THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2011-CP-22-319

Litchfield Plantation Association, Inc., Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips.....Appellants.

v.

Litchfield Plantation Company, Inc. .....Respondent.

And E.Scott Trotter.....Intervenor.

RESPONDENT'S FINAL BRIEF

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I. STATEMENT OF ISSUES ON APPEAL:

A. The clear and unambiguous language of the 2005 Amended Covenants and Bylaws for Litchfield Plantation do not provide for the termination of Respondent's Class "B" membership as requested by the Appellants.

B. The lower court properly held Appellants' Notice of Appeal did not stay the execution of the May 25, 2012 Order.

C. The lower court properly issued the Temporary Restraining Order.

II. STATEMENT OF THE CASE:

A. Introduction:

This case concerns Litchfield Plantation, a residential development located in Georgetown County. It is a very unique development in that it is the site of a historic plantation house and rice fields located on the Waccamaw River. Litchfield Plantation Company, Inc. bought the property in 1969 with plans to create an upscale private neighborhood with the historic plantation house as its centerpiece. The original Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation were dated January 26, 1971 and filed with the Georgetown County Register of Deeds. The articles of incorporation for Litchfield Plantation Association, Incorporated were filed with the Secretary of State on April 13, 1971.

Over the years, there have been disputes between property owners, Litchfield Plantation Company, Inc., and Litchfield Plantation Association, Incorporated. The restrictive covenants were amended in 1988 and in 2005.

Litchfield Plantation Company, Inc. suffered financial loss during the recession and real estate market collapse. In February 2011, a group of property owners took

advantage of the company's weakened condition and improperly seized control of Litchfield Plantation Association, Incorporated. In April 2011, Miller-Few Development, LLC purchased the stock interests of the company's long-time owner, Louise Parsons. The new owner of Litchfield Plantation Company, Inc. is intent on rebuilding the financial viability of the company and to continue developing Litchfield Plantation pursuant to the 2005 Amendments to the restrictive covenants. However, the group of owners who seized control of the Association in February 2011 unilaterally declared that Litchfield Plantation Company, Inc. could no longer exercise its voting rights in the Association. This lawsuit seeks a determination of the parties' rights pursuant to the 2005 Amendments to the Declaration of Restrictive Covenants for Litchfield Plantation.

B. Procedural History:

On March 9, 2011, the Appellants filed their Complaint.[1] The Complaint asserts two causes of action: (1) a Declaratory Judgment that the individual Appellants were elected to the Board of Governors at a meeting held February 26, 2011; and (2) a Declaratory Judgment determining Respondent lost its Class "B" membership status as of January 1, 2011. Respondent filed its Answer on April 29, 2011,[2] and an Amended Answer and Counterclaims on May 27, 2011.[3]

On or about July 29, 2011, E. Scott Trotter filed a Motion to Intervene.[4] Mr. Trotter was the President of Litchfield Plantation Company from June 2009 until he

[1] Complaint, R.p. 81.
[2] Answer, R.p. 90.
[3] Amended Answer and Counterclaim, R.p. 94.
[4] Motion to Intervene, R.p. 101.

resigned in March 2011.[5] Mr. Trotter also served on the Board of Governors for Litchfield Plantation Association beginning in 2007. On September 23, 2011, an Order was filed granting Mr. Trotter's Motion. On that same date, Mr. Trotter filed his Intervenor Complaint.[6] On or about October 21, 2011, Respondent filed its Answer to the Intervenor's Complaint,[7] as well as, its Second Amended Answer and Counterclaim.[8] Respondent voluntarily dismissed its counterclaims during a hearing held April 19, 2012.[9]

Appellants and Respondent filed cross-motions for Summary Judgment. On June 7, 2011, Appellants filed their Motion for Summary Judgment as to both causes of action asserted in their Complaint.[10] On September 9, 2011, Respondent filed a Motion for Summary Judgment as to Appellants' Second Cause of Action. Thereafter, on December 30, 2011, Respondent filed a Motion for Summary Judgment as to Appellants' First Cause of Action. In the Order filed May 25, 2012, the lower court granted Respondent's Motion for Summary Judgment as to Appellants' second cause of action and determined Respondent's Class "B" membership was not terminated.[11] However, the Court determined that it could not issue summary judgment regarding Appellants' first cause of action; accordingly, the case remains on the non-jury trial roster.

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[5] Affidavit of E. Scott Trotter filed September 26, 2011, R.p. 529.
[6] Intervenor Complaint, R.p. 113.
[7] Respondent's Answer to Intervenor Complaint, R.p. 118.
[8] Second Amended Answer and Counterclaim, R.p. 120.
[9] April 19, 2012 hearing transcript, R.p. 304, lines 7 - 12.
[10] Appellants' Motion for Summary Judgment, June 7, 2011, R.p. 105.
[11] Order, May 25, 2012. R.p. 3.

Appellants filed a Motion to Reconsider dated June 6, 2012.[12] By way of a Form 4 Order filed August 17, 2012, the lower court denied the Motion.[13] Appellants filed Notice of Appeal on August 24, 2012. On September 7, 2012, Respondent filed a Motion for Temporary Injunction/Lift of Stay because Appellants attempted to prevent Respondent from exercising its voting rights.[14] By way of an Order filed October 22, 2012, the lower court granted Respondent's Motion.[15] Thereafter, Appellants filed a subsequent Notice of Appeal on October 31, 2012.

III. STATEMENTS OF FACTS:

A. The 2005 Amended Covenants and Bylaws for Litchfield Plantation:

The currently governing documents for Litchfield Plantation consist of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation and Waiver of Right of First Refusal, hereinafter "the 2005 Amended Covenants;" [16] and (2) Amended and Restated Bylaws of Litchfield Plantation Association, Inc., hereinafter "the 2005 Amended Bylaws." [17]

According to Appellants, the 2005 Amended Covenants and Bylaws were a result of a civil action brought by property owners against the Litchfield Plantation Company and Litchfield Plantation Association in 1984.[18] The property owners in the 1984 action sought a declaration from the court that the Litchfield Plantation Company and the

[12] Motion to Reconsider. R.p.155.
[13] Form 4, August 17, 2012. R.p. 10.
[14] Motion for Temporary Injunction/Lift of Stay. R.p.161.
[15] Order, October 22, 2012. R.p.15.
[16] 2005 Amended Covenants, R.p. 358.
[17] 2005 Amended Bylaws, R.p. 411.
[18] December 2011 hearing transcript, R.p. 219, lines 1 - 24.

Association breached fiduciary duties. As a result of that lawsuit, the original 1971 covenants and restrictions were amended in 1988 to establish a finite period of developer control. Once the period of developer control ended as set forth in the 1988 covenants, the 2005 Amended Covenants and Amended Bylaws were established which gave more power and control to the owners. The 2005 Amended Covenants and Bylaws were heavily negotiated between Litchfield Plantation Company and Litchfield Plantation Association. Robert W. Dibble, Jr. was the attorney representing Litchfield Plantation Association during the negotiations. Jeffrey VanTreese, also an attorney, negotiated the amendments on behalf of Litchfield Plantation Company.[19]

Prior to the finalization of the 2005 Amended Covenants, there was a meeting with the property owners. The property owners were advised by Mr. Dibble as to the terms and conditions set forth in the Amended Covenants and were given full and ample opportunity to read the Amendment and the documents attached as exhibits, including the Amended and Restated Bylaws.[20] One hundred percent of the property owners agreed to the 2005 Amendments of the Covenants and Bylaws as shown by their signatures attached to the Amendments and filed of record. In the present action, Appellants recognize that the 2005 Amended Covenants and Bylaws are the governing documents for the Association.[21]

The 2005 Amended Covenants provide for two classes of membership in the Association, Class "A" and Class "B." Class "A" members include all owners except for the Class "B" Member. Class "A" Members have one vote for each Lot. The sole Class

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[19] Affidavit of Robert W. Dibble, Jr., R.p. 745.
[20] Affidavit of Robert W. Dibble, Jr., R.p. 745.
[21] Complaint, paragraph four, R.p. 84.

"B" Member is the Declarant – Litchfield Plantation Company. Litchfield Plantation Company has the number of votes equal to all Class "A" Members plus one (1) vote.[22]

The 2005 Amended Covenants further provide the Class "B" membership is terminated and converted to a Class "A "Membership upon the earlier occurrence of the following:

1. An initial period commencing on January 1, 2005 and ending December 31, 2010; provided, this initial period shall be automatically extended for successive periods of five (5) years, provided that in each five-year period prior to the automatic extension the Declarant has sold 100 or more lots, including the number of Lots or Dwelling Units designated in connection with a Bulk Sale, to non-affiliated Owners;

2. When, in its discretion, the Declarant so determines; or,

3. One Hundred Eighty (180) Days after the Declarant has sold 90% of all Lots subject to this Declaration. [23]

As to the automatic extension of the Class "B" membership:

The condition for automatic five-year (5) extensions of the Class "B" share period provided in (B) shall be conclusively established by the Declarant recording an affidavit stating the Declarant has sold 100 or more lots to Non-Affiliated Owners in the preceding five (5) years.[24]

The Class "B" share period was automatically extended for another five year period to end on December 31, 2015. The automatic extension was conclusively established by the filing of an Affidavit on December 3, 2010, entitled "Affidavit of Extension of Class "B" Membership.[25]

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[22]2005 Amended Covenants, R.p. 382.
[23] 2005 Amended Covenants, R.p. 382-383.
[24] 2005 Amended Covenants, R.p. 383.
[25] Affidavit of Extension of Class "B" Membership, R.p. 657.

Appellants erroneously argue the Class "B" Membership should be declared terminated because Respondent allegedly failed to fund an Association budget shortfall and breached fiduciary duties. The lower court correctly determined that Appellants' argument contradicts the restrictive covenants and bylaws. While Litchfield Plantation Company is required to either pay assessments on unsold lots or pay the association's budget shortage, the covenants do not provide for the termination of its Class "B" membership in the event Litchfield Plantation Company defaults.

The 2005 Amended Bylaws specifically provide:

> Declarant's Obligation for Assessments during Class "B" share Period. During the Class "B" Share Period, the Declarant may annually elect to either pay Assessments on all of its unsold Lots, or to pay the "shortage" for each fiscal year. The shortage shall be the difference between:
>
> > (A) The amount of all income and revenue of any kind received by the Association, including, but not limited to, Assessments collected from all other Lots, use fees, and income from other sources; and
> >
> > (B) The amount of all actual expenditures incurred by the Association during the fiscal year.[26]

The 2005 Amended Bylaws further provide for unfavorable consequences in the event Litchfield Plantation Company fails to pay the required assessments during the Class "B" period. Paragraph three on page two of the 2005 Amended Bylaws states:

> Voting Rights. Each Class "A" member shall be entitled to one (1) vote for each Lot owned. Provided, no Owner shall have a vote if the Owner is more than 60 days in arrears with respect to all money owed to the Association by that Owner. During the Class "B" Share Period the Class "B" member shall have the number of votes equal to all Class "A" members plus one (1) vote. Provided, the Declarant shall not have a vote

[26] 2005 Amended Bylaws, R.p. 416.

> for any Lot as to which Declarant is more than sixty (60) days in arrears with respect to all money owed to the Association.[27]

Litchfield Plantation Company and Litchfield Plantation Association contemplated the possibility the Company may fail to pay its required assessments. Robert W. Dibble, Jr., the attorney representing Litchfield Plantation Association during the negotiations of the 2005 Amended Covenants stated in his Affidavit:

> On behalf of Litchfield Plantation Association, Incorporated, I wanted the Class B status of Litchfield Plantation Company, Inc. terminated in the event Litchfield Plantation Company, Inc. failed to pay dues, assessments or budget shortfall. Mr. VanTreese on behalf of Litchfield Plantation Company, Inc. refused to agree to this request.
>
> After serious and sometimes acrimonious negotiations, Mr. VanTreese and I agreed the Class "B" membership would only be terminated in the event of one of three scenarios which are set forth on pages twenty-five and twenty-six of the 2005 Amendment.[28]

Appellants admit the 2005 Amended Covenants and Bylaws do not provide for the relief they are requesting. Instead, Appellants argue that because Respondent allegedly failed to pay its monetary obligations and allegedly breached fiduciary duties, the lower court should have rewritten the 2005 Amended Covenants and Bylaws and terminated Respondent's Class "B" membership.

B. Litchfield Plantation Company's financial status:

Litchfield Plantation Company experienced financial difficulties as a result of the real estate market crash and recession. In the Affidavit of E. Scott Trotter filed June 7, 2011, Mr. Trotter stated that in the years 2007, 2008, and 2009, Litchfield Plantation

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[27] 2005 Amended Bylaws, R.p. 412.
[28] Affidavit of Robert W. Dibble, Jr., R.p. 745.

Company funded the budget shortfalls of Litchfield Plantation Association.[29] However, by the fall of 2010, the financial condition of the Litchfield Plantation Company was poor and it appeared that the company would not be able to fund the shortfall going forward.

Attached to Mr. Trotter's affidavit filed June 7, 2011 are three letters he authored and sent to property owners dated April 30, 2010, November 19, 2010, and December 23, 2010.[30] In the letter dated April 30, 2010, Mr. Trotter states Litchfield Plantation Company would not be able to fund the budget shortage because of limited property sales and "because there are not enough property owners paying assessments." The need for and the plan to change the fiscal year for Litchfield Plantation Association is set forth in all three of Mr. Trotter's letters. In the April 30th letter, Mr. Trotter provides the following explanation:

> The LPA fiscal year has always run from April 1st through March 31st. The 2010/2011 assessments will fall short of covering the 2010/2011 fiscal operating expenses. I am hopeful funds will cover expenses through December 31, 2010. In order to collect additional LPA assessments after December 31st 2010, the strategy is to change the LPA fiscal year to a calendar year thereby allowing assessment bills for Calendar Year 2011 to be sent out in December 2010 for collection in January 2011. This should give LPA enough funds to pay expenses through approximately May 2011. 2011 calendar year dues will be $1,425.00 with a credit given for one (1) quarter.

Mr. Trotter, as President of the Board of Governors for the Association, had the authority to change the fiscal year of the Association. The 2005 Amended Bylaws, Article X, Paragraph 3 provides:

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[29] Affidavit of E. Scott Trotter filed June 7, 2011, R.p. 522.
[30] Affidavit of E. Scott Trotter filed June 7, 2011, R.p. 522.

> Fiscal Year. The fiscal year of the Association shall be an annual period commencing on such date as may be initially determined by the Board of Governors. The commencement date of the fiscal year shall be subject to change by the Governors for accounting reasons or other good cause.[31]

In his letters, Mr. Trotter also informed the owners of efforts being made to find a purchaser of Litchfield Plantation Company:

> The good news is we have been seeking a compatible buyer to purchase the assets of LPC and to provide patient money to weather this real estate storm and to provide funds to finish the development. We are confident we can find that person or company before summer of 2011 when LPA will run out of funds. This new entity would replace LPC as the Declarent and take on the responsibility of funding LPA budget shortages going forward. (April 30, 2010)[32]

> We continue to search for a purchaser and new Declarant to provide a solid new ownership group. Since April of this year, LPC has entertained four serious prospects and each prospect has declined the transaction. The real estate market continues to be very weak with clarity on value; competing transactions appear to offer better returns, and finding the right purchaser or group has been and remains challenging. (November 19, 2010)[33]

Litchfield Plantation Company was eventually sold as Mr. Trotter predicted. On April 21, 2011, Miller-Few Development, LLC purchased the stock interests of long-time owner Louise Parsons. Mr. John Miller has held the position of president of Litchfield Plantation Company since April 21, 2011.[34]

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[31] 2005 Amended Bylaws, R.p. 428.
[32] Affidavit of E. Scott Trotter filed June 7, 2011, R.p. 524.
[33] Affidavit of E. Scott Trotter filed June 7, 2011, R.p. 525.
[34] Affidavit of John Miller filed September 26, 2011, R.p. 538.

C. February 26, 2011 Special Meeting:

It is Respondent's position that Appellants improperly seized control knowing Litchfield Plantation Company was in a financially vulnerable position. According to Mr. Trotter's Affidavit filed September 26, 2011, Appellants purposefully chose February 26, 2011 as the date to call a special meeting so that owners aligned with them would not be disqualified from voting as a result of their failure to pay assessments. Mr. Trotter states:

> Affiant believes the Plaintiffs understood, accepted and acknowledged the Board of Governors for Litchfield Plantation Association, Incorporated, had the right to change the commencement date of the fiscal year because they caused the Special Meeting to be scheduled on February 26, 2011, for the express purpose of ensuring the Members of Litchfield Plantation Association, Incorporated present at the Special meeting would not be disqualified from voting at the Special Meeting under the 2005 Restated Covenants.
>
> Affiant believes as many as 66% of the Members of Litchfield Plantation association Incorporated could have been at least sixty (60) days in arrears three (3) days after the Special Meeting pursuant to Article 5, Section 5.6, of the 2005 Restated Declaration; Affiant believes Plaintiffs were aware of the provision within the 2005 Restated Declaration which disqualified Members of Litchfield Plantation Association, Incorporated from voting in the event the Member was 60 days in arrears "with respect to all money owed the Association.
>
> Affiant believes Plaintiffs purposefully scheduled the Special Meeting 57 days from January 1, 2011, the amended and new commencement date of the 2011 Litchfield Plantation Association, Incorporated fiscal year, and thereby recognized the efficacy of the amendment.[35]

The 2005 Amended Covenants and Bylaws give owners the right to call a special meeting. Paragraph 5 on page eleven of the 2005 Amended Bylaws provide:

[35] Affidavit of E. Scott Trotter filed September 26, 2011, R.p. 529.

> Special Meetings. Special meetings of the Members shall be held whenever called by the President, the Board of Governors, or by the holders of at least five percent (5%) of the voting power of the Association. Provided, a call by the holders of at least 5% of the voting power of the corporation shall require such Members to sign, date, and deliver to the President of the Association a demand for the meeting describing the purpose or purposes for which it is to be held. The close of business on the 30th day before delivery of the demand or demands for a Special Meeting to the President is the record date for purpose of determining whether the 5% requirement has been met. Only those matters that are within the purpose or purposes described in the meeting notice may be conducted at a Special Meeting of Members. At a meeting of Members, a quorum shall consist of Members having a majority of the votes entitled to be cast of Members present either in person or in proxy, and a majority vote of such quorum shall decide any question that may come before the meeting.[36]

Pursuant to the 2005 Amended Bylaws, notice for a special meeting must be provided in the same manner as notice of regularly scheduled meetings of members. Paragraph 3 on page eleven of the 2005 Amended Bylaws provide:

> Notice of Meetings. Written notice of each meeting of the Members shall be given by or at the direction of the Secretary or persons authorized or qualified to call the meeting, by mailing a copy of such notice, with proper postage affixed, at least fourteen (14) days [but not more than thirty (30) days] before such meeting to each Member entitled to vote at the meeting. The notice shall be mailed to the last known address of the person or entity that appears as a Member on the records of the Association...Such notice shall specify the place, day and hour of the meeting, and, in the case of a Special Meeting, the purpose of the meeting. Conclusive evidence of the notice of meeting having been given may consist of an affidavit of mailing evidencing the requisite notice was mailed at least fourteen (14) days prior to such meeting to all Members of record.[37]

As to the special meeting held February 26, 2011, the undisputed evidence shows the required notice was not provided and not all members attended:

- In the affidavit of Capers Johnston, wife of Appellant Joseph E. Johnston, Mrs. Capers states she was responsible for notifying property owners of

[36] 2005 Amended Bylaws, R.p. 421-422.
[37] 2005 Amended Bylaws, R.p. 421.

the special meeting. Mrs. Capers further states that she sent notice of the meeting by email to property owners. For those owners whose email addresses she did not have, notice was either given by hand delivery or by mail.[38]

- In the affidavit of Appellant Joseph E. Johnston, Mr. Johnston states he hand-delivered notice of the meeting to Mr. Trotter on February 15, 2011.[39]

- In the affidavit of Appellant Carol E. Kirby dated August 8, 2011, Ms. Kirby states she personally sent by email or hand delivery notice of the meeting to Allan Kidston on February 15, 2011. Mr. Kidston did not attend the meeting.[40]

- In the affidavit of Appellant Carol E. Kirby dated June 5, 2011, Ms. Kirby states she was informed there were one hundred thirty-one (131) property owners owning one hundred sixty-five (165) properties within Litchfield Plantation. She further states ninety members (90) were present at the February 26, 2011 meeting.[41]

- In the affidavit of E. Scott Trotter filed September 26, 2011, Mr. Trotter states there were one hundred sixty-five members (165) of the Association. But as of February 26, 2011, only eighty-three (83) Members were in good standing and entitled to vote at the Special Meeting.[42]

During the hearing held December 8, 2011, Appellants admitted not all owners attended the Special Meeting.[43] Mr. Trotter has further stated the required quorum of members was not present at the special meeting and the ballot used during the meeting was improperly worded.[44]

Appellants erroneously claim they were elected to the Board of Governors during the special meeting. Three of the stated purposes for the improperly noticed special

[38] Affidavit of Capers Johnston dated June 6, 2001, R.p. 565.
[39] Affidavit of Joseph E. Johnston dated June 6, 2001, R.p. 551.
[40] Affidavit of Carol E. Kirby dated August 8, 2011, R.p. 789.
[41] Affidavit of Carol E. Kirby dated June 5, 2011, R.p. 543.
[42] Affidavit of E. Scott Trotter filed September 22, 2011, R.p. 532.
[43] December 2011 Transcript, R.p. 217, lines 21-24.
[44] Affidavit of E. Scott Trotter filed September 26, 2011, R.p. 533.

meeting were to remove E. Scott Trotter and Jeffrey W. Van Treese from the Board of Governors, to nominate and elect five new Governors to the Board, and to discuss the termination of the Class "B" share period.[45] Mr. Trotter attended the February 26, 2011 meeting and made clear that Litchfield Plantation Company retained its Class "B" Membership status and that Appellants did not have authority to elect a new Board of Governors.[46] Mr. Trotter handed out a written memorandum to owners at the meeting in which he states:

> Regarding the Class "B" Period, the Declarant, LPC, considers it as valid through December 31, 2015. Accompanying Declarant Rights are also controlled by LPC during this period. Per the CCRs, LPC reserves the right to refuse to consent to any actions taken at this special meeting.[47]

D. Appellants' Declaratory Judgment Complaint filed March 9, 2011:

Appellants seek a declaration from the court that Respondent lost its Class "B" membership as of January 1, 2011 because the Association was out of money and Respondent failed to pay the budget shortage.[48] Those allegations are not accurate. In the Affidavit of Mr. Trotter dated September 22, 2011, Mr. Trotter states the fiscal year for Litchfield Plantation Association was properly changed to a fiscal year beginning January 1, 2011 and ending December 31, 2011.[49] The dues and assessments collected were sufficient to pay the operating expenses for Litchfield Association through the end of July 2011 and no shortfall existed as of January 1, 2011.

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[45] Affidavit of Carol E. Kirby dated August 8, 2011, R.p. 789.
[46] Affidavit of E. Scott Trotter filed September 26, 2011, R.p. 529.
[47] Affidavit of E. Scott Trotter filed September 26, 2011, R.p. 529.
[48] Complaint, R.p.83.
[49] Affidavit of E. Scott Trotter, filed September 26, 2011, R.p.531.

Appellants unilaterally prohibited Respondent from voting at meetings on account of the alleged budget shortfall. At the same time, Appellants refused to inform Respondent the amount of the shortfall and how it was calculated. In Appellants' Answers to Supplemental Interrogatories dated November 10, 2011, Appellants admitted they were "unaware of whether there has ever been a determination of the exact amount of the budget shortfall," and "the exact amount of the shortfall has not been calculated."[50] In the Affidavit of John Miller filed on September 26, 2011, Mr. Miller states since becoming President of Litchfield Plantation Company on April 21, 2011, the company has not received notice of, or demands for, payment of a budget shortfall.[51] Mr. Miller further states he received three invoices from the Association for an additional assessment enacted by the Appellants dated July 11, 2011 and that each invoice provided there was a zero balance owed by the company as of July 1, 2011. However, Respondent recognized that as the months passed, a legitimate budget shortfall would accrue and continued to try to find out from Appellants the amount of the shortfall.

E. Motion to Intervene by E. Scott Trotter:

On July 29, 2011, Mr. Trotter filed a Motion to Intervene.[52] Appellants objected and submitted a memorandum to the lower court in which they provided:

> On July 1, 2011 Trotter was arrested and charged with Grand Larceny by the Georgetown County Sheriff for converting Promissory Notes and Mortgages with a value of $926,881.00 that belonged to the Plaintiff, Litchfield Plantation Association, to Trotter's own company, Litchfield Buyout Group....On April 27, 2011 Trotter filed an Assignment of Promissory Notes, Guarantees and Mortgages in the Georgetown County Clerk of Court's office....to allow Trotter to intervene in this action will also change the nature of this action. If Trotter is allowed to file a

[50] Plaintiffs' Answers to Defendant's Supplemental Interrogatory Answers. R.p. 766.
[51] Affidavit of John Miller filed September 26, 2011, R.p. 538.
[52] Motion to Intervene, R.p. 101.

> pleading, the Association will be required by SCRCivP 13 (A) to either assert compulsory counterclaims or forfeit those counterclaims. The Association has legal claims against Trotter arising from his action as President of the Association. These claims include the claim for conversion related to the Assignment. Other claims that will have to be asserted against Trotter involve his taking of $75,000 of Association funds on June 9, 2008 and allowing $20,000 of Association funds to be taken by his fellow Board member on July 21, 20098 in exchange for certain Notes that are believed to be either worthless or not executed at all....To allow Trotter to intervene in this action will require that these claim (*sic*) be brought in this action and will convert this action from a declaratory judgment action to a claim for monetary relief. [53] (emphasis added).

Attached to the memorandum was a copy of the arrest warrant issued against Mr. Trotter in which Mr. Trotter is accused of the following:

> That on or about April 27, 2011, in the Pawleys Island area of Georgetown County. The defendant Edwin Scott Trotter did with intent to permanently deprive the owner, did take and carry away Promissory Notes and Mortgages valued at more than $10,000.00 belonging to the Litchfield Plantation Association, Inc. The defendant, the previous President of the Litchfield Plantation Association was voted out of the position on February 26, 2011. The defendant did represent himself as the President of the Association on April 27, 2011 and converted the Promissory Notes and Mortgages to his own company, Litchfield Plantation Buyout Group, with the transaction being recorded with the Register of Deeds office in Georgetown County. The Promissory Notes and Mortgages are valued at $926,881.00 and the defendant did not have authorization to convert the items to his own company. This being against the peace and dignity of the State of South Carolina.[54]

Over Appellants' objections, the lower court allowed Mr. Trotter to intervene. On September 23, 2011, Mr. Trotter filed his Intervenor Complaint seeking a declaration that (1) the special meeting was improperly held; (2) the vote taken at the special meeting was ineffective; and, (3) the officers of Litchfield Plantation Association remain as they were

[53] Memorandum in Opposition to Motion to Intervene, R.p. 781.

[54] Exhibit C to Memorandum in Opposition to Motion to Intervene, R.p. 517.

prior to the special meeting.[55] On November 10, 2011, Mr. Trotter filed a Motion to Deposit in Court the promissory notes, guarantees, and mortgages he was accused of converting. The lower court granted the motion over Appellants' objections as discussed further below.

F. Hearing held December 8, 2011:

During the hearing held December 8, 2011, the lower court asked the parties what relief they were seeking in their respective motions for summary judgment. Counsel for Respondent responded "[w]e're looking for an order granting summary judgment to us that the Class B voting rights are still in effect."[56] Appellants stated "[w]e filed this action to terminate the class – to have the declaration that the Class B voting rights were terminated on two different grounds. One of the grounds was the financial default of the defendant...The shortfall."[57] The second ground was Respondent's alleged breach of fiduciary duties to the Association.[58]

Respondent argued the 2005 Amended Covenants and Bylaws should be enforced.[59] In contrast, Appellants admitted the relief they sought was not supported by the restrictive covenants.[60] Instead, Appellants argued the lower court should "abolish" Respondent's Class "B" membership pursuant to the court's "equitable jurisdiction."[61]

Respondent requested, without objection, an accounting be performed so that Respondent could ascertain the amount of the budget shortfall:

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[55] Intervenor Complaint, R.p. 113.
[56] December 8, 2011 Transcript, R.p. 208, line 24- page 209, line 2.
[57] December 8, 2011 Transcript, R.p. 210, lines 7-12.
[58] December 8, 2011 Transcript, R.p. 213, lines 7-10.
[59] December 8, 2011 Transcript, R.p. 201, lines 4-5; R.p. 208, lines 16-17.
[60] December 8, 2011 Transcript, R.p. 211, lines 6-8; R.p. 226, lines 8-11.
[61] December 8, 2011 Transcript, R.p. 218, lines 20-25.

It [Litchfield Plantation Company] was bought by Mr. John Miller and some investor partners of his. Like I said, their goal was just to recapitalize the company, that's what we're trying to do here but that's what --- they [Appellants] don't want that because they want to be in control of all this. We want to get – pay the shortfall, get our rights back but – if I showed up today and said, I want to pay the shortfall, there's not one person that can tell me what that shortfall is.[62]

The bottom line is, Judge, is it only matters if we pay it. If we don't pay them, guess what, everybody's rights are suspended, we'll never get to vote. But what they're worried about is that once we know what the amount is and we can restructure this debt and we restructure this company and pay them, guess who gets our voting rights back, we get our voting rights back. That's what they don't like. That's why this matters. That's why their regular remedies aren't good enough for them because they want us to pay and then not have control over the development that we're trying to develop.[63]

In response, Appellants stated:

Your Honor, to say that they don't know how much the assessed shortfall is, that's ludicrous. There was a meeting in June of this year in which they were told that the shortfall was $160,000 from that point to the end of the ...Plus what was the shortfall from last year... Well, we've given them a number, the only thing we have not calculated is there is an offset that they were due that we didn't give them but we have not formally calculated because the offset occurred when they had control of our homeowners association.[64]

After hearing the parties' arguments, the lower court determined:

I have looked at the articles. I think it's very clear as to under what conditions the voting rights can be terminated. I think it's by everybody's estimation clear that there ...was a shortfall. Whether or not Mr. McNeill's [sic] client intends or can catch that up, I don't know whether they can or not. Mr. Neill, you tell me they can. The issue before me, though, is whether or not this Court can under the circumstances of this case can issue an order determining that as a matter of law these rights are terminated. I cannot do that.[65]

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[62] December 2011 Transcript, R.p. 233, lines 13-23.
[63] December 8, 2011 Transcript, R.p. 240, lines 1-11.
[64] December 8, 2011 Transcript, R.p. 240, lines 13-25.
[65] December 8, 2011 Transcript, R.p. 242, lines 13-25.

> Mr. Neill, I'm going to rule in your favor. If you would, prepare me an order to that effect and I want in that order to require an accounting within sixty days of all funds which are due to the association by your company, everything that is in arrears. That should clear it up. If you don't pay it, you don't vote....And I'm sure that there's gonna be a dispute over that but I want to know - - I want to bring it to a head right now.[66]

G. Civil Action No: 2012-CP-22-00341:

On April 10, 2012, Appellants filed a second lawsuit against Respondent Litchfield Plantation Company and third-parties having possible property interests in the development – including Litchfield Buyout Group, LLC.[67] Case No: 2012-CP-22-00341 is entitled "*Litchfield Plantation Association, Inc. vs. Litchfield Plantation Company, Inc.; Louise P. Parsons; South Carolina Dept. of Revenue; BDC Capital, Inc., f/k/a BDC Capital, LLC; Allan L. Kidston; First National Bank of South Carolina; Lawrence A. Shapiro; Info Quest, Inc.; Small Luxury Hotels of the World Limited; and Litchfield Buyout Group, LLC.*" The complaint contains six causes of action summarized as follows:

- In the first cause of action, Appellants claim:

> For valuable consideration given, Litchfield Plantation Company, Inc., executed and delivered to Litchfield Plantation Association, Inc. ("Plaintiff"), certain Secured Promissory Notes, one dated May 22, 2009 in the principal sum of Five Hundred and Seventy Thousand and 00/100 ($570,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated the 1st day of June, 2010, in the principal sum of Fifty thousand and 00/100 ($50,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated June 10, 2009, in the principal sum of Seventy Five Thousand and 00/100 ($75,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated July 21, 2009 in the principal sum of Twenty Thousand and 00/100

[66] December 8, 2011 Transcript, R.p. 243, line 6-p.244, line 2.
[67] Complaint filed in Case No: 2012-CP-22-00341, R.p. 139.

($20,000.00), ("Notes"). Litchfield Plantation promised to repay the Plaintiff the amounts advanced under the Notes.

Subsequent to the execution of the Notes, and to better secured the repayment of the Notes and Debts evidenced thereby, Litchfield Plantation Company, Inc. executed and delivered unto the Plaintiff, a certain Mortgage dated the 1st day of June, 2010 ("Mortgage), covering a number of various properties....

The payments due on the Note and Mortgage are in default. Although demand for payment thereof has been made and the Plaintiff, as present lienholder, after providing all required notices, elect to, and does declared the entire balance due and payable, and that there is due and owing on the Notes as of April 9, 2012 the sum of Seven Hundred and Thirty-Four Thousand Six Hundred and Twenty Four Dollars and Forty Nine Cents ($734,624.49), together with interest as provided at the rate set forth in the Notes from to the date of payment, and also for the costs and disbursements of this action, including attorney fees.

- In the Second Cause of Action, Appellants seek the appointment of a receiver.
- In the Third Cause of Action, Appellants claim on December 29, 2010, Litchfield Plantation Company deeded a beach house, which was a common property amenity, to the Association. Respondent allegedly breached fiduciary duties by transferring a beach house "in a poor state of repair" and by failing to provide Plaintiff with funds to repair the beach house.
- In the Fourth and Fifth Causes of Action, Appellants claim Litchfield Plantation Company breached the 2005 Amended Covenants and its fiduciary duties by failing to collect working capital contributions from purchasers to fund the reserve account and by failing to pay the Association's budget shortages.
- In the Sixth Cause of Action, Appellants claim Litchfield Plantation Company breached fiduciary duties by borrowing monies from the Association secured by notes and mortgage that were "commercially unreasonable."

On June 1, 2012, Respondent filed an Answer denying the claims and asserting affirmative defenses.[68] There has been no adjudication of the claims or defenses asserted in the lawsuit. The case is still pending in Georgetown County.

[68] Answer filed in Case No: 2012-CP-22-00341, R.p. 150.

H. Hearing held April 19, 2012:

At the hearing held April 19, 2012, the court and the parties discussed the accounting performed subsequent to the December hearing. Pursuant to the accounting performed by Appellants, the budget shortfall ended up being $119,148.00. However, Appellants argued Respondent should be required to pay the budget shortfall and all the other damages claimed in Civil Action No: 2012-CP-22-00341 totaling over $900,000.00.[69] Respondents countered that two of the notes were not due to be paid until 2014. As to the other notes, there was a dispute as to whom the notes belonged and which Board of Governors should receive payment.[70] Appellants acknowledged their claims regarding the notes, beach house repairs, and alleged breaches of fiduciary duty were the subject of the second lawsuit.[71]

Judge Hyman explained the court's position:

> What I'm trying to do here, while this action is pending, is do what I can to make sure everybody is treated fairly. I want you to have your voting rights...But I don't want the, the homeowners association to suffer...I'm trying to strike a balance here that's the fairest thing I can do right now to preserve this status quo and that's what I want to do. [72]

Judge Hyman wanted the Association to have funds needed to operate and determined Respondent must pay all monies in arrears before exercising its voting rights. Appellants' disputed claims regarding the funding of the reserve account, promissory

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[69] April 19, 2012 Transcript, R.p. 275, lines 3 –17.
[70] April 19, 2012 Transcript, R.p. 275, line 20 – R.p. 276, line 12.
[71] April 19, 2012 Transcript, R.p. 257, line 10 – R.p. 258, line 1; R.p 292, lines 21-25.
[72] April 19, 2012 Transcript, R.p. 264, line 17 – R.p. 265, line 1.

notes, and repairs to the beach house would be determined at a later date.[73] Judge Hyman stated:

> I understand what arrears means and that's what I'm trying to do. We can wait two years and try to find out what is really arrears and in the meantime if they don't have voting rights I don't blame them, I wouldn't pay anything if I don't have to. I'm trying to strike a balance here so that we can have them pay up and make a good faith payment of what I consider to be due as of this date, if we have no litigation what, where would we be right now and that's how I'm trying to calculate these amounts so that they can get their voting rights, they can pay in, and then we can proceed with whatever else we have.[74]

As set forth in the lower court's Order filed May 25, 2012, Judge Hyman determined Respondent must pay the budget shortfall of $119,148.00, the balance on a promissory note dated July 21, 2009 in the amount of $17,887.12, and the balance on a promissory note dated June 1, 2011 in the amount of $12,946.48. As to the other monies Appellants claimed were owed, Judge Hyman determined "it has not been conclusively established at this present time that Defendant is liable to the Association for those monies and therefore, those monies are not currently in arrears."[75]

Also during the hearing, the lower court heard Mr. Trotter's Motion to Deposit in Court, filed November 10, 2011, regarding the disputed promissory notes and mortgages which he assigned to his company, Litchfield Buyout Group, LLC. Mr. Trotter's attorney explained to the court:

> Mr. Trotter has filed a motion to Rule 67 to deposit to the Clerk of Court those notes and, the notes and mortgages that are, that are in dispute and what we've been arguing back and forth about. They are, they're the secondary lawsuit that's been discussed this morning that was not in place

[73] April 19, 2012 Transcript, R.p. 286, line 20 –R.p. 287, line 5.
[74] April 19, 2012 Transcript, R.p. 287, lines 13 – 24.
[75] *See* page seven of the Order filed May 25, 2012, R.p. 9.

> when we filed this motion, to that secondary lawsuit seeks to foreclose them and alleges that the assignment is void for lack of consideration and is void for lack of authority to execute the assignment. In any event either way Mr. Trotter wants to tender those notes to the Clerk of Court for safekeeping until there's a final determination as to who should receive them.[76]

In arguing against Mr. Trotter's motion, Appellants admitted collection of the debt owed on the notes and mortgages was the subject of the second lawsuit, not the present lawsuit. Appellant McMahan argued:

> [W]hat they're (*being Mr. Trotter*) trying to do is get an advantage over the Solicitor's office. But the notes here, if you assign the notes to any case they should be assigned in the other case (*being Civil Action No: 2012-CP-22-00341*) not in this case because this case does really not have anything to do with collection on those notes and if you decide in this case there's going to be a title problem because what we have is a filed assignment saying that those notes went from the homeowners association to a buyout group and then we'll have an order saying that they went from Mr. Trotter individually to the Court. The gap between what happened between the buyout group and Mr. Trotter will be unfilled.[77]

The lower court addressed Appellants' concerns by specifying in its order that although Mr. Trotter had physical possession of the notes and mortgages, there was a dispute pending in the Court of Common Pleas as their ownership and the documents would be turned over to the Clerk of Court for safekeeping.[78]

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[76] April 19, 2012 Transcript, R.p. 305, lines 13 – 24.
[77] April 19, 2012 Transcript, R.p. 311, lines 19 – R.p. 312, line 5.
[78] April 19, 2012 Transcript, page R.p. 312, lines 6 – 12.

I. Appellants' Motion to Reconsider:

On June 6, 2012, Appellants filed a motion for reconsideration of the Order filed May 25, 2012.[79] In the motion, Appellants did not object to the court's determination of their second cause of action. Rather, Appellants asked the court to reconsider the amount of the arrearage Respondent should pay in order to lift the suspension of its voting rights.

On August 16, 2012, a hearing was held before the lower court. During the hearing, counsel for Appellants stated:

> We understand your ruling on the termination but on the suspension, if you look at the middle of the second paragraph you say that is appears that the notes which we as the Plaintiffs allege are due and owing were assigned and that they're not currently in default. Well. Your Honor, we take a different view of that and I would just point out to the Court there's been no testimonial evidence or other evidence other than an accounting provided by the Plaintiffs that they are in fact in default."[80]
>
> "We would ask that you strike and rewrite that part of the order that doesn't talk to the termination but to the suspension and allow us a full evidentiary hearing continuing the suspension of those voting rights until the amount due and owing under the notes and mortgage is determined as a matter of law by the court after findings of fact by the fact finder.[81]

In response, Respondent pointed out once again that collection of the debt owed on the notes and other claims raised by Appellants was the subject of a different lawsuit. Additionally, and evidentiary hearing was not needed because the parties and court relied upon the numbers set forth in Appellants' accounting. The court simply determined what monies were in arrears and which monies was the subject of the other lawsuit. On

[79] Motion to Reconsider, R.p.155.
[80] August 16, 2012 Transcript, R.p. 353, lines 1-10.
[81] August 16, 2012, Transcript, R.p. 354, lines 5-11.

August 17, 2012, a Form 4 Order was filed denying Appellants' Motion. Thereafter, Appellants filed their first Notice of Appeal dated August 23, 2012.

J. Special Meeting held August 25, 2012:

On August 3, 2012, Respondent made full payment of the monies, $150,438.05, the lower court determined was in arrearage.[82] Thereafter, in compliance with the restrictive covenants, Respondent requested a special meeting of owners be called for the purpose of removing Appellants who were holding themselves out to be the Governors of the Association and to nominate and elect five individuals to serve as the proper Board. Appellants recognized Respondent had the right to call a special meeting and the property management company, KA Diehl, was instructed to schedule the meeting for August 25, 2012 and provide the required notice to owners.[83]

At the meeting, Appellants Bob McMahon, Joe Johnston, and Tom Eckard were present, as well as, representatives from KA Diehl.[84] The parties agreed that a quorum of owners was present and the meeting agenda and ballot prepared by KA Diehl were distributed. However, Appellant McMahon announced that because he had filed notice of appeal, it was his opinion that the May 25, 2012 order was stayed and Litchfield Plantation Company did not have the right to vote on any issue. He and the other Appellants took votes from the other owners present and determined he and the other Appellants had not been removed from the Board of Governors. Appellants then left the meeting even after being informed they were not acting properly and that the special meeting would continue without them. After Appellants left, Respondent and the

[82] Affidavit of John Miller filed September 7, 2012. R.p. 600.
[83] Affidavit of John Miller filed September 7, 2012. R.p. 600.
[84] Affidavit of John Miller filed September 7, 2012. R.p. 600.

remaining owners continued with the special meeting, and proceed to nominate and elect five individuals to serve as the proper Board of Governors.

On September 7, 2012, Respondent filed a Motion for Temporary Injunction or in the alternative, an Order Lifting the Automatic Stay. Respondent sought an Order from the lower court prohibiting the Appellants from continuing to interfere with its voting rights and property rights. On October 22, 2012, an Order was filed granting Respondent's Motion. Order filed October 22, 2012. Thereafter, Appellants filed their second Notice of Appeal on October 31, 2012.

IV. ARGUMENTS:

A. The clear and unambiguous language of the 2005 Amended Covenants and Bylaws for Litchfield Plantation do not provide for the termination of Respondent's Class "B" membership as requested by the Appellants:

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 6661 S.E.2d &981 (2008)(internal citations omitted). 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. Id. In the present case, the lower court properly granted summary judgment because there was no evidence to support Appellants' claim that Respondent's Class "B" membership was terminated.

Restrictive covenants are contractual in nature. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)(*citing*, Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Id., *citing* Taylor c. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). In Cullen v. McNeal, 702 S.E.2d 378 (Ct.App. 2010), the Court of Appeals applied the rules of contract interpretation in reviewing a declaration of restrictive covenants. "The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract]. If a contract's language in clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." Id., *quoting* Gilbert v. Miller, 356 S.C. 25, 30-31, 586 S.E.2d 861, 864 (Ct.App. 2003). Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008). Under South Carolina law, construction and enforcement of an unambiguous contract is question of law for the court, and thus can be properly disposed of at summary judgment. Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc., 421 F. Supp. 2d 908 (D.S.C. 2006).

In South Carolina Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001), the Supreme Court stated that it had recently explained the rules for interpreting restrictive covenants and provided the following excerpt from its opinion in Taylor v. Lindsey, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-864 (1998):

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property. (internal quotations and citations omitted).

In both South Carolina Department of Natural Resources v. Town of McClellanville and Taylor v. Lindsey, the Supreme Court refused to enlarge a restrictive covenant beyond its plain language. Likewise, in the present case, Appellants' attempt to rewrite the 2005 Amended Covenants and Bylaws for Litchfield Plantation should also be denied. Appellants want to amend the restrictive covenants to add an additional scenario as to when the Respondent would lose its Class "B" membership. Appellants argue Respondent lost its Class "B" status by allegedly failing to pay a budget shortfall and breaching duties owed to the Association. As discussed above, during the negotiations of the 2005 Amendments to the Covenants and Bylaw, attorney Robert W. Dibble, Jr., who represented Litchfield Plantation Association "wanted the Class B status of Litchfield Plantation Company, Inc. terminated in the event Litchfield Plantation Company, Inc. failed to pay dues, assessments or budget shortfall. Mr. VanTreese on behalf of

Litchfield Plantation Company, Inc. refused to agree to this request.[85] Instead, the 2005 Amendments provided alternative relief. If Litchfield Plantation Company was in arrearage for more than sixty days with regards to monies it owed the Association, then its voting rights were suspended. Additionally, the Association had alternative relief, such as filing liens against property owned by the Company or filing complaints for collection.

The clear and unambiguous language of the 2005 Amended Covenants and Bylaws for Litchfield Plantation do not provide for the termination of Respondent's Class "B" membership as requested by the Appellants. Accordingly, the lower court correctly granted summary judgment for the Respondent.

B. The lower court properly held that Appellants' Notice of Appeal did not stay the execution of the May 25, 2012 Order.

1. The present appeal is not proper:

The Notices of Appeal did not automatically stay the execution of the Order filed May 25, 2012. SCACR Rule 201(a) provides an appeal may be taken from any final judgment, appealable order or decision. Appellants have not appealed the lower court's determination that Respondent's Class "B" membership was not terminated as of January 1, 2011. Instead, Appellants have appealed the lower court's determination as to what monies were in arrears as of April 19, 2012. It is Respondent's position that this Appeal is not proper because there is currently a case pending, Civil Action No: 2012-CP-22-00341, in which Appellants' contested monetary claims against Respondent are being litigated. The lower court in its Order filed May 25, 2012 specifically stated that its

[85] Affidavit of Robert W. Dibble, Jr., R.p. 745.

decision would not prevent Appellants from pursuing their claims that additional monies were owed by the Respondent. Accordingly, there has not been a final judgment as to that issue.

Additionally, this is not an interlocutory order which is immediately appealable because it does not involve the merits of the action commenced, does not discontinue the action, nor does it prevent a judgment from which an appeal might be taken. S.C. Code Ann. § 14-3-330. Appellants did not seek a determination from the lower court as to what damages the Respondent may owe as a result of alleged breaches of fiduciary duties or promissory notes. Instead, Appellants asked for a declaratory judgment as to whether or not Respondent's Class "B" membership was terminated as of January 2, 2011.

Appellants have repeatedly acknowledged that the present case is not about collection of monies. As discussed above, in their memorandum against Mr. Trotter's Motion to Intervene, Appellants argued:

> On July 1, 2011 Trotter was arrested and charged with Grand Larceny by the Georgetown County Sheriff for converting Promissory Notes and Mortgages with a value of $926,881.00 that belonged to the Plaintiff, Litchfield Plantation Association, to Trotter's own company, Litchfield Buyout Group....to allow Trotter to intervene in this action will also change the nature of this action....The Association has legal claims against Trotter arising from his action as President of the Association. These claims include the claim for conversion related to the Assignment ....To allow Trotter to intervene in this action will require that these claim (*sic*) be brought in this action and will convert this action from a declaratory judgment action to a claim for monetary relief. [86]

As further discussed above, the Appellants chose to file a separate lawsuit, Case No: 2012-CP-22-00341. During the hearing held April 19, 2012, Appellants admitted

[86] Memorandum in Opposition to Motion to Intervene, R.p.771.

collection of the debt owed on the notes and mortgages, beach house repairs, reserve fund, and breach of fiduciary duty was the subject of the second lawsuit. Appellant McMahan even argued "if you assign the notes to any case they should be assigned in the other case not in this case because this case does really not have anything to do with collection on those notes." [87]

2. Respondent's Class "B" Membership and right to vote is a property right:

Respondent is a member of Litchfield Plantation Association, Inc. All members of a non-profit corporation have the same rights and obligations with respect to voting, unless the articles or bylaws establish classes of membership with different rights or obligations. S.C. Code § 33-31-610.

The right to vote is an integral part of ownership in a corporation:

> Generally, the right to vote stock at corporate shareholder meetings is an incident of stock ownership, and while it is to be exercised in the mode and under the restrictions prescribed by the charter and bylaws, it is nevertheless a part of the stockholder's property inherent in the stockholder by virtue of the stockholder's title. There is a general policy against the disenfranchisement of stockholders. The shareholder vote has primacy in the system of corporate governance because it is the ideological underpinning upon which the legitimacy of directorial power rests. The right to vote is among the most fundamental rights of ownership of voting shares. The right to vote and act in corporate matters is a valuable right which cannot be taken away by the act or failure to act of the corporate officers. 18 A Am. Jur. 2d Corporations § 850.

The right to vote cannot be separated from the ownership of voting stock without the consent of the legal owner of the stock. 18 C.J.S. Corporations § 456. The right to

[87] April 19, 2012 Transcript, R.p.311, lines 19 – R.p.312, line 5.

vote is to be exercised free of duress and intimidation by corporate management. Id. A corporate board of directors may take no action that interferes with the shareholders' exercise of their voting rights without showing a compelling justification for its actions. Id.

In addition to its right to vote as a member of the corporation, Respondent's voting rights are directly related and arise solely from their ownership of property in Litchfield Plantation. These voting rights provide Respondent with certain valuable property rights which are only available provided that they own property within Litchfield Plantation. *See* Am.Condo. Ass'n v. IDC, Inc., 844 A.2d 117, 136-137 (R.I. 2004) *decision clarified on reargument*, 870 A.2d 434 (R.I. 2005); Kelso Woods Ass'n, Inc. v. Swanson, 753 A.2d 894 (P.A. 2000); C.M. King et al v. Oakmore Homes Ass'n, 195 Cal.App. 3d (1987); In re Fentonville Cemetary Ass'n, 238 A.D. 491, 264 N.Y.S. 790 (App.Ct. 1933); McCarthy v. The Homeowners's Ass'n of Tweed Lakes, Inc., 2012 WL 3834033. Therefore, Respondent's right to exercise its Class "B" Membership votes is not only a personal right, but a property right as well.

S.C. Code Ann. §18-9-150 provides the execution of judgment directing the delivery of documents or personal property shall not be stayed on appeal unless the property is delivered into the Court or the appellant posts a bond. The Supreme Court in Harmna v. Wagner, 33 S.C. 487, 12 S.E. 98 (1890) held where an appeal without bond is taken by the executor from an order appointing a receiver of the personal property of the estate, it does not operate to stay the execution of the order unless the property be brought into court or bond with surety given. Additionally, S.C. Code Ann. §18-9-170 also provides the execution of judgment directing the delivery of possession of real property

shall not be stayed on appeal unless a written undertaking be executed on the part of the appellant, with two sureties. Because the Plaintiffs did not file a bond, the notice of appeal did not trigger an automatic stay.

Furthermore, even if the Appeal was not an impermissible interlocutory appeal, the notice of appeal would not serve as an automatic stay. SCACR Rule 241 (b) provides exceptions to the general rule. One of the exceptions is for judgments directing the delivery of personal property pursuant to S.C. Code Ann. § 18-9-150, and another is for judgments directing the delivery of possession of real property pursuant to S.C. Code Ann. § 18-9-170. It is clear that Respondent's Class "B" voting rights constitute not only the delivery of personal property under the statute, but real property as well. The lower court's order directs that these rights be restored (thereby directing delivery of these personal and property rights to Respondent, Litchfield Plantation Company). It is obvious that Appellants desperately wanted to maintain control of the Association – or at least prevent the Respondent from regaining control. However, Appellants should not be allowed to use the appellate process to intentionally deprive Respondent of its property rights.

C. The lower court properly issued the Temporary Restraining Order.

Respondent paid the arrearage of over $150,000.00 pursuant to the lower court's order with the expectation of having its voting rights restored. Appellants accepted the monies and exercised control over the monies. Thereafter, Appellants refused to recognize Respondent's votes during the special meeting held August 25, 2012. Those undisputed facts certainly presented an inequitable situation for Respondent and clearly

showed Appellants' bad faith attempt to keep control of the association no matter what – whether that meant ignoring the restrictive covenants or Judge Hyman's orders.

Appellants not only attempted to take away Respondent's right to vote, Appellants also attempted to thwart Respondents' ability to sell its remaining property located within Litchfield Plantation. As set forth above, the 2005 Amended Covenants require Respondent to sell 100 lots by December 31, 2015 in order to maintain its Class "B" Membership with superior voting rights. It is axiomatic that potential purchasers would be less likely to purchase Respondent's property knowing Appellants refuse to recognize the fundamental voting rights connected with the ownership of that property. It is clear that if Respondent's property rights remained in limbo for the duration of this litigation and appeal, Respondent would likely suffer significant damages without any adequate remedy at law.

Furthermore, as set forth in the record discussed above, there was plenty of evidence showing that Respondent was likely to succeed on the remaining merits of the case.

V. CONCLUSION:

For the reasons discussed above, Appellants' Appeal must be dismissed and the lower court's Orders affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2011-CP-22-319

Litchfield Plantation Association, Inc., Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips.....Appellants.

v.

Litchfield Plantation Company, Inc. .....Respondent.

And E.Scott Trotter.....Intervenor.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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Dated: December 18, 2013
Murrells Inlet, South Carolina.

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And E. Scott Trotter .....Intervenor.

PROOF OF SERVICE

I certify that I have served a copy of Respondent Litchfield Plantation Company, Inc.'s Final Brief, by depositing a copy of it in the United States Mail, postage prepaid, on December 19, 2013, addressed to counsel, Timothy W. Bouch, Michael S. Seekings, and Yancey McLeod, III, P.O. Box 59, Charleston, SC 29402 and a copy to Robert S. Shelton, P.O. Box 357, Myrtle Beach, SC 29578.

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