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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Opinion No. 2026-UP-339 (S.C. Ct. App. filed July 1, 2026)

James A. Leonard, III; Sheryl A. Leonard; Merrie P. Grant; G. Duncan Grant, and Pamela K. Smith,

Petitioners,

v.

WildeWood Sections I-IV Homeowners Association, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 29, 2026.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding Petitioners' argument that even though the underlying documents did not have a seal visibly attached to them, the intent of the parties was to create sealed documents, was not preserved for appellate review?

2. Did the Court of Appeals err in affirming the lower court's ruling that the three-year statute of limitations applied to the claims in this matter?

STATEMENT OF THE CASE

1. Factual Background.

Petitioners brought this declaratory judgment action requesting the lower court determine (1) whether certain purported assignments of restrictive covenants to Respondent were valid; (2) whether Respondent's purported amendment of those restrictive covenants was valid; (3) whether the actions taken by Respondent to require homeowners in the WildeWood subdivision to pay a new assessment for a pool and social membership were valid; and (4) whether Respondent has the authority to place liens against homeowners' properties as part of a collection effort to recover unpaid assessments for the pool and social membership. [ROA, p. 19, ¶ 27].

The restrictive covenants involved in this matter originate in individual deeds in the chain of title of the respective Petitioners. [ROA, p. 97, line 17 - p. 88, line 5]. Rather than create a set of restrictive covenants and make them applicable to the entirety of the development prior to partitioning the lots of the development, the various corporate entities developing WildeWood chose to, instead, include variations of similar restrictive covenants in the individual deeds for each property as the parcels were subdivided from the larger development and initially sold for home construction. [ROA, p. 97, line 17 - p. 98, line 5]. The deeds conveying title to Petitioners Merrie

P. Grant, G. Duncan Grant, and Pamela K. Smith do not contain the restrictive covenants, and one must look to deeds in their prior chain of title to locate those which are purportedly applicable to their properties. [Leonard: ROA, pp. 21-26, pp. 27-33; Grant: ROA, p. 34-37, pp. 258-266, pp. 160-161; Smith: ROA, pp. 38-42, pp. 267-277, pp. 163-164, pp. 166-168, pp. 170-172]. The deed conveying title to Petitioners James Leonard and Sheryl Leonard does contain restrictive covenants applicable to their parcel. [ROA, p. 16-17, ¶¶ 2-7; ROA, pp. 27-33].

Petitioners James and Sheryl Leonard live at 131 Running Fox Road (TMS # 22810-01-12). The restrictive covenants in their chain of title first appear in a 1985 deed from WildeWood III Associates to The Manning Company, Inc. [ROA, pp. 21-26]. Thereafter, they appear in the deed from The Manning Company, Inc. to the Leonards. [ROA, p. 16-17, ¶¶ 2-7; ROA, pp. 27-33]. Thirty numbered restrictions appear in both deeds. Number 20 in each reads as follows:

> It is understood that the above restrictions shall be appurtenant to and run with the land, and in the event of the violation of any of the said restrictions, Grantor shall have the right to abatement and the right to enforce compliance by injunction or any other appropriate remedy without liability for damages. The restrictions, however, shall be construed to be for the benefit of the Grantor alone, who reserves the right to alter, amend, or release the same at will.

[ROA, p. 24]. There is no reference to the existence or creation of a homeowner's association in either of the deeds. [ROA, pp. 21-26; ROA, pp. 27-33].

Although it is difficult to ascertain, given the age and quality of the existing copies, whether the deed from WildeWood III Association to The Manning Company, Inc. has a physical seal affixed to it, the testimonium clause contains the phrase "Witness its hand and seal…" [ROA, p. 25]. The witnesses' signatures are preceded by "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF." [ROA, p. 25]. The signature of WildeWood III Association's general partner is followed by "(SEAL)," and the attestation clause contains language indicating the witness saw the general partner sign, seal and deliver the deed. [ROA, pp. 25-26].

The testimonium clause of the deed from The Manning Company to the Leonards also contains the phrase "Witness its hand and seal…" [ROA, p. 32]. The witnesses' signatures are preceded by the words "Signed, Sealed and Delivered in the presence of." [ROA, p. 32]. The signature of The Manning Company's president is followed by the word "(SEAL)," and the attestation clause contains language indicating the witness saw the president sign, seal and deliver the deed. [ROA, pp. 32-33].

Petitioners Merrie Grant and Duncan Grant live at 55 Running Fox Road (TMS # 22805-02-02). [ROA, p. 17, ¶ 8]. The restrictive covenants in their chain of title appear only in a 1976 deed from Wildewood Associates I to Donald Richardson. [ROA, pp. 34-37; R. p. 258-258-266; ROA, pp. 160-161]. Unlike the Leonard deeds, this deed contains only twenty-one numbered restrictions. [ROA, pp. 34-36]. However, similar to the Leonard deeds, the restriction numbered 20 reads:

> It is understood that the above restrictions shall be appurtenant to and run with the land, and in the event of the violation of any of the said restrictions, Grantor shall have the right to abatement and the right to enforce compliance by injunction or any other appropriate remedy without liability for damages. The restrictions, however, shall be construed to be for the benefit of the Grantor alone, who reserves the right to alter, amend, or release the same at will.

[ROA, p. 36]. There is no reference to the existence or creation of a homeowner's association in this deed. [ROA, pp. 34-37]. No other deeds in the Grants' chain of title up through and including their purchase of the property in 1994 contain any other restrictions or references to the existence or creation or a homeowner's association. [ROA, p. 258-258-266; R. pp. 160-161].

As with the older deeds in the Leonards' chain of title, given the age and quality of the existing copies of the deed from WildeWood I Association to Donald Richardson it is difficult to ascertain whether it has a physical seal affixed to it. However, the testimonium clause contains the phrase "IN WITNESS WHEREOF, WildeWood I Associates has caused these presents to be executed in its name by C. Heath Manning, General Partner, and his seal to be hereto affixed…" The signature block for the grantor contains the word "(SEAL)" immediately following the words "WildeWood I Association." Finally, the attestation clause indicates that the witness "saw the within-named WildeWood I Associates, by C. Heath Manning, General Partner, sign the within Deed and seal said Deed…."

Petitioner Pamela Smith lives at 120 Wood Duck Road (TMS # 22809-03-22). [ROA, p. 18, ¶ 13]. The first and only deed in Ms. Smith's chain of title which enumerates restrictions is one from 1974 from Heathcote Corporation and City Investment Corporation to Joy Williamson. [ROA, pp. 38-42, pp. 267-277, pp. 163-164, pp. 166-168, pp. 170-172]. Unlike the pertinent deeds of the other Petitioners, this deed only enumerates seventeen (17) restrictions. [ROA, pp. 38-41]. Restriction number 17 reads:

> It is understood that the above restrictions shall be appurtenant to and run with the land, and in the event of the violation of any of the said restrictions, Grantor shall have the right to abatement and the right to enforce compliance by injunction or any other appropriate remedy without liability for damages. The restrictions, however, shall be construed to be for the benefit of the Grantor alone, who reserves the right to alter, amend, or release the same at will.

[ROA, p. 41]. There is no reference to the existence or creation of a homeowner's association in this deed. [ROA, 38-42].

Again, given the age and quality of the existing copies of the deed from Heathcote Corporation and City Investment Corporation to Joy Williamson it is difficult to ascertain whether it has a physical seal affixed to it. However, the testimonium clause contains the following:

> IN WITNESS WHEREOF, Heathcote Corporation has caused these presents to be executed in its name by C. Heath Manning, its President, and City Investment Corporation has caused these presents to be executed in its name by Darnell W. Boyd, its President, and their respective corporate seals to be hereto affixed….

[ROA pp. 41-42]. The signature block for Heathcote Corporation has “(SEAL)” immediately following the words “Heathcote Corporation,” and the signature block for City Investment Corporation likewise has “(SEAL)” immediately following the words “City Investment Corporation.” [ROA, p. 42]. The attestation clause contains language indicating the witness saw both signatories “sign the within Deed…seal said Deed, and, as their act and deed, deliver the same….” [ROA, p. 42].

On or about January 19, 1998, the entities WildeWood I Associates, WildeWood II Associates, WildeWood III Associates and WildeWood IV Associates executed a document captioned “Assignment of Covenants, Conditions and Restrictions Affecting Lots in Sections I, II, III and IV of the WildeWood Subdivision” (“Assignment”). [ROA, pp. 43-47]. According to the Assignment those entities were developers or owners of property in the WildeWood subdivision, not homeowners’ associations. [ROA, p. 43]. Curiously, although the Assignment includes a recital indicating that the deed restrictions contained provisions providing for the establishment of homeowners’ associations for the enforcement and management of the restrictions themselves, none of the deeds in this matter contain such language. [Leonard: ROA, pp. 21-26, pp. 27-33; Grant: ROA, p. 34-37, pp. 258-266, pp. 160-161; Smith: ROA, pp. 38-42, pp. 267-277, pp. 163-164, pp. 166-168, pp. 170-172]. Nevertheless, in the Assignment the Assignors for undisclosed consideration consent to the formation of Respondent and assign all rights they have in the “covenants, conditions, restriction and easements [previously] imposed on the real property known as Sections I, II, III and IV of the WildeWood Subdivision…,” except the right to be paid for sewer tap fees and annual charges for sewer services. [ROA, p. 43-44]. There is no similar assignment from Heathcote Corporation or City Investment Corporation to Respondent.

Directly above the signature blocks for the Assignors and witnesses the Assignment contains the words, "WITNESS, Our hands and seals effective on this date as above noted," and "Signed, sealed and delivered in the presence of." [ROA, p. 45]. The word "(SEAL)" appears next to the signature of the general partner of each of the Assignors, and the Probate/Attestation includes language indicating the witness, "saw the within named Assignors, sign, seal and as the act and deed of the partnership, deliver the within Assignment…." [ROA, pp. 45-46].

On or about February 23, 1998, Respondent, citing the aforementioned Assignment as authority, issued a document captioned "Declaration of Covenants, Conditions and Restrictions WildeWood Subdivision Sections I, II, III and IV" ("Declaration"), in which it expressed its desire to amend and restate all covenants, conditions, restrictions and easements previously imposed on the lots in WildeWood Sections I through IV. [ROA, pp. 18-19, ¶ 21]. Unlike the Petitioners' deeds the Declaration contains thirty-six restrictions, and for the first time one which requires all property owners to be members of Respondent. [ROA, pp. 200-211].

Directly above the signature blocks for Respondent and witnesses the Declaration contains the words, "IN WITNESS WHEREOF, the undersigned have set their hands and seals as of the first day above written," and "Signed, sealed and delivered in the presence of." [ROA, p. 209]. The word "(SEAL)" appears next to the signature of Respondent's then-president and secretary, and the probate/attestation includes language indicating the witness, "saw the within named Association, by its duly authorized officers, sign, seal and as the act and deed of the Association, deliver the within [Declaration]…." [ROA, p. 209].

In 2018 The Members Club at Wood Creek and WildeWood, LLC, which owned and operated both the Wood Creek and WildeWood golf courses and related amenities in and around the WildeWood neighborhood, went out of business. [ROA, pp. 60-62, ¶ 22; ROA, p. 139]. First

Citizens Bank foreclosed on the properties and offered them for sale to the highest bidder. [ROA, pp. 60-62, ¶ 22; ROA, p. 139]. A group of WildeWood residents ("Investor Group") approached the several WildeWood homeowners' associations, including Respondent, with a proposal to raise sufficient annual capital to support the operation and maintenance of the foreclosed properties should the Investor Group be successful in purchasing the properties from the bank. [ROA, pp. 60-62, ¶ 22; ROA, p. 139].

The Investor Group's proposal included the Investor Group purchasing the foreclosed property and operating it as a new private club, with an agreement, to be memorialized in a deed restriction, to only operate the property as a private club and not sell or develop it for a minimum of 25 years. [ROA, pp. 60-62, ¶ 22; ROA, p. 139]. Additionally, Respondent's members would receive limited rights to use some of the new club's amenities. [ROA, pp. 60-62, ¶ 22; ROA, p. 139]. In exchange for the new club's deed restriction, Respondent agreed to charge a new, additional $40 per month assessment, the pool and social membership, to each of its members, which would then be directly paid to the new club. [ROA, pp. 60-62, ¶ 22; ROA, p. 139].

On November 27, 2018, Respondent placed a proposed resolution before its members requesting they vote on whether they would authorize Respondent to charge a mandatory $480 per year assessment to all members for a special membership in the new club to be known as a "Pool and Social Membership." [ROA, p. 74, line 5 - p. 75, line 13; ROA, pp. 197, fifth recital]. The resolution itself indicated that its effectiveness was contingent upon the Investor Group purchasing the old club property. [ROA, pp. 196-197]. In pertinent part the resolution reads, "expressly conditioned on the golf course and related property being purchased by the Investor Group. If this transaction does not take place, the Assessment increase will be considered withdrawn." [ROA, p. 197].

The Investor Group purchased the golf course and related property in September 2019. [ROA p. 103, lines 14-22]. Respondent did not begin billing for the pool and social membership until October 2019. [ROA, p. 103, lines 14-22]. Respondent filed a lien against Petitioners James and Sheryl Leonard's property on March 4, 2022, seeking to collect unpaid assessments for the pool and social membership. [ROA, p. 19, ¶ 25; ROA, p. 52-53; ROA, p. 62, ¶ 25; ROA, p. 78, lines 12-16]. Respondent filed a Release of Notice of Delinquent Assessment Lien on May 22, 2024, which was recorded with the Richland County Register of Deeds in Book 2925 at page 1202. [ROA, p. 10].

A chronological list of the deeds in the Petitioners' respective chains of title follows.

<u>James A. Leonard, III and Sheryl A. Leonard</u>

1. Deed from WildeWood III Associates to The Manning Company, Inc.
   Dated: December 31, 1984
   Filed: January 7, 1985
   Book/Page: 724/716

2. Deed from The Manning Company, Inc. to James A. Leonard, III and Sheryl A. Leonard
   Dated: August 27, 1985
   Filed: August 27, 1985
   Book/Page: 755/961

<u>Merrie P. Grant and G. Duncan Grant</u>

1. Deed from Wildewood Associates I to Donald V. Richardson
   Dated: October 14, 1976
   Filed: December 30, 1976
   Book/Page: 408/703

2. Deed from Donald V. Richardson to John G. Morrison and Barbara L. Morrison
   Dated: May 14, 1979
   Filed: May 17, 1979
   Book/Page: 501/629

3. Deed from John G. Morrison and Barbara L. Morrison to Richard D. Swartout and Carolyn J. Swartout
   Dated: April 2, 1984
   Filed: April 3, 1984

Book/Page: 688/827

4. Deed from Richard D. Swartout and Carolyn J. Swartout to Merrie P. Grant
Dated: July 28, 1994
Filed: July 29, 1994
Book/Page: 1211/196

5. Deed from Merrie P. Grant to Merrie P. Grant and G. Duncan Grant
Dated: May 24, 2013
Filed: May 31, 2013
Book/Page: 1865/1473

Pamela K. Smith

1. Deed from Heathcote Corporation and City Investment Corporation to Joy C. Williamson
Dated: December 19, 1974
Filed: December 24, 1974
Book/Page: 336/362

2. Deed from Joy C. Williamson to Western Enterprises of Asheville
Dated: April 29, 1980
Filed: May 15, 1980
Book/Page: 540/112

3. Deed from Western Enterprises of Asheville to Herbert and Claire Meltzer
Dated: January 9, 1981
Filed: January 13, 1981
Book/Page: 564/171

4. Deed from Herbert and Claire Meltzer to Timothy McConnell
Dated: April 20, 1982
Filed: May 6, 1982
Book/Page: 608/769

5. Master Deed from Timothy McConnell to LaSalle National Bank
Dated: August 3, 2000
Filed: August 9, 2000
Book/Page: 433/1017

6. Deed from LaSalle National Bank to Pamela K. Smith
Dated: November ___, 2001
Filed: December 17, 2001
Book/Page: 603/1874

7. Deed of ½ interest from Pamela K. Smith to Douglas McFadden
Dated: November 21, 2003
Filed: December 1, 2003

Book/Page: 880/1677

8. Deed of ½ interest from Douglas McFadden to Pamela K. Smith
Dated: October 2, 2012
Filed: August 22, 2013
Book/Page: 1889/1269

2. Procedural Background.

This matter came before the Richland County Court of Common Pleas by way of a complaint filed by James A. Leonard, III; Sheryl A. Leonard; Merrie P. Grant; G. Duncan Grant, and Pamela K. Smith ("Petitioners") on March 4, 2022. [ROA, pp. 15-55]. In their complaint Petitioners sought declaratory relief from the court on issues concerning the validity of an assignment between various homeowners' associations, whether certain restrictive covenants were valid and enforceable, whether the actions taken by Respondent in 2018 to require homeowners to pay an assessment for a pool and social membership were valid, and whether Respondent had the authority to file a lien against homeowners to attempt to collect unpaid assessments for a pool and social membership. [ROA, p. 19, ¶ 27]. Respondent timely answered. [ROA, pp. 56-66].

Thereafter, on November 10, 2023, Respondent filed a motion for summary judgment, requesting that the complaint be dismissed in its entirety because it was time barred. [ROA, pp. 136-178]. In addition, on April 18, 2024, Respondent filed with the court the affidavit of Gail Bragg, Respondent's president, with several attached exhibits. [ROA, pp. 182-199]. A hearing on the motion was held before the Honorable Joseph M. Strickland on April 18, 2024, at the Richland County Courthouse. Petitioners were not present but were represented at the hearing by Spencer A. Syrett, Esquire. Respondent, likewise, was not present, but it was represented at the hearing by Richard H. Willis, Esquire, and John G. Tamasitis, Esquire. The lower court received argument of counsel and reviewed documents provided by counsel, but no exhibits were formally entered into evidence. [ROA, p. 68]. Subsequently, by order dated November 1, 2024, the lower court issued an order granting Respondent summary judgment. [ROA, pp. 1-11]. The parties received written notice of entry of the order on November 1, 2024.

On December 2, 2024, Petitioners served notice of appeal on Respondent. By letter dated December 2, 2024, Petitioners filed their notice of appeal with the Court of Appeals and the Richland County Clerk of Court. The Court of Appeals affirmed the decision of the lower court. James A. Leonard, III; Sheryl A. Leonard; Merrie P. Grant; G. Duncan Grant, and Pamela K. Smith v. WildeWood Sections I-IV Homeowners Association, Inc., Op. No. 2026-UP-339 (S.C. Ct. App. filed July 1, 2026). Petitioners filed a timely Petition for Rehearing which was denied by the Court of Appeals on July 29, 2026. This Petition follows.

ARGUMENT I

The Court of Appeals erred in holding Petitioners' argument that even though the underlying documents did not have a seal visibly attached to them, the intent of the parties was to create sealed documents, was not preserved for appellate review.

Petitioners acknowledge that an issue must be raised to and ruled upon by the trial court to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). However, Petitioners submit that the issue was, in fact, raised and ruled upon by the trial court. As the Court of Appeals noted in its ruling on Issue 1, there is no question Petitioners argued before the lower court that a twenty-year statute of limitations applied in this matter because the documents upon which Respondent based its authority to act were sealed instruments. (Opinion No. 2026-UP-339, S.C. Ct. App. filed July 1, 2026, p. 2). Petitioner's counsel argued before the lower court, "I disagree that the 20 -- that three-year statute applies, but the restrictive covenants are a sealed instrument, and so it would be 20 years." (ROA, p. 81, ll. 7-9). At the hearing Respondent acknowledged said argument and provided argument against its application and in favor of application of the three-year statute. (ROA, p. 81, l. 20 - p. 83, l. 11). Further, although in its order the lower court erroneously found that the material facts regarding Respondent's statute of limitations argument were not in dispute, it also acknowledged, as the Court of Appeals did, that Petitioners did, in fact, argue that the twenty-year, sealed instrument statute of limitations applied. (ROA, p. 7; pp. 7-8, footnote 3). Moreover, six of Respondent's eighteen pages of argument in its final brief submitted to the Court of Appeals were devoted to arguing against the merits of the application of the twenty-year statute of limitations, never once arguing that the issue was not preserved for review. (Final Brief of Respondent, pp. 14-20).

Since the documents in question were before the lower court or matters of public record, which the lower court acknowledged reviewing and referenced in its order (ROA, p. 3, footnote

1), and the law cited by Petitioners in its brief well settled, the issue was preserved for appellate review. All the relevant, underlying documents before the court were either photocopies of the originals or the scanned versions on file with the Register of Deeds. Since the only available versions of the underlying documents were photocopies or scanned copies, it hardly seems equitable to claim Petitioners did not raise the argument made in its brief regarding alternative indicia of the sealed nature of the instruments, as it was the only argument counsel could have been advancing at the motion hearing, given examination of the original documents for physical seals was not possible.

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*,313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). Taken in the light most favorable to the Petitioners, they raised the issue of the twenty-year, sealed instrument statute of limitation at the hearing on Respondent's motion for summary judgement, and it was, therefore, preserved for appellate review.

ARGUMENT II

The Court of Appeals erred in affirming the lower court's ruling that the three-year statute of limitations applied rather than the twenty-year statute of limitation applicable to sealed instruments.

South Carolina Code Ann. § 15-3-520(b) provides for a twenty-year statute of limitations for an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only. In *Lyons v. Fidelity National Title Insurance Company*, 415 S.C. 115, 125-26, 781 S.E.2d 126, 131-32 (Ct. App. 2015), the Court of Appeals explained:

> A sealed instrument is defined as "an instrument to which the bound party has affixed a personal seal, [usually] recognized as providing indisputable evidence of the validity of the underlying obligations." *Sealed Instrument*, BLACK'S LAW DICTIONARY (9th ed. 2010). A seal is defined as "an impression or sign that has legal consequences when applied to an instrument." *Id*.; see also 68 Am. Jur. 2d *Seals* § 6 (2014) ("Devices or impressions held to be seals include . . . a printed impression of a seal."). The prevailing view is that "the seal may consist of any substance affixed to the document or the use of an impression such as that customarily used by notaries and corporations, or the use of any other mark, work, symbol, scrawl, or sign intended to operate as a seal." 1 WILLISTON ON CONTRACTS § 2:4 (2007).

In this matter, Petitioners requested the lower court determine whether the deed restrictions, Assignment and Declaration provide Respondent with the authority to enact the pool and social membership assessment and, if so, whether Respondent properly exercised its authority in enacting the pool and social membership resolution and applying it to them. Respondent claims its authority to enact the assessment flows from the 1998 Assignment and Declaration, which both, in turn, obtain their authority from the restrictions found in Petitioners James and Sheryl Leonard's deed and in the deeds in the prior chain of title of Petitioners Merrie Grant, Duncan Grant and Pamela Smith. As discussed above, given the state of the copies of these documents there is no clear indication any have physical seals affixed to them.

Nevertheless, the lack of an affixed seal is not dispositive of the issue of whether these documents constitute sealed instruments. For, if there are other indicia that the parties intended to create a sealed instrument, the twenty-year statute would still be applicable. "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." S.C. Code Ann. § 19-1-160. *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 172, 609 S.E.2d 548, 550 (Ct. App. 2005).

In *Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901), this Court, relying on the predecessor to S.C. Code Ann. § 19-1-160, found that, although the deed in question lacked a seal on its face, the parties intended to create a sealed instrument because (1) it contained an attestation clause; (2) it contained the word "seal" adjacent to the grantor's signature; and (3) the deed concluded with "Signed, Sealed and Delivered in the [presence] of [names of witnesses]." *Id*. In *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, the Court of Appeals concluded that although the contract at issue did not include a seal, the language of the contract manifested the parties' intent to create a sealed instrument. 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984). In *Winyah* the attestation clauses stated that "the parties hereto have set their hands and seals," and the notation "L.S." followed the signatures of the parties to the contract. *Id*. Likewise, in *Treadaway v. Smith*, the Court of Appeals found the parties to a separation agreement intended to create a sealed instrument. 325 S.C. 367, 378, 479 S.E.2d 849, 855 (Ct. App. 1996), *abrogated by Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). There, the parties' agreement stated, "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written" and

"SIGNED SEALED AND DELIVERED IN THE PRESENCE OF [signatures of parties and witnesses]." *Id*. The Court of Appeals concluded that the plaintiff's action, which sought to enforce a provision of the agreement in which the defendant agreed to pay the children's college expenses, was governed by the twenty-year statute of limitations. *Id*.

As discussed above, the deeds in the Petitioners' respective chains of title upon which the Assignment and Declaration claim to derive their authority and the Assignment and Declaration themselves all contain the same or similar indicia that the parties intended to create sealed instruments, and some arguably contain more than those in *Cook*, *Winyah* and *Treadaway*. Thus, Petitioners contend this action is governed by the twenty-year statute of limitations.

The 9th District Ohio Court of Appeals has specifically held that "[d]eclarations and bylaws of a homeowners association are contracts between the association and the purchasers." *Lisy v. Mayfair Estates Homeowners Ass'n*, 2012-Ohio-68, ¶ 29 (Ct. App.). *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994), suggests that bylaws and other homeowner association governing documents are treated the same in South Carolina. In *Shupe* homeowners Douglas and Anna Marie Shupe brought an action for breach of contract against their homeowners association, Oakridge Association, Inc., among others, for failing to provide them with certain insurance information they had requested pursuant to the association's bylaws. While the trial court granted the homeowners association judgment notwithstanding the verdict, which the Court of Appeals later reversed, reinstating a jury verdict in favor of the Shupes, the case is notable because both the lower court and Court of Appeals recognized the bylaws of the association as a contract between the homeowners association and the member homeowner and applied contract principles to their analyses of the dispute. As Respondent noted in its brief in the Court of Appeals, South Carolina courts have long recognized that "a restrictive covenant is a voluntary contract between the parties." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). Accordingly, "[c]ovenants requiring property owners to pay fees for improvements, maintenance, or other services to the homeowners' association," are deemed "contractual in nature and bind the parties to the covenants in the same manner as other contracts." *First Fed. Sav. & Loan Ass'n of Charleston v. Bailey*, 316 S.C. 350, 354-55, 450 S.E.2d 77, 79-80 (Ct. App. 1994).

In *Seabrook Island Property Owners Association v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005), the Court of Appeals upheld the trial court's award of attorney's fees to the Association, finding that the restrictive covenants' incorporation of its regulations and bylaws into the covenant itself and the inclusions of attorney's fees provisions therein, created the contractual basis for the award of attorney's fees. Here, as in *Seabrook Island*, Respondent's restrictive covenants, the Declaration, incorporates its bylaws into the association-member "contract." (ROA, pp. 206-207, ¶ 29). Thus, interpretation of amendments to Respondent's bylaws should be analyzed under contract principles.

Petitioners' challenge to the resolution authorizing collection of dues for the pool and social membership is essentially an allegation that Respondent has breached its contract with the members. "A condition precedent is an act which must occur before performance by the other party is due." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010). "If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 521-22, 812 S.E.2d 750, 757 (Ct. App. 2018) *quoting McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009). Petitioners' position is the breach did not occur, and was, thus, not actionable until the resolution became effective, which, by its own terms, did not occur until the Investment Group purchased the golf club in September 2019. Since the complaint was filed on

March 4, 2022, it would be well within both the three and twenty-year statutes of limitations. Even were the statute of limitations triggered by the November 27, 2018, vote, the complaint would still be timely under the twenty-year statute of limitations. Thus, it was error for the Court of Appeals to uphold the lower court's grant of summary judgment, for there is at the very least a genuine issue of material fact as to the application and expiration of the statute of limitations on Petitioners' claims.

CONCLUSION

For the reasons stated, this Court should grant Petitioner's petition, reverse the Court of Appeals and remand this matter to the lower court for further proceedings.

Respectfully submitted,

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