THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2016-UP-519 (S.C. Ct. App. filed Dec. 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	Petitioners,
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.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

In accordance with Rule 242(d)(1), SCACR, it is hereby certified by counsel for Petitioners[1] that a petition for rehearing was timely made (App. pp. 549–70) and, thereafter, finally ruled on by the Court of Appeals. (App. pp. 571–72.)

QUESTIONS PRESENTED

The trial court granted summary judgment in favor of Respondents[2] (against the HOA) as to all HOA claims, finding that the claims had not been brought in compliance with the HOA By-laws; that complying with the By-laws was a condition precedent to bringing the claims; and, consequently, that the HOA did not have standing and/or authorization to bring the claims:

I. Did the Court of Appeals err in affirming the trial court's summary judgment on the basis of S.C. Code Ann. § 33-31-831(e)?

A. Did it so err where § 33-31-831(e) was not a basis of the trial court's decision; where Respondents themselves had abandoned any argument for affirmance on the basis of § 33-31-831(e) when they did not raise any such argument as an additional sustaining ground in their responsive briefs (and, indeed, in the case of Messrs. Morris and Hannemann, where they affirmatively argued in their brief *against* its application); and where, no such argument having been made by Respondents, Petitioners did not have notice and a meaningful opportunity to argue against it, i.e., they were not afforded procedural due process?

B. Assuming, *arguendo*, it was proper for the Court of Appeals to consider § 33-31-831(e) as a potential basis for

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[1] Petitioners are Live Oak Village Homeowners Association, Inc. (the "HOA"); Jennifer McFarland; and Carlton Holcombe.

[2] Respondents are Thomas Morris, David Hannemann, and Sofia and Michael Mazell.

affirmance, did it nonetheless err on the merits in affirming on this basis?

1. **Did it so err where Messrs. Morris and Hannemann themselves took the position that § 33-31-831 is inapplicable?**

2. **Did it so err because commencement of litigation is not a "transaction" covered by § 33-31-831?**

3. **Did it so err because § 33-31-831 addresses only the circumstance where a director(s) has/have a conflict of interest and does not address the circumstance where a director(s) is/are ineligible to vote for another reason?**

4. **Did it so err because § 33-31-831 does not address the validity of Mr. McFarland's actions as HOA *president*?**

II. **Did the Court of Appeals err in regard to its view of issue preservation and/or the merits of Petitioners' argument?**

   A. **Did it so err in finding Petitioners' refutation of the trial court's standing analysis unpreserved for review?**

   B. **Did it so err in finding Petitioners' argument regarding Mr. McFarland's[3] status as HOA president unpreserved for review?**

   C. **Did it so err by misapprehending or overlooking the dispositive question of whether the trial court erred in deciding that there was no genuine issue of material fact and it was appropriate to render judgment on the HOA claims as a matter of law?**

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[3] Mr. McFarland is William McFarland, identified as Third-Party Defendant in the above caption, though he has been granted summary judgment as to all claims asserted against him.

STATEMENT OF THE CASE

Live Oak Village (the "Subdivision") consists of seven single-family homes and certain common elements. A South Carolina nonprofit corporation, the HOA was organized for the purpose of managing the business of the Subdivision's homeowners association. (*See generally* R. pp. 398–416.) Per its By-laws, the HOA is to be governed by a three-member Board of Directors (the "Board");[4] its individual members (each a "Director") are—or rather *were* as of the time the Board became dysfunctional—Mr. McFarland, Mr. Morris, and Mr. Hannemann. (R. p. 175:4–21, p. 245:8–13.) Mr. McFarland is also the HOA's president, its chief executive officer. (R. p. 175:4–24, p. 404 at § 7(B).)

As HOA president, and contending that the Board had become dysfunctional because of the acts/omissions of Messrs. Morris and Hannemann (i.e., the other two Directors) themselves, leaving him the only Director authorized to act, Mr. McFarland initiated this lawsuit by/on behalf of the HOA against Respondents. (R. pp. 25–30, p. 234:3–18.)[5]

The operative complaint alleges a total of four causes of action, but only the first, second, and fourth are relevant to this petition. The first is for a declaratory

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[4] (*See generally* R. pp. 400–404.)

[5] As the record reflects, there were, and still are, other individual homeowner plaintiffs, but the individual claims are not relevant to this petition, and therefore not addressed herein.

judgment as to Messrs. Morris and Hannemann: The HOA alleges acts/omissions, both past and ongoing, by these Respondents outside the scope of their authority as Directors[6] and seeks related declaratory, as well as injunctive, relief. (R. pp. 33–34 at ¶¶ 4–9.) The second is conspiracy: The HOA alleges all Respondents conspired to injure it and caused it special damages including, but not limited to, attorney's fees and costs in defending against Respondents' actions as well as loss of HOA fees. (R. p. 34 at ¶¶ 10–12.) The fourth is against the Mazells for breach of the Subdivision's covenants and restrictions by having renters in their home: The HOA alleges the Mazells are liable for HOA fines, costs, and fees related to the breach. (R. p. 35 at ¶¶ 16–19.)

Messrs. Morris and Hannemann moved for summary judgment. (R. pp. 324–340.)[7] They contended the HOA did not have standing to sue them, arguing HOA By-laws pertaining to official Board action were not followed—more

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[6] More specifically, it is alleged that Messrs. Morris and Hannemann "have willfully operated and continue to willfully operate outside of the scope of their authority by taking action or failing to take action as required by the [Subdivision's] covenants and restrictions, including but not limited to the following acts: A. voting to waive fines that applied to themselves; B. failing to hold timely or properly noticed [HOA] or [Board] meetings; C. allowing unauthorized persons to vote and participate in [Board] meetings; D. voting on matters in which they have a personal financial interest; E. voting in violation of South Carolina Code § 33-31-830; F. failing to properly handle HOA funds; G. failing to enforce covenants and restrictions in a uniform and unbiased manner; [and] H. violating the covenants and restrictions." (R. p. 33 at ¶ 6.)

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

specifically, they argued any action by the Board, to include bringing the instant action by/on behalf of the HOA, required approval by vote of at least two Directors at a meeting or, without a meeting, required written approval by all three Directors, and the necessary approval was not obtained—and, thus, a condition precedent to bringing the HOA claims had not been met and no right of action in favor of the HOA had arisen against them. (R. pp. 324–340.) The Mazells similarly challenged the HOA claims via motion for summary judgment. (R. pp. 296–304.)

Following oral argument and submission of written material on the motions, the trial court, the Honorable Diane Schafer Goodstein presiding, granted summary judgment in favor of Respondents (against the HOA) as to the HOA claims. (*See generally* R. pp. 1–15, pp. 53–165, pp. 298–313, pp. 324–340, pp. 348–353.) In granting summary judgment to Messrs. Morris and Hannemann, the trial court ruled that the HOA failed to follow its By-laws in bringing suit and therefore lacked standing to sue them. (R. pp. 6–15.) In granting summary judgment to the Mazells, the trial court ruled the claims asserted in the name of the HOA were null and void because suit on behalf of the HOA had not been properly authorized in accordance with its By-laws. (R. pp. 1–5.)[8]

Petitioners timely appealed. The Court of Appeals heard oral argument on

[8] Petitioners and Mr. McFarland had also moved for summary judgment on the counterclaims/third-party claims alleged against them, and the trial court granted that motion, too. (R. pp. 16–24.)

November 9, 2016, and filed its opinion affirming the trial court's summary judgment on the HOA claims on December 21, 2016. (App. pp. 544–48.) Petitioners timely sought rehearing[9] but were denied by order filed March 23, 2017. (App. pp. 571-72.)

The instant petition for a writ of certiorari timely follows.[10]

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's summary judgment on the HOA claims on the basis of § 33-31-831(e).

A. It so erred where § 33-31-831(e) was not a basis of the trial court's decision; where Respondents themselves had abandoned any argument for affirmance on the basis of § 33-31-831(e) when they did not raise any such argument as an additional sustaining ground in their responsive briefs (and, indeed, in the case of Messrs. Morris and Hannemann, where they affirmatively argued in their brief *against* its application); and where, no such argument having been made by Respondents, Petitioners did not have notice and a meaningful opportunity to argue against it, i.e., they were not afforded procedural due process.

On the merits, the Court of Appeals 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

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[9] (App. pp. 549–70.)

[10] To be clear, in this petition, as in their prior petition for rehearing, Petitioners challenge only the part of the Court of Appeals' decision by which they are aggrieved—in other words, they, of course, do not challenge the Court of Appeals' reversal of the trial court's summary judgments against Mrs. McFarland and Mr. Holcombe.

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 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.

(App. pp. 545–46.)

The trial court itself, however, did not rule on the basis of § 33-31-831(e),[11] and no Respondent argued for affirmance of the trial court on the basis of § 33-31-831(e)[12]—indeed, Messrs. Morris and 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." (App. pp. 509–10; *see id.* ("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

[11] (R. pp. 3–5, 8–15.)

[12] (*See generally* App. pp. 488–530.)

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. 510, 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 appellate court's discretion in this regard is not without limitation; indeed, it is not even implicated unless and until a respondent actually raises 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. Moreover, where no such argument for affirmance was made, no notice and meaningful opportunity to be heard was afforded Petitioners 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 was proper for the Court of Appeals to consider § 33-31-831(e) as a potential basis for affirmance, it nonetheless erred on the merits in affirming on this basis.

1. It so erred where Messrs. Morris and Hannemann themselves took the position that § 33-31-831 is inapplicable.

Again, as explained above, not only did Messrs. Morris and Hannemann not advance § 33-31-831(e) in support of affirmance, they argued against its applicability on the merits.

2. It so erred because 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' . . . ." (App. p. 510, n. 12.)

3. It so erred because § 33-31-831 addresses only the circumstance where a director(s) has/have a conflict of interest and does not address the circumstance where a director(s) is/are ineligible to vote for another reason.

By its plain language, § 33-31-831 applies to "conflict of interest transaction[s]." *See, e.g.,* § 33-31-831(a). As the Court of Appeals expressly recognized in the above-quoted passage from its opinion, Petitioners contend the HOA claims were 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 does not address.

4. It so erred because § 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 like Mr. McFarland as HOA *president* and 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).)

II. The Court of Appeals erred in regard to its view of issue preservation and/or the merits of Petitioners' argument: (A) it so erred in finding Petitioners' refutation of the trial court's standing analysis unpreserved for review, (B) in finding Petitioners' argument regarding Mr. McFarland's status as HOA president unpreserved for review, and (C) by misapprehending or overlooking the dispositive question of whether the trial court erred in deciding that there was no genuine issue of fact and judgment was appropriately rendered as a matter of law.

Long ago this Court explained, "In matters of appeal . . . all that [it] 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, 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, Chief Justice Toal cautions 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 of Appeals 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 By-laws. (R. pp. 296–304, pp. 314–340.) In response, Petitioners argued that, under the particular circumstances, the HOA suit was proper, or at least there was a question of fact making summary judgment improper,[13] and that Respondents were

[13] Petitioners expressly argued that, although there was no formal Board action, under the circumstances, Mr. McFarland appropriately initiated the suit as HOA president and the only Director authorized to act. In support of this argument, Petitioners cited Messrs. Morris and Hannemann's obvious conflict of interest and the additional fact of their ineligibility to vote for non-payment of dues; Petitioners cited evidence of prior precedent where HOA action was taken without a formal Board meeting; and Petitioners cited powers granted Mr. McFarland by the By-laws as HOA president, which, under the circumstances,

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 had rendered the Board (and, by extension, the By-laws) dysfunctional and effectively prevented compliance:

> **[Petitioners' 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.
>
> . . .
>
> 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

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either authorized him to initiate the suit or at least created a question of fact in this regard. (R. pp. 350–51.)

> 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. 75:6–9, p. 76:6–11, p. 79:20–31, pp. 85:25–86:21; *see also* R. pp. 350–51; *see generally* R. pp. 53–164.)

The trial court's ruling on—rejection of—Petitioners' argument in opposition to summary judgment is sufficiently reflected in its orders and other record material to preserve it for appellate review. (*See generally* R. pp. 1–15; *see also* R. pp. 71:4–124:21; App. p. 507 (implicitly observing that the linchpin of the trial 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.")[14]

And it is appropriate for Petitioners to underscore their argument in challenge to the trial court's ruling by pointing out the flawed and illogical notion, reflected in its orders, that noncompliance with the By-laws 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.,

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[14] *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.").

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 By-laws 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 Petitioners set forth below 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, Petitioners' challenge was (and is reiterated now in support of this petition) as follows, which Petitioners contend should have been fully considered and addressed by the Court of Appeals—and had it done so, should have resulted in reversal of the trial court's summary judgment on the HOA claims[15]:

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.

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[15] The following is recited from Petitioners' principal brief to the Court of Appeals, which can be found in full at pages 466-87 of the Appendix. The original bold print in the argument heading is omitted.

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,[16] 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

[16] 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).)

triable issue as to any of the HOA's claims and granting summary judgment against it on the basis of such a fundamentally unjust catch-22.

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

The circuit court's analysis is illogical, particularly the idea that a right of action had not arisen in favor for failure to follow its own by-laws. "'A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.'" Stephen v. Draffin, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309 (1997) (citing Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962); *see also* id. at 4, 488 S.E.2d at 309,

n. 4 (explaining that, for the purpose of the Court's analysis, the terms "accrue" and "arise" were interchangeable). The question of the HOA's right to sue on a given cause of action is a question of substantive law concerned with whether the elements of the claim are present; the existence or non-existence of such a right has nothing to do with the HOA's by-laws.

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

Where a director of a corporation has an interest adverse to the corporation, the director is ineligible to participate in the corporate decision. Talbot v. James, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (citing Peurifoy v. Loyal, 154 S.C. 267, 151 S.E. 579 (1930) and Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E. 141 (1930)). The general rule is that the conflicted director "may not even be counted to make a quorum at a meeting where the matter is acted upon . . . ." Id.

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

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

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

176, lines 11-16.)

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

"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.").

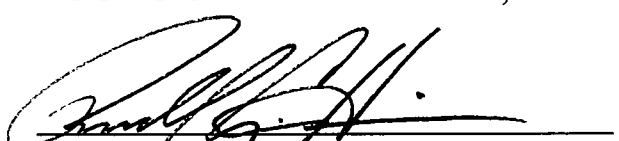
CONCLUSION

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

For the foregoing reasons, Petitioners ask that the Court grant this petition, review the Court of Appeals' decision insofar as it affirmed the trial court's summary judgment against the HOA, reverse the Court of Appeals (as well as the trial court) in that regard, and remand this matter for trial of the HOA's claims along with the other claims already awaiting disposition.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Dated: 5/9/14

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 11 2017
S.C. SUPREME COURT

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2016-UP-519 (S.C. Ct. App. filed Dec. 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	Petitioners,
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.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners, hereby certify that the **PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 9, 2017, properly posted for delivery to the following addressees:

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