

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

FEB 13 2017

SC Court of Appeals

Case No. 2015-000599

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

RETURN TO PETITION FOR REHEARING OF RESPONDENTS
THOMAS MORRIS AND DAVID HANNEMANN

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton (S.C. Bar No. 15456)
Graham P. Powell (S.C. Bar No. 68280)
William W. Watkins, Jr. (S.C. Bar No. 73582)
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Attorneys for Respondents Thomas Morris
and David Hannemann

Respondents Thomas Morris (“Morris”) and David Hannemann (“Hannemann”) submit this return to the Appellants’ Petition for Rehearing dated February 3, 2017 pursuant to South Carolina Appellate Court Rule 240(e). For the following reasons and those set forth in these Respondents’ Final Brief, the Appellants’ Petition for Rehearing should be denied.

STANDARD FOR PETITION FOR REHEARING

Rule 220(c) of the South Carolina Appellate Court Rules provides that the “appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR. Rule 221 of the South Carolina Appellate Court Rules governs the procedural aspects of a hearing in appellate matters. The rule provides that a petition “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” Kennedy v. S.C. Retirement Center, 349 S.C. 531, 564 S.E.2d 322 (2001). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court for a second time.” Id. (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)).

ARGUMENT

The petition for rehearing does not identify any issue that this Court overlooked or misapprehended. Rather this Court properly determined that William McFarland filed an unauthorized lawsuit in the name of the HOA that did not comply with the bylaws; that the HOA’s argument that it had standing because its causes of action accrued when the elements of its claims

were present regardless of whether it complied with the bylaws when initiating this action was raised for the first time on appeal and is not preserved; and that the HOA's argument that its bylaws authorized William McFarland to properly initiate this action in his capacity as president of the HOA was not included in the trial court's order, no motion was filed pursuant to South Carolina Rule of Civil Procedure 59, and the issue is not preserved.

A. The Court Did Not Overlook Or Misapprehend Appellants' Argument Regarding The HOA's Failure To Follow The Bylaws And Lack Of Standing To File Suit

This Court did not overlook or misapprehend the Appellants' argument regarding the HOA's failure to follow the bylaws. This Court specifically acknowledged that "[t]he HOA contends the circuit court erred by granting summary judgment on all of the HOA's causes of action based on the circuit court's finding the HOA lacked standing because it failed to follow its bylaws when authorizing this action." The Appellants' petition directly contradicts this plain language in this Court's opinion. The Appellants argue that this Court "overlooked or misapprehended the essence of what was presented 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." Pet. for Rehearing p. 7. Certainly, the Court cannot be said to have overlooked an argument where the opinion acknowledges the argument on its face.

B. The Appellants Incorrectly Argue That S.C. Code § 33-31-831(e) Was This Court's Sole Basis For Affirming The Trial Court As To The HOA's Failure To Follow The Bylaws And Lack Of Standing To File Suit

The Appellants incorrectly construe this Court's opinion where the petition states that 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*.” Pet. for Rearing p. 1 (emphasis original). Nowhere in the opinion does this Court limit its holding that the HOA failed to comply with the bylaws solely to the basis that Mr. McFarland could not initiate the filing of the lawsuit under S.C. Code § 33-31-831(e). Quite simply, there is no such limiting language and this Court affirms the trial court’ order granting partial summary judgment.

Indeed, the Respondents argued there must be some mechanism enabling Mr. McFarland to take action in the name of the HOA. The Respondents argued that the trial court correctly held that no right of action arose and the HOA lacks standing because the HOA admittedly failed to follow the voting procedure under the bylaws required to take action in the name of the HOA. See Respondents’ Final Brief p. 9. Further, these Respondents argued that the HOA does not and cannot cite any authority under South Carolina law for the proposition that an HOA is not required to adhere to a voting procedure established under the Horizontal Property Act and legally enforceable bylaws as a condition precedent to filing a lawsuit in the name of the HOA. See Respondents’ Final Brief p. 10.¹

This Court addressed and rejected the HOA’s contention that it complied with the bylaws even though only one director voted to initiate the action because the other two directors had a conflict of interest with reference to S.C. Code § 33-31-831(e). Having done so, this Court did not and need not have addressed these Respondents’ additional arguments for affirming the trial court’s

¹The Respondents argued that the HOA failed to follow the bylaws requiring a majority vote of two out of three directors of the Board or the written approval of all three directors of the Board prior to any official action by the HOA. Because Mr. McFarland unilaterally brought a lawsuit against Morris and Hannemann in the name of the HOA admittedly without Board approval under the bylaws, the trial court correctly granted Morris and Hannemann summary judgment as to all claims asserted against them by the HOA. See Respondents’ Final Brief pp. 10-11.

order granting summary judgment in part based on Mr. McFarland's unilateral and unauthorized action of bringing a lawsuit in the name of the HOA for failure to follow the specific terms and conditions precedent in the bylaws in addition to the lack of any authority generally. As such, the Appellants incorrectly state that this Court based the opinion on the merits solely under S.C. Code § 33-31-831(e) and further fail to demonstrate anything this Court misapprehended or overlooked.

C. The Appellants Incorrectly Argue That This Court Could Not Base Its Opinion On S.C. Code § 33-31-831(e) Because The Issue Was Not Raised Before The Trial Court

The Appellants incorrectly argue that this Court could not affirm the trial court based on S.C. Code § 33-31-831(e) because the issue was not raised before the trial court and not raised by the Respondents as an alternative sustaining ground for affirming the trial court. First, the fact that the trial court's order makes no specific reference to S.C. Code § 33-31-831(e) does not mean that this section cannot form a basis for this Court's opinion. This Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR (emphasis added). Here, this Court makes specific reference to the Record on Appeal stating that "[t]he HOA's bylaws state it is a nonprofit corporation organized under the laws of this state, and the South Carolina Nonprofit Corporation Act." The Appellants do not dispute that the Horizontal Property Act and the South Carolina Nonprofit Corporation Act apply. The Appellants do not dispute and in fact contend that Mr. McFarland was a single director who initiated the lawsuit on his own accord. There are numerous references in the Record on Appeal as to McFarland acting as a sole director and filing the lawsuit and, as such, this Court may affirm the trial court to the extent the opinion relies on S.C. Code § 33-31-831(e) as set forth in the opinion. See Rule 220(c), SCACR.

D. The Appellants Incorrectly Argue That This Court Could Not Base Its Opinion On S.C. Code § 33-31-831(e) Because The Respondents Did Not Raise The Issue As An Alternative Sustaining Ground

The Appellants' petition incorrectly argues that S.C. Code § 33-31-831(e) cannot form the basis for this Court's opinion because it was not raised by the Respondents as an alternative sustaining ground for affirming the trial court. First, the Respondents need not raise the issue if it is an alternative sustaining ground, particularly since the Appellants raised this issue on appeal as one component of their effort to have this Court reverse the trial court. The Appellants now seek to use S.C. Code § 33-31-831(e) as a shield where they heretofore drew it as a sword. The petition states that the trial court did not reference this statute and asserts that the Respondents failed to raise the issue as an alternative sustaining ground. This Court should note that the petition does not argue that this Court could not base its opinion on S.C. Code § 33-31-831(e) because of any absence of information in the Record on Appeal nor because it was not raised by the Appellants.

In the Appellants' initial brief, they argued that “[o]perating as HOA President and contending he was the only Director authorized to act, Mr. McFarland initiated the lawsuit by/on behalf of the HOA.” Final Brief of Appellants p. 2, fn.1. The Appellants stated with respect to the allegations in the lawsuit that the Plaintiffs alleged Messrs. Morris and Hanemann “have willfully operated and continue to willfully operate outside of the scope of their authority by taking action or failing to take action as required by the [Subdivision’s] covenants and restrictions, including but not limited to the following acts . . . E. Voting in violation of South Carolina Code § 33-31-830.” Final Brief of Appellants p. 3, fn. 2. Further, the initial brief argues that “[w]here a director of a corporation has in interest adverse to the corporation, the director is ineligible to participate in the

corporate decision” and that “[t]he 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’” Final Brief of Appellants pp. 11-12 (citations omitted). The Appellants specifically argued that “[b]ecause 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.” Final Brief of Appellants p. 12. The Appellants further argued that “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.” Final Brief of Appellants p. 13.

In response, these Respondents argued that the trial court correctly found that the HOA’s lawsuit was improperly brought despite Mr. McFarland’s argument that he was the only board member authorized to act because Morris and Hannemann had an interest adverse to the HOA and that the voting agreements are specifically enforceable under S.C. Code § 33-31-730(b). See Respondents’ Final Brief pp. 15-21. These Respondents argued that the Appellants incorrectly cited Talbot v. James for the proposition that a director with an interest adverse to a corporation is ineligible from participating in a corporate decision. See Respondents’ Final Brief pp. 15-21 (referencing and citing 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.B. 579 (1930); Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E.

141 (1930)). The Appellants' petition correctly states that these Respondents took the position that the HOA is a nonprofit corporation, there was no transaction at issue, and there was no corporate action taken. Respondents' Final Brief pp. 15, fn. 12-17. However, these Respondents alternatively argued that if a conflict of interest action was at issue, "McFarland still cannot act unilaterally because a transaction may not be authorized, approved, or ratified under this section by a single director." Respondents' Final Brief pp. 15, fn. 12-17 (citing S.C. Code Ann. § 33-31-831(e)).

In their final reply, the Appellants addressed numerous issues and specifically these Respondents' "misguided" effort to distinguish Talbot and "myopic focus" on the nonprofit corporation, transaction, and corporate action taken issues. Appellants' Final Reply Brief p. 6, fn. 4. The Appellants' reply does not reverse course and argue that S.C. Code § 33-31-831(e) does not apply nor that the issue was improperly before this Court. This Court determined that "[r]egardless of whether the HOA is correct in asserting that the other directors had a conflict of interest in 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." This Court concludes that "even if McFarland was the only director eligible to vote, under section 33-31-831(e), he still could not properly initiate this action in his capacity as a director." As such, this Court includes as one bases for its opinion that if the HOA was correct in asserting that the other directors had a conflict of interest in any vote to bring the lawsuit in the name of the HOA, in that event S.C. Code § 33-31-831(e) would preclude Mr. McFarland from improperly taking the action of improperly filing the lawsuit in the name of the HOA.

Had Mr. McFarland prevailed and his actions were found compliant with the South Carolina Nonprofit Corporation Act with respect to his theory that he was the only director who could act, Mr.

McFarland would undoubtedly accept the outcome and take the position that the issue was properly before this Court. Having received the opposite outcome, the Appellants' petition is nothing more than an improperly disguised effort to manufacture a preservation issue and shield the Appellants from one of the very arguments they raised.²

E. The Appellants Incorrectly Argue That S.C. Code § 33-31-831(e) Does Not Apply If Properly Raised

The Appellants incorrectly argue in the alternative that if S.C. Code § 33-31-831 was properly before this Court, that this Court overlooked or misapprehended some aspect of its application. First, the Appellants' effort to distinguish Mr. McFarland as the "president" where the statute references "directors" (1) fails to cite any authority for the proposition that an individual cannot be both president and a director under the Nonprofit Corporation Act; (2) raises the incorrect and improper alleged distinction without legal authority for the first time; and (3) fails because it is completely inconsistent with the arguments previously raised.

Second, the Appellants cite no authority for the proposition that this Court overlooked or misapprehended the application of S.C. Code § 33-31-831(e). The Appellants argue that Section 33-31-831 does not specifically state that it applies in the event one or more directors are ineligible to vote due to failure to pay assessments. Again, this Court's opinion contains no limiting language in finding that Mr. McFarland lacked authority under the bylaws to bring the improper lawsuit in the name of the HOA. Further, this Court states that if McFarland was the only director eligible to vote,

²The Appellants further argue that this Court's reference to S.C. Code § 33-31-831(e) in the opinion denies them due process. The issue was raised by the Appellants, briefed by the Respondents, referenced by the Appellants in reply, and included in this Court's opinion. Further, this Court did not limit its finding that Mr. McFarland did not comply with the bylaws to the referenced section stating instead that he would have been precluded from doing so even if the he was correct in his assertion that these Respondents had a conflict of interest.

he could not initiate the lawsuit under S.C. Code § 33-31-831(e). Moreover, the Appellants petition this Court to rehear this issue having not previously made the effort to construct an argument under the specific sections of the Nonprofit Corporation Act that the Appellants admit applies to this HOA as a non-profit. Instead of constructing an argument that Mr. McFarland's actions were legal with reference to the statute and other legal authority, the Appellants have elected to (1) argue that these Respondents' interpretation of the Talbot v. James case relied upon by the Appellants is "misguided" without stating any basis for the contention;³ (2) argue that these Respondents took a myopic view of the Nonprofit Corporation Act that "simply overlooks" the distinguishing fact that these Respondents have a clear conflict of interest;⁴ (3) fail to provide any specific law and authority for the proposition that Mr. McFarland could have taken this improper action under the Act while stating that Mr. McFarland's action was proper under the Act; (4) fail to provide any specific law and authority for the proposition that Mr. McFarland could have taken this improper action under the Act irrespective of the conflict of interest provision under S.C. Code § 33-31-831 assuming these Respondents were otherwise ineligible to vote; (5) fail to distinguish any specific law and authority for the proposition that Mr. McFarland could have taken this improper action under the Act from S.C. Code § 33-31-831; (6) petition this Court arguing that these Respondents failed to assert the issue as an alternative sustaining ground without stating that the issue was directly before the Court by way of the Appellants' own appeal, without stating whether the alleged failure of the Respondents to assert this section as an alternative sustaining ground applies where the Appellants raise the issue, and making an argument that is factually inconsistent with the Record on Appeal and briefs filed

³Appellants' Final Reply Brief p. 6.

⁴Appellants' Final Reply Brief p. 6.

with the Court; and (7) petition this Court to rehear this issue having failed in the manners referenced above and again without offering any authority as to the specific provisions of the Act that would make McFarland's action legal if a board member was ineligible versus having a conflict of interest (or the manner in which the bylaws would treat such an issue) while at the same time stating that there is something that this Court has overlooked or misapprehended. The Appellants' argument should be rejected and the petition denied.

F. The Court Did Not Overlook Or Misapprehend Appellants' Argument Regarding The Failure To Preserve The Issues Of Whether Standing Is Conferred Upon Accrual Or Whether The President Of The HOA Has Standing To Act Independent Of The Board Under The Bylaws

The Appellants incorrectly argue that either issue associated with standing addressed in this Court's opinion are preserved for review. The Appellants do not provide any specific reference to the Record on Appeal where the HOA argued that standing was conferred when its causes of action accrued regardless of whether it complied with the bylaws. Simply put, the record is devoid of this argument and it appears for the first time on appeal. Likewise, the trial court did not rule on any argument that Mr. McFarland could properly initiate this action in his capacity as president of the HOA under the bylaws and no Rule 59 motion was filed. The Appellants cannot point to any specific reference in the record and, moreover, concede that "neither of these notions (regarding standing or accrual) is an independent basis for the trial court's summary judgment" and that "both are wholly derivative of the trial court's conclusion." Pet. for Rearing p. 11. Rather than direct this Court to anything specific in the record and identify anything this Court misapprehended or overlooked, the Appellants proceed to copy their appellate brief in its entirety on these issues into the body of their petition for rehearing. The petition amounts to a request that this Court provide

unreasonable breadth to principles of issue preservation and allow “derivative issue preservation” not provided for under South Carolina law. The petition thus amounts to a request that this Court address this appeal a second time. Therefore, the petition on the issues of standing should be denied.

WHEREFORE, Respondents Thomas Morris and David Hannemann respectfully request that this Court issue an order denying Appellants’ Petition for Rehearing and remit this matter to the Court of Common Pleas for Dorchester County, and awarding these Respondents the reasonable costs and attorneys’ fees associated with this appeal as provided under the rules and specifically as to this petition as to any aspects the Court deems wholly inappropriate, if any.

Dated this 10th day of February, 2017.

Respectfully submitted,


WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton (S.C. Bar No. 15456)
Graham P. Powell (S.C. Bar No. 68280)
William W. Watkins, Jr. (S.C. Bar No. 73582)
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Attorneys for Respondents Thomas Morris
and David Hannemann

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

FEB 13 2017

Case No. 2015-000599

SC Court of Appeals

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

I certify that I have served Return to Petition for Rehearing of Respondents Thomas Morris and David Hannemann on counsel for Appellants, Stephen L. Brown and Russell G. Hines, Young Clement Rivers, LLP, 25 Calhoun Street, Suite 400, Charleston, South Carolina 29401 and P. Brandt Shelbourne, Shelbourne Law Firm, 131 E. Richardson Avenue, Summerville, South Carolina 29483 by depositing same in U.S. Mail this date.

February 10, 2017.

By:


WALL TEMPLETON & HALDRUP, P.A.
Morgan S. Templeton (S.C. Bar No. 15456)
Graham P. Powell (S.C. Bar No. 68280)
William W. Watkins, Jr. (S.C. Bar No. 73582)
145 King Street, Suite 300
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Attorneys for Respondents Thomas Morris
and David Hannemann

Other counsel of record served:

William B. Jung, Esquire
William B. Jung, Esq., LLC
1156 Bowman Road, Suite 200
Mount Pleasant, South Carolina 29464



Wall Templeton
ATTORNEYS

Graham P. Powell
Graham.Powell@WallTempleton.com
Telephone: 843.329.9500 Ext. 204
Facsimile: 843.329.9501

February 10, 2017

Via FedEx:

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Live Oak Village Homeowners' Association, Inc., et al. vs. Thomas Morris and David Hannemann, et al.*
Case No.: 2015-000599
Claim No.: 72-3238-2012

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of Return to Petition for Rehearing of Respondents Thomas Morris and David Hannemann in the above referenced matter. Please file the originals and return a filed copy to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed.

Thank you for your assistance. If you have any questions regarding the enclosed, please contact me.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Graham P. Powell

GPP/sds

Enclosures

cc: Stephen L. Brown, Esquire (w/encl)
Russell G. Hines, Esquire (w/encl)
William B. Jung, Esquire (w/encl)

RECEIVED
FEB 13 2017
SC Court of Appeals