THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Ninth Judicial Circuit
R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2016-000553

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Matthew L. Dawson and Kateri Dawson, Plaintiffs,
Of whom Matthew L. Dawson is the Appellant,

v.

Ravenel Associates, Inc. d/b/a Ravenel Associates, Defendant.

Matthew L. Dawson, Plaintiff,

v.

Village Green Homeowners Association, Defendant,
Of whom Village Green Homeowners Association is the Respondent.

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# FINAL BRIEF OF RESPONDENT VILLAGE GREEN HOMEOWNERS ASSOCIATION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes and Rules

## STATEMENT OF ISSUE ON APPEAL

1. WHETHER THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN APPLYING THE BUSINESS JUDGMENT RULE TO THE CONDUCT OF RESPONDENT.

## STATEMENT OF THE CASE

Appellant Matthew L. Dawson ("Appellant") filed this action on January 25, 2013 in the Charleston County Court of Common Pleas against Respondent Village Green Homeowners Association, Inc. ("Respondent") (Case No. 2013-CP-10-457). The Complaint set forth causes of action for negligence and defamation, and sought damages allegedly incurred as a result of the same. On March 21, 2013, Respondent filed an Answer in which it denied all allegations of negligence and defamation.

On April 8, 2014, Appellant and his wife, Kateri Dawson ("Mrs. Dawson"), filed a separate action against Ravenel Associates, Inc. ("Ravenel") (Case No. 2014-CP-10-2319). This Complaint set forth causes of action for negligence and libel. On April 30, 2014, Ravenel filed an Answer in which it denied all allegations of negligence. Ravenel also filed a Third-Party Complaint against Respondent seeking indemnification from all damages, if any, awarded to Appellant or Mrs. Dawson. On May 29, 2014, Ravenel filed an Amended Answer to the Complaint in which it withdrew its cause of action against Respondent.

On May 27, 2014, Respondent and Ravenel filed motions to consolidate the above-referenced lawsuits pursuant to Rule 42(a), SCRCP, on the grounds that both cases arose out of identical factual allegations and asserted similar claims against Respondent and Ravenel. On September 29, 2014, The Honorable R. Markley Dennis, Jr. granted the motions to consolidate.

On December 5, 2014, Respondent filed a Motion for Summary Judgment as to both causes of action alleged by Respondent. Ravenel filed a similar Motion for Summary Judgment. Respondent submitted a Memorandum in Support of its Motion and other related exhibits before Judge Dennis heard oral arguments on both motions on January 15, 2015. At the time of the

hearing, and by agreement of the parties, the scope of the motions was confined to Appellant's defamation cause of action. The parties also agreed that Respondent and Ravenel reserved the right to file and prosecute motions for summary judgment as to the remaining claims (negligence) asserted by Appellant at a later date. On February 6, 2015, Judge Dennis entered an Order granting Respondent's Motion for Summary Judgment as to Appellant's defamation cause of action.

On March 23, 2015, Respondent refiled its Motion for Summary Judgment on Appellant's remaining cause of action for negligence. Ravenel filed a similar Motion for Summary Judgment on April 20, 2015 as to Appellant's cause of action for negligence. Ravenel also filed a Motion for Summary Judgment on August 31, 2015 as to the cause of action for negligence asserted by Mrs. Dawson. On September 29, 2015, Judge Dennis heard oral arguments on all three motions. Prior to the hearing, all parties submitted memoranda in support of their respective positions, along with affidavits and other related documents. At the hearing, Judge Dennis incorporated all submissions from all parties into the record.

On October 9, 2015, Judge Dennis entered separate Form 4 Orders granting Respondent's Motion for Summary Judgment and granting Ravenel's Motion for Summary Judgment as to Appellant's cause of action for negligence. Judge Dennis denied Ravenel's Motion for Summary Judgment as to Mrs. Dawson's cause of action for negligence. In the Form 4 Orders, Judge Dennis indicated that formal Orders detailing these rulings would follow. On October 29, 2015, Appellant's former counsel filed a Motion to Reconsider.

On January 19, 2016, Judge Dennis entered formal Orders granting Respondent's Motion for Summary Judgment and Ravenel's Motion for Summary Judgment as to Appellant's cause of

action for negligence. On February 19, 2016, Judge Dennis heard Appellant's Motion to Reconsider and entered a Form 4 Order denying the same. This appeal followed.

## STATEMENT OF FACTS

Appellant owns and resides at 3290 Middlebury Lane in Charleston County, South Carolina. This property is located in the Village Green subdivision. Respondent is charged with governing Village Green, which it does through the appointment or election of the Village Green HOA Board of Directors ("the Board"). Appellant initially agreed to serve as a member of the Board in 2011. During this time as a member of the Board, Appellant served as Treasurer and, on February 28, 2012, was appointed Chairman of the Village Green Architectural Review Board ("the ARB").

On March 19, 2012, Mr. David Malara ("Mr. Malara") and Ms. Virginia Adrihan ("Ms. Adrihan") presented a formal complaint ("Complaint Letter") to the Board requesting that it remove Appellant from his positions as Board member and ARB Chairman due to "misuse" of the authority vested in these positions. (Supp. R. pp. 24-25). At the time, Mr. Malara and Ms. Adrihan resided at 3286 Middlebury Lane in Charleston County, South Carolina and were next-door neighbors of Appellant. Ms. Adrihan has since moved.

The Board addressed the allegations set forth in the Complaint Letter over several meetings, the first of which was the regular monthly meeting held on March 19, 2012. The Board also considered the Complaint Letter in special meetings held on March 26, 2012 and April 2, 2012, a monthly meeting previously scheduled for April 16, 2012, and in a final special meeting on April 24, 2012. Board members also discussed the matter informally on several occasions.

Ultimately, the Board voted against removing Appellant from his positions as Board member and ARB Chairman. However, the Board unanimously voted in favor of censuring Appellant for his conduct. The Board also placed certain restrictions on Appellant's authority as ARB Chairman, including prohibiting Appellant from exercising any authority over ARB matters pertaining to the residence of Mr. Malara and Ms. Adrihan. Subsequently, the Board revised the censure to a "Memo of Counseling" at the request of, and with the approval of Appellant. Appellant voluntarily resigned from his positions as Board member and ARB Chairman on May 30, 2012.

## STANDARD OF REVIEW

An appellate court must review the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Peterson v. West American Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Pursuant to Rule 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, "the court must view the facts and inferences therefrom in a light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). "A party opposing a properly supported Motion for Summary Judgment, however, may not rest on the mere allegations or denials of its pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a Motion for Summary Judgment." *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C.

311, 313, 411 S.E.2d 672, 673 (Ct. App. 1991), *reversed* in part on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993).

## ARGUMENT

I. THE CIRCUIT COURT APPROPRIATELY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT ACTED WITHIN ITS SCOPE OF AUTHORITY IN INVESTIGATING AND DISCIPLINING APPELLANT AND SUCH CONDUCT IS SUBJECT TO THE BUSINESS JUDGMENT RULE AS ESTABLISHED BY SOUTH CAROLINA LAW.

A corporation can only "exercise the powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986). When a corporation acts within its scope of authority, such conduct is considered *intra vires*. "Acts beyond the scope of a corporation's powers as defined by law or its charter are *ultra vires*." *Id.* In South Carolina, the business judgment rule operates to preclude judicial review of *intra vires* actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) (internal citation omitted).

"In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule,' and absent a showing of good faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). "The burden of proving good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions." *Dockside Ass'n, Inc.*, 294 S.C. at 87, 362 S.E.2d at 874. Within the context of decisions by a homeowners association, the "business judgment rule applies to actions allowed

by the Master Deed, Bylaws, and [South Carolina Horizontal Property Act], *intra vires* acts." *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 180, 760 S.E.2d 121, 130 (2014).

As applied to this case, the business judgment rule operates to preclude judicial review of all Board action within its scope of authority as established by South Carolina law, the Declaration of Covenants, Conditions, and Restrictions for Village Green ("Covenants"), the Bylaws of Village Green ("Bylaws"), and the ARB Guidelines.

### A. Respondent fulfilled its obligation to reasonably investigate the Complaint Letter filed by Mr. Malara and Ms. Adrihan.

Pursuant to S.C. Code Ann. § 33-31-801(b), all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board. This includes, without limitation, the power to "sue and be sued, complain, and defend in its corporate name" and to "do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation." *See* S.C. Code Ann. §§ 33-31-302(1), (18). Pursuant to Article VI, Section 1 of the Bylaws, the Board shall be responsible for managing the business and affairs of Village Green HOA. Section 1(c) of Article VIII further states that the Board shall exercise for Village Green HOA all powers, duties and authority vested in or delegated to Village Green HOA and not otherwise reserved to the membership by other provisions of the Bylaws, Articles of Incorporation, or the Declaration.

Within the broad scope of authority established by South Carolina law and the governing documents of Village Green HOA is the obligation of the Board to investigate complaints filed by homeowners or other third parties. In this case, Mr. Malara and Ms. Adrihan presented a Complaint Letter to the Board outlining multiple instances in which Appellant abused his power

as Board member and ARB Chairman. (Supp. R. pp. 24-25). Specifically, the Complaint Letter alleged Appellant inappropriately confronted Mr. Malara about various ARB issues, used vulgar language on multiple occasions, and generally used his position as Board member and ARB Chairman to "harass, discredit and slander" Mr. Malara and Ms. Adrihan. (Supp. R. pp. 24-25). The Complaint Letter further requested that Appellant be removed from his positions as Board member and ARB Chairman immediately and threatened legal action against Respondent if it failed to do so. (Supp. R. p. 25).

At this point, and in order to protect itself from future litigation, Respondent began its investigative efforts. On March 19, 2012, Mr. Malara and Ms. Adrihan addressed the Board to discuss the allegations set forth in their Complaint Letter. Mr. Malara and Ms. Adrihan further requested that the Board call a special meeting to consider the Complaint Letter and how it intended to resolve the issues set forth therein. The Board agreed to do so and scheduled a special meeting for March 26, 2012. During this meeting, the Board went into Executive Session to further discuss the Complaint Letter and afford Appellant the opportunity to be heard on the allegations. Shawn Toole ("Mr. Toole"), President of the Board at that time, testified as follows:

> Q: And so with regard to March 26th, 2012, you already testified that you didn't have any specific recollection about what happened at that meeting; is that correct?
>
> A: I remember at that meeting that Matt had the opportunity to address us and give us some background on the situation. Putting these three documents together reminded me of a couple of things. Yeah. So that was – I think that was the meeting where Matt shared with us the situation that was taking place at the Malara's residence. I think this came after the complaint from Malara.
>
> [. . .]

Q: But you recall Matt Dawson having an opportunity to share what happened?

A: I do. I don't remember the specifics at this time, but I remember him sharing with us that there was some possible ARB issues with that residence.

(Supp. R. p. 227, 19:13-24; Supp. R. p. 227, 20:6-10).

After an hour in Executive Session regarding this issue, the Board adjourned without a decision. On April 2, 2012, the Board held another special meeting to consider the disciplinary measures requested by Mr. Malara and Ms. Adrihan in their Complaint Letter. Specifically, the Board met to discuss whether Appellant should be removed from his position as Board member or ARB Chairman. Appellant did not attend this meeting, but submitted a letter to the Board outlining his position regarding the allegations set forth in the Complaint Letter and offering his perspective on the same. Ultimately, this meeting was adjourned without the presentation of a motion to remove Appellant from either position.

On April 16, 2012, the Board reconvened for its regular monthly meeting. Among the items to be addressed was the "ARB Committee Chairman Censure." (Supp. R. p. 228, 22:10-16). However, upon reaching this item on the agenda, Mr. Toole made a motion to "remove" it from further deliberation. Mr. Toole was asked in his deposition why the motion was tabled and testified as follows:

A: And I can't tell you why I made a motion for it to be removed. That – that doesn't necessarily mean that we had resolved the matter. We could have just removed it to discuss it at the next meeting.

[ . . . ]

Q: Was there a determination made at the April 16th, 2012 meeting that a determination was made that Matt Dawson did not misuse his position as ARB chairman?

A: We didn't discuss it. It was tabled.

(Supp. R. p. 228, 23:14-24:12).

Finally, on April 24, 2012, the Board met at the request of Appellant for another special meeting to discuss a final resolution to the Complaint Letter of Mr. Malara and Ms. Adrihan. Four Board members, including Appellant, were present for the meeting. During the meeting, Board member Heather McKelvey made a motion to approve the censure of Appellant. (R. p. 69). This motion was carried by a majority vote. (R. p. 69). At that point, Appellant expressed concern that the censure could affect his career as a Certified Public Accountant and requested the Board reconsider its decision. Upon further review, the Board agreed to revoke the censure and issue a memo of counseling to Appellant. (R. p. 69).

The memo of counseling served to express the Board's disapproval with Appellant's involvement in particular matters related to 3286 Middlebury Lane, the residence of Mr. Malara and Ms. Adrihan, as ARB Chairman. The memo of counseling further required that Appellant remove himself from all future issues directly pertaining to 3286 Middlebury Lane (the residence of Mr. Malara and Ms. Adrihan). Finally, the Board required that Appellant attend several training/educational seminars.

Beginning with its receipt of Mr. Malara and Ms. Adrihan's Complaint Letter on March 19, 2012, the Board engaged in reasonable efforts to investigate the allegations set forth therein, determine the appropriate response, and mitigate the threat of future litigation against it. In his deposition, Appellant even acknowledged the Board should investigate all threats of possible litigation:

Q: When a board of directors receives a threat of litigation, is it reasonable for that board to do some due diligence and look into this threat?

A: Yes, they should.

(Supp. R. p. 361, 337:5-9).

The Complaint Letter was on the agenda of two regular monthly meetings and three special meetings were called to exclusively address how the Board should respond to the Complaint Letter. During these meetings, the Board considered all relevant documentation and also offered both parties the opportunity to further explain the situation. Specifically, Mr. Toole testified:

Q: Was there any particular things that the – say, a board member or the board in general or anybody did to investigate this matter?

A: We looked at the documents that were presented to us, most of what you've shown me here.

(Supp. R. p. 232, 38:2-6).

Mr. Toole further testified as follows:

Q: Do you have any recollection of when the board met to discuss that?

A: Again, like I've said a couple of times, we met so many times about this issue. . . . And that was some information that we had received from Dave Malara and – and, again, these things were coming in. We were getting personal E-mails –

Q: From Dave Malara?

A: -- from Malara and from Matt during this period of time. There were phone calls. There was a lot of communication going on about this. The meeting and the minutes aren't reflective of the only time communications were being made about this topic.

(Supp. R. p. 229, 24:24-25; Supp. R. p. 230, 25:1-15).

Based on the above, it is evident that the Board considered all evidence relevant to the Complaint Letter and afforded both parties ample opportunity to be heard on the matter before reaching a decision on April 24, 2012. Thus, it acted reasonably and within its scope of authority as provided by South Carolina law and all governing documents by investigating the allegations of Appellant's misuse and abuse of power and issuing a memo of counseling to Appellant for his unprofessional conduct.

**B. Respondent acted reasonably and within its authority to discipline Appellant for his misuse and abuse of power as set forth in the Complaint Letter filed by Mr. Malara and Ms. Adrihan.**

Pursuant to S.C. Code Ann. § 33-31-830(a), a director shall discharge his duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner that the director reasonably believes to be in the best interests of the corporation. If a member fails to act in accordance with requirements of his or her position as established by S.C. Code Ann. § 33-31-830(a) or any other governing documents, the member may be subject to discipline by the Board.

Generally, the Board's authority to discipline a member is established by Section 1 of Article VI of the Bylaws. This provision states that the business and affairs of the Association shall be managed by the Board of Directors. (Supp. R. p. 100). More specifically, the Bylaws also state that any Board member may be removed, with or without cause, at the discretion of the Board. (Supp. R. p. 101). The Board is also guided by Robert's Rules of Order, which provides that the Board may censure or otherwise discipline a member if it determines that he or she acted inappropriately. A censure can also operate to separate the Board from the actions of a single member so as not to incur liability or exposure to liability for the remaining Board members.

These provisions grant wide latitude to the Board in determining if a member's conduct warrants discipline and in assigning the appropriate measure of discipline on a case-by-case basis.

In 2008, Mr. Malara purchased the property located at 3286 Middlebury Lane in Charleston, South Carolina. At the time, Appellant resided at the house next-door. Over the next several years, Mr. Malara and Appellant grew to be "social friends" with each other. As Appellant testified, this friendship included spending time with each other on multiple occasions each week. (Supp. R. p. 289, 52:16-17). Mr. Malara and Appellant often watched football games together and the two of them, along with Mrs. Dawson and Ms. Adrihan, would occasionally go to dinner together. (Supp. R. p. 289, 52:18-25; Supp. R. p. 290, 53:1-3). This relationship continued until November 2011. On November 8, 2011, Mrs. Dawson submitted an online complaint to Ravenel, the property management group for Village Green HOA, regarding trash accumulation on the side of Mr. Malara's home. Following the complaint, Appellant testified that both parties agreed to "move forward" and maintain a respectful relationship. (Supp. R. p. 393, 464:23). However, by December 2011, it was apparent the parties were incapable of doing so.

On December 8, 2011, Mr. Malara and Ms. Adrihan sent an email to Appellant and Mrs. Dawson in effort to put closure to the situation. (Supp. R. p. 195, 84:20). Several hours later, Appellant responded with a profanity-laced email. This email, which Appellant read into the record during his deposition, stated as follows:

A: Okay.

> You motherfucker, Dave, I work during the day, unlike you, so sorry if I didn't call you. After reading your ridiculous letter, I don't even want to talk to you. By the way, you feed Whiskers – this is our cat. You even

> bought food and a damn bed. How dare you say we go over there and feed him snacks. I don't doubt it happened a time or two, but the snacks given were the snacks/food you bought. I can't fucking believe what I just read. You are a damn asshole and I can't even think straight to write this email. You are certainly right we are not friends. You want to go that route, then go with it. You can take your codes and shove them up your ass. I'll be sure to share that letter with everyone as it is so ass backwards.
>
> Yes, your fence was approved by the ARB, but does not meet the ARB guidelines. It was to go up to the corner of the house which it doesn't. Your fence does not go all the way around your property, so your trailer and other trash you have been accumulating can be seen from other surrounding properties and from the pond easement. Your shed violates ARB guidelines by not being made of wood and on a slab, so get rid of it NOW.
>
> Also, don't be throwing any gambling parties and providing alcohol to minors. A good cop wouldn't do that, but then again you won't be a cop in any town around here, trust me on that.
>
> One more time. FUCK YOU!!!!!!

(Supp. R. p. 340, 254:25-256:4).

In his deposition, Appellant admitted that the email was "out of line." (Supp. R. p. 302, 104:10). At the time of this correspondence, Appellant was a member of the Board, but was not ARB Chairman. However, in February 2012, Appellant nominated himself to become ARB Chairman and the Board voted to appoint him to this position.

On March 16, 2012, several weeks after Appellant's appointment as ARB Chairman, Mr. Malara began installing security cameras on his property. Appellant, in his new capacity, then proceeded to text message Mr. Malara the following: "Please submit ARB form for approval of the cameras or lights you just installed. All additions must run through ARB. Thank you." (Supp. R. p. 168). Mr. Malara then responded to inquire about the identity of who sent the text message. In response, Appellant stated: "ARB Chair. Thank you for your cooperation." (Supp.

R. p. 169). Mr. Malara then inquired again about the identity of who was sending the text messages. Finally, Appellant responded: "Item will be discussed at the next board meeting. Hope to see you there." (Supp. R. p. 169). Later that day, Appellant and Mr. Malara verbally confronted each other about the text messages and underlying events. At the request of Mr. Malara, Charleston Police Department reported to investigate the verbal confrontation and subsequently completed a written report outlining the same. Several days later, Mr. Malara and Ms. Adrihan presented the formal Complaint Letter to the Board about Appellant's conduct in his capacity as ARB Chairman and Board member. (Supp. R. p. 24-25).

The timing of events outlined above suggests that Appellant sought appointment to the ARB Chairman position in order to further an ongoing and personal feud with Mr. Malara. In December 2011, Appellant was not capable of enforcing what he suggested were several ARB violations at Mr. Malara's residence. However, Appellant wasted little time exercising such authority upon his appointment to ARB Chairman. In fact, Appellant also intended to pursue several other ARB matters against Mr. Malara. Specifically, Appellant testified:

> Q: Right. And then after that letter where you called him a "motherfucker," you became ARB chair?
>
> A: That would have been – I was voted in March – February, so that was several months later.
>
> Q: And then within weeks of you being an ARB chair, you've already talked with Nadine about sending other letters about violations that Malara had, and you also texted him about the cameras that he was putting up?
>
> A: The shed was already a complaint. Nadine brought up the shutters. And Nadine was also was the facilitator of that letter. That was not me, at all.
>
> Q: But you were involved in that?
>
> A: I was the ARB chair, yes.

(Supp. R. p. 335, 236:11-23).

Even if this timing of events is pure happenstance, Appellant admitted in his deposition that he treated Mr. Malara differently than all other property owners in Village Green regarding ARB violations. Specifically, Appellant testified:

> Q: All right. How many text messages did you send to other landowners or homeowners in the neighborhood, about submitting forms or concerns regarding violations of ARB guidelines?
>
> A: I had sent no other. I didn't have the phone numbers.
>
> Q: All right. Text communication is kind of a more personal form of communication rather than something you would see in an official capacity from an ARB committee chairman; wouldn't you agree?
>
> A: Because someone would have their number?
>
> Q: Right. Okay. Yes; you would agree?
>
> A: Yes.
>
> Q: Okay. And so the entire time that you were ARB committee chairman, the only person you ever sent a text to asking them to submit a form or to advise them of an alleged violation of the guidelines was Mr. Malara; right?
>
> A: During my time; yes.

(Supp. R. p. 339, 250:9-251:3).

In fact, Appellant sent the text messages to Mr. Malara upon making a unilateral decision that the surveillance cameras/lights required ARB approval and without consulting with other ARB officials or even reviewing the relevant guidelines. Specifically, Appellant testified:

> Q: In between the time you saw him putting up the lights and the time that you send him the text, did you reference the ARB guidelines?

A: No.

Q: Did you communicate with Nadine Evans, the co-chair of the ARB, about whether or not security cameras are, in fact, modifications under the ARB guidelines?

A: I did not communicate with her at the time.

Q: Did you reference any records, ARB records, from Village Green to see whether or not those owners that had cameras had submitted applications?

A: No, not at that time.

(Supp. R. p. 364, 349:16-350:6).

Not only was Appellant more zealous in attempting to enforce the ARB guidelines with Mr. Malara, but he also actively investigated Mr. Malara's property for additional violations. This consisted of Appellant taking video and photographing the residence of Mr. Malara and Ms. Adrihan to document what he perceived to be various violations. Appellant did not engage in such efforts with any other property owner in Village Green.

It is clear from the above testimony that Appellant exercised his authority as ARB Chairman differently with Mr. Malara than he did with all other residents of Village Green. It is further evident that his conduct as ARB Chairman directed towards Mr. Malara was wholly inconsistent with the procedures and protocols in place for resolving ARB issues with property owners. Mrs. Nadine Evans, former Board member and ARB Chairwoman, provided the following testimony:

Q: Okay. Would you – would – is that activity – in terms of, you know, texting a resident about an ARB violation, was that in any way improper or inappropriate for the ARB chairman to do?

A: Yes.

Q: Why? Why so?

A: It didn't follow our procedures and flow charts.

(Supp. R. p. 246, 26:17-24).

A conflict of interest clearly prevented Appellant from fulfilling his duties as Board member and ARB Chairman with the best interests of Respondent in mind. Most likely, Appellant used his newly-inherited authority as ARB Chairman to revive a personal feud with Mr. Malara. Regardless, the evidence is clear that Appellant did not follow proper procedures in sending a direct text message to Mr. Malara about an ARB matter, and his reprimand was justified. Upon receiving the Complaint Letter of Mr. Malara and Ms. Adrihan, it was incumbent upon the Board to investigate the allegations and vote on a resolution to the matter. In terms of disciplining Appellant, several options were available to the Board. The Board could have removed Appellant entirely, issued a censure, or a memo of counseling. Ultimately, the Board consulted with Appellant about an acceptable outcome during the April 24, 2012 special meeting. During this meeting, Appellant accepted a memo of counseling, assisted in drafting the language contained therein, and even voted in favor of the Board issuing the memo of counseling.

In his deposition, Appellant testified that he "[understood] what [the Board's] thought processes were and the reasons for why they did what they did." (Supp. R. p. 384, 430:22-24). Thus, the allegations of negligence focus primarily on the final disciplinary decision of the Board as opposed to the process utilized by the Board to reach that decision. As established above, the Board's decision to discipline Appellant was well within its scope of authority as established by South Carolina law and the governing documents of the community. As an *intra vires* act, the

'business judgment rule' operates to preclude judicial review of its decision to discipline Appellant.

## II. THE CIRCUIT COURT APPROPRIATELY RULED ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT'S CAUSE OF ACTION FOR NEGLIGENCE.

### A. Respondent's Motion for Summary Judgment was properly filed with the Court and served on Appellant's former counsel.

Appellant's Initial Brief appears to suggest that Respondent did not file a Motion for Summary Judgment and that the Circuit Court arbitrarily entered an Order granting relief Respondent never sought. A quick review of the procedural history of this litigation dispels Appellant's contention. As Appellant correctly noted, Respondent filed its initial Motion for Summary Judgment on December 5, 2014. This Motion sought summary judgment on both of Appellant's causes of action – negligence and defamation. At the hearing, however, all parties agreed to limit the scope of Respondent's Motion to Appellant's defamation cause of action. In fact, the Order entered by Judge Dennis granting Respondent's Motion for Summary Judgment on the defamation cause of action specifically provided that: "[b]y agreement of the parties, Ravenel Associates and [Respondent] reserve their right to file and prosecute their motions for summary judgment as to the remaining claims of Plaintiff Matthew Dawson and Plaintiff Kateri Dawson in the future."

Even assuming *arguendo* that the Circuit Court originally denied Respondent's Motion for Summary Judgment as to Appellant's cause of action for negligence, South Carolina law clearly states that the trial judge maintains discretionary authority to permit and hear a second motion for summary judgment even if a movant's first attempt to obtain such relief is unsuccessful. *Croswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App.

1992). Thus, Respondent was not precluded from re-filing or filing another Motion for Summary Judgment, which it did on March 23, 2015.

Appellant also submitted the Affidavit of Myles I. Glick, AIA on September 2, 2015 and a Memorandum in Support of its Motion for Summary Judgment on September 24, 2015. (Supp. R. pp. 162-166). Both documents were filed with the Court and served on Appellant's former counsel. In fact, Appellant's former counsel even submitted a Memorandum in Opposition to Respondent's Motion for Summary Judgment on September 23, 2015. Despite Appellant's apparent contention to the contrary, it is clear that Respondent's Motion for Summary Judgment was properly heard by the Circuit Court on September 29, 2015.

### B. Respondent's Motion for Summary Judgment, and the Order ultimately entered by the Circuit Court, properly addressed Appellant's negligence cause of action.

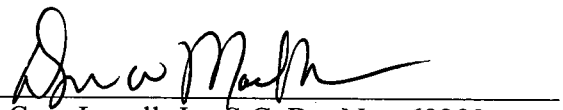
Appellant's Initial Brief also implies the Circuit Court improperly ruled on "contract law theory" and "breach of confidentiality" causes of action in granting Respondent's Motion for Summary Judgment. Admittedly, Appellant's Complaint is void of any such allegations against Respondent. For this reason, Respondent never sought any such relief from the Circuit Court. Rather, Respondent's Motion for Summary Judgment sought relief from Appellant's cause of action for negligence. This is evidenced by Respondent's Motion, accompanying Memorandum in Support, and the affidavit filed by Myles I. Glick, AIA. At no point in any of this documentation did Respondent suggest Appellant was pursuing contract-based or breach of confidentiality causes of action against Respondent.

Furthermore, the Order entered by Judge Dennis granting Respondent's Motion for Summary Judgment is void of any such references. The terms of the Order explicitly grant Respondent's Motion for Summary Judgment on the grounds that Respondent was not negligent

in investigating or disciplining Appellant and the "business judgment rule" operated to preclude judicial review of Respondent's decisions in that regard. (R. pp. 1-4). For these reasons, the Circuit Court did not err in analyzing Appellant's cause of action against Respondent as one of "contract law theory" or breach of confidentiality.

## CONCLUSION

For the reasons outlined above, Respondent respectfully requests that this Court affirm the judgment of the Circuit Court.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Ninth Judicial Circuit
R. Markley Dennis, Jr., Circuit Court Judge



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Appellate Case No. 2016-000553

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Matthew L. Dawson and Kateri Dawson, Plaintiffs,
Of whom Matthew L. Dawson is the Appellant,

v.

Ravenel Associates, Inc. d/b/a Ravenel Associates, Defendant.

Matthew L. Dawson, Plaintiff,

v.

Village Green Homeowners Association, Defendant,
Of whom Village Green Homeowners Association is the Respondent.

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## CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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