

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Diane Schafer Goodstein, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-519 (S.C. Ct. App. filed Dec. 21, 2016)

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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

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RESPONDENTS THOMAS MORRIS AND DAVID HANNEMANN'S RETURN TO  
PETITION FOR CERTIORARI

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## QUESTION PRESENTED

**DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN THE NAME OF THE HOA WHERE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY?**

## STATEMENT OF THE CASE

This matter involves disputes between residents of the Live Oak Village subdivision located in Summerville, South Carolina. Live Oak is a small community that includes seven lots and common areas governed by the Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina, as amended, and Bylaws of Live Oak Village Homeowners Association, Inc. ("HOA"). (R. pp. 229-246, 367-448). The HOA is governed by the Board of Directors ("Board"), which is comprised of three elected directors. (R. p. 400). The three directors of the Board are William McFarland, David Hannemann, and Thomas Morris. (R. pp. 175, 245).

William McFarland, purportedly on behalf of the HOA, and three other individual homeowners, Jennifer McFarland, Carlton Holcombe, and Ute Holcombe, filed a Complaint in the Dorchester County Court of Common Pleas on November 16, 2012 against Respondents Thomas Morris ("Morris"), David Hannemann ("Hannemann"), Sofia Mazell, and Michael Mazell. (R. pp. 25-30). The operative Amended Complaint was filed on October 31, 2014, asserting the following causes of action: (1) declaratory judgment alleged by all Plaintiffs against Morris and Hannemann; (2) conspiracy alleged by all Plaintiffs against all Defendants; (3) slander and defamation alleged by Plaintiff Jennifer McFarland against Defendants Sofia Mazell and Michael Mazell; and (4) breach of covenants and restrictions alleged by all Plaintiffs against Defendants Sofia Mazell and Michael Mazell. (R. pp. 31-36).

The petition before this Court as it pertains to Respondents Morris and Hannemann seeks a reversal of the Court of Appeals' opinion affirming the trial court's order granting summary judgment only as to the declaratory judgment action purportedly asserted in the name of the HOA. The declaratory judgment action seeks, in sum, a declaration that Morris and Hannemann acted outside the scope of their authority as Board members and failed to abide by the HOA Declarations and Bylaws. (R. p. 34). Morris and Hannemann moved for summary judgment because the lawsuit filed in the name of the HOA was improper because the "HOA" failed to follow the requirement for Board approval for filing a lawsuit under the Bylaws. (R. pp. 314-321, 324-340).<sup>1</sup> The Plaintiffs filed a memorandum in opposition to Morris and Hannemann's motion for summary judgment and Morris and Hannemann filed a reply in support of the motion for summary judgment. (R. pp. 341-353).

On January 29, 2015, a hearing took place before The Honorable Diane Goodstein on Morris and Hannemann's motion for summary judgment among other motions. (R. pp. 69-109). The court issued an order granting in part and denying in part Morris and Hannemann's motion for summary judgment. (R. pp. 6-15). The court granted Morris and Hannemann's motion for summary judgment as to all claims asserted by the HOA for lack of standing for failure to follow the Bylaws and failure to obtain Board approval prior to filing a lawsuit on behalf of the HOA. (R. pp. 6-15). The Appellants filed no motion to alter or amend the judgment.

The Appellants served a Notice of Appeal of the order granting in part and denying in part

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<sup>1</sup>The Amended Motion for Summary Judgment filed January 16, 2015 withdrew as moot and supplanted Morris and Hannemann Motion for Partial Summary Judgment filed December 8, 2014.

Morris and Hannemanns' motion for summary judgment on March 17, 2015,<sup>2</sup> the South Carolina Court of Appeals heard oral argument on November 9, 2016, and the Court issued an unpublished opinion affirming in part and reversing in part the trial court's order on December 21, 2016. (App. pp. 544-48). The Appellants filed a petition for rehearing that was denied by the Court of Appeals by order dated March 23, 2017. (App. pp. 571-72).

The Petitioners/Appellants now petition this Court for certiorari seeking reversal of the Court of Appeals' opinion where the Court affirmed in part the trial court's order granting in part and denying in part the Respondents' motions for summary judgment.

### ARGUMENT

#### **I. THE PETITION SHOULD BE DENIED BECAUSE IT FAILS TO SATISFY ANY OF THE "CHARACTER OF REASONS" FOR CONSIDERATION**

The petition should be denied because it is not special or important within the meaning of South Carolina Rule of Appellate Procedure 242(b). Respectfully, the language in Rule 224(b) insofar as this Court's review provides that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Although "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general," none of the "character of reasons" are met because there is no (1) novel question of law; (2) dissent in the decision of the Court of Appeals; (3) conflict between the Court of Appeals' decision and a prior decision of this Court; (4) substantial constitutional issue involved; nor (5) federal question that conflicts with a United States Supreme Court decision. Id.

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<sup>2</sup>The Petitioners/Appellants also appeal the trial court's order granting the Mazells' motion for partial summary judgment on the basis that the HOA failed to comply with HOA Bylaws because there was neither a majority vote of the Board nor unanimous consent in writing of the Board. (R. pp. 1-5).

There is no express attempt in the petition to set forth any such considerations because there are none. There is no such attempt by way of inference if the petition is mined for extrapolation that would satisfy any single guidepost of the five. As there is no basis for the petition under Rule 242(b), these Respondents respectfully request that this Court decline the blank invitation to entertain the issuance of a writ.

**II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT AS TO THE CLAIMS ASSERTED IN THE NAME OF THE HOA BECAUSE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY**

**A. The Court Of Appeals Did Not Err By Applying S.C. Code § 33-31-831(e) Because SCACR 220(c) Provides That The Court May Affirm Based On Any Grounds Appearing In The Record On Appeal**

The Petitioners incorrectly argue that the Court of Appeals erred by affirming the trial court on the basis that S.C. Code § 33-31-831(e) was not raised before the trial court. The Court of Appeals “may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR (emphasis added). The Court specifically referenced 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 expressly states a conflict of interest transaction ‘may not be authorized, approved, or ratified . . . by a single director.’” App. p. 546 (citing S.C. Code § 33-31-831(e)). The Court of Appeals found 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.” App. p. 545. The Court held 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.” App. p. 546.

The Petitioners now seek to use S.C. Code § 33-31-831(e) as a shield where they heretofore drew it as a sword. The Petitioners do not dispute that the Horizontal Property Act and the South Carolina Nonprofit Corporation Act apply. On appeal, the Appellations/Petitioners 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.” App. p. 473, n. 2 (emphasis added).

In response to the Petitioners’ own reference to § 33-31-830, 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 App. pp. 508-514. These Respondents argued that the Petitioners 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 id. pp. 509-511 (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.E. 579 (1930); Fidelity Fire Ins. Co. v. Harby, 156 S.C. 238, 153 S.E. 141 (1930)). The Petitioners correctly state 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. See id. 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.” See id. p. 510 fn. 12 (citing S.C. Code Ann. § 33-31-831(e)).

As such, the Court of Appeals did not err by affirming the trial court’s order to the extent the opinion relies on S.C. Code § 33-31-831(e). See Rule 220(c), SCACR. Had Mr. McFarland prevailed and his actions were found compliant with the South Carolina Nonprofit Corporation Act under 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 the Court of Appeals. Having received the opposite outcome, the Petitioners’ argument that the Court of Appeals cannot cite S.C. Code § 33-31-831(e) as a ground for affirming the trial court is nothing more than an improperly disguised effort to manufacture a preservation issue and shield the Petitioners from the outcome of the very argument they raised before the Court of Appeals.<sup>3</sup>

**B. The Court Of Appeals Did Not Err By Applying S.C. Code § 33-31-831(e) On The Basis That These Respondents Did Not Raise The Issue As An Alternate Sustaining Ground**

The Petitioners incorrectly argue that the Court of Appeals erred by applying S.C. Code § 33-31-831(e) on the basis that it was not raised by these Respondents as an alternate sustaining ground

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<sup>3</sup>The Petitioners/Appellants further argue that the Court of Appeals’ reference to S.C. Code § 33-31-831(e) in the opinion denies them procedural due process because there was “no notice and meaningful opportunity to be heard.” See Pet. for Cert. p. 9. This argument fails because the first such reference to the statute was by the Petitioners/Appellants in their initial brief, subsequently briefed by the Respondents, referenced by the Petitioners/Appellants in reply, and included in Court of Appeals’ opinion. See App. pp. 473 n. 2, 508-514, 540, 545-46. Further, there is no violation of procedural due process. “The first step in examining a procedural due process matter is deciding whether a deprivation of a constitutionally protected interest in life, liberty or property has occurred.” Zinermon v. Burch, 494 U.S. 113, 126 (1990). Mr. McFarland had no right to bring the action in the name of the HOA in the first instance as argued by these Respondents and confirmed by the Court of Appeals. App. pp. 545-46. As such and because the Petitioners are necessarily on notice of the arguments raised in their own briefs, there is no violation of procedural due process here.

for affirming the trial court. Pet. for Cert. pp. 8-9. First, these Respondents need not raise the issue as an alternate sustaining ground, particularly since the Petitioners raised this issue on appeal as one component of their effort to have the Court of Appeals reverse the trial court. App. p. 473, n. 2. The Petitioners 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.” See id. p. 482.

Second, as set forth, *supra*, the Court of Appeals may affirm the trial court’s order on any grounds in the Record on Appeal. Rule 220(c), SCACR. The Petitioners argue that the trial court did not reference the statute but do not argue that the Court of Appeals could not base its opinion on S.C. Code § 33-31-831(e) due to the lack of any support in the Record on Appeal. Pet. for Cert. pp. 8-9. In similar fashion, the Petitioners argue that these Respondents did not raise the issue as an alternate sustaining ground but do not argue that the Court of Appeals could not base its opinion on S.C. Code § 33-31-831(e) because the issue was not raised before the Court at all. See App. p. 473, n. 2. The Petitioners avoid any mention of the fact that they raised the issue on appeal generally by arguing that Mr. McFarland could file the lawsuit in the name of the HOA and any mention that the Petitioners specifically referenced the statute in what they then believed would be in furtherance of their argument. See id. The Court of Appeals reached the opposite conclusion finding that Mr. McFarland could not properly authorize the filing of the lawsuit in the name of the HOA even if he

was acting as the sole remaining director because § 33-31-831(e) prohibits such an action by single director. Id. pp. 545-46. The Court of Appeals did not err on the basis that these Respondents did not raise § 33-31-831(e) as an alternate sustaining ground where the Petitioners raised the issue and the Court simply disagreed.

**C. The Petitioners Incorrectly Argue That The Court Of Appeals Erred In The Application Of S.C. Code § 33-31-831**

The Petitioners argue in the alternative that if S.C. Code § 33-31-831 was properly raised, the Court of Appeals erred in its application of the statute. See Pet. for Cert. pp. 9-10. The Petitioners argue that the Court of Appeals erred because (1) these Respondents argued that the statute was inapplicable; (2) the commencement of a civil action is not a “transaction” within the meaning of S.C. Code § 33-31-831(a); (3) the statute does not specifically state that it applies in the event one or more directors are ineligible to vote due to failure to pay assessments; and (4) S.C. Code § 33-31-831 does not address the validity of Mr. McFarland’s actions as HOA president. Id.

As to the first and second arguments, the Petitioners simply rehash the argument that the Court of Appeals erred by applying S.C. Code § 33-31-831 generally and as to a “transaction” within the meaning of the statute. See Pet. for Cert. pp. 9-10. As set forth, *supra*, these Respondents addressed the statute in response to the Petitioners’ argument for its application. The Petitioners now reverse course requesting that this Court assign error to the Court of Appeals for applying the very statute implored by the Petitioners/Appellants in their unsuccessful effort to have the trial court reversed because the result is not well received. The Petitioners cannot avoid the inherent contradictions and glaring inconsistencies of such an endeavor having buried their argument in too shallow a grave.

The Petitioner's third argument that the Court of Appeals erred by applying § 33-31-831 because the statute does not address the Petitioners' argument that these Respondents were ineligible to vote due to their failure to pay assessments fails for several reasons. See Pet. for Cert. pp. 10. First, the fact that § 33-31-831 does not apply to the inability of directors to vote for failure to pay assessments does not mean that the Court of Appeals erred by applying § 33-31-831(e) finding that Mr. McFarland could not file the lawsuit in the name of the HOA as a single director. App. pp. 545-56. Second, having held that Mr. McFarland could not bring the lawsuit in the name of the HOA under § 33-31-831(e), the Court of Appeals did not need to reach the Petitioners' "voting assessment" argument, any other arguments raised by the Petitioners/Appellants for reversal, nor any arguments raised by these Respondents for affirming this aspect of the trial court's order. Indeed, the Court of Appeals' opinion contains no such limiting language. Third, the Court of Appeals' opinion states that if McFarland was the only director eligible to vote, he could not initiate the lawsuit under S.C. Code § 33-31-831(e). See App. p. 546. Therefore, even if the Petitioners were correct as to any argument that these Respondents were ineligible to vote, the result would be that Mr. McFarland would have been the only director and the outcome would be the same.

Finally, the Petitioners argue that the Court of Appeals' erred by applying § 33-31-831 because the statute does not address Mr. McFarland's corporate power as "president" where the statute references "directors." See Pet. for Cert. p. 10. The Petitioners (1) fail to cite any authority for the proposition that an individual cannot be both president and a director under the Nonprofit Corporation Act; (2) raised the incorrect and improper alleged distinction without legal authority for the first time in their Petition for Rehearing to the Court of Appeals asserting that it was misapprehended or overlooked; and (3) assert this position despite the inconsistencies with the

arguments previously raised. Moreover, the Petitioners seek to overturn the Court of Appeals having made no previous effort to construct any such argument under the specific sections of the Nonprofit Corporation Act that the Petitioners admit applies to the HOA as a non-profit. Instead, the Petitioners (1) argued that these Respondents' interpretation of the Talbot v. James case that was relied upon by the Petitioners was "misguided" without stating any basis for the contention;<sup>4</sup> (2) argued 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;<sup>5</sup> (3) failed 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) failed 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) failed 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) petitioned the Court of Appeals to rehear the appeal arguing that these Respondents failed to assert the issue as an alternative sustaining ground without stating that the issue was directly before the Court of Appeals by way of the Petitioners/Appellants' own appeal, without stating whether the alleged failure of the Respondents to assert this section as an alternative sustaining ground applies where the Petitioners raised the issue, and all the while raising purported issues associated with such an argument that were factually inconsistent with the Record on Appeal and briefs filed with the Court of Appeals;

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<sup>4</sup>App. p. 540.

<sup>5</sup>Id.

and (7) continue to fail to offer any legal theory that would support any possible grounds for reversing the Court of Appeals.

**III. THE COURT OF APPEALS DID NOT ERR BY HOLDING THAT THE PETITIONERS/APPELLANTS FAILED 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 Petitioners incorrectly argue that the Court of Appeals erred by holding that the HOA did not preserve for appeal the arguments that (1) the HOA has standing based on the accrual of causes of action when the elements of the claims were present regardless of compliance with the bylaws and (2) Mr. McFarland was authorized to file an action in the name of the HOA under the bylaws in his capacity as president of the HOA. See App. p. 546. The Petitioners 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 as the Court of Appeals correctly held.

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 Petitioners 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 Cert. p. 15. The Petitioners argue that the Court of Appeals misapprehended or overlooked what was presented to the trial court. Id. p. 12. Rather than direct this Court to anything specific in the record, the Petitioners/Appellants proceed to copy their appellate brief in its entirety on these

issues into the body of this petition for certiorari in the same fashion as their petition for rehearing submitted to the Court of Appeals. Id. pp. 16-24. This petition for certiorari, as with the petition for rehearing to the Court of Appeals, amounts to a request for unreasonable breadth of principles of issue preservation for the purpose of “derivative issue preservation” not provided for under South Carolina law. Therefore, the petition on the issues of standing should be denied.

**CONCLUSION**

For the reasons set forth herein, Respondents Thomas Morris and David Hannemann respectfully request that this Honorable Court deny the Petition for Certiorari or, in the alternative, affirm Court of Appeals’ opinion affirming in part and revering in part the trial court’s order granting in part and denying in part Morris and Hannemann’s Amended Motion for Summary Judgment as to the matters raised in Petitioners/Appellants’ Notice of Appeal, and award the costs of this appeal, including attorneys’ fees, and such other and further relief as the Court deems just and proper.

Dated this 9<sup>th</sup> day of June, 2017.

Respectfully submitted,

  
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Diane Schafer Goodstein, Circuit Court Judge

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William McFarland, Third-Party Defendant

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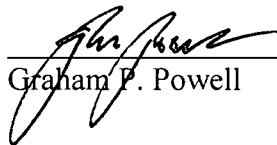
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I, Graham P. Powell, of Wall Templeton & Haldrup, P.A., counsel for Respondents above named, do hereby certify that I have served the **Return to Petition for Writ of Certiorari of Respondents Thomas Morris and David Hannemann** on all counsel listed below by depositing a copy of the same in the United States Mail, properly posted, on June 9, 2017, addressed as follows:

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