THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2016-001194

Allenwood Owners Association, Inc., Stephen Seefeld, John Kovich, Yvette Smith, Everett Butler, and Amanda Johansson, Plaintiffs,

Of Whom Allenwood Owners Association, Inc., is .....Appellant,

v.

Mike Prince, Stacy Keller, Jeff Miller, Debra Reed, Fran Stevens, Meredith Florencio, and Jacques Talbot.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CAUSES OF ACTION WHEN APPELLANTS REPEATEDLY FAILED TO COMPLY WITH THE COURT'S ORDERS, THE SOUTH CAROLINA COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION RULES, AND THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

2. DID THE LOWER COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CAUSES OF ACTION WITH PREJUDICE WHEN APPELLANT HAS FAILED TO PROSECUTE ITS CAUSES OF ACTION?

STATEMENT OF THE CASE

This appeal arises out of the Circuit Court's dismissal on February 11, 2016, of Appellant's action for failure to prosecute its case. (February 11, 2016 Order.) The action arises out of a dispute regarding the validity of certain Board of Director elections and the controlling leadership of the Allenwood Owners Association, Inc. ("Allenwood" or "Association"). The community of Allenwood is located in Hilton Head, South Carolina, and all Respondents reside there. (Compl. ¶¶ 2-8.)

Appellant filed this action on April 23, 2014, seeking a declaratory judgment that Stephen Seefeld and the other individually named Plaintiffs were elected to the Board on February 28, 2014. (Compl.) Appellant also asserted claims for conversion, constructive trust, injunction, conspiracy and an accounting. (Compl.) Respondents filed an Answer and Counterclaim on August 18, 2014, denying all material allegations and asserting counterclaim for declaratory relief that they themselves were elected to the Board on March 1, 2014. (Ans.) Respondents later amended their Answer and Counterclaim to seek judicial relief pursuant to S.C. Code Ann. § 33-31-703, which allows members of a non-profit corporation to seek judicial relief in the form of a court supervised meeting and election and further amended to seek a declaration on the validity of a Special Meeting of the Association held on December 6, at which they contend they were again elected to the Board. (Am. Ans.)

On November 23, 2015, Respondents filed a Motion to Dismiss for Failure to Prosecute, Motion for Sanctions against Stephen Seefeld and Petition for Rule to Show Cause ("Motion to Dismiss"). (Motion to Dismiss.) A hearing was held on Respondents' Motion to Dismiss, along with several other motions, on January 15, 2016. The lower

court considered the arguments of counsel for nearly a month. On February 11, 2016, the lower court entered its Order finding that dismissal with prejudice was warranted under the facts of this particular case (the "Dismissal Order"). (Dismissal Order.)

Specifically, the lower court spent eight paragraphs describing Appellant's repeated disobedience of court orders and refusal to abide by mediation rules and discovery deadlines. The lower court found: (1) Appellant violated Rule 6 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules and the lower court's October 13, 2015 Order by failing to physically attend the mediation scheduled on November 11, 2015 and, further, that no good cause was shown for Appellant's failure to physically attend; (2) Appellant violated the lower court's October 13, 2015 Order by failing to produce documents and information to Respondents within thirty (30) days and, again, that no justification or explanation was offered for Appellant's failure to produce the documents and information required; (3) Seefeld has failed to cooperate in the scheduling of his deposition in his individual capacity and his capacity as representative of the entity Appellant, forcing Respondents to file a Motion to Compel his deposition; and (4) Appellant failed to respond to additional written discovery served over six months ago but not part of an earlier lower court order, requiring Respondents to file yet another Motion to Compel. (*Id.*)

The lower court concluded that the Appellant "continually exhibited indifference to the rulings of this Court and [Respondents'] rights, subjected this Court and [Respondents] to wasteful expenditures of time and resources, and unreasonably delayed the resolution of this action through its disobedience and dilatory acts." (*Id.*) In addition, the lower court noted that the "purposeful and continued refusal to cooperate in discovery

and comply with this Court's order has prohibited [Respondents] from preparing their defense." (*Id.*) As a result, the lower court dismissed Appellant's causes of action with prejudice. (*Id.*)

Appellant filed a Motion to Alter or Amend the Judgment on February 18, 2016. (Motion to Alter or Am.) The lower court denied Appellant's Motion to Alter or Amend on April 26, 2016. (Denial Order.) Appellant served its Notice of Appeal on June 2, 2016. (Notice of Appeal.)

STATEMENT OF THE FACTS

The community of Allenwood is located in Hilton Head, South Carolina, and all Respondents reside there. (Compl. ¶¶2-8, 11; Am. Ans. 13.) Although the action was filed in the name of Allenwood, former Board President and purported Board President at the time the underlying action was filed, Stephen Seefeld ("Seefeld"), initiated the action on its behalf. Seefeld lives in Florida and during the relevant time period owned companies that held title to approximately fifty-eight (58) properties in Allenwood. (Compl. ¶ 24; Def.'s Mot. to Dismiss, Exh. B, 20:17, 35:10-15.)

Seefeld claims that he and the other individually named Plaintiffs, who were involuntarily added as parties to the underlying action, were elected to the Board on February 28, 2014. (Compl. 37.) Seefeld does so even through the other individually named Plaintiffs who have been deposed, Mr. Butler and Ms. Smith, have denied ever being elected to or serving as members of the Board.[1] Respondents[2] dispute that Seefeld had authority to file this suit on behalf of Allenwood. (Am. Ans. p. 10.) Respondents claim that they themselves, not the involuntary Plaintiffs, were properly elected to the Board of Directors for Allenwood in an election held March 1, 2014. (Ans. pp. 11 ¶ 3, 14 ¶ 24.)

The parties first attempted to mediate the case on February 27, 2015, but Seefeld unexpectedly failed to physically attend the mediation. (Proof of ADR; Def's Mot. to Dismiss, Exh. B, p. 79:10-19.) No other member of Seefeld's purported Board attended

[1] The involuntary Plaintiffs have not appealed the lower court's decision to dismiss the action for failure to prosecute.

[2] Jacques Talbot was never served in this action and has not made any appearance. Respondents do not consent to service or jurisdiction on Mr. Talbot by virtue of filing this brief.

the mediation.[3] (*Id.*) Representatives from the Respondents' Board with authority to settle had taken time away from work and travelled to Charleston for the scheduled mediation, and the mediator, Karl Folkens, Esq., traveled from Florence to attend the mediation. (*Id.*, p. 2 n. 2.) Seefeld provided no advance notice that he would not physically attend the February mediation and never made any request to appear by telephone. (*Id.*, p. 2 n. 2.) Rather, the morning of mediation, Seefeld claimed that weather difficulties prevented his private plane from being able to travel from Florida to Charleston for the mediation. (*Id.* at Exh. B, p.79:10-19.) Seefeld, however, never produced any evidence to support the claimed weather difficulties. (Jan. 15, 2016 Hr'g Tr. pp. 16-17.) Having already set aside the day for mediation, Respondents participated with Seefeld participating by telephone. (*Id.* at Exh. B, p. 79:10-19.) The mediation resulted in an impasse. (*Id.*)

On August 4, 2015, a hearing was held wherein the Honorable Carmen Mullen ordered the parties to promptly mediate the case for a second time. (*Id.* at Exh. B, pp. 80:11-22; Oct. 13, 2015 Order.) The hearing lasted over two hours as evidenced by the face of the transcript. (Def.'s Mot. to Dismiss, Exh. B p. 1.) During the hearing, Judge Mullen learned that Allenwood failed to have a representative physically present at the February 27, 2015 mediation. (*Id.* at Exh. B, p. 79.) Consequently, Judge Mullen specifically and expressly ordered Seefeld to be physically present for a second mediation: "I can tell you, Mr. Seefeld needs to be here. He's the player, he needs to be here. He seems to be the one to have the greatest interest in it . . . . And, of course, I'm

[3] Seefeld is the only member of his purported Board to participate in the prosecution of the underlying action. Involuntary Plaintiffs, Everette Butler and Yvette Smith, voluntarily appeared for their depositions in Florida and disclaimed any knowledge of having ever been elected to the Board. Respondents were unable to effectuate service of a deposition subpoena on Ms. Johansson and Mr. Kovitch failed to appear for his duly noticed deposition in New York.

going to order that he be here." (*Id.* at Exh B, pp. 82-83.) A written order followed on October 13, 2015. (Oct. 13, 2015 Order.)

The parties scheduled mediation for November 11, 2015, with Ned Tupper, Esq., serving as the mediator. There is no evidence Seefeld requested permission to attend the mediation telephonically, and the expectation was that he would be physically present at mediation. (Jan. 15, 2016 Hr'g Tr. pp. 7-8, 13-14.) Again, representative members from Respondent's Board with authority to settle took time from work and personally travelled to Beaufort from Hilton Head. (*Id.* at pp. 7:25-8:2, 15:15-16.) And, again, Seefeld failed to be present, despite the rules and Court's order requiring his physical presence. (*Id.* at p. 8:1-3.) Seefeld offered no explanation for his failure to be physically present for mediation and never submitted an affidavit or any other documentation to the lower court explaining or justifying his failure to attend. (*Id.*) Because Seefeld failed to attend the mediation (and Appellant had no other representative present), Respondents objected to proceeding with mediation, and no mediation occurred. (*Id.* at p. 3-7.) Appellant posits that mediation did occur on November 11, 2015. (Appellant's Br. p. 6.) There is no evidence that any mediation occurred, and the mediator never filed any proof of ADR. Appellant, however, mistakenly cites the ADR report from the first mediation dated March 16, 2015, filed by mediator Folkens to support its argument that the second mediation occurred. (Appellant's Br. p. 6.) Of course, such reliance is improper and wholly misplaced.[4]

Failure to personally attend mediation for the second time was not the only way that Appellant violated Judge Mullen's October 13, 2015 Order. Judge Mullen also

[4] Respondents note that Appellant's counsel for purpose of this appeal is Appellant's fourth attorney of record in this matter. The filing firm was not involved in the underlying case and thus there may be some confusion about the facts.

ordered Appellant to respond to interrogatories served by Respondents. (Oct. 13, 2015 Order at pp. 4-6.) Appellant has not. (Jan. 15, 2016 Hr'g Tr. pp. 15:20-16:7.) Appellant was ordered to produce certain records requested by Respondents. (Oct. 13, 2015 Order at pp. 4-6.) Appellant has not. (Jan, 15, 2016 Hr'g Tr. pp. 15:20-16:7.) The only explanation that Appellant has offered for failing to comply with the discovery portion of the Order was provided during the hearing on the Motion to Dismiss and centered on Appellant's assertion that it didn't comply because it thought the case might settle and because it did not know what it was supposed to produce pursuant to the Order because it's counsel doesn't "know what meta data is . . . ." (*Id.* at p. 13:4-12.) Notably, however, even after Respondents filed their Motion to Dismiss, which was based on part on Appellant's failure to comply with Judge Mullen's Order directing that discovery be answered and produced, Appellant still did not provide the discovery responses and documents. To date, Appellant has not complied with the discovery compelled by the October 13, 2015 Order.

Appellant has also failed to respond to additional written discovery requests and to participate in scheduling depositions. On July 9, 2015, Defendants served interrogatories on Appellant. (Motion to Compel.) No responses have been received, and a Motion to Compel was pending at the time the Appellants' cause of action was dismissed. (Jan. 15, 2015 Hr'g Tr. p. 18:9-25.) Likewise, Defendants initially noticed the deposition of Appellant on March 3, 2015. (Motion to Compel Deposition.) That deposition did not go forward. (*Id.*) The depositions of Appellant and Seefeld were thereafter noticed an additional five (5) times, but Appellant and Seefeld indicated they could not attend each time. (January 15, 2016 Hr'g Tr. pp. 14:24-15:14.) Respondents

have repeatedly requested convenient deposition dates from Appellant, but Appellant has never provided a single date, even after Respondents filed a Motion to Compel Deposition. (*Id.*) As with the written discovery, Respondents were forced to file a Motion to Compel Deposition that was pending at the time Appellant's cause of action was dismissed. (Motion to Compel Deposition.)

STANDARD OF REVIEW

Whether to dismiss for failure to prosecute is within the trial court's sound discretion and is subject to an abuse of discretion standard of review. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 803 (1970). An "abuse of discretion" only occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 413, 697 S.E.2d 558, 561 (2010). "The burden is on the party appealing from the order to demonstrate the trial court abused its discretion." *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003).

SUMMARY OF ARGUMENT

Appellant stands in a swamp of its own making. After more than eighteen months of repeatedly failing to comply with court orders, the South Carolina Rules of Civil Procedure, and the South Carolina Court-Annexed Alternative Dispute Resolution Rules, Appellant asks this Court to reverse the lower court's exercise of its inherent and discretionary power to dismiss Appellant's claims.

Appellant characterizes its representative's failure to attend mediation as both inconsequential and the sole basis for the lower court's dismissal, but it is neither. Appellant's utter indifference to the process and defiance of the lower court's order is serious, and the damage it caused to Respondents cannot be overstated. Of equal importance, however, is the fact that the lower court's order is based upon a multitude of failures to abide by both judicial orders and the applicable rules. In addition to multiple failures to physically appear for mediations, Appellant has failed to respond to written discovery, failed to produce records and refused to participate in the scheduling of a 30(b)(6) deposition or the individual deposition of Seefeld.

The combination of Appellant's refusal to physically attend mediation as required by both the lower court's order and applicable rules and Appellant's failure to comply with the lower court's orders and applicable rules on discovery means that the lower court's ruling was based neither on an error of law nor a factual conclusion without evidentiary support. The Appellant cannot meet its high burden of showing that the lower court abused its discretion, and the lower court's dismissal should be affirmed.

ARGUMENT

I. APPELLANT'S FAILURE TO COMPLY WITH THE COURT'S ORDERS, THE SOUTH CAROLINA COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION RULES, AND THE SOUTH CAROLINA RULES OF CIVIL PROCEDURES JUSTIFIED DISMISSAL OF ITS CLAIMS.

It is well established in South Carolina that a trial court's power to dismiss claims for failure to prosecute is inherent. "[T]rial judges possess the inherent power to dismiss actions *sua* sponte for a party's failure to prosecute the relevant claims." *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 211, 493 S.E.2d 826, 832 (1997). This "inherent power" is derived not from a statute or rule, but from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989). Rule 41(b) of the South Carolina Rules of Civil Procedure provides "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action against him."

Respondents did so move for dismissal of Appellant's claims against them after being continually frustrated in their efforts to mount a complete defense to Appellant's action and after time and resources had been wasted not once, but twice, at mediations for which Appellant failed to appear. The lower court's dismissal of Appellant's action is not an abuse of discretion because, as outlined in the lower court's Order, Appellant repeatedly failed to comply with the lower court's orders, the South Carolina Court-Annexed Alternative Dispute Resolution (ADR) Rules, and the South Carolina Rules of Civil Procedure.

A. Appellant has failed to comply with the lower court's orders regarding discovery and mediation.

Dismissal of an action is an appropriate response to violations of court orders. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 572 (2003). In *Barnette*, the Supreme Court of South Carolina affirmed the dismissal of an action for repeated violations of trial court orders. The *Barnette* plaintiff repeatedly failed to produce certain medical records and sign a consent form allowing a Social Security Administration official to testify regarding her matter in a deposition. *Id.* at 355 S.C. at 594. Notably, like the Appellant here, the *Barnette* plaintiff argued that the oral rulings of the trial judge were not binding. *Id.* The lower court dismissed plaintiff's causes of action. *Id.* at 594-95. The Supreme Court affirmed the lower court's dismissal of the action as appropriate where the litigant had repeatedly failed to comply with the lower court's orders. *Id.*

Here, like the *Barnette* plaintiff, Appellant argues that the lower court's oral ruling that Appellant was required to physically attend mediation was not binding on Appellant and, moreover, repeatedly failed to comply with the lower court's discovery rulings.

Appellant admits that it never complied and never intended to comply with the lower court's October 13, 2015 Order requiring it to respond to certain overdue interrogatories and produce certain overdue documents by November 11, 2015. (Br. 9.) Instead, Appellant affirmatively chose not to prepare responses, claiming now that the failure to do so was in hope that the case would settle at mediation. Because mediation was scheduled for November 11, 2015, the very same day that the responses were due, Appellant knew it would not have time to comply with the October 13, 2015 Order in the

event that the case did not settle. Appellant's affirmative choice means that it willfully and knowingly failed to produce the interrogatory responses and documents required by the lower court, and the flagrant disrespect for the lower court demonstrated by this alone is sufficient to justify the lower court's dismissal of the action.[5]

Of course, Appellant's failure to respond to discovery requests and produce documents was not the only way that Appellant violated the October 13, 2015 Order. Despite the lower court expressly ordering Seefeld's physical attendance at mediation as a representative for Appellant, Seefeld failed to appear for mediation a second time.

At the hearing on August 4, 2015 that resulted in the October 13, 2015 Order to mediate, Judge Mullen unequivocally ordered Seefeld to be physically present at mediation: "I can tell you, Mr. Seefeld needs to be here. He's the player, he needs to be here. He seems to be the one to have the greatest interest in it . . . . And, of course, I'm going to order that he be here." (Hrg. Tr. pp. 82-83.) The lower court recognized that Seefeld's physical presence was imperative after his failure to physically attend the first mediation contributed to a failed mediation. The lower court's October 13, 2016 Order required "the parties in this case to participate in a mediation as soon as practicable."

Appellant attempts to whitewash Seefeld's failure to physically attend the November 11, 2015 mediation by distinguishing between the lower court's explicit verbal instructions and the written October 13, 2015 Order subsequently entered by the lower court, but Appellant's arguments are unavailing.

First, Appellant apparently argues that statements by the lower court judge can be ignored and disregarded simply because they are not included verbatim in a written order.

[5] Of note, there is no evidence in the record that Appellant ever attempted to comply with the lower court's Order on discovery, even after Respondents adjourned the second mediation for Seefeld's failure to attend and even after Respondents filed their Motion to Dismiss.

In doing so, Appellant suggests that parties should be permitted to place their hands over their ears and become willfully deaf to express instructions given by the presiding judge. Such suggestion is absurd, particularly whereas here, the express instruction given by Judge Mullen from the bench requiring Appellant's representative, Seefeld, to be physically present for mediation is consistent with court rules with which Appellant was already required to comply. See South Carolina Court Annexed Alternative Dispute Resolution (ADR) Rules, Rule 6(b)(2).

Importantly, there is no claim or argument that the plain language of the written October 13, 2015 Order was intended to or had the effect of circumventing the South Carolina Court-Annexed Alternative Dispute Resolution (ADR) Rules, which also required Seefeld's physical attendance.[6]

Appellant's argument that Judge Mullen's specific order that Seefeld be physically present at mediation disappeared when it was not expressly restated in the subsequently entered written order leads to ludicrous results, particularly when one considers other requirements contained in the ADR rules that were not contained in Judge Mullen's written October 13, 2015 Order. For example, Rule 6(d), SCADR requires the parties and their representatives to cooperate with the mediator, but Judge Mullen did not specifically reference Rule 6(d) in her October 13, 2015 Order. Under Appellant's reasoning, Appellant would not have any duty to cooperate because an order requiring mediation only requires the parties to cooperate at mediation if such requirement is expressly stated in the order.

[6] The South Carolina Court-Annexed Alternative Dispute Resolution Rules apply to court-ordered mediations. Rule 1(a), SCADR.

Taken to its extreme, Appellant's argument that a party can disregard verbal statements consistent with applicable rules unless expressly included in an order would necessarily mean that any time a judge orders mediation in a case, the written order must include, at a minimum (1) a statement that all parties must be in physical attendance (Rule 6(b)(2), SCADR; (2) a statement that all parties and their counsel are required to cooperate with the mediator (Rule 6(d), SCADR; and (3) a statement that a communications made during the court ordered mediation are to remain confidential (Rule 6(e), SCADR). Moreover, there appears no compelling reason why the very same logic would not apply to orders entered regarding the South Carolina Rules of Civil Procedure. Shall courts be required to incorporate by reference all procedural rules regarding discovery, the provision of notice for hearing, and applicable deadlines for motions for reconsideration in each order they enter? Such a result would defy logic, create redundancy, and waste valuable judicial resources. For these reasons, adoption of Appellant's position would not only place a stamp of approval on Appellant's decision to disregard a specific order from Judge Mullen, but also lead to an outrageous result requiring judges to expressly include each specific applicable rule in every order touching on or concerning those rules.

Appellant references a handful of cases in an effort to cloak the absurdity of its argument, but those cases are unavailing here. First, Appellant cites to *Ford v. State Ethics Com'n*, 344 S.C. 642, 545 S.E.2d 821 (2001), a case confirming that the trial court retains the discretion to change its mind at any time between a bench ruling and entry of a final written order. Here, there is no claim or evidence that the lower court "changed its mind" about Seefeld's physical attendance between its statements at the

hearing and its subsequent written order, nor can there be when the lower court itself evinces a belief that the order to mediate the case was an order for Appellant's representative, Seefeld, to physically attend mediation.[7]

Similarly inapposite is Appellant's reference to *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). Although Appellant's discussion of the case might suggest otherwise, *Woodson* does not address the question of whether specific rulings issued from the bench are incorporated into more general subsequently entered written orders. Instead, *Woodson* rejects the position that a hearing transcript always must be included in a record on appeal along with the court's written order. The *Woodson* Court of Appeals determined that the *Woodson* appellants had not provided a sufficient record for review of a lower court's grant of summary judgment when the *Woodson* appellants failed to provide the Court of Appeals with a copy of the hearing transcript. The lower court's grant of summary judgment was affirmed on that basis alone. The Supreme Court also affirmed the lower court's grant of summary judgment but modified the Court of Appeals' reasoning. The Supreme Court simply held that the written order without the hearing transcript was sufficient for appellate review where the basis of the lower court's decision could otherwise be found in the record on appeal. The *Woodson* Court never implied that a specific bench ruling could be ignored if it was not expressly and specifically included into a more general subsequently entered written order.

Appellant has cited no law suggesting that either outright disobedience or willful ignorance of a judge's order is ever acceptable. Because Appellant willfully violated the October 13, 2015 Order by refusing to produce documents and interrogatory responses by the court-ordered deadline of November 11, 2015 and by refusing to physically appear to

[7] Oct. 13, 2015 Order, p. 6.

mediate the case as ordered, the lower court did not abuse its discretion in dismissing Appellant's action.

B. Appellant twice failed to comply with the South Carolina Court-Annexed Alternative Dispute Resolution Rules requiring it to physically appear for mediation.

Although Appellant's violation of the October 13, 2015 Order is a sufficient basis for the lower court to exercise its discretion and dismiss Appellants' action, Appellants also flouted the South Carolina Court-Annexed Alternative Dispute Resolution Rules by twice failing to physically appear for mediation without notice to or consent from the other parties.

Rule 6, SCADR, requires that all parties "physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties . . . ." As an initial matter, Appellant makes no mention of their first failure to comply with Rule 6, SCADR, which is included in the Dismissal Order. Beyond that, Appellant misstates the facts twice: First, Appellants suggest that Respondents agreed to their telephonic participation. Second, Appellant states that the matter was actually mediated on November 11, 2015. Both statements are false and there is no evidence of their truth.

First, Appellant never suggested to the trial court that Appellant believed it had Respondents' consent to appear by telephone, and therefore this theory is unpreserved for appellate review. Claims or defenses not raised before the lower court may not be considered on appeal. *McNeely v. South Carolina Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 190 S.E.2d 499 (1972). Importantly, the appellate argument cannot differ from the grounds presented below. *State v. McCray*, 332 S.C. 356, 506 S.E.2d 301 (1998); *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). Never once did Appellant state or even suggest to the trial court that Appellant believed it had permission to appear

by telephone rather than in person. Never once was any evidence presented to the trial court that would have supported either the claim that Appellant had such a belief or that any such belief was justified.

The reason no such evidence was presented below or here on appeal is both simple and telling: There is none. Respondents never agreed to anything other than Seefeld's physical presence at mediation. Perhaps to draw attention away from their utter lack of evidence of any such consent, Appellant attempts to equate, without basis, the parties' agreement documented in writing for telephonic participation by insurance adjusters to consent for telephonic participation by Seefeld. These arguments, however, are completely devoid of merit.

Respondents expressly provided consent for the adjusters to attend mediation by phone, but Respondents never provided consent for Seefeld to attend by phone. The difference between the two is simple, inasmuch as this case is primarily about community leadership, not damages. The adjustors play no role in the negotiation of community leadership, but Seefeld, as the representative of the underlying Plaintiff, the lower court noted, is "the player" and "the one to have the greatest interest" in the outcome of this case. Mediation without Seefeld being physically present at both the proverbial and literal table is not fruitful, and Respondents never consented to his attendance by telephone.

Because Respondents never consented to telephonic participation by Seefeld, Seefeld twice violated Rule 6, SCADR, by failing to physically appear for mediation on both February 27, 2015 and November 11, 2015. Rule 10(b), SCADR, provides that a court may sanction any person or entity subject to the SCADR for violation of "any

provision of the ADR Rules without good cause." The sanctions available to the court include dismissal of the action. Rule 10(b), SCADR; Rule 37(b)(2)(C), SCRCP. Here, there was no evidence of good cause submitted to the lower court. The lower court did not abuse it discretion when it dismissed Appellants' action for failure twice to physically attend mediation without good cause as required under the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Appellant also states that this case was actually mediated on November 11, 2015, but that statement is in error. There is no evidence that the parties moved forward with mediation on November 11, 2015 when Seefeld again failed to physically appear for mediation. Appellant cannot cite to any affidavit, from Seefeld or anyone else, or any document that supports its position that that the parties actually mediated the case on November 11, 2015, nor is there any evidence to support Appellant's statement that Respondents never objected to Seefeld's appearance by phone is false. Further, there is no ADR report supporting Appellant's position that the case was mediated on that date.

In fact, Respondents, frustrated by a second bait-and-switch, refused to consent to Seefeld's participation by telephone. (Jan. 15, 2016 Hr'g Tr. pp. 7:25-8:7.) Appellant's statement that Respondents consented to or never objected to Seefeld's appearance by phone is false and unsupported by any evidence. When Respondents realized that Seefeld would again fail to appear, Respondents immediately left and drove back to Hilton Head from Beaufort. (*Id.*) Mediation was thus adjourned before it ever began. Counsel for Respondents was asked by the mediator to stay and engage in an informal discussion among counsel regarding settlement possibilities, and she did so as a courtesy to the mediator. (*Id.* p. 14:5-14.) Respondents were not present in any capacity during

those informal discussions. (*Id.*) No settlement offers were ever relayed to Respondents. (*Id.*) Simply stated, mediation did not take place. (*Id.*)

C. Appellant repeatedly failed to comply with the South Carolina Rules of Civil Procedure.

In addition to its violations of court orders and disregard for the SCADR Rules, Appellant has also repeatedly failed to comply with the South Carolina Rules of Civil Procedure. The October 13, 2015 Order is, in part, a result of Appellant's failure to abide by the rules set forth for written discovery, inasmuch as the lower court was required to order Appellant to produce documents and respond to interrogatories previously left undone. In addition to that Order, Respondents have been forced to file two additional Motions to Compel – one relating to even more unanswered written discovery and another relating to noticed depositions where Appellant would not agree to appear on the dates noticed and would not provide alternative dates. Even as of this date, even with the time between the filing of Respondents' Motion to Dismiss for Failure to Prosecute, the hearing on Respondents' Motion to Dismiss for Failure to Prosecute, the issuance of the Court's order dismissing the case for failure to prosecute, the Appellant's Motion for Reconsideration, and this appeal, Appellant still has not made the discovery responses required by the October 13, 2015 Order. Rule 37(b)(2)(C), SCRCP, provides the trial court with the power to dismiss actions for failure to abide by the discovery rules. Here, where the discovery violations are coupled with violations of court orders and the South Carolina ADR Rules, it cannot be said that the lower court abused its discretion in dismissing Appellant's case.

D. Unreasonable neglect may be presumed from Appellant's failures, justifying dismissal of its action.

Even though Appellant begins by reciting the correct standard of "unreasonable neglect", they then go on to claim that the lower court was required to find intentional misconduct before dismissing the case. Even if that were true, Appellant has admitted to willfully violating the October 13, 2015 Order by failing to prepare the ordered discovery responses in hope that the case would settle at the mediation Seefeld did not intend to physically attend.

South Carolina law provides that a trial court may dismiss a plaintiff's action for "unreasonable neglect" in proceeding with the case. Unreasonable neglect may be inferred from the circumstances of a particular action. In *Small v. Mungo*, the South Carolina Supreme Court affirmed the lower court's dismissal of an action when counsel for the plaintiff was called for trial but did not appear. 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970). The clerk of court reached out to plaintiff's counsel to notify him that his case had been reached for trial. *Id.* Plaintiff's counsel explained that he could not appear until after 2 p.m., and the court dismissed his case for failure to prosecute. *Id.* In affirming the dismissal, the Supreme Court held that unreasonable neglect was inferable. *Id.*

Appellant's failures in this case are much more significant and prejudicial than the need for a brief delay that was affirmed as an appropriate basis for dismissal in *Small v. Mungo*. A few hours can hardly be said to compare to the eighteen months of non-responsiveness, violation of court orders and court rules, and dilatory tactics employed by Appellant.

Likewise, the cases cited by Appellant to support their claims that the lower court's dismissal is too severe are inapposite. *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996), arises under Rule 37(b), SCRCP, not Rule 41(b), SCRCP, and involves a one-time failure to abide by a deposition deadline contained in a scheduling order. Here, even leaving aside the disregard for court orders and failure to abide by the applicable rules, five deposition notices have been issued by Respondents but zero depositions have been scheduled, much less attended, by Appellant. As noted above, even after the court-ordered deadline had passed and after the second mediation failed to take place, Appellant continued to ignore the Court's deadline and failed to produce written discovery. Even now, after Judge Mullen has dismissed its case for failure to prosecute, and even as it appeals that dismissal, Appellant has still not complied with the Court's deadline to produce already-overdue discovery.

Similarly, *Karppi v. Greenville Terazzo Co., Inc.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997), involves the two-time failure to abide by a discovery order relating to one particular party. The *Karppi* Court determined that the lower court's decision to strike the entirety of the offending party's pleadings, even pleadings relating to a party not involved in the discovery order and who had not been prejudiced in any way by the offending party's failure to comply with the discovery order, was too harsh. Here, Respondents have been extremely prejudiced by all of Appellant's failures to comply with court orders and applicable rules, and the lower court's Dismissal Order does not impact Appellant's position with respect to any party other than Respondents.

Even the four factors from *McComas v. Ross*, 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct. App. 2006), a case relied on by Appellant, serve to further justify the lower

court's Dismissal Order. First, the Appellant is directly responsible for its own failure to attend the two mediations where it were required to be physically present. Second, representatives of Respondents with authority to settle have twice taken time away from work to travel for mediations where the Appellant has failed to appear as required under the rules. Respondents have been forced to file numerous motions to compel due to Appellant's refusal to abide by the discovery deadlines outlined in court orders and the South Carolina Rules of Civil Procedure. Respondents have faced significant expenditures of attorney time in attempts to resolve Appellant's failure to play by the rules. The prejudice to Respondents cannot be overstated. Third, Appellant has an eighteen-month history of these tactics. Fourth, and finally, other court orders attempting to resolve these issues have not worked. The lower court has ordered discovery and such orders have been ignored. The lower court has ordered mediation in compliance with the rules and such orders have been ignored. Dismissal here is appropriate under all of the *McCormas* factors.

Appellant claims that the lower court does nothing but point to Appellant's failure to comply with its "discovery order", but Appellant understates the nature and effect of the Dismissal Order. The Dismissal Order outlines the eighteen-month history of Appellant's refusal to abide by court rules, beginning with the failure to physically appear for mediation in February 2015 without consent or good cause shown. The Dismissal Order does not stop there, however. Rather it continues to reach the Appellant's failure to comply with court orders and discovery rules on interrogatories and requests for production. The Dismissal Order points to Appellant's failure to participate in the deposition process or provide any alternate dates for the noticed depositions. Finally, it

describes Appellant's decision to disregard the explicit statements from the lower court ordering Appellant to comply with Rule 6, SCADR, and physically attend mediation. To say that the Dismissal Order does nothing more than "declar[es] the Association failed to comply with [the lower court's] discovery order" is disingenuous, as it outlines a long history of not just disregard, but unreasonable neglect and intentional violations of court orders and rules.

It was not an abuse of discretion for the lower court to dismiss Appellant's action for failure to prosecute, and the lower court should be affirmed.

II. APPELLANT'S REPEATED FAILURES TO COMPLY WITH COURT ORDERS AND APPLICABLE RULES WARRANTS DISMISSAL WITH PREJUDICE AND THE LOWER COURT DID NOT ERR IN SO ORDERING APPELLANT'S CLAIMS DISMISSED WITH PREJUDICE WHILE MAINTAINING RESPONDENTS' COUNTERCLAIMS.

Appellant's reliance upon *Smalls v. Mungo* for the proposition that the dismissal with prejudice is improper is unavailing here. The Appellant's edited quotes are somewhat misleading, as *Mungo* actually says that "Ordinarily, [a dismissal for failure to prosecute] does not put an end to the action." Likewise, the omitted portion of Appellant's third quotation is important: "An order of dismissal with prejudice under the present facts was not justified." Of course, *Mungo* is the case where the impetus for the dismissal is counsel's reply that he cannot appear in court before 2 p.m. when notified that he was being called for trial on that day. This case is significantly different from *Mungo* because Appellant isn't asking this Court to overlook a single mistake but a history and pattern of violating court orders and applicable rules.

The present case is much more like *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (1990), where this Court affirmed the dismissal of a case with prejudice pursuant to Rule 41(b), SCRCP, because the plaintiff committed "numerous

violations" of a court order. The *Georganne* plaintiff had a long history of delay and ultimately violated a clear court order by filing a new complaint containing additional causes of action. The *Georganne* plaintiff offered confusion as an excuse, but the *Georganne* Court rejected the excuse and affirmed the dismissal with prejudice. Noting that the plaintiff "is under an affirmative duty to know its own case", the *Georganne* Court held: "There is a limit beyond which the court should [not] allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties. The granting of the [dismissal] order was a discretionary matter."

So it is here. Appellant has had eighteen months of time wherein they have repeatedly violated court orders and rules. Appellant has had the opportunity to litigate its case. Instead, it has "prolong[ed] unnecessarily the time, effort, and costs" borne by Respondents, who have done nothing but comply with court orders and follow applicable rules in an attempt to reach the merits of this matter. Under the totality of the circumstances, it was not an abuse of discretion for the lower court to dismiss Appellant's case with prejudice.

CONCLUSION

Appellant has shown unreasonable neglect and intentional misconduct and disrespect to parties and the Court over the past eighteen months by violating multiple court orders, failing to physically attend mediation as required by Rule 6, SCADR, and repeatedly refusing to respond to properly served written discovery requests and deposition notices. Appellant presents not one single piece of evidence in support of any of its positions and thus cannot meet its own burden of demonstrating that the lower court

abused its discretion when it dismissed Appellant's case with prejudice. Respondents respectfully request that the lower court be affirmed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2016-001194

Allenwood Owners Association, Inc., Stephen Seefeld,
John Kovich, Yvette Smith, Everett Butler, and
Amanda Johansson, Plaintiffs,

Of Whom Allenwood Owners Association, Inc., is .....Appellant,

v.

Mike Prince, Stacy Keller, Jeff Miller, Debra Reed,
Fran Stevens, Meredith Florencio, and Jacques Talbot.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on November 14, 2016 s/he has caused a copy of the **Respondents' Initial Brief and Designation of Matter to be Included in the Record** to be served upon on all parties by hand and by depositing them in the United States Mail, postage prepaid, addressed to counsel as follows:

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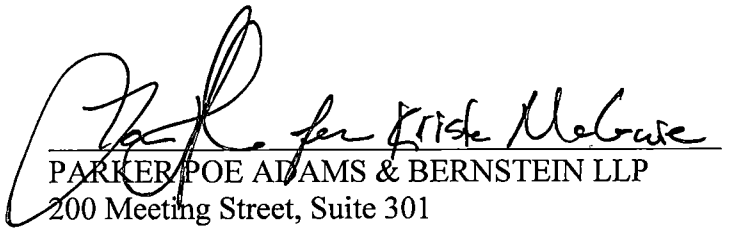

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November 14, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Allenwood Owners Association, Inc., et al. v. Prince, et al.
Appellate Case No. 2016-001194

Dear Ms. Kitchings:

Enclosed for filing please find an original and a copy of each of the following for filing:

1. Initial Brief of Respondents; and

2. Respondents' Designation of Matter to be Included in the Record on Appeal.

Please file the originals and provide file-stamped copies to the courier.

If you should have any questions, please do not hesitate to contact me. With kindest regards, I am

Sincerely,

Krista M. McGuire

KMM:kjg
Enclosures

cc (w/enc.): Bonum S. Wilson III, Esq.
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