

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2015-000599

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SC Court of Appeals

Live Oak Village Homeowners Association, Inc.; Jennifer McFarland; Carlton Holcombe
and Ute Holcombe, Plaintiffs,

Of whom Live Oak Village Homeowners Association, Inc.; Jennifer McFarland;
and Carlton Holcombe are Appellants,

v.

Thomas Morris; David Hannemann; Sofia Mazell and Michael Mazell, Respondents,

Sofia Mazell and Michael Mazell, Third-Party Plaintiffs,

v.

William McFarland, Third-Party Defendant

INITIAL BRIEF OF RESPONDENTS
THOMAS MORRIS AND DAVID HANNEMANN

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN THE NAME OF THE HOA WHERE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS?**
- II. **DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT?**

STATEMENT OF THE CASE

This matter involves disputes between residents of the Live Oak Village subdivision located in Summerville, South Carolina. Live Oak is a small community that includes seven lots and common areas governed by the Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina, as amended, and Bylaws of Live Oak Village Homeowners Association, Inc. ("HOA"). [Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. A - Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina, Ex. B - Amendments to the Declaration of Covenants And Restrictions for Live Oak Village, Summerville, South Carolina, Ex. C - Bylaws Of Live Oak Village HOA; Rule 30(b)(6), SCRCF Dep. of Live Oak Village Homeowners Ass'n]. The HOA is governed by the Board of Directors ("Board"), which is comprised of three elected directors. [Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws of Live Oak Village Homeowners Association, Inc. § 4(A)]. The three directors of the Board are William McFarland, David Hannemann, and Thomas Morris. [Hannemman Dep. 67:18-21; 30(b)(6) of HOA 286:8-13].

William McFarland, purportedly on behalf of the HOA, and three other individual homeowners, Jennifer McFarland, Carlton Holcombe, and Ute Holcombe, filed a Complaint in the Dorchester County Court of Common Pleas on November 16, 2012 against Respondents Thomas Morris (“Morris”), David Hannemann (“Hannemann”), Sofia Mazell, and Michael Mazell. [Complaint]. An Amended Complaint was filed on October 31, 2014, asserting the following causes of action: (1) declaratory judgment alleged by all Plaintiffs against Morris and Hannemann; (2) conspiracy alleged by all Plaintiffs against all Defendants; (3) slander and defamation alleged by Plaintiff Jennifer McFarland against Defendants Sofia Mazell and Michael Mazell; and (4) breach of covenants and restrictions alleged by all Plaintiffs against Defendants Sofia Mazell and Michael Mazell. [Amended Complaint].¹

The Plaintiffs’ first cause of action for declaratory judgment seeks, in sum, a declaration that Morris and Hannemann acted outside the scope of their authority as Board members and failed to abide by the HOA Declarations and Bylaws. [Amended Complaint ¶ 8]. The second cause of action for conspiracy alleges that the Defendants have conspired against the Plaintiffs but sets forth no specific alleged conduct. [Id. ¶ 8]. The third cause of action asserted by Jennifer McFarland only against Sofia Mazell and Michael Mazell alleges slander and defamation. [Id. ¶ 14]. The fourth cause of action asserted by the Plaintiffs against Sofia and Michael Mazell alleges a breach of

¹The Amended Complaint filed on October 31, 2014 is the most recently filed complaint and the operative complaint. [See Amended Complaint]. The Amended Complaint is identical to the Complaint but adds a fourth cause of action for breach of covenants and restrictions alleged by all Plaintiffs against Sofia Mazell and Michael Mazell. [See Complaint; Amended Complaint].

covenants and restrictions by having renters on the property. [Id. ¶¶ 18-19].²

Sofia Mazell and Michael Mazell filed an Answer to the Amended Complaint. [Sofia Mazell and Michael Mazell Answer to Plaintiffs' Amended Complaint filed October 23, 2014]. Morris and Hannemann filed an Answer to the Amended Complaint, Counterclaims, and a Third-Party Complaint against William McFarland. [Morris and Hannemann's Answer to Amended Complaint, Counterclaims, and Third-Party Complaint filed November 13, 2014]. The Counterclaim and Third-Party Claim assert causes of action for breach of fiduciary duty, negligence/negligence per se, conversion of HOA funds, accounting, and indemnity. [Id. ¶¶ 26-48].

Sofia Mazell and Michael Mazell moved for partial summary judgment as to the second cause of action for conspiracy and fourth cause of action for breach of covenants and restrictions brought by the HOA. [Sofia Mazell and Michael Mazell Motion for Summary Judgment dated November 7, 2014]. The motion for partial summary judgment asserted that the HOA had no authority to bring the action without the required approval of the Board under the Bylaws and that there was no evidence to support the Plaintiffs' claims. [Id.]. On November 19, 2014, the Honorable Diane S. Goodstein heard Sofia Mazell and Michael Mazell's motion for partial summary judgment as to the claims asserted against them by the HOA. [Transcript of Record dated November

²The Amended Complaint seeks: (a) Declaratory Judgment against Defendants Thomas Morris and David Hannemann declaring that Defendants are acting outside of their scope of authority on the Live Oak Village Homeowner's Association Board of Directors; (b) Injunctive Relief prohibiting Defendants Thomas Morris and David Hannemann from taking further action and/or serving on the Live Oak Village Homeowner's Association Board of Directors contrary to the express terms of the covenants and bylaws; (c) Special damages incurred as a result of Defendants' conspiracy; (d) Fines, costs and fees incurred as a result of Defendant Sofia Mazell's and Michael Mazell's breach of the Covenants and Restrictions; (e) Actual and punitive damages as allowed by law; (f) Attorney's fees and costs in bringing this action; and (g) Any such other and further relief this Court deems just and proper. [See Amended Complaint].

19, 2014]. The court granted the Mazells' motion for partial summary judgment as to all claims asserted by the HOA based on the failure of the HOA to comply with HOA Bylaws in obtaining either a majority vote of the Board or unanimous consent in writing of the Board. [Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015].³ The order granting the Mazell's motion for summary judgment as to the claims asserted by the HOA noted that Plaintiffs' counsel conceded at the hearing that there was no unanimous written consent of all members of the Board nor was there a vote by the Board to institute claims in the name of the HOA against the Mazells. [Id. at 2]. The trial court held that there was no dispute of fact and that the Plaintiffs' claims in the name of the HOA against the Mazells "was not properly made in accordance with the procedures set forth in the governing Bylaws" and that "the HOA was not empowered or authorized to have filed any claims in this action against anyone." [Id. at 3]. The Plaintiffs filed no motion to alter or amend the judgment.

Morris and Hannemann moved for summary judgment on the bases that (1) the Plaintiffs lack standing because (a) Jennifer McFarland, Carlton Holcombe, and Ute Holcombe have not suffered any damages or injury in fact required to seek declaratory relief and (b) the HOA failed to follow the requirement for Board approval for filing a lawsuit under the Bylaws; and (2) the Plaintiffs have no damages and their claims fail as a matter of law where (a) Ute Holcombe has no claim and has not been damaged and (b) the Plaintiffs have suffered no special damages required to sustain an action for conspiracy. [Morris and Hannemann Motion for Partial Summary Judgment filed December 8,

³The court's order did not address the Mazells' motion for partial summary judgment as to the second cause of action for conspiracy and fourth cause of action for breach of covenants and restrictions. The court granted summary judgment as to all claims by the HOA against the Mazells but did not address the individual Plaintiffs' claims against the Mazells. [See Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015].

2014; Morris and Hannemann Amended Motion for Summary Judgment filed January 16, 2015].⁴

The Plaintiffs filed a memorandum in opposition to Morris and Hannemann's motion for summary judgment and Morris and Hannemann filed a reply in support of the motion for summary judgment. [Plaintiffs' Memorandum in Opposition to Morris and Hannemann's Motion for Summary Judgment filed January 30, 2015; Morris and Hannemann Reply in Support of Morris and Hannemann's Amended Motion for Summary Judgment filed January 29, 2015].

On January 29, 2015, a hearing took place before Judge Goodstein on Morris and Hannemann's motion for summary judgment. [Transcript of Record January 29, 2015 pp. 1-41].⁵ The court issued an order granting in part and denying in part Morris and Hannemann's motion for summary judgment. [Order Granting, In Part, Morris and Hannemann's Amended Motion for

⁴The Amended Motion for Summary Judgment filed January 16, 2015 withdrew as moot and supplanted Morris and Hannemann Motion for Partial Summary Judgment filed December 8, 2014.

⁵The court also heard Respondents Sofia Mazell and Michael Mazell motion for partial summary judgment as to the Appellants' fourth cause of action for breach of covenants and restrictions alleging improper rental of property on the bases that the claims are improper for failure to follow the procedures required under the Bylaws for enforcing HOA Declarations and Bylaws. [Transcript of Record January 29, 2015 pp. 41-57; see Sofia Mazell and Michael Mazell Motion for Summary Judgment as to Plaintiffs' Fourth Cause of Action for Breach of Covenants and Restrictions filed December 11, 2014]. The court has not ruled on this motion and it is not the subject of this appeal.

On the same date, the court also heard and ultimately granted Plaintiffs Jennifer McFarland and Carlton Holcombe's and Third-Party Defendant William McFarland's Motion for Summary Judgment as to Defendant/Third-Party Plaintiffs Morris and Hannemann's Counterclaims and Third-Party Claims. [Plaintiffs/Third-Party Defendant William McFarland's Motion for Summary Judgment as to Counterclaims and Third Party Claims of Morris and Hannemann filed December 23, 2014; Order Granting Summary Judgment as to Counterclaims and Third Party Claims of Morris and Hannemann filed March 13, 2015]. Upon information and belief, the Appellants are not appealing this order in favor of the Appellants despite the fact that it was included in Appellants' Notice of Appeal.

Summary Judgment filed March 13, 2015]. The court granted Morris and Hannemann's motion for summary judgment as to: (1) all claims asserted by Ute Holcombe because she was not claiming nor has she sustained any injury or damage;⁶ (2) all claims by the HOA for lack of standing for failure to follow the Bylaws and obtain Board approval prior to filing a lawsuit on behalf of the HOA; and (3) the declaratory judgment action brought by Jennifer McFarland and Carlton Holcombe for lack of standing because they have suffered no injury in fact and because there is no justiciable controversy as required to seek declaratory relief. [Id.]. The court denied Morris and Hannemann's motion for summary judgment as to Appellants Jennifer McFarland and Carlton Holcombe's conspiracy cause of action. [Id.]. The Appellants filed no motion to alter or amend the judgment.⁷

The Appellants served a Notice of Appeal of the orders granting the Mazells' motion for summary judgment and granting in part Morris and Hannemanns' motion for summary judgment on March 17, 2015. [Appellants' Notice of Appeal].

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citation omitted). "Summary judgment is appropriate when the

⁶Ute Holcombe has not filed any Notice of Appeal. [See Appellants' Notice of Appeal].

⁷As a result of the orders granting the Mazells' motion for summary judgment and granting in part Morris and Hannemanns' motion for summary judgment, the remaining claims are Appellants Jennifer McFarland and Carlton Holcombe's second cause of action for conspiracy against all Defendants; Appellant Jennifer McFarland's third cause of action for slander and defamation against the Mazells; and Appellants Jennifer McFarland and Carlton Holcombe's fourth cause of action for breach of covenants and restrictions against the Mazells. [See Amended Complaint; Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015; Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015].

pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; Rule 56(c), SCRCP. “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Id. (citation omitted). “In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.” Id. (citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). “The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Richardson v. The State Record Co., Inc., 330 S.C. 562, 565, 499 S.E.2d 825-26 (Ct.App. 1998). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing” –that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.’” Id. at 825. “The moving party need not ‘support its motion with affidavits or other similar materials negating the opponent’s claim.’” Id.; see Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 480, 443 S.E.2d 381-82 (1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct.App. 2008). “It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group, I, 306 S.C. 193, 194, 410 S.E.2d 593, 593 (Ct.App. 1991).

“Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues.” Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct.App. 2006); see Noisette v. Ismail, 299 S.C. 243, 246, 384 S.E.2d 310, 312 (Ct.App. 1989) rev’d in part, 304 S.C. 56, 403 S.E.2d 122 (1991) (stating that “[a] declaratory judgment action is like a chameleon . . . [i]ts color is determined by its background, *i.e.*, the underlying action.”). “In actions at law, on appeal of a case tried without a jury, the lower court must be affirmed where there is any evidence which reasonably supports the judge’s findings.” Sloan v. Greenville Cnty., 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct.App. 2003) (citations omitted). “In an action in equity, however, the appellate court may ‘find facts in accordance with its views of the preponderance of the evidence.’” Id. The standard of review is determined by the “main purpose” of the lawsuit. Id. “A case with legal and equitable issues presents a divided scope of review.” Id. “When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” Id.

In this case, the complaint seeks declarations under the HOA’s master deed and bylaws and also seeks injunctive relief. The nature of the underlying issues depend entirely on the court’s requested interpretation of the master deed and bylaws and, therefore, the character of the underlying action is one at law. Even if the nature of the action is considered one at equity based on the equitable relief sought, that relief is dependent upon the outcome of a legal interpretation, *i.e.* the interpretation of the master deed and bylaws. “A legal question in an equity case receives review as in law.” Sloan, 356 S.C. at 545, 590 S.E.2d at 345. “Even if a case is tried in equity if it is actually a law case, the appellate court will apply the scope of review in law cases.” Id. Therefore, this Court should review the declaratory judgment action as one at law. Further, the issues raised

do not involve disputes of fact but rather application of the law to the facts and, more particularly, the law as applied to Appellants' claims as pled. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 356, 628 S.E.2d 902, 910 (Ct.App. 2006) (stating that when facts are not in dispute, the question before the court is one of law).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE CLAIMS ASSERTED IN THE NAME OF THE HOA BECAUSE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS

A. The HOA Failed To Follow The Bylaws And Lacks Standing To File Suit Against Its Own Board Directors Based On The Unilateral Action Of A Single Board Director

This Court should affirm the trial court's order granting summary judgment as to all claims asserted by William McFarland under the guise of "HOA" claims because the HOA failed to obtain Board approval under the Bylaws as a condition precedent to a right of action as a matter of law. The trial court correctly held that no right of action arose and the HOA lacks standing because the HOA admittedly failed to follow the voting procedure under the Bylaws required to take action in the name of the HOA.⁸ [See Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015 pp. 4-5, 8]. The HOA does not and cannot cite to

⁸The HOA concedes that "no formal Board action took place" and that a single director, William McFarland, "initiated the suit as he contends that he was the only Board member authorized to act." [Plaintiffs' Memorandum in Opposition to Morris and Hannemann's Motion for Summary Judgment filed January 30, 2015 p. 3]. William McFarland is not a Plaintiff in this action but he and Jennifer McFarland have filed a new lawsuit against Morris and Hannemann during the pendency of this appeal despite the fact that this Notice of Appeal was filed shortly before the case was scheduled to go to trial on the remaining causes of action. [See Respondents Morris and Hannemann's Motion to Dismiss filed September 15, 2015, Exhibit A - McFarland Complaint dated July 31, 2015].

authority under South Carolina law for the proposition that an HOA is not required to adhere to a voting procedure established under the Horizontal Property Act and legally enforceable bylaws as a condition precedent to filing a lawsuit in the name of the HOA. Therefore, the trial court's order granting summary judgment as to claims brought in the name of the "HOA" should be affirmed.

A right of action does not arise until such conditions precedents are met. Metal Serv. Corp. v. Indus. Elec. Co., 253 S.C. 507, 510, 171 S.E.2d 703, 704 (1970); Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 149, 328 S.E.2d 132, 132 (Ct.App. 1985). "A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 207, 687 S.E.2d 714, 719 (Ct.App. 2009) (citing Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App. 1994)).

The HOA failed to follow the Bylaws requiring a majority vote of two out of three directors of the Board or the written approval of all three directors of the Board prior to any official action by the HOA. A majority of the Board, which is two directors, constitutes a "quorum." [Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws of Live Oak Village Homeowners Association, Inc. § 5(C)]. Any action taken by the Board requires a majority vote, or a vote of at least two directors, at a meeting in which a quorum is present. [Id. ("Every act or decision done or made by a majority of the directors present at a duty (sic) held meeting at which a quorum is present shall be regarded as the act of the [Board].")]. The Board may take action without a meeting; however, such actions require written approval of all three elected directors of the Board. [Id. Ex. C § 4(E)]. The HOA conceded that "no formal Board action took place" and that a single director, William McFarland, "initiated the suit as he contends that he was the only Board

member authorized to act.” [Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015 p. 3].⁹ Because Mr. McFarland unilaterally brought a lawsuit against Morris and Hannemann in the name of the HOA admittedly without Board approval under the Bylaws, the trial court correctly granted Morris and Hannemann summary judgment as to all claims asserted against them by the HOA. Metal Serv. Corp., 253 at 510, 171 S.E.2d at 704; [Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 pp. 4-5, 8]; see also S.C. Code Ann. § 27-31-150 (“The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease”); Ortega v. Kingfisher Homeowners Ass’n, Inc., 314 S.C. 180, 181, 442 S.E.2d 202, 203 (Ct.App. 1994) (noting “voting agreements are generally valid and enforceable” and upholding challenge to HOA bylaws requiring majority vote where owner signed deed at purchase acknowledging application of master deed and bylaws).

B. The Trial Court Did Not Err By Requiring That The HOA Follow The Bylaws

The HOA argues that the trial court incorrectly applied the law regarding conditions precedent because the HOA’s right to assert a claim is a question of substantive law unrelated to the HOA’s

⁹The HOA did not challenge the fact that the lawsuit lacked Board approval at oral argument. [Transcript of Record January 29, 2015 pp. 1-41]. Mr. McFarland, as the 30(b)(6) deponent for the HOA, testified that no such discussion or vote occurred prior to bringing suit:

Q. Am I correct also the HOA, nor the board of directors, has ever held a meeting to authorize the HOA to bring suit against any of the defendants in this case, correct?

A. No. That'd have been impossible. The defendants in the case are board of directors.

Q. Right. So the board has never authorized any litigation, correct?

A. Exactly. My answer stands. It would have been impossible, as the defendants in this case are board of directors.

[30(b)(6) Dep. of HOA 24:3 – 13].

Bylaws. [Appellants' Initial Brief pp. 9-11]. The HOA did not raise this argument before the trial court and, if raised, it was not ruled upon and the HOA failed to preserve the issue by filing a motion to alter or amend. See Rule 59(e), SCRPC.

An issue cannot be raised for the first time on appeal. Doe v. Roe, 379 S.C. 291, 297, 665 S.E.2d 182, 185 (Ct.App.2008); Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct.App.2006); Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct.App.2001). The issue must have been raised to and ruled upon by the trial judge to be preserved for review. Pye v. Est. of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct.App.2008); see also Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (“An appellate court will not consider issues on appeal which have not been preserved for appellate review.”). To preserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)). Without an initial ruling by the trial judge, a reviewing court would have no foundation on which to evaluate whether an error has been committed. Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct.App.2008); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004).

S. Carolina Coastal Conservation League v. S. Carolina Dep't of Health & Env'tl. Control, 380 S.C. 349, 379-80, 669 S.E.2d 899, 914-15 (Ct.App. 2008) rev'd on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010). “Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved.” Altman v. Griffith, 372 S.C. 388, 396, 642 S.E.2d 619, 623 (Ct.App. 2007) (citing Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 58 (2d ed.2002)).

Although not raised, the HOA incorrectly argues that the trial court “misapprehended the law with respect to conditions precedent” and that the “HOA’s right to sue on a given cause of action is

a question of substantive law concerned with whether the elements of the claim are present” irrespective of the Bylaws. [Appellants’ Initial Brief pp. 10-11]. Worley v. Yarborough Ford stands for the proposition that “A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action.” Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994) (citing 4 S.C. Juris Actions § 25 (1991)). The HOA correctly states that the Worley opinion further provides that a condition precedent “connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.” [Appellants’ Initial Brief p. 11 (citing Worley, 317 S.C. at 210, 452 S.E.2d at 624)]. The trial court’s order is consistent with Worley because the condition precedent that must be met, i.e. the “act that must exist or occur before a duty of immediate performance arises” is the vote of the majority of the Board or unanimous approval of the Board in writing to file a lawsuit in the name of the HOA. [See Worley, 317 S.C. at 210, 452 S.E.2d at 624; Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 pp. 4-5]. Although the HOA finds fault with the trial court’s analysis and endeavors to shift the focus to Morris and Hannemann’s alleged “duty of immediate performance with respect to [their] roles as Directors,” the trial court correctly determined that the HOA lacked the authority to file the lawsuit in the name of the HOA without compliance with legally binding Bylaws. [Appellants’ Initial Brief p. 11; Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 pp. 4-5].

The HOA cannot distinguish in any manner a condition precedent that is “essential to a right of action” from a cause of action that “accrues at the moment when the plaintiff has a legal right to sue on it” as applied to the HOA’s lawsuit brought unilaterally by Mr. McFarland without any legal

authority and without the approval of the Board in compliance with the Bylaws. See Worley, 317 S.C. at 210, 452 S.E.2d at 624; [Appellants' Initial Brief p. 11 (citing Stephen v. Draffin, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309 (1997))]. Most importantly, the HOA's contention that the trial court misapprehended the law by illogically confusing a condition precedent with the accrual of a right of action as a question of substantive law does not change the ultimate outcome of this appeal. The trial court granted Morris and Hannemann summary judgment as to the HOA's claims based on a lack of standing for failure to follow the Bylaws and obtain Board approval prior to filing a lawsuit on behalf of the HOA. [Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015]. The HOA acknowledges that "no formal Board action took place" and that Mr. McFarland "initiated the suit as he contends that he was the only Board member authorized to act." [Plaintiffs' Memorandum in Opposition to Morris and Hannemann's Motion for Summary Judgment filed January 30, 2015 p. 3]. Whether couched in terms of standing or simply the right of the HOA to bring the lawsuit, the record supports the trial court's holding that Mr. McFarland cannot bring an action against fellow owners/Board members on his own accord in the name of the HOA without complying with the HOA's Bylaws. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). The HOA does not and cannot cite any legal authority that removes the condition precedent to filing the lawsuit in the Bylaws that was relied upon by the trial court and, therefore, the order granting Morris and Hannemann summary judgment as to all causes of action asserted against them by the HOA should be affirmed.¹⁰

¹⁰The HOA also incorrectly argues that the trial court erred in its order granting Morris and Hannemann summary judgment based on any evidence that the HOA has been damaged because such a contention is wholly unsubstantiated in the record and immaterial to the trial

C. The Trial Court Correctly Enforced The HOA's Bylaws Despite A Single Owner's Stated Grounds For Avoidance

The trial court correctly held that the lawsuit could not be brought in the name of the HOA without the HOA's approval despite Mr. McFarland's alleged bases for circumventing the requirements of the Bylaws. The HOA argues that (1) Morris and Hannemann had an interest adverse to the HOA in not having the HOA sue them and were therefore ineligible to participate in the corporate decision to bring the lawsuit; (2) Morris and Hannemann did not pay annual assessments to the HOA in violation of the HOA's governing documents making them ineligible to serve on the board or creating an issue of fact as to their authority to act; (3) the Board previously hired a property manager without formal approval of the Board thus setting precedent for the HOA to act without Board approval; and (4) the provision in the Bylaws providing the HOA president with "all the powers and duties which are usually vested in the office of the president of an association" creates an issue of fact as to whether Mr. McFarland could bring a lawsuit in the name of the HOA without Board approval.¹¹ [Appellants' Initial Brief pp. 11-14].

The trial court correctly found that the HOA's lawsuit was improperly brought despite Mr.

court's decision. [See Appellants' Initial Brief p. 10 n. 6]. Morris and Hannemann's motion states as to the cause of action for conspiracy that "All of these alleged damages are damages suffered by the HOA, who does not have standing to assert the same, and are not damages personally suffered by Mr. Holcombe. Further, these damages are general, rather than special damages." [Morris and Hannemann Amended Motion for Summary Judgment filed January 16, 2015 p.15 (emphasis added)]. The trial court did not need to reach the issue of any alleged damages sustained by the HOA having determined the HOA lacked the ability to bring any lawsuit under the Bylaws in the first instance; Morris and Hannemann never admitted that the HOA sustained any damages and argued to the contrary that none were sustained and could not be asserted by individual owners; and the issue was not raised by the HOA, ruled upon by the trial court, nor preserved for appellate review.

¹¹The trial court did not address these arguments and the Appellants filed no motion to alter or amend the order seeking a ruling on these issues.

McFarland's argument that he was the only Board member authorized to act because Morris and Hannemann have "an interest adverse to the HOA." The HOA Bylaws are enforceable as a matter of law and Mr. McFarland cannot act unilaterally as a matter of law. "Horizontal property regimes are administered by the bylaws incorporated into the master deed or lease." Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182, 442 S.E.2d 202, 204 (Ct.App. 1994) (holding majority vote provision enforceable and that owner consented to voting agreement as evidenced by signature on the indenture deed) (citing S.C. Code Ann. § 27-31-150) (stating that administration of the property shall be governed by bylaws). "Each co-owner must comply with the bylaws and with the administrative rules and regulations set forth in the master deed." Id. (citing S.C. Code Ann. § 27-31-170) (stating that each owner shall comply strictly with the bylaws). Under S.C. Code § 33-31-730, voting agreements are specifically enforceable. See S.C. Code Ann. § 33-31-730(b).

The Appellant incorrectly cites Talbot v. James for the proposition that a director with an interest adverse to a corporation is ineligible from participating in a corporate decision. See Talbot v. James, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (citing Peurifoy v. Loyal, 154 S.C. 267, 151 S.B. 579 (1930); Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E. 141 (1930)). Talbot and the cases cited therein address the validity of corporate transactions of business corporations where the director of a corporation has an interest in the transaction. See id. The rule in Talbot does not apply here as the HOA is a nonprofit corporation, there is no transaction at issue, and there was no corporate action taken.¹² The applicable Nonprofit Corporation Act does not allow a single director

¹²The rule in Talbot addressing director or officer conflicts of interests of business corporations is substantially codified under S.C. Code § 33-8-310 of the South Carolina Business Corporation Act of 1988. See S.C. Code Ann. § 33-8-310. S.C. Code § 33-31-830 of the South Carolina Nonprofit Corporation Act "sets forth the general standards of conduct for directors of nonprofit corporations" and "settles the dispute as to whether directors of nonprofit corporations

to authorize, approve, or ratify a transaction involving a director conflict of interest. See S.C. Code Ann. § 33-31-831(e). The Horizontal Property Act does not allow an owner to file suit in the name of the HOA against any other owner or board member whenever an owner sees fit under the theory that the board members would not approve a lawsuit against themselves in the event that any such

should meet the general business standards or the trustee standards.” S.C. Code Ann. § 33-31-830 (official comment).

The applicable Nonprofit Corporation Act does not allow a single director to authorize, approve, or ratify a “transaction” involving a director conflict of interest. Under S.C. Code Ann. § 33-31-831: (a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into or is approved as provided in subsection . . . (c) . . .

...
(c) A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:

(1) the material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) the material facts of the transaction and the director’s interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

(d) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(2) another entity of which the director is a director, officer, or trustee is a party to the transaction.

(e) For purposes of subsection . . . (c) a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board or on the committee who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. S.C. Code Ann. § 33-31-831 (emphasis added).

This lawsuit is not a “transaction” and, even if it was and involved a conflict of interest, Mr. McFarland still cannot act unilaterally because a transaction may not be authorized, approved, or ratified under this section by a single director. S.C. Code Ann. § 33-31-831(e). [See also Articles of Incorporation ¶ 4 (HOA is a mutual benefit corporation)].

vote were taken. The Appellants never argued that the HOA Declarations and Bylaws were invalid or unenforceable nor did they allege any bases for avoidance or reformation.

The Appellants incorrectly argue that Morris and Hannemann are ineligible to serve on the Board for failure to pay annual HOA assessments. First, even if annual dues and assessments had not been paid,¹³ the voting rights of Morris and Hannemann were never suspended under the terms of the Bylaws. The Bylaws require (1) a written demand to cease and desist, (2) written notice of a hearing if the violation continues and (3) a hearing prior to imposing fines, suspending voting rights, or infringing upon or suspending any other rights. [Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws Of Live Oak Village HOA §15(C)]. The due process set forth in the Bylaws was never followed and Morris and Hannemann remain entitled to vote. Second, any ineligibility to vote does not create the right of a single board member to file a lawsuit in the name of the HOA where one does not exist as set forth above. See S.C. Code Ann. § 33-31-730(b) (providing that voting agreements are specifically enforceable).

The trial court correctly found that the HOA's lawsuit was improper for failure to follow the Bylaws despite the HOA's argument that the Board previously took action without a vote of the Board by hiring a property manager and, therefore, there was established precedent for failure to follow the Bylaws. The HOA cites no authority for the proposition that any prior action taken without a vote of the Board that requires a vote of the Board would justify a separate instance of failure to follow the Bylaws. Even if the prior action taken without a vote is deemed to have been subsequently ratified, the HOA put forth no evidence that there was any Board ratification of Mr.

¹³The HOA is aware that Morris and Hannemann have both paid their HOA dues into an escrow account being held in trust. [See 30(b)(6) HOA Dep. 91:10-15].

McFarland's unilateral decision in this instance to file a lawsuit in the name of the HOA without a vote in violation of the Bylaws. As set forth above, the filing of the lawsuit is not a "conflict of interest transaction" and, if it was, Mr. McFarland as a single director cannot approve or ratify the filing of the lawsuit in the name of the HOA. See S.C. Code Ann. § 33-31-831.

Finally, the Appellants incorrectly argue that there is an issue of fact as to whether Mr. McFarland as president was allowed to file a lawsuit in the name of the HOA without Board approval. This argument fails because (1) the interpretation of the master deed and Bylaws is a matter of law and must be strictly construed and (2) the Bylaws contain a specific voting provision requiring Board approval where the description of the office of President of the HOA provides no language supporting the contention that Mr. McFarland may act alone. First, "the construction of an unambiguous deed is a question of law, not fact." Walters v. Summey Bldg. Systems, 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct.App. 1993) (cert. denied) (citing Vause v. Mikell, 290 S.C. 65, 348 S.E.2d 187, 189 (Ct.App. 1986). "The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." Id.¹⁴ "When a controversy regarding the rights of condominium unit owners arises, the court must examine all relevant provisions of the Horizontal Property Act, master deed and allied documents." Harrington v. Blackston, 319 S.C. 1, 5, 459 S.E.2d 309, 311 (Ct.App. 1995) vacated, 322 S.C. 470, 473 S.E.2d 47 (1996) (vacated based

¹⁴Confusingly, the Appellants argue that the extent of the powers vested in the president to act unilaterally create an "issue of fact" but the Appellants cite by way of comparison the decision in Café Associates, Ltd. v. Gerngross for the proposition "where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact." [Appellants' Initial Brief p. 14 (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)]. Thus, the Appellants apparently argue that application of the unambiguous language in the Bylaws creates an ambiguity. However, to the extent the Appellants argue that the Bylaws are ambiguous, this issue was neither raised nor ruled upon and is not preserved for appellate review.

on settlement).¹⁵ “These sources of rights and obligations of the condominium owners must be read together, in relation to each other and harmonized, if possible. Id. (citing Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) (regime’s authority must be gleaned from Act and master deed)). “The board of directors of a horizontal property regime may exercise only those powers that are granted to it by law, its master deed, and by any bylaws made pursuant thereto.” Trost v. Sea Mark Tower Prop. Owners Ass'n, Inc., Case No. 2004-UP-284, 2004 WL 6310042, at *3 (S.C. Ct. App. Apr. 29, 2004) (citing S.C. Code Ann. §§ 27-31-100 and 37-31-150); Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987)). “Any act beyond the scope of the powers so granted is *ultra vires*.” Id. (citing Seabrook, 292 S.C. at 347, 356 S.E.2d at 414).

The Appellants argue that Section 7(b) of the Bylaws identifying the officers of the Association and describing, in part, the role of president as chief executive officer with “powers and duties which are usually vested in the office of the President of an association . . .” creates an issue of fact for the jury as to whether Mr. McFarland as president of the HOA had the authority to bring a lawsuit in the name of the HOA. [Appellants’ Initial Brief pp. 13-14]. However, the interpretation of the Bylaws is properly decided as a matter of law by the court. Walters, 429 S.E.2d at 856 (holding that terms of a deed may not be varied or contradicted by evidence outside of the deed itself); Harrington, 319 S.C. at 5, 7, 459 S.E.2d at 311-312 (holding rules of construction are those applicable to contracts and court must examine all provisions of HOA documents and Horizontal Property Act when addressing a controversy among unit owners). The Horizontal Property Act does not describe the powers of the president of an HOA but does provide that the bylaws must provide

¹⁵There is no true “justiciable controversy” presented here as set forth in Section II, infra.

for the administration of the property and that each owner must strictly comply with the bylaws. See S.C. Code Ann. §§ 27-31-150; 27-31-170. The Nonprofit Corporation Act provides that the act of a board is the affirmative vote of a majority of directors at a meeting where a quorum is present and that voting agreements are specifically enforceable. See S.C. Code Ann. §§ 33-31-730(b); 33-31-824(a)-(b); see also S.C. Code Ann. § 33-31-140(36) (stating that “Vote” includes authorization by written consent).¹⁶ The Appellants can point to no specific language that would allow Mr. McFarland to act unilaterally as president of the HOA in filing the lawsuit and, by contrast, the Bylaws contain specific voting provisions that were not followed by Mr. McFarland as set forth above. The president has no power to file a lawsuit in the name of the HOA as a matter of law and the trial court should be affirmed.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY FOR CLAIMS ASSERTED PURSUANT TO THE DECLARATORY JUDGMENT ACT

This Court should affirm the trial court’s order granting summary judgment as to the claims asserted by Appellants Jennifer McFarland and Carlton Holcombe (“Individual Appellants”) under

¹⁶Under S.C. Code § 33-31-840(a), “Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer, and such other officers as are appointed by the board.” S.C. Code Ann. § 33-31-840(a). Under the Official Comment to S.C. Code § 33-31-840: “The president is not involved in the day-to-day activities of the organization, and may or may not be the most significant member of its board of directors. Under these circumstances the title of ‘president’ may be misleading. The term is certainly not analogous to the president of a business corporation.” S.C. Code Ann. § 33-31-840 (official comment). See also S.C. Code Ann. § 33-31-841 (“Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed in a resolution of the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers.”). The Official Comment to S.C. Code § 33-31-841 provides: “[I]n some nonprofit organizations the president may not be involved in the day-to-day activities or decision-making. If not, the president’s role is different than that of the president of a business corporation.” S.C. Code Ann. § 33-31-841 (official comment).

the Declaratory Judgment Act because there is no justiciable controversy. The Individual Appellants' claim is a contingent, hypothetical, and abstract dispute over "their ability to reside at their property" for which there has admittedly been no actual damage and for which no advisory opinion should be issued. "A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct.App. 2002) (citing Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998)). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. (citing Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996)). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Id. (citing Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995)). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Id. (citing Jackson v. State, 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997)). "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citing Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970)).

The trial court correctly held that the Individual Appellants could not establish the three elements required to meet the minimum requirements for constitutional standing and that there is no justiciable controversy with respect to their claim for declaratory relief. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The United States Supreme Court has “established that the irreducible constitutional minimum of standing containing three elements”:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Id.; ATC S., Inc. v. Charleston Cnty., 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008).

First, the trial court correctly held the Individual Appellants “have not suffered any ‘injury in fact’ but instead allude to a conjectural or hypothetical injury.” [Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 p. 6]. The declaratory judgment action alleges that the Individual Appellants “will suffer irreparable damage to their ability to reside at their property” unless the court “enjoins and prohibits Defendants Thomas Morris and David Hannemann from continuing to act outside their scope of authority.”¹⁷ [Amended

¹⁷The Appellants allege that Respondents Morris and Hannemann acted outside the scope of their authority by:

- A. voting to waive fines that applied to themselves;
- B. failing to hold timely or properly noticed Home Owners Association or Board of Directors meetings;
- C. allowing unauthorized persons to vote and participate in Board of Directors meetings;
- D. voting on matters in which they have a personal financial interest;
- E. voting in violation of South Carolina Code § 33-31-830;
- F. failing to properly handle HOA funds;
- G. failing to enforce covenants and restrictions in a uniform and unbiased manner; [and]
- H. violating the covenants and restrictions.

[Amended Complaint ¶ 6].

The Appellants have brought no action for breach of contract or any other claim but have elected to couch their claims as those for “declaratory judgment” and “conspiracy.” [See Amended Complaint; see also Plaintiffs’ Memorandum in Opposition to Morris and

Complaint ¶ 8 (emphasis added)]. The Individual Appellants admitted that the only damage claimed pursuant to the declaratory judgment action was their ability to reside at their residences and that they still have full and uninterrupted access to their property.¹⁸ Thus, the trial court correctly found that the Individual Appellants “still have full and uninterrupted access to the common elements and to their property and continue to reside in their homes at Live Oak Village” based on their own testimony and suffered no “injury in fact” but rather a “conjectural or hypothetical injury.” [Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 p. 6].

Hannemann’s Motion for Summary Judgment filed January 30, 2015].

¹⁸Both Mrs. McFarland and Mr. Holcombe testified that the only injury they were claiming related to the declaratory judgment action was their the ability to reside at their residences

Q. And as part of that cause of action, it says: The Plaintiffs will suffer irreparable damage to their ability to reside at their property. Is that the – is that the only injury that you are claiming in this case?

A. With reference to Hannemann and Morris?

Q. For the declaratory judgment action, yes ma’am.

A. Yes I believe so.

J. McFarland dep. 25:6 – 15.

Q. But my question to you is: Is there any other – the only injury that’s been alleged is that the plaintiffs have suffered irreparable damage to their ability to reside at their property. Is there any other injury that you are claiming as a result of these actions?

A. Not at this time.

C. Holcombe Dep. 44:7- 13.

The Individual Appellants admitted in responses to Requests to Admit that they still have full and uninterrupted access to their property:

8., 10. Admit [Jennifer McFarland and Carlton Holcombe are] able to access [his/her] residence freely and uninterrupted.

RESPONSE: Admitted.

(Defendants Morris and Hannemann’s Amended Motion for Summary Judgment, Ex. E - - Pls.’ Resp. to Req. for Admis. 8, 10).

The Individual Appellants argue that it is sufficient that they are persons to a contract seeking a determination of rights, status, or other legal relations for there to be a justiciable controversy under the Declaratory Judgment Act. [Appellants' Initial Brief pp. 16-17; Plaintiffs' Memorandum in Opposition to Morris and Hannemann's Motion for Summary Judgment filed January 30, 2015 p. 3]. The Appellants argue that "[t]he circuit court misapprehended the factual and legal circumstances of these Plaintiffs' declaratory-judgment claim in finding they lacked standing because they had not suffered an injury at law and there was no justiciable controversy." [Appellant's Initial Brief p. 16]. However, the trial court granted summary judgment on the bases that the Appellants' failed to meet the minimal requirements of constitutional standing; that the Appellants allude to a conjectural or hypothetical injury; that any declaration will not change or redress Appellants' ability to reside at their residences; and that any declaration would be advisory. [Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015 pp. 5-8]. The trial court recognized that "[a] declaratory judgment action does not require financial damages; but it does require a justiciable controversy." [Id. p.7]. The trial court did not, however, find that the Appellants lacked standing because they suffered no damage at law but rather addressed the Appellants' only articulated potential basis for damage – their ability to reside at their property – and found this damage does not exist and that it was conjectural or hypothetical. The Appellants offered nothing in response to the motion for summary judgment that would allow the trial court to conclude that such damage exists or might exist so as to entitle them to legal or equitable relief. Although it may be sufficient that the Individual Appellants are "persons" to a contract seeking a determination of rights, status, or other legal relations for there to be a legally protected interest, there is no invasion of that legally protected interest that is both (a)

concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”
See Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339.

Second, the trial court correctly held the Individual Appellants failed to allege the manner in which Morris and Hannemman’s alleged actions affect their ability to reside at their property. [Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 p. 6]. The trial court found that “[w]ith no traceable or alleged connection between actions of the Defendants and the alleged injury, the Court finds that Plaintiffs Mrs. McFarland and Mr. Holcombe fail to meet the second element required for standing.” [Id.]. The Individual Appellants not only failed to present any evidence of Morris and Hannemann’s alleged failure to abide by HOA covenants and restrictions or that any such failure was about to occur, they failed and continue to fail to articulate any existing or potential nexus between any requested declaration and any harm based on irreparable damage to their ability to reside at their property or otherwise. See Sunset Cay, 357 S.C. at 423, 593 S.E.2d at 466 (stating that the Declaratory Judgment Act “is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.”) (citing Waller v. Waller, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951)); Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339 (holding that “there must be a causal connection between the injury and the conduct complained of--the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant . . .’”).

Third, the trial court correctly held that “a declaration by the Court regarding whether or not the Defendants are acting outside the scope of their authority will not change or redress Plaintiffs’ ability to reside at their residence as they are all currently residing, unimpeded at their residence.” [Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed

March 13, 2015 p. 6]. The Appellants do not set forth the manner in which any declarations sought would change or redress any current or future harm based on irreparable damage to their ability to reside at their property or otherwise. Again, the Appellants rely on their status as “persons” to a contract to establish a justiciable controversy under the Declaratory Judgment Act. [Appellants’ Initial Brief pp. 16-17; Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015 p. 3]. Further, the Appellants did not present any evidence or articulate any way that any alleged injury could be redressed at all – much less that it would be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339.

The trial court correctly held that the Individual Appellants’ declaratory judgment action presents no justiciable controversy. The Appellants presented nothing to the trial court by way of evidence or argument that would allow the court to reach any conclusion other than that the Appellants “allude to a conjectural or hypothetical injury.” [See Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 p. 6]. In other words, the Appellants failed to demonstrate any actual or imminent injury that would allow the trial court to determine that there is “a real and substantial controversy which is appropriate for judicial determination . . . as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Holden, 349 S.C. at 137, 561 S.E.2d at 637. Therefore, the trial court correctly determined that the Individual Appellants lack a justiciable controversy and that “any declaration by the Court would only be advisory in nature and is beyond the intended purpose and scope of the Uniform Declaratory Judgments Act.” [Order Granting, In Part, Morris and Hannemann’s Amended

Motion for Summary Judgment filed March 13, 2015 p. 7 (citing Sunset Cay, at 423, 593 S.E.2d at 466)].

CONCLUSION

For the reasons set forth herein, Respondents Thomas Morris and David Hannemann respectfully request that this Honorable Court affirm the order granting, in part, Morris and Hannemann's Amended Motion for Summary Judgment as to the matters raised in Appellants' Notice of Appeal, remand this matter to the trial court, award the costs of this appeal, including attorneys' fees, and such other and further relief as the Court deems just and proper.

Dated this 19th day of October, 2015.

Respectfully submitted,


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2015-000599

RECEIVED

OCT 22 2015

SC Court of Appeals

Live Oak Village Homeowners Association, Inc.; Jennifer McFarland; Carlton Holcombe
and Ute Holcombe, Plaintiffs,

Of whom Live Oak Village Homeowners Association, Inc.; Jennifer McFarland;
and Carlton Holcombe are Appellants,

v.

Thomas Morris; David Hannemann; Sofia Mazell and Michael Mazell, Respondents,

Sofia Mazell and Michael Mazell, Third-Party Plaintiffs,

v.

William McFarland, Third-Party Defendant.

PROOF OF SERVICE


I certify that I have served Initial Brief of Respondents Thomas Morris and David Hannemann and Designation of Matter to be Included in the Record on Appeal of Respondents Thomas Morris and David Hannemann on counsel for Appellants, Stephen L. Brown and Russell G. Hines, Young Clement Rivers, LLP, 25 Calhoun Street, Suite 400, Charleston, South Carolina 29401 and P. Brandt Shelbourne, Shelbourne Law Firm, 131 E. Richardson Avenue, Summerville, South Carolina 29483 by depositing same in U.S. Mail this date.

October 19, 2015.

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