THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000599
Circuit Court Case No. 2012-CP-18-2583

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 REPLY BRIEF OF APPELLANTS

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The Appellants submit this reply brief in further support of their appeal.

ARGUMENT

I. The circuit court erred in granting summary judgment against the HOA, as to all of its claims, because the court wrongly determined that the HOA failed to follow its by-laws, which the court found to be a condition precedent to bringing suit, and therefore the HOA lacked standing and/or authorization to sue.

Respectfully, the Respondents miss the main point from the Appellants' principal brief: Essentially, the circuit court granted summary judgment against the HOA, as to all of its claims, not for lack of evidence of the alleged misdeeds of Messrs. Morris and Hannemann or of damages,[1] but because—on account of the very Board dysfunction they were alleged to

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[1] Messrs. Morris and Hannemann note that "evidence that the HOA has been damaged . . . [is] immaterial to the trial court's decision." (Br. of Resps. Morris and Hannemann at pp. 14-15, n. 10.) Indeed, this is part of the Appellants' point. Summary judgment was not granted against the HOA for want of evidence to support the merits of its claims. Messrs. Morris and Hannemann inaccurately state that "[t]he 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[.]" (Id. (emphasis added).) In point of fact, the circuit court was not asked by the Respondents "to reach" this issue. Also, with respect to Messrs. Morris and Hannemann "never admit[ing] that the HOA ***sustained*** any damages . . . [,]" (Id. (emphasis added)) in their principal brief, the Appellants did not claim Messrs. Morris and Hannemann made such an admission; rather, the Appellants noted that they had "admitted the existence of ***evidence of*** damages to the HOA . . . ." (Br. of Apps. at p. 10, n. 6 (emphasis added); *see also* Morris-Hannemann Amended MSJ at pp. 14-15 (regarding testimony by the HOA and Mr. Holcombe about damages).)

have caused—these Defendants had not agreed to be sued for them; a fundamentally unjust catch-22.

This point, this patent absurdity—that the Respondents could shield themselves from allegations of wrongdoing (especially, non-compliance with the HOA's governing documents) on the basis of claimed non-compliance with the HOA's governing documents (specifically, the by-laws pertaining to official Board action) when they themselves effectively prevented compliance—was raised in the circuit court:

> [**Plaintiffs' Counsel**]: [E]ssentially . . . the Defendants are conspiring to prevent the HOA from operating as a viable entity, and . . . our claims go directly to that, which is why they're being sued. Because we're alleging that they are conspiring to stop that entity from operating.
>
> If you have to have two votes to have a board meeting and an election, and they won't cooperate, nothing ever gets done. And that's exactly where we are. Nothing is done . . . enforcement is not being made of the covenants and restrictions, and so the lawsuit was brought by Mr. McFarland.
>
> . . .
>
> So, therefore, having a board meeting is impossible with two people who are not able to vote. So that leaves only Bill McFarland who -- there's no question that he was a board member and he essentially is the board, therefore, authorizing the lawsuit to be brought in this action.
>
> . . .

> The board covenants designate Mr. McFarland as chief executive officer with all rights and privileges normally and reasonably associated with that position. . . .
>
> . . .
>
> What the parties are asking for is the determination that – in paragraph 6 of the Amended Complaint, that the Defendants are willfully operating and continue to willfully operate outside the scope of their authority by taking action, or failing to take action as required by the covenants . . . .
>
> What the McFarlands and the Holcombes are asking and the HOA are asking us to do is to determine that these violations are occurring. . . .
>
> They're not enforcing the covenants and restrictions, and we need them enforced . . . they're not doing what they are supposed to be doing and so we can't get any traction.

(Hearing Transcript: January 29, 2015, at p. 7, lines 6-19, at p. 8, lines 6-11, at p. 11, lines 20-23, at p. 17, line 25 - p. 18, line 21; *see also* Plaintiffs' Memo in Opp. to Morris-Hannemann Amended MSJ at § II.)

The circuit court's ruling on—rejection of—this point is sufficiently reflected in the court's orders and other record material to preserve it for appellate review. (*See generally* Order Granting Mazell PSJ; Order Granting Morris-Hannemann PSJ; *see also* Hearing Transcript: January 29, 2015, at p. 3, line 4 - 56, line 21; Br. of Resps. Morris and Hannemann at p. 14 (implicitly observing that the linchpin of the circuit court's decision,

notwithstanding how it was "couched," was its determination that the alleged non-compliance with the by-laws required summary judgment be granted in favor of the Respondents: "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."[2])[3] And it is appropriate for the

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[2] Mesrrs. Morris and Hannemann go on to state that "[t]he 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 . . . ." (Id.) In this regard, the Appellants would, of course, counter by reference to the argument presented on this point in their principal brief.

[3] *Cf.* Staubes v. City of Folly Beach, 339 S.C. 406, 412-15, 529 S.E.2d 543, 546-47 (2000) (rejecting the respondent's preservation argument, even though a "more appropriate" procedure could have been followed, noting the lack of prejudice to the respondent and explaining: "[The appellant] knew from the order that the trial court had decided to grant summary judgment for the [respondent] on any negligence claim he might raise. Thus, requesting permission to add a negligence claim to his complaint would have been futile. This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."); Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) (rejecting the respondent's preservation argument and noting the sufficiency of the appellate record: "Here, we have a complete record containing the motion for JNOV and memorandum in support thereof, the transcript of the hearing on the post-trial motion, and the trial court's order denying the motion. . . . Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon. The record on appeal in this case is sufficient for our review.") (internal citations omitted); *see also* Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its

Appellants to underscore this point by pointing out flawed and illogical reasoning reflected in the circuit court's written orders, as they did in their

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decision must first have been fairly and properly raised to the lower court and passed upon by that court.").

Moreover, our Supreme Court has expressly recognized that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004); *cf.* Microtronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (noting "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities."); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action"). Indeed, Chief Justice Toal cautions against "denigrat[ing] the primary purpose of the judiciary" by the "over-zealous application of appellate preservation rules:"

> In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. . . . I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.

Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting).

principal brief.

To further underscore this point, the Appellants note flawed and illogical reasoning reflected in the respondents' brief of Messrs. Morris and Hannemann. Their charge that "[t]he 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 . . ."[4] is beside the point; as explained in the Appellant's principal brief, the point is that the whole condition-precedent analysis is irrelevant and therefore misplaced to begin with, which the Appellants highlight as illustrative of the absurdity of the Respondents' use of the alleged non-compliance with the bi-laws as a defense under the circumstances—it is an absurd notion that the alleged non-compliance with the bi-laws has any bearing on the HOA's "right of action" or "right to sue" the Respondents. Their effort to distinguish Talbot v. James, 259 S.C. 73, 190 S.E.2d 759 (1972), is similarly misguided. Their myopic focus on the HOA being a "nonprofit corporation" and whether there was a "transaction at issue" or "corporate action taken" simply overlooks the undeniable—and unusual—distinguishing fact of the present matter: Messrs. Morris and Hannemann's clear conflict of interest.

[4] (Br. of Resps. Morris and Hannemann at p. 13.)

Lastly, in their brief, the Mazells contend: "Simply stated, the individual appellants have no right to commandeer the HOA, naming it as a co-plaintiff to this lawsuit, in addition to their individual claims against the respondents. The trial court recognized this very point at oral argument in discussion of the merits of appellants' position." (Br. of Resps. Mazell at p. 6.) The Appellants would note, however, the circuit court ***struck*** the following language from the proposed order prepared by the Mazell's counsel: "In effect, the individual plaintiffs have commandeered the HOA as a co-plaintiff in this action without having the requisite prior proper authorization from the Board of Directors." (Order Granting Mazell PSJ at p. 3.)

II. The circuit court erred in granting partial summary judgment against Mrs. McFarland and Mr. Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, because the court wrongly determined that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim.

The Appellants would reiterate that an unduly narrow view was adopted by the circuit court—and urged by Messrs. Morris and Hannemann—of the justiciability of Mrs. McFarland and Mr. Holcombe's cause of action for a declaratory judgment, which is contrary to the expressly remedial purpose and liberal legislative intent of the Act, particularly in the

context of a motion for summary judgment. In this regard, the Appellants would also note that, since the circuit court only granted partial summary judgment to the Respondents, this case is still on track for trial and, thereby, a full presentation of evidence and development of the record. Besides being the correct result for these declaratory judgment claims to survive summary judgment, it is also a practical means of furthering the interests of justice.[5]

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[5] In this regard, out of an abundance of caution, the Appellants would also note that to the extent Messrs. Morris and Hannmann's counterargument includes a challenge to the sufficiency of evidence in support of the merits with respect to their alleged wrongdoing or the effect thereof it is not proper and it would violate due process for it to be allowed in any way to undermine the Appellants' appeal of the circuit court's decisions. The Appellants were not given notice and an opportunity to address such an argument below, which was not presented or ruled upon below. *Cf.* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

CONCLUSION

Again, the Appellants ask this Honorable Court to reverse the summary judgments granted against them by the circuit court and to remand their claims to that court so they may proceed.

Respectfully submitted,

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants, do hereby certify that I have served the **INITIAL REPLY BRIEF OF APPELLANTS** and **APPELLANTS' REPLY DESIGNATION OF MATTER** on all Respondents by depositing a copy of the same into the United States Mail, with sufficient postage, on November 19, 2015, addressed as follows to their counsel of record:

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November 19, 2015

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Re: Live Oak Village Homeowners Association, Inc., Jennifer McFarland and Carlton Holcombe v. Thomas Morris, David Hanneman, Sofia Mazell and Michael Mazell
Case No.: 2015-000599
YCR File: 15508-20150492

Dear Ms. Kitchings:

Enclosed please find the original and two copies of the Initial Reply Brief of Appellants and Appellants' Reply Designation of Matter. Also enclosed are the original and one copy of the Proof of Service for same. Please file the originals and return court stamped copies to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

/kbb
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