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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge
Case Number 2018-CP-26-03173

Appellate Case No.: 2022-001529

Frederick E. Brown, Charles O. Pakosta, Conrad A. Calvano, Gayle N. Scott, and Philip D. Cox, individually and derivatively on behalf of Myrtle Beach Resort Homeowners' Association, Inc., and on behalf of all other similarly situated Co-owners, and Lori Niedzwiecki, and Robert S. Rosencrans, individually and derivatively on behalf of the Myrtle Beach Resort Homeowners' Association, Inc. for its right and benefit.....Appellants,

v.

Jeffery L. Richardson and Nancy L. Moore, individually and as current members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc., and Peter A. Grusauskas and Jim Perkins, individually and as former members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc.....Respondents,

Myrtle Beach Resort Homeowners' Association, Inc.,.....Nominal Respondent

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE COURT ERR IN CONCLUDING SECTION 4.1 OF THE DECLARATION WHEN READ IN CONJUNCTION WITH THE LANGUAGE OF THE DECLARATION, AMENDED BY-LAWS, AND HORIZONTAL PROPERTY REGIME ACT DOES NOT EXPRESSLY AND/OR IMPLIEDLY ESTABLISH CORRESPONDING DUTIES AND MANDATORY OBLIGATIONS ON THE PART OF THE BOARD WITH CERTAIN DISCRETIONARY POWERS UNDER THIS SECTION?

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III. DID THE COURT ERR IN NOT CONCLUDING THE RESPONDENTS HAD VOLUNTARILY UNDERTAKEN TO PERFORM THE ACTS AS DESCRIBED IN SUBPARAGRAPHS (A) THROUGH (H) OF SECTION 4.1 OF DECLARATION THEREBY RENDERING THESE PROVISIONS AS AFFIRMATIVE OBLIGATIONS?

STATEMENT OF THE CASE

This action was commenced by Appellants derivatively on behalf of the Myrtle Beach Resort Homeowners' Association, Inc., ("MBRHOA") on May 24, 2018, by the filing of their Verified Complaint seeking relief from the Court regarding the *Ultra Vires* and Breach of Contract Claims ("Personal Claims") against Respondents Jeffery L. Richardson ("Richardson") Peter A. Grusauskas ("Grusauskas"), Nancy L. Moore ("Moore"), and Jim Perkins ("Perkins"), who are either former and/or present Directors on the Board of Directors for the MBRHOA, and also seeking Declaratory Judgment Relief, among other things, on the following grounds:

a. That the Respondents and their successors or designees have affirmative duties and responsibilities under MBRHOA's governing documents to provide security services for the Resort Property, which are non-delegable to the individual condominium associations from the MBRHOA;

b. That the Respondents and their successors or designees have affirmative duties and responsibilities under MBRHOA's governing documents to provide trash collection services for the Resort Property, which cannot be legally delegated to the individual condominium associations from the MBRHOA; and

c. That the Respondents and their successors or designees are bound by the express provisions of the MBRHOA's governing documents and are required to comply with their affirmative obligations under these governing documents. (R. p. 0038, ¶ 46 (a), (b) and (d).)

MBRHOA is charged with administering certain affairs of the Myrtle Beach Resort, a resort within Horry County, South Carolina presently including: (a) Myrtle Beach Resort Horizontal Property Regime, Inc. ("HPR"); (b) Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime, Inc.("Ocean Front Spa"); (c) Renaissance Tower Horizontal Property Regime, Inc.("Renaissance Tower"); (d) Myrtle Beach Resort Five Seasons Centre Council of Co-Owners, Inc.("Five Seasons Centre") (Collectively known as "Four Individual Condominium Regimes"). (R. p. 0030, ¶ 23.)

On July 13, 2018, the Respondents Richardson and Grusauskas answered the Verified Derivative Complaint, denying the allegations of wrongdoing. (R. pp. 123-133.)

On July 30, 2018, the Nominal Defendant MBRHOA answered the Verified Derivative Complaint, asserting insufficient knowledge or information to form a belief as to the truth of the allegations contained in the paragraphs of the pleading. (R. pp. 134-144.) Lastly, the Respondents Moore and Perkins answered the Verified Derivative Complaint on August 24, 2018, denying the allegations of wrongdoing. (R. pp. 145-155.)

On November 14, 2018, the Appellants filed a Motion for the Court to appoint a Temporary Custodian, not as an anticipatory adjunct to dissolution, but only to operate and manage MBRHOA during the pendency of this litigation or until the dissension and deadlock between the four-member Board of Directors ("Board") was resolved. Specifically, the Appellants' motion asserted that the four-member Board was evenly deadlocked - with respect to the following purported issues and/or actions not taken by them as set forth below:

a. Board could not elect corporate officers: the President, the Vice President, the Secretary, and the Treasurer, within thirty (30) days after the Association's Annual Meeting that was held on April 29, 2018. (R. p. 1998, line 23 – p. 2000, line 2.)

b. Board could not adopt the 2019 Annual Operating Budget for the MBRHOA prepared by Empress Resort Management ("Empress"). The three different annual budget options adequately addressed all known shortfalls in the operating and reserve accounts. (R. p. 1993, lines 13-25; R. p. 1994, lines 1-10; R. p. 1995, lines 22-25; R. p. 2001, lines 22-24.)

c. Board could not agree to a special assessment for the $297,000.00 shortfall in the 2018 operating account as directed by Empress; (R. p. 1997, lines 13-21.)

d. Board could not agree to a special assessment for the $377,239.87 shortfall in the 2018 reserve account as directed by Empress; (R. p. 1989, lines 1-25; R. p. 1991, lines 4-13.)

e. Board could not agree to prosecute Renaissance Tower for non-payment of MBRHOA assessment in the amount of $116,000.00; (R. pp. 1983 – 1985, lines 1-7.)

f. Board could not agree to prosecute Oceanfront Spa for non-payment of MBRHOA assessment in the amount of $106,000.00; and (R. p. 1985, line 1- p. 1987, line 18.)

g. Board could not agree to sign and approve the Board meeting minutes recorded and transcribed in 2018. (R. p. 2002, lines 6-9; R. pp. 156-164.)

On December 12, 2018, after hearing arguments from counsel and testimony from a witness, the Honorable William H. Seals, Jr. denied the Appellants' Motion for the Appointment of a Temporary Custodian but granted Appellants' request for equitable relief and issued an Order appointing Attorney Kenneth Moss ("Moss") as a fifth board member for the MBRHOA with the authority to vote to resolve the dissension and deadlock between the four-member Board of Directors. (R. p. 0001-0004.)

On February 17, 2020, the Appellants filed an Amended Verified Derivative Complaint adding a cause of action for judicial dissolution under S.C. Code Ann. § 33-31-1430 requesting the Court either involuntarily dissolve MBRHOA or employ the statutory reasonable alternatives to dissolution. (R. p. 0344-0375.)

On March 16, 2020, the Respondents Richardson, Grusauskas, Moore and Perkins, answered the Appellants' Amended Verified Derivative Complaint, denying the allegations of wrongdoing. (R. pp. 0840-0852; R. pp. 0827-0839.)

On March 24, 2020, the Appellants moved for Partial Summary Judgment, among other things, that the MBRHOA's Board of Directors' powers under Section 4.1, Article IV of the Declaration are not optional, but affirmative obligations binding on each of the individual Board members. (R. pp. 0853-0857.) The Appellants filed a memorandum in support of their motion for Partial Summary Judgment on April 30, 2021. (R. pp. 0896-0987.)

On April 24, 2020, this case was assigned to the Business Court for Horry County. It was further ordered that this case be assigned to the Honorable R. Markley Dennis, Jr. (R. pp. 0005-0006.)

On March 22, 2021, the Respondents moved for Partial Summary Judgment and requested that the Court grant judgment by declaring Section 4.1, Article IV of the Declaration only grants

additional discretionary powers to the Board of Directors for MBRHOA, not mandatory obligations. (R. pp. 0858-0859.) Respondents filed a memorandum in support of their motion on April 28, 2021. (R. pp. 0860-0895.)

On May 4, 2021, after hearing arguments from counsel at a scheduled motion hearing, Judge R. Markley Dennis ruled from the bench and declared in his Order that "the language of Section 4.1 of Article IV of the Declaration grants additional powers or authority to the Board, but the Board is not required to exercise those powers." The Court made this finding even though the Court also found that "[b]oth parties agree[d] that section 3.2 of Article III of the Declaration and Section 8 of the By-Laws mandate[d] certain Board actions." (R. pp. 0007-0013.) In so declaring, the Court granted the Respondents' Motion for Partial Summary Judgment as to the Appellants' Third Cause of Action, while at the same time denying the Appellants' Motion for Summary Judgment. (R. pp. 1968-1981; R. pp. 0007-0013.)

On January 10, 2022, the Court signed the proposed order granting the Respondents' Motion for Partial Summary Judgment. (R. pp. 0007-0013.)

The Appellants filed a Motion to Reconsider on January 18, 2022. (R. pp. 0988-1012.)

By email dated April 6, 2022, Judge Dennis communicated to all counsel of record his decision to deny the Appellants' Motion to Reconsider. Judge Dennis requested Respondents prepare the Order, and counsel for Respondents submitted the proposed Order to Judge Dennis' chambers by email dated April 7, 2022. Judge Dennis retired without issuing a written Order on the Motion to Reconsider and Court administration assigned this action to Judge William H. Seals, Jr. by Order dated August 26, 2022, for the handling of all matters, including "all pretrial motions and other matters pertaining to this case." (R. pp. 0014-0016.)

On October 5, 2022, the Court denied Appellants' Motion to Reconsider without a hearing and also without further input from the attorneys. (R. pp. 0017-0021.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the circuit court under Rule 56(c), SCRCP, to wit: summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); *see also* Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E .2d 326, 330 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed strongly against the moving party).

When further inquiry into the facts of the case is desirable to clarify the application of the law, summary judgment is not appropriate. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct.App.2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004). Stated differently, "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

STATEMENT OF FACTS

The Myrtle Beach Resort ("Resort") is a condominium project located just south of the City of Myrtle Beach, South Carolina. It is composed of four separate horizontal property regimes: (a) Myrtle Beach Resort Horizontal Property Regime, Inc. ("HPR") consisting of 251 Residential Units; (b) Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime ("Ocean Front Spa") consisting of 267 Residential Units and 4 Commercial Units for a total of 271 Units; (c) Renaissance Tower Horizontal Property Regime, Inc. ("Renaissance Tower") consisting of 322 Residential Units and 5 Commercial Units for a total of 327 Units; and (d) Myrtle Beach Resort Five Seasons Centre Council of Co-Owners, Inc. ("Five Seasons Centre") consisting of 156 Residential Units and 5 Commercial Units. (Collectively known as "Four Individual Condominium Regimes"). Thus, in total the Resort consists of 996 Residential Units and 14 Commercial Units, as well as many recreational amenities available to the members and guests of the Resort. (R. pp. 2032-2420; R. pp. 2437-2465.) (R. p. 0320, ¶ 6.) A fifth regime was intended to be developed, but was never developed.

The Master Deed and Bylaws for the four separate horizontal property regimes located within the Resort were recorded in the Office of Register of Deeds for Horry County, South Carolina as follows:

a. HPR's Master Deed and Bylaws was recorded on June 6, 1982 in Deed Book 750, at Page 642;
b. Ocean Front Spa's Master Deed and Bylaws was recorded on April 25, 1983 in Deed Book 789 at Page 362;
c. Renaissance Tower's Master Deed and Bylaws was recorded on November 28, 1984 in Deed Book 917, at Page 885; and
d. Five Seasons Centre Master Deed and Bylaws was recorded on June 20, 1985 in Deed Book 966, at Page 654. (R. pp. 2032-2420; R. pp. 2437-2465.) (R. p. 0320, ¶ 6.)

The Master Deed and Bylaws for the separate horizontal property regimes are almost identical with one another and all four regimes contain the same provision for Article XVIII. This

Article grants authority to the Declarant or his successors and assigns in interest the right to create a Master Association. Article XVIII provides in pertinent part as follows:

> ***The Co-Owners shall each be members of The Myrtle Beach Resort Homeowners Association and as such shall pay pro rata with the Owners of other dwelling Apartments and other interests in real property within the Resort who shall be given similar easements and license of use all costs of maintenance, upkeep, and repair arising out of or associated with the Resort Facilities as such exist from time to time; such costs to include, but not limited to, providing management supervision and control thereof, property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith (herein collectively "Resort Expenses"). Such Resort Expenses shall be included as an item of Common Expense and paid over by the Council of Co-Owners to Declarant, its successors or assigns in interest as developer of the Resort (or Present Owner, as the case may be), or its designee,*** upon such schedule (but not more frequently than once a month) and in advance for use for such purpose, provided the Board or the Council of Co-Owners shall be entitled to an annual accounting of the use of all Resort Expenses by Declarant or its designee. In the event of non-payment of Resort Expenses, Declarant, or if appropriate its designee, shall be subrogated to the rights of the Council of Co-Owners as to the individual Co-Owners to collect the Resort Expenses from the Co-Owners, including being subrogated to all lien rights for non-payment of Common Expenses as described in the Master Deed. (Emphasis added).
>
> . . .
>
> Declarant (its successors or assigns in interest as developer of the Resort or Present Owner, as the case may be) may, in its sole discretion ***establish the Myrtle Beach Resort Homeowners Association (herein "Homeowners"), which shall be an association (which may in Declarant's sole discretion, be incorporated as a corporation or as corporation not for profit or unincorporated) and all Co-Owners shall, in addition to being Co-Owners, automatically become members thereof.*** In addition, the Board of Directors shall elect one of its members who shall serve on the Board of Directors of the Homeowners. The Board of Directors shall be comprised of one representative from ... [each of the existing and future Regimes], one representative from Myrtle Beach Resort Horizontal Property Regime, one representative from Myrtle Beach Oceanfront Spa Horizontal Property Regime and one representative from each other development as Declarant as developer of the Resort shall designate. ***In the event of such establishment, Declarant shall designate Homeowners as its designee to carry out the duties and responsibilities and have the powers granted herein to Declarant's designee.*** In addition, Declarant (its successors or assigns in interest as developer of the Resort or Present Owner as the case may be) may, in its sole discretion, at any time convey to the Regime and its Co-Owners and/or any other horizontal property regimes or other multi-family developments within the Resort or which Declarant has developed in close proximity to the Resort having the like non-exclusive easements and Licenses for use, or to Homeowners, all or any portion of the Resort Facilities

> or any interests therein, provided such shall be for no consideration other than actual cost of such improvement or facility. Declarant... retaining unto itself and the right to grant to such third parties as it may designate easements and licenses for use consistent with the conveyed facilities and contracts for management thereof and all matters and right theretofore of record. **In such event, such documents shall be considered an amendment to this Master Deed and execution only by the Declarant (or its successors or assigns in interest as developer of the Resort or Present Owner as case may be), shall be sufficient and no execution, concurrence or consent shall be required of the Council of Co-Owners, any Co-owner, any Mortgagee or any third-party whatsoever.** (Emphasis added).

The MBRHOA was created as an umbrella or "Master Association" for HPR, Five Seasons Centre, Renaissance Tower, and Ocean Front Spa Condominium Regimes as evidenced by the Articles of Incorporation filed with the South Carolina Secretary of State on April 30, 1987 as well as the Master Deeds for HPR, Five Seasons Centre, Renaissance Tower, and Ocean Front Spa. (R. pp. 2215-2218; R. pp. 2131-2134; R. pp. 2327-2330; R. pp. 2437-2476; R. pp. 0997-0998.)

On March 18, 1987, the Original Declarant[1] ("Assignor") assigned its rights under Articles X1V, XVIII, and XIX, of the Master Deeds for HPR, Five Seasons Centre, Renaissance Tower, and Ocean Front Spa to Vacation Properties, Inc. ("Assignee Declarant" or "Vacation Properties") by an Assignment of Declarant Rights filed in the Office of the Clerk of Court for Horry County, South Carolina in Deed Book 1121, Page 401 on March 18, 1987 ("First Assignment"). (R. pp. 2007-2018.) Specifically, Original Declarant granted, conveyed and assigned to Vacation Properties under subparagraph (1) the following:

a. all of the Assignor's rights, title and interest (on a non-exclusive basis) in and to the easements reserved by Assignor under Article XIV of the Master Deed, including but not limited to easements for access to and for ingress and egress across portions of the Regime Property for pedestrian and vehicular purposes, and easements across the Regime Property for the purpose of providing access to the beach area which is part of the Regime Property, together with a license to use the beach area which is part of the Regime Property;

[1] The Original Declarant was Resort Development Corp (f/k/a Resort Investment Corp).

b. all of the Assignor's rights reserved by Assignor under Article XIV of the Master Deed to grant the easements described in subparagraph a. above to those persons or entities designated in Article XIV;

c. all of the Assignor's rights reserved by Assignor under Article XVIII of the Master Deed to add any part or all of portions of the Resort Property now owned or hereafter acquired by the Assignee to the Resort (as defined in the Master Deed), including but not limited to the Assignor's reserved right to grant easements for ingress and egress across areas of the Regime Property to the Atlantic Ocean and its beach;

d. ***all of the Assignor's rights reserved under Article XIV of the Master Deed to establish a master homeowners association for the present and future owners of any part or all of the Resort Property***; and

e. all of the Assignor's rights under Article XIX of the Master Dees to convey additional property located within the Resort Property to the regime and its co-owners, subject to the restrictions set forth in said Article XIX. (R. pp. 2007-2018.) (Emphasis added).

On October 10, 1987, Vacation Properties conveyed one (1) acre to MBRHOA as shown in Plat Book 98 at 13; the Deed was recorded in Deed Book 1173 at 404 in the Office of the Clerk of Court for Horry County, South Carolina. Stated consideration was $5.00. (R. pp. 2421-2424.)

On January 19, 1988, Resort Development Corp. (f/k/a Resort Investment Corp.) deeded to MBRHOA the following Commercial Units A, B and D located in the Ocean Front Spa HPR; A = laundry; B= bar & food; D = game room; the Deed dated November 20, 1987 and recorded in Deed Book 1192 at 467 in the Office of the Clerk of Court for Horry County, South Carolina. Stated consideration was $40,000.00. (R. pp. 2425-2428; R. pp. 0371 - 0372, ¶ 77.)

On February 2, 1989, Vacation Properties deeded to MBRHOA the following properties: Parcel One (1) consisting of 2.357 acres (Commercial Area "A"); Parcel Two (2) consisting of .639 acres designated as "18' and 5' Landscape Buffer Zone," and Parcel Three (3) – Commercial Units A, B, C, D and E located in the Renaissance Tower HPR. The Deed was recorded on February 2, 1989 in Deed Book 1284 at 223 in the Office of the Clerk of Court for Horry County,

South Carolina. Stated consideration was $501,000.00. (R. pp. 2429-2432; R. pp. 0371 – 0372, ¶ 77.)

On February 2, 1989, Vacation Properties assigned its rights under the Master Deeds, including Articles X1V, XVIII, and XIX of each of the Master Deeds, to MBRHOA (hereinafter "Assignee Declarant") by an Assignment of Declarant Rights filed in the Office of the Clerk of Court for Horry County, South Carolina in Deed Book 1284 at 239 on February 2, 1989 (hereinafter "Second Assignment"). (R. pp. 2019-2031.)

On February 3, 1989, Resort Development Corp. (f/k/a Resort Investment Corp) conveyed to MBRHOA the following property: 50' entry road. The Deed was recorded on February 2, 1989 in Deed Book 1284 at 624 in the Office of the Clerk of Court for Horry County, South Carolina. Stated consideration was $3,000.00. (R. pp. 2433-2436.)

On April 25, 1991, in accordance with the rights granted to the MBRHOA under Article XVIII of the Master Deeds, and pursuant to the Second Assignment, the MBRHOA's Board filed a Declaration of Covenants, Conditions and Restrictions and Amended By-Laws for the Myrtle Beach Resort Homeowners' Association, Inc. in the Office of Register of Deeds Horry County, South Carolina in Deed Book 1465 at Page 329 ("Declaration"). The Declaration was signed by the authorized representatives from all four regimes as well as the authorized representative of the MBRHOA. (R. pp. 2437-2476.)

The aforementioned Condominium Regimes agreed to MBRHOA's creation and to be bound by its Declaration of Covenants, Conditions and Restrictions and Amended By-Laws which were imposed for the purpose of protecting the value and desirability of these properties. The Declaration runs with title to the real property subjected to the Declaration and is binding on all

parties having any right, title or interest in these described properties or any portion of them. (R. pp. 2437-2465.) (R. pp. 2437-2476.)

In addition thereto, the authority of the MBRHOA's Board, arises from, the individual Master Deeds of the aforementioned Condominium Regimes which specifically reserves to the developer the right to establish the MBRHOA. (R. pp. 2032-2420; R. pp. 2437-2465; R. pp. 0988-1012.) (Emphasis added).

Moreover, all of the developer's reserved rights were assigned to the MBRHOA by that Assignment of Rights dated January 27, 1989 and filed of record in the Office of the R.M.C. for Horry County in Deed Book 1284 at Page 239. (R. pp. 2019-2031.)

As structured, the MBRHOA is managed by a four-member Board of Directors and each member of the Board is from one of the four horizontal property regimes that make up the MBRHOA. The Board has the power and the obligation to perform certain services or functions on behalf of the property owners under subsections (a) through (i) of Section 4.1, Article IV of the Declaration in order to control and manage the MBRHOA for their benefit. Moreover, each Director is assigned the number of votes that represents the number of units (whether residential or commercial) that exists in that director's individual regime.[2] There are 1,010 combined residential and commercial votes for any action taken at a meeting of the Board members for MBRHOA in the Myrtle Beach Resort. Under the MBRHOA's By-Laws Section 7 in order for any action to be approved by the Board, at least sixty-seven percent (67%) of the entire representative votes of the members of the MBRHOA must approve. In effect, this requires three of the four Board Members to agree to any action. (R. pp. 2466-2476.)

[2] For example, the voting director of Myrtle Beach Resort Horizontal Property Regime has 251 votes; the voting director of Myrtle Beach Resort Ocean Front Spa Horizontal Property Regime has 271 votes; the voting director of Renaissance Tower Horizontal Property Regime has 327 votes; and the voting director of Myrtle Beach Resort Five Seasons Centre Horizontal Property Regime has 161 votes.

Over the last six (6) years, the four (4) member Board of Directors for the MBRHOA and the underlying associations have disagreed about the legality of the MBRHOA, interpretation of the Declaration, the duties of the MBRHOA, and numerous other aspects pertaining to the upkeep and repair of the property belonging to MBRHOA. Specifically, the Respondents contend MBRHOA's Declaration and the By-Laws ***"may be flawed or invalid to the extent that [they] exceed the reserved authority provided under the Master Deed . . ."*** for the four individual horizontal property regimes located inside Myrtle Beach Resort. (R. pp. 2003-2005; R. pp. 0344-0375; R. pp. 0156-0338.) (Emphasis Added).

This action was commenced by Appellants derivatively on behalf of the MBRHOA on May 24, 2018, by the filing of their Verified Complaint seeking Declaratory Judgment Relief, among other things, that the Respondents have affirmative duties under MBRHOA's governing documents regarding administration and management of the Myrtle Beach Resort Property. However, the Respondents seek to challenge the validity, enforceability, and interpretation of the Declaration and the By-Laws for MBRHOA. (R. pp. 2003-2005; R. pp. 0156-0338; R. pp. 0344-0375.)

In an effort to resolve the parties' disagreements regarding the interpretation of the restrictive covenants, the duties of the MBRHOA's Board, and numerous other aspects pertaining to the upkeep and repair of the resort property, the Appellants and Respondents both filed separate Motions for Partial Summary seeking a determination from the Court whether the Section 4.1 powers read in conjunction with the Declaration and Article IV, Section 8(a) through (e) of the Amended By-Laws as whole are mandatory or discretionary. (R. pp. 0896-0987.)

On January 10, 2022, the Court granted the Respondents' Motion for Partial Summary Judgment ("Order"). (R. pp. 0007-0013.)

On October 5, 2022, Judge William H. Seals, Jr., denied Appellants' Motion to Reconsider without a hearing and also without further input from the lawyers. (R. pp. 0017-0021.)

The Appellants assert following exceptions with the Court's findings of fact and conclusion of law as stated in the Court's aforementioned Orders for the reasons set forth below:

ARGUMENT

I. THE COURT ERRED IN CONCLUDING SECTION 4.1 OF THE DECLARATION WHEN READ IN CONJUNCTION WITH THE LANGUAGE OF THE DECLARATION, AMENDED BY-LAWS, AND HORIZONTAL PROPERTY REGIME ACT DOES NOT EXPRESSLY AND/OR IMPLIEDLY ESTABLISH CORRESPONDING DUTIES AND MANDATORY OBLIGATIONS ON THE PART OF THE BOARD WITH CERTAIN DISCRETIONARY POWERS UNDER THIS SECTION.

Section 4.1 of Article IV of the Declaration states:

> The Association, acting through the Board of Directors, ***shall also have the power*** to: (a) maintain all streets and roads within the Property, including cleaning and periodic resurfacing; (b) provide for all refuse collection; (c) obtain, for the benefit of the Property, by purchase, lease or otherwise, as deemed proper by the Board of Directors, cable or master television service and telephone service; (d) maintain the oceanfront area; (e) grant easements, rights-of-way or strips of land, where necessary, for utilities, and sewer facilities and other services over the Common Areas to service the Property; (f) maintain such policy or policies of liability and fire insurance with respect to property owned by the Association; (g) *employ or contract with a management company to perform all or any part of the duties and responsibilities of the Association, including further duties and responsibilities which may be delegated to the Association by the Individual Condominium Associations and to equitably apportion assessments of same; (h) install and maintain security devices, detectors and communication facilities and contract for employment of security services, guards and watchmen for the project*; (i) take such other reasonable action as the Board shall deem advisable with respect to the Myrtle Beach Resort for the benefit of the overall Property. (R. pp. 2443-2444.) (Emphasis added.)

"Restrictive covenants are ***contractual in nature and bind the parties thereto in the same manner as would any other contract.***" Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (2006) (quoting from

Seabrook Island Prop. Owners Assoc. v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987)).[3] (Emphasis added). The paramount rule of contract construction is to ascertain and give effect to the intent of the parties as determined from the whole document. RV Resort and Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc., 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010) (citing Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998)). Where the agreement in question is a written contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) (citing Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962)). The specific words and phrases of a covenant cannot be read exclusive of other contractual provisions. (20 Am Jur. 2d Covenants, Conditions, and Restrictions § 15.) In interpreting any single provision in a covenant, the entire agreement must be viewed as a whole. Id. Wherever possible, a covenant should be construed to give effect to all of the provisions and to avoid

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[3] Restrictive covenants differ from contracts in that they "run with the land," meaning that they are enforceable by and against later grantees. 17 S.C. Jur. Covenants § 18 (2005). Restrictive covenants that require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which "touch and concern" land, and therefore, run with the land. Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) ***by declaration***; and (3) ***by implication from a general plan or scheme of development.*** 17 S.C. Jur. Covenants § 60. The initial restrictive covenants applicable to Palmetto Dunes were created by the Declaration of Covenants when Palmetto Dunes Resort executed and recorded the 1972 Covenants. See Smith v. Commissioners of Pub. Works, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994); 17 S.C. Jur. Covenants § 8.

Restrictive covenants will be enforced unless they are indefinite or contravene public policy. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). Moreover, a developer may generally reserve to himself the right to amend restrictive covenants in his sole discretion, and may do so without the consent of the grantee, so long as he exercises that right in a reasonable manner. Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So.2d 665, 666 (Fla. Dist. Ct. App. 1974) (citing Johnson v. Three Bays Props. # 2, Inc., 159 So.2d 924, 925 n.1 (Fla. Dist. Ct. App. 1964)), cited with approval in Wright v. Cypress Shores Dev. Co., Inc., 413 So. 2d 1115, 1123-24 (Ala. 1982); Rossman v. Seasons at Tiara Rado Assocs., 943 P.2d 34, 37 (Colo. Ct. App. 1996); Markey v. Wolf, 92 Md. App. 137, 607 A.2d 82, 94 (Md. Ct. Spec. App. 1992); Appel v. Presley Cos., 111 N.M. 464, 806 P.2d 1054, 1056 (N.M. 1991); Scoville v. SpringPark Homeowner's Assoc., Inc., 784 S.W.2d 498, 509 n.7 (Tex. App. 1990); Lakemoor Cmty. Club, Inc. v. Swanson, 24 Wn. App. 10, 600 P.2d 1022, 1025 (Wash. Ct. App. 1979).

rendering any provision meaningless. Id. Documents will be interpreted to give effect to all of their provisions, if practical. Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385 (1991)). One part of the contract should not be interpreted to annul another provision of the same contract. Any inconsistency between a general clause and a specific clause must be resolved in favor of the specific. In re Crawford, 532 B.R. 645, 646 (Bankr. D.S.C. 2015).

Article IV, Section 4.1 of the Declaration lists the Powers of the Association and states, "The Association, acting through the Board of Directors, shall also have the power to: ...." (R. pp. 2443-2444.) As stated above, the covenant must be construed to give effect to all provisions. In accordance with the law, Article IV of the Declaration must then be read in light of Article IV, subsection 8(e) of the Amended By-Laws which states, "Consistent with these By-Laws and applicable Declarations, the Board ***shall***: . . . ***exercise all rights granted it by these By-Laws, the Declaration, and the Act.***" (R. p. 2470.) (Emphasis added). Additionally, Article IV of the Declaration must be read in light of Article III, Section 3.2 of the Declaration which states, "***This Board of Directors shall act in accordance with the By-Laws*** . . . ." (R. p. 2443.) (Emphasis added). When these three Sections are read in conjunction, the Amended By-Laws mandate the exercise of all powers of the MBRHOA in Article IV of the Declaration. Rights are synonymous with powers. See also, Black's Law Dictionary (6th ed. 1990) (defining ***"right"*** as ***"[a] power."***). (R. pp. 0992-0994.) (Emphasis added).

The introductory phrase "***shall also have the power to***" must be read in conjunction with Article IV, subsection 8(e) of the Amended By-Laws which mandates the Board exercise all enumerated powers set forth in Section 4.1. (R. p. 2470; R. pp. 0994-0995.) (Emphasis added).

In the Order granting Partial Summary Judgment, the Court concluded that subsection 8(e),

read in conjunction with the Amended By-Laws and the Declaration as a whole, merely affirms the purported discretion granted to the MBRHOA's Board in Section 4.1. (R. pp. 0011-0012.) Further, the Court determined, when compared with the other language in the Declaration and the Amended By-Laws, [it] could not reconcile the documents in any other way than to conclude Section 4.1 grants additional discretionary powers without any mandatory duties. (R. p. 0012.) The Court reasoned that "[a]ny other interpretation eviscerates Section 4.1(i) of Article IV of the Declaration, which grants the Board the power to 'take other such reasonable action as the Board shall deem advisable with respect to the Myrtle Beach Resort for the benefit of the overall Property." (R. p. 0012; R. p. 0995.)

The Court erred in interpreting the language in Section 4.1 as purely discretionary where Section 3.2 of Article III of the Declaration and the subsection (a), (b), (c), (d), and (e) of Section 8 of Article IV of the Amended By-Laws require mandatory action from the Board of its Section 4.1 powers. (R. p. 2470.)

Article IV, Section 8 of the Amended By-Laws supports the Appellants' argument. This section of the By-Laws states in relevant part:

> Consistent with these By-Laws and applicable Declarations, the Board ***shall***: ***(a) transact all Association business ...; (b) annually set a budget for the Association; (c) fix, impose, and remit penalties for violations of these By-Laws and the rules and regulations of the Association; (d) elect from the Board... the President, Vice-President, Secretary and Treasurer; (e) carry out all other duties and obligations imposed and exercise all rights granted it by these By-Laws, the Declaration, and the Act.*** (R. p. 2470.) (R. p. 0995.) (Emphasis added)

All parties agree that Section 3.2 of Article III of the Declaration and Section 8 of Article IV of the Amended By-Laws require mandatory action from the Board as indicated in the Court's Order. (R. p. 0011; R. p. 0995.)

The Court incorrectly concluded in its Order that subsection 8(e), when read in conjunction

with the Amended By-Laws and the Declaration as a whole, "***corroborates the discretion granted to the Board in Section 4.1.***" (R. p. 0011.) (Emphasis Added). The Court's construction of subsection 8(e) in light of Section 4.1of the Declaration is not a reasonable and fair interpretation consistent with the meaning of the subsection's defined terms, which provide that the Board ***shall***: . . . ***exercise all rights granted it by these By-Laws, the Declaration, and the Act.***" (R. p. 2470; R. pp. 0995-0996.) For example, "[a]according to Black's Law Dictionary, "shall," as used in contracts, means "***imperative or mandatory***." Black's Law Dictionary (6th Ed. 1990)." (Emphasis added). Palmetto Bank v. Bank First, No. 6:08-cv-4072-GRA, 2009 U.S. Dist. LEXIS 6391, at 6-7 (D.S.C. Jan. 27, 2009). "***'Shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation.***" Id. (Emphasis added). Also, according to Black's Law Dictionary, the term "exercise" as used in contracts means "***to exercise the right or power***" or ***"to transact or execute"***. Black's Law Dictionary (6th ed. 1990) (Emphasis added). Finally, the term "right" as used in contracts means "***[a] power***". Black's Law Dictionary (6th ed. 1990). (R. pp. 0994-0995.) (Emphasis added). Considering the wording and the definitions of the terms: "shall", "exercise", and "right" as used in Article IV, subsection 8 (e) of the By-Laws, the Court should have determined that subsection 8(e) does not corroborate in any way that discretionary powers were only granted to the Board under Section 4.1 without corresponding duties based upon the applicable standards of construction and common sense application of the rules for contract interpretation as discussed below in the subheadings A, B, C, and D. (R. p. 0996.)

A. THE PLAIN LANGUAGE OF ARTICLE XVIII OF THE MASTER DEEDS FOR THE INDIVIDUAL CONDOMINIUM REGIMES STATES THAT THE DECLARANT INTENDED FOR THE MBRHOA'S BOARD OF DIRECTORS TO HAVE MANDATORY DUTIES UNDER SECTION 4.1

It is important to note that once the MBRHOA's Declaration and Amended By-Laws were filed on April 25, 1991 in the Office of Register of Deeds Horry County, South Carolina in Deed

Book 1465 at 329 and said governing documents became an amendment to the Master Deeds for the three of the Regimes: Ocean Front Spa, Renaissance Tower, and Five Seasons Centre pursuant to the express language of Articles XVIII included in each of their Master Deeds. (R. p. 0997.) Article XVIII of each of these three respective Master Deeds provides in pertinent part:

> ***The Co-Owners shall each be members of The Myrtle Beach Resort Homeowners Association and as such shall pay pro rata with the Owners of other dwelling Apartments and other interests in real property within the Resort who shall be given similar easements and license of use all costs of maintenance, upkeep, and repair arising out of or associated with the Resort Facilities as such exist from time to time; such costs to include, but not limited to, providing management supervision and control thereof, property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith (herein collectively "Resort Expenses"). Such Resort Expenses shall be included as an item of Common Expense and paid over by the Council of Co-Owners to Declarant, its successors or assigns in interest as developer of the Resort (or Present Owner, as the case may be), or its designee,*** upon such schedule (but not more frequently than once a month) and in advance for use for such purpose, provided the Board or the Council of Co-Owners shall be entitled to an annual accounting of the use of all Resort Expenses by Declarant or its designee. In the event of non-payment of Resort Expenses, Declarant, or if appropriate its designee, shall be subrogated to the rights of the Council of Co-Owners as to the individual Co-Owners to collect the Resort Expenses from the Co-Owners, including being subrogated to all lien rights for non-payment of Common Expenses as described in the Master Deed. (Emphasis added).
>
> ***Declarant (its successors or assigns in interest as developer of the Resort or Present Owner, as the case may be) may, in its sole discretion establish the Myrtle Beach Resort Homeowners Association (herein "Homeowners"), which shall be an association (which may in Declarant's sole discretion, be incorporated as a corporation or as corporation not for profit or unincorporated) and all Co-Owners shall, in addition to being Co-Owners, automatically become members thereof. In addition, the Board of Directors shall elect one of its members who shall serve on the Board of Directors of the Homeowners.*** The Board of Directors shall be comprised of one representative from ... [each of the existing and future Regimes], one representative from Myrtle Beach Resort Horizontal Property Regime, one representative from Myrtle Beach Oceanfront Spa Horizontal Property Regime and one representative from each other development as Declarant as developer of the Resort shall designate. ***In the event of such establishment, Declarant shall designate***

> ***Homeowners as its designee to carry out the duties and responsibilities and have the powers granted herein to Declarant's designee***. In addition, Declarant (its successors or assigns in interest as developer of the Resort or Present Owner as the case may be) may, in its sole discretion, at any time convey to the Regime and its Co-Owners and/or any other horizontal property regimes or other multi-family developments within the Resort or which Declarant has developed in close proximity to the Resort having the like non-exclusive easements and Licenses for use, or to Homeowners, all or any portion of the Resort Facilities or any interests therein, provided such shall be for no consideration other than actual cost of such improvement or facility. Declarant... retaining unto itself and the right to grant to such third parties as it may designate easements and licenses for use consistent with the conveyed facilities and contracts for management thereof and all matters and right theretofore of record. ***In such event, such documents shall be considered an amendment to this Master Deed and execution only by the Declarant (or its successors or assigns in interest as developer of the Resort or Present Owner as case may be), shall be sufficient and no execution, concurrence or consent shall be required of the Council of Co-Owners, any Co-owner, any Mortgagee or any third-party whatsoever***. (R. pp. 2215-2217; R. pp. 2131-2134; R. pp. 2327-2330; R. pp. 2437-2465; R. pp. 0997-0998.) (Emphasis added).

The above incorporated language of Article XVIII shows that the Declarant intended for the Board of the MBRHOA to have corresponding duties and/or mandatory responsibilities under Section 4.1 for the purpose of collecting common expenses for, including but not limited to, *"**providing management supervision and control thereof, property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith (herein collectively Resort Expenses)**."* (R. pp. 2215-2217; R. pp. 2131-2134; R. pp. 2327-2330; R. p. 0998.) (Emphasis added).

The plain language of these Articles XVIII requires members of the MBRHOA to pay pro rata all costs of maintenance, upkeep, and repair arising out of or associated with the Resort Facilities as well as collecting common expenses for *"**property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith (herein collectively Resort Expenses)**."* (R. pp. 2215-2217; R. pp. 2131-2134; R. pp. 2327-2330; R. p. 0998.)

(Emphasis added).

It is illogical for the MBRHOA's Board to have only discretionary powers without corresponding duties and/or responsibilities under Section 4.1 of the Declaration, while at the same time still being required to prepare an annual budget under Article IV, Section 4 of the Amended By-Laws for the collection of resort expenses, including, but not limited to: (a) for maintaining all streets and roads within the Myrtle Beach Resort; (b) for all trash collection; (c) for obtaining, for the benefit of the four separate individual horizontal property regimes . . . cable or master television service and telephone service; (d) for maintaining the oceanfront area; (e) for granting easements, rights-of-way or strips of land, ***where necessary***, for utilities, and sewer facilities and other services over the Common Areas to service the four separate individual horizontal regimes; (f) for maintaining such policy or policies of liability and fire insurance with respect to property owned by the Association; (g) for contracting with a management company to perform all or any part of the duties and responsibilities of the Association; and (h) for installing and maintaining security devices, detectors and communication facilities and contracting for employment of security services, guards and watchmen for the Resort. (R. pp. 2443-2444; R. pp. 0998-0999.)

Based upon the foregoing, the Board of MBRHOA has both mutual and dependent obligations under the incorporated language of the Article XVIII of the respective Regime Master Deeds when read together with Section 4.1 of the Declaration and Article IV, Section 8 of the Amended By-Laws to collect common expenses from the membership for, including but not limited to, *"**providing management supervision and control thereof, property taxes, insurance, maintenance and reserve funds and all other costs connected or associated therewith (herein collectively 'Resort Expenses.**"* (R. pp. 2215-2217; R. pp. 2131-2134; R. pp. 2327-2330; R. p. 0999.) (Emphasis added).

B. THE HORIZONTAL PROPERTY REGIME ACT SUPPORTS MANDATORY DUTIES ON THE PART OF THE MBRHOA 'S BOARD OF DIRECTORS AND THEIR CIVIL LIABILITY FOR NOT COMPLYING WITH THEIR AFFIRMATIVE DUTIES.

The Declaration for MBRHOA states it was formed pursuant to the South Carolina Horizontal Property Act., Title 27, Chapter 31, Code of Laws of South Carolina, 1976, as amended. Subsection 8(e) of Article IV of the Amended By-Laws states, "***Consistent with these By-Laws and applicable Declarations, the Board shall: carry out all other duties and obligations imposed and exercise all rights granted it by these By-Laws, the Declaration, and the Act.***" (R. p. 2470; R. pp. 901-903.) (Emphasis added). Earlier in the document, Section 1.1.0 of the "Definitions" states "Act" shall mean the South Carolina Horizontal Property Regime Act, Title 27, Chapter 31, Code of Laws of South Carolina, 1976, as Amended. (R. p. 2438; R. p. 0904.) Two statutory provisions in the Horizontal Property Regime Act explain the purpose of Amended By-Laws and the necessity of compliance with Amended By-Laws. These provisions thereby lend further clarity to the fact that the powers of Section 4.1 powers must be interpreted as affirmative duties as discussed below. (R. p. 0904.)

S.C. Code Ann. § 27-31-150 states "The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease." This statutory provision notes that By-Laws must be part of the documents of the horizontal property regime and that the administration of the property must be governed by such. This language gives additional force to Article IV, subsection 8(e) of the Amended By-Laws and further confirms that the MBRHOA, through the Board of Directors, must carry out the statutory duties, obligations, and rights granted to them in the Declaration as mandated by the Amended By-Laws. (R. pp. 0904-0905.)

Section 27-31-170 then explains the necessity of compliance with the By-Laws and the remedy for non-compliance. This section provides that:

> Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified in the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.

(R. p. 0905.)

Similarly, Article VI, Section 2 of the Declaration provides in pertinent part:

> Failure to comply with any of the same shall be grounds for imposing fines, for suspending rights of use in and to the Recreational Amenities, or for instituting an action to recover sums due, for damages and/or ***for injunctive relief, such actions to be maintainable by the Board of Directors on behalf of the Association, or in a proper case, by an aggrieved Owner***. . . . Inasmuch as the enforcement of the provisions of this Declaration, the By-Laws and the rules and regulations of the Association are essential for the effectuation of the general plan of development contemplated hereby and for the protection of present and future Owners, ***it is hereby declared that any breach thereof may not adequately be compensated by recovery of damages, and that the Association, in addition to all other remedies, may require and shall be entitled to the remedy of injunction to restrain any such violation or breach or any threatened violation of breach***. (R. p. 0905.) (Emphasis Added).

Thus, by not exercising the rights granted them in Article IV, Section 4.1 of the Declaration, as mandated by Article III, Section 3.2 of the Declaration and the Amended By-Laws, under Article IV, Section 8 (a) through (e), the MBRHOA's Board is subject to injunctive relief and liability for damages to the aggrieved co-owners. Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987)("The Association is bound to follow the covenants and its own bylaws."); *See* Alala v. Peachtree Plantations, Inc., 292 S.C. 160,

167, 355 S.E.2d 286, 290 (Ct. App. 1987) (Of course, all parties must be obligated under a contract in order for it to be enforceable.) (Citing as authority 1A A.L. CORBIN, CORBIN ON CONTRACTS § 152 (1963); 1S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 105A (3d ed. 1957) and also the case of Humble Oil & Refining Co. v. DeLoache, 297 F. Supp. 647, 658 (D.S.C. 1969) (Judge Russell: "In the law of contracts, mutuality, both in definition and application, is largely synonymous with consideration."). There is no mutuality of obligation in a unilateral contract. Towles v. United Healthcare Corp., 338 S.C. 29, 38, 524 S.E.2d 839, 844 (Ct. App. 1999). The Respondents' contention that Article IV, Section 4.1 powers are optional means that the Declaration and Amended By-laws are merely a unilateral restrictions without any mutual obligations and/or duties of care owed to the Regimes or their owners by the Board of the MBRHOA. This contention is contrary to the common law and statutory law of South Carolina for the reasons described above. (R. pp. 0905-0906.)

C. THE PLAIN LANGUAGE OF SECTIONS 27-31-160 AND 240 WHEN READ IN CONJUNCTION WITH THE LANGUAGE OF THE DECLARATION AND AMENDED BY-LAWS AS A WHOLE, IS FURTHER PROOF THAT THE DECLARANT INTENDED FOR SECTION 4.1 POWERS TO ALSO INCLUDE MANDATORY DUTIES ON THE PART OF MBRHOA'S BOARD OF DIRECTORS.

The Declarant's (e.g. the four Individual Regimes) incorporation of the Horizontal Regime Property Act ("Act"), Title 27, Chapter 31, Code of Laws of South Carolina, 1976, as amended, as a part of the Declaration and Amended By-Laws is further proof that the Declarant and/or the Regimes intended for Section 4.1 to include mandatory obligations on the part of the Board. (R. p. 2438.) (See Ayres v. Crowley, 205 S.C. 51, 53, 30 S.E.2d 785, 785 (1944) (When parties enter into a contract, ***all the laws of a state that may relate to the subject-matter of the contract are part of that contract. Every contract entered into in South Carolina embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated***). (R. p.

0999.) (Emphasis added).

Two statutory provisions in the Horizontal Property Regime Act that explain the underlying purpose and mandatory obligations of the Amended By-Laws, such as the Board's obligation to purchase property insurance against risks lends further clarity to the fact that the Declarant intended for the Section 4.1 powers to include mandatory duties. (R. p. 0999.)

For example, Section 27-31-240 provides that "***the council of co-owners [and/or Board] shall insure the property against risks.***" The incorporation of this statute as a part of the Declaration and Amended By-Laws is confirmation that the Declarant intended for the Board under subsection (f) of Section 4.1 of the Declaration to affirmatively "***maintain . . . policies of liability and fire insurance with respect to property owned by the Association.***" (R. pp. 0999-1000.)

Further, Section § 27-31-160 provides that the "***bylaws must necessarily provide for the care, upkeep and surveillance of the property and it's general or limited common elements and services.***" The incorporation of this statute as a part of the Declaration and Amended By-Laws is also proof that the Declarant intended for the Board to affirmatively provide for: "(a) the maintenance of all streets and roads within the Property . . ." ; "(b) all refuse collection"; "(c) obtaining, for the benefit of the Property . . . cable or master television service and telephone service;" "(d) the maintenance of the oceanfront area;" "(e) granting easements, rights-of-way or strips of land, ***where necessary***, for utilities, and sewer facilities and ***other services over the Common Areas to service the Property***;" and "(h) installation and maintenance for security devices, detectors and communication facilities and contracting for employment of security services, guards and watchmen for the Project." (R. p. 1000.)

In its Order denying the Appellants' Motion to Reconsider, the Court incorrectly found that

Sections 27-31-160 and 240 do not mandate the Board exercise certain powers set forth in Section 4.1. (R. pp. 0017-0021.) In other words, the Court found that the MBRHOA Board of Directors could simply ignore its statutory requirements.

With regard to Section 27-31-240, the Court found this statute does not require the Board of Directors to insure the property because the Act does not mention the term "Board of Directors." (R. p. 0019.) However, Section 27-31-90 under the Horizontal Property Act allows the Council of Co-Owners to incorporate into a non-profit corporation under the Nonprofit Corporation Act found in Chapter 13 of Title 33 of the South Carolina Code. Specifically, Section 27-31-90 provides in pertinent part: "Nothing herein contained shall prohibit any council of co-owners from incorporating pursuant to the laws of South Carolina for the purpose of the administration of the property constituted into a horizontal property regime." (Order Denying Motion to Reconsider, Alter, or Amend, pp. 1-5). Moreover, Section 33-31-801 (a) of the South Carolina Nonprofit Corporation Act provides in pertinent part that "***[e]ach corporation must have a board of directors . . . all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board.***" (Emphasis added). Accordingly, the Court's ruling is misplaced for the following reasons. First, the council of co-owners can incorporate pursuant to the laws of South Carolina. Second, the incorporated council of co-owners' Board of Directors is still required to insure the property. See Condominiums § 29. *Mandatory insurance of common property.* ("The South Carolina Act requires the board of administration to maintain insurance coverage on all the common property of the condominium regime although the amount and type of insurance required are not specified. Insurance premiums constitute a common expense.") (Internal citations omitted). (R. pp. 0017-0021.)

Similarly, with regard to Section 27-31-160, the Court found the statute does not mandate

the association's board of directors do anything. (R. p. 0019.)

However, the Court's above ruling is misplaced and in error for the following reasons. First, Section 27-31-160 does mandate that the incorporated council of co-owners' Board of Directors must plan "***for the care, upkeep and surveillance of the property and it's general or limited common elements".*** 4 S.C. Jur. Condominiums § 13 **(The *condominium regime must be governed by by-laws, which are appended to and recorded with the master deed or master lease. The by-laws must provide: . . . (c) a plan for the care and maintenance of the property; (d) the means by which common expense is collected from the apartment owners; and (e) the method of hiring and firing personnel necessary to operate and care for the common elements of the regime".*** (citations omitted). Moreover, Section 27–31–190 provides in pertinent part: ***"The co-owners of the apartments are bound to contribute pro rata ... toward the expenses of administration and of maintenance and repair of the general common elements."*** (Emphasis added).

Based upon the foregoing, the MBRHOA Board has an implied duty to "***provide for the care, upkeep and surveillance of the property and it's general or limited common elements".*** See 4 S.C. Jur. Condominiums § 21 (The care and upkeep of regime common elements, both general and limited, must be addressed in the condominium by-laws.); compare. Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 409 S.C. 164, 179, 760 S.E.2d 121, 129 (Ct. App. 2014) (the Court of Appeals determined "that even though the By-Laws do not specifically state the Council had a duty to investigate, ***the duties created by the Bylaws and South Carolina law also support a duty to investigate who is responsible for damage to the common elements***). (Emphasis added).

D. THE PLAIN LANGUAGE OF SECTION 6.4 OF THE DECLARATION WHEN READ TOGETHER WITH S.C. CODE ANN. §§ 27-31-160 AND 240 OF THE ACT, AS WELL AS SECTIONS 4 AND 8 OF ARTICLE IV OF THE AMENDED BY-LAWS AS A WHOLE, INDICATES THAT THE

DECLARANT INTENDED FOR SECTION 4.1 TO INCLUDE CORRESPONDING DUTIES ON THE PART OF THE MBRHOA'S BOARD OF DIRECTORS.

Section 6.4 provides in pertinent part; ***"the provisions of the Declaration shall be liberally interpreted and, if necessary, they shall be so extended or enlarged by implication as to make them fully effective."*** (R. pp. 2447-2448.) (Emphasis added). Additionally, Section 6.2 of Article VI provides in pertinent part: ***"the enforcement of the provisions of this Declaration, the By-Laws and the rules and regulations of the Association are essential for the effectuation of the general plan of development contemplated hereby and for the protection of present and future Owners . . . ."*** (R. pp. 2446-2447.) (Emphasis added). Enforcement of the provisions of the Declaration, the By-Laws, and the rules and regulations of the MBRHOA are clearly indispensable in order to maintain a viable plan of development and also for the protection of present and future Owners. (R. pp. 1001-1002.)

Additionally, Article II, Section 4 of the Amended By-Laws provides in pertinent part: ***"[a]ll terms and phrases used herein shall, unless the context otherwise requires, have the same definition and meaning as set forth in the various Master deeds of the Horizontal Property Regime comprising The Myrtle Beach Resort . . . ."*** (R. p. 2467.) (Emphasis added). Article I of the Master Deeds for the Regimes defines Association or Council of Co-Owners under subparagraph (c) as follows:

> Association or Council of Co-Owners means the Council of Co-Owners as defined in the Act and ***specifically formed for the purpose of exercising the powers and duties of the Council of Co-Owners*** of such Horizontal Property Regime. (Emphasis Added).

Article II, Section 4 of the Amended By-Laws when read together with Section 6.4 of the Declaration requires the interpretation of Section 4.1 to be enlarged by implication to include duties to make the Board's powers more fully effective, and also to reconcile the alleged

repugnancy or conflict between Sections 3.2, 6.2, 6.4, and 4.1 of the Declaration and Article IV, Section 8, Article IV of the Amended By-Laws when read together as a whole. 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 12 (While courts must construe covenants as a whole based upon their underlying purpose, and will liberally construe a covenant to give effect to its purpose and intent, they will enforce a covenant as written if the covenant is clear on its face.). (R. pp. 1001-1002.)

"Under the doctrine of necessary implication, the law will imply a provision in a contract only when it is necessary to carry out the purpose for which the contract was made. The doctrine of necessary implication holds that if it can be plainly seen from all the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making their contract, or is necessary to carry their intention into effect, ***in other words if it is a necessary implication from the provisions of the instrument, the law will imply the obligation and enforce it.*** Terms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression." 17A Am. Jur. 2d Contracts § 361. (internal citations and quotes are omitted) (R. p. 1002.) (Emphasis added).

The South Carolina Supreme Court first recognized the "doctrine of implied obligations" in the case of Reynolds v. Stockman, 109 S.C. 112, 113, 95 S.E. 341, 341 (1918), wherein the Court indicated that "***an obligation may sometimes be implied from a contract as a whole or from the circumstances, and where the implication is necessary or is plain, it becomes as much a part of the contract as if it had been expressed.***"(Emphasis added).

Considering the provisions of Sections 3.2 and 4.1 of the Declaration and Sections 1, 4 and

8, Article IV of the Amended By-Laws as a whole, and including the incorporated parts of the Master Deeds and the Act, their language when read together clearly shows that the Declarant intended for Section 4.1 to include corresponding duties and/or mandatory responsibilities along with discretionary powers on the part of the Board. For example, the MBRHOA's members are obligated to pay their pro-rata share of assessments for Resort Expenses. The explicit purpose and object for imposing the covenants, conditions, and restrictions on the Resort properties was "to protect their value and desirability". The fact that the prior MBRHOA Boards had historically exercised all rights/powers granted them under Section 4.1 of the Declaration and Sections 1,4 and 8, Article IV of the Amended By-Laws, and the Act as shown in the Affidavit of Daniel L. Patrick, Esquire, (R. pp. 1148-1149.) and the Affidavit of Freddy Brown (R. pp. 1142-1147.), the Court should have found that the Regimes, as Declarant under the Declaration, had intended for the term "power" to also encompass the term "duties" such that the language of Section 4.1 necessarily reads as follows: "the Board of Directors shall also have the powers and **[duties]** to: ...." (Emphasis added). Consequently, the Regimes intended for the MBRHOA to also be ***"specifically formed for the purpose of exercising the powers and duties"*** like the Associations or Council of Co-Owners of the four Regimes themselves. This is corroborated by the plain language of Article XVIII of the Master Deeds, Sections 27-31-160 and 240 of the Horizontal Property Act, when read together with Section 4.1 of the Declaration and Section 4, Article II and Section 8, Article IV of the Amended By-Laws as a whole. Stated differently, the term – "duties" is to be implied as a matter of law in the language of Section 4.1 of the Declaration along with powers because they are necessary to the enforcement of the mutual and dependent covenants existing between the Association and its membership and that the Declarant did not express the term duties ***because they are too obvious to need expression***.

In Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 409 S.C. 164, 179, 760 S.E.2d 121, 129 (Ct. App. 2014)[4] (the Court of Appeals found the duties created by the Bylaws and South Carolina law support an "implied duty" to investigate who is responsible for damage to the common elements, even if the obligation was not expressly stated in the Master Deed and By-Laws). Specifically, the Court of Appeals affirmed "that even though the By-Laws do not specifically state the Council had a duty to investigate, ***the duties created by the Bylaws and South Carolina law also support a duty to investigate who is responsible for damage to the common elements***. (Emphasis added). This is the exact situation with the Declaration and Amended By-Laws of MBRHOA.

Accordingly, under the doctrine of implication, the Court erred in interpreting the powers under Section 4.1 to be purely discretionary notwithstanding the fact that Section 3.2 of Article III of the Declaration as well as Sections 1, 4, and 8 of Article IV of the Amended By-Laws all mandate certain Board action with respect to its Section 4.1 powers. Moreover, the Court in its Order granting Partial Summary Judgment has already acknowledged "***that Section 3.2 of Article III of the Declaration and Article IV, Section 8 of the Bylaws mandate certain Board Action.***" (R. p. 0011.) (Emphasis added). See S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (A contract is read as a whole document so that one may not, by pointing out a single sentence or clause, create an ambiguity); see also Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S .E.2d 344, 349 (1976) ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is

[4] 6A Home Owner Assocs & Planned Unit Developments § 7A.07 (2021) ("Where there is reason to believe damage to the common elements may have been in part caused by one or more owners, the association has a duty to investigate who is responsible for damage to the common elements even though that duty is not specifically stated in the documents.") (citing Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 409 S.C. 164, 179, 760 S.E.2d 121, 129 (Ct. App. 2014)).

reasonable to do so."); J.T.M. Co., Inc. v. Vane, 283 S.C. 512, 516, 323 S.E.2d 794, 796 (Ct.App.1984) ("In determining the intent and purport of a contract, a court should not look solely to one clause read in isolation from the rest of the document; rather, it should consider the contents of the whole instrument."). (R. p. 0011, lines 18-21.)

II. THE COURT ERRED IN FAILING TO RECONCILE THE APPARENT CONFLICT BETWEEN SECTION 4.1 OF THE DECLARATION AND ARTICLE IV, SUBSECTION 8(E) OF THE AMENDED BY-LAWS BY INCORRECTLY INTERPRETING SECTION 4.1 TO GRANT ONLY DISCRETIONARY POWERS TO THE BOARD WITHOUT ANY MANDATORY DUTIES UNDER THIS SECTION? . THE LOWER COURT'S INTERPRETATION OF SECTION 4.1 EVISCERATES AND/OR ANNULS ARTICLE IV, SECTION 8 OF THE AMENDED BY-LAWS.

The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. Koon v. Fares, 379 S.C. 150, 155-56, 666 S.E.2d 230, 233-34 (2008) (citing Litchfield Co. of S.C., Inc. v. Kiriakides, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986)). 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. Koon v. Fares, 379 S.C. at 155-56, 666 S.E.2d at 233-34. (citing Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975)). 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. Id. (R. p. 1004.)

In its Order granting the Respondents' Motion for Partial Summary Judgment and Denying the Appellants' Motion for Summary Judgment, the Court concluded:

> [S]ubsection 8(e) when read in conjunction with By-Laws and the Declaration as a whole, corroborates the discretion granted to the Board in Section 4.1. Again, when compared with other language in the Declaration and By-Laws, the Court cannot reconcile the documents other than to conclude Section 4.1 grants additional discretionary powers. (R. pp. 0011-

0012.)

The Court erred in concluding that conflicts between Article IV Section 8(e) of the Amended By-Laws and Section 4.1 of the Declaration could only be reconciled by concluding Section 4.1 grants only discretionary powers without mandatory duties. This interpretation leads to an absurd result by annulling the Board's mandatory duties under subsections 8(a) and (e) of Article IV of the Amended By-Laws and also violates the basic rules of contract construction. (R. p. 1005.)

Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. Farr v. Duke Power Co., 265 S.C. 356, 360, 218 S.E. (2d) 431, 434, (1975)). "Since the intention of the parties controls, it should be given effect regardless of mere literal repugnancies in different clauses of an agreement. Where there is an apparent repugnancy or conflict between two clauses or provisions of a contract, it is the province and duty of the court to find harmony between them and to reconcile them if possible. In other words, and as a corollary of the rule that the entire contract and each and all of its parts and provisions must be given effect if that can consistently and reasonably be done, all clauses and provisions of a contract should, if possible, be so construed as to harmonize with one another; in doing so, however, the court need not embrace strained rules of interpretation to avoid ambiguity at all costs." See 17A Am. Jur. 2d Contracts § 374 (2021). (citations omitted) (R. p. 1005.)

The Court erred by not harmonizing the conflicts between Section 4.1 of the Declaration and Article IV, Section 8 of the Amended By-Laws. The Appellants contend the circuit court could have harmonized the conflicts between the sections by concluding that Section 4.1 grants

discretionary powers under subsection (i) as well as mandatory duties under subsections (a), (b), (c), (d), (e), (f), (g), and (h). Such an interpretation by the Court would be fair, reasonable, and just by harmonizing these sections. This interpretation would also be consistent with the Declarant's intention as discussed above. Any other interpretation annuls and/or eviscerates the mandatory requirements of the Article IV, Sections 1, 4, and 8 of the Amended By-Laws. These subsections provide in pertinent part that the Board ***shall***: (a) transact all Association business ...; and (e) exercise all rights granted it by these By-Laws, the Declaration, and the Act.

Further, in the Order, the Court declares "***the Board is not required to exercise those powers***" granted in Section 4.1 of Article IV of the Declaration. (R. p. 0012.) (Emphasis Added). The Court's finding negates any legal duty arising by contract or negligence owed to members of the MBRHOA by the Board in accordance with the provisions of Section 4.1. Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997) (An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance). "An essential element in a negligence action is the existence of a legal duty of care owed by the Respondent to the Appellant. . . . If there is no duty, then the Respondent in a negligence action is entitled to judgment as a matter of law." Shaw v. Psychemedics Corp., 426 S.C. 194, 197-98, 826 S.E.2d 281, 282-83 (2019) (internal quotes and citations omitted). "Proof of negligence in the air, so to speak, will not do." Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (quoting Sir Frederick Pollock). Our own Supreme Court has repeatedly affirmed this rule. In Kershaw Motor Co. v. Southern Railway Co., 136 S.C. 377, 382, 134 S.E. 377, 378 (1926), the Court stated:

> An essential ingredient in any ***conception of negligence is that it involves the violation of a legal duty***, which one person owes to another -- the duty to take care for the safety of the person or property of the other; ***and the converse of the proposition is that, where there is no legal duty to exercise,***

> ***there can be no actionable negligence***. Therefore it is reasoned that a Appellant, who grounds his action upon the negligence of the Respondent, must show, not only that the conduct of the Respondent was negligent, but also that it was a violation of some duty which the Respondent owed him. (R. pp. 1006-1007.) (Emphasis Added).

Accordingly, where there is no legal duty to exercise, there can be no actionable negligence or Breach of Contract claim ever brought against the Board members for their non-performance under any circumstances. Stated differently, when the Court concluded "***the Board is not required to exercise[5] those powers***" under Section 4.1, the Board members became completely immune from liability under any circumstances from the members of the Association under the business judgment for non-performance of their Section 4.1 powers for:

1. Failing to ever maintain all streets and roads within the Property, including cleaning and periodic resurfacing;

2. Failing to ever collect trash;

3. Failing to obtain cable or master television service and telephone service;

4. Failing to ever maintain the oceanfront area;

5. Failing to ever grant easements, rights-of-way or strips of land, where necessary, for utilities, and sewer facilities and other services over the Common Areas to service the Property;

6. Failing to ever maintain such policy or policies of liability and fire insurance with respect to property owned by the Association;

7. Failing to install and maintain security devices, detectors and communication facilities and contract for employment of security services, guards and watchmen for the project. (R. pp. 1007-1008.)

In South Carolina, courts apply the business judgment rule to protect corporate directors. Fisher v. Shipyard Vill. Council of Co.-Owners, Inc., 415 S.C. 256, 270-71, 781 S.E.2d 903, 910-11 (2016). "'Under the business judgment rule, a court will not review the business judgment of a

[5] (R. p. 0012.)

corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.'" Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) (quoting Dockside Ass'n, v. Detyens, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987). The business judgment rule applies to disputes between directors of a homeowners' association and aggrieved homeowners, and the 'business judgment rule' the judgment of the directors will not be set aside by judicial action absent a showing of bad faith, dishonesty, or incompetence. Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)). (R. p. 1008.)

For these reasons, the Court erred in failing to reconcile the apparent repugnancy or conflict between Section 4.1 of the Declaration and Article IV, Section 8 of the Amended By-Laws by incorrectly interpreting Section 4.1 to grant only discretionary powers to the Board without any mandatory duties under this section even though Section 8 requires mandatory action. The Court's limiting and/or extraordinary interpretation of Section 4.1 violates the common law rules of contract interpretation and has the unintended effect of annulling all affirmative duties on the part of the Board as expressly stated under Article IV, Section 8 of the Amended By-Laws. (R. pp. 1008-1010.)[6] See 17A Am. Jur. 2d Contracts § 369 ("A construction will not be given to one part of a contract which will annul or obliterate another part. Courts also do not consider only the parts favoring one party and disregard the remainder, as that would render the latter meaningless"). See, Restatement 3d of Prop: Servitudes, § 6.13 (3rd 2000) (the restatement provides that association of a common interest community has separate legal duties owed to the members of the common-

[6] See 17A Am Jur 2d Contracts § 326 (When reviewing contracts, a court should not stretch its imagination in order to read ambiguity into a contract where none is present.) The court interpreting Section 4.1 to grant only discretion powers to the Board without any duty to act reads ambiguity into a governing documents where none is present.

interest community in addition to duties imposed by statute and the governing documents).[7] See also, Restatement 3d of Prop: Servitudes, § 6.14 (3rd 2000) ("The directors and officers of an association ***have a duty to act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions***."). Id. (citing Murphy v. Yacht Cove Homeowners Ass'n, 345 S.E.2d 709 (1986) (members of unincorporated condominium association can sue association in contract for failure to adhere to bylaws, rules, and regulations, and in tort; negligence of association will not be imputed to members). (R. p. 1009.) (Emphasis added).

III. THE COURT ERRED IN NOT CONCLUDING THE RESPONDENTS HAD VOLUNTARILY UNDERTAKEN TO PERFORM THE ACTS AS DESCRIBED IN SUBPARAGRAPHS (A) THROUGH (H) OF SECTION 4.1 OF DECLARATION THEREBY RENDERING THESE PROVISIONS AS AFFIRMATIVE OBLIGATIONS.

In addition to the affirmative obligations contained in Article IV, Section 4.1, the Respondents have undertaken to perform these duties by entering into binding contracts which render the provisions as mandatory. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." Walbeck v. I'On Co., LLC, 426 S.C. 494, 514, 827 S.E.2d 348, 358 (Ct. App. 2018) (quoting Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003)).

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[7] (1) " In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common-interest community: (a) ***to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control***; (b) ***to treat members fairly***; (c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers; (d) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association. (2) ***A member challenging an action of the association under this section has the burden of proving a breach of duty by the association. Except when the breach alleged is ultra vires action by the association, the member has the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common-interest community***." (Emphasis added).

Restatement 3d of Prop: Servitudes, § 6.13 (3rd 2000).

Over the past twenty years, the Boards of the MBRHOA have continuously undertaken to perform all of the powers in Article IV, Section 4.1 of the Declaration for the sole purpose of administering and managing the resort property for the mutual benefit of all members. (R. pp. 1143-1147; R. p. 1149.) While the current MBRHOA's Board has only recently abandoned the performance of some of these tasks, it does not negate the fact that the Board voluntarily undertook to perform these duties which created a continuing obligation to execute these tasks with due care.

The legal and practical nature of any condominium regime consists of a web of mutually reinforcing mandatory obligations of support, complemented by a series of powers for the MBRHOA when the nature of the Regime and the needs of the owners of units in the Regime require it. In the case of the Myrtle Beach Resort, the value of the individual apartment units depends upon the MBRHOA and the Board taking those steps required by the Declaration, By-Laws and the Act. Without an appropriate amendment, neither an individual unit owner nor any constituent regime or association may simply abandon its or their obligations, without serious practical, legal and financial detriment to the other unit owners and regimes to whom the defaulting party is bound. (R. p. 1162, ¶ 28.)

Based upon the foregoing, the Court erred in not concluding the Respondents had voluntarily undertaken to perform the acts as described in subparagraph (a) through (h) of Section 4.1 thereby by entering into binding contracts with third-party vendors over the last twenty (20) years, thereby, rendering them ongoing affirmative obligations. (R. pp. 1143-1147; R. p. 1162, ¶ 28; R. p. 1149; R. pp. 0906-0907; R. pp. 1010-1012.)

CONCLUSION

Based on the foregoing reasons and cited evidence before the Court, and upon such other arguments and submissions of counsel as may be reviewed by the Court, and viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the Appellants,

the Circuit Court's Orders granting Respondents Partial Summary Judgment should be reversed and the matter remanded in full to the Circuit Court.

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June 27, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No.: 2022-001529

Frederick E. Brown, Charles O. Pakosta, Conrad A. Calvano, Gayle N. Scott, and Philip D. Cox, individually and derivatively on behalf of Myrtle Beach Resort Homeowners' Association, Inc., and on behalf of all other similarly situated Co-owners, and Lori Niedzwiecki, and Robert S. Rosencrans, individually and derivatively on behalf of the Myrtle Beach Resort Homeowners' Association, Inc. for its right and benefit.....Appellants,

v.

Jeffery L. Richardson and Nancy L. Moore, individually and as current members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc., and Peter A. Grusauskas and Jim Perkins, individually and as former members of the Board of Directors for Myrtle Beach Resort Homeowners' Association, Inc.....Respondents,

and

Myrtle Beach Resort Homeowners' Association, Inc.,.....Nominal Respondent

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CERTIFICATE OF COUNSEL

The undersigned attorney for Appellants certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR and is identical to the Initial Brief of Appellants, except for References to the Record and Corrections of Typographical Errors and Misspellings contained in the Initial Brief of Appellants.

June 27, 2023

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