THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2012-CP-18-2583

Appellate Case No. 2015-000599
Unpublished Opinion No. 2016-UP-519 (filed December 21, 2016)

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.

APPELLANTS' PETITION FOR REHEARING

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COME NOW Appellants,[1] by and through their undersigned counsel, in the wake of the Subject Decision,[2] and, pursuant to Rule 221, SCACR, hereby petition this Honorable Court for rehearing.[3]

ARGUMENT/GROUNDS FOR REHEARING

Re: S.C. Code Ann. § 33-31-831(e)

On the merits, the Court affirmed the trial court's summary judgment against the HOA for the *sole* reason that under § 33-31-831(e) Mr. McFarland could not initiate this action on behalf of the HOA in his capacity as a *director*:

> The HOA claims it complied with its bylaws even though only one director voted to initiate this action because the other two directors had a conflict of interest or were ineligible to vote for failure to pay assessments. We disagree. Regardless of whether the HOA is correct in asserting the other directors had a conflict of interest in

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[1] "Appellants" are, of course, the Live Oak Village Homeowners Association, Inc. (the "HOA"); Jennifer McFarland ("Mrs. McFarland"); and Carlton Holcombe ("Mr. Holcombe"), collectively.

[2] The "Subject Decision" is, of course, Live Oak Village Homeowners Association, Inc. v. Morris, Unpublished Op. No. 2016-UP-519 (S.C. Ct. App. filed December 21, 2016).

[3] Appellants took this appeal in challenge to the trial court's grant of summary judgment as to, i.e., against, (1) all of the HOA's claims and (2) Mrs. McFarland and Mr. Holcombe's claims for a declaratory judgment. Given that the Subject Decision affirmed the trial court only in part—upholding summary judgment as to the HOA but not as to Mrs. McFarland and Mr. Holcombe, whose declaratory-judgment claims the Subject Decision revived—Appellants are aggrieved by it only in part. To be clear, this petition seeks rehearing and reconsideration only with respect to that part of the Subject Decision by which Appellant's are aggrieved: the part affirming the grant of summary judgment against the HOA.

> any vote to bring this action, we believe William McFarland, in his capacity as the sole remaining director, could not properly authorize this action in the HOA's name. The HOA's bylaws state it is a nonprofit corporation organized under the laws of this state, and the South Carolina Nonprofit Corporation Act expressly states a conflict of interest transaction "may not be authorized, approved, or ratified . . . by a single director." S.C. Code Ann. § 33-31-831(e) (2006). Thus, even if McFarland was the only director eligible to vote, under section 33-31831(e), he still could not properly initiate this action in his capacity as a director.

(Subject Decision.) Most respectfully, the Court overlooked or misapprehended a number of material points in so doing:

1. Affirmance *cannot* be based on § 33-31-831(e).

(a) Section 33-31-831(e) was not a basis of the trial court's decision, and any argument for affirmance on the basis of § 33-31-831(e) was abandoned when Respondents did not raise any such argument as an additional sustaining ground; moreover, where no such argument was made, no notice and meaningful opportunity to be heard was afforded Appellants to oppose it, so affirmance on the basis of § 33-31-831(e) denies Appellants procedural due process.

The trial court itself did not rule on the basis of § 33-31-831(e),[4] and no Respondent argued for affirmance on the basis of § 33-31-831(e)[5]—indeed, Respondents Thomas Morris ("Mr. Morris") and David Hannemman ("Mr. Hannemann") affirmatively argued that § 33-31-831 does *not* apply here because "there is no transaction at issue, and there was no corporate action taken."

[4] (R. pp. 2-5, 8-15.)

[5] (See generally Morris-Hannemann Br.; Mazell Br.)

(Morris-Hannemann Br. pp. 16-17; see id. at p. 16-17 ("The Appellant incorrectly cites Talbot v. James for the proposition that a director with an interest adverse to a corporation is ineligible from participating in a corporate decision. . . . The rule in Talbot does not apply here as the HOA is a nonprofit corporation, there is no transaction at issue, and there was no corporate action taken."); id. at p. 17, n. 12 (citing to § 33-31-830 and explaining that "[t]he rule in Talbot . . . is substantially codified" therein); see also id. ("This lawsuit is not a 'transaction' . . . .").)

Although Rule 220(c), SCACR, provides, "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal," the Court's discretion in this regard is not without limitation; indeed, it is not even implicated unless and until a respondent actually raises to it an additional sustaining ground. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . The basis for respondent's additional sustaining grounds must appear in the record on appeal . . . . *Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief.*") (emphasis added).

Section 33-31-831 played no part in the trial court's summary judgment

against the HOA, and it cannot properly be invoked as an additional sustaining ground because it was abandoned, having never been raised in Respondents' briefs as an additional sustaining ground—with two-thirds of them (Respondents) not only *not* arguing it as an additional sustaining ground *but also* affirmatively arguing that § 33-31-831 does not even apply here. Moreover, where no such argument for affirmance was made, no notice and meaningful opportunity to be heard was afforded Appellants to oppose it, so affirmance on the basis of § 33-31-831(e) denies Appellants procedural due process. Kurschner v. City of Camden Planning Com'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.")

(b) Even assuming, *arguendo*, it is proper to consider § 33-31-831(e) as a potential basis for affirmance of the trial court, it does not, in fact, provide a proper basis to affirm the trial court.

(1) Again, as explained above, Messrs. Morris and Hannemann have admitted that it is inapplicable.

(2) Commencement of litigation is not a "transaction" covered by § 33-31-831.

By its plain language, § 33-31-831 applies to "transaction[s]." See, e.g., §

33-31-831(a) ("A conflict of interest transaction is a *transaction* with the corporation in which a director of the corporation has a direct or indirect interest.") (emphasis added). In the words of Messrs. Morris and Hannemann, "[t]his lawsuit is not a 'transaction' . . . ." (Morris-Hannemann Br. 17, n. 12.)

(3) It addresses only the circumstance where a director(s) has/have a conflict of interest; it does not address the circumstance where a director(s) is/are ineligible to vote for another reason, as are Messrs. Morris and Hannemann here fore

By its plain language, § 33-31-831 applies to "conflict of interest transaction[s]." See, e.g., § 33-31-831(a). As the Court expressly recognized in the above-quoted passage from the Subject Decision, Appellants contend the HOA claim was validly brought not only because the other two directors had a conflict of interest but also because those other directors were ineligible to vote for failure to pay assessments, a circumstance which § 33-31-831 simply does not address.

(4) Section 33-31-831 does not address the validity of Mr. McFarland's actions as HOA *president*.

By its plain language, § 33-31-831 addresses the authority of a "director;" it does not address the power of a corporate officer such as Mr. McFarland as HOA *president* and chief executive officer of the HOA 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).)

33-31-831(a) ("A conflict of interest transaction is a *transaction* with the corporation in which a director of the corporation has a direct or indirect interest.") (emphasis added). In the words of Messrs. Morris and Hannemann, "[t]his lawsuit is not a 'transaction' . . . ." (Morris-Hannemann Br. 17, n. 12.)

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By its plain language, § 33-31-831 addresses the authority of a "director;" it does not address the power of a corporate officer such as Mr. McFarland as HOA *president* and chief executive officer of the HOA 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).)

Re: Appellants' Argument/Issue Preservation

Most respectfully, the Court overlooked or misapprehended a number of material points regarding the merits of Appellants' argument and issue preservation:

1. **Appellants' refutation of the trial court's standing analysis is preserved for review;**

2. **Appellants' argument regarding Mr. McFarland's status as HOA president is preserved for review; and**

3. **Ultimately, the dispositive question is whether the trial court erred in deciding that there was no genuine issue of fact and that judgment was appropriately rendered as a matter of law—and the answer to this question is yes, the trial court did err.**[6]

Long ago, our Supreme Court explained, "In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). At that, the Court has expressly recognized that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004); cf. Microtronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506,

[6] In this regard, Appellants incorporate herein by reference the entirety of the argument/analysis set forth in their principal and reply briefs in challenge to the trial court's grant of summary judgment against the HOA in further support of this petition.

511, 548 S.E.2d 223, 226 (Ct. App. 2001) (noting "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities."); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action"). Indeed, former Chief Justice Toal has cautioned against "denigrat[ing] the primary purpose of the judiciary" by the "over-zealous application of appellate preservation rules:"

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

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

Most respectfully, the Court overlooked or misapprehended the essence of what was presented to and passed upon by the trial court. The bottom line is that Respondents moved for summary judgment against the HOA arguing that the HOA suit had not been properly authorized in accordance with the bylaws. (R. pp. 296-

304; R. pp. 314-340). In response, Appellants argued that, under the particular circumstances, the HOA suit was proper, or at least there was a question of fact making summary judgment improper,[7] and that Respondents were not able to shield themselves from allegations of wrongdoing (especially non-compliance with the HOA's governing documents) on the basis of claimed non-compliance with the HOA's governing documents (specifically, the by-laws pertaining to official Board action) when they themselves effectively prevented compliance:

> [**Appellants' Counsel**]: [E]ssentially . . . the [Respondents] are conspiring to prevent the HOA from operating as a viable entity, and . . . our claims go directly to that, which is why they're being sued. Because we're alleging that they are conspiring to stop that entity from operating.
>
> If you have to have two votes to have a board meeting and an election, and they won't cooperate, nothing ever gets done. And that's exactly where we are. Nothing is done . . . enforcement is not being made of the covenants and restrictions, and so the lawsuit was brought by Mr. McFarland.
>
> . . .

[7] Appellants expressly argued that, although there was no formal Board action, Mr. McFarland as HOA president, initiated the suit and contended that he was the only Director authorized to act under the circumstances. In support of this argument, Appellants cited Messrs. Morris and Hannemann's obvious conflict of interest and the additional fact of their ineligibility to vote for non-payment of dues; Appellants cited evidence of prior precedent where HOA action was taken without a formal Board meeting; and Appellants cited powers granted Mr. McFarland by the bylaws as HOA president, which either authorized his initiated of the suit under the circumstances or at least created a question of fact in this regard. (R. pp. 350-351.)

> So, therefore, having a board meeting is impossible with two people who are not able to vote. So that leaves only Bill McFarland who -- there's no question that he was a board member and he essentially is the board, therefore, authorizing the lawsuit to be brought in this action.
>
> . . .
>
> The board covenants designate Mr. McFarland as chief executive officer with all rights and privileges normally and reasonably associated with that position. . .
> .
>
> . . .
>
> What the parties are asking for is the determination that – in paragraph 6 of the Amended Complaint, that the Defendants are willfully operating and continue to willfully operate outside the scope of their authority by taking action, or failing to take action as required by the covenants . . . .
>
> What the McFarlands and the Holcombes are asking and the HOA are asking us to do is to determine that these violations are occurring. . . .
>
> They're not enforcing the covenants and restrictions, and we need them enforced . . . they're not doing what they are supposed to be doing and so we can't get any traction.

(R. p. 75, lines 6-9, at p. 76, lines 6-11, at p. 79, lines 20-31, at p. 85, line 25 - p. 86, line 21; see also R. pp. 350-351; see generally R. pp. 53-164.)

The circuit court's ruling on—rejection of—Appellants' argument in opposition to summary judgment is sufficiently reflected in the court's orders and other record material to preserve it for appellate review. (See generally R. pp. 1-5;

R. pp. 6-15; see also R. p. 71, line 4 - p. 124, line 21; Br. of Resps. Morris and Hannemann at p. 14 (implicitly observing that the linchpin of the circuit court's decision, notwithstanding how it was "couched," was its determination that the alleged non-compliance with the by-laws required summary judgment be granted in favor of the Respondents: "Whether couched in terms of standing or simply the right of the HOA to bring the lawsuit, the record supports the trial court's holding that Mr. McFarland cannot bring an action against fellow owners/Board members on his own accord in the name of the HOA without complying with the HOA's Bylaws.")[8] And it is appropriate for the Appellants to underscore their argument in challenge to the trial court's ruling by pointing out the flawed and illogical notion,

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

reflected in its orders, that noncompliance with the bylaws affected standing or accrual of the HOA's right of action. But to be clear, neither of these notions (regarding standing or accrual) is an independent basis for the trial court's summary judgment; both are wholly derivative of the trial court's conclusion (i.e., agreement with Respondents' argument, i.e., the argument which Appellants had duly opposed) that there was no genuine dispute of material fact and the (alleged) non-compliance with the bylaws required summary judgment against the HOA as a matter of law, i.e., the essence of what was presented to and passed upon by the trial court—and it includes the entirety of the analysis/arguments Appellants set forth previously in challenge to the trial court's grant of summary judgment against the HOA, especially in regard to the standing/accrual issue and whether Mr. McFarland could initiate suit on behalf of the HOA its president, or at least whether the odd circumstances here left a question of fact for a jury that should have prevented summary judgment against the HOA.

More specifically, Appellants' challenge was (and is reiterated now in support of this petition) as follows, which Appellants now ask the Court to rehear and reconsider in full:

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,[9] 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 and granting summary judgment

[9] 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).)

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.").

"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.").

Ultimately, the dispositive question is whether the trial court erred in deciding that there was no genuine issue of fact and that judgment was appropriately rendered as a matter of law—and the answer to this question is yes, the trial court did err.

INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

Appellants do not intend to abandon (for any potential future consideration) any argument/analysis presenting in their previously filed appellate briefs in challenge to the trial court's grant of summary judgment against the HOA; therefore, again, out of an abundance of caution, besides making the above points, Appellants incorporate their briefs by reference herein and, thereby, reiterate the argument/analysis therein in support of this petition.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to grant this petition, rehear this matter, and issue a re-filed opinion that not only reverses the trial court's grant of summary judgment against Mrs. McFarland and Mr. Holcombe on their declaratory-judgment claims (as the Subject Decision correctly does) but also reverses the trial court's grant of summary judgment against the HOA.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____

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Counsel for Appellants

Charleston, South Carolina

Dated: 2/3/17

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2012-CP-18-2583

Appellate Case No. 2015-000599
Unpublished Opinion No. 2016-UP-519 (filed December 21, 2016)

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

Plaintiffs,

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

Appellants,

v.

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

Respondents.

Sofia Mazell and Michael Mazell,

Third-Party Plaintiffs,

v.

William McFarland,

Third-Party Defendant.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants above named, hereby certify that the **APPELLANTS' PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on February 3, 2017, properly posted for delivery to the following addressees:

Graham P. Powell, Esquire
William W. Watkins, Jr., Esquire
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Respectfully submitted,
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By: _____
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February 3, 2017

VIA FEDERAL EXPRESS
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Live Oak Village Homeowners Association, Inc., Jennifer McFarland and Carlton Holcombe v. Thomas Morris, David Hanneman, Sofia Mazell and Michael Mazell
Appellate Case No. 2015-000599
Case No.: 2012-CP-18-02583
YCR File: 15508-20150492

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and seven copies of *Appellants' Petition for Rehearing* and the original and one copy of a *Proof of Service* regarding the same. Kindly file the original and return one court-stamped copy to me using the pre-stamped envelope provided.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Partner

RGH/amj
Enclosures
cc: (All below via US Mail)
Graham P. Powell, Esquire, Wall Templeton & Haldrup, P.A.
William "Trey" W. Watkins, Jr., Esquire, Wall Templeton & Haldrup, P.A.
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