

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

MAY 11 2017

Appeal from Dorchester County
Court of Common Pleas

S.C. SUPREME COURT

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Unpublished Opinion No. 2016-UP-519 (S.C. Ct.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.

APPENDIX VOLUME 2

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Petitioners

William B. Jung
 1156 Bowman Road, Suite 200
 Mount Pleasant, SC 29464
 (843) 576-4200
Counsel for Respondents
Sofia Mazell and Michael Mazell

WALL TEMPLETON &
 HALDRUP, P.A.
 Morgan S. Templeton
 Graham P. Powell
 William W. Watkins
 145 King Street, Suite 300
 Charleston, SC 29401
 P.O. Box 1200 (29402)
 (843) 329-9500

-and-

KRAWCHECK & DAVIDSON, LLC
 Lydia P. Davidson
 9 State Street
 Charleston, SC 29401
 (843) 577-2577
Counsel for Respondents
Thomas Morris and
David Hannemann

INDEX

<u>Appendix Volume 1</u>	
Record on Appeal.....	001
<u>Appendix Volume 2</u>	
Final Brief of Appellants.....	466
Final Brief of Respondents Thomas Morris and David Hannemann	488
Brief of Respondents Sofia Mazell and Michael Mazell.....	522
Final Reply Brief of Appellants	531
Unpublished Opinion No. 2016-UP-519, filed December 21, 2016	544
Appellants' Petition for Rehearing	549
Order Denying Petition for Rehearing.....	571

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JAN 13 2016

Appeal from Dorchester County
Court of Common Pleas

SC Court of Appeals

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000599
Circuit Court Case No. 2012-CP-18-2583

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.

FINAL BRIEF OF APPELLANTS

[counsel identified on following page]

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW	6
ARGUMENT	7
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.....	7
II. The circuit court erred in granting partial summary judgment against Mrs. McFarland and Mr. Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, because the court wrongly determined that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim.....	14
CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<u>Baughman v. American Tel. & Tel. Co.</u> , 306 S.C. 101, 410 S.E.2d 537 (1991)	6
<u>Brown v. Finger</u> , 240 S.C. 102, 124 S.E.2d 781 (1962)	11
<u>Brown v. Wingard</u> , 285 S.C. 478, 330 S.E.2d 301(1985)	17
<u>Cafe Assoc. Ltd. v. Gerngross</u> , 305 S.C. 6, 406 S.E.2d 162 (1991)	13
<u>Fidelity Fire Ins. Co. v. Harby</u> , 156 S.C. 238, 153 S.E. 141 (1930)	12
<u>Hancock v. Mid-South Mgmt. Co., Inc.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009)	7
<u>Koester v. Carolina Rental Ctr.</u> , 313 S.C. 490, 443 S.E.2d 392 (1994)	6-7
<u>Mosteller v. County of Lexington</u> , 336 S.C. 360, 520 S.E.2d 620 (1999)	6
<u>Peurifoy v. Loyal</u> , 154 S.C. 267, 151 S.E. 579 (1930)	12
<u>Powell ex rel. Kelley v. Bank of Am.</u> , 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008)	14
<u>Rothrock v. Copeland</u> , 305 S.C. 402, 409 S.E.2d 366 (1991)	6
<u>Stephen v. Draffin</u> , 327 S.C. 1, 488 S.E.2d 307 (1997)	10
<u>Talbot v. James</u> , 259 S.C. 73, 190 S.E.2d 759 (1972)	11
<u>Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co., Inc.</u> , 311 S.C. 275, 428 S.E.2d 734 (Ct. App. 1993)	11
<u>Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.</u> , 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999)	6, 7
<u>Vermont Mut. Ins. Co. v. Singleton</u> , 316 S.C. 5, 446 S.E.2d 417 (1994)	7
<u>Watson v. Southern Ry. Co.</u> , 420 F. Supp. 483 (D.S.C. 1975)	6
<u>Worley v. Yarborough Ford, Inc.</u> , 317 S.C. 206, 452 S.E.2d 622 (Ct. App. 1994)	10
 <u>Statutes</u>	
S.C. Code Ann. §§ 15-53-10 to -140	14

Statutes (continued)

S.C. Code Ann. § 15-53-20	15
S.C. Code Ann. § 15-53-30	15
S.C. Code Ann. § 15-53-130	15

Rules

Rule 8(f), SCRCP	16
Rule 56(c), SCRCP	6

STATEMENT OF ISSUES ON APPEAL

- I. The circuit court granted summary judgment against (Plaintiff/Appellant) Live Oak Village Homeowners Association, Inc., as to all of its claims against (Defendants/Respondents) Thomas Morris, David Hannemann, Sofia Mazell, and Michael Mazell, based on the court's determination that it failed to follow its by-laws, which the court found to be a condition precedent to bringing suit, and therefore it lacked standing and/or authorization to sue; did the circuit court err in so doing?**
- II. The circuit court granted partial summary judgment against (Plaintiffs/Appellants) Jennifer McFarland and Carlton Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, based on the court's determination that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim; did the circuit court err in so doing?**

STATEMENT OF THE CASE

The Live Oak Village subdivision (the "Subdivision") is a small community, consisting of seven single-family homes and certain common elements, in Dorchester County.

Live Oak Village Homeowners Association, Inc. (the "HOA"), is a South Carolina nonprofit corporation organized for the purpose of managing the business of the homeowners association for the Subdivision. (R. pp. 398-399 at § 1.) The HOA is governed by a three-member Board of Directors (the "Board"); its members ("Directors") are William McFarland, Thomas Morris, and David Hannemann. (R. pp. 400-401 at § 4; R. p. 175,

lines 4-21; R. p. 245, lines 8-13; R. p. 326.) Mr. McFarland is also the HOA's President, its chief executive officer. (R. p. 404 at § 7(B); R. p. 234, lines 14-18; R. p. 175, lines 4-24.)

The parties to this litigation are the HOA and individuals who are, or were, residents of the Subdivision and members of the HOA. Specifically, the Plaintiffs are the HOA,¹ Jennifer McFarland, Carlton Holcombe, and Ute Holcombe; the Defendants are Mr. Morris, Mr. Hannemann, Sofia Mazell, and Michael Mazell (collectively, Mr. and Mrs. Mazell are the "Mazells"); Mr. McFarland is a third-party defendant.

The Plaintiffs commenced this action on November 16, 2012, by filing a summons and complaint against the Defendants in Dorchester County. (R. pp. 25-30.) The operative complaint is their amended complaint filed on October 31, 2014. (R. pp. 31-36.) It alleges a total of four causes of action, but only the first, second, and fourth are relevant to this appeal.

The first cause of action is for a declaratory judgment as to Messrs. Morris and Hannemann; the Plaintiffs allege acts/omissions, both past and ongoing, by these Defendants outside the scope of their authority as

¹ Operating as HOA President and contending he was the only Director authorized to act, Mr. McFarland initiated the lawsuit by/on behalf of the HOA.

Directors² and seek related declaratory, as well as injunctive, relief to spare them irreparable damage for which they have no adequate remedy at law. (R. pp. 33-34, ¶¶ 4-9.) The second cause of action is for conspiracy against all Defendants; the Plaintiffs allege the Defendants conspired to injure them and caused them special damages including, but not limited to, attorney's fees and costs in defending against the Defendants' actions and loss of HOA fees. (R. p. 34, ¶¶ 10-12.) The fourth cause of action is against the Mazells for breach of the Subdivision's covenants and restrictions by having renters in their home; the Plaintiffs allege the Mazells are liable for HOA fines, costs, and fees related to the breach. (R. p. 35, ¶¶ 16-19.)³

² More specifically, the Plaintiffs allege 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, ¶ 6.)

³ The third cause of action is by Mrs. McFarland against the Mazells for defamation; Mrs. McFarland alleges the Mazells falsely accused her of being unchaste and having extra-marital relations, of committing criminal acts by stealing her father's business, of being racist, and of invading the Defendants' privacy by peering into their windows. (R. pp. 34-35, ¶¶ 13-15.)

After responsive pleading and a period of discovery, Messrs. Morris and Hannemann moved for summary judgment, and the Mazells moved for partial summary judgment. (R. pp. 324-340; R. pp. 296-297.)⁴

Messrs. Morris and Hannemann contended they were entitled to judgment as a matter of law, as to all claims against them, because the Plaintiffs did not have standing and lacked damages and/or special damages. (R. pp. 324-340.) With particular respect to the HOA's standing, they argued by-laws pertaining to official Board action were not followed—more 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—thus, a condition precedent to the HOA's suit was not 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's claims against them. (R. pp. 296-297; R. pp. 298-304.)

Following oral argument and submission of written material on the motions, the circuit court, The Honorable Diane Schafer Goodstein presiding, granted the Defendants partial summary judgment via separate

⁴ Messrs. Morris and Hannemann (together) and the Mazells are represented by separate counsel.

orders. (R. pp. 298-304; R. pp. 305-313; R. pp. 324-340; R. pp. 348-353; R. pp. 53-68; R. pp. 69-165; R. pp. 1-5; R. pp. 6-15.) In granting partial summary judgment to Messrs. Morris and Hannemann, the circuit court ruled (1) Mrs. Holcombe lacked damages to support her claims, (2) the HOA failed to follow its by-laws in bringing suit and therefore lacked standing to sue the Defendants, and (3) Mrs. McFarland and Mr. Holcombe lacked standing to pursue their cause of action for declaratory judgment as to Messrs. Hannemann and Morris, because they had not suffered an injury in fact and lacked a justiciable controversy. (R. pp. 6-15.) In granting partial summary judgment to the Mazells, the circuit 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.)⁵

This appeal timely follows. Of the Plaintiffs, the Appellants are the HOA, Mrs. McFarland, and Mr. Holcombe. All of the Defendants are Respondents.

⁵ The Plaintiffs and Mr. McFarland had made their own motion for summary judgment on all the counterclaims/third-party claims alleged against them; the circuit court also granted this motion. (R. pp. 16-24.)

STANDARD OF REVIEW

“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), SCRPC. “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.”).

ARGUMENT

- I. The circuit court erred in granting summary judgment against the HOA, as to all of its claims, because the court wrongly determined that the HOA failed to follow its by-laws, which the court found to be a condition precedent to bringing suit, and therefore the HOA lacked standing and/or authorization to sue.**

In granting summary judgment against the HOA on its claims against Messrs. Morris and Hannemann, the circuit court’s analysis was, in its entirety (excluding citations), as follows:

“A condition precedent entails something that is essential to a right of action, as opposed to a

condition subsequent, which is something relied upon to modify or defeat the action.” A right of action does not arise until such conditions precedent are met. The HOA failed to follow its own By-laws and condition precedents before instituting this suit. Any official action by the HOA requires a majority vote, or the vote of two (2) of the three (3) directors. Mr. McFarland, as the 30(b)(6) deponent for the HOA, testified that no such discussion or vote occurred prior to bringing 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,⁶ but because—on account of the very Board dysfunction they were alleged to have caused—these Defendants had not agreed to be sued for them. Most respectfully, the circuit court erred in finding no triable issue as to any of the HOA's claims

⁶ 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).)

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.").

II. The circuit court erred in granting partial summary judgment against Mrs. McFarland and Mr. Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, because the court wrongly determined that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim.

Although set forth separately, the circuit court's analysis in support of its grant of partial summary judgment against Mrs. McFarland and Mr. Holcombe overlaps. In finding both that these Plaintiffs had not suffered an injury in fact and that they lacked a justiciable controversy (so, therefore, they did not have standing), the court focused on what it viewed as a lack of concrete harm attributable to Messrs. Morris and Hannemann that was capable of being redressed via judicial action. (R. pp. 12-15.) Most respectfully, the court erred in so doing.

Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Id.

Under South Carolina's enactment of the Uniform Declaratory Judgments Act (the "Act"), S.C. Code Ann. §§ 15-53-10 to -140, "[c]ourts of record within their respective jurisdictions . . . have power to declare

rights, status and other legal relations whether or not further relief is or could be claimed.” § 15-53-20. “No action or proceeding [is] open to objection on the ground that a declaratory judgment or decree is prayed for,” and “[t]he declaration may be either affirmative or negative in form and effect.” Id.; *see also* § 15-53-30 (“Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction . . . and obtain a declaration of rights, status or other legal relations thereunder.”) The legislature expressly “declared [the Act] to be remedial[,]” with “[i]ts purpose [being] to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[,]” instructing that “[i]t is to be liberally construed and administered.” § 15-53-130.

Here, a cause of action has been alleged for declaratory judgment as to Messrs. Morris and Hannemann based on their alleged violation the Subdivision’s governing documents, which are contracts or writings constituting a contract insofar as the Act is concerned. It was/is appropriate and consistent with the purpose of the Act for these Plaintiffs, as “person[s] interested,” to seek a determination of “rights, status, or other legal relations” in this regard.

The circuit court misapprehended the factual and legal circumstances

of these Plaintiffs' declaratory-judgment claim in finding they lacked standing because they had not suffered an injury at law and there was no justiciable controversy. The court took too narrow a view of the concept of injury, especially the language in the amended complaint alleging that these Plaintiffs "will suffer irreparable damage to their ability to reside at their property" in the absence of the requested declaratory and injunctive relief, and especially in the context of a motion for summary judgment. *See above-cited authorities regarding the summary judgment standard; see also* Rule 8(f), SCRCP ("All pleadings shall be so construed as to do substantial justice to all parties.").

These Plaintiffs' ability to reside at their property is not unharmed merely because it is still physically possible for them to reside at their property and they still have access to the Subdivision's common elements. The alleged unauthorized acts/omissions on the part of Messrs. Morris and Hannemann and the accompanying dysfunction of the Board, whose purpose is, after all, to manage the business of the homeowners association for the Subdivision,⁷ unquestionably constitute harm, or at least the threat of significant harm, to the Plaintiffs' significant interests in their property (including their ability to reside at the property), which are directly traceable

⁷ (R. pp. 398-399 at § 1.)

to Messrs. Morris and Hannemann, and which can be meaningfully redressed via declaratory and injunctive relief.

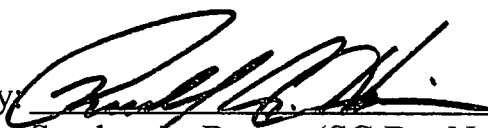
When bringing an action under the Act, “[a]ll that is required is that the [plaintiff] demonstrate a justiciable controversy;”⁸ these Plaintiffs have done so here, and the circuit court erred in ruling otherwise.

CONCLUSION

For the foregoing reasons, the Appellants ask this Honorable Court to reverse the summary judgments granted against them by the circuit court and to remand their claims to that court so they may proceed.

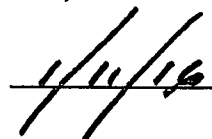
Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

Dated:  _____

⁸ Brown v. Wingard, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 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

FINAL BRIEF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL.....	1
I. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN THE NAME OF THE HOA WHERE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS?.....	1
II. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT?.....	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	6
ARGUMENT	
I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE CLAIMS ASSERTED IN THE NAME OF THE HOA BECAUSE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS.....	9
A. The HOA Failed To Follow The Bylaws And Lacks Standing To File Suit Against Its Own Board Directors Based On The Unilateral Action Of A Single Board Director.....	9
B. The Trial Court Did Not Err By Requiring That The HOA Follow The Bylaws	12
C. The Trial Court Correctly Enforced The HOA's Bylaws Despite A Single Owner's Stated Grounds For Avoidance	15
II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY FOR CLAIMS ASSERTED PURSUANT TO THE DECLARATORY JUDGMENT ACT.....	22
CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<u>Altman v. Griffith</u> , 372 S.C. 388, 642 S.E.2d 619 (Ct.App. 2007).	12
<u>ATC S., Inc. v. Charleston Cnty.</u> , 380 S.C. 191, 669 S.E.2d 337 (2008).	23, 26, 27
<u>Auto-Owners Ins. Co. v. Hamin</u> , 368 S.C. 536, 629 S.E.2d 683 (Ct.App. 2006).	8
<u>Byrd v. Irmo High Sch.</u> , 321 S.C. 426, 468 S.E.2d 861 (1996).	22
<u>Café Associates, Ltd. v. Gerngross</u> , 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).	19
<u>Doe v. Roe</u> , 370 S.C. 206, S.E.2d 51 (Ct.App. 2006).	12
<u>Doe v. Roe</u> , 379 S.C. 291, 665 S.E.2d 182 (Ct.App. 2008).	12
<u>Ellie, Inc. v. Miccichi</u> , 358 S.C. 78, 594 S.E.2d 485 (Ct.App. 2004).	12
<u>Fidelity Fire Ins. Co. v. Harby</u> , 156 S.C. 238, 153 S.E. 141 (1930).	16
<u>Floyd v. St. Paul Fire & Marine Ins. Co.</u> , 285 S.C. 148, 328 S.E.2d 132 (Ct.App. 1985).	10
<u>Graham v. State Farm Mut. Auto. Ins. Co.</u> , 319 S.C. 69, 459 S.E.2d 844 (1995).	22
<u>Hancock v. Mid-South Mgmt. Co., Inc.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009).	7
<u>Harrington v. Blackston</u> , 319 S.C. 1, 459 S.E.2d 309 (Ct.App. 1995).	20
<u>Harrington v. Blackston</u> , 322 S.C. 470, 473 S.E.2d 47 (1996).	20
<u>Holden v. Cribb</u> , 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002).	22, 28
<u>Jackson v. State</u> , 331 S.C. 486, 489 S.E.2d 915 (1997).	22
<u>Lennon v. S.C. Coastal Council</u> , 330 S.C. 414, 498 S.E.2d 906 (Ct.App. 1998).	22
<u>Lujan v. Defenders of Wildlife</u> , 504 U.S. 555 (1992).	23, 26, 27
<u>Metal Serv. Corp. v. Indus. Elec. Co.</u> , 253 S.C. 507, 171 S.E.2d 703 (1970).	10, 11

<u>Milligan v. Liberty Life Ins. Co.</u> , 313 S.C. 478, 443 S.E.2d 381 (1994).	7
<u>Nicholson v. Nicholson</u> , 378 S.C. 523, 663 S.E.2d 74 (Ct.App. 2008).	12
<u>Noisette v. Ismail</u> , 299 S.C. 243, 384 S.E.2d 310 (Ct.App. 1989).	8
<u>Noisette v. Ismail</u> , 304 S.C. 56, 403 S.E.2d 122 (1991).	8
<u>Ortega v. Kingfisher Homeowners Ass'n, Inc.</u> , 314 S.C. 180, 442 S.E.2d 202 (Ct.App. 1994).	11, 16
<u>Peurifoy v. Loyal</u> , 154 S.C. 267, 151 S.B. 579 (1930).	16
<u>Plantation A.D., LLC v. Gerald Builders of Conway, Inc.</u> , 386 S.C. 198, 687 S.E.2d 714 (Ct.App. 2009).	10
<u>Power v. McNair</u> , 255 S.C. 150, 177 S.E.2d 551 (1970).	22
<u>Pye v. Est. of Fox</u> , 369 S.C. 555, 633 S.E.2d 505 (Ct. App. 2006).	12
<u>Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</u> , 368 S.C. 342, 628 S.E.2d 902 (Ct.App. 2006).	9
<u>Richardson v. The State Record Co., Inc.</u> , 330 S.C. 562, 499 S.E.2d 825 (Ct.App. 1998).	7
<u>Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.</u> , 282 S.C. 415, 321 S.E.2d 46 (1984).	20
<u>S.C. Dep't of Transp. v. First Carolina Corp. of S.C.</u> , 372 S.C. 295, 641 S.E.2d 903 (2007).	12
<u>Seabrook Island Prop. Owners Ass'n v. Pelzer</u> , 292 S.C. 343, 356 S.E.2d 411 (Ct.App. 1987).	20
<u>Singleton v. Sherer</u> , 377 S.C. 185, 659 S.E.2d 196 (Ct.App. 2008).	7, 12
<u>Sloan v. Greenville Cnty.</u> , 356 S.C. 531, 590 S.E.2d 338 (Ct.App. 2003).	8, 9
<u>S. Carolina Coastal Conservation League v. S. Carolina Dep't of Health & Env'tl. Control</u> , 380 S.C. 349, 669 S.E.2d 899 (Ct.App. 2008).	12
<u>S. Carolina Coastal Conservation League v. S. Carolina Dep't of Health & Env'tl. Control</u> , 390 S.C. 418, 702 S.E.2d 246 (2010).	12

<u>Stephen v. Draffin</u> , 327 S.C. 1, 488 S.E.2d 307 (1997).....	14
<u>Sunset Cay, LLC v. City of Folly Beach</u> , 357 S.C. 414, 593 S.E.2d 462 (2004).....	22, 26, 28
<u>Talbot v. James</u> , 259 S.C. 73, 190 S.E.2d 759 (1972).....	16
<u>Thompkins v. Festival Centre Group, I</u> , 306 S.C. 193, 410 S.E.2d 593 (Ct.App. 1991).....	8
<u>Trost v. Sea Mark Tower Prop. Owners Ass’n, Inc.</u> , 2004 WL 6310042 (S.C. Ct. App. Apr. 29, 2004).....	20
<u>Turner v. Milliman</u> , 392 S.C. 116, 708 S.E.2d 766 (2011).....	7
<u>Ulmer v. Ulmer</u> , 369 S.C. 486, 632 S.E.2d 858 (2006).....	12
<u>Vause v. Mikell</u> , 290 S.C. 65, 348 S.E.2d 187 (Ct.App. 1986).....	19
<u>Waller v. Waller</u> , 220 S.C. 212, 66 S.E.2d 876 (1951).....	26
<u>Walters v. Summey Bldg. Systems</u> , 311 S.C. 507, 429 S.E.2d 854 (Ct.App. 1993).....	19, 20
<u>Widman v. Widman</u> , 348 S.C. 97, 557 S.E.2d 693 (Ct.App. 2001).....	12
<u>Worley v. Yarborough Ford, Inc.</u> , 317 S.C. 206, 452 S.E.2d 622 (Ct.App. 1994).....	10, 13, 14

STATUTES

South Carolina Code Ann. § 27-31-100.....	20
South Carolina Code Ann. § 27-31-150.....	11, 16, 21
South Carolina Code Ann. § 27-31-170.....	16, 21
South Carolina Code Ann. § 33-8-310.....	17
South Carolina Code Ann. § 33-31-140.....	21
South Carolina Code Ann. § 33-31-730.....	16, 18, 21
South Carolina Code Ann. § 33-31-824.....	21
South Carolina Code Ann. § 33-31-830.....	17, 24

South Carolina Code Ann. § 33-31-831.	17, 19
South Carolina Code Ann. § 33-31-840.	21
South Carolina Code Ann. § 33-31-841.	21
South Carolina Code Ann. § 37-31-150.	20

OTHER AUTHORITIES

Rule 220(c), South Carolina Appellate Court Rules.	14
Rule 56(c), South Carolina Rules of Civil Procedure.	6, 7
Rule 59(e), South Carolina Rules of Civil Procedure.	12
4 S.C. Juris <u>Actions</u> § 25 (1991).	13
Jean Hoefer Toal et al., <i>Appellate Practice in South Carolina</i> (2d ed.2002).	12

STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN THE NAME OF THE HOA WHERE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS?**
- II. **DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT?**

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. 367-397, Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. A - Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina); (R. pp. 417-448, Id. Ex. B - Amendments to the Declaration of Covenants And Restrictions for Live Oak Village, Summerville, South Carolina,); (R. pp. 398-416, Id. Ex. C - Bylaws Of Live Oak Village HOA); (R. pp. 229-246, Rule 30(b)(6), SCRCF Dep. of Live Oak Village Homeowners Ass'n). The HOA is governed by the Board of Directors ("Board"), which is comprised of three elected directors. (R. p. 400, Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws of Live Oak Village Homeowners Association, Inc. § 4(A)). The three directors of the Board are William McFarland, David Hannemann, and Thomas Morris. (R. p. 175, lines 18-21, Hannemman Dep.); (R. p. 245,

lines 8-13, 30(b)(6) of HOA).

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, Complaint). An 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, Amended Complaint).¹

The Plaintiffs' first cause of action for declaratory judgment 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, Amended Complaint ¶ 8). The second cause of action for conspiracy alleges that the Defendants have conspired against the Plaintiffs but sets forth no specific alleged conduct. (R. p. 34, Id.). The third cause of action asserted by Jennifer McFarland only against Sofia Mazell and Michael Mazell alleges slander and defamation. (R. p. 34, Id. ¶ 14). The fourth cause of action asserted by the Plaintiffs against Sofia and Michael Mazell alleges a breach of covenants and restrictions by having renters on the property. (R. p. 35, Id. ¶¶ 18-

¹The Amended Complaint filed on October 31, 2014 is the most recently filed complaint and the operative complaint. (See R. pp. 31-36, Amended Complaint). The Amended Complaint is identical to the Complaint but adds a fourth cause of action for breach of covenants and restrictions alleged by all Plaintiffs against Sofia Mazell and Michael Mazell. (See R. pp. 25-30, Complaint); (R. pp. 31-36, Amended Complaint).

19).² Sofia Mazell and Michael Mazell filed an Answer to the Amended Complaint. (R. pp. 37-41, Sofia Mazell and Michael Mazell Answer to Plaintiffs' Amended Complaint filed October 23, 2014). Morris and Hannemann filed an Answer to the Amended Complaint, Counterclaims, and a Third-Party Complaint against William McFarland. (R. pp. 42-52, Morris and Hannemann's Answer to Amended Complaint, Counterclaims, and Third-Party Complaint filed November 13, 2014). The Counterclaim and Third-Party Claim assert causes of action for breach of fiduciary duty, negligence/negligence per se, conversion of HOA funds, accounting, and indemnity. (R. pp. 46-51, Id. ¶¶ 26-48).

Sofia Mazell and Michael Mazell moved for partial summary judgment as to the second cause of action for conspiracy and fourth cause of action for breach of covenants and restrictions brought by the HOA. (R. pp. 296-297, Sofia Mazell and Michael Mazell Motion for Summary Judgment dated November 7, 2014). The motion for partial summary judgment asserted that the HOA had no authority to bring the action without the required approval of the Board under the Bylaws and that there was no evidence to support the Plaintiffs' claims. (R. pp. 296-297, Id.). On November 19, 2014, the Honorable Diane S. Goodstein heard Sofia Mazell and Michael Mazell's motion for partial summary judgment as to the claims asserted against them by the HOA. (R. pp.

²The Amended Complaint seeks: (a) Declaratory Judgment against Defendants Thomas Morris and David Hannemann declaring that Defendants are acting outside of their scope of authority on the Live Oak Village Homeowner's Association Board of Directors; (b) Injunctive Relief prohibiting Defendants Thomas Morris and David Hannemann from taking further action and/or serving on the Live Oak Village Homeowner's Association Board of Directors contrary to the express terms of the covenants and bylaws; (c) Special damages incurred as a result of Defendants' conspiracy; (d) Fines, costs and fees incurred as a result of Defendant Sofia Mazell's and Michael Mazell's breach of the Covenants and Restrictions; (e) Actual and punitive damages as allowed by law; (f) Attorney's fees and costs in bringing this action; and (g) Any such other and further relief this Court deems just and proper. (See R. pp. 31-36, Amended Complaint).

53-68, Transcript of Record dated November 19, 2014). The court granted the Mazells' motion for partial summary judgment as to all claims asserted by the HOA based on the failure of the HOA to comply with HOA Bylaws in obtaining either a majority vote of the Board or unanimous consent in writing of the Board. (R. pp. 1-5, Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015).³ The order granting the Mazell's motion for summary judgment as to the claims asserted by the HOA noted that Plaintiffs' counsel conceded at the hearing that there was no unanimous written consent of all members of the Board nor was there a vote by the Board to institute claims in the name of the HOA against the Mazells. (R. p. 4, Id.). The trial court held that there was no dispute of fact and that the Plaintiffs' claims in the name of the HOA against the Mazells "was not properly made in accordance with the procedures set forth in the governing Bylaws" and that "the HOA was not empowered or authorized to have filed any claims in this action against anyone." (R. p. 5, Id.). The Plaintiffs filed no motion to alter or amend the judgment.

Morris and Hannemann moved for summary judgment on the bases that (1) the Plaintiffs lack standing because (a) Jennifer McFarland, Carlton Holcombe, and Ute Holcombe have not suffered any damages or injury in fact required to seek declaratory relief and (b) the HOA failed to follow the requirement for Board approval for filing a lawsuit under the Bylaws; and (2) the Plaintiffs have no damages and their claims fail as a matter of law where (a) Ute Holcombe has no claim and has not been damaged and (b) the Plaintiffs have suffered no special damages required to sustain an action for conspiracy. (R. pp. 314-321, Morris and Hannemann Motion for Partial Summary Judgment

³The court's order did not address the Mazells' motion for partial summary judgment as to the second cause of action for conspiracy and fourth cause of action for breach of covenants and restrictions. The court granted summary judgment as to all claims by the HOA against the Mazells but did not address the individual Plaintiffs' claims against the Mazells. (See R. pp. 1-5, Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015).

filed December 8, 2014); (R. pp. 324-340, Morris and Hannemann Amended Motion for Summary Judgment filed January 16, 2015).⁴ 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. 348-353, Plaintiffs' Memorandum in Opposition to Morris and Hannemann's Motion for Summary Judgment filed January 30, 2015); (R. pp. 341-347, Morris and Hannemann Reply in Support of Morris and Hannemann's Amended Motion for Summary Judgment filed January 29, 2015).

On January 29, 2015, a hearing took place before Judge Goodstein on Morris and Hannemann's motion for summary judgment. (R. pp. 69-109, Transcript of Record January 29, 2015).⁵ The court issued an order granting in part and denying in part Morris and Hannemann's

⁴The 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.

⁵The court also heard Respondents Sofia Mazell and Michael Mazell motion for partial summary judgment as to the Appellants' fourth cause of action for breach of covenants and restrictions alleging improper rental of property on the bases that the claims are improper for failure to follow the procedures required under the Bylaws for enforcing HOA Declarations and Bylaws. (R. pp. 109-125, Transcript of Record January 29, 2015); (see R. pp. 322-323, Sofia Mazell and Michael Mazell Motion for Summary Judgment as to Plaintiffs' Fourth Cause of Action for Breach of Covenants and Restrictions filed December 11, 2014). The court has not ruled on this motion and it is not the subject of this appeal.

On the same date, the court also heard and ultimately granted Plaintiffs Jennifer McFarland and Carlton Holcombe's and Third-Party Defendant William McFarland's Motion for Summary Judgment as to Defendant/Third-Party Plaintiffs Morris and Hannemann's Counterclaims and Third-Party Claims. (R. pp. 354-355, Plaintiffs/Third-Party Defendant William McFarland's Motion for Summary Judgment as to Counterclaims and Third Party Claims of Morris and Hannemann filed December 23, 2014); (R. pp. 16-24, Order Granting Summary Judgment as to Counterclaims and Third Party Claims of Morris and Hannemann filed March 13, 2015). Upon information and belief, the Appellants are not appealing this order in favor of the Appellants despite the fact that it was included in Appellants' Notice of Appeal.

motion for summary judgment. (R. pp. 6-15, Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015). The court granted Morris and Hannemann's motion for summary judgment as to: (1) all claims asserted by Ute Holcombe because she was not claiming nor has she sustained any injury or damage;⁶ (2) all claims by the HOA for lack of standing for failure to follow the Bylaws and obtain Board approval prior to filing a lawsuit on behalf of the HOA; and (3) the declaratory judgment action brought by Jennifer McFarland and Carlton Holcombe for lack of standing because they have suffered no injury in fact and because there is no justiciable controversy as required to seek declaratory relief. (R. pp. 6-15, Id.). The court denied Morris and Hannemann's motion for summary judgment as to Appellants Jennifer McFarland and Carlton Holcombe's conspiracy cause of action. (R. pp. 6-15, Id.). The Appellants filed no motion to alter or amend the judgment.⁷

The Appellants served a Notice of Appeal of the orders granting the Mazells' motion for summary judgment and granting in part Morris and Hannemanns' motion for summary judgment on March 17, 2015. (Appellants' Notice of Appeal).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard

⁶Ute Holcombe has not filed any Notice of Appeal. (See Appellants' Notice of Appeal).

⁷As a result of the orders granting the Mazells' motion for summary judgment and granting in part Morris and Hannemanns' motion for summary judgment, the remaining claims are Appellants Jennifer McFarland and Carlton Holcombe's second cause of action for conspiracy against all Defendants; Appellant Jennifer McFarland's third cause of action for slander and defamation against the Mazells; and Appellants Jennifer McFarland and Carlton Holcombe's fourth cause of action for breach of covenants and restrictions against the Mazells. (See R. pp. 31-36, Amended Complaint); (R. pp. 1-5, Order Granting Mazell Motion for Partial Summary Judgment dated March 3, 2015); (R. pp. 6-15, Order Granting, In Part, Morris and Hannemann's Amended Motion for Summary Judgment filed March 13, 2015).

applied by the trial court pursuant to Rule 56(c), SCRPC. Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citation omitted). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; Rule 56(c), SCRPC. “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Id. (citation omitted). “In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.” Id. (citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

“The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Richardson v. The State Record Co., Inc., 330 S.C. 562, 565, 499 S.E.2d 825-26 (Ct.App. 1998). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing” –that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party’s case.’” Id. at 825. “The moving party need not ‘support its motion with affidavits or other similar materials negating the opponent’s claim.’” Id.; see Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 480, 443 S.E.2d 381-82 (1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct.App. 2008). “It is not sufficient that one create an

inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group, I, 306 S.C. 193, 194, 410 S.E.2d 593, 593 (Ct.App. 1991).

“Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues.” Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct.App. 2006); see Noisette v. Ismail, 299 S.C. 243, 246, 384 S.E.2d 310, 312 (Ct.App. 1989) rev’d in part, 304 S.C. 56, 403 S.E.2d 122 (1991) (stating that “[a] declaratory judgment action is like a chameleon . . . [i]ts color is determined by its background, *i.e.*, the underlying action.”). “In actions at law, on appeal of a case tried without a jury, the lower court must be affirmed where there is any evidence which reasonably supports the judge’s findings.” Sloan v. Greenville Cnty., 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct.App. 2003) (citations omitted). “In an action in equity, however, the appellate court may ‘find facts in accordance with its views of the preponderance of the evidence.’” Id. The standard of review is determined by the “main purpose” of the lawsuit. Id. “A case with legal and equitable issues presents a divided scope of review.” Id. “When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” Id.

In this case, the complaint seeks declarations under the HOA’s master deed and bylaws and also seeks injunctive relief. The nature of the underlying issues depend entirely on the court’s requested interpretation of the master deed and bylaws and, therefore, the character of the underlying action is one at law. Even if the nature of the action is considered one at equity based on the equitable relief sought, that relief is dependent upon the outcome of a legal interpretation, *i.e.* the interpretation of the master deed and bylaws. “A legal question in an equity case receives review as in law.” Sloan, 356 S.C. at 545, 590 S.E.2d at 345. “Even if a case is tried in equity if it is

actually a law case, the appellate court will apply the scope of review in law cases.” Id. Therefore, this Court should review the declaratory judgment action as one at law. Further, the issues raised do not involve disputes of fact but rather application of the law to the facts and, more particularly, the law as applied to Appellants’ claims as pled. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 356, 628 S.E.2d 902, 910 (Ct.App. 2006) (stating that when facts are not in dispute, the question before the court is one of law).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE CLAIMS ASSERTED IN THE NAME OF THE HOA BECAUSE AN INDIVIDUAL OWNER BROUGHT THE LAWSUIT WITHOUT ANY LEGAL AUTHORITY AND IN VIOLATION OF THE BYLAWS

A. The HOA Failed To Follow The Bylaws And Lacks Standing To File Suit Against Its Own Board Directors Based On The Unilateral Action Of A Single Board Director

This Court should affirm the trial court’s order granting summary judgment as to all claims asserted by William McFarland under the guise of “HOA” claims because the HOA failed to obtain Board approval under the Bylaws as a condition precedent to a right of action as a matter of law. 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.⁸ (See R. pp. 11-12, 15, Order Granting, In Part, Morris and Hannemann’s

⁸The HOA concedes that “no formal Board action took place” and that a single director, William McFarland, “initiated the suit as he contends that he was the only Board member authorized to act.” (R. p. 350, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015). William McFarland is not a Plaintiff in this action but he and Jennifer McFarland have filed a new lawsuit against Morris and Hannemann during the pendency of this appeal despite the fact that this Notice of Appeal was filed shortly before the case was scheduled to go to trial on the remaining causes of action. (See Respondents Morris and Hannemann’s Motion to Dismiss filed September 15, 2015,

Amended Motion for Summary Judgment filed March 13, 2015). The HOA does not and cannot cite to 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. Therefore, the trial court's order granting summary judgment as to claims brought in the name of the "HOA" should be affirmed.

A right of action does not arise until such conditions precedents are met. Metal Serv. Corp. v. Indus. Elec. Co., 253 S.C. 507, 510, 171 S.E.2d 703, 704 (1970); Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 149, 328 S.E.2d 132, 132 (Ct.App. 1985). "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." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 207, 687 S.E.2d 714, 719 (Ct.App. 2009) (citing Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App. 1994)).

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. A majority of the Board, which is two directors, constitutes a "quorum." (R. p. 401, Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws of Live Oak Village Homeowners Association, Inc. § 5(C)). Any action taken by the Board requires a majority vote, or a vote of at least two directors, at a meeting in which a quorum is present. (R. p. 401, Id. ("Every act or decision done or made by a majority of the directors present at a duty (sic) held meeting at which a quorum is present shall be regarded as the act of the [Board].")). The Board may take action without a meeting; however, such actions require written approval of all three

Exhibit A - McFarland Complaint dated July 31, 2015).

elected directors of the Board. (R. p. 401, Id. Ex. C § 4(E)). The HOA conceded that “no formal Board action took place” and that a single director, William McFarland, “initiated the suit as he contends that he was the only Board member authorized to act.” (R. p. 350, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015).⁹

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. Metal Serv. Corp., 253 at 510, 171 S.E.2d at 704; (R. pp. 11-12, 15, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015); see also S.C. Code Ann. § 27-31-150 (“The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease”); Ortega v. Kingfisher Homeowners Ass’n, Inc., 314 S.C. 180, 181, 442 S.E.2d 202, 203 (Ct.App. 1994) (noting “voting agreements are generally valid and enforceable” and upholding challenge to HOA bylaws requiring majority vote where owner signed deed at purchase acknowledging application of master deed and bylaws).

⁹The HOA did not challenge the fact that the lawsuit lacked Board approval at oral argument. (R. pp. 69-109, Transcript of Record January 29, 2015). Mr. McFarland, as the 30(b)(6) deponent for the HOA, testified that no such discussion or vote occurred prior to bringing suit:

Q. Am I correct also the HOA, nor the board of directors, has ever held a meeting to authorize the HOA to bring suit against any of the defendants in this case, correct?

A. No. That'd have been impossible. The defendants in the case are board of directors.

Q. Right. So the board has never authorized any litigation, correct?

A. Exactly. My answer stands. It would have been impossible, as the defendants in this case are board of directors.

(R. p. 234, lines 3-13, 30(b)(6) Dep. of HOA).

B. The Trial Court Did Not Err By Requiring That The HOA Follow The Bylaws

The HOA argues that the trial court incorrectly applied the law regarding conditions precedent because the HOA's right to assert a claim is a question of substantive law unrelated to the HOA's Bylaws. (Appellants' Initial Brief pp. 9-11). The HOA did not raise this argument before the trial court and, if raised, it was not ruled upon and the HOA failed to preserve the issue by filing a motion to alter or amend. See Rule 59(e), SCRPC.

An issue cannot be raised for the first time on appeal. Doe v. Roe, 379 S.C. 291, 297, 665 S.E.2d 182, 185 (Ct.App.2008); Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct.App.2006); Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct.App.2001). The issue must have been raised to and ruled upon by the trial judge to be preserved for review. Pye v. Est. of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct.App.2008); see also Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("An appellate court will not consider issues on appeal which have not been preserved for appellate review."). To preserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)). Without an initial ruling by the trial judge, a reviewing court would have no foundation on which to evaluate whether an error has been committed. Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct.App.2008); Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004).

S. Carolina Coastal Conservation League v. S. Carolina Dep't of Health & Envtl. Control, 380 S.C. 349, 379-80, 669 S.E.2d 899, 914-15 (Ct.App. 2008) rev'd on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010). "Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved." Altman v. Griffith, 372 S.C. 388, 396, 642 S.E.2d 619, 623 (Ct.App. 2007) (citing Jean Hoefer Toal, Shahin Vafai &

Robert A. Muckenfuss, *Appellate Practice in South Carolina* 58 (2d ed.2002)).

Although not raised, the HOA incorrectly argues that the trial court “misapprehended the law with respect to conditions precedent” and that 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” irrespective of the Bylaws. (Appellants’ Initial Brief pp. 10-11). Worley v. Yarborough Ford stands for the proposition that “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.” Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994) (citing 4 S.C. Juris Actions § 25 (1991)). The HOA correctly states that the Worley opinion further provides that a condition precedent “connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.” (Appellants’ Initial Brief p. 11 (citing Worley, 317 S.C. at 210, 452 S.E.2d at 624)). The trial court’s order is consistent with Worley because the condition precedent that must be met, i.e. the “act that must exist or occur before a duty of immediate performance arises” is the vote of the majority of the Board or unanimous approval of the Board in writing to file a lawsuit in the name of the HOA. See Worley, 317 S.C. at 210, 452 S.E.2d at 624; (R. pp. 11-12, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). Although the HOA finds fault with the trial court’s analysis and endeavors to shift the focus to Morris and Hannemann’s alleged “duty of immediate performance with respect to [their] roles as Directors,” the trial court correctly determined that the HOA lacked the authority to file the lawsuit in the name of the HOA without compliance with legally binding Bylaws. (Appellants’ Initial Brief p. 11); (R. pp. 11-12, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015).

The HOA cannot distinguish in any manner a condition precedent that is “essential to a right of action” from a cause of action that “accrues at the moment when the plaintiff has a legal right to sue on it” as applied to the HOA’s lawsuit brought unilaterally by Mr. McFarland without any legal authority and without the approval of the Board in compliance with the Bylaws. See Worley, 317 S.C. at 210, 452 S.E.2d at 624; Appellants’ Initial Brief p. 11 (citing Stephen v. Draffin, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309 (1997)). Most importantly, the HOA’s contention that the trial court misapprehended the law by illogically confusing a condition precedent with the accrual of a right of action as a question of substantive law does not change the ultimate outcome of this appeal. The trial court granted Morris and Hannemann summary judgment as to the HOA’s claims based on a lack of standing for failure to follow the Bylaws and obtain Board approval prior to filing a lawsuit on behalf of the HOA. (R. pp. 6-15, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). The HOA acknowledges that “no formal Board action took place” and that Mr. McFarland “initiated the suit as he contends that he was the only Board member authorized to act.” (R. p. 350, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015). 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. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”). The HOA does not and cannot cite any legal authority that removes the condition precedent to filing the lawsuit in the Bylaws that was relied upon by the trial court and, therefore, the order granting Morris and Hannemann summary judgment

as to all causes of action asserted against them by the HOA should be affirmed.¹⁰

C. The Trial Court Correctly Enforced The HOA's Bylaws Despite A Single Owner's Stated Grounds For Avoidance

The trial court correctly held that the lawsuit could not be brought in the name of the HOA without the HOA's approval despite Mr. McFarland's alleged bases for circumventing the requirements of the Bylaws. The HOA argues that (1) Morris and Hannemann had an interest adverse to the HOA in not having the HOA sue them and were therefore ineligible to participate in the corporate decision to bring the lawsuit; (2) Morris and Hannemann did not pay annual assessments to the HOA in violation of the HOA's governing documents making them ineligible to serve on the board or creating an issue of fact as to their authority to act; (3) the Board previously hired a property manager without formal approval of the Board thus setting precedent for the HOA to act without Board approval; and (4) the provision in the Bylaws providing the HOA president with "all the powers and duties which are usually vested in the office of the president of an association" creates an issue of fact as to whether Mr. McFarland could bring a lawsuit in the name of the HOA

¹⁰The HOA also incorrectly argues that the trial court erred in its order granting Morris and Hannemann summary judgment based on any evidence that the HOA has been damaged because such a contention is wholly unsubstantiated in the record and immaterial to the trial court's decision. (See Appellants' Initial Brief p. 10 n. 6). Morris and Hannemann's motion states as to the cause of action for conspiracy that "All of these alleged damages are damages suffered by the HOA, who does not have standing to assert the same, and are not damages personally suffered by Mr. Holcombe. Further, these damages are general, rather than special damages." (R. p. 338, Morris and Hannemann Amended Motion for Summary Judgment filed January 16, 2015 (emphasis added)). The trial court did not need to reach the issue of any alleged damages sustained by the HOA having determined the HOA lacked the ability to bring any lawsuit under the Bylaws in the first instance; Morris and Hannemann never admitted that the HOA sustained any damages and argued to the contrary that none were sustained and could not be asserted by individual owners; and the issue was not raised by the HOA, ruled upon by the trial court, nor preserved for appellate review.

without Board approval.¹¹ (Appellants' Initial Brief pp. 11-14).

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 have "an interest adverse to the HOA." The HOA Bylaws are enforceable as a matter of law and Mr. McFarland cannot act unilaterally as a matter of law. "Horizontal property regimes are administered by the bylaws incorporated into the master deed or lease." Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182, 442 S.E.2d 202, 204 (Ct.App. 1994) (holding majority vote provision enforceable and that owner consented to voting agreement as evidenced by signature on the indenture deed) (citing S.C. Code Ann. § 27-31-150) (stating that administration of the property shall be governed by bylaws). "Each co-owner must comply with the bylaws and with the administrative rules and regulations set forth in the master deed." Id. (citing S.C. Code Ann. § 27-31-170) (stating that each owner shall comply strictly with the bylaws). Under S.C. Code § 33-31-730, voting agreements are specifically enforceable. See S.C. Code Ann. § 33-31-730(b).

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. See 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)). Talbot and the cases cited therein address the validity of corporate transactions of business corporations where the director of a corporation has an interest in the transaction. See id. The rule in Talbot does not apply here as the HOA is a nonprofit corporation, there is no transaction at issue, and there was no

¹¹The trial court did not address these arguments and the Appellants filed no motion to alter or amend the order seeking a ruling on these issues.

corporate action taken.¹² The applicable Nonprofit Corporation Act does not allow a single director to authorize, approve, or ratify a transaction involving a director conflict of interest. See S.C. Code Ann. § 33-31-831(e). The Horizontal Property Act does not allow an owner to file suit in the name

¹²The rule in Talbot addressing director or officer conflicts of interests of business corporations is substantially codified under S.C. Code § 33-8-310 of the South Carolina Business Corporation Act of 1988. See S.C. Code Ann. § 33-8-310. S.C. Code § 33-31-830 of the South Carolina Nonprofit Corporation Act “sets forth the general standards of conduct for directors of nonprofit corporations” and “settles the dispute as to whether directors of nonprofit corporations should meet the general business standards or the trustee standards.” S.C. Code Ann. § 33-31-830 (official comment).

The applicable Nonprofit Corporation Act does not allow a single director to authorize, approve, or ratify a “transaction” involving a director conflict of interest. Under S.C. Code Ann. § 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. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into or is approved as provided in subsection . . . (c). . . .

. . .
(c) A transaction in which a director of a mutual benefit corporation has a conflict of interest may be approved if:

(1) the material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) the material facts of the transaction and the director’s interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

(d) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(2) another entity of which the director is a director, officer, or trustee is a party to the transaction.

(e) For purposes of subsection . . . (c) a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board or on the committee who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. S.C. Code Ann. § 33-31-831 (emphasis added).

This lawsuit is not a “transaction” and, even if it was and involved a conflict of interest, Mr. McFarland still cannot act unilaterally because a transaction may not be authorized, approved, or ratified under this section by a single director. S.C. Code Ann. § 33-31-831(e).

of the HOA against any other owner or board member whenever an owner sees fit under the theory that the board members would not approve a lawsuit against themselves in the event that any such vote were taken. The Appellants never argued that the HOA Declarations and Bylaws were invalid or unenforceable nor did they allege any bases for avoidance or reformation.

The Appellants incorrectly argue that Morris and Hannemann are ineligible to serve on the Board for failure to pay annual HOA assessments. First, even if annual dues and assessments had not been paid,¹³ the voting rights of Morris and Hannemann were never suspended under the terms of the Bylaws. The Bylaws require (1) a written demand to cease and desist, (2) written notice of a hearing if the violation continues and (3) a hearing prior to imposing fines, suspending voting rights, or infringing upon or suspending any other rights. (R. p. 414, Defendants Morris and Hannemann's Amended Motion for Summary Judgment, Ex. C - Bylaws Of Live Oak Village HOA §15(C)). The due process set forth in the Bylaws was never followed and Morris and Hannemann remain entitled to vote. Second, any ineligibility to vote does not create the right of a single board member to file a lawsuit in the name of the HOA where one does not exist as set forth above. See S.C. Code Ann. § 33-31-730(b) (providing that voting agreements are specifically enforceable).

The trial court correctly found that the HOA's lawsuit was improper for failure to follow the Bylaws despite the HOA's argument that the Board previously took action without a vote of the Board by hiring a property manager and, therefore, there was established precedent for failure to follow the Bylaws. The HOA cites no authority for the proposition that any prior action taken without a vote of the Board that requires a vote of the Board would justify a separate instance of

¹³The HOA is aware that Morris and Hannemann have both paid their HOA dues into an escrow account being held in trust. (See R. p. 235, lines 10-15, 30(b)(6) HOA Dep.).

failure to follow the Bylaws. Even if the prior action taken without a vote is deemed to have been subsequently ratified, the HOA put forth no evidence that there was any Board ratification of Mr. McFarland's unilateral decision in this instance to file a lawsuit in the name of the HOA without a vote in violation of the Bylaws. As set forth above, the filing of the lawsuit is not a "conflict of interest transaction" and, if it was, Mr. McFarland as a single director cannot approve or ratify the filing of the lawsuit in the name of the HOA. See S.C. Code Ann. § 33-31-831.

Finally, the Appellants incorrectly argue that there is an issue of fact as to whether Mr. McFarland as president was allowed to file a lawsuit in the name of the HOA without Board approval. This argument fails because (1) the interpretation of the master deed and Bylaws is a matter of law and must be strictly construed and (2) the Bylaws contain a specific voting provision requiring Board approval where the description of the office of President of the HOA provides no language supporting the contention that Mr. McFarland may act alone. First, "the construction of an unambiguous deed is a question of law, not fact." Walters v. Summey Bldg. Systems, 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct.App. 1993) (cert. denied) (citing Vause v. Mikell, 290 S.C. 65, 348 S.E.2d 187, 189 (Ct.App. 1986)). "The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." Id.¹⁴ "When a controversy regarding the rights of condominium unit owners arises, the court must examine all relevant provisions of the

¹⁴Confusingly, the Appellants argue that the extent of the powers vested in the president to act unilaterally create an "issue of fact" but the Appellants cite by way of comparison the decision in Café Associates, Ltd. v. Gerngross for the proposition "where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact." (Appellants' Initial Brief p. 14 (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991))). Thus, the Appellants apparently argue that application of the unambiguous language in the Bylaws creates an ambiguity. However, to the extent the Appellants argue that the Bylaws are ambiguous, this issue was neither raised nor ruled upon and is not preserved for appellate review.

Horizontal Property Act, master deed and allied documents.” Harrington v. Blackston, 319 S.C. 1, 5, 459 S.E.2d 309, 311 (Ct.App. 1995) vacated, 322 S.C. 470, 473 S.E.2d 47 (1996) (vacated based on settlement).¹⁵ “These sources of rights and obligations of the condominium owners must be read together, in relation to each other and harmonized, if possible. Id. (citing Roundtree Villas Ass’n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) (regime’s authority must be gleaned from Act and master deed)). “The board of directors of a horizontal property regime may exercise only those powers that are granted to it by law, its master deed, and by any bylaws made pursuant thereto.” Trost v. Sea Mark Tower Prop. Owners Ass’n, Inc., Case No. 2004-UP-284, 2004 WL 6310042, at *3 (S.C. Ct. App. Apr. 29, 2004) (citing S.C. Code Ann. §§ 27–31–100 and 37–31–150); Seabrook Island Prop. Owners Ass’n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987)). “Any act beyond the scope of the powers so granted is *ultra vires*.” Id. (citing Seabrook, 292 S.C. at 347, 356 S.E.2d at 414).

The Appellants argue that Section 7(b) of the Bylaws identifying the officers of the Association and describing, in part, the role of president as chief executive officer with “powers and duties which are usually vested in the office of the President of an association . . .” creates an issue of fact for the jury as to whether Mr. McFarland as president of the HOA had the authority to bring a lawsuit in the name of the HOA. (Appellants’ Initial Brief pp. 13-14). However, the interpretation of the Bylaws is properly decided as a matter of law by the court. Walters, 429 S.E.2d at 856 (holding that terms of a deed may not be varied or contradicted by evidence outside of the deed itself); Harrington, 319 S.C. at 5, 7, 459 S.E.2d at 311-312 (holding rules of construction are those applicable to contracts and court must examine all provisions of HOA documents and Horizontal

¹⁵There is no true “justiciable controversy” presented here as set forth in Section II, infra.

Property Act when addressing a controversy among unit owners). The Horizontal Property Act does not describe the powers of the president of an HOA but does provide that the bylaws must provide for the administration of the property and that each owner must strictly comply with the bylaws. See S.C. Code Ann. §§ 27-31-150; 27-31-170. The Nonprofit Corporation Act provides that the act of a board is the affirmative vote of a majority of directors at a meeting where a quorum is present and that voting agreements are specifically enforceable. See S.C. Code Ann. §§ 33-31-730(b); 33-31-824(a)-(b); see also S.C. Code Ann. § 33-31-140(36) (stating that “Vote” includes authorization by written consent).¹⁶ The Appellants can point to no specific language that would allow Mr. McFarland to act unilaterally as president of the HOA in filing the lawsuit and, by contrast, the Bylaws contain specific voting provisions that were not followed by Mr. McFarland as set forth above. The president has no power to file a lawsuit in the name of the HOA as a matter of law and the trial court should be affirmed.

¹⁶Under S.C. Code § 33-31-840(a), “Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer, and such other officers as are appointed by the board.” S.C. Code Ann. § 33-31-840(a). Under the Official Comment to S.C. Code § 33-31-840: “The president is not involved in the day-to-day activities of the organization, and may or may not be the most significant member of its board of directors. Under these circumstances the title of ‘president’ may be misleading. The term is certainly not analogous to the president of a business corporation.” S.C. Code Ann. § 33-31-840 (official comment). See also S.C. Code Ann. § 33-31-841 (“Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties and authority prescribed in a resolution of the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers.”). The Official Comment to S.C. Code § 33-31-841 provides: “[I]n some nonprofit organizations the president may not be involved in the day-to-day activities or decision-making. If not, the president's role is different than that of the president of a business corporation.” S.C. Code Ann. § 33-31-841 (official comment).

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE THERE IS NO JUSTICIABLE CONTROVERSY FOR CLAIMS ASSERTED PURSUANT TO THE DECLARATORY JUDGMENT ACT

This Court should affirm the trial court's order granting summary judgment as to the claims asserted by Appellants Jennifer McFarland and Carlton Holcombe ("Individual Appellants") under the Declaratory Judgment Act because there is no justiciable controversy. The Individual Appellants' claim is a contingent, hypothetical, and abstract dispute over "their ability to reside at their property" for which there has admittedly been no actual damage and for which no advisory opinion should be issued. "A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct.App. 2002) (citing Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998)). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. (citing Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996)). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Id. (citing Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995)). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Id. (citing Jackson v. State, 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997)). "An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citing Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970)).

The trial court correctly held that the Individual Appellants could not establish the three elements required to meet the minimum requirements for constitutional standing and that there is no justiciable controversy with respect to their claim for declaratory relief. “[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The United States Supreme Court has “established that the irreducible constitutional minimum of standing containing three elements”:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Id.; ATC S., Inc. v. Charleston Cnty., 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008).

First, the trial court correctly held the Individual Appellants “have not suffered any ‘injury in fact’ but instead allude to a conjectural or hypothetical injury.” (R. p. 13, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). The declaratory judgment action alleges that the Individual Appellants “will suffer irreparable damage to their ability to reside at their property” unless the court “enjoins and prohibits Defendants Thomas Morris and David Hannemann from continuing to act outside their scope of authority.”¹⁷ (R. p. 34,

¹⁷The Appellants allege that Respondents Morris and Hannemann acted outside the scope of their authority by:

- A. voting to waive fines that applied to themselves;
- B. failing to hold timely or properly noticed Home Owners Association or Board of Directors meetings;
- C. allowing unauthorized persons to vote and participate in Board of Directors meetings;
- D. voting on matters in which they have a personal financial interest;

Amended Complaint ¶ 8 (emphasis added)). The Individual Appellants admitted that the only damage claimed pursuant to the declaratory judgment action was their ability to reside at their residences and that they still have full and uninterrupted access to their property.¹⁸ Thus, the trial court correctly found that the Individual Appellants “still have full and uninterrupted access to the common elements and to their property and continue to reside in their homes at Live Oak Village”

-
- 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, Amended Complaint ¶ 6).

The Appellants have brought no action for breach of contract or any other claim but have elected to couch their claims as those for “declaratory judgment” and “conspiracy.” (See R. pp. 31-36, Amended Complaint); (see also R. pp. 348-353, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015).

¹⁸Both Mrs. McFarland and Mr. Holcombe testified that the only injury they were claiming related to the declaratory judgment action was their the ability to reside at their residences

Q. And as part of that cause of action, it says: The Plaintiffs will suffer irreparable damage to their ability to reside at their property. Is that the – is that the only injury that you are claiming in this case?

A. With reference to Hannemann and Morris?

Q. For the declaratory judgment action, yes ma’am.

A. Yes I believe so.

(R. p. 264, lines 6-15, J. McFarland dep.).

Q. But my question to you is: Is there any other – the only injury that’s been alleged is that the plaintiffs have suffered irreparable damage to their ability to reside at their property. Is there any other injury that you are claiming as a result of these actions?

A. Not at this time.

(R. p. 251, lines 7-13, C. Holcombe Dep.).

The Individual Appellants admitted in responses to Requests to Admit that they still have full and uninterrupted access to their property:

8., 10. Admit [Jennifer McFarland and Carlton Holcombe are] able to access [his/her] residence freely and uninterrupted.

RESPONSE: Admitted.

(R. p. 364, Defendants Morris and Hannemann’s Amended Motion for Summary Judgment, Ex. E - - Pls.’ Resp. to Req. for Admis. 8, 10).

based on their own testimony and suffered no “injury in fact” but rather a “conjectural or hypothetical injury.” (R. p. 13, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015)

The Individual Appellants argue that it is sufficient that they are persons to a contract seeking a determination of rights, status, or other legal relations for there to be a justiciable controversy under the Declaratory Judgment Act. (Appellants’ Initial Brief pp. 16-17); (R. p. 350, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015). The Appellants argue that “[t]he circuit court misapprehended the factual and legal circumstances of these Plaintiffs’ declaratory-judgment claim in finding they lacked standing because they had not suffered an injury at law and there was no justiciable controversy.” (Appellant’s Initial Brief p. 16). However, the trial court granted summary judgment on the bases that the Appellants’ failed to meet the minimal requirements of constitutional standing; that the Appellants allude to a conjectural or hypothetical injury; that any declaration will not change or redress Appellants’ ability to reside at their residences; and that any declaration would be advisory. (R. pp. 12-15, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). The trial court recognized that “[a] declaratory judgment action does not require financial damages; but it does require a justiciable controversy.” (R. p. 14, Id.). The trial court did not, however, find that the Appellants lacked standing because they suffered no damage at law but rather addressed the Appellants’ only articulated potential basis for damage—their ability to reside at their property – and found this damage does not exist and that it was conjectural or hypothetical. The Appellants offered nothing in response to the motion for summary judgment that would allow the trial court to conclude that such damage exists or might exist so as to entitle

them to legal or equitable relief. Although it may be sufficient that the Individual Appellants are “persons” to a contract seeking a determination of rights, status, or other legal relations for there to be a legally protected interest, there is no invasion of that legally protected interest that is both (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” See Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339.

Second, the trial court correctly held the Individual Appellants failed to allege the manner in which Morris and Hannemman’s alleged actions affect their ability to reside at their property. (R. p. 13, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). The trial court found that “[w]ith no traceable or alleged connection between actions of the Defendants and the alleged injury, the Court finds that Plaintiffs Mrs. McFarland and Mr. Holcombe fail to meet the second element required for standing.” (R. p. 13, Id.). The Individual Appellants not only failed to present any evidence of Morris and Hannemann’s alleged failure to abide by HOA covenants and restrictions or that any such failure was about to occur, they failed and continue to fail to articulate any existing or potential nexus between any requested declaration and any harm based on irreparable damage to their ability to reside at their property or otherwise. See Sunset Cay, 357 S.C. at 423, 593 S.E.2d at 466 (stating that the Declaratory Judgment Act “is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.”) (citing Waller v. Waller, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951)); Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339 (holding that “there must be a causal connection between the injury and the conduct complained of--the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant . . .’”).

Third, the trial court correctly held that “a declaration by the Court regarding whether or not the Defendants are acting outside the scope of their authority will not change or redress Plaintiffs’ ability to reside at their residence as they are all currently residing, unimpeded at their residence.” (R. p. 13, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). The Appellants do not set forth the manner in which any declarations sought would change or redress any current or future harm based on irreparable damage to their ability to reside at their property or otherwise. Again, the Appellants rely on their status as “persons” to a contract to establish a justiciable controversy under the Declaratory Judgment Act. (Appellants’ Initial Brief pp. 16-17); (R. p. 350, Plaintiffs’ Memorandum in Opposition to Morris and Hannemann’s Motion for Summary Judgment filed January 30, 2015). Further, the Appellants did not present any evidence or articulate any way that any alleged injury could be redressed at all – much less that it would be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” Lujan, 504 U.S. at 560; ATC South, 380 S.C. at 195-96; 669 S.E.2d at 339.

The trial court correctly held that the Individual Appellants’ declaratory judgment action presents no justiciable controversy. The Appellants presented nothing to the trial court by way of evidence or argument that would allow the court to reach any conclusion other than that the Appellants “allude to a conjectural or hypothetical injury.” (See R. p. 13, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015). In other words, the Appellants failed to demonstrate any actual or imminent injury that would allow the trial court to determine that there is “a real and substantial controversy which is appropriate for judicial determination . . . as distinguished from a dispute or difference of a contingent, hypothetical or

abstract character.” Holden, 349 S.C. at 137, 561 S.E.2d at 637. Therefore, the trial court correctly determined that the Individual Appellants lack a justiciable controversy and that “any declaration by the Court would only be advisory in nature and is beyond the intended purpose and scope of the Uniform Declaratory Judgments Act.” (R. p. 14, Order Granting, In Part, Morris and Hannemann’s Amended Motion for Summary Judgment filed March 13, 2015 (citing Sunset Cay, at 423, 593 S.E.2d at 466)).

CONCLUSION

For the reasons set forth herein, Respondents Thomas Morris and David Hannemann respectfully request that this Honorable Court affirm the order granting, in part, Morris and Hannemann’s Amended Motion for Summary Judgment as to the matters raised in Appellants’ Notice of Appeal, remand this matter to the trial court, award the costs of this appeal, including attorneys’ fees, and such other and further relief as the Court deems just and proper.

Dated this 11th day of January, 2016.

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 OF COMMON PLEAS

The Hon. Diane S. Goodstein, Circuit Court Judge

Appellate 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 the 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.

BRIEF OF RESPONDENTS SOFIA MAZELL AND MICHAEL MAZELL

WILLIAM B. JUNG, ESQ.
1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200
(#0068788)

Attorney for the Respondents
Sofia and Michael Mazell

TABLE OF CONTENTS

Table of Authorities	ii
Preliminary Statement	1
Argument:	
I. THE TRIAL COURT'S ORDER DISMISSING THE CLAIMS FILED IN THE NAME OF THE HOA SHOULD BE AFFIRMED	1
Conclusion	6

TABLE OF AUTHORITIES

Statutes

Rule 56(e), South Carolina Rules of Civil Procedure	3
---	---

Preliminary Statement

Respondents Sofia and Michael Mazell ("Mazell") submit this Brief on the appeal of the Order of dismissing the claims brought in the name of the appellant Live Oak Village Homeowners Association, Inc. (the "HOA") against Mazell. For the following reasons, Mazell respectfully submits that the Order of the trial court should be affirmed.

Argument

I. THE TRIAL COURT'S ORDER DISMISSING THE CLAIMS FILED IN THE NAME OF THE HOA SHOULD BE AFFIRMED

The Amended Complaint states two claims against Mazell in the name of the HOA: (1) a claim of civil conspiracy (Set forth in Count II); and (2) a claim for breach of the covenants and restrictions (Set forth in Count IV). (R. p. 034). In sum, the civil conspiracy claim alleges that Mazell and the other respondents, Board of Director Members David Hannemann and Thomas Morris, formed a conspiracy to injury HOA and association property owners, appellants Jennifer McFarland and Carlton Holcombe. *Id.* Count IV alleges that Mazell had renters in the Mazell home in violation of the HOA By-laws, covenants and restrictions. (R. pp. 034-035). Mazell denies the facts supporting these alleged claims; however, it is not necessary to determine said facts in order to determine whether the plaintiff HOA has any standing assert such claims against Mazell.

The Applicable HOA By-laws

In pertinent part, the By-laws for the HOA authorize the HOA to bring legal actions against members of the Association for violations of the By-laws, covenants and restrictions:

6. POWERS AND DUTIES OF THE BOARD OF DIRECTORS

(A) ... The Board of Directors shall exercise such duties and responsibilities as shall be incumbent upon it by law ... and shall include ... the following:

(6) To enforce by legal means the provisions of the Certificate of Incorporation and By-laws of the Association ...

(R. p. 402, par. 6(A) and 6(A)(6)).

However, before any action on behalf of the HOA against an individual homeowner can be instituted, the By-laws mandate two alternative conditions precedent. One requires a decision by a majority of BOD Members at a BOD Meeting: "An act or decision done or made a majority of the number of directors present at a duly held meeting at which a quorum is present shall be regarded as an act of the Board."

(R. p. 401, par. 5(C)). The second is by "Actions Taken Without a Meeting." Herein, any action taken without a meeting requires **advance written consent** of all the BOD Directors to such action: "The directors shall have the right to take any action in the absence of a meeting of the directors which they could take at a meeting **by obtaining the written approval of all the directors**. Any action so approved shall have the same effect as though taken at a meeting of the directors." (R. p. 40-1, par. 4(E)). (Emphasis added).

At his deposition, respondent HOA Board of Director David Hannemann ("Hannemann") confirmed that the Board of Directors for Live Oak Village HOA never met or voted to institute the claims filed in the name of the HOA against Mazell. (R. p. 171-72, lines 25-23)). Furthermore, in discovery, the appellant HOA failed to produce any minutes for any meeting of the HOA Board of Directors where said actions were

discussed or voted upon. (*Cf.* R. pp. 449-59). Accordingly, there is no dispute that no meeting or vote was taken to authorize the claims that have been filed against Mazell in the name of the HOA. (R. p. 63, lines 10-15(Conceded by Appellant's Counsel); *see also*, R. pp. 171-172).

Rule 56(e) dictates the evidence that a party opposing summary judgment must meet. In pertinent part, Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in affidavits shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment has been made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials in his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

South Carolina Rules of Civil Procedure, Rule 56(e).

At the hearing on the respondents' motion for summary judgment, appellants conceded that prior unanimous written consent of all members of the Board of Directors for the HOA to have instituted claims against Mazell did not occur. (R. p. 63; *see also*, R. pp. 171-172). Counsel further conceded that a majority of members of the HOA Board of Directors did not vote at a board meeting to institute claims in the name of the HOA against Mazell. *Id.* Given that there is no dispute over the fact that appellants' filing of claims in the name of the HOA against Mazell violated the procedures set forth in the governing Bylaws, the HOA was not empowered or authorized to have filed any claims in this action against anyone. (E.g., R. pp. 064-65) (Trial Court's colloquy with counsel on issue). In effect, the individual appellants

commandeered the HOA as a co-plaintiff in this action without having requisite prior authorization from the Board of Directors. (*E.g.*, R. 063, lines 5-16).

Appellants argue that the respondents Hannemann and Morris, as co-members of the HOA's Board of Directors, cannot be expected to vote in a favor of a lawsuit to be brought against themselves. Therefore, appellants maintain they are excused from following the condition precedent procedures set forth in the By-Laws before the HOA can file litigation. Without commenting on the merits of this argument, this argument does not apply to respondents Mazell, who have never been members of the Board of Directors for the HOA. In fact, the evidence introduced at the summary judgment motion confirmed that the HOA did not authorize the filing of any lawsuit against Mazell. (R. p. 171-72, lines 12-23). Respondent David Hannemann confirmed this in a November 4, 2014 deposition:

Q: OK, I want to take you back to the time, I think it was in late of 2012, when this lawsuit got started. Was there a board of directors meeting prior to the filing of this lawsuit in which the HOA voted on whether or not to pursue a claim against yourself, Mr. Morris and the Mazell's?

A: No.

Q: Okay.

A: My understanding is that the suit filed was not filed on behalf of the HOA. It was separate and distinct by Mr. McFarland or Mrs. McFarland, Mr. Holcombe and Mrs. Holcombe.

Q: My next question is: Do you know who is acting on behalf of the HOA? Because the HOA most certainly is a Plaintiff to this lawsuit?

A: I understand that. And, no I do not.

Q: But you didn't make any vote for that to happen?

A: That's correct.

Q: Did you conduct any meeting for that to happen?

A: No, sir.

Q: Did you send out any notice to any HOA members for that to happen?

A: No.

Id.

Simply put, there was a failure of a condition precedent to the HOA's authority to file a civil action against the respondents, and it is respectfully submitted that the HOA's claims should be dismissed therefor. Even crediting the argument that filing suit against respondents was proper because respondents Hannemann and Morris, as members of the Board of Directors, had a conflict of interest, it is still true that the remedy available to the individual appellants is the filing of suit in their individual capacities against respondents. (R. p. 393, Section 8.1). Simply stated, the individual appellants have no right to commandeer the HOA, naming it as a co-plaintiff to this lawsuit, in addition to their individual claims against respondents. The trial court recognized this very point at oral argument in discussion of the merits of appellants' position. Transcript of Hearing before Judge Goodstein. (R. pp. 063-65).

Indeed, the real reason that the individual appellants have hijacked the HOA as a co-plaintiff to this lawsuit is to use the authorization provided under the By-Laws for the HOA to recover attorney's fees on successful suits against community homeowners. (R. p. 415, par. 15(D). After filing this lawsuit, the individual appellants made "loans" to the HOA for payment of attorney's fees in prosecuting their claims. (R. pp. 232-23). The individual appellants now seek to use the HOA's authority to recover attorney's fees from community homeowners as a means of gaining repayment of the

individual appellants' "loans" for payment of attorney's fees. *Id.* It is shocking that the individual appellants have taken such action on purported behalf of the HOA without the consent, knowledge or authorization of the other members of the community HOA. The trial court saw through this transparent attempt to create inequity, and respondents respectfully submit that the judgment of the trial court should be affirmed.

Conclusion

Based upon the foregoing argument and evidence in the record before this Court, Mazell respectfully submits that the dismissal of the HOA as a plaintiff from this action should be confirmed.

Dated: December 31, 2015

Respectfully submitted,

WILLIAM B. JUNG, ESQ.


1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200
(#0068788)

Attorney for the Respondents
Sofia and Michael Mazell

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000599
Circuit Court Case No. 2012-CP-18-2583

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.

FINAL REPLY BRIEF OF APPELLANTS

[counsel identified on following page]

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
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.....	1
II. The circuit court erred in granting partial summary judgment against Mrs. McFarland and Mr. Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, because the court wrongly determined that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim.....	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

Page

Cases

<u>Atlantic Coast Builders & Contractors, LLC v. Lewis</u> , 398 S.C. 323, 730 S.E.2d 282 (2012) (Toal, C.J., dissenting).....	5
<u>Bailey v. Segars</u> , 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001)	4
<u>Elam v. S.C. Dep't of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772 (2004)	5
<u>Hubbard v. Rowe</u> , 192 S.C. 12, 5 S.E.2d 187 (1939).....	4
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	8
<u>Microtronics, Inc. v. S.C. Dep't of Revenue</u> , 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)	5
<u>Staubes v. City of Folly Beach</u> , 339 S.C. 406, 529 S.E.2d 543 (2000)	4
<u>Talbot v. James</u> , 259 S.C. 73, 190 S.E.2d 759 (1972).....	6

Rules

Rule 1, SCRCF.....	5
--------------------	---

The Appellants submit this reply brief in further support of their appeal.

ARGUMENT

- 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.**

Respectfully, the Respondents miss the main point from the Appellants' principal brief: 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,¹ but because—on account of the very Board dysfunction they were alleged to

¹ Messrs. Morris and Hannemann note that “evidence that the HOA has been damaged . . . [is] immaterial to the trial court’s decision.” (Br. of Resps. Morris and Hannemann at pp. 14-15, n. 10.) Indeed, this is part of the Appellants’ point. Summary judgment was not granted against the HOA for want of evidence to support the merits of its claims. Messrs. Morris and Hannemann inaccurately state that “[t]he trial court *did not need to reach* the issue of any alleged damages sustained by the HOA having determined the HOA lacked the ability to bring any lawsuit under the Bylaws in the first instance[.]” (*Id.* (emphasis added).) In point of fact, the circuit court was not asked by the Respondents “to reach” this issue. Also, with respect to Messrs. Morris and Hannemann “never admit[ing] that the HOA *sustained* any damages . . . [.]” (*Id.* (emphasis added)) in their principal brief, the Appellants did not claim Messrs. Morris and Hannemann made such an admission; rather, the Appellants noted that they had “admitted the existence of *evidence of* damages to the HOA” (Br. of Apps. at p. 10, n. 6 (emphasis added); *see also* R. pp. 337-338 (regarding testimony by the HOA and Mr. Holcombe about damages).)

have caused—these Defendants had not agreed to be sued for them, a fundamentally unjust catch-22.

This point, this patent absurdity—that the Respondents could shield themselves from allegations of wrongdoing (especially, non-compliance with the HOA's governing documents) on the basis of claimed non-compliance with the HOA's governing documents (specifically, the by-laws pertaining to official Board action) when they themselves effectively prevented compliance—was raised in the circuit court:

[Plaintiffs' Counsel]: [E]ssentially . . . the Defendants 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 chief executive officer with all rights and privileges normally and reasonably associated with that position. . . .

. . .

What the parties are asking for is the determination that – in paragraph 6 of the Amended Complaint, that the Defendants are willfully operating and continue to willfully operate outside the scope of their authority by taking action, or failing to take action as required by the covenants

What the McFarlands and the Holcombes are asking and the HOA are asking us to do is to determine that these violations are occurring. . . .

They're not enforcing the covenants and restrictions, and we need them enforced . . . they're not doing what they are supposed to be doing and so we can't get any traction.

(R. p. 75, lines 6-19, at p. 76, lines 6-11, at p. 79, lines 20-23, at p. 85, line 25 - p. 86, line 21; *see also* R. pp. 350-352.)

The circuit court's ruling on—rejection of—this point is sufficiently reflected in the court's orders and other record material to preserve it for appellate review. (*See generally* R. pp. 1-5; R. pp. 6-15; *see also* R. p. 71, line 4 – p. 124, line 21; Br. of Resps. Morris and Hannemann at p. 14 (implicitly observing that the linchpin of the circuit court's decision, notwithstanding how it was "couched," was its determination that the alleged non-compliance with the by-laws required summary judgment be

granted in favor of the Respondents: “Whether couched in terms of standing or simply the right of the HOA to bring the lawsuit, the record supports the trial court’s holding that Mr. McFarland cannot bring an action against fellow owners/Board members on his own accord in the name of the HOA without complying with the HOA’s Bylaws.”²³ And it is appropriate for the

² Mesrrs. Morris and Hannemann go on to state that “[t]he HOA does not and cannot cite any legal authority that removes the condition precedent to filing the lawsuit in the Bylaws that was relied upon by the trial court” (*Id.*) In this regard, the Appellants would, of course, counter by reference to the argument presented on this point in their principal brief.

³ *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.”).

Appellants to underscore this point by pointing out flawed and illogical reasoning reflected in the circuit court's written orders, as they did in their principal brief.

To further underscore this point, the Appellants note flawed and

Moreover, our Supreme 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).

illogical reasoning reflected in the respondents' brief of Messrs. Morris and Hannemann. Their charge that "[t]he HOA cannot distinguish in any manner a condition precedent that is 'essential to a right of action' from a cause of action that 'accrues at the moment when the plaintiff has a legal right to sue on it' as applied to the HOA's lawsuit . . ."⁴ is beside the point; as explained in the Appellant's principal brief, the point is that the whole condition-precedent analysis is irrelevant and therefore misplaced to begin with, which the Appellants highlight as illustrative of the absurdity of the Respondents' use of the alleged non-compliance with the bi-laws as a defense under the circumstances—it is an absurd notion that the alleged non-compliance with the bi-laws has any bearing on the HOA's "right of action" or "right to sue" the Respondents. Their effort to distinguish Talbot v. James, 259 S.C. 73, 190 S.E.2d 759 (1972), is similarly misguided. Their myopic focus on the HOA being a "nonprofit corporation" and whether there was a "transaction at issue" or "corporate action taken" simply overlooks the undeniable—and unusual—distinguishing fact of the present matter: Messrs. Morris and Hannemann's clear conflict of interest.

Lastly, in their brief, the Mazells contend: "Simply stated, the individual appellants have no right to commandeer the HOA, naming it as a

⁴ (Br. of Resps. Morris and Hannemann at p. 13.)

co-plaintiff to this lawsuit, in addition to their individual claims against the respondents. The trial court recognized this very point at oral argument in discussion of the merits of appellants' position." (Br. of Resps. Mazell at p. 6.) The Appellants would note, however, the circuit court *struck* the following language from the proposed order prepared by the Mazell's counsel: "In effect, the individual plaintiffs have commandeered the HOA as a co-plaintiff in this action without having the requisite prior proper authorization from the Board of Directors." (R. p. 5.)

II. The circuit court erred in granting partial summary judgment against Mrs. McFarland and Mr. Holcombe, on their cause of action for a declaratory judgment as to Messrs. Morris and Hannemann, because the court wrongly determined that Mrs. McFarland and Mr. Holcombe had not suffered an injury in fact and could not show the existence of a justiciable controversy and therefore lacked standing to pursue their declaratory-judgment claim.

The Appellants would reiterate that an unduly narrow view was adopted by the circuit court—and urged by Messrs. Morris and Hannemann—of the justiciability of Mrs. McFarland and Mr. Holcombe's cause of action for a declaratory judgment, which is contrary to the expressly remedial purpose and liberal legislative intent of the Act, particularly in the context of a motion for summary judgment. In this regard, the Appellants would also note that, since the circuit court only granted partial summary judgment to the Respondents, this case is still on track for trial and, thereby,

a full presentation of evidence and development of the record. Besides being the correct result for these declaratory judgment claims to survive summary judgment, it is also a practical means of furthering the interests of justice.⁵

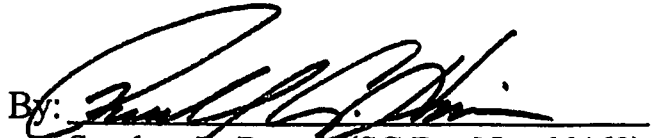
⁵ In this regard, out of an abundance of caution, the Appellants would also note that to the extent Messrs. Morris and Hannmann's counterargument includes a challenge to the sufficiency of evidence in support of the merits with respect to their alleged wrongdoing or the effect thereof it is not proper and it would violate due process for it to be allowed in any way to undermine the Appellants' appeal of the circuit court's decisions. The Appellants were not given notice and an opportunity to address such an argument below, which was not presented or ruled upon below. *Cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

CONCLUSION

Again, the Appellants ask this Honorable Court to reverse the summary judgments granted against them by the circuit court and to remand their claims to that court so they may proceed.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

Dated: 1/11/16

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2015-000599

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2016-UP-519
Heard November 9, 2016 – Filed December 21, 2016

AFFIRMED IN PART, REVERSED IN PART

Stephen Lynwood Brown and Russell Grainger Hines,
both of Young Clement Rivers, LLP, of Charleston, for
Appellants.

Lydia Pruitt Davidson, of Krawcheck & Davidson, LLC;
Morgan S. Templeton, Graham Pollock Powell, and
William Wharton Watkins, Jr., of Wall Templeton &
Haldrup, P.A.; all of Charleston, for Respondents
Thomas Morris and David Hannemann.

William B. Jung, of William B. Jung, Esq., LLC, of Mt.
Pleasant, for Respondents Michael Mazell and Sofia
Mazell.

PER CURIAM: Appellants Live Oak Village Homeowners Association (HOA), Jennifer McFarland, and Carlton Holcombe appeal the circuit court's grant of summary judgment. *See Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011) ("When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP."); Rule 56(c), SCRCP (explaining the circuit court should grant a motion for summary judgment when the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). The 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. McFarland and Holcombe argue the circuit court erred by granting summary judgment on their declaratory judgment cause of action against Respondents Thomas Morris and David Hannemann.

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 33-31-831(e), he still could not properly initiate this action in his capacity as a director.

Next, the HOA argues it had standing because its causes of action accrued when the elements of its claims were present, regardless of whether it complied with its bylaws when initiating the action. We find this argument is unpreserved. The HOA's arguments to the circuit court focused on how the HOA properly authorized and initiated this action. In contrast, on appeal, the HOA essentially asserts whether it properly authorized this action is irrelevant to a standing analysis. The HOA claims whether it complied with its bylaws does not impact whether it had standing to bring this action. The HOA's initial brief on appeal is the first time it made this type of argument. Additionally, the circuit court did not issue a ruling on this argument. Thus, it is unpreserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.").

Finally, the HOA argues its bylaws authorized William McFarland to properly initiate this action in his capacity as president of the HOA. We find this argument is also unpreserved. Although the HOA raised this argument to the circuit court, the circuit court failed to rule on whether the bylaws authorized the HOA president to initiate this action on the HOA's behalf. The circuit court's explanation focused entirely on what the Board was required to do to authorize this action. Also, the HOA failed to file a Rule 59, SCRCP motion requesting a ruling from the circuit court on this issue. Therefore, the HOA's argument regarding the HOA president's authority to authorize this action is unpreserved. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding an argument unpreserved when "the circuit court did not explicitly rule" on it and the party failed to file a motion under Rule 59); *Van Blarcum v. City of N. Myrtle Beach*, 337 S.C. 446, 453, 523 S.E.2d 486, 490 (Ct. App. 1999) (explaining "an implicit ruling will not suffice" to preserve an argument).

Appellants McFarland and Holcombe argue the circuit court erred by granting summary judgment on their declaratory judgment cause of action because they showed a justiciable controversy. We agree. McFarland and Holcombe properly stated a cause of action under the Declaratory Judgments Act (DJA) because a

justiciable controversy existed. *See* S.C. Code Ann. § 15-53-30 (2005) ("Any person interested under a . . . written contract or other writings constituting a contract or whose rights, status[,] or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . [or] contract . . . and obtain a declaration of rights, status[,] or other legal relations thereunder."); *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) ("Under the [DJA], a party whose rights, status, or other legal relations are affected by a contract may seek a court's determination of any question of construction or validity of the contract and obtain a declaration of the party's rights, status, or other legal relations thereunder."); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("To state a cause of action under the [DJA], a party must demonstrate a justiciable controversy. 'A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical[,] or abstract character.'" (citation omitted) (quoting *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970))); *id.* (explaining the DJA "should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships").

McFarland and Holcombe's allegations amount to claims that Respondents Morris and Hannemann were violating the covenants and restrictions (C&R), which was an agreement contractual in nature, in their capacities as directors. They claimed Morris and Hannemann had already violated the C&R, rather than alleging some hypothetical, future event would violate the C&R. We believe such allegations amount to a claim of an existing controversy regarding the rights and status of a writing or contract. Such allegations reasonably come within section 15-53-30 and satisfy the requirement for a justiciable controversy.

Additionally, we find the circuit court erred by requiring McFarland and Holcombe to establish constitutional standing, which includes showing an injury in fact. The circuit court explained they lacked standing to bring a declaratory judgment action because they failed to satisfy our supreme court's test for constitutional standing. However, we find McFarland and Holcombe acquired standing to bring this cause of action by statute, specifically the DJA. *See ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (explaining there are three ways a party may acquire standing, including "by statute"). Therefore, they were not required to possess constitutional standing.

Based on the foregoing, we affirm the circuit court's grant of summary judgment on the HOA's causes of action. However, we reverse the circuit court's grant of summary judgment on McFarland and Holcombe's declaratory judgment cause of action against Morris and Hannemann.

AFFIRMED IN PART, REVERSED IN PART.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2012-CP-18-2583

Appellate Case No. 2015-000599

Unpublished Opinion No. 2016-UP-519 (filed December 21, 2016)

RECEIVED

FEB 06 2017

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.

APPELLANTS' PETITION FOR REHEARING

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Appellants

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

ARGUMENT/GROUNDS FOR REHEARING

Re: S.C. Code Ann. § 33-31-831(e)

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

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

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

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

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

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

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

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

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

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

⁴ (R. pp. 2-5, 8-15.)

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

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

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

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

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

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

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

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

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

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

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

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

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

By its plain language, § 33-31-831 addresses the authority of a “director;” it does not address the power of a corporate officer such as Mr. McFarland as HOA *president* and chief executive officer of the HOA with “all the powers and duties which are usually vested in the office of the President of an association. (R. p. 404 at § 7(B).)

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

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

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

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

By its plain language, § 33-31-831 addresses the authority of a “director;” it does not address the power of a corporate officer such as Mr. McFarland as HOA *president* and chief executive officer of the HOA with “all the powers and duties which are usually vested in the office of the President of an association.” (R. p. 404 at § 7(B).)

Re: Appellants' Argument/Issue Preservation

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

1. **Appellants' refutation of the trial court's standing analysis is preserved for review;**
2. **Appellants' argument regarding Mr. McFarland's status as HOA president is preserved for review; and**
3. **Ultimately, the dispositive question is whether the trial court erred in deciding that there was no genuine issue of fact and that judgment was appropriately rendered as a matter of law—and the answer to this question is yes, the trial court did err.⁶**

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

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

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

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

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

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

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

[Appellants' Counsel]: [E]ssentially . . . the [Respondents] are conspiring to prevent the HOA from operating as a viable entity, and . . . our claims go directly to that, which is why they're being sued. Because we're alleging that they are conspiring to stop that entity from operating.

If you have to have two votes to have a board meeting and an election, and they won't cooperate, nothing ever gets done. And that's exactly where we are. Nothing is done . . . enforcement is not being made of the covenants and restrictions, and so the lawsuit was brought by Mr. McFarland.

...

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

So, therefore, having a board meeting is impossible with two people who are not able to vote. So that leaves only Bill McFarland who -- there's no question that he was a board member and he essentially is the board, therefore, authorizing the lawsuit to be brought in this action.

...

The board covenants designate Mr. McFarland as chief executive officer with all rights and privileges normally and reasonably associated with that position. . .

...

What the parties are asking for is the determination that -- in paragraph 6 of the Amended Complaint, that the Defendants are willfully operating and continue to willfully operate outside the scope of their authority by taking action, or failing to take action as required by the covenants

What the McFarlands and the Holcombes are asking and the HOA are asking us to do is to determine that these violations are occurring. . . .

They're not enforcing the covenants and restrictions, and we need them enforced . . . they're not doing what they are supposed to be doing and so we can't get any traction.

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

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

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

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

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

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

- I. The circuit court erred in granting summary judgment against the HOA, as to all of its claims, because the court wrongly determined that the HOA failed to follow its by-laws, which the court found to be a condition precedent to bringing suit, and therefore the HOA lacked standing and/or authorization to sue.**

In granting summary judgment against the HOA on its claims against Messrs. Morris and Hannemann, the circuit court's analysis was, in its entirety (excluding citations), as follows:

"A condition precedent entails something that is essential to a right of action, as opposed to a condition subsequent, which is something relied upon to modify or defeat the action." A right of action does not arise until such conditions precedent are met. The HOA failed to follow its own By-laws and condition precedents before instituting this suit. Any official action by the HOA requires a majority vote, or the vote of two (2) of the three (3) directors. Mr. McFarland, as the 30(b)(6) deponent for the HOA, testified that no such discussion or vote occurred prior to bringing suit. As no such vote occurred, the conditions precedent set out in the By-Laws were not met and the HOA's right of action did not arise. Therefore, the Court holds the HOA lacked standing to bring this lawsuit and dismisses the HOA as a Plaintiff.

(R. pp. 11-12 (citations omitted).)

The circuit court's analysis in granting summary judgment against the HOA on its claims against the Mazells was substantially the same:

In pertinent part, the By-laws for the HOA do empower the HOA to bring legal actions against members of the Association for violation of HOA By-laws, covenants and restrictions. However, to authorize any such action by and on behalf of the HOA, the Bylaws provide for two alternative means. One requires a decision by a majority of [Directors] at a [Board] Meeting. . . . The second means by which action by the HOA may be undertaken is following advance written approval of all [Directors]. . . .

[C]ounsel for the plaintiffs conceded that prior unanimous consent of all members of the [Board] for the

HOA to have instituted claims against [the] Mazell[s] did not occur. Counsel further conceded that a majority of members of the [Board] did not vote at a board meeting to institute claims in the name of the HOA against [the] Mazell[s]. . . .

Given that there is no dispute over the fact that the plaintiffs' filing of claims in the name of the HOA against [the] Mazell[s] was not properly made in accordance with the procedures set forth in the governing Bylaws, the HOA was not empowered or authorized to have filed any claims against anyone. Accordingly, the plaintiffs' filing of claims in the name of the HOA is null and void, and [the] Mazell[s'] motion to dismiss said claims is hereby GRANTED.

(R. pp. 4-5 (citations omitted).)

Essentially, the circuit court granted summary judgment against the HOA, as to all of its claims, not for lack of evidence of the alleged misdeeds of Messrs. Morris and Hannemann or of damages,⁹ but because—on account of the very Board dysfunction they were alleged to have caused—these Defendants had not agreed to be sued for them. Most respectfully, the circuit court erred in finding no triable issue as to any of the HOA's claims and granting summary judgment

⁹ In their motion for summary judgment, Messrs. Morris and Hannemann admitted the existence of evidence of damages to the HOA in the form of the Mazells' failure to pay fines, the HOA's inability to fine them (i.e., Messrs. Morris and Hannemann), their (i.e., Messrs. Morris and Hannemann's) payment of HOA fees into escrow instead of to the HOA, and attorney's fees, stating, "[a]ll of these alleged damages are damages suffered by the HOA" (R. pp. 337-338; see also id. at R. p. 338 ("Thus, as to the civil conspiracy claim, the HOA and Mr. Holcombe seek general damages allegedly suffered by the HOA; *damages the HOA could have sought* if it had met the condition precedent under the Bylaws and had standing to bring suit.") (emphasis added).)

against it on the basis of such a fundamentally unjust catch-22.

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

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

and “arise” were interchangeable). The question of the HOA’s right to sue on a given cause of action is a question of substantive law concerned with whether the elements of the claim are present; the existence or non-existence of such a right has nothing to do with the HOA’s by-laws.

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

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

Because Messrs. Morris and Hannemann obviously had an interest adverse

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

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

Further still, there is evidence of prior conduct that cuts against the Defendants' position. Without a meeting/vote or written approval of all Directors, the Board hired and paid property manager Kathleen Green, whom Mr. McFarland had identified for the position. (R. p. 168, lines 13-22; R. p. 282, lines 16-17; R. p. 176, lines 11-16.)

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

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citing *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975)). Summary judgment is appropriate—i.e., is *only* appropriate—when "it is clear" there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Mosteller v. County of Lexington*, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999); see also *id.* ("Summary judgment is not

appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”); Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) (“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.”); Rule 56(c), SCRCP. “If triable issues exist, those issues must go to the jury.” Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994); see also Vermeer, 336 S.C. at 305, 518 S.E.2d at 59 (“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.”). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); see also Vermont Mut. Ins. Co. v. Singleton, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994) (“Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence.”).

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

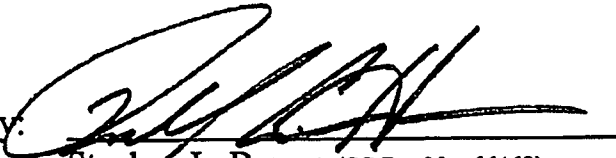
INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

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

CONCLUSION

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

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Appellants

Charleston, South Carolina

Dated: 2/3/17

The South Carolina 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,

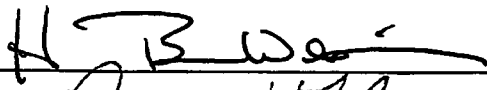
v.

William McFarland, Third-Party Defendant.

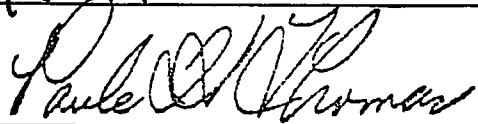
Appellate Case No. 2015-000599

ORDER

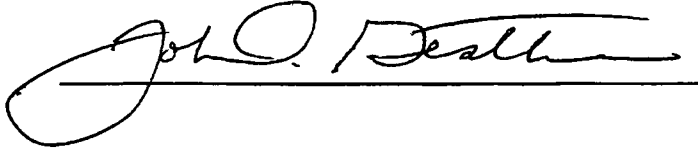
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.

 J.

Columbia, South Carolina

cc:

William ("Trey") Wharton Watkins, Jr., Esquire

Lydia Pruitt Davidson, Esquire

William B. Jung, Esquire

Stephen Lynwood Brown, Esquire

Russell Grainger Hines, Esquire

Graham Pollock Powell, Esquire

Morgan S. Templeton, Esquire

FILED

March 23, 2017