecting assessments; (5) borrowing money; (6) entering into contracts; (7) establishing bank accounts; (8) recordkeeping; and (9) assisting the Architectural Control Committee. (Id.). In addition to the foregoing, and by way of further example, Respondent's bylaws clearly contemplate the employment and *compensation* of a community association manager by Respondent, and to assess the members for the cost of such services. Respondent's bylaws, Art. VIII, §§ 8.2(o) & 8.3. (Bylaws, pp. 7-8).

In addition to the terms of the Declaration and Respondent's bylaws, the Nonprofit Corporation Act also vests nonprofit corporations with broad powers, including: (1) the power to sue and be sued; (2) the power to impose dues, assessments, and admission and transfer fees upon its members; and (3) the power to do all things necessary or convenient, not inconsistent

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with law, to further the activities and affairs of the corporation. S.C. Code Ann. § 33-31-302. Specifically, S.C. Code Ann. § 33-31-302 provides in relevant part:

> Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
>
> (1) to sue and be sued, complain, and defend in its corporate name;
> …
>
> (15) to impose dues, assessments, and admission and transfer fees upon its members;
> …
>
> (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

Based on the foregoing, and viewing the Declaration and Respondent's bylaws as a whole, it is readily apparent that assessments may be used for a broad range of purposes beyond solely subdivision or common area maintenance. If fact, the Declaration and Respondent's bylaws clearly contemplate that Respondent can engage in litigation and will incur attorney's fees. For example, Article IV, Section 4.4 of the Declaration requires a lot owner to reimburse Respondent for attorney's fees incurred by Respondent in defending any action brought by such owner seeking to partition the common area. (Declaration Sec. 4.4 – p. 13). Further, the Declaration provides that attorney's fees incurred by Respondent are part of its lien for assessments and other charges, and are also a personal obligation of the lot owner. Declaration, Art. XI, §§ 11.1 & 11.10. (Declaration, pp. 28, 30). <u>See also</u>, Declaration, Art. XI, § 11.14. (Declaration, p. 31). Likewise, Article XI, Section 11.9 of the Declaration specifically provides for the institution of legal action by Respondent to collect assessments and other charges, and provides a right for Respondent to recover its

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attorney's fees. (Declaration Sec. 11.9 – p. 30). Additionally, Article XIII, Sections 13.3 and 13.4 of the Declaration contemplate Respondent pursuing legal action to enforce the governing documents for Chandelle Subdivision. (Declaration Secs. 11.3 and 11.4 – p. 34). Further, Article XIII, Section 13.9 of the Declaration provides for the recovery of attorney's fees to the prevailing party in an action to enforce the governing documents for Chandelle subdivision, and specifically provides:

> **Section 13.9 Recovery of Costs**. If legal assistance is obtained to enforce any of the provisions of the Chandelle Documents, or in any legal proceeding (whether or not suit is brought) for damages or for the enforcement of the Chandelle Documents or the restraint of violations of the Chandelle Documents, the prevailing party shall be entitled to recover all costs incurred by it in such action, including reasonable attorney's fees as may be incurred, or if suit is brought, as may be determined by the Court.

(Declaration Sec. 13.9 – pp. 34-35). Consequently, the Declaration clearly contemplates that Respondent can and will incur attorney's fees. In fact, attorney's fees fall within the broad uses for which assessments may be used as set forth above, and undoubtedly, the retention of legal services can and does promote the health, safety and welfare of Respondent's members.

Further, Appellants' assertion that assessments cannot be levied and used for attorney's fees cannot be sustained, as it would lead to absurd results. For example, under the position advanced by Appellants, Respondent would never be able to seek legal advice, unless it was able to find a lawyer willing to provide *pro bono* legal services to Respondent. Further, South Carolina law prohibits a corporation or other business entity from being represented by a non-lawyer in Circuit Court, and thus corporations and other business entities are required to be represented by a lawyer in Circuit Court. In re Unauthorized Prac. of L. Rules Proposed by S.C. Bar, 309 S.C. 304, 306, 422 S.E.2d 123, 124 (1992); State ex rel.

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Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939). Therefore, under the position advanced by Appellants, Respondent would be left defenseless and would have to go into default every time it was sued in Circuit Court, unless it could find a lawyer willing to represent it for free. Likewise, under the position advanced by Appellants, Respondent would never be able to pursue legal action in Circuit Court to protect its interests and/or the interests of its members, unless it was able to find a lawyer willing to represent it for free. As an example, under the position advanced by Appellants, Respondent would not even be able to bring suit in Circuit Court against a vendor that breached its contract with Respondent unless Respondent was able to find free legal representation, thus impairing or prohibiting Respondent from protecting its interests and the interests of its members. These are clearly absurd results; therefore, Appellants' position cannot be sustained.

Additionally, as set more fully above, a challenge to the levying and use of assessments on the basis of being *ultra vires* would need to be brought derivatively, which has not been done by Appellants. S.C. Code Ann. § 33-31-304. Further, it should also be noted that Appellants have made a claim against Respondent in this action for an award of attorney's fees, which is generally inconsistent with their assertion that Respondent is unable to levy and use assessments to pay attorney's fees. Appellant's Answer to Third Amended Complaint, ¶¶ 57, 84, Prayer for Relief. (Appellant's Answer to 3rd Amended Complaint, pp. 11, 17-19)

Further, to the extent that Appellants rely on Lovering v. Seabrook Island Property Owners Association, such reliance is misplaced. Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), overturned due to legislative action, aff'd as modified, 291 S.C. 201, 352 S.E.2d 707 (1987), overturned due to legislative action. First, to the extent that Lovering stood for the proposition that a nonprofit corporation's powers must be

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strictly construed against it or that its powers are limited to those expressly enumerated in its governing documents, Lovering has been subsequently legislatively overturned by the Nonprofit Corporation Act, particularly Section 33-31-302 thereof. Further, the issue in Lovering dealt with a provision of the corporation's governing documents requiring assessments to be based on the assessed value of the property as established by the tax assessor, a limitation and issue not present here. Lovering, 289 S.C. at 83-84, 344 S.E.2d at 866-76; Lovering, 291 S.C. at 203, 352 S.E.2d at 708.

Based on all of the foregoing, Respondent's governing documents, together with applicable law, clearly and unambiguously allow assessments to be levied and used for the purpose of paying attorney's fees. Therefore, the trial court did not err.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT FOR THE AMOUNT OF ASSESSMENTS OWED BY APPELLANTS DESPITE THEIR ASSERTIONS CONCERNING "RETROACTIVE" APPLICATION OF RECIPROCAL NEGATIVE EASEMENTS

While Appellants do not challenge that the Subject Lots are subject to and bound by the Declaration on the basis of reciprocal negative easements, they seem to assert that the trial court's finding of reciprocal negative easements would mean that the Subject Lots are/were subject to and bound by the Declaration only from the date of the trial court's order. Specifically, Appellants assert that the trial court erred in granting summary judgment to Respondent for the amount of the assessments owed by Appellants by allegedly improperly "retroactively" applying reciprocal negative easements in this case. Respondent disagrees and asserts that the trial court's order should be affirmed for the following reasons.

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First, Appellants' argument fails to take into account that the trial court's order found that the Subject Lots were subject to and bound by the Declaration for at least the entirety of Appellants' ownership based on three independent/alternate grounds, and not solely on the basis of reciprocal negative easements/unmistakable implication. (Order, pp. 16-22, 25). Specifically, the trial court found that Appellants' properties were subject to and bound by the Declaration for at least the entirety of Appellants' ownership based on the following three independent and alternate grounds: (1) the properties were expressly bound by the Declaration; (2) the properties were bound by the Declaration through reciprocal negative easements/unmistakable implication; and (3) the properties were bound by the Declaration through the exercise of the court's inherent equitable powers. (Order, pp. 16-22, 25). Although Appellants have an asserted an allegation of error as to the timing of when their properties would be bound by the Declaration under the theory of reciprocal negative easements, in their brief (and consequently in this appeal), Appellants have not raised any challenge to or asserted any error with the trial court's ruling as to grounds (1) and (3) above, and Appellants have not included any challenge pertaining to grounds (1) and (3) in their Statement of Issues on Appeal. "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR. See also, State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "'Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.'" Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 451, 814 S.E.2d 643, 653–54 (Ct. App. 2018) (quoting Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). "'[A]n unappealed ruling, right or wrong, is the law of the case.'" Id. at 451–52, 814 S.E.2d at 654 (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329,

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730 S.E.2d 282, 285 (2012)). Because Appellants did not appeal grounds (1) and (3) listed above, these grounds have become the law of the case – i.e., the trial court's holdings that the Subject Lots have been subject to and bound by the Declaration for at least the entirety of Appellants' ownership on the basis of the properties being expressly bound by the Declaration and additionally through the trial court's exercise of its inherent equitable powers have now become the law of the case. See id. at 451-52, 814 S.E.2d at 654-55. Therefore, the trial court's finding that the Subject Lots have been subject to and bound by the Declaration for the entirety of their ownership should be affirmed based on the two-issue rule, and consequently it is unnecessary for this Court to address Appellants' argument concerning retroactive application of reciprocal negative easements.

Even if Appellants' argument concerning retroactive application of reciprocal negative easements is considered, such argument misconstrues the law concerning when reciprocal negative easements arise and such argument is consequently without merit. Appellants' argument seems to suggest that under the doctrine of reciprocal negative easements, the Subject Lots did not become bound by the Declaration until the date of the trial court's order declaring them bound on the basis of reciprocal negative easements/unmistakable implication, and thus any award of assessments levied prior to the trial court's order would consequently be a "retroactive" application of reciprocal negative easements.[24]

In support of their argument, Appellants rely on the case of Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct. App. 1992). However, Mangiaracina does not stand for the proposition that reciprocal negative easements only become effective as of the date of the court's order declaring their existence, and Mangiaracina is also readily

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[24] For example, see (Transcript, p. 24, lns. 3-13).

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distinguishable from the case at hand. In Mangiaracina, the property owners association sought a judicial declaration granting it authority to alter the assessment provisions in certain restrictive covenants from fixed rate assessments to variable rate assessments to equalize the assessments among all property owners in the Shipyard Plantation development. Id. at 304-06, 414 S.E.2d at 799-800. According to the facts stated in the Mangiaracina opinion, Shipyard Plantation was developed from 1970 to 1983. Id. at 305, 414 S.E.2d at 799. Rather than recording a single declaration of restrictive covenants applicable the entirety of Shipyard Plantation, the developer filed separate documents for each residential area at or near the time each area was developed. Id. A total of thirty-two (32) sets of restrictive covenants were filed and were generally uniform, except for the assessments to be paid by the property owners. Id. Five (5) of the sets of restrictive covenants provided for fixed assessments, and the other twenty-seven (27) sets provided for variable assessments. Id. Ultimately, this resulted in 1,248 dwelling units paying variable rate assessments and 230 dwelling units paying fixed rate assessments. Id. The court in Mangiaracina noted that the five (5) sets of restrictive covenants containing the fixed rate assessments were executed between December 1970 and February 1977, and during that time period, a total of six (6) sets of restrictive covenants containing variable rate assessments were also executed. Id., 414 S.E.2d at 799-800. In support of its request, the property owners association in part relied upon a theory of reciprocal negative easements to impose the variable assessment covenants uniformly throughout the Shipyard Plantation development. Id. at 306, 414 S.E.2d at 800. The court recited the four elements of reciprocal negative easements,[25] and the court's analysis focused on the element of whether there was a general plan or scheme of

[25] The four elements are as follows: "(1) a common grantor, (2) a designation of land subject to restrictions, (3) a general plan or scheme of restrictions, and (4) covenants running with the land in accordance with such plan or scheme." Mangiaracina, 307 S.C. at 309, 414 S.E.2d at 801-02.

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restrictions. Id. at 308-10, 414 S.E.2d at 801-02. In its analysis, the court noted that to establish negative reciprocal easements, "[g]enerally, the developer must establish the general scheme of development before any lots are sold", and the court further found as follows:

> Here, we think it important to examine the record for evidence whether at the time the last fixed assessment covenant was recorded there was in place a general scheme of covenants burdening the properties in the PUD with variable assessments. This is important because reciprocal negative easements are never retroactive. *Sanborn v. McLean,* 233 Mich. 227, 206 N.W. 496 (1925). As noted above, during the development period of December 1970 through February 1977, five of the restrictions and covenants provided for fixed assessments and six provided for variable assessments. In fact, the first three restrictions and covenants provided for fixed assessments. Such covenants indicate no plain and unmistakable implication that during such period the developer intended to burden the land with variable assessments or intended to reserve the right to modify the fixed assessments. *Reyner,* 289 S.C. 575, 347 S.E.2d 878. We hold Shipyard has not shown a right to imposition of reciprocal negative easements which would provide for variable assessments throughout the PUD.

Id. at 309–10, 414 S.E.2d at 802.

First, Mangiaracina is readily distinguishable from the case at hand because in the case at hand, there is only a single declaration of restrictive covenants applicable to the entirety of Chandelle subdivision, and there is no attempt to use other restrictive covenants to try to modify the Declaration through a theory of reciprocal negative easements.[26] Likewise, in the case at hand, the assessment provisions were contained in the Declaration when originally recorded in 1997, and the assessment provisions have remained unchanged since that time.[27]

Second, while the court in Mangiaracina did acknowledge that reciprocal negative easements are never retroactive, this does not mean that reciprocal negative easements only exist and only become effective as of the date of a court order confirming or declaring their existence. Instead, the principle that reciprocal negative easements are never retroactive is simply an

[26] See (Respondent's memo, pp. 2-35; Affidavit of Billy Israel (Exhibit 4 to Respondent's memo), p.2, and Exhibit A thereto, all pages; Order, pp. 2-22)

[27] See (Affidavit of Billy Israel (Exhibit 4 to Respondent's memo), p.2, and Exhibit A thereto, all pages).

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acknowledgment that the general scheme of development must exist at the outset of the development, and that later events occurring after the property has been subdivided and sold cannot be used to retroactively establish a common scheme of development that did not exist at the outset of development. This conclusion is supported by a reading of the case of Sanborn v. McLean, which is the Michigan Supreme Court decision cited by the court in Mangiaracina for the principle that reciprocal negative easements are never retroactive. See Sanborn v. McLean, 206 N.W. 496 (1925). In Sandborn, the Michigan Supreme Court stated in part:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land, subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restriction must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot, it was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it.

Id. at 497. Further, other authorities are also in accord with the aforesaid conclusion. See, Phillips v. Hatfield, 624 S.W.3d 464, 474-81 (Tenn. 2021). To find that reciprocal negative easements do not arise or become effective until a court's order declaring their existence is contrary to the elements and purposes of the doctrine of reciprocal negative easements, and it would completely eviscerate the doctrine, as reciprocal negative easements are placed on the

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land by operation of law when the common plan or scheme of development and restrictions is put into operation. See, Gambrell v. Schriver, 312 S.C. 354, 358, 440 S.E.2d 393, 395 (Ct. App. 1994) ("In the various grants of the lots, there must have been included some restriction for the benefit of the land retained, evidencing a scheme or intent that the entire tract shall be similarly treated, *so that once the plan has been effectively put into operation, the burden placed upon the land conveyed is by operation of law reciprocally placed upon the land retained.*") (emphasis added).

In the present case, Appellants have conceded that the Subject Lots are bound by the Declaration (at least as originally recorded) via the doctrine of reciprocal negative easements.[28] By conceding this, Appellants have effectively conceded the essential elements of reciprocal negative easements, which means that they have conceded that the common scheme of development and restrictions existed at the outset of development. Further, there is no dispute and no question of material fact that Appellants took title to their properties after the Declaration was recorded and after the common scheme of development and restrictions was put into operation, nor is there any dispute or question of material fact that the assessments in question were levied after such time.[29] Therefore, based on the foregoing, the trial court did not err and did not "retroactively" apply reciprocal negative easements.

Based on all of the foregoing, the trial court's ruling should be affirmed.

III. THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT TO RESPONDENT FOR THE AMOUNT OF ASSESSMENTS OWED BY APPELLANTS DESPITE THE PRESENCE OF COUNTERCLAIMS ASSERTED BY APPELLANTS

[28] (Appellants' memo in opposition to Respondent's motion for partial summary judgment, pp. 15-16; Appellants' memo stating objections to proposed order, pp. 2-3; Hearing Transcript, p. 2, line 21 to p.3, line 15, p. 10, line 22 to p. 11, line 1, p. 13, lines 9-11, and p. 14, lines 18-23). See also Appellants brief wherein it is stated: "At the beginning of the hearing, Appellants conceded that they would most likely be brought into the subdivision under the reciprocal negative easement theory…."

[29] (Respondent's Memo, pp. 2-37, and Exhibits 1-33 thereto; Order, pp.2-24)

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Appellants seem to assert that they had a right to have their legal counterclaims tried first; therefore, they assert that trial court committed error in granting summary judgment to Respondent for the amount of assessments owed by Appellants. Respondent asserts that the trial court did not err and that the trial court's order should be affirmed for the reasons set forth below.

First and foremost, Appellants never raised this issue to the trial court, and therefore it is not preserved for review.[30] Instead, Appellants have raised this issue for the first time on appeal.

> In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–780 (2004). Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004). The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. *Id.* Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.

Queen's Grant II Horizontal Prop. Regime, 368 S.C. at 372–73, 628 S.E.2d at 919. See also, Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The issue preservation requirement "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an

[30] It was not raised by Appellants in their memoranda submitted to the trial court in connection with the September 13, 2022 hearing. (Appellants' memo in opposition to Respondent's and 3rd Party Defendants' motion to dismiss/MSJ as to counterclaims and 3rd party claims, all pages; Appellants memo in opposition to Respondents' motion for partial summary judgment, all pages). Appellants also never raised this issue during oral argument at the hearing. (Hearing transcript, all pages). Further, Appellants never raised this issue in their October 25, 2022, memorandum emailed to Judge Kelly setting forth objections to the proposed order that had been submitted to Judge Kelly. (Appellants' memorandum in opposition to Respondent's proposed order, all pages). Additionally, Appellants never served or filed any Rule 59(e), SCRCP motion after the trial court's order was filed.

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appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Because this issue has not been preserved for review, it is procedurally barred and thus should not be considered. Consequently, the trial court's ruling should be affirmed for failure to preserve this issue for appeal. Therefore, and it is unnecessary to address the merits of Appellant's arguments on this issue.

Even if this issue was preserved for appeal, the trial court's order should nonetheless be affirmed. Appellants' argument seems to misconstrue the trial court's order as granting summary judgment to Respondent for the amount of the assessments owed by Appellants under an equitable cause of action. However, the trial court awarded summary judgment for the assessments under a legal cause of action asserted by Respondent rather than an equitable cause of action; therefore, Appellants' contention is without merit.

In Johnson v. South Carolina National Bank, the Supreme Court of South Carolina summarized the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaim as follows:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:
>
> > (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

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> (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the "most imperative circumstances," *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), the "at law" claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
>
> (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Johnson v. S.C. Nat. Bank, 292 S.C. 51, 55–56, 354 S.E.2d 895, 897 (1987).

Nonetheless, Appellants' argument seems to misunderstand the nature of summary judgment. The premise of summary judgment is that there is no genuine issue of material fact, and thus judgment is granted as a matter of law without the need for a trial before a factfinder – it is a determination that are no triable issues of fact that need to go to a factfinder via trial, whether the factfinder be a judge a jury. See Rule 56(c), SCRCP; Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 659–60 (2000) (summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law – if triable issues of fact exist, those issues must go to the jury). Therefore, the analysis in Johnson only applies to the extent that there are claims that necessitate a trial due to the existence of genuine issues of material fact. Johnson cannot be read as prohibiting summary judgment to a plaintiff when otherwise proper under Rule 56, SCRCP, simply because the defendant has asserted a legal counterclaim. In fact, South Carolina adheres to the rule that a grant of summary judgment to a plaintiff is proper despite the presence of a potentially meritorious counterclaim, and the Supreme Court of South Carolina has stated that "when summary judgment for the plaintiff on its claim is otherwise appropriate, we view it as

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proper to grant the motion despite the presence of a meritorious counterclaim." SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 502, 392 S.E.2d 789, 794 (1990). Since the trial court found that there was no genuine issue of material fact as to Respondent's claim for assessments and that judgment for the amount of assessments was appropriate as a matter of law, that claim is removed from the Johnson analysis.

Appellants do not seem to raise issue with the timing of the grant of summary judgment as to the determination that their properties are bound by the Declaration, and in fact have conceded that their properties are bound by the Declaration (at least as originally recorded), at least on the basis of reciprocal negative easements.[31] In fact, such a determination is a necessary prerequisite to many of Appellants' claims, and such a determination does not involve common factual issues with any legal claims that Appellants may have asserted. For example, Appellants have asserted a counterclaim/third-party claim for breach of restrictive covenants, alleging various violations of the Declaration and/or Respondent's bylaws,[32] and such claim cannot exist unless and until a determination has been made as to whether Appellants' properties are subject to the Declaration (and consequently whether Appellants are members of Respondent).

However, Appellants nonetheless assert that the trial court erred in awarding the amount of the assessments as part of Respondent's "equitable claim of implied covenants," and that they were entitled to have their legal counterclaims tried first. However, as set forth above, Johnson cannot be read to prohibit summary judgment on a plaintiff's claims if otherwise proper, simply because a defendant may have counterclaim. See, SSI Med. Servs., Inc., 301 S.C. at 502, 392

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[31] (Appellants' memo in opposition to Respondent's motion for partial summary judgment, pp. 15-16; Appellants' memo stating objections to proposed order, pp. 2-3; Hearing Transcript, p. 2, line 21 to p.3 line 15, p. 10, line 22 to p. 11, line 1, p. 13, lines 9-11, and p. 14, lines 18-23). See also Appellants brief wherein it is stated: "At the beginning of the hearing, Appellants conceded that they would most likely be brought into the subdivision under the reciprocal negative easement theory…."

[32] (Appellant's Answer to 3rd Amended Complaint, pp. 16-17)

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S.E.2d at 794. Further, it is not necessary to delve into whether Respondent's causes of action for reciprocal negative easements, quiet title, or declaratory judgment would truly be considered legal or equitable, as summary judgment for the amount assessments was not awarded under those causes of action. Instead, summary judgment for the amount of the assessments was awarded under the fourth cause of action in Respondent's Third Amended Complaint, which was styled "Breach of Governing Documents/Collection of Assessments and Other Allowable Charges." (3rd Amended Complaint, pp. 23-25). In its fourth cause of action, Respondent asserted that Appellants and their properties are bound by the Declaration and other governing documents for Chandelle subdivision, that Appellants are therefore obligated to pay assessments and other charges under the Declaration and other governing documents for Chandelle subdivision, that Appellants have failed to pay assessments and other charges levied by Respondent pursuant to the Declaration and other governing documents for Chandelle subdivision, and that Respondent was entitled to a judgment for the amounts owed by Appellants under the Declaration and other governing documents for Chandelle subdivision. (3rd Amended Complaint, pp. 23-25). Once the trial court determined that Appellants and the Subject Lots were subject to the Declaration (and thus the other governing documents for Chandelle subdivision), it was then in a position to evaluate whether Respondent was entitled to summary judgment as to the amounts claimed as owed under the Declaration and other governing documents for Chandelle subdivision. (Order, pp. 22-24). It is clear from the trial court's order that judgment for the amount of the assessments was made on the basis of the provisions of the Declaration and other governing documents, rather than on some independent equitable basis. (Order, pp. 22-24). Specifically, the trial court's order cites to relevant provisions of the Declaration and states that "[b]ecause the Subject Lots are subject to the Declaration as set forth

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above, the [Appellants] and the Subject Lots are subject to assessments under the Declaration and Bylaws of [Respondent]." (Order, pp. 22-24). "Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." Queen's Grant II Horizontal Prop. Regime, 368 S.C. at 361, 628 S.E.2d at 913. "An action for a breach of restrictive covenants that seeks monetary damages is an action at law…." RV Resort & Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc., 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010). Therefore, since summary judgment for the amount of the assessments was awarded on the basis of a legal cause of action rather than an equitable cause of action, Appellants' assertion of error is further without merit.[33]

Based on all of the foregoing, the trial court did not err and the trial court's order should be affirmed.

IV. APPELLANTS NEVER RAISED AN ISSUE OF FAILURE TO EXHAUST LEGAL REMEDIES TO THE TRIAL COURT, AND SUCH CLAIM IS NONETHELESS WITHOUT MERIT BECAUSE THE TRIAL COURT AWARDED SUMMARY JUDGMENT FOR THE AMOUNT OF THE ASSESSMENTS UNDER A LEGAL CAUSE OF ACTION RATHER THAN ON AN EQUITABLE BASIS

Appellants next assert that the trial court erred in failing to require Respondent to exhaust its legal remedies before awarding summary judgment to Respondent for the amount of the assessments through the "equitable action." Respondent disagrees and asserts that the trial court's order should be affirmed for the following reasons.

[33] It should be further noted that while Appellants' brief cites to a passage from the hearing transcript found at Page 19, lines. 7-13 (R. p. ___) indicating that Respondent's counsel stated that the interpretation of the Declaration is a legal question, what was intended by that statement is that it is a question of law for the court, as more fully articulated in Part I.2 of this brief supra.

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First, Appellants never raised this issue to the trial court, and therefore it is not preserved for review.[34] Instead, Appellants have raised this issue for the first time on appeal. Therefore, this issue is not preserved for review. See, e.g., Queen's Grant II Horizontal Prop. Regime, 368 S.C. at 372–73, 628 S.E.2d at 919.[35]

Second, as set for the in Part III supra, the trial court awarded summary judgment to Respondent for the amount of the assessments under the fourth cause of action in Respondent's Third Amended Complaint, which was styled "Breach of Governing Documents/Collection of Assessments and Other Allowable Charges", and the amount of the assessments was not awarded on basis of an equitable cause of action. In their brief, Appellants admit that Respondent's fourth cause of action styled "Breach of Governing Documents/Collection of Assessments and Other Allowable Charges" is in fact a legal cause of action. See also, RV Resort & Yacht Club Owners Ass'n, Inc., 386 S.C. at 321, 688 S.E.2d at 559 ("An action for a breach of restrictive covenants that seeks monetary damages is an action at law…."). Therefore, since summary judgment for the amount of the assessments was awarded on the basis of a legal cause of action rather than an equitable cause of action, Appellants' assertion of error is further without merit.

Based on the foregoing, the trial court did not err and the trial court's order should be affirmed.

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[34] It was not raised by Appellants in their memoranda submitted to the trial court in connection with the September 13, 2022 hearing. (Appellants' memo in opposition to Respondent's and 3rd Party Defendants' MSJ as to counterclaims and 3rd party claims, all pages; Appellants memo in opposition to Respondents' motion for partial summary judgment, all pages). Appellants also never raised this issue during oral argument at the hearing. (Hearing transcript, all pages). Further, Appellants never raised this issue in their October 25, 2022, memorandum emailed to Judge Kelly setting forth objections to the proposed order that had been submitted to Judge Kelly. (Appellants' memorandum in opposition to Respondent's proposed order, all pages). Additionally, Appellants never served or filed any Rule 59(e), SCRCP motion after the trial court's order was filed.

[35] Further, see additional case law cited in Part III, supra.

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V. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT FOR THE AMOUNT OF ASSESSMENTS OWED BY APPELLANTS DESPITE THEIR ASSERTION THAT DISCOVERY WAS NOT COMPLETE ON THE ISSUE OF THE AMOUNT OF DEBT ALLEGEDLY INCURRED BY RESPONDENT WITHOUT MEMBER APPROVAL

1. *Standard of Review*

The appellate courts apply an abuse of discretion standard of review to a claim that a grant of summary judgment was premature because the party had not been provided a full and fair opportunity to conduct discovery. See Doe ex rel. Doe v. Batson, 345 S.C. 316, 319, 321, 548 S.E.2d 854, 855, 857 (2001)

2. *Argument*

Appellants next assert that the trial court erred in granting summary judgment to Respondent for the amount of assessments owed by Appellants because discovery was not complete on the issue of the amount of debt allegedly incurred by Respondent without member approval. Appellants' contention relates back to their assertion that Respondent's Board of Directors violated Article VIII, Section 8.2(i) of Respondent's bylaws. This issue was addressed in depth in Part I.1 supra. Appellants seem to contend that the deposition of Jeff Cooper would have provided additional evidence of a violation of Article VIII, Section 8.2(i) of Respondent's bylaws, and thus the grant of summary judgement to Respondent for the amount of assessments was premature. Respondent asserts that the trial court did not err, and thus trial court's order should be affirmed.

> A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

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Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009). Respondent respectfully asserts that Appellants have failed to advance a good reason why the time for discovery was insufficient under the facts of this case based on anything properly before the trial court and properly within the record, especially given the significant age of this case. Further, in any event, the trial court did not err because additional evidence of an alleged violation of Article VIII, Section 8.2(i) of Respondent's bylaws (i.e., an alleged violation of an alleged debt limit) simply would not have changed the outcome of the trial court's ruling. As set forth more fully in Part I.1 supra, the trial court's ruling was not based upon or dependent on whether a question of fact existed as to any alleged violation of Article VIII, Section 8.2(i) of Respondent's bylaws. (Order, pp. 23-24). In fact, while the trial court did not reach the merits of whether a violation of Article VIII, Section 8.2(i) of Respondent's bylaws had occurred, the trial court found that "even assuming *arguendo* that a violation occurred, it does not relieve the [Appellants] of their obligation to pay assessments." (Order, p. 23). Therefore, the trial court found that Appellants owed the assessments claimed by Respondent even assuming for the sake of argument that there had in fact been a violation of Article VIII, Section 8.2(i) of Respondent's bylaws, because any such violation would not relieve Appellants of their independent obligation to pay the assessments. (Order pp. 23-24). Therefore, further discovery on the issue of an alleged violation of Article VIII, Section 8.2(i) of Respondent's bylaws is irrelevant to the trial court's ruling and would have not changed the outcome of the trial court's ruling – Appellants are essentially contending that they should have been allowed to conduct further discovery to try to prove a point that was already assumed for the sake of argument in the trial court's order.[36]

[36] Further, as noted in Respondent's statement of facts, Respondent disputes Appellants' assertation that Respondent's counsel unilaterally cancelled the deposition of Jeff Cooper originally scheduled for August 23, 2022.

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The merits of the trial court's ruling as it relates to Appellants' contentions pertaining to an alleged violation of Article VIII, Section 8.2(i) of Respondent's bylaws is addressed in Part I.1 supra.

Based on the foregoing, the trial court's grant of summary judgment was not premature and the trial court did not abuse its discretion; therefore, trial court did not err. Therefore, the trial court's order should be affirmed.

VI. APPELLANTS NEVER RAISED THE ISSUE OF AN ALLEGED NEED TO REVIEW THE AMOUNT OF THE JUDGMENT GRANTED TO RESPONDENT FOR REASONABLENESS UNDER THE FACTORS SET FORTH IN JACKSON V. SPEED TO THE TRIAL COURT AND THEREFORE IT IS NOT PRESERVED FOR REVIEW; EVEN IF THE ISSUE IS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR

Appellants next assert that the trial court erred by not evaluating the reasonableness of the amount of the judgment granted to Respondent for the amount of assessments owed by Appellants through the lens of an award of attorney's fees. Respondent asserts that this issue is not preserved for review, and even if it is preserved, the trial court did not err.

Appellants never raised this issue to the trial court, and therefore it is not preserved for review.[37] Instead, Appellants have raised this issue for the first time on appeal. Therefore, this

Further, while Appellants cite to the transcript of the deposition of Jeff Cooper, upon information and belief, the actual transcript was never actually submitted to the trial court.

[37] It was not raised by Appellants in their memoranda submitted to the trial court in connection with the September 13, 2022 hearing. (Appellants' memo in opposition to Respondent's and 3rd Party Defendants' MSJ as to counterclaims and 3rd party claims, all pages; Appellants memo in opposition to Respondents' motion for partial summary judgment, all pages). Appellants also never raised this issue during oral argument at the hearing. (Hearing transcript, all pages). Further, Appellants never raised this issue in their October 25, 2022, memorandum emailed to Judge Kelly setting forth objections to the proposed order that had been submitted to Judge Kelly. (Appellants' memorandum in opposition to Respondent's proposed order, all pages). Additionally, Appellants never served or filed any Rule 59(e), SCRCP motion after the trial court's order was filed.

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issue is not preserved for review. See, e.g., Queen's Grant II Horizontal Prop. Regime, 368 S.C. at 372–73, 628 S.E.2d at 919.[38]

Even if this issue is preserved for review, the trial court nonetheless did not err. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Generally, the amount of attorney's fees to be awarded is within the discretion of the trial judge; however, the amount of the award must be reasonable. Gordon v. Drews, 358 S.C. 598, 612–13, 595 S.E.2d 864, 871–72 (Ct. App. 2004). Generally, the following factors should be considered in determining a reasonable attorney fee award: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Jackson, 326 S.C. at 308, 486 S.E.2d at 760. However, the foregoing analysis only applies to an award of attorney's fees to a party. A grant of summary judgment to Respondent for the amount of the assessments owed by Appellants is not an award of attorney's fees and therefore is not subject to the foregoing analysis.

What Respondent was granted summary judgment for were amounts owed by Appellants for assessments under the Declaration and Respondent's bylaws. (Order, pp. 22-25). Under the Declaration, the annual and special assessments are levied uniformly across all of the lot owners in Chandelle subdivision,[39] and provide funds to Respondent to fund its obligations and to apply

[38] Further, see additional case law cited in Part III, supra.

[39] See Section 11.6 of the Declaration entitled "Uniform Rate of Assessment", which provides in part: "Both annual and special assessments must be fixed at a uniform rate for all Lots, except that the Board may provide a reduced assessment to be paid by those Lot Owners whose property is undeveloped; provided, however, that the Owners of undeveloped Lots are assessed on a uniform basis." (Declaration Sec. 11.6 – p. 29)

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toward the gross expenses of Respondent.[40] Like most homeowners associations, Respondent's primary source of funds is through assessments levied upon its members. See, Declaration, Article XI. (Declaration, pp. 28-31). Thus, expenses incurred by Respondent are in turn passed along to its members by way of assessments under Article XI of the Declaration. Respondent does not dispute that it has incurred attorney's fees over the years, including in relation to this lawsuit. Further, Respondent does not dispute that its expenses incurred for attorney's fees have been passed along to the lot owners by way of assessments. Likewise, Respondent does not dispute that at least a portion of the judgment for assessments in the amount of $145,250.00 awarded by the trial court would include expenses incurred by Respondent for attorney's fees, such assessments generally representing Appellants' fractional share of all of the common expenses of Respondent.[41] However, this does not make the judgment an "award of attorney's fees" that would require a reasonableness review under the factors set forth in Jackson v. Speed and other similar cases. To hold otherwise would lead to absurd results and would mean that before any homeowners association or other entity that relies upon dues or assessments as its source of funding could use or levy dues or assessments in relation to expenses incurred for attorney's fees, it would first have to apply to the court for an evaluation of the reasonableness of the attorney's fees. This would overwhelm the court system and is not what is contemplated by Jackson v. Speed and other similar cases relating to an evaluation of the reasonableness of attorney's fees in relation to an award of attorney's fees by the court.

Notably, in addition to seeking judgment for the amount of the assessments, Respondent did also seek an award of attorney's fees and costs in connection with its motion for summary

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[40] See Article XI of the Declaration regarding assessments. (Declaration, pp. 28-31).

[41] Excepting the individual/default assessments levied against Appellant Jane Van Wieren as trustee of the Greer R.G. Irrevocable Property Trust, dated October 25, 2006, which were noted in Respondent's Statement of Facts supra.

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judgment. (Motion for Summary Judgment, p. 5; Respondent's memo in support of Mot. For Sum. Jud., pp. 37-39). The net effect of an award of attorney's fees against Appellants would be to shift Respondent's attorney's fees to Appellants beyond their fractional share of Respondent's common expenses. However, the trial court's order did not grant Respondent an award of attorney's fees, but instead the trial court held that the issue of an award of attorney's fees should be held in abeyance for a determination at a later date. (Order, p. 24).

Based on all of the foregoing, the trial court did not err and the trial court's order should be affirmed.

CONCLUSION

Based on all of the foregoing, and any other reasons apparent to the Court, Respondents respectfully assert that the trial court's order should be affirmed.

Respectfully submitted,

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Columbia, South Carolina

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