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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2022-001587

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315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives, as set forth herein, ...Respondents/Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; John Does 1-25, ... Appellants/Respondents.

FINAL RESPONDENTS' BRIEF OF APPELLANTS / RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

A. Whether Plaintiffs have appealed from a reviewable decision of the Circuit Court.

B. Whether Plaintiffs failed to preserve the issues raised in their appeal for appellate review.

C. Whether the Circuit Court had discretion to defer ruling on Plaintiffs' claim for declaratory judgment.

INTRODUCTION

Plaintiffs purport to cross-appeal the Circuit Court's determination that their Motion was "not ripe," and ask this Court to rule, in the first instance, on their declaratory judgment claims. It is axiomatic, however, that an appellate court "cannot review a decision that has not been made." *Lee v. Bondex*, 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013). And yet, that is exactly what Respondents/Appellants' ("Plaintiffs") cross-appeal asks this Court to do. The Circuit Court has not ruled, one way or the other, on Plaintiffs' declaratory judgment claims. Instead, it deferred ruling on Plaintiffs' Motion for Partial Summary Judgment ("Motion"), denying it without prejudice until it becomes ripe for determination. There is no "appealable order or decision" within the meaning of Rule 201(a), SCACR. Since there is no decision to review, it is no surprise that Plaintiffs' initial brief does not even include the standard of review, required by Rule 208(b)(1)(D), SCACR.

Plaintiffs appear to treat the Circuit Court's deferral as a denial of their Motion, but this tactic does not help them. The law is well established in South Carolina that the denial of a motion for summary judgment is *never* appealable, even when presented at the same time as an immediately appealable order.

Even if Plaintiffs could appeal the Circuit Court's determination that their declaratory judgment claims are not ripe for determination, this Court would be constrained to affirm. First, because the Circuit Court did not rule on Plaintiffs' Motion in its Order, Plaintiffs were obliged to raise those issues, including the ripeness issue, in a Rule 59(e), SCRCP, motion to alter or amend. Having failed to do so, those issues are

not preserved for review. Second, the Circuit Court's finding that further development of the case was necessary before Plaintiffs' claims would be ripe for determination was a proper exercise of its discretion with respect to declaratory judgment claims. No principle of law requires issuing a declaratory summary judgment at the pleading stage. And none permits this Court to step into the shoes of the Circuit Court and issue a declaration in the absence of an appealable order on the merits.

STATEMENT OF THE CASE

A. Factual Background[1]

Plaintiffs own homes within Palmetto Bluff, a premier high-end residential/resort development in Beaufort County. (R. 90-95, 100 (Compl. at ¶¶ 1-17, 36).) As a planned community, Palmetto Bluff is subject to covenants, restrictions, and governing documents. (R. 100 (*Id*. at ¶ 37).) The Community Charter provides, among other things, for the establishment of the Palmetto Bluff Club, as detailed in the Declaration of Recreational Covenant and the Palmetto Bluff governing documents. (R. 101; 518; 218 (*Id*. at ¶ 41; Ferguson Aff. ¶ 4; Charter § 19).)

Pursuant to the Charter and Recreational Covenant, a person who buys property at Palmetto Bluff also agrees to become a member of the Palmetto Bluff Club. (R. 519; 218 (Ferguson Aff. ¶ 6; Charter § 19).) This occurs as two separate transactions at closing for two separate items of value—the buyer pays the sales price to the seller for the real estate and pays the Club for the license. (R. 518 (Ferguson Aff. ¶ 7).) An owner executes a Palmetto Bluff Club Membership Agreement upon becoming a member of the Palmetto Bluff Club. (R. 520-521 (*Id*. at ¶ 10).) Consistent with the Recreational Covenant, the Palmetto Bluff Membership Plan states that the member is receiving a non-exclusive license to use Club facilities. (R. 271; 519 (Plan at 2; Ferguson Aff. ¶ 6).)

[1] The facts of this case are more fully set forth in the Statement of the Case in the Initial Brief of Appellants/Respondents, which is specifically incorporated herein by reference. The Factual Background herein sets forth facts specifically relevant to Plaintiffs' cross-appeal.

Since becoming owners at Palmetto Bluff, Plaintiffs have used Club amenities and enjoyed the benefits of Club membership. (R. 524-525 (Ferguson Aff. ¶ 19).) Plaintiffs allege harm to their short-term rental businesses as a result of various Palmetto Bluff governing documents allegedly restricting short-term renters' access to Palmetto Bluff Club amenities. (R. 78, 86-89, 132-152, 286-295 (Compl. at 7, 15-18, ¶¶ 160-253, Ex. 5).)

B. Procedural History

Plaintiffs sued Appellants/Respondents ("Defendants") on April 12, 2022, in the Court of Common Pleas for the County of Beaufort, asserting 16 causes of action. (R. 70-154 (Complaint).) Only the first and second causes of action are relevant to Plaintiffs' cross-appeal. Plaintiffs' first cause of action seeks a declaratory judgment that Club dues and membership fees constitute "unlawful transfer fee covenants" and that Palmetto Bluff's governing documents are invalid and unenforceable. (R. 133 (Compl. ¶¶ 164.1, 164.2).) Plaintiffs' second cause of action seeks a judgment that Defendants violated the South Carolina Homeowners Association Act by failing "to record the Club's governing documents," which therefore "are unenforceable." (R. 136 (Compl. ¶ 175).)

Two days after filing the complaint, Plaintiffs filed a Demand for Arbitration with the American Arbitration Association ("AAA"), attaching the complaint as an exhibit. (R. 354-362 (Defs.' Arb. Mot., Ex. A).) Defendants answered the Demand on May 16, and filed a timely Counter-Demand with the AAA on May 23 and a Counterclaim on June 7, seeking resolution of the same issues raised in Plaintiffs' Demand. (R. 363-370 (*Id*. at Exs. B-C; Defs.' Mem. in Support of MTD, Ex. A).) In the Circuit Court, Plaintiffs filed a Motion to Stay Arbitration and a Motion for Summary Proceedings on the Invalidity of

the Purported Arbitration Clause ("Plaintiffs' Arbitration Motion") on May 10, 2022. (R. 347-350 (Pls.' Arb. Mot.).) On May 24, 2022, Defendants moved to dismiss the Circuit Court action pursuant to Rule 12(b)(8), SCRCP, or, in the alternative, to compel arbitration and stay the Circuit Court action. (R. 351-353 (Defs.' Arb. Mot.).)

On June 9, 2022—while the arbitration motions were pending and before Defendants had answered the complaint—three Plaintiffs filed the Motion, which the remaining Plaintiffs joined on July 17. (R. 481-483; 855-856 (Pls.' Mot.; Add'l. Pls. Mot.).) The Motion sought summary judgment on Plaintiffs' first and second causes of action. (R. 481-483 (Pls.' Mot.).) Specifically, Plaintiffs asked the court to grant summary judgment on:

I. Plaintiffs' First Cause of Action, against all Defendants, for Declaratory Judgment, declaring that:

  a. The transfer free covenant and mandatory Club membership are unlawful and are void *ab initio*.

  b. The transfer fee covenant and mandatory Club membership may not be enforced going forward.

  c. The Club Membership Plan, Membership Agreement, and associated documents are unlawful, invalid, unconscionable, and void.

II. Plaintiffs' Second Cause of Action, against Defendants Palmetto Bluff Development LLC, Palmetto Bluff Club, LLC, and Palmetto Bluff Preservation Trust, Inc., for Violation of the South Carolina Homeowners Association Act.

(R. 482 (*Id*. at 2).)

On September 15, 2022, the Circuit Court entered an Order ("Order") granting Plaintiffs' Motion to Stay Arbitration; denying Defendants' Motion to Compel Arbitration and Motion to Dismiss; and deferring a ruling on Plaintiffs' Motion. (R. 2

(Order at 2).) As to the latter, the court stated: "This Court finds that the motion is not ripe for determination at this time, and therefore **denies the motion at this time without prejudice to any party**." (R. 31 (*Id*. at 31 (emphasis in original)).) The Court further stated, "Plaintiffs are free to re-file the motion at a later time." (*Id.*)

Defendants timely moved to Alter or Amend the portions of the Order denying their Motion to Compel Arbitration. (R. 863-890 (Defs.' Mot. to Alter or Amend).) Plaintiffs, however, did not seek reconsideration of the court's Order, or its determination that their Motion was not ripe. On November 2, 2022, the Circuit Court entered an Amended Order that was identical to the September 15 Order except for the date and title. (R. 34-66 (Am. Order).) On November 8, 2022, the Circuit Court entered a Form 4 Order clarifying that the Amended Order "was entered in relation to Defendants' Motion to Alter or Amend pursuant to Rule 59(e), SCRCP." (R. 67-69 (Form 4 Order).)

Defendants timely appealed the Order, Amended Order, and Form 4 Order on November 15, 2022 (R. 959-960 (Defs.' Notice of Appeal).) On November 23, 2022, Plaintiffs filed a notice of cross-appeal. (R. 961-963 (Pls.' Notice of Cross-Appeal).) Plaintiffs cross-appeal the Circuit Court's determination that their Motion was "not ripe," and ask this Court to rule, in the first instance, on their declaratory judgment claims. The declaratory judgments Plaintiffs seek on appeal are stated differently than in their Motion, however. As a result, and compounded by Plaintiffs failure to file a Rule 59(e), SCRCP, motion specifying which of the requested declarations were the subject of further challenge, it is unclear which of the requested declarations are the subject of this cross-appeal.

STANDARD OF REVIEW

Because there is no reviewable decision of the Circuit Court from which Plaintiffs can appeal, no standard of review applies here. Specifically, Plaintiffs cross-appeal the Circuit Court's denial without prejudice of their Motion as "not ripe for determination at this time." (R. 31 (Order at 31).). A denial without prejudice is interlocutory and is not a reviewable decision. *See Ashenfelder v. City of Georgetown*, 389 S.C. 568, 576-77, 698 S.E.2d 856, 860 (Ct. App. 2010). Moreover, the denial of a motion for summary judgment is not a ruling on the merits of the case, *see Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994), and is *never* appealable, *see Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 460, 814 S.E.2d 643, 658 (Ct. App. 2018).

However, if the Circuit Court's deferral of a ruling on Plaintiffs' declaratory judgment claims were appealable, it would be reviewed for abuse of discretion. *See Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820-21 (1995) ("The decision to grant a declaratory judgment is a matter which rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse.")

ARGUMENT

A. The Circuit Court Has Not Ruled on the Issues Raised in Plaintiffs' Cross-Appeal

1. There is No Reviewable Decision of the Circuit Court from Which Plaintiffs Appeal

"Appeal may be taken" only "as provided by law" and only "from any final judgment, appealable order or decision." Rule 201(a), SCACR. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). Plaintiffs' cross-appeal should be dismissed because there is no "decision" here, let alone an appealable one. The Circuit Court has not decided Plaintiffs' Motion and thus has not ruled on the claims for declaratory judgment that were the subject of the Motion. Rather, the Circuit Court determined that "***the [M]otion*** is not ripe for determination at this time." (R. 2 (Order at 2 (emphasis added)).) The Circuit Court made clear that its denial of the Motion was "without prejudice to any party," and expressly provided that "[a]ll parties maintain all claims and defenses regarding this [M]otion," and "Plaintiffs are free to re-file the [M]otion at a later time." (R. 32 (Order at 32 (emphasis omitted)).) The Circuit Court simply deferred ruling on Plaintiffs' Motion until it was "ripe for determination." If that deferral could be construed as denying the Motion—and, as explained below, it cannot be construed that way—any denial is preliminary and subject to revision. Neither the issues raised in the Motion nor the Motion itself have been fully or finally decided.

Under these circumstances, there has been no "decision" within the meaning of Rule 201(a), SCACR. *See, e.g.*, *Shem Creek Dev. Grp., LLC v. Town of Mt. Pleasant*, No. 2022-UP-421, 2022 WL 17174889, at *1 (Ct. App. Nov. 23, 2022) (dismissing appeal of circuit court order deferring ruling on a motion to alter or amend); *Smith v. Smith*, 359 S.C. 393, 397, 597 S.E.2d 188, 190 (Ct. App. 2004) (holding that trial court's deferral of consideration of attorney's fee award in a contempt order was not ripe for appeal); *see also Lee*, 406 S.C. at 103, 749 S.E.2d at 158 (holding the Court could not review a decision "held in abeyance," because "[it could not] review a decision that has not been made"). *Accord Chase v. Sidney Frank Importing Co.*, 133 F.3d 913, 1998 WL 3609, at *2 (4th Cir. 1998) (dismissing appeal as premature where the district court "explicitly stated that it needed more information before reaching its decision"); *Ashenfelder*, 389 S.C. at 576-77, 698 S.E.2d at 860 (holding the Court was "one step removed from the question of whether [the decisions are immediately appealable]" because "[they did] not yet have a decision that dons a veil of appealability due to the potential for revision" under Rule 54(b), SCRCP). This Court "cannot review a decision that has not been made," irrespective of whether a "decision" would otherwise be appealable had it been made. *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 381, 762 S.E.2d 44, 48 (Ct. App. 2014) (quoting *Lee*, 406 S.C. at 103, 749 S.E.2d at 158).

2. <u>A Denial of Summary Judgment Is Never Appealable</u>

Ignoring the fact that the Circuit Court deferred a ruling on their Motion, Plaintiffs proceed as if the Circuit Court had *denied* the Motion. *See* Pls.' Br. at 16 ("This Court has jurisdiction and authority to reverse the circuit court, including as to its ***denial of the***

declaratory judgments." (emphasis added)); *id.* at 19 ("[Plaintiffs] respectfully request this Court to ***reverse the circuit court's denial of the [Motion]*** and grant the requested [declaratory] judgments." (emphasis added)). But a denial of summary judgment is not appealable—now or ever. "[I]t is well-settled that an order denying summary judgment is never reviewable on appeal." *Bank of New York v. Sumter County*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) (citing *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003)); *see also Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380 ("[T]his Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment."). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380.

"Appellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion." *Holloman v. McAllister*, 289 S.C. 183, 185-86, 345 S.E.2d 728, 729 (1986). Because "it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment," *Ballenger*, 313 S.C. at 478 n.1, 443 S.E.2d at 380 n.1, there is "no basis on which an appellate court could make its review." *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 219, 544 S.E.2d 38, 51 (Ct. App. 2001). All the more so here, where the Motion was deferred rather than denied.

Plaintiffs admit that a denial of summary judgment is not directly appealable but contend that the Circuit Court's ruling (which, again, did not *deny* Plaintiffs' Motion but rather *deferred* it) is subject to appellate review because it is contained in the same Order denying Defendants' Motion to Compel Arbitration, which is properly before this Court on appeal. It is true that "courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily appealable when these appeals are companion to issues that are reviewable." *Skywaves*, 423 S.C. at 458, 814 S.E.2d at 658 (quoting *Olson*, 344 S.C. at 216, 544 S.E.2d at 49). But the Supreme Court has emphatically rejected the application of that exception to the denial of a motion for summary judgment. As this Court recently held, "the supreme court did not intend for the exception allowing orders that are not immediately appealable to be reviewed on appeal when accompanied by a related, immediately-appealable order to apply to orders denying motions for summary judgment." *Skywaves,* 423 S.C. at 460-61, 814 S.E.2d at 658-59.

In *Skywaves*, this Court dismissed a cross-appeal that was meaningfully indistinguishable from the purported cross-appeal here. *See id.* The Court rejected the cross-appellant's argument that the Court could review the denial of a motion for summary judgment in the interest of judicial economy and because the denial was closely related to the issues raised in the appeal. *See id. Skywaves* accords with the South Carolina Supreme Court's earlier holding that the denial of summary judgment may not be reviewed even if another appealable issue is before the court. *Olson*, 354 S.C. at 167, 580 S.E.2d at 443. That is so even if the appealable issue is a *grant* of summary judgment on the same issue. *See, e.g., Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 553, 790 S.E.2d

417, 422 (Ct. App. 2016). Indeed, none of the cases Plaintiffs cite involve denials of motions for summary judgment.

Moreover, although addressed within the same Orders, Defendants' Motion to Compel Arbitration and Plaintiffs' Motion are not "companion issues." The former goes to the forum for deciding Plaintiffs' claims while the latter goes to the merits of those claims. In short, *Skywaves* is controlling and compels dismissal of the cross-appeal.

3. <u>The Circuit Court Did Not Deny Plaintiffs' Claims for Declaratory Judgment</u>

In addition, the Order did not constitute a judgment on Plaintiffs' underlying claims for declaratory judgment. The law is well-established in South Carolina that "[a] denial of a motion for summary judgment decides nothing about the merits of the case, … and the issues raised in the motion may be raised again later in the proceedings …." *Ballenger*, 313 S.C. at 477, 443 S.E. 2d at 380; *see also State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 130, 348 S.E.2d 381, 384 (Ct. App. 1986) (holding that "[t]he denial of a motion for summary judgment is not an adjudication on the merits in favor of the party opposing the motion") (citing *Geiger v. Carolina Pool Equip. Distrib., Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971)).

Thus, Plaintiffs are wrong to characterize the Circuit Court's deferral of the merits of the Motion as a denial of their claims for declaratory judgment. Plaintiffs argue that the Circuit Court ruled that declaratory judgments are "not ripe" at the outset of litigation. *See* Pls.' Br. at 18. But the Circuit Court made no such categorical ruling. To the contrary, the Circuit Court found only that Plaintiffs' Motion was not ripe for

determination in this case. Moreover, the Circuit Court was not required to make findings of fact or conclusions of law in denying Plaintiffs' Motion. *See Ballenger*, 313 S.C. at 478 n.1, 443 S.E.2d at 380 n.1. Thus, Plaintiffs' arguments are ultimately immaterial to the issue of appealability. *See Crites v. Horlbeck*, No. 2012-UP-095, 2012 WL 10830193, at *1 (Ct. App. Feb. 22, 2022) ("[T]he denial of a motion for summary judgment is not appealable regardless of the language used in the order denying summary judgment."). And, even if the Circuit Court's denial of the Motion were appealable (which it is not), this Court would be unable to issue the relief sought by Plaintiffs—that is, to reverse the "denial of the declaratory judgments"—because, in merely denying summary judgment, the Circuit Court has not ruled on the merits nor denied Plaintiffs' claims for declaratory judgment.

B. The Issues Raised in Plaintiffs' Cross-Appeal Are Not Preserved for Review

Plaintiffs' cross-appeal should be dismissed for another reason. Because they did not file a motion pursuant to Rule 59(e), SCRCP, to alter or amend the Circuit Court's Order, the issues raised in their cross-appeal are not preserved for review. "[F]or an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010). And it is well-established that, where a party "raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that there are four basic requirements to preserving issues for appellate review: "[t]he issue must

have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity") (citation omitted).

Here, the Circuit Court did not rule on or address the merits of Plaintiffs' claims for declaratory judgment, which were the subject of their Motion, nor did it rule on or address Plaintiffs' argument that their claims involve solely questions of law. Because Plaintiffs failed to file a motion to alter or amend the Order, those issues are not preserved for review. *See, e.g.*, *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that an issue is not preserved where the trial court does not explicitly rule on an argument and that appellant fails to make a Rule 59(e), SCRCP motion to alter or amend the judgment on that ground).

Similarly, Plaintiffs failed to preserve their challenge to the Circuit Court's determination that their Motion was not ripe for review. A party must present issues and arguments to the trial court and obtain a ruling before those issues and arguments will be reviewed on appeal. *See, e.g.*, *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Plaintiffs never presented any argument concerning the ripeness of their Motion or of their declaratory judgment claims raised therein. Even after the Circuit Court stated that Plaintiffs' Motion was "not ripe" for determination in its Order, Plaintiffs did not file a motion to alter or amend that presented the ripeness arguments they make now for the first time on appeal.

For this additional reason, the appeal should be dismissed because none of the issues raised in Plaintiffs' cross-appeal are preserved for review. *See First Carolina Corp.*

of S.C., 372 S.C. at 301-02, 641 S.E.2d at 907 (holding that "[i]t 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") (citation omitted).

C. Whether and When to Decide Plaintiffs' Claims for Declaratory Judgment Is Within the Discretion of the Circuit Court

"The decision to grant a declaratory judgment is a matter which rests in the sole discretion of the trial court and will not be disturbed absent a clear showing of abuse." *Garris*, 319 S.C. at 390, 461 S.E.2d at 820-21 (citing *Ott v. Tindal*, 297 S.C. 395, 377 S.E.2d 303 (1989)); *see also Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 59-60, 152 S.E.2d 676, 678-79 (1967) (holding that declaratory relief will ordinarily be refused where a special statutory remedy has been provided or where another remedy will be more effective or appropriate under the facts and circumstances of the case) (citation omitted); *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1, 3 (1997) (holding that "[t]he Declaratory Judgment Act gives the judge the discretion to refuse to render a declaratory judgment where the decree 'would not terminate the uncertainty or controversy giving rise to the proceeding'") (quoting S.C. Code Ann. § 15-53-70). While the Circuit Court has not ruled on the merits of Plaintiffs' claims for declaratory judgment, it is within its discretion to do so, and to grant or deny declaratory relief, whenever the court concludes that the claims are ripe for determination. Plaintiffs' cross-appeal improperly attempts to eliminate the Circuit Court's discretion.

1. <u>This Court Should Not Rule on Plaintiffs' Claims for Declaratory Judgment in the First Instance</u>

When they are ripe for determination, Plaintiffs' claims for declaratory judgment should be ruled upon in the first instance by the Circuit Court, not the Court of Appeals. "[F]actfinding is the basic responsibility of [trial] courts, rather than appellate courts, and … the Court of Appeals [should not resolve] in the first instance [a] factual dispute which [has] not been considered by the [trial court]." *DeMarco v. United States*, 415 U.S. 499, 450 (1974). While Plaintiffs maintain that their claims for declaratory judgment are "based entirely on questions on law," it is the domain of the Circuit Court to determine the existence of any factual issues, including whether the resolution of a legal issue requires the development or assessment of a factual record. *See Brightwell v. Hershberger*, No. DKC 11-3278, 2016 WL 5815882, at *2 (D. Md. Oct. 5, 2016) (contrasting "pure questions of law" with legal questions requiring "factual assessment," which are to be resolved by the factfinder). And factual questions may well be dispositive here, where the private club joining fee that Plaintiffs characterize as a transfer fee in fact provides consideration for membership in that club under a membership agreement.

The Circuit Court's conclusion that a determination on the merits prior to discovery would be premature is a nonreviewable interlocutory order that in any event was well within the court's discretion. Plaintiffs have no right to receive a declaratory judgment at the pleading stage before any factual development on the merits has occurred. Especially in the highly discretionary context of declaratory relief, this Court

should allow the Circuit Court to rule in the first instance, and to make such factual findings and conclusions of law as the trial court deems necessary to guide its discretion.

2. The Proper Forum to Decide Plaintiffs' Claims for Declaratory Judgment Is Not Known

Defendants' appeal of the denial of their Motion to Compel Arbitration provides further grounds weighing against this Court's intervention on the merits of Plaintiffs' declaratory judgment claims. Under the arbitration agreements, the parties agreed to submit their disputes to mandatory and binding arbitration, and arbitration proceedings have been initiated. Accordingly, until Defendants' appeal is resolved, it is unknown whether South Carolina's civil courts are the proper forum for determination of Plaintiffs' declaratory judgment claims, or whether they must be sent to arbitration.

CONCLUSION

Plaintiffs' cross-appeal should be dismissed because there is no appealable order and because the issues raised were not preserved for appellate review.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr. , Circuit Court Judge

Appellate Case No. 2022-001587

315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives, as set forth herein, ...Respondents/Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; John Does 1-25, ... Appellants/Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

July 20, 2023

s/Kirsten Small

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