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.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Statutes (continued)

Rules

STATEMENT OF ISSUES ON APPEAL

I. **The circuit court granted summary judgment against (Plaintiff/Appellant) Live Oak Village Homeowners Association, Inc., as to all of its claims against (Defendants/Respondents) Thomas Morris, David Hannemann, Sofia Mazell, and Michael Mazell, based on the court's determination that it failed to follow its by-laws, which the court found to be a condition precedent to bringing suit, and therefore it lacked standing and/or authorization to sue; did the circuit court err in so doing?**

II. **The circuit court granted partial summary judgment against (Plaintiffs/Appellants) Jennifer McFarland and Carlton Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, based on the court's determination 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; did the circuit court err in so doing?**

STATEMENT OF THE CASE

The Live Oak Village subdivision (the "Subdivision") is a small community, consisting of seven single-family homes and certain common elements, in Dorchester County.

Live Oak Village Homeowners Association, Inc. (the "HOA"), is a South Carolina nonprofit corporation organized for the purpose of managing the business of the homeowners association for the Subdivision. (R. pp. 398-399 at § 1.) The HOA is governed by a three-member Board of Directors (the "Board"); its members ("Directors") are William McFarland, Thomas Morris, and David Hannemann. (R. pp. 400-401 at § 4; R. p. 175,

lines 4-21; R. p. 245, lines 8-13; R. p. 326.) Mr. McFarland is also the HOA's President, its chief executive officer. (R. p. 404 at § 7(B); R. p. 234, lines 14-18; R. p. 175, lines 4-24.)

The parties to this litigation are the HOA and individuals who are, or were, residents of the Subdivision and members of the HOA. Specifically, the Plaintiffs are the HOA,[1] Jennifer McFarland, Carlton Holcombe, and Ute Holcombe; the Defendants are Mr. Morris, Mr. Hannemann, Sofia Mazell, and Michael Mazell (collectively, Mr. and Mrs. Mazell are the "Mazells"); Mr. McFarland is a third-party defendant.

The Plaintiffs commenced this action on November 16, 2012, by filing a summons and complaint against the Defendants in Dorchester County. (R. pp. 25-30.) The operative complaint is their amended complaint filed on October 31, 2014. (R. pp. 31-36.) It alleges a total of four causes of action, but only the first, second, and fourth are relevant to this appeal.

The first cause of action is for a declaratory judgment as to Messrs. Morris and Hannemann; the Plaintiffs allege acts/omissions, both past and ongoing, by these Defendants outside the scope of their authority as

[1] Operating as HOA President and contending he was the only Director authorized to act, Mr. McFarland initiated the lawsuit by/on behalf of the HOA.

Directors[2] and seek related declaratory, as well as injunctive, relief to spare them irreparable damage for which they have no adequate remedy at law. (R. pp. 33-34, ¶¶ 4-9.) The second cause of action is for conspiracy against all Defendants; the Plaintiffs allege the Defendants conspired to injure them and caused them special damages including, but not limited to, attorney's fees and costs in defending against the Defendants' actions and loss of HOA fees. (R. p. 34, ¶¶ 10-12.) The fourth cause of action is against the Mazells for breach of the Subdivision's covenants and restrictions by having renters in their home; the Plaintiffs allege the Mazells are liable for HOA fines, costs, and fees related to the breach. (R. p. 35, ¶¶ 16-19.)[3]

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[2] More specifically, the Plaintiffs allege Messrs. Morris and Hannemann "have willfully operated and continue to willfully operate outside of the scope of their authority by taking action or failing to take action as required by the [Subdivision's] covenants and restrictions, including but not limited to the following acts: A. voting to waive fines that applied to themselves; B. failing to hold timely or properly noticed [HOA] or [Board] meetings; C. allowing unauthorized persons to vote and participate in [Board] 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." (R. p. 33, ¶ 6.)

[3] The third cause of action is by Mrs. McFarland against the Mazells for defamation; Mrs. McFarland alleges the Mazells falsely accused her of being unchaste and having extra-marital relations, of committing criminal acts by stealing her father's business, of being racist, and of invading the Defendants' privacy by peering into their windows. (R. pp. 34-35, ¶¶ 13-15.)

After responsive pleading and a period of discovery, Messrs. Morris and Hannemann moved for summary judgment, and the Mazells moved for partial summary judgment. (R. pp. 324-340; R. pp. 296-297.)[4]

Messrs. Morris and Hannemann contended they were entitled to judgment as a matter of law, as to all claims against them, because the Plaintiffs did not have standing and lacked damages and/or special damages. (R. pp. 324-340.) With particular respect to the HOA's standing, they argued by-laws pertaining to official Board action were not followed—more specifically, they argued any action by the Board, to include bringing the instant action by/on behalf of the HOA, required approval by vote of at least two Directors at a meeting or, without a meeting, required written approval by all three Directors, and the necessary approval was not obtained—thus, a condition precedent to the HOA's suit was not met and no right of action in favor of the HOA had arisen against them. (R. pp. 324-340.) The Mazells similarly challenged the HOA's claims against them. (R. pp. 296-297; R. pp. 298-304.)

Following oral argument and submission of written material on the motions, the circuit court, The Honorable Diane Schafer Goodstein presiding, granted the Defendants partial summary judgment via separate

[4] Messrs. Morris and Hannemann (together) and the Mazells are represented by separate counsel.

orders. (R. pp. 298-304; R. pp. 305-313; R. pp. 324-340; R. pp. 348-353; R. pp. 53-68; R. pp. 69-165; R. pp. 1-5; R. pp. 6-15.) In granting partial summary judgment to Messrs. Morris and Hannemann, the circuit court ruled (1) Mrs. Holcombe lacked damages to support her claims, (2) the HOA failed to follow its by-laws in bringing suit and therefore lacked standing to sue the Defendants, and (3) Mrs. McFarland and Mr. Holcombe lacked standing to pursue their cause of action for declaratory judgment as to Messrs. Hannemann and Morris, because they had not suffered an injury in fact and lacked a justiciable controversy. (R. pp. 6-15.) In granting partial summary judgment to the Mazells, the circuit court ruled the claims asserted in the name of the HOA were null and void, because suit on behalf of the HOA had not been properly authorized in accordance with its by-laws. (R. pp. 1-5.)[5]

This appeal timely follows. Of the Plaintiffs, the Appellants are the HOA, Mrs. McFarland, and Mr. Holcombe. All of the Defendants are Respondents.

[5] The Plaintiffs and Mr. McFarland had made their own motion for summary judgment on all the counterclaims/third-party claims alleged against them; the circuit court also granted this motion. (R. pp. 16-24.)

STANDARD OF REVIEW

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citing Watson v. Southern Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975)). Summary judgment is appropriate—i.e., is ***only*** appropriate—when "it is clear" there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Mosteller v. County of Lexington, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999); *see also* id. ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) ("Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied."); Rule 56(c), SCRCP. "If triable issues exist, those issues must go to the jury." Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v.

Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994); *see also* Vermeer, 336 S.C. at 305, 518 S.E.2d at 59 ("All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); *see also* Vermont Mut. Ins. Co. v. Singleton, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994) ("Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence.").

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.

In granting summary judgment against the HOA on its claims against Messrs. Morris and Hannemann, the circuit court's analysis was, in its entirety (excluding citations), as follows:

> "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." A right of action does not arise until such conditions precedent are met. The HOA failed to follow its own By-laws and condition precedents before instituting this suit. Any official action by the HOA requires a majority vote, or the vote of two (2) of the three (3) directors. Mr. McFarland, as the 30(b)(6) deponent for the HOA, testified that no such discussion or vote occurred prior to brining suit. As no such vote occurred, the conditions precedent set out in the By-Laws were not met and the HOA's right of action did not arise. Therefore, the Court holds the HOA lacked standing to bring this lawsuit and dismisses the HOA as a Plaintiff.

(R. pp. 11-12 (citations omitted).)

The circuit court's analysis in granting summary judgment against the HOA on its claims against the Mazells was substantially the same:

> In pertinent part, the By-laws for the HOA do empower the HOA to bring legal actions against members of the Association for violation of HOA By-laws, covenants and restrictions. However, to authorize any such action by and on behalf of the HOA, the Bylaws provide for two alternative means. One requires a decision by a majority of [Directors] at a [Board] Meeting. . . . The second means by which action by the HOA may be undertaken is following advance written approval of all [Directors]. . . .
>
> [C]ounsel for the plaintiffs conceded that prior unanimous consent of all members of the [Board] for the HOA to have instituted claims against [the] Mazell[s] did not occur. Counsel further conceded that a majority of members of the [Board] did not

> vote at a board meeting to institute claims in the name of the HOA against [the] Mazell[s]. . . .
>
> Given that there is no dispute over the fact that the plaintiffs' filing of claims in the name of the HOA against [the] Mazell[s] was not properly made in accordance with the procedures set forth in the governing Bylaws, the HOA was not empowered or authorized to have filed any claims against anyone. Accordingly, the plaintiffs' filing of claims in the name of the HOA is null and void, and [the] Mazell[s'] motion to dismiss said claims is hereby GRANTED.

(R. pp. 4-5 (citations omitted).)

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,[6] but because—on account of the very Board dysfunction they were alleged to have caused—these Defendants had not agreed to be sued for them. Most respectfully, the circuit court erred in finding no triable issue as to any of the HOA's claims

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[6] In their motion for summary judgment, Messrs. Morris and Hannemann admitted the existence of evidence of damages to the HOA in the form of the Mazells' failure to pay fines, the HOA's inability to fine them (i.e., Messrs. Morris and Hannemann), their (i.e., Messrs. Morris and Hannemann's) payment of HOA fees into escrow instead of to the HOA, and attorney's fees, stating, "[a]ll of these alleged damages are damages suffered by the HOA . . . ." (R. pp. 337-338; *see also* id. at R. p. 338 ("Thus, as to the civil conspiracy claim, the HOA and Mr. Holcombe seek general damages allegedly suffered by the HOA; ***damages the HOA could have sought*** if it had met the condition precedent under the Bylaws and had standing to bring suit.") (emphasis added).)

and granting summary judgment against it on the basis of such a fundamentally unjust catch-22.

The circuit court misapprehended the law with respect to conditions precedent. Conditions precedent—and the authority the circuit court cited on them—are irrelevant here. For instance, the circuit court cites Worley v. Yarborough Ford, Inc., where this Court was analyzing a matter of contract law about whether there was a condition precedent to a party's obligation to perform under an agreement. 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) ("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. ***In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.***") (emphasis added). Here, there is, of course, no question that Messrs. Morris and Hannemann were (as they continue to be) under a duty of immediate performance with respect to the roles as Directors.

The circuit court's analysis is illogical, particularly the idea that a right of action had not arisen in favor for failure to follow its own by-laws. "'A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.'" Stephen v. Draffin, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309

(1997) (citing Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962); *see also* id. at 4, 488 S.E.2d at 309, n. 4 (explaining that, for the purpose of the Court's analysis, the terms "accrue" and "arise" were interchangeable). The question of 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; the existence or non-existence of such a right has nothing to do with the HOA's by-laws.

Also illogical—and, of course, patently unjust—is the circuit court's view of the applicability of the by-laws under these unique circumstances, which allows the very parties against whom rights in favor of the HOA have arisen to prevent exercise of those rights on the basis of the HOA's by-laws. *Cf.* Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co., Inc., 311 S.C. 275, 277, 428 S.E.2d 734, 735 (Ct. App. 1993) ("The general rule of contract construction requires that language used in a contract must be interpreted in its natural and ordinary sense. Furthermore, a contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences.")

Where a director of a corporation has an interest adverse to the corporation, the director is ineligible to participate in the corporate decision. 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.E. 579 (1930) and Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E. 141 (1930)). The general rule is that the conflicted director "may not even be counted to make a quorum at a meeting where the matter is acted upon . . . ." Id.

Because Messrs. Morris and Hannemann obviously had an interest adverse to the HOA, i.e., not having the HOA sue them, they were disqualified from voting or even making up a quorum of the Board, leaving Mr. McFarland as the only Director qualified to vote. While it is true that prosecution of the HOA's claims was not precipitated by formal Board action, Mr. McFarland initiated suit by and on behalf of the HOA operating as its President and chief executive officer and, indeed, contending, under the circumstances, he was the only Director authorized to act. (R. p. 232, line 5 – p. 233, line 25; R. p. 234, lines 1-18.)

Additionally, as referenced above (*see* footnote 6), Messrs. Morris and Hannemann had not paid their annual assessments to the HOA. (R. p. 235, lines 2-15.) While they take the position that they have placed the fees in escrow by tendering the funds to their attorney, their position finds no support in any of the Subdivision's governing documents; accordingly, Messrs. Morris and Hannemann are in violation of the Subdivision's governing documents and ineligible to serve as Directors—at the very least

there is a triable issue about whether they are authorized act.

Further still, there is evidence of prior conduct that cuts against the Defendants' position. Without a meeting/vote or written approval of all Directors, the Board hired and paid property manager Kathleen Green, whom Mr. McFarland had identified for the position. (R. p. 168, lines 13-22; R. p. 282, lines 16-17; R. p. 176, lines 11-16.)

Section 7(B) of the HOA's by-laws identifies the HOA President as its chief executive officer, with "all the powers and duties which are usually vested in the office of the President of an association." (R. p. 404 at § 7(B).) The extent of "the powers . . . which are usually vested in the office of the President of an association" is a triable issue of fact, particularly under the circumstances of this case, where the President, Mr. McFarland, is one of three Directors, the other two, Messrs. Morris and Hannemann, having interests clearly adverse to the HOA and unable—not to mention most certainly unwilling—to give the approval the Defendants claim to be required. *Cf.* Cafe Assoc. Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) ("[W]here a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury.").

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.

Although set forth separately, the circuit court's analysis in support of its grant of partial summary judgment against Mrs. McFarland and Mr. Holcombe overlaps. In finding both that these Plaintiffs had not suffered an injury in fact and that they lacked a justiciable controversy (so, therefore, they did not have standing), the court focused on what it viewed as a lack of concrete harm attributable to Messrs. Morris and Hannemann that was capable of being redressed via judicial action. (R. pp. 12-15.) Most respectfully, the court erred in so doing.

Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Id.

Under South Carolina's enactment of the Uniform Declaratory Judgments Act (the "Act"), S.C. Code Ann. §§ 15-53-10 to -140, "[c]ourts of record within their respective jurisdictions . . . have power to declare

rights, status and other legal relations whether or not further relief is or could be claimed." § 15-53-20. "No action or proceeding [is] open to objection on the ground that a declaratory judgment or decree is prayed for," and "[t]he declaration may be either affirmative or negative in form and effect." Id.; *see also* § 15-53-30 ("Any person interested under a deed, will, writien contract or other writings constituting a contract . . . may have determined any question of construction . . . and obtain a declaration of rights, status or other legal relations thereunder.") The legislature expressly "declared [the Act] to be remedial[,]" with "[i]ts purpose [being] to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[,]" instructing that "[i]t is to be liberally construed and administered." § 15-53-130.

Here, a cause of action has been alleged for declaratory judgment as to Messrs. Morris and Hannemann based on their alleged violation the Subdivision's governing documents, which are contracts or writings constituting a contract insofar as the Act is concerned. It was/is appropriate and consistent with the purpose of the Act for these Plaintiffs, as "person[s] interested," to seek a determination of "rights, status, or other legal relations" in this regard.

The 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. The court took too narrow a view of the concept of injury, especially the language in the amended complaint alleging that these Plaintiffs "will suffer irreparable damage to their ability to reside at their property" in the absence of the requested declaratory and injunctive relief, and especially in the context of a motion for summary judgment. *See above-cited authorities regarding the summary judgment standard*; *see also* Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties.").

These Plaintiffs' ability to reside at their property is not unharmed merely because it is still physically possible for them to reside at their property and they still have access to the Subdivision's common elements. The alleged unauthorized acts/omissions on the part of Messrs. Morris and Hannemann and the accompanying dysfunction of the Board, whose purpose is, after all, to manage the business of the homeowners association for the Subdivision,[7] unquestionably constitute harm, or at least the threat of significant harm, to the Plaintiffs' significant interests in their property (including their ability to reside at the property), which are directly traceable

[7] (R. pp. 398-399 at § 1.)

to Messrs. Morris and Hannemann, and which can be meaningfully redressed via declaratory and injunctive relief.

When bringing an action under the Act, "[a]ll that is required is that the [plaintiff] demonstrate a justiciable controversy;"[8] these Plaintiffs have done so here, and the circuit court erred in ruling otherwise.

CONCLUSION

For the foregoing reasons, 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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[8] Brown v. Wingard, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985).

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellants complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants, do hereby certify that I have served the **FINAL BRIEF OF APPELLANTS** and **APPELLANTS' CERTIFICATION FOR FINAL BRIEF** on all Respondents by depositing a copy of the same into the United States Mail, with sufficient postage, on January 11, 2016, addressed as follows to their counsel of record:

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